



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-133



Before: Judge Mary Faherty, Presiding
Judge Kamaljit Singh Garewal
Judge Jean Courtial

Judgment No.: 2011-UNAT-140

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: Timothy Lemay

Counsel for Respondent: Stéphanie Cartier

JUDGE MARY FAHERTY, Presiding.

Synopsis

1. Lirong Wang (Wang), an Austrian national, had for a period of time while residing and working in Bangkok, Thailand, the benefit of an authorization from the Secretary-General pursuant to Staff Rule 105.3(d) (iii) designating China as his country of home leave. Furthermore, as he was residing and working outside of his home country, he was entitled to the benefit of an education grant for his child, pursuant to the provisions of Staff Rule 103.20(b).
2. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) determined that the exception which had been granted to Wang by the Secretary-General could not be regarded as permanent, and that the circumstances of his having returned to work and reside in Austria, his home country, were sufficient for the Secretary-General to have revoked the authorization previously granted designating a country other than the home country as the country of home leave.
3. The Dispute Tribunal also determined that because Wang, as of February 2004, was residing and working in Austria, he was no longer entitled to the benefit of an education grant.
4. The United Nations Appeals Tribunal (Appeals Tribunal) upholds the decision of the Dispute Tribunal that, as a matter of law and fact, Wang's return to work and reside in Austria rendered him no longer entitled to either the benefit of China as his home leave country or to an education grant.
5. On the issue of an education grant, Wang received erroneous assurances from the Administration that he would remain entitled to same on his return to Austria. The Dispute Tribunal accepted that Wang, in good faith, relied on those assurances, but it concluded that the payment which was made by the Administration of two years' school fees for his child constituted sufficient compensation for that reliance.
6. We found that while the Dispute Tribunal, in determining the question of compensation, quite properly took into consideration Wang's reliance on the assurances given, it failed to give sufficient weight to that reliance. Accordingly, we award Wang

additional compensation equivalent to two years of the education grant which, if he had qualified for same, would have been available to him for the school years 2006/2007 and 2007/2008.

Facts and Procedure

7. Wang was born in China and had Chinese citizenship until he relinquished it on 21 December 1989 upon acquiring Austrian citizenship. He also held German permanent residence status for a time.

8. Between 1984 and 2001, Wang held several short-term and fixed-term appointments. His initial appointment with the United Nations Secretariat was in May 2001 when he was assigned to work with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), Bangkok, first on a fixed-term appointment and since May 2003 on a permanent appointment. It was a condition of his recruitment that he would have to renounce his permanent residence status in Germany as the Human Resources Management Service (HRMS), ESCAP, stated that United Nations staff members could not be permanent residents in a country other than the country of their nationality. Wang complied with this condition.

9. At Wang's request, on 15 January 2002, the Chief, HRMS, ESCAP, approved the designation of Shanghai, China, as Wang's place of home leave.

10. In December 2003, Wang was selected for the post of Interpreter (P-3), Conference Management Service (CMS), United Nations Office at Vienna (UNOV).

11. In August 2003, before taking up the appointment in Austria, Wang inquired from the Human Resources Officer (HRO) in UNOV whether his wife, his daughter and himself, all of Chinese descent, but with Austrian nationality and home leave destination of Shanghai, China, would lose their home leave entitlements by moving to Vienna. He further asked whether he would remain entitled to an education grant for his daughter, whose mother tongue was Chinese. He specified that at that time, he was receiving both an education grant and Chinese mother-tongue tuition reimbursement for his daughter.

12. In September 2003, the HRO advised Wang that with respect to the first question, he would require clarification from the Office of Human Resources Management

(OHRM) at the United Nations Headquarters in New York. Regarding the second question, the HRO quoted Staff Rule 103.20(b) and stated that “[a]s [his] country of home leave is China, [Wang] would continue to be eligible for education grant for [his] daughter while serving in Austria”.

13. Upon further request by Wang, the HRO reiterated on 30 December 2003 that he would “be entitled to education grant while serving in Austria since [his] country of home leave is China”. (Emphasis omitted) The HRO stated that he had yet to consult with OHRM regarding his home leave entitlement.

14. On 28 February 2004, Wang took up his assignment with CMS/UNOV.

15. On 10 March 2004, the same HRO e-mailed Wang, confirming his entitlement to an education grant while serving in Austria, but advising that he was still waiting for a reply from OHRM regarding his home leave entitlement.

16. On 29 March 2004, OHRM advised HRMS, UNOV, that the Staff Rules precluded Wang from receiving both an education grant and home leave entitlement as Wang had Austrian nationality and resided in Austria. This information was not immediately conveyed to Wang.

17. Unaware of OHRM’s view on the matter, Wang enrolled his daughter at the Vienna International School in April 2004.

18. A Personnel Action (PA) specifying that Wang was not entitled to international benefits was issued on 14 May 2004 and transmitted to Wang. On 8 July 2004, HRMS verbally informed him of the decision.

19. On 9 July 2004, Wang requested a review of the OHRM decision. He noted that receiving the education grant would “alleviate the hardship caused by [his] daughter’s disability”.

20. On 18 August 2004, Wang submitted a claim for the education grant for the period from April to June 2004, and this claim was granted under Staff Rule 103.20(c), as it was for the balance of the school year 2003/2004. However, Wang’s further request for an advance on the education grant for the school year 2004/2005 was denied.

21. On 31 January 2005, OHRM confirmed the decision that Wang was not eligible for an education grant and home leave under the Staff Regulations and Rules. While the possibility of receiving a special education grant for children with a disability under Staff Rule 103.20(k) was raised, the Medical Service in Vienna informed Wang that the medical condition of his daughter was not such as to allow him to benefit from this special grant.

22. On 18 August 2005, a PA was issued which retroactively recorded the change in Wang's place of home leave to Vienna, effective 28 February 2004.

23. On 23 January 2006, Wang inquired whether he would be entitled to international benefits if he acquired German or Taiwanese nationality. After consultation with OHRM, HRMS advised Wang that when a staff member has more than one nationality, the one taken into account for the purpose of the Staff Regulations and Rules is that with which the staff member is the most closely associated.

24. On 21 February 2006, Wang requested a second review of the decision by OHRM not to grant him international benefits. On 3 April 2006, OHRM responded that there was no legal ground which would qualify Wang for an education grant while serving in his country of nationality. It stated that although ESCAP had determined Shanghai as the place of home leave, this determination was not in accordance with the Staff Rules, since it was indicated in Wang's Personal History Profile that his nationality was Austrian. OHRM concluded that "the decision to determine Austria as the country of home leave is a correction to an erroneous decision in accordance with the Rules".

25. OHRM, however, recognized that Wang had been wrongly advised by the HRO in UNOV that he would remain eligible for an education grant upon moving to Vienna; and that Wang had "counted on the grant when he enrolled his daughter at the private school in Vienna". OHRM therefore approved a one-time entitlement for the school year 2005/2006, as an exception to the Staff Rules.

26. On 6 April 2006, Wang asked why he had been granted payment only for the school year 2005/2006 and pointed out that UNOV had refused to pay him the education grant for the school year 2004/2005. On 7 April 2006, OHRM explained that the fact

that his daughter had attended school in Vienna in 2004/2005 had been overlooked and therefore approved, the same day, payment of an education grant for the school year 2004/2005.

27. On 1 June 2006, Wang requested the Secretary-General to review the administrative decision not to grant him his overseas entitlements. On 26 June 2006, the Secretary-General confirmed that the “decision was proper, having been based on the nationality [that Wang] had at the time of the appointment”.

28. On 26 July 2006, Wang filed an incomplete statement of appeal from this decision with the Joint Appeals Board (JAB) in Vienna. On 25 October 2006, he perfected his appeal. In its report dated 15 October 2007, the JAB concluded that Wang was not eligible for home leave or an education grant, and that ESCAP had made an error in approving China as Wang’s country of home leave. But it also found that the Administration had committed an error by advising Wang that he would be eligible for an education grant, for which Wang deserved compensation. While the JAB noted that the Secretary-General had acknowledged his error and exceptionally authorized the payment of an education grant for two years as compensation, it recommended an increase in the amount by 39,000 euros.

29. The Secretary-General agreed with the JAB that Wang was not eligible for either a home leave or an education grant, but did not accept its recommendation for additional compensation.

30. In April 2008, Wang filed an application before the former Administrative Tribunal of the United Nations challenging the Secretary-General’s decision not to approve his eligibility for home leave and education grant. Upon the abolishment of the former Administrative Tribunal on 31 December 2009, the case was transferred to the Dispute Tribunal.

31. On 26 July 2010, the UNDT issued Judgment No. UNDT/2010/132. The UNDT held that the designation of China as Wang’s country of home leave was not a permanent decision that could not be changed; it was an exception to the general rule that the country of home leave is the country of nationality. The UNDT further held that the Secretary-General had the discretion to make an exception; and that the fact of Wang

moving to his country of nationality provided a good reason for the Secretary-General to reassess his eligibility for the exception.

32. The UNDT found that the Secretary-General was entitled to refuse Wang's request for a continuation of the exception to his place of home leave and to reject the application for the education grant. The UNDT also held that the Secretary-General's exceptional authorization of an education grant for two years constituted a sufficient remedy for any errors made by the Organization.

33. On 30 September 2010, Wang filed an appeal from the UNDT Judgment. On 15 November 2010, the Secretary-General filed an answer to the appeal.

Submissions

Wang's Appeal

34. Wang submits that the UNDT failed to consider the merits of his submission that, having induced Wang to enter into a contract with UNOV and alter his situation to his detriment (by moving his family from Bangkok to Vienna), the Administration bears the responsibility for the loss flowing from the Administration's misrepresentation. In his case, this meant the loss of an education allowance for his daughter and of home leave entitlement for his family. He submits that such loss occurred in spite of the fact that he had received assurances that the education grant entitlement would remain in place once he had taken up his post in Vienna.

35. Wang submits that the Administration also effectively imposed a unilateral alteration of his contract status through the withdrawal of his overseas benefits as an internationally recruited staff member. The UNDT acknowledged this misrepresentation by the Administration as well as Wang's good-faith reliance thereon, but failed to address Wang's arguments on this issue. Wang further submits that the UNDT failed to acknowledge the extent of the damage he had suffered or to award adequate compensation.

36. Wang contends that the UNDT's finding that the compensation offered by the Administration was sufficient was erroneous. Because the loss was solely caused by the

Administration, the only reasonable measure is the restoration of the full benefits Wang would have had, had the representation been true, or the equivalent value in money.

37. Wang submits that, in the alternative, and in any event, under the Staff Regulations and Rules, he is entitled to the benefits he claims, and the UNDT erred in finding otherwise.

38. Wang requests the Appeals Tribunal to set aside the UNDT Judgment; to confirm his entitlement to both home leave and to an education grant or to order payment of compensation in lieu thereof; to order “compensation for mental anguish suffered by [him] as a result of the wrongful denial of benefits by the Respondent”; and to order “an amount in recognition of the costs of these proceedings, of his request for review to the Secretary-General and of proceedings before the JAB”.

Secretary-General’s Answer

39. The Secretary-General submits that the UNDT, relying on the purpose and legal framework for home leave, correctly concluded that the Secretary-General had properly refused Wang’s request for home leave upon moving to Austria.

40. The Secretary-General further submits that the UNDT properly refused Wang’s request for an education grant upon moving to Austria. The UNDT Judgment is consistent with the purpose and legal framework governing eligibility for an education grant.

41. The Secretary-General submits that the UNDT correctly concluded that the exceptional authorization of an education grant for two years constituted a sufficient remedy for any errors made by the Organization.

Considerations

42. As the Dispute Tribunal correctly set out, the starting point in this case is the basic rule in Staff Rule 105.3 concerning home leave. The purpose and objective of this provision is to give internationally-recruited staff who are residing and serving outside their home country and who are otherwise eligible the opportunity to take home leave to visit their home country at the Organization’s expense. The definition of home country in

Rule 105.3(d) is the country of the staff member's nationality. Rule 105.3(d)(iii) provides that in exceptional and compelling circumstances, the Secretary-General may authorize a country other than the country of nationality as the home leave country, subject to the staff member satisfying the Secretary-General

that the staff member maintained normal residence in such other country for a prolonged period preceding his or her appointment, that the staff member continues to have close family and personal ties in that country and that the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3.

43. Administrative Instruction ST/AI/367 sets out the terms and conditions for the exercise of discretionary authority of the Secretary-General, as provided for in Rule 105.3, to change either the place of home leave within the staff member's country or the country of home leave. Paragraph 6 of ST/AI/367 provides that "[i]n accordance with Staff Rule 105.3(d), the country of home leave shall be the country of the staff member's nationality" and it reaffirms the discretionary authority of the Secretary-General "in exceptional and compelling circumstances" to "authorize a country other than the country of nationality as the home leave country". Paragraph 7 of ST/AI/367 reads as follows:

For a permanent change in the country of home leave to be authorized, the conditions set out in staff rule 105.3 (d) (iii) a must be met, i.e., the staff member must satisfy the Secretary-General:

- (a) That he or she maintained normal residence in such other country for a prolonged period preceding his or her appointment;
- (b) That the staff member continues to have close family and personal ties in that country;
- (c) That the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3.

When such change is authorized, the Organization shall bear the travel and transportation expenses to the newly designated home country.

44. Common to both Staff Rule 105.3(d)(iii) and the provisions of paragraph 7 of ST/AI/367 is the requirement *inter alia* that the staff member taking home leave in a country other than the country of his or her nationality "would not be inconsistent with the purposes and intent of staff regulation 5.3". Staff Regulation 5.3 provides that

[e]ligible staff members shall be granted home leave once in every two years. However, in the case of designated duty stations having very difficult conditions of life and work, eligible staff members shall be granted home leave once in every twelve months. A staff member whose home country is either the country of his or her official duty station or the country of his or her normal residence while in United Nations service, shall not be eligible for home leave.

45. As observed by the Dispute Tribunal, there is inconsistency in language between the applicable Staff Regulation and Staff Rule, with the former referring to “home country” and the latter to “country of nationality”. This inconsistency was addressed in the judgment of the former Administrative Tribunal in *Larsen*¹, which held that it was “entirely reasonable” to equate the term “home country” in Staff Regulation 5.3 to the expression “country of nationality” in Staff Rule 105.3(b)(i). The former Administrative Tribunal also found such an equation to be consistent with General Assembly Resolution 470 (V) which states that “[a] staff member whose home country is the country of his official duty station or who continues to reside in his home country while performing his official duties shall not be eligible for home leave”.

46. Having reviewed the aforementioned Regulations and Rules and the manner in which they were interpreted in *Larsen*, the Dispute Tribunal stated that

[w]hen a person has chosen to change their [sic] nationality, it is entirely reasonable to expect that person to accept, for the purposes of the UN Regulations and Rules, that their country of nationality is also their home country. If this were not so, then a staff member would have the dual advantages of nationality of one country as well as the entitlements to home country leave. This is not in accord with the General Assembly resolution or the intent and purpose of the relevant rules.

It went on to state that “[t]he clear purpose and intent of the staff regulation 5.3 is to restrict the entitlement to home leave to those who are serving the UN outside of their home country and by implication their country of nationality”. We are satisfied that the pronouncement of the Dispute Tribunal in this regard is the correct interpretation of the prevailing Regulations and Rules.

¹ Former Administrative Tribunal Judgment No. 703, *Larsen* (1995).

Issue of Home Leave

47. In his submission before the Dispute Tribunal, Wang relied on section 7 of ST/AI/367 in arguing that the decision to grant him an exception concerning the country of his home leave was permanent. Staff Rule 105.3(d) does not contain an express provision for the Secretary-General to revoke an authorization of a home country other than the country of nationality as the country of home leave, in the event that there is a change in the circumstances which give rise to the exercise of the discretion in the first place.

48. In ascertaining whether such an authorization may be revoked, the Dispute Tribunal noted that while expressed as “permanent” in section 7, for a change to a home leave country other than the country of nationality to be sanctioned, it nevertheless remained subject to the Secretary-General being satisfied that the conditions set out in the section were met.

49. In the course of its determination on this issue, the Dispute Tribunal took cognizance of the provisions of Staff Rules 104.7(c) and 104.8.

50. Rule 104.7(c) contemplates the situation where a staff member changes his or her residential status so as to become a permanent resident of a country other than the country of nationality and may thereby lose entitlements to allowances including inter alia entitlements to home leave and education grants. Rule 104.8 vests in the Secretary-General discretion, in the case of dual nationality, as to which nationality should be taken into account for the purpose of the Rules.

51. The Dispute Tribunal observed that “[e]ach of these rules indicates that in the international environment of the UN, the nationality and country of permanent residence of staff members may change and that this can impact on their entitlements under the applicable rules”. The UNDT concluded that “[i]t would be contrary to the purpose and intent of the regulations that such an exception [as made in the case of Wang whereby a country other than the country of nationality was deemed his country of home leave] should be permanent and immutable”.

52. The Appeals Tribunal finds no error in law with regards to the approach of the Dispute Tribunal on this issue. Having regard to the facts as were before that Tribunal,

we find as a matter of law and fact that the Dispute Tribunal properly concluded that Wang's moving to his country of nationality was a good reason for the Secretary-General to reassess his eligibility for a country of home leave other than the country of nationality.

Issue of Education Grant

53. For a staff member to be entitled to an education grant, Staff Rule 103.20(b) requires that

- (i) The staff member is regarded as an international recruit under rule 104.7 and resides and serves at a duty station which is outside his or her home country;
- (ii) The child is in full-time attendance at a school, university or similar educational institution; and
- (iii) The appointment or assignment of the staff member is for a minimum of six months or, if initially for a period of less than six months, is extended so that total continuous service is at least six months.

54. This requirement is underpinned by the contents of General Assembly Resolution 49/241 which provides that "the repatriation grant and other expatriate benefits are limited to staff who both work and reside in a country other than their home country". Included in the list of expatriate benefits outlined in the aforesaid resolution is the entitlement to an education grant.

55. In light of Wang's having returned to work and reside in the country of his nationality, as a matter of law, he ceased to be eligible for the payment of an education grant. Thus, we uphold the Dispute Tribunal's finding that the Secretary-General through his administration was entitled to refuse Wang's application for an education grant.

Issue of Adequate Compensation

56. Wang's principal contention before this Tribunal is that the Dispute Tribunal did not adequately consider the merits of his submissions that, having induced him to enter into a contract with UNOV and alter his situation to his detriment (by moving his family from Bangkok to Vienna), the Administration bears responsibility for the losses incurred

by him. He cites such losses as the loss of the education grant for his child and of home leave for himself and his family. He also maintains that the withdrawal of his overseas benefits as an internationally-recruited staff member amounted to the effective unilateral alteration of his contract.

57. In the course of its Judgment, the Dispute Tribunal dealt with Wang's submission on the aforementioned issues as follows:

The respondent has consistently acknowledged that it made an error in advising the applicant that he was entitled to the education grant, and that he relied on that incorrect information when choosing to enrol his child at the International School of Vienna. The outcome of that acceptance was that the applicant received two years worth of the education grant to which he would not otherwise have been entitled. That is adequate compensation for the error made and the consequences to the applicant.

58. There is no reference made by the Dispute Tribunal to the issue of home leave entitlement in its consideration of Wang's submission, most probably because, from the facts before the Dispute Tribunal, it was clearly established that Wang never received an assurance either from the HRO in UNOV or OHRM at UN Headquarters that he would continue to benefit from his home leave entitlement following his move to Vienna. At all relevant times, Wang was advised that this issue was under review by the Administration. Thus, we find no merit in Wang's submission that the Dispute Tribunal did not consider the issue of home leave in the context of the representations as were made to him, following his initial inquiries to the HRO in UNOV.

59. With regards to the issue of the education grant, the Dispute Tribunal, as indeed accepted by Wang, acknowledged that the Administration misrepresented the position and acknowledged that Wang had relied on the incorrect information received by him in choosing to enroll his child at the International School of Vienna. Indeed, such acknowledgement on the part of the Dispute Tribunal formed the basis upon which it determined that for that misrepresentation and Wang's reliance thereon, he required to be compensated.

60. The Dispute Tribunal, however, went on to find that the errors perpetrated in the case of Wang were adequately rectified by the Administration having paid him two years worth of the education grant to which he would not otherwise have been entitled.

61. It is beyond question that Wang on three separate occasions received assurances (albeit erroneously) from the HRO in UNOV of his entitlement to an education grant for his daughter. The first assurance was received on 11 September 2003, following inquiries made by him prior to his taking up the position in Vienna. The second assurance was given on 30 December 2003, again prior to his taking up the appointment. This entitlement was confirmed on 11 March 2004, after he had commenced work.

62. The entitlement to an education grant was reversed on 29 March 2004. A number of weeks elapsed before Wang was apprised of this reversal. But by then Wang had enrolled his child at the International School of Vienna.

63. Given that Wang specifically inquired about his eligibility for an education grant on two occasions prior to taking up his post, we are satisfied that it was a matter of importance to him and we are satisfied that, having been advised on 11 September 2003, some five months prior to taking up his post in Vienna, that “[a]s [his] country of home leave [was] China, [he] would continue to be eligible for education grant for [his] daughter while serving in Austria”, Wang had an expectation that the assurance given with regard to the education grant would be honored.

64. However, while recognizing that Wang acted to his detriment in relying on the assurances given by the HRO in UNOV, we do not find, as contended for in this case, that there occurred a unilateral alteration of his contract status. This Tribunal in *Castelli* determined that the contracts by which the Organization employs staff members

are not regular contracts, given the particular relationship established between staff members and the Organization. Such contracts are for the most part governed by the Regulations, which set out the basic conditions of service, and by the Staff Rules and the Secretary-General’s administrative instructions.²

65. In *Castelli*, the Appeals Tribunal also recognized that “[w]here the administration commits an irregularity in the recruitment procedure, it falls to it to take such measures as are appropriate to correct the staff member’s situation”.³ Thus, while the issues in the present case were not on all fours with *Castelli*, the Secretary-General, as found by the

² *Castelli v. Secretary-General of the United Nations*, Judgment No.2010-UNAT-037, para. 23.

³ *Ibid*, para. 26.

Dispute Tribunal, was entitled to reassess Wang's entitlement to an education grant, in light of the realities as of February 2004.

66. This Tribunal in *Castelli* also recognized that where a "staff member has acted in good faith, he or she is entitled to compensation for the damage suffered as a result".⁴ This principle is equally applicable to the circumstances of the present case. The amount of the compensatory award for the adverse consequences of the Administration's error in this case, however, must be determined by having regard to the prevailing circumstances.

67. Wang's expectation that the assurances given would be honoured has to be measured, both against the obligation of the Administration to rectify the error that occurred in this case and against the appreciation Wang himself must have had, as an internationally-recruited staff member, of the purposes and intent of the Organization's Regulations and Rules governing expatriate benefits, including the entitlement to an education grant.

68. In the circumstances of this case, we are satisfied that while it gave due recognition to the fact that the Administration's errors impacted adversely on Wang, the Dispute Tribunal, in assessing the level of compensation Wang should receive, erred in failing to attach sufficient weight to the reliance placed by Wang on the assurances given to him and the reasonable expectations he held, following such assurances.

69. Accordingly, applying the factors set out above, and having regard to the undisputed reliance Wang placed on the assurances given, we find that the Dispute Tribunal erred in its conclusion that the payment made by the Administration constituted sufficient satisfaction for Wang. We hereby award him additional compensation equivalent to two years of the education grant which would have been available to him for the school years 2006/2007 and 2007/2008.

⁴ *Ibid.*

Judgment

70. This Tribunal orders that the Secretary-General pay Wang, within 60 days from the date this Judgment is issued to the parties, the monetary compensation equivalent to two years of the education grant which would have been available to him for the school years 2006/2007 and 2007/2008.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Courtial

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar