
UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1253

Cecile Berthaud
(Appellant)

v.

Secretary -General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos , Presiding Judge Kanwaldeep Sandhu Judge John Raymond Murphy
Case No:	2021-1592
Date of Decision:	1 July 2022
Date of Publication:	12 August2022
Registrar:	Weicheng Lin

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

... 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”.

... 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.

... 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.

... 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.

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

... 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.

... 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.

... 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.

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

Impugned Judgment

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

Mr. Vidal asks “Based on message below, UNDP seems to understand that if my wife gets dependency rate, WFP would not pay me anything for the repatriation grant, i.e. not even single rate.”

To which Ms. P replies: “Dear Denis Of course you will get the repatriation grant at single rate paid by WFP4.2 690.48 Tm 1(g)1.9 (7 Tw ()Tj 0.001 Tc -hed [59der12 79.90hD (0.4 ET EMC /Artifa

13. The UNDT erred in law in finding that UNDP's rule allowed them to reconcile payments made to staff members not employed by UNDP but within the United Nations system. Ms. Berthaud's argument in this regard is relatively simple. Given the respective employment

amount of repatriation grant paid to the first spouse to separate (Option 3). Per the *Sanwidi*¹ standard of review, the UNDT reviewed the legality of the decision by considering the above framework and facts of this case. The UNDT found that, under Section 17(d), the UNDP had an obligation to reconcile payments made to UN spouses when one spouse claims payment of the repatriation grant at thn9.2 (n9.2 (n9.2 e)7.7(n9.2 (n9.2.046 Tw76.8 (ya)6.7 (i)-8.6 (m()irant)-7.17nt)-78.5 (o)1 11 0

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

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

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

36. We also find correct the UNDT's reasoning at para. 39 of its Judgment that the application of the above provision of Section 17(d) is not limited to UNDP staff members as it seeks to reconcile payments made to staff members within the Unit1 0 Td [(n)7 (o)6n(e9 (a)7 ()21.9

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

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

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

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

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

Judgment

46. The appeal is upheld and Judgment No. UNDT /2021/063 is hereby vacated. The discrete issues of (i) the exact amount of the repatriation grant to which Ms. Berthaud is entitled, per Section 17(d) of the UNDP Repatriation Policy, as interpreted by this Tribunal,