



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

WESSLUND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Stan Sarygin

Counsel for Respondent:

Bart Willemsen, UNICEF

Zarqaa Chohan, UNICEF

Introduction

1. On 2 February 2019, the Applicant, a staff member of the United Nations Children’s Fund (“UNICEF”) based in Bangladesh, filed an application contesting the decision not to pay her registration and parents’ association fees, as part of a claim for an advance of education grant for the school year 2018-2019.

Facts

2. On 27 March 2018, the Applicant submitted a request for an education grant advance for the 2018-2019 school year in relation to her child (“first request”). The Applicant attached to her request an invoice of 12 March 2018, which did not include any registration fee and showed an amount of EUR50 for parents’ association fee.

3. On 29 March 2018, the Applicant was advised by a Human Resources Manager, Global Shared Services Centre (“GSSC”), that her request had been approved. On the same day, the Applicant requested that the first request be cancelled and be substituted with a new request (“second request”). Attached to the second request was a copy of the statement of school fees for her child for the 2016-2017 school year. This statement included a registration fee of EUR1,250 and a parents’ association fee of EUR50.

4. On the same date, the Human Resources Manager, GSSC, asked the Applicant to provide the statement of fees for the 2018-2019 school year. The Applicant’s Counsel responded that the 2016-2017 statement was submitted as “evidence of payment of the registration fee” at initial enrolment. He noted that the registration fee is charged “upon the initial enrolment, not on a yearly basis” and that, as such, it was the Applicant’s prerogative when to claim it against her education grant and that she had chosen to do so as part of the education grant for school year 2018-2019.

5. By an email of 30 March 2018, the Human Resources Manager, GSSC, advised the Applicant and her Counsel of the rejection of her second request related to the registration and parents’ association fees.

6. On 16 April 2018, the Applicant lodged a request for management evaluation of the decision not to pay her the registration and parents' association fees as part of the education grant advance for the school year 2018-2019.

7. On 23 May 2018, the Deputy Executive Director, UNICEF, affirmed the decision not to pay the registration and parents' association fees. The decision concluded with a comprehensive statement of the appeal rights of the Applicant to the United Nations Dispute Tribunal. The Applicant did not file an appeal against the decision related to her second request.

8. On 30 July 2018, the Applicant made a further request for an advance payment of the education grant for the 2018-2019 school year ("third request"). In support of the third request, the Applicant provided a new invoice for the school year 2018-2019, which included EUR1,250 as "[r]egistration fees", and EUR50 for "[p]arents [a]ssociation [f]ees". Both these sums were shown as due and payable. It is apparent from the filed documentation, including the application itself, that these are the same sums that had already been rejected for payment in the decision of 30 March 2018, which decision was reviewed by request for management evaluation filed on 16 April 2018.

9. The third request for an advance did not receive a response until 6 September 2018 when, by email of that date to the Applicant, the Human Resources Manager, GSSC, indicated that "in view of the fact that the registration fee was charged and paid when [her] child was not eligible for education grant, [they] reiterate[d] that [they] [were] unable to reimburse [her] for the registration fee for the school year 2018/2019". The earlier decision was essentially restated.

10. On 15 October 2018, the Applicant requested management evaluation of the outcome of her third request for an advance. She received a reply on 26 November 2018 where the Deputy Executive Director, UNICEF, found that the request for management evaluation was not receivable as the decision being contested was that of 29 March 2018, which had already been the subject of an earlier request for management evaluation. In the alternative, the Deputy Executive Director found that the decision made was consistent with the regulatory framework of the Organization.

11. On 2 February 2019, the Applicant filed the present application. On 6 March 2019, the Respondent filed his reply challenging the receivability *ratione temporis* of the application. In his reply, the Respondent also sought an award of costs against the Applicant for abuse of proceedings.

12. On 17 March 2019, the Applicant filed a motion requesting leave to file a rejoinder. By Order No. 15 (GVA/2019) dated 18 March 2019, the Tribunal granted leave to the Applicant to file a rejoinder on the sole issue of the receivability of the application and it determined to consider the receivability on the papers, once the rejoinder had been received. On 24 March 2019, the Applicant filed a rejoinder seeking, *inter alia*, an award of costs against the Administration.

Consideration

13. Article 2.6 of the Statute of the Dispute Tribunal provides that in the event of a dispute as to whether the Tribunal has competence under said statute, the Tribunal shall decide on the matter. In *Christensen* 2013-UNAT-335, the Appeals Tribunal confirmed that legal position when it held that “the [Dispute Tribunal] is competent to review its own competence or jurisdiction in accordance with Article 2(6) of its Statute” when determining the receivability of an application.

14. The Respondent submitted that the application is not receivable *ratione temporis* because the Applicant failed to submit her application to the Tribunal within the mandatory 90 days from when she first became aware of the decision of the Deputy Executive Director, UNICEF, in respect of the matter. The Respondent asserts that this date was 23 May 2018 and, thus, the Applicant should have filed an application by 21 August 2018. The Respondent further submits that the withdrawal of the claim for the education grant and its substitution do not alter the deadline or create a fresh administrative decision. He also asserts that the decision taken on 30 March 2018 stood and was not the subject of a reconsideration.

15. In her rejoinder filed on 24 March 2019, the Applicant only referred to a request of 30 July 2018 for “an advance [of] payment of all applicable fees for school year 2018-[2019]”. She noted that “[t]he first substantive communication received [...] with regard to her [30 July] application [was] dated [6 September] 2018”. The Applicant has thus chosen not to address the Respondent’s assertions that the operative decision in the matter was made on 30 March 2018. The Applicant has inferentially asserted that the request of 30 July 2018 stands alone and that that which has gone before is of no moment.

16. The Applicant further complains about the wording of the communication of the 6 September 2018 decision, noting its apparent lack of formality. She attached to her application a copy of a formal decision made by a County Administrative Board to ban fire outdoors asserting that this is how a decision should be presented. A decision in the context of human resource management within the Organization can be contained in an email and must be viewed within the context of the request made.

17. The Tribunal finds that, on 29 March 2018, the Applicant was advised of the decision to approve an education grant advance for the school year 2018-2019. On 30 March 2018, the Applicant was clearly advised in the following terms in respect of the decision concerning the claimed registration and parents’ association fees:

Natalia has clearly mentioned that the deposit for the next year (i.e. 2018-2019) is deducted from the [tuition] of the same school year. Kindly note that this refers to any deposit you have to pay for the school year 2018-2019 exclusively which most schools, as Natalia [mentioned], deduct the amount paid from the annual [tuition] amount of that school year in the form of securing an enrollment spot at the school for the [particular] school year.

The [registration] fee paid in 2016-2017 stems from enrollment of your child at the school during that school year when Nathan was not eligible for [Education] Grant based on his date of birth (14 December 2012) vis-à-vis the school year. As [mentioned] in [Section] 2 of the [Administrative] [Instruction] on [Education] Grant, as well as the Appendix B of the Staff [Regulations] and Rules, the admissible expenses for the eligible school year will be subject to reimbursement under the [Education] Grant scheme therefore the [registration] fee incurred in the 2016-2017 school year as [certified] by the school on the [submitted] invoice cannot be

considered as part of your reimbursement in the 2018-2019 school year when Nathan is eligible.

Lastly, kindly note that the Parents [Association] fee was considered as a non-admissible expense under the previous [Education] Grant scheme and [continues] to be so under the new [Education] Grant scheme whereby the list of admissible expenses has been extensively reduced, as the admissible expenses under the [Education] Grant scheme considers only [tuition], [tuition] for mother tongue, and enrollment related fees (i.e. Registration fee, [application] fee, admission fee etc.), therefore the [registration] fee and the parents [association] fee either from the 2016-2017 school year, or from the 2018-2019 school year cannot be reimbursed.

18. It is clear from the Applicant's request for management evaluation of 16 April 2018, that the email of 30 March 2018 to the Applicant was clearly understood to be a decision. The Applicant determined not to challenge the decision before the Dispute Tribunal following the outcome of the management evaluation of 23 May 2018, although she was well within time to do so when she made her third request for an advance payment of the education grant.

19. The Tribunal does not regard the making of the third request as being such as to stop the time running in respect of the decision confirmed by the Deputy Executive Director, UNICEF, on 23 May 2018. In this matter, it is apparent that the Applicant made a determination to resubmit a third request that was substantially the same as the earlier ones made by her and rejected in respect of the registration and parents' association fees. The only difference appears to have been that in the third request she proffered a different invoice from those provided earlier. This last invoice, dated 30 July 2018, claimed the payment of the registration fee in the amount of EUR1,250, which had already been rejected, as it was paid at a time when the Applicant's child was not yet five years old and it was thus not claimable. The new invoice indicated that the registration fee is due and payable.

20. The Human Resources Manager's response of 6 September 2018 to the Applicant's third request was also clear. It reads as follows (emphasis in the original):

Thank you for your e-mail, and apologies for the delay in our reply.

With respect to your request for an EG advance for the school year 2018/2019, [submitted] on 30 July 2018, for your child Nathan Olof Wesslund Starygin, we note that you included a fee structure from your child's school, for the school year 2018/2019, **with** a charge for a "[registration] fee" in the amount of 1250 Euro, and a charge for a "parents [association] fee" in the amount of 50 Euro.

We note that your request for an EG advance for the same school year (2018/2019) [submitted] on 27 March 2018, included a fee structure from your child's school (the same school) for the school year 2018/2019, **without** a charge for a "[registration] fee".

We further note that your request for an EG advance for the same school year (2018/2019) [submitted] on 29 March 2018, included a [fee] structure for the school year 2016/2017, with a charge for the "[registration] fee" and that you confirmed that this "[registration] fee" was paid when your child started school in 2017.

In view of the fact that the [registration] fee was charged and paid when your child was not eligible for [education] grant, we reiterate that we are unable to reimburse you for the [registration] fee for the school year 2018/2019. However, and as [mentioned] in my e-mail to you dated 29 March 2018 (to which you replied and requested the advance NOT be paid), the EG Advance for the 2018-2019 school year can be paid solely based on the [tuition] fee of EUR 5,758.

21. The Tribunal finds that the above-mentioned response did not amount to a new decision. The operative decision was that of 30 March 2018 and the Applicant, in choosing to bring the third request but not pursue an appeal in respect of the second one, did so at her peril.

22. Art. 8.1(i) of the UNDT Statute provides that in cases where a management evaluation of the contested decision is required, as in this case, an application shall be receivable if it is filed within the following time-limits:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

23. The Tribunal agrees with the submissions of the Respondent whereby an application in respect of the operative decision should have been filed with the Tribunal on or before 21 August 2018. The Tribunal also agrees with the Respondent's argument that a staff member who has received an adverse decision about a claim cannot purport to unilaterally withdraw it and resubmit it with allegedly new evidence to attempt to have a new decision. In this case, there is not even new evidence. There would never be finality or certainty in respect of any decision if this were to be permitted. Such conduct, aimed at resetting the time limits, would also be inappropriate.

24. The Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory time limits; rather, the time starts to run from the date the original decision was made (*Sethia* 2010-UNAT-079; *Odio-Benito* 2012-UNAT-196). The Appeals Tribunal also held in *Rosana* 2012-UNAT-273 that "the date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".

25. Both parties have asked for costs in this matter. The Tribunal considered Article 10.6 of its Statute. The Applicant has no basis to ask for costs. In respect of the Respondent's request, while finding that Counsel for the Applicant has not acted in a courteous manner in written submissions, the Tribunal finds it appropriate to warn Counsel for the Applicant not to engage in inclusion of abusive and irrelevant statements and assertions in submissions. No order for costs shall be made.

Conclusion

26. In view of the foregoing, the Tribunal ORDERS:

The application is dismissed as not receivable.

(Signed)

Judge Rowan Downing

Dated this 29th day of March 2019

Case No. UNDT/GVA/2019/006

Judgment No. UNDT/2019/050

Entered in the Register on this 29th day of March 2019

(Signed)

René M. Vargas M., Registrar, Geneva