UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-530

Ovcharenko et al.

(Appellants/Respondents on Cross-Appeal)

v.

Secretary-General of the United Nations

(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Rosalyn Chapman Judge Mary Faherty
Case No:	2014-607
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Ovcharenko et al.: George G. Irving

Counsel for Secretary-General: Amy Wood

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Egor Ovcharenko and 47 other persons (Ovcharenko et al.) against Judgment No. UNDT/2014/035, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 25 March 2014 in *Ovcharenko et al. and Kucherov v. Secretary-General of the United Nations*. Mr. Ovcharenko et al. appealed on 15 May 2014, and the Secretary-General filed his answer and a cross-appeal on 21 July 2014. On 20 August 2014, Ovcharenko et al. filed their answer to the cross-appeal.

Facts and Procedure

2. In 2011, the International Civil Service Commission (ICSC) advised the General Assembly that Member States had implemented austerity measures in their respective civil services to mitigate the effects of the financial crisis. In particular, the United States, the comparator civil service by which the wages of United Nations Professional Staff are set, had implemented a pay-freeze for its civil service.[1]

3. On 24 December 2011, the General Assembly requested the ICSC to "explore the feasibility and suitability of possible measures to reflect in the administration of the post adjustment system the pay freeze of the comparator civil service", and to report back to the General Assembly at its sixty-seventh session.

4. In its 2012 report to the General Assembly (A/67/30), para. 121, the ICSC:

> (a) Noted that a post adjustment multiplier of 68.0 would become due in New York on 1 August 2012 in accordance with the approved methodology;
>
> (b) Decided to defer the promulgation of the revised New York post adjustment multiplier in view of the financial situation of the United Nations as described by the Secretary-General;
>
> (c) Also decided that unless the General Assembly acted otherwise, the multiplier would be promulgated on 1 January 2013 with a retroactive effect as of 1 August 2012.

5. On 1 August 2012, the ICSC issued Circular ICSC/CIRC/PAC/452 (Consolidated Post Adjustment Circular), which advised that although a revised post adjustment multiplier of 68.0 would become due in New York, effective 1 August 2012, the ICSC decided to defer the

[1] Answer, para. 2.

promulgation of this revised multiplier to 1 January 2013, unless the United Nations General Assembly acted otherwise. It further provided that the post adjustment multiplier of 65.5 would remain in effect for New York "until further notice".

6. On 24 December 2012, in General Assembly decision 67/551, the General Assembly requested the ICSC to maintain the New York post adjustment multiplier then in place until 31 January 2013, with the understanding that the normal operation of the post adjustment system would resume on 1 February 2013.

7. On 15 January 2013, the ICSC issued Circular ICSC/CIRC/PAC/457 (Consolidated Post Adjustment Circular), which advised that the post adjustment multiplier for New York would be maintained at 65.5 until 31 January 2013, and that the normal operation of the post adjustment system would resume on 1 February 2013.

8. On 30 January 2013, Ovcharenko et al. each received a statement of earnings and deductions for the pay period 1 to 31 January 2013, showing the post adjustment multiplier as 65.5%. Their pay statements from August to December 2012 reflected the same.

9. On 15 February 2013, the ICSC issued a further circular promulgating a post adjustment multiplier of 68.7 for New York, effective 1 February 2013.

10. Some of the Ovcharenko et al. group submitted individual requests for management evaluation of the Secretary-General's decision to implement the ICSC's and General Assembly's recommendations to maintain post adjustment at 65.5, rather than pay post adjustment on the basis of the increased multiplier value of 68.0 for the period from 1 August 2012 to 1 February 2013.

11. On 18 March 2013, the Management Evaluation Unit (MEU) informed those who had requested management evaluation that the matter was not receivable under Chapter XI of the Staff Rules.

12. On 29 April 2013, Ovcharenko et al. filed an application with the UNDT contesting the Secretary-General's refusal to pay post adjustment based on the 68.0 multiplier.

13. On 5 August 2013, by Order No. 188 (NY/2013), the UNDT transferred the case to the Geneva Registry.

14. On 5 March 2014, the Dispute Tribunal issued Judgment No. UNDT/2014/035, in which it rejected the applications. As a preliminary matter, the Dispute Tribunal found it unnecessary to examine whether the staff members were obliged to submit a request for management evaluation prior to filing an application with the Dispute Tribunal. Concerning the merits, the Dispute Tribunal found that if the staff members challenged the refusal to pay post adjustment based on the 68.0 multiplier as of 1 August 2012, this did not constitute an appealable administrative decision and was not receivable *ratione materiae*. Furthermore, the UNDT held that as the Secretary-General was duty bound to implement decisions by the ICSC, as directed by the General Assembly, his decision to pay Ovcharenko et al. post adjustment at 65.5 was lawful, and the applications must fail.

Submissions

Ovcharenko et al.' Appeal

15. Ovcharenko et al. contend that the UNDT failed to exercise its jurisdiction by refusing to review the matter on its merits, and thus also erred in law. The UNDT also erred in failing to apply jurisprudence of the former Administrative Tribunal and the Administrative Tribunal of the International Labour Organisation, which accepts that staff may challenge decisions affecting their post adjustment. By dismissing the application as not receivable, the UNDT failed to provide a proper avenue for redress as required by the internal justice system.

16. The 1954 advisory opinion of the International Court of Justice (ICJ) titled *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* upheld the inviolability of employment contracts, and found that the General Assembly was bound to honour the Organization's engagements as related to expenditure. Implicitly, the ICJ Advisory Opinion also provides authority for the "Administration of Justice" to exercise jurisdiction over administrative decisions emanating from the actions of the General Assembly and ICSC, as the former Administrative Tribunal concluded. As the General Assembly has not explicitly circumscribed the UNDT's jurisdiction, it may be assumed that the Dispute Tribunal may exercise the same jurisdiction.

17. As the payment of post adjustment constitutes part of a staff member's established conditions of service, the Secretary-General's decision not to pay the increased post adjustment violated each staff member's contract and constitutes an administrative decision affecting each

staff member individually. The decision also violated their acquired rights to be paid according to the 68.0 post adjustment multiplier during the contested period.

18. The UNDT Judgment implies that a decision of a general order that applies to a group of staff may not be challenged because it is consequently not "of individual application" and is thus inconsistent with the Appeals Tribunal's jurisprudence in *Al Surkhi*[2] or *Ademagic et al.*[3] The Dispute Tribunal also adjudicated a similar salary survey case in *Shaia*.[4]

19. The UNDT also erred insofar as it arbitrarily divided the Appellants' application into two decisions. Contrary to the UNDT's interpretation, the Appellants do not contest the ICSC decision to defer implementation of the increased post adjustment multiplier or the methodology for determining post adjustment. They contest the Secretary-General's decision not to pay the increased post adjustment that had been earned from August 2012, as indicated in their January 2013 pay slips. The Appellants contend that in light of established jurisprudence on acquired rights, including *Castelli*,[5] the Secretary-General may not apply decisions retroactively in violation of existing contractual obligations. The fact that the Secretary-General may not have any discretion in applying decisions of the ICSC or General Assembly does not relieve the Secretary-General of his obligation to honour his contractual obligations to the Appellants.

20. The Appellants request that the Appeals Tribunal vacate the UNDT Judgment and enter a finding of liability and award compensation for the violation of the Appellants' rights.

The Secretary-General's Answer

21. The Secretary-General contends that the UNDT correctly rejected the applications as non-receivable, in view of *Andronov*,[6] which defines 'administrative decisions' as distinct from decisions with regulatory power. Contrary to the Appellants' contention, the UNDT did not find a decision that applies to a group of staff members is in itself non-receivable. Rather, the UNDT found that a decision is not receivable when it is of a regulatory nature and when the decision is not based on the individual circumstances of each staff member. For this reason, the UNDT

[2] *Al Surkhi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-304.
[3] *Ademagic et al. and McIlwraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359.
[4] *Shaia v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/096.
[5] *Castelli v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-037.
[6] Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

decision is not inconsistent with *Al Surkhi* or *Ademagic et al.*, which concerned decisions based on individualized circumstances. Although the UNDT in *Shaia* examined the ICSC methodology used to determine salary scales, the UNDT erred in finding the application in that case receivable, and the Secretary-General refrained from appealing this point in light of the limitation on appeals expressed in *Sefraoui*.[7]

22. Furthermore, the Appellants do not have any acquired rights to be paid according to the 68.0 post adjustment multiplier. By the terms of their appointments, the Appellants are only entitled to receive the prevailing post adjustment at the multiplier that the Secretary-General is bound to apply, as decided by the ICSC at the direction of the General Assembly; they do not have a right to be paid post adjustment at a specific multiplier, nor a right to a specific increase in the post adjustment multiplier, nor to determine the timing of such increase.

23. The Appellants' argument that the UNDT has an implicit obligation to review the contested administrative decision is also legally unsustainable. The authorities cited by the Appellants fail to provide any authority for their contention that decisions taken as a direct consequence of a decision by the General Assembly are reviewable. Judgments of the former Administrative Tribunal which reflected otherwise are inconsistent with the jurisprudence of the Appeals Tribunal and are no longer legally authoritative.

The Secretary-General's Cross-Appeal

24. The UNDT erred in law and exceeded its competence in proceeding to examine the contested decisions where at least six members of the group had not first sought management evaluation as mandated by the Staff Rules and the Appeals Tribunal's jurisprudence. Notwithstanding that the UNDT ultimately rejected the application, it was nevertheless required to first examine whether it had competence in this respect. It should thus have dismissed the applications of those Appellants who had not first sought management evaluation.

Ovcharenko et al.' Answer to the Cross-Appeal

25. Ovcharenko et al. submit that the Secretary-General failed to raise the issue of jurisdiction either before the UNDT or within 60 days of the UNDT Judgment. Further, while it is mandatory that an applicant request management evaluation in most instances before filing an

[7] *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048.

application with the UNDT, in collective actions involving a large number of applicants with identical claims, no clear instruction requires that each individual need file a management evaluation request.

26. In any event, where an administrative decision is taken pursuant to the advice of a technical body, as in the present case, a request for management evaluation is not a prerequisite to filing an application for review. The fact that the MEU informed those applicants who did request management evaluation that it did not have competence to evaluate their requests, infers likewise. The Secretary-General's contention that management evaluation was a necessary prerequisite to the UNDT's review is also inconsistent with his submission that the contested decision is that of the ICSC. The Appellants contend that the advancement of contradictory arguments amounts to an abuse of process by the Secretary-General, which confuses staff members and jeopardizes their claims.

27. Accordingly, the Secretary-General failed to show why the UNDT should have considered this question after the MEU clearly considered it did not have such competence. The Appellants request reimbursement of USD 3,000 for the additional expenses incurred in responding to the Secretary-General's "superfluous" cross-appeal.

Considerations

28. The Appellants request an oral hearing before the full bench of the Appeals Tribunal, claiming that the matter presents implications for all staff of the Organization, as well as the future of the functioning of the internal justice system. As we stated in *Applicant*, the parties have no standing to request that the case be decided by a full bench.[8] Only the President of the Appeals Tribunal or any two Judges sitting on a case have the authority to cause the handling of the case *en banc*, under the provisions of Article 10(2) of the Statute and Article 4(2) of the Rules of Procedure of the Appeals Tribunal.[9] Certainly, the present case raises no exceptional issues as to justify a decision coming from other than the regular assignment of a case to a three-Judge panel. Thus, the Appellants' request for an *en banc* hearing is denied.

[8] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-393.
[9] *Id*., para. 10.

29. Turning to the merits of the Dispute Tribunal's Judgment, this Tribunal shares the view of the Appellants with regard to which is the relevant administrative decision under challenge. As proposed and reiterated by the Appellants, what they impugn is the administrative decision taken in January 2013 not to pay them, not only for that month but retroactively since August 2012, their salary with the post adjustment increase (at the 68.0 multiplier), the execution of which was temporarily postponed.

30. That was a challengeable administrative decision, despite its general application because it had a direct impact on the actual salary of each of the Appellants who filed their application after receiving their January 2013 pay slips.

31. Therefore, the terms of service of each staff member were affected, allowing him or her to impugn the contested administrative decision that caused the alleged grievance. As this Tribunal held in *Lee*, "the key characteristic of an administrative decision subject to judicial review is that the decision must 'produce [] direct legal consequences' affecting a staff member's terms and conditions of appointment; the administrative decision must 'have a direct impact on the terms of appointment or contract of employment of the individual staff member.'"[10]

32. It was not the ICSC or the General Assembly's decision to freeze their salaries, but the execution of that decision that was challenged insofar as it affected the staff members' pay slips.

33. Nevertheless, and notwithstanding that not all of the Appellants asked for management evaluation, the Dispute Tribunal was right when it examined the merits of the application and concluded that the administrative decision was lawful.

34. Having analysed the merits of the contested post adjustment freeze or non-payment of the increased multiplier, the Appeals Tribunal concurs that the Secretary-General had to comply with General Assembly decision 67/551 of 24 December 2012 and the ensuing enactment of that decision by the ICSC. These decisions constituted the grounds for the freeze and non-application of the 68.0 multiplier from August 2012 until February 2013, when the payment of the increased multiplier returned to its normal schedule, albeit with no retroactive payments.

[10] *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49.

35. Decisions of the General Assembly are binding on the Secretary-General and therefore, the administrative decision under challenge must be considered lawful, having been taken by the Secretary-General in accordance with the content of higher norms.

36. Although the Appellants expressly stated in paragraph 38 of their brief that their claim "does not call for a review [of] the actions of the ICSC or the General Assembly", the Appeals Tribunal finds this argument to be contradictory and self-defeating: if the Secretary-General had no discretion to depart from the determinations of the General Assembly and the ICSC, and given that the decisions of those bodies were not under review, it becomes impossible to hold the Secretary-General responsible for having rightly executed the General Assembly's decision. Asking the Secretary-General to behave otherwise, as the appeal does, would result in the unlawful imputation of the powers of the General Assembly to the Secretary-General.

37. From the foregoing, the Appellants' appeal fails. Due to the dismissal of the appeal, the Tribunal need not address the Secretary-General's cross-appeal.

38. However, it must simply be pointed out that the cross-appeal was not considered abusive such as to justify the award of costs.

Judgment

39. The appeal and the cross-appeal are dismissed and the Judgment of the Dispute Tribunal is affirmed.

Original and Authoritative Version: English

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

(Signed)	*(Signed)*	*(Signed)*
Judge Simón, Presiding	Judge Chapman	Judge Faherty

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

(Signed)

Weicheng Lin, Registrar