Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SAMOULADA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicants:
Robbie Leighton, OSLA

Counsel for the Respondent:
Stéphanie Cochard, Human Resources Legal Unit, UNOG
Jérôme Blanchard, Human Resources Legal Unit, UNOG

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 on six different Counsel acting for the Respondent for their respective entities. These cases were assigned to Judge Bravo on 24 August 2017, and the Respondent's replies were due by 27 and 28 September 2017. The present case concerns a staff member of the United Nations Office in Geneva (UNOG).

3. All the 332 Applicants in the nine cases are requesting the rescission of the "decision to implement a post adjustment change resulting in a pay cut" notified to the Applicants 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, the Counsel for the Respondent were notified that the cases had been transferred to the Nairobi Registry.

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 filing the single reply until 31 October 2017.

9. The reply was filed on 31 October 2017.

10. The Tribunal has decided that an oral hearing is not required in determining

> 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.
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> 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.
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> 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.
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> 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 of the 2016 baseline cost-of-living surveys at Headquarters duty stations…[1]

14. In its memorandum entitled "Post adjustment classification memo" dated 12 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.[2]

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

[1] Application, Annex 1.
[2] 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.[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 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 August 2017 was considered as a "new request for a management evaluation", and that, pursuant to staff rule 11.2 (d), the management evaluation was to be completed no later than 1 October 2017.

25. Allowing the Applicants to file multiple applications is contrary to the

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.

The ICSC may constitute a technical body.

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until August 2017. As such, it communicated a final decision of individual application which will produce direct legal consequences to the Applicants. 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 Applicants considered that the 60-day deadline ran from the 11 May 2017 communication.

41. Such a decision has direct legal consequences for the Applicants 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-living surveys were carried out by the Secretariat in accordance with the approved methodology while simultaneously forwarding a report suggesting the contrary to the Advisory Committee for evaluation.

46. Since the Administration is not clear whether the original decision has been rescinded and replaced, the Applicants, in order to protect their rights, are obliged to maintain their challenge to the 11 May 2017 communication and may in due course be obliged to contest the 19 and 20 July 2017 communications.

Considerations

47. In the layered argument concerning receivability of the application, the primary question to be addressed is the nature of the decision that the Applicants seek to challenge. The Applicants identified the contested decision as being the 11 May 2017 email from the Administration related to the post adjustment change effective 1 May 2017. Whilst the content of the email relays findings and decisions of ICSC and the Respondent copiously argues irreceivability of an application directed against decisions of ICSC, it is however obvious from the application that the challenge is

directed not against the acts of ICSC but against the communication as such, which announces the intent to implement the ICSC directive. The legal issue arising for consideration at this stage is therefore whether the application is properly against an administrative decision in the sense of art. 2.1(a) of the UNDT statute, which provides as follows:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

48. It is recalled that in *Hamad*[9], the UNAT adopted the former United Nations Administrative Tribunal's definition forged in *Andronov*, which describes an administrative decision as:

> a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or

Andronov because at the moment of their issuance the secondary salary scales were to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. Regarding the appellants' challenge to the freeze 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 a specific salaryc0BT1 0 0 1 135.38 415.25 T4-37(il)-044-5004A1004404004C0pTBT1 0 0 1 135.

execute such decisions.[17] The UNAT, who agreed that ICSC had made a decision binding upon the Secretary-General[18], affirmed the judgment because "Mr. Obino did not identify an administrative decision capable of being reviewed, as he failed to meet 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*