



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/083

Judgment No.: UNDT/2018/026

Date: 23 February 2018

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BOZIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicants:

Robbie Leighton, OSLA

Counsel for the Respondent:

Melissa Bullen UN Women,
Myline Spence, UN Women

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

7. On 15, 16 and 18 September 2017, the 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. To submit a single reply on the issue of receivability only.

c. For a six-week extension of the deadline to file a single reply should the Tribunal consider that a response on the merits is required at this stage.

8. On 18 September 2017, the Tribunal issued Order No. 152 (NBI/2017) in which it granted the Respondent leave to file a single reply on receivability and on the merits in relation to the nine cases and extended the deadline for fil(49(the)-6.56rc3(s 5531(a)07)-110

the determination of the post adjustment index at those locations. In the years prior to this round of surveys, the ICSC had approved a number of changes to the survey methodology based on recommendations of the Advisory Committee on Post Adjustment Questions (ACPAQ).

12. The results of the surveys were included in the ACPAQ Report presented to the ICSC Secretariat at its 84th meeting in March 2017. The ICSC Secretariat noted at the time that, in the case of Geneva, implementation of the new post adjustment would lead to a reduction of 7.5% in the net remuneration of staff in that duty station as of the survey date (October 2016).

13. On 11 May 2017, the Applicants received an email broadcast from the Department of Management, United Nations Headquarters, informing them of a post adjustment change effective from 1 May 2017 translating to an overall pay cut of 7.7%. The email states in relevant part:

In March 2017, the International Civil Service Commission (ICSC) approved the results of the cost-of-

The post adjustment index variance for Geneva has translated into a decrease in the net remuneration of staff in the professional and higher categories of 7.7%.

The Commission, having heard the concerns expressed by the UN Secretariat and other Geneva-based organizations as well as staff 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 response to the questions raised, the ICSC has posted a “Questions & Answers” section on their website dealing specifically with the Geneva survey results, as well as an in-depth explanation of the results

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 the same decision however only “in the event the ICSC is deemed not a technical body”. The present application was filed without awaiting the result of the management evaluation.

17. On 18 July 2017, at its 85th Session, the ICSC determined that its earlier measures would not be implemented as originally proposed.

18. On 19 July 2017, an article was posted on the Geneva intranet by the Department of Management indicating that a new decision of the ICSC had amended the Commission’s earlier decision with regard to the post-adjustment in Geneva, to the effect that there would be no post adjustment-related reduction in net remuneration for serving staff members until 1 February 2018, and that from February 2018, the decrease in the post adjustment would be less than originally expected.³ This was followed by a broadcast on 20 July 2017 by the UNOG Director General which also indicated that a further decision of the ICSC had amended their earlier decision and that “[f]urther detailed information on implementation of the reduction in the post adjustment for Geneva will be communicated in due course.”⁴

19. In its memorandum entitled “Post adjustment classification memo” for August 2017, dated 31 July 2017, the ICSC indicated that post adjustment multipliers for Geneva had been revised as a result of cost-of-living surveys approved by the ICSC during its 85th session. The post adjustment multiplier for Geneva was now set at 77.5 as of August 2017. The memorandum also indicated that staff serving in Geneva

totally offset for a six-month period any negative impact of the reduction in the post adjustment amount; and that this allowance would be revised in February 2018.⁵

20. Following this new ICSC decision, retroactive payments were made to new staff members in Geneva who joined after 1 May 2017, and had not received a PTA. Staff members who joined after 1 May 2017 have since received the same post adjustment than staff members who joined prior to 1 May 2017.⁶

21. In the period from July to September 2017 the post adjustment multiplier has been further revised.⁷ 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.⁸

22. On 27 October 2017, the ctober

25. Allowing the Applicant to file multiple applications is contrary to the efficient use of judicial resources. As the Applicant requested management evaluation of the contested decision on 10 July 2017 and received the response to the management evaluation on 23 August 2017, the present application is premature and not receivable. To find otherwise could result in the Dispute Tribunal finding itself effectively seized of two appeals of the same contested decision.

The contested decision does not constitute an “administrative decision taken pursuant to advice obtained from technical bodies”, which is exempt under staff rule 11.2(b) from the requirement to request a management evaluation.

26. OSLA has asserted that the application is filed pursuant to staff rule 11.2(b) on the basis that the ICSC may constitute a technical body. The ICSC is not a technical body within the meaning of staff rule 11.2(b). The ICSC is a subsidiary organ of the General Assembly within the meaning of art. 22 of the United Nations Charter and was established in accordance with General Assembly resolution 3357(XXIX) of 18 December 1974 in which it approved the ICSC Statute.

27. Article 11(c) of the ICSC Statute provides that the Commission shall establish the classification of duty stations for the purpose of applying post adjustments. The ICSC does not advise the Secretary-General on post adjustment; rather, the ICSC takes decisions which have to be implemented by the Secretary-General. Therefore, the implementation of the ICSC decisions on the post adjustment multiplier does not constitute an administrative decision taken pursuant to advice obtained from technical bodies. The Applicant is therefore not exempt from the requirement to first request a management evaluation prior to submitting an application with

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 the Organization on or after 1 May 2017. However, the July 2017 ICSC decision superseded the May 2017 ICSC decision, by increasing the post adjustment multiplier, establishing different gap closure measures and a different implementation date for the payment of post adjustment at the new rate, i.e., 1 August 2017. The cancellation of the May 2017 ICSC decision also resulted in retroactive payments to staff members who joined on or after 1 May 2017.

31. On 23 August 2017, the Applicant was informed that the July 2017 ICSC decision rendered moot the matter raised in his management evaluation request.

The implementation of an ICSC decision on post adjustment multipliers is not an administrative decision subject to review pursuant to the UNDT Statute.

32. The May 2017 ICSC decision and the July 2017 ICSC decision are not administrative decisions pursuant to art. 2 of the UNDT Statute or pursuant to the Staff Regulations and Rules. The setting of the post adjustment multipliers by the ICSC, as reflected in its May 2017 and July 2017 decisions, must be implemented by the Secretary-General, there is no room for interpretation or the exercise of discretion. The only action taken to implement such a decision is to make a payment by calculating the post adjustment based on the multiplier set by the ICSC.

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.

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 has 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 Applicant 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 until August 2017. As such, it communicated a final decision of individual

application which will produce direct legal consequences to the Applicant. Since the time limit runs from communication rather than implementation of a decision and no rule specifies the means of communication required to trigger that deadline, the Applicant considered that the 60-day deadline ran from the 11 May 2017 communication.

41. Such a decision has direct legal consequences for the Applicant and is properly reviewable. The instant case can be distinguished from that in *Obino* which dealt with a decision within the ICSC's decisory powers, from *Tintukasiri et al.* 2015-UNAT-526 which related to a methodology specifically approved by a General Assembly Resolution and from *Ovcharenko et al.*, which similarly related to a decision pursuant to a General Assembly Resolution. Whereas the decision challenged here falls within the ICSC's advisory powers and was not subject to approval by the General Assembly.

42. In *Pedicelli* it was found that notwithstanding a finding that the Secretary-General had no discretion in the implementation of an ICSC decision, the negative impact of that decision still rendered it capable of review. To find otherwise would be to render decisions regarding fundamental contractual rights of staff members immune from any review regardless of the circumstances. This is inconsistent with basic human rights and the Organization's obligation to provide staff members with a suitable alternative to recourse in national jurisdictions. Since the International Labour Organization Administrative Tribunal (ILOAT) has consistently reviewed decisions relating to post adjustment it would further risk the breakup of the common system with staff members from one jurisdiction afforded recourse denied in other parts.

43. Further or in the alternative, the decision was taken *ultra vires*. Consequently, any argument on receivability relying on the absence of discretion on the part of the Secretary-General must fail. If the ICSC can exercise powers for which it has no authority and those actions cannot be checked by either the Secretary-General or the internal justice system, then there is no rule of law within the Organization.

Effect of the 19 and 20 July 2017 communications.

44. It is possible that the Administration's communications of 19 and 20 July 2017 indicate that the 11 May 2017 decision has been rescinded and replaced by a new administrative decision triggering a further 60-day deadline. However, the Administration has not taken a clear position in this regard.

45. The 19 and 20 July 2017 communications describe the changes made as "a decision" but go on to indicate that "this latest development amends the Commission's earlier decision". The word "amends" suggests that rescission has not occurred. Various elements of the original decision are changed though confusingly the ICSC affirm their decision that the collection and processing of the data from the 2016 baseline cost-of-

nature of norms contained in regulatory acts, has been explained in the second sentence of the *Andronov*

of the then-existing salary scales, the UNAT upheld the UNDT's finding that the applications were not receivable *ratione materiae* because the contested decision was of a general order, in that the circle of persons to whom the salary freeze applied was not defined individually but by reference to the status and category of those persons within the Organisation, at a specific location and at a specific point in time.¹⁴ However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

... [i]t is only at the occasion of individual applications against the monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-General to fix and apply

his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment.”¹⁹

52. With minor variation, the UNAT restated the holding in *Tintukasiri et al.* in *Ovcharenko et al.*, where the appellants contested the Secretary-General’s refusal to pay post adjustment based on a multiplier promulgated by the ICSC. The UNAT found that the administrative decision not to pay the appellants their salary with the post adjustment increase, the execution of which was temporarily postponed, was a challengeable administrative decision, despite its general application because it had a

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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

other UNAT judgments, notwithstanding occasional intertwining elements pertinent

CONCLUSION

61. This application is dismissed as not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 23rd day of February 2018

Entered in the Register on this 23rd day of February 2018

(Signed)

Eric Muli, Legal Officer, for,

Abena Kwakye-Berko, Registrar, Nairobi