



## Introduction

1. On 16 October 2017, the Geneva Registry of the United Nations Dispute Tribunal (UNDT) received 323 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.

changes to the survey methodology based on recommendations of the Ad Hoc Committee on Post Adjustment Questions (ACP<sup>A</sup>Q).

7. 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 General implementation of the new post adjustment would lead to a reduction of 7.5% in the net remuneration of staff in

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 ICSC by organizations and staff representatives to defer the implementation of the revised post adjustment. On 24 and 25 April

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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. This was reflected by pay check at the end of August 2017.<sup>10</sup>

16. On 14 September 2017, OSLA acting on behalf of the Applicant requested a management evaluation of the decision to implement the July 2017 ICSC decision. On 27 October 2017, the Applicant was informed that there was no administrative decision to be evaluated.<sup>11</sup>

17. On 16 October 2017, thus prior to obtaining management evaluation, OSLA filed 344 applications including the present one, contesting the July 2017 decision conveyed by Broadcast on 19 and 20 July 2017.<sup>12</sup>

18. On 6 November and 28 November 2017, OSLA again filed 344 applications contesting the decision to implement a post adjustment change in Geneva.<sup>13</sup>

19. On 26 and 27 December 2017 replies were filed in response to the applications from 6 October, including the present one.

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*A matter cannot be before management evaluation and the Dispute Tribunal simultaneously.*

20. The application relates to the implementation of the July 2017 ICSC decision. A request for management evaluation was submitted on 14 September 2017 and as of the 16 October 2017 date of the filing of the application, the response from the management evaluation was not completed. The response of the management evaluation was subsequently sent to the Applicant on 27 October 2017.

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<sup>10</sup> Application, Annex 4.

<sup>11</sup> Paragraph 18 of the reply

<sup>12</sup> Paragraph 19 of the reply

<sup>13</sup> Paragraph 23 of the reply.

21. 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 indeed have filed applications after receiving the response to their 14 September 2017 request for management evaluation.<sup>14</sup>

22. Allowing the Applicants to file multiple applications with the Tribunal before the deadline for a response to a request for management evaluation has





that the effect of this new decision cannot be foreseeable, the application should not be receivable at this stage.

*The Applicants should not be allowed to file multiple applications to contest a*

and Counsel representing the Respondent before the UNDT (for example as illustrated by *Syrja* UNDT/2015/092).

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

32. 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 was made in due course pursuant to the management evaluation request of 10 July 2017.

*Deadline is triggered by communication of a decision not implementation.*

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

34. The 19 and 20 July 2017 communications notified the Applicant of a decision to implement a post adjustment change as of August 2017 with transitional measures applied from that date, meaning that it would not have impact on the amount of salary received until February 2018. As such, it communicated a final decision of individual application which will produce direct negative 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 19 or 20 July 2017 communication.

35. In the alternative, the time limit must run from receipt of the staff members' paychecks for the month of August. Such a decision has direct legal consequences for the Applicant and is properly reviewable.

36. 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.

### Considerations

37. This Tribunal has already determined in Judgment No. UNDT/2018/02 involving the same parties and arising from the above cited communication of 11 May 2017, that, on the basis of the definition of administrative decision adopted by the Appeals Tribunal for the purpose of art. 2.1(a) of the UNDT statute after *Andronov*<sup>15</sup>, applications originating from implementation of acts of general order are receivable when an act of general order has resulted in a crystallization in relation to individual staff members by way of a concrete decision, such as in similar cases had been expressed through a pay slip or personnel actions<sup>16</sup>. It has also held that the degree of discretion exercised by the Secretary General in the issuance of an individual decision is inconsequential for the receivability of a decision for a judicial review<sup>17</sup>. The Tribunal incorporates by reference the particular reasons given as substantiating this holding.

38. Just as was the case with the communication of 11 May 2017, the communication of 19 and 20 July 2017, which announces implementation of a post adjustment change as of August 2017, constitutes a decision of general order. Whereas the Tribunal agrees with the Applicant that communication of a decision, and not its implementation, triggers the running of time limits for the filing of an application, the communication of 19 July did not constitute a *Andronov* definition of a reviewable decision. The Tribunal takes it, however, that an individual decision concerning the Applicant would have been issued and subsequently communicated to them through the August 2017 paycheck, which is the alternative indication of the impugned decision contained in the application. As

39. Two questions fall to be resolved in this connection: first, whether in the instant case a management evaluation was required as a matter of law; second, if so, whether an application can be accepted for review by the UNDT when filed without awaiting management evaluation or the expiration of the time limit for it but subsequently such management evaluation has been obtained. These issues arise under art. 8 of the UNDT Statute and staff rule 11.2(b), which in relevant parts provide, respectively

UNDT Statute Article 8

- (a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;
- (b) An applicant is eligible to file an application, pursuant to article 3 of the present statute
- (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required[.]

Staff rule 11.2

- (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his other contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
- (b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

40. To the extent the Respondent argues economy of proceedings, postulates that applicant against the same decision and imputes frivolousness to the applicants, the Tribunal finds itself compelled to note that the issue would not have occurred had the Respondent promulgated administrative technical advisory bodies as determined by him pursuant to staff rule 11.2(b).





ICSC.<sup>28</sup> The Tribunal finds no grounds to attribute to the Applicant use of process under 10.6 of the UNDT Statute. Conversely, the Tribunal puts it before

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UNDT Statute, is not consistent with United Nations standards of the rule<sup>29</sup> of law and, should this argument be not sufficiently persuasive, certainly is not conducive to economy of proceedings<sup>30</sup>.

45. Turning to the second question, the Tribunal recalls that in *Omwanda*, the UNDT held that

[a] matter cannot be before the MEU and the Dispute Tribunal

this process and file applications with the Tribunal before the deadline for a response to a request for management evaluation has

Procedure, undermine the time lines set out in the Staff Rules, and would be contrary to the intentions of the General Assembly<sup>31</sup>.

46. In *Omwanda*, as the application had been filed before MEU completed its management evaluation and the time limit for completing such a response<sup>32</sup> had yet expire, the application was dismissed as premature. In the present case, a differing element is that by the date of this judgment the Applicants had obtained management evaluation of the impugned decision, as a result of which their claims were not satisfied. The question before the Tribunal is whether a management evaluation so obtained validates the filing of the application so that it becomes receivable for adjudication.

47. In this respect, it is recalled that, although staff rule 11.2 and art. 8 of obtaining it, the Appeals Tribunal stressed the obligation to await management evaluation, which process provides the Administration an opportunity to correct any errors in an administrative decision and resolve disputes without the necessity to involve judicial review.<sup>33</sup> Moreover, another rationale noted by the Appeals Tribunal for management evaluation and the attendant requirement to wait for the period necessary to obtain it is that it provides for the applicant an opportunity to consider reasons on the part of the Administration prior to drafting and filing of the application and in this way fosters rationality and completeness of the argument before the Tribunal. In view of this reasoning, the Tribunal considers that the answer to the debated question is negative, and that the application which had been filed without awaiting the result of management evaluation (or expiry of the time limit for it) remains not receivable also after the management evaluation has been issued. Such situation for an applicant who wishes to pursue his or her claim before the Dispute Tribunal calls for a new filing made in accordance with the applicable time limits.

48. This conclusion renders unnecessary discussing and deciding the remainder of arguments.

## CONCLUSION

49. The present application is dismissed as not receivable.

(Signed)

Judge Agnieszka Klonowicz-Milart

Dated this 8<sup>th</sup> day of March 2018

<sup>33</sup> *Kouadio* 2015-UNAT-558 para 17; *Amany* 2015-UNAT-521, para. 17; *Nagayoshi* 2015-UNAT-498 para 36; *Mosha* 2014-UNAT-446, para. 17; *Christensen* 2011-UNAT-335, para 22; *Pirnea* 2013-UNAT-311 para 42.

<sup>34</sup> *Neault* 2013-UNAT-345 at para. 34.



Entered in the Register on the 8<sup>th</sup> day of March 2018

*(Signed)*

Abena KwakyeBerko, Registrar, Nairobi



