



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/109

Judgment No.: UNDT/2018/0

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).²

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 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).³

8. 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-living surveys conducted in Geneva in October 2016, as recommended by the Advisory Committee on Post Adjustment Questions (ACPAQ) at its 39th session, which had recognized that both the collection and processing of data had been carried out on the basis of the correct application of the methodology approved by the General Assembly.

Such periodic baseline cost-of-living surveys provide an opportunity to reset the cost-of-living in such a way as to guarantee purchasing power parity of the salaries of staff in the Professional and higher categories relative to New York, the basis of the post adjustment system. Changes in the post adjustment levels occur regularly in several duty stations so as to abide by this principle of equity and fairness in the remuneration of all international civil servants at all duty stations.

The extensive participation of staff in the recent cost-of-living salary surveys' process and the high response rates provided by staff in the duty stations provide assurance that the results accurately reflect the actual cost of living experienced by the professional staff serving at these locations.

² Paragraph 5 of the reply.

³ Paragraph 6 and Annex 2 of the reply.

10. Following the issuance of the broadcast, Geneva-based organizations expressed concerns regarding the cost of living surveys and post adjustment matters.⁶

11. In August 2017, numerous staff members based in Geneva, including the Applicants, filed management evaluation requests as well as applications on the merits concerning the May 2017 decision. To date those proceedings for the present Applicants resulted in Judgment No. UNDT/2018/024.

12. 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 of 18 July 2017 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. This was followed by a broadcast on 20 July 2017 by the Director General of the United Nations Office at Geneva (UNOG) which also indicated that a further decision of the ICSC had amended their earlier decision and that “[

14. 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.⁹

15. In the period from July to September 2017 the post adjustment multiplier has been further revised, mainly as a result of fluctuation of the US dollar. 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. This was reflected by pay check at the end of August 2017.¹⁰

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

17. On 16 October 2017, thus prior to obtaining management evaluation, OSLA filed 344 applications including the present one, contesting the July 2017 decision to “impleme

Respondent's submissions on receivability

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 Applicants on 26 October 2017.

21. It is uncontested that the Applicants submitted the present application without awaiting the result of their requests for management evaluation. It is further uncontested that the Applicants indeed have filed applications after receiving the response to their 14 September 2017 requests for management evaluation.¹⁴

22. Allowing the Applicants to file multiple applications with the Tribunal before the deadline for a response to a request for management evaluation has passed would contravene the Tribunal's Statute and Rules of Procedure, undermine the time lines set out in the Staff Rules, and would be contrary to the intentions of the General Assembly.

11.2(b) from the requirement to request a management evaluation.

23. 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.

24. 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

¹⁴ Registered as Case No. UNDT/NBI/2018/019.

Assembly resolution 3357(XXIX) of 18 December 1974 in which it approved the ICSC Statute. 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.

25. The application is not receivable under staff rule 11.2(b), and should be filed under staff rule 11.2(a), requiring staff members to, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision. The3(veh4()-1997im)-emeeivaion thof-171(whan-1997imICS-2()-1697de)4(c)

The Application is not receivable as the Applicants are not adversely affected by the ICSC decisions on post adjustment multipliers.

28. With the July 2017 ICSC decision, the Applicants have not been adversely affected as the ICSC has approved the payment of a PTA as a gap closure measure to address any reduction in net remuneration as a result of the revised post adjustment multiplier. This allowance will be reviewed in February 2018, which means that it will be in place until then. Moreover, further modifications to the post adjustment in Geneva are expected. According to a notice on iSeek, the reduction in Geneva may be further mitigated by the positive movement of the Geneva post adjustment index (that already increased from about 166 in March to 172.6 in July), as well as by the effects of the expected positive evolution of the United 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 Applicants should not be allowed to file multiple applications to contest a new post adjustment multiplier for Geneva.

29. The Applicants have submitted that they have deliberately filed multiple applications of the same decision and have taken multiple distinct and contradictory positions to justify it – that the decision may or may not have been taken by a technical body; that the May 2017 ICSC decision is affecting the Applicants while also attempting to argue that only some parts of that earlier decision survived; and, finally, that the July 2017 ICSC decision was actually a new decision. This latter submission by the Applicants supports the arguments put forward by the Respondent that the May 2017 ICSC decision was rendered moot by the July 2017 ICSC decision. Regarding the question of management evaluation, the proper procedure would have been to submit a written request to the UNDT in accordance with art. 8.3 of its Statute to suspend the deadline to file an appeal pending the Applicants being informed whether the contested decision was taken pursuant to advice received from a technical body. The purpose of art. 10.6 of the UNDT Statute specifically serves the purpose of avoiding such blatantly frivolous proceedings.

Applicants' submissions on receivability

The ICSC may constitute a technical body.

30. 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).

31. 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.

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 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.

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 Applicants of a decision to implement a post adjustment change as of 1 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 Applicants. Since the time limit runs from communication rather

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 1 August 2017, constitutes a decision of general order. Whereas the Tribunal agrees with the Applicants that communication of a decision, and not its implementation, triggers the running of time limits for the filing of an application, the communication of 19-20 July did not constitute a decision in “precise individual case” as required under the *Andronov* definition 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.

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an inconsistent stance among representatives of the Respondent as to “technical body” in particular cases.²⁵

43. In the face of this ambiguity the Tribunal considers it most appropriate to follow the jurisprudential line initiated by the UNAT in two of the *Gehr* cases. It indicates, first, that the overarching import of staff rule 11.2(a) read together with the UNDT Statute establishes the obligation of seeking management evaluation prior to invoking the jurisdiction of the Dispute Tribunal as a rule.²⁶ Second, that controlling element for the status of “technical body” in the sense of staff rule 11.2(b), is designation by the Secretary-General.²⁷

44. In accordance with the aforesaid, the Tribunal concludes that absent designation by the Secretary-General, ICSC is not to be deemed a technical body for the purpose of exempting the impugned decision from the management evaluation requirement. The Tribunal notes, however, that the Applicants had no means of knowing it prior to filing their application, *i.e.*, until relevant representation was made on behalf of the Respondent, especially given that in the past representations different positions were expressed as to the status of the ICSC.²⁸ The Tribunal finds no grounds to attribute to the Applicants abuse of process under 10.6 of the UNDT Statute. Conversely, the Tribunal puts it before the Respondent that maintaining the state of uncertainty regarding “technical bodies” impedes staff members’ right to access to court granted to them under the UNDT Statute, is not consistent with United

²⁵ *Syrja* UNDT/2015/092, see also *Ovcharenko* UNAT 2015-UNAT-530 para. 11 v. para 24

²⁶ *Gehr* 2013-UNAT-293 at para. 27; *Gehr* 2014-UNAT-479 at para. 26.

²⁷ *Gehr* 2014-UNAT-479 para. 26; *Faust* 2016-UNAT-695 at para. 39, *Fayek* 2017-UNAT-739 at para. 12.

²⁸ *Ovcharenko* UNAT 2015-UNAT-530 para. 11 v. para 24.

administrative decision and resolve disputes without the necessity to involve judicial review.³³ Moreover, another rationale noted by the Appeals Tribunal for management evaluation and the attendant requirement to wait for the period necessary to obtain it³⁴, 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 Klonowiecka-Milart

Dated this 8th day of March 2018

³³ *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 2013-UNAT-335, para 22.; *Pirnea* 2013-UNAT-311 para 42.

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Judgment No.: UNDT/2018/037

Annex 1

List of Applicants

1. Yulia ANDREEVA
2. Sarah BEL
3. Luisa Eugenia BERNAL IBARRA
4. Hakan Magnus BJORKMAN
5. Tijana DRAGICEVIC
6. Estelle Monique FACH
7. Joseph A. GARI
8. Leslie OUARZAZI
9. Berta PESTI
10. Clement SAN SEBASTIAN
11. Mariam TRAORE