



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

BERTHAUD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Angela Arroyo, UNDP

Introduction

1. The Applicant, a former staff member of the United Nations Development Programme (“UNDP”), contests the decision to pay her repatriation grant at the single rather than the dependency rate.

Facts and procedural history

2. On 5 August 2016, the Applicant separated from the service of UNDP upon reaching early retirement age. Since her husband was at the time serving with the World Food Programme (“WFP”), she remained in Rome, where she had been on secondment with the International Fund for Agricultural Development (“IFAD”) from 2011 to 2015.

3. Between December 2015 and November 2016, i.e., prior and after the Applicant’s separation from service, she had several email exchanges with a colleague in the Global Shared Services Unit (“GSSU”), UNDP, concerning her separation entitlements, namely repatriation grant, relocation lump-sum and travel grant. The exchanges focused in particular on the Applicant’s understanding of being entitled to be paid repatriation grant at the dependency rate, whereas her husband would receive it at the single rate.

4. By email of 10 November 2016, the Applicant’s GSSU colleague, *inter alia*, clarified to her that she and her husband would be paid a repatriation grant only if both were paid at the single rate.

5. By email of 14 November 2016 to her GSSU colleague, the Applicant acknowledged that UNDP’s and the UN Secretariat’s legal texts on repatriation grant were confusing, and she suggested to revisit the matter at the actual time of her relocation.

6. Consequently, in agreement with UNDP, the Applicant deferred until her husband's separation:

- a. The determination of the rate to be applied for the calculation of her repatriation grant and its payment; and
- b. The payment of her relocation lump-sum (paid in lieu of shipment).

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

8. On the same day, the Applicant's GSSU colleague emailed her twice recalling his November 2016 clarification (see para. 4 above⁴) and underlining, *inter alia*, that he needed to discuss the matter with WFP. In particular, referring to the Applicant and her husband, the Applicant's GSSU colleague clearly indicated that "There is only one of you who can get dependency rate for the full period and the other will only get the balance. This is why I need to talk with [WFP] on what is being paid. Your husband then would only be able to get the balance, if you [are] paid at dependency rate".

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

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

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

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

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

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

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

15. The Applicant replied to the HR Specialist on the same day. Noting that lengthy exchanges on the matter had taken place and that her reading of the rules was different, the Applicant requested to be informed to "whom [she] should write to next in UNDP to claim a review of [her] claim to dependency rate according to the UN rule".

16. The HR Specialist responded to the Applicant by email of 3 July 2019 informing her that:

- a. Pursuant to UNDP rules, UNDP staff members cannot be paid repatriation grant at the dependency rate if their UN spouse receives said grant at the single rate; and

b. As discussions about her case were ongoing with UNDP Policy colleagues, she suggested to proceed with payment of her repatriation grant at the single rate subject to processing adjustments, if any, later on if needed.

17. By email of 4 July 2019, the Applicant acknowledged the HR Specialist's reply and confirmed that she would await the outcome of consultations between UNDP and WFP.

18. By email of 15 August 2019, the HR Specialist assured the Applicant that the policy question she had raised was still under consideration and that she hoped to have "final clarification" by the following week.

19. By email of 22 August 2019, the HR Specialist confirmed to the Applicant that payment of her repatriation grant was at the single rate, as she did not have a child recognized as a dependant at the time of her separation from service or of her actual repatriation. The HR Specialist concluded that there would be no adjustment made to the repatriation grant amount already paid to the Applicant.

20. By email of 23 August 2019 to the HR Specialist, the Applicant expressed her disagreement with the decision and requested confirmation of whether it was final so that she could appeal it in due course.

21. By email of 28 August 2019, the HR Specialist reiterated to the Applicant that UNDP was not able to pay her repatriation grant at the dependency rate.

22. On 18 October 2019, the Applicant filed a request for management evaluation contesting the decision not to pay her repatriation grant at the dependency rate.

23. By letter dated 2 December 2019, the Assistant Administrator and Director, Bureau for Management Services, UNDP, informed the Applicant that there was no basis for amending the contested decision.

24. On 28 February 2020, the Applicant filed an application before this Tribunal contesting the decision referred to in para. 1 above.

25. By Judgment *Berthaud* UNDT/2021/063, this Tribunal rejected the application in its entirety.

26. By Judgment *Berthaud* 2022-UNAT-1253, the Appeals Tribunal vacated the above-mentioned UNDT Judgment and remanded the case back to this Tribunal.

27. By Order No. 116 (GVA/2022) of 29 November 2022, the Tribunal ordered the Respondent to provide information in relation to the repatriation grant at issue and instructed him to submit his arguments, together with supporting documentation, on whether the Applicant's husband was entitled to the repatriation grant at the dependency rate at the time of his separation from service from the World Food Programme.

28. On 14 December 2022, the Respondent filed his submissions pursuant to Order No. 116 (GVA/2022).

29. By Order No. 8 (GVA/2023) of 15 February 2023, the Tribunal instructed the Applicant to file her comments on the Respondent's 14 December 2022 submission, which she did on 28 February 2023.

Consideration

Scope of judicial review

30. In its Judgment *Berthaud* 2022-UNAT-1253, the Appeals Tribunal upheld the Applicant's appeal and found that the contested decision was unlawful. Specifically, the Appeals Tribunal found that:

41. [...] under the legal framework envisaged by Section 17(d) of the UNDP Repatriation Policy ... when both spouses are staff members and both entitled to the repatriation grant and there exist dependent children ... then it is the first spouse to separate from service [i.e., the Applicant] who is afforded a choice to claim payment of the repatriation grant at the dependency rate. It is not the second spouse to separate from service [i.e., the Applicant's husband] who is conferred such a right to make a choice nor the Administration, as this is not an issue that is subject to the discretionary authority of the Administration. This, however, does not mean that the amount of grant payment to the first spouse to separate, who made such a choice, will eventually be at the

dependency rate, because ... in the calculation of it the Administration will factor in the entitlement possibly already received by the second spouse.

42. In the case at hand, it is common cause that [the Applicant], the first spouse to separate, made her choice under Section 17(d) of the UNDP Repatriation Policy by claiming her repatriation grant at the dependency rate, while her spouse, a WFP's staff member, who separated afterwards, received payment of the repatriation grant at the single rate...

43. [...] given that [the Applicant's] husband had completed an aggregate service exceeding the minimum of five years of qualifying service per Sections 3(a) and 6(a) of the UNDP Repatriation Policy, he was entitled to the repatriation grant for the balance of the remaining service period subsequent to the separation of [the Applicant], notwithstanding that it had been less than five years of continuous service, i.e., only three years.

31. Moreover, noting that the Applicant requested it to order payment of her repatriation grant at the dependency rate with interest, the Appeals Tribunal instructed this Tribunal to consider the discrete issues of:

- (i) The exact amount of the repatriation grant to which [the Applicant] is entitled, per Section 17(d) of the UNDP Repatriation Policy, as interpreted by this Tribunal, and
- (ii) Whether her claim to that entitlement is eventually more financially advantageous than that accorded to her with the contested administrative decision.

32. Accordingly, the Tribunal will address these issues in turn.

The exact amount of the repatriation grant to which the Applicant is entitled

33. The Tribunal notes that staff regulation 9.4, staff rule 3.19, Annex IV to the Staff Regulations, and the UNDP Repatriation Policy regulates the payment of repatriation grant to UNDP staff members. Staff rule 3.19(g) sets out the rules governing amount and computation of the repatriation grant to UN spouses as follows:

When both spouses are staff members and each is entitled to payment of a repatriation grant on separation of service, the amount of the grant paid to each shall be calculated in accordance with terms and conditions established by the Secretary-General.

34. Annex IV to the Staff Regulations, entitled “Repatriation grant”, provides in its relevant part that:

In principle, the repatriation grant shall be payable to staff members who have completed at least five years of qualifying service, whom the Organization is obligated to repatriate and who at the time of separation are residing, by virtue of their service with the United Nations, outside their country of nationality. The repatriation grant shall not, however, be paid to a staff member who is dismissed. Eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station. Detailed conditions and definitions relating to eligibility and requisite evidence of relocation shall be determined by the Secretary-General.

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

Payment

17. The modalities for the payment of the repatriation grant are as follows:

Calculation

a) The amount of the grant is established in relation to the staff member’s length of service with UNDP or another organization of the UN common system. It is calculated for international professional staff members, based on their gross salary, less staff assessment.

...

Rate

b) The repatriation grant is calculated at the rates specified according to the schedule provided in Annex IV of the Staff Regulations.

c) The repatriation grant is paid at the rate for a staff member with a spouse or dependent child, if the staff member, at the time of separation, has a spouse (regardless of whether the spouse is a

dependent) or a child recognized as dependent, regardless of where they are located.

Both spouses are UN staff members

d) If both spouses are staff members and both are entitled to the repatriation grant, on separation, the grant is normally paid to each according to his/her length of qualifying service at the rate for a staff member with neither a spouse nor a dependent child at the time of separation. If there are dependent children, the first parent to be separated may claim payment of the grant at the rate for a staff member with a spouse or dependent child. In this case, the second parent to be separated may claim the repatriation grant either at the rate for a staff member with neither a spouse nor a dependent child at the time of separation for the period of service subsequent to the separation of the spouse or, if he/she is eligible, at the rate for a staff member with a spouse or dependent child for the whole period of qualifying service, less the amount of the repatriation grant paid to the first parent.

36. The Appeals Tribunal interpreted and applied sec. 17(d) of the UNDP Repatriation Policy to the Applicant's case as follows:

[W]hen both spouses are staff members and both entitled to the repatriation grant and there exist dependent children, the first spouse to separate from service is entitled to claim payment of the repatriation grant at the dependency rate. In this case, per the plain language of the relevant provision, there are two options open to the second spouse to separate; either he/she may lay claim to a repatriation grant for the period of service subsequent to the separation of the first spouse, i.e., to the balance, at the single rate; or, if he/she is eligible to a dependency rate, claim that rate for the whole period of qualifying service, minus the amount of the grant paid to the first spouse (see *Berthaud* 2022-UNAT-1253, para. 25).

37. Considering that the Applicant opted for payment of the repatriation grant at the dependency rate, two options were open to her husband:

- a. To claim a repatriation grant at the single rate for the period of service subsequent to the Applicant's separation up to the date of his separation from service; or
- b. If eligible to a dependency rate, to claim that rate for the whole period of qualifying service, minus the amount of the grant paid to the Applicant.

38. Bearing in mind that the calculation of a repatriation grant does not vary according to the specific rules of individual organizations in the UN Common System, the Tribunal will calculate relevant amounts pursuant to Annex IV to the Staff Regulations below.

Option A: the Applicant's husband claims a repatriation grant at the single rate for the period of service subsequent to the Applicant's separation

39. Annex IV to the Staff Regulations establishes two rates of payment: a dependency rate for a staff member with a “spouse or dependent child at time of separation”, or a single rate for a staff member “with neither a spouse nor dependent child at time of separation” (see the table below).

<i>Years of qualifying service</i>	<i>Staff member with a spouse or dependent child at time of separation</i>	<i>Staff member with neither a spouse nor dependent child at time of separation</i>	
		<i>Professional and higher categories</i>	<i>General Service category</i>
Weeks of gross salary, less staff assessment, where applicable			
5	14	8	7
6	16	9	8
7	18	10	9
8	20	11	10
9	22	13	11
10	24	14	12
11	26	15	13
12 or more	28	16	14

40. The evidence on record shows that the Applicant's husband served three years after the Applicant's separation. For these three years of non-overlapping service, a single rate applies. From the table above, the Tribunal can deduce that the formula applicable to professional staff, for the determination of the number of weeks of gross salary in the calculation of a repatriation grant at the single rate, for “N” years of service below eight years is as follows: (N + 3).

41. As such, for his three years of non-overlapping service, the Applicant's husband is entitled to six weeks of gross salary, less staff assessment.

42. As per the calculation of WFP, the Applicant's husband received 16 weeks of gross salary less staff assessment, which amounted to USD33,606.46. It follows that he would have received USD12,602.42 ($33,606.46 \times 6/16$) for his three years of service.

43. The evidence on record shows that the Applicant would have been paid USD51,514.19 at the dependency rate.

44. Accordingly, under this scenario, the Applicant and her husband would have been entitled to a total repatriation grant of USD64,116.61 (USD12,602.42 + USD51,514.19).

Option B: the Applicant's husband claims a repatriation grant at the dependency rate

45. Had the Applicant's husband claimed a repatriation grant at the dependency rate, he would have received 28 weeks of gross salary, less staff assessment, minus the amount of the grant that would have been paid to the Applicant at the dependency rate (USD51,514.19).

46. Bearing in mind that to calculate the total repatriation grant one would have to add back USD51,514.19 (namely, the amount of the grant that would have been paid to the Applicant at the dependency rate), the total repatriation grant under Option B is equal to the Applicant's husband's repatriation grant at the dependency rate resulting from the calculation described in para. 45 above.

47. As per the calculation of WFP in para. 42 above, the Applicant's husband would have received USD58,811.31 ($33,606.46 \times 28/16$) as repatriation grant at the dependency rate, and this amount would have been the total repatriation grant that the Applicant and her husband would have received.

Whether the Applicant's claim is eventually more financially advantageous than that accorded to her with the contested administrative decision

48. The Tribunal notes that pursuant to the contested administrative decision, both the Applicant and her husband were paid a repatriation grant at the single rate,

totalling USD62,728.61. This is USD1,388 lower than what she would have received under Option A above, i.e., USD64,116.61.

49. Accordingly, the Applicant's claim is more financially advantageous than that accorded to her under the contested administrative decision. Consequently, the Tribunal finds it appropriate to direct the Respondent to pay the Applicant the USD1,388 difference with interest calculated as from her husband's separation date.

Conclusion

50. In view of the foregoing, the Tribunal DECIDES that:

- a. The Respondent shall pay to the Applicant USD1,388 with interest at the United States of America prime rate pursuant to para. 49 above; and
- b. The above-mentioned payments shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Teresa Bravo

Dated this 23rd day of March 2023

Entered in the Register on this 23rd day of March 2023

(Signed)

René M. Vargas M., Registrar, Geneva