



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/079

Judgment No.: UNDT/2018/22

Date: 23 February 2018

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

Introduction

1. On 3 August 2017, the Geneva Registry of the United Nations Dispute Tribunal (UNDT) received 332 similar applications filed by the Office of Staff Legal Assistance (OSLA) on behalf of staff members employed by different United Nations entities at the Geneva duty station.

2. The 332 applications were grouped into nine cases and served to six different Counsel acting for the Respondent for their respective entities. These cases were served on 27 and 28 September 2017. The present case concerns 20 staff members of the United Nations Environment Programme (UNEP)

3. The Respondent has agreed to implement the Applicant's request for rescission of the Respondent's decision on 11 May 2017. The Applicants also seek compensation for any loss accrued prior to such rescission.

4. On 30 August 2017, Judge Bravo issued Orders Nos.: 157, 158, 159, 160, 161, 162, 163, 164 and 165 (GVA/2017) recusing herself from the cases.

5. On 5 September 2017, Judge Downing, President of the United Nations Dispute Tribunal, issued Order No. 169 (GVA/2017) accepting the recusal of Judge Bravo, recusing himself from adjudication of the cases, and ordering the transfer of the nine cases to the Dispute Tribunal in Nairobi.

6. On 13 and 14 September 2017, Counsel for the Respondent were notified that the cases have now been transferred to the Nairobi Registry.

7. On 15, 16 and 18 September 2017, Counsel for the Respondent filed identical Motions requesting the Tribunal:

a. For a joint consideration of the 332 applications on the grounds that: the Applicants in all nine cases are challenging the same decision; they all claim the exact same relief; the material facts in all nine cases are identical; the Tribunal has been requested to determine substantially the same questions of law and fact; the Counsel for the Respondent wish to file a single reply; and a joint consideration of the cases would promote judicial economy by minimizing duplication of proceedings.

b.

representatives has decided to implement the post adjustment change for Geneva, effective 1 May 2017 (in lieu of 1 April as initially intended) with the transitional measures foreseen under the methodology and operational rules approved by the General Assembly, to reduce the immediate impact for currently serving staff members.

Accordingly, the new post adjustment will initially only be applicable to new staff joining the duty station on or after 1 May 2017; and currently serving staff members will not be impacted until August 2017.

During the month of April, further appeals were made to the ICSC by organizations and staff representatives to defer the implementation of the revised post adjustment. On 24 and 25 April 2017, Executive Heads, Heads of Administration and HR Directors of Geneva-based Organizations and UNOG senior management met with the ICSC Vice-Chairman and the Chief of the Cost-of-Living Division of the ICSC in Geneva to reiterate their concerns. During the meeting, a number of UN system-wide repercussions were identified.

The ICSC has taken due note of the concerns expressed and in

Geneva survey results, as well as an in-depth explanation of the results of the 2016 baseline cost-of-living surveys at Headquarters duty

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14.

May 2017, the ICSC indicated that Geneva was one of the duty stations whose post adjustment multipliers had been revised as a result of cost-of-living surveys. The post adjustment multiplier was set at 67.1. The memorandum also indicated that staff serving in Geneva before 1 May 2017 would receive a personal transitional allowance (PTA), which would be revised in August 2017.³

15. Following the issuance of the broadcast, Geneva-based organizations expressed concerns regarding the cost of living surveys and post adjustment matters.

16. On 10 July 2017, the Applicants filed management evaluation requests against

² Application, Annex 1.

³ Reply para 9; Annexes 4 and 5.

Staff members who joined after 1 May 2017 have since received the same post adjustment than staff members who joined prior to 1 May 2017.⁷

21. In the period from July to September 2017 the post adjustment multiplier has been further revised.⁸ The decision of ICSC of May 2017 has not been implemented. The later decision has been implemented to the extent that the affected staff received a PTA meant to moderate the impact of the decreased post adjustment.⁹

22. On 21 and 22 August 2017, MEU informed that the new determination of the ICSC rendered moot the matter raised in the management evaluation request of 10 July 2017. MEU further indicated that the additional submission filed by OSLA on 17

that, pursuant to staff rule 11.2 (d), the management evaluation was to be completed no later than 1 October 2017.

Respondent's submissions on receivability

A matter cannot be before the MEU and the Dispute Tribunal simultaneously.

23. The application relates to the implementation of the May 2017 ICSC decision. A request for management evaluation was submitted on 10 July 2017 and as of the date of the filing of the application on 3 August 2017, the response from the management evaluation was not completed. The response of the management evaluation was subsequently sent to the Applicants on 21 and 22 August 2017.

24. It is uncontested that the Applicants submitted the present application without awaiting the result of their request for management evaluation. It is further uncontested that the Applicants stated that they made their request for management evaluation.

⁷ Reply, para 15; Annex 11.

⁸ Reply, para 16; Annexes 12-14.

⁹ Reply, para 20.

The 11 May 2017 ICSC decision, or the implementation thereof, is moot.

29. The management evaluation request dated 10 July 2017 relates to the May 2017 ICSC decision, or its implementation, which was superseded by the July 2017 ICSC decision. The July 2017 decision constitutes a new decision of the ICSC and the May 2017 ICSC decision is void.

30. The July 2017 ICSC decision cannot be considered as a continuation of the May 2017 decision. The May 2017 decision was initially projected to result in a decrease of 7.7% in net remuneration. The payment of a post adjustment based on the revised multiplier was to be paid to new staff joining

Nations/United States net remuneration margin in 2018. Therefore, given that the effect of this new decision cannot be foreseeable, the application should not be receivable at this stage.

Applicant's submissions on receivability

The ICSC may constitute a technical body.

36. Staff rule 11.2(b) indicates that the Secretary-General is competent to determine what represents a technical body for purposes of determining if a decision requires management evaluation or is contestable directly to the UNDT. The Secretary-General has not published a list of such technical bodies. In similar cases the Administration have alternately taken the position that decisions were and were not made by technical bodies falling under staff rule 11.2(b). The Administration's interpretation as to what constitutes a technical body has been subject to change over time and is not necessarily consistent between the MEU and Counsel representing the Respondent before the UNDT (for example as illustrated by *Syrja* UNDT/2015/092).

37. Given the difficulty in predicting the position that might be taken by the Respondent in the instant case, the Applicants are obliged to file multiple applications in order to ensure that they are not procedurally barred.

38. The instant application is filed pursuant to staff rule 11.2(b) on the basis that the ICSC may constitute a technical body. A further application will be made in due course pursuant to the management evaluation request of 10 July 2017.

Deadline is triggered by communication of a decision not implementation.

39. Staff rule 11.2(c) provides that the time limit for contesting an administrative decision runs from notification rather than implementation.

40. The 11 May 2017 email notified the Applicants of a decision to implement a post adjustment change as of 1 May 2017 with transitional measures applied from that date, meaning that it would not have impact on the amount of salary received

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i.e., whose legal consequences are not directed inward but outward the administrative apparatus.¹² Concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts, has been explained in the second sentence of the *Andronov* definition reproduced above. When it comes to the requirement of external effect, the UNAT made it explicit in *Andati-Amwayi*¹³ that, in accordance with the UNDT Statute, the proceedings are concerned with decisions having impact not just on the legal order as a whole but on the terms of appointment or contract of employment of the staff member. What has proven to require
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decision.²⁶ Substantive law may be a primary or secondary general legislation or may be an administrative decision of a general order. Constrained decisions are as a rule reviewable for legality, *i.e.*, their compliance with the elements of the controlling legal norm. The UNDT reviews daily applications directed against constrained decisions, such as, for the most part, those pertaining to entitlements. The UNAT confirmed that highly constrained decisions, such as placement of reports on staff

²⁷ If anything, it is judicial review of discretionary decisions which, as expression of separation of powers and prohibition

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general order has resulted in norm crystallisation in relation to individual staff members by way of a concrete decision expressed through a payslip or personnel action. This is precisely the holding of *Tintukasiri*, the leading case on the issue. The other UNAT judgments, notwithstanding occasional intertwining elements pertinent to legality rather than receivability²⁹, express the same concept and are directed toward the same legal effect.

59. From the foregoing, it is evident that by applying the test of *Andronov*, and even assuming that the 11 May 2017 communication confers a general intent to implement the ICSC decision with respect to each and every staff member based in Geneva, such individual decisions have not yet been taken. This renders the

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