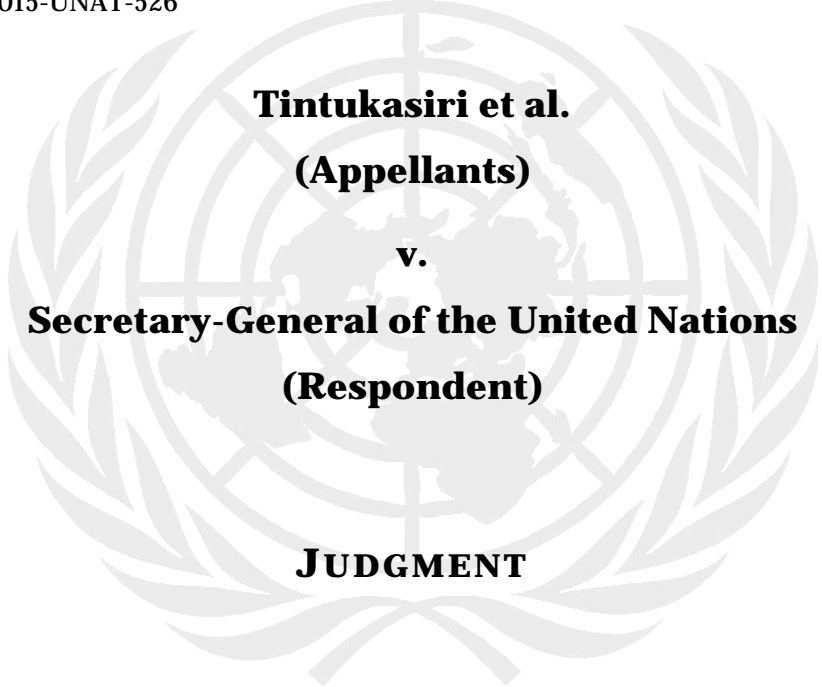




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-526



Tintukasiri et al.
(Appellants)
v.
Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Richard Lussick
Judge Mary Faherty

Case No: 2014-603

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Appellants: George Irving

Counsel for Respondent: Amy Wood

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The Appeals Tribunal has before it an appeal of Judgment No. UNDT/2014/026, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 5 March 2014, in the matter of *Tintukasiri et al. v. Secretary-General of the United Nations*. The staff members, Tintukasiri et al., filed their appeal on 30 April 2014, and the Secretary-General filed his answer on 30 June 2014.

Facts and Procedure

2. The 2011 Comprehensive Local Salary Survey for Bangkok was conducted from June to December 2011.

3. On 10 January 2012, the Local Salary Survey Committee (LSSC) met to review the specialists' salary survey report (Report), which found that the salaries for the General Service and National Officer categories of staff in Bangkok were higher than the relevant comparators by 27.2% for General Service category staff and 41.4% for National Officer category staff.

4. On 13 January 2012, the Report and the comments of the LSSC, including negative comments by some members, were presented to the Headquarters Salary Steering Committee (HSSC), which unanimously approved the Report and, based on the Report's findings, recommended to freeze the salaries for the General Service and National Officer categories of staff in Bangkok who were employed as of 1 March 2012, and to establish a secondary salary scale for the General Service and National Officer categories of staff recruited on or after 1 March 2012.

5. On 6 February 2012, the Office of Human Resources Management (OHRM) announced the salary survey results of the Report on its website, thereby adopting the HSSC's recommendations, and informed staff members that salaries for the General Service and National Officer categories of staff in Bangkok would be frozen as of 1 March 2012, and new salary scales would be promulgated for staff hired on or after 1 March 2012.

6. On 5 April 2012, numerous staff members serving with the Economic and Social Commission for Asia and the Pacific (ESCAP) and other United Nations entities in Bangkok made requests for management evaluation of the Secretary-General's decision to accept the HSSC's recommendations. On 27 April 2012, the Management Evaluation Unit determined that the requests were not receivable because the Secretary-General's decision was based on

advice from the LSSC and the Report; thus, the decision was by a “technical body” and was not subject to management evaluation.

7. On 30 July 2012, 86 ESCAP and staff members of other United Nations entities based in Bangkok (the Appellants) filed an application before the UNDT challenging the Secretary-General’s decision to accept the HSSC’s recommendations for the promulgation of revised salary scales for the General Service and National Officer categories of staff in Bangkok, based on the results of a salary survey conducted in 2011, that would freeze the salaries for extant staff members at then-existing rates and establish a second tier of salaries for staff members hired on or after 1 March 2012. On 14 September 2012, the Secretary-General filed his reply.

8. The Office of Internal Oversight Services (OIOS) conducted an independent review or audit of the salary survey process at the request of the Department of Management and, on 23 August 2013, issued Report 2013/069, which became part of the record before the UNDT.

9. On 9 December 2013, the UNDT issued Order No. 333 (NY/2013), transferring the case from the New York Registry to the Geneva Registry.

10. On 22 January 2014, the UNDT issued Order No. 14 (GVA/2014), ordering the parties to file memoranda addressing whether the applications were receivable *ratione materiae*. The parties filed their memoranda on 12 February 2014.

11. On 5 March 2014, the UNDT issued Judgment No. UNDT/2014/026, in which it concluded that the applications were not receivable *ratione materiae*.

12. On 30 April 2014, the Appellants filed their appeal of the UNDT Judgment, and the Secretary-General filed his answer on 30 June 2014.

13. On 14 October 2014, the Appeals Tribunal, in Order No. 199 (2014), denied the joint request of the ESCAP Staff Association and the Staff Association Committee of UNDP/UNFPA/UNOPS/UN Women to file an amicus curiae brief, noting that the issue on appeal is whether the UNDT “erred in finding the staff members’ applications were not receivable” and not the merits of the claims in the applications.

Submissions

The Appellants' Appeal

14. The UNDT erred in concluding the administrative decisions “to issue a secondary scale and to freeze existing salaries do not represent administrative decisions” subject to judicial review. It “confuse[d] regulatory power with executory power. [...] The way in which salaries are determined is part of every staff member’s contract of employment. If the Secretary-General fails to follow the rules and issues an improper salary scale, he makes an administrative decision affecting each staff member individually to pay them a salary that is in violation of his or her contract of employment.”

15. The Appellants are not challenging the methodology or authority of the International Civil Service Commission (ICSC or Commission) or the General Assembly, but are claiming the survey process was not correctly applied to them and was subject to extraneous influence of political and financial considerations, and was pre-determined. Under jurisprudence of the former United Nations Administrative Tribunal (UNAdT), the manner in which the ICSC methodology is applied may be subject to judicial review. Additionally, under jurisprudence from the International Labor Organization Administrative Tribunal (ILOAT), the process may be judicially reviewed for an “abuse of authority”.

16. The UNDT erred by making “an arbitrary distinction between the issuance of a secondary scale [...] and the freezing of salaries for all staff recruited prior to 1 March 2012. These are, in effect, inseparable aspects of the same flawed decision making process that is being contested.” The secondary scale affects current staff since it is used to determine benefits relating to medical insurance and pensions and has a direct impact on staff mobility.

17. The UNDT erred when it found the freezing of salaries was a general order that applied to all staff, rather than to specific individuals. Decisions of general order may be contested by staff members who are individually affected by them under Appeals Tribunal jurisprudence.

The Secretary-General's Answer

18. The UNDT properly dismissed the applications as non-receivable. The Appeals Tribunal’s definition of an administrative decision subject to judicial review is characterized by the fact that

the decision is of individual application and carries direct legal consequences, as set forth in UNAdT Judgment No. 1157, *Andronov* (2003), para. V. The UNDT properly applied this definition in determining that the applications were not receivable *ratione materiae*.

19. The UNDT did not err in refusing to receive *ratione materiae* the challenge to the secondary salary scale in the applications. The UNDT correctly held that the administrative decision challenged by the Appellants had two parts: (1) the decision to implement a secondary salary scale for staff recruited on and after 1 March 2012; and (2) the decision to temporarily freeze the salary scale for staff recruited before 1 March 2012. Since the Appellants were all recruited before 1 March 2012, the implementation of the secondary salary scale does not have any direct legal consequences for them. Moreover, their claim that the secondary salary scale would affect their future mobility is merely a hypothetical possibility that does not establish the Appellants' standing to challenge the decision to introduce a secondary salary scale.

20. The UNDT did not err in refusing to receive *ratione materiae* the challenge to the temporary freeze in the applications. The administrative decision to freeze the existing salary scales for staff recruited prior to 1 March 2012 is not a decision of individual application under *Andati-Amwayi*.¹ Rather, it is a regulatory decision, which "might impose some requirements in order for a staff member to exercise his or her rights," but does not affect his or her terms of appointment or contract. The Appellants are challenging a policy decision of general application that was adopted to ensure parity between staff recruited before 1 March 2012 and staff recruited after 1 March 2012; thus, it is a regulatory decision. The UNAdT judgments cited by the Appellants are inconsistent with the jurisprudence developed by the Appeals Tribunal. Moreover, ILOAT judgments are not applicable since the scope of the ILOAT Statute is significantly broader than that of the UNDT Statute.

21. In the event the Appeals Tribunal determines the UNDT erred in not receiving the applications, any review of the merits of the Appellants' claims is a limited review. The reviewing tribunal can only intervene if the assessment by the LSSC is flawed to the extent it amounts to an abuse of authority. There is no evidence of any abuse of authority in the conduct of the salary survey. Moreover, official acts enjoy a presumption of regularity, which the Administration has shown, thus shifting the burden to the Appellants to show by clear and convincing evidence that their rights have been violated. The 2011 salary survey was conducted in two phases: the

¹ *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-58.

preparation phase and the data analysis phase. The HSSC determined the survey had been properly and lawfully conducted when it reviewed the survey and made its recommendations to OHRM. Thus, there is insufficient evidence to rebut the presumption of regularity and to support the Appellants' claim that there were procedural flaws. Opinions by the Chief of the Compensation and Classification Section do not demonstrate a pre-determined outcome, and the Appellants have not presented evidence showing technical shortcomings in the job matches. Thus, the UNDT correctly declined to address the merits of the applications.

Considerations

Preliminary Matters

22. The Appellants request an oral hearing “[d]ue to the importance of the policy matters presented in this case [...]”. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). Under Article 18(1) of the Rules, a request for an oral hearing should be granted when it would “assist in the expeditious and fair disposal of the case”. This Tribunal does not find that an oral hearing would assist it “in the expeditious and fair disposal of the case” since the sole issue on appeal is an issue of law, i.e., whether the UNDT exceeded its competence or erred in not receiving *ratione materiae* the staff members' applications. The merits of the claims raised in the applications are not before the Appeals Tribunal. Thus, the request for an oral hearing is denied.

23. The Appellants also request that the appeal be heard *en banc* by the whole Appeals Tribunal “as this decision has implications for all staff as well as for the future of the justice system”. Article 10(1) of the Statute provides that “[c]ases before the Appeals Tribunal shall normally be reviewed by a panel of three judges [...]”. Article 10(2) provides, in part, that “[w]here the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgment is rendered, the case may be referred for consideration by the whole Appeals Tribunal”. Neither the President nor any two judges sitting on this appeal find the case “raises a significant question of law” warranting an *en banc* proceeding. Thus, the Appellants' request is denied.

Legal Framework

24. On 19 December 1972, the General Assembly of the United Nations, by resolution 3042 (XXVII), decided in principle to establish an international civil service commission and requested proposals, including a draft statute for the commission. On 18 December 1974, the General Assembly approved the Statute and Rules of Procedure for the ICSC by resolution 3357 (XXIX).²

25. In Articles 10 through 12 of its Statute, the Commission is given functions and powers related to the establishment of salaries for staff members in the General Service and related categories, including National Professional Officers. Pursuant to Article 10(a), the “Commission shall make recommendations to the General Assembly on [...] [t]he broad principles for the determination of the conditions of service of the staff”. Pursuant to Article 11(a), the “Commission shall establish [...] [t]he methods by which the principles for determining conditions of service should be applied”. And pursuant to Article 12(1), “the Commission shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories” at the “headquarters duty stations and such other duty stations as may from time to time be added”.

26. On 22 October 2003, the ICSC promulgated ICSC/57/R.15 (known as “the Methodology”) to meet its responsibilities under Articles 10 through 12 of its Statute “with regard to the establishment of salaries for staff in the General Service and related categories”.³ On 23 December 2003, the General Assembly approved the Methodology in resolution 58/251. The Methodology is guided by the Flemming principle: “The conditions of service, including both paid remuneration and other basic elements of compensation, are to be among the best in the locality, without being the absolute best.”⁴

27. The United Nations “is responsible for the promulgation of all salary scales”.⁵ Although the ICSC “is responsible for the conduct of surveys of conditions of service at the headquarters duty stations”, the United Nations is responsible for conducting salary surveys at non-headquarters duty stations, including Bangkok.⁶ The general Methodology survey

² ICSC Statute, Introductory note.

³ Methodology, para. 1.

⁴ Methodology, para. 3.

⁵ Methodology, paras. 12, 13.

⁶ Methodology, para. 2.

process has four phases: (a) the preparation phase; (b) the data collection phase; (c) the data assembly phase; and (d) the salary scale construction phase.⁷ The ICSC developed an operational Manual for Salary Survey in Non-Headquarters Duty Stations to provide “guidance on the various steps and issues in the survey process.”⁸

28. Several key components are involved in the salary survey process:

- a) The HSSC “is a coordinating management mechanism”, which “reviews the recommendations made by the relevant designated agencies”;⁹
- b) The LSSC “coordinates survey activities and calls for the participation of representatives of administration and staff of the various common system organizations employing locally recruited staff at th[e] duty station. [...] It is the forum for staff/management and inter-agency consultations and is aimed at ensuring a broad participatory process for all parties concerned”;¹⁰ and
- c) “A salary survey specialist [...] is delegated authority to take on-the-spot decisions on certain technical matters where this is necessary for the survey to proceed.”¹¹ The specialist is responsible for reviewing the initial preparations by the LSSC, briefing the survey team, leading the data collection, presenting the analysis of the data to the LSSC and providing information and recommendations for the final salary scale approval.¹²

29. Staff Regulation 3.1 provides that “[s]alaries of staff members shall be fixed by the Secretary-General in accordance with the provisions of annex I to the present Regulations”. Annex I, paragraph 6, provides:

The Secretary-General shall fix the salary scales for staff members in the General Service and related categories, normally on the basis of the best prevailing conditions of employment in the locality of the United Nations Office concerned [...]

30. The OHRM adopted the recommendations of the HSSC on 6 February 2012.

⁷ Methodology, para. 7.

⁸ Methodology, para. 10.

⁹ Methodology, para. 13.

¹⁰ Methodology, para. 15.

¹¹ Methodology, para. 14.

¹² *Id.*

Receivability

31. Regarding the receivability of the applications, the UNDT noted that under Article 2(1)(a) of the UNDT Statute it “is competent to hear and pass judgment on applications against administrative decisions ‘alleged to be in non-compliance with the terms of appointments or the contract of employment’.”¹³ Thus, for an application to be receivable, it follows that the “decision that is being challenged has to be an ‘administrative decision’ under art. 2.1(a) of the [Dispute] Tribunal’s Statute”.¹⁴

32. Initially, the Appellants complain that the Dispute Tribunal exceeded its competence when it raised *sua sponte* the question of whether the applications were receivable *ratione materiae* in Order No. 14. There is no merit to this complaint. As our jurisprudence makes clear, the Dispute Tribunal “is competent to review its own competence or jurisdiction” under Article 2(6) of the UNDT Statute and “[t]his competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law [...]”.¹⁵

33. In determining whether the contested decision is an administrative decision that is subject to judicial review under Article 2(1)(a), the UNDT correctly applied the jurisprudence of the Appeals Tribunal, which has adopted the definition of “administrative decision” in *Andronov*, UNAdT Judgment No. 1157 (2003).¹⁶

34. The UNDT also correctly opined that, “when the Appeals Tribunal has determined its jurisprudence on a precise legal question, it is not appropriate for this [Dispute] Tribunal to examine the jurisprudence developed by other jurisdictions”.¹⁷ Judgments of the Appeals Tribunal are precedent for the Dispute Tribunal to follow¹⁸ and, when a judgment of the Appeals Tribunal conflicts with a judgment from another tribunal, the UNDT has the duty to apply Appeals Tribunal jurisprudence.¹⁹ The General Assembly has repeatedly stated that the

¹³ Impugned Judgment, para. 32.

¹⁴ *Id.*

¹⁵ *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335, paras. 20-21; *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, paras. 28-29.

¹⁶ Impugned Judgment, para. 34. See also *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457, para. 34; *Hamad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-269, para. 23; *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-58.

¹⁷ Impugned Judgment, para. 33.

¹⁸ *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 24.

¹⁹ *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503.

“elements of the system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly”. Thus, the Appellants’ reliance on jurisprudence from the former UNAdT and ILOAT, which have jurisdictional statutory provisions that are different than the jurisdictional requirements of the UNDT Statute, does not assist them.

35. The UNDT separately considered the Appellants’ challenges to: (1) the issuance of secondary salary scales for staff recruited on or after 1 March 2012; and (2) the freeze of then-existing salary scales (in effect on an interim basis since 1 August 2010). Regarding the challenge to the issuance of secondary scales for staff recruited on or after 1 March 2012, the Dispute Tribunal concluded the claim was not receivable *ratione materiae*, stating:

The decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 clearly does not amount to an administrative decision under art. 2.1(a) of the [Dispute] Tribunal’s Statute, as per the terms of the [*Andronov*] definition adopted by the Appeals Tribunal. At the moment of their issuance, the secondary salary scales were to apply exclusively in the future, for an undefined period, to a group of persons which at that time[,] as at today[,] could and cannot be identified. As such, the issuance of secondary salary scales for General Service staff and National Officers recruited on or after 1 March 2012 is not of individual application and does not produce direct legal consequences. It does constitute an administrative act with regulatory power, but not an administrative decision [...]. Therefore, this part of the application is not receivable, *ratione materiae* and has to be dismissed.²⁰

36. The Appeals Tribunal agrees with the Dispute Tribunal’s reasoning and finds that the UNDT did not make an error of law when it refused to receive the Appellants’ claim challenging the issuance of secondary salary scales for staff hired on or after 1 March 2012.

37. Regarding the Appellants’ challenge to the freeze of the then-existing salary scales, the UNDT also found that claim was not receivable *ratione materiae*, stating:

[T]hat decision is of a general order, in that it concerns all eligible General Service staff and National Officers in Bangkok on board prior to 1 March 2012. As such, the circle of persons to whom the salary freeze applies is not defined individually but by reference to the status and category of these persons within the Organisation, at a specific location and at a specific point in time. Moreover, the decision will apply for a duration which, at the time it was taken and as at today, cannot be determined. Indeed, nobody can predict

²⁰ Impugned Judgment, para. 35.

when the gap flagged by the survey will be closed, hence the actual duration of the salary freeze is unknown.

... Accordingly, the Tribunal concludes that in applying the test of *Andronov*, the decision to freeze existing salary scales until the ‘gap is closed’, as contained in OHRM cable of 6 February 2012, does not constitute an administrative decision for the purpose of art. 2.1(a) of the [Dispute] Tribunal’s Statute.²¹

38. Additionally, the UNDT concluded that the challenge to the freeze of the salary scales was not receivable because “decisions by which the Secretary-General fixes salary scales in accordance with the [...] provisions of the Staff Regulations, are measures with regulatory power which the Tribunal has no competence to rescind”.²² In explaining the reasons for this conclusion, the UNDT further stated:

... It 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 salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it. As such, the Tribunal confirms its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.²³

39. The Appeals Tribunal agrees with the Dispute Tribunal’s reasoning and finds that the UNDT did not make an error of law when it refused to receive the Appellants’ claim regarding the freeze of the salary scales.

40. For all these reasons, the appeal should be dismissed and the Judgment affirmed.

Judgment

41. The appeal is dismissed and Judgment No. UNDT/2014/026 is affirmed.

²¹ Impugned Judgment, paras. 37, 39.

²² Impugned Judgment, para. 41.

²³ Impugned Judgment, para. 42.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Faherty

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar