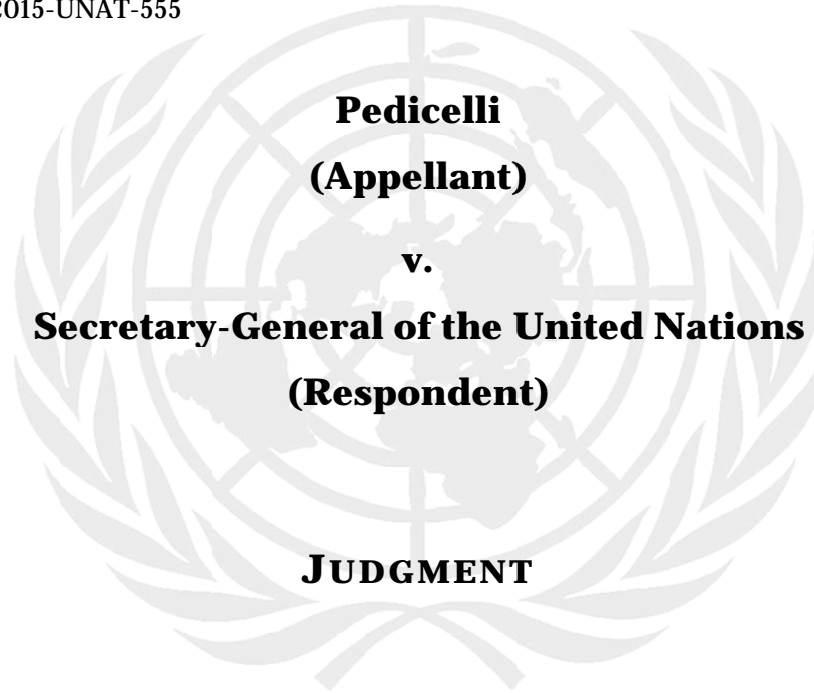




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-555



**Pedicelli
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Richard Lussick Judge Mary Faherty
Case No.:	2014-640
Date:	2 July 2015
Registrar:	Weicheng Lin

Counsel for Ms. Pedicelli: George Irving

Counsel for Secretary-General: Stéphanie Cartier

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2014/087, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 26 June 2014 in the case of *Pedicelli v. Secretary-General of the United Nations*. Ms. Lisa Pedicelli appealed on 22 August 2014 and the Secretary-General answered on 23 October 2014.

Facts and Procedure

2. Ms. Pedicelli is a Meetings Services Assistant at the Secretariat of the Convention on Biological Diversity (SCBD) based in Montreal. As the SCBD is part of the United Nations Environment Programme (UNEP), which is headquartered in Nairobi and administered by the United Nations Office at Nairobi (UNON), the SCBD is also administered by UNON.

3. Ms. Pedicelli joined the Organization in June 1998 at the G-6 level. On 29 August 2006, she took up service with the SCBD as a General Services staff member at the G-7 level.

4. In March 2010, the International Civil Service Commission (ICSC) promulgated a new seven-level job classification standard for General Services (GS) and related categories within the United Nations Common System.

5. On 10 February 2011, Ms. Pedicelli's appointment was converted to a permanent appointment with retroactive effect as of 30 June 2009. At the time, she held a post at the G-7 level, Step 10.

6. In March 2012, the International Civil Aviation Organization (ICAO), which acts as the lead agency for ICSC and UN Common System matters in Montreal, announced that in April 2012 it would commence the conversion from the nine-level salary scale then applied to GS staff at the Montreal duty station to the seven-level salary scale promulgated by the ICSC.

7. In late March 2012, UNON's Human Resources Management Service informed the SCBD staff that, pursuant to the ICAO's lead, it would renumber SCBD posts in order to align them with all the other United Nations organizations at the seven-level structure. As a result of the realignment, G-7 level posts, including Ms. Pedicelli's post, would henceforth be renumbered as G-6 level posts.

8. In early May 2012, a number of staff members, including the Appellant, received Personnel Action forms confirming their new grade. Ms. Pedicelli's Personnel Action form indicated that effective from 1 April 2012 she was appointed at the G-6 level, Step 10.

9. On 20 May 2012, Ms. Pedicelli requested management evaluation of the decision to "reclassify and/or downgrade [her] salary scale level from G7 to G6 due to the introduction of the Global Classification Standard for General Services positions" at the SCBD in Montreal. She claimed that the renumbering exercise amounted to a downgrading of her post, breached Administrative Instruction ST/AI/1998/9 (System for the Classification of Posts), and was conducted without due diligence in the planning and implementation phases.

10. On 28 August 2012, the Management Evaluation Unit (MEU) advised Ms. Pedicelli that her request was moot. The MEU found that SCBD's "realignment exercise" appeared premature and that the SCBD uniformly renumbered all posts without regard to the actual functions and description of each post or tailoring the process. However, while the MEU considered that the renumbering exercise should have been carried out by the SCBD in a non-arbitrary manner that respected the rules of natural justice, the contested decision, i.e., the "realignment exercise", had been rendered moot as the SCBD was conducting a classification exercise pursuant to Administrative Instruction ST/AI/1998/9.

11. On 26 November 2012, Ms. Pedicelli filed an application with the UNDT contesting the manner in which SCBD implemented the Global Classification Standard for GS-positions in Montreal, namely by a unilateral renumbering exercise that resulted in a *de facto* reclassification of posts down one level in breach of ST/AI/1998/9. She requested, inter alia, reinstatement to her personal grade at the level of G-7, Step 10, and related salary adjustments.

12. On 26 June 2014, the UNDT issued its Judgment and dismissed Ms. Pedicelli's application on the basis that it was not receivable. The UNDT found that Ms. Pedicelli had failed to challenge an "appealable administrative decision" in that the contested decision was made by the ICSC and not the Secretary-General, and the latter had no discretionary authority in proceeding with implementing the ICSC's decision. The UNDT further found that the contested decision was not taken solely with respect to Ms. Pedicelli, nor did the renumbering exercise give rise to legal consequences that adversely affected her given that her functions, salary and emoluments remained the same even after her post was reclassified at the G-6 level. Consequently, it found that Ms. Pedicelli had no standing to

contest the decision. Notwithstanding its findings on receivability, the UNDT also considered the merits of Ms. Pedicelli's claims, and found that her application did not disclose a cause of action.

Submissions

Ms. Pedicelli's Appeal

13. The UNDT erred in law and failed to exercise its jurisdiction when it found the application not receivable. The UNDT confused the regulatory authority of the ICSC with the question of Ms. Pedicelli's contractual rights. Relying on the 1954 Advisory Opinion of the International Court of Justice (ICJ) on the inviolability of contracts,¹ Ms. Pedicelli submits that the downgrading of her grade was an "administrative decision" that affected the terms of her appointment, and over which the internal justice system had jurisdiction notwithstanding that the decision arose as a result of the ICSC's policies. The UNDT's conclusion that her claim was not receivable is inconsistent with its own prior rulings as to the definition of an "appealable administrative decision". Further, its finding that the decision had no adverse consequences for her is not based on facts. Her demotion to the G-6 level resulted in a salary freeze and a loss of \$420 per month, to which she was entitled had she remained at the G-7 level. The demotion to the G-6 level also affects her service record since it implies that she had never served at the G-7 level and will have to reestablish her position at the G-7 level by competing for other posts at that level.

14. The Judgment is contrary to the Appeals Tribunal's jurisprudence in *Al Surkhi et al.*² insofar as it implies that it is not open to staff members to challenge decisions of a general order. However, in *Ademagic et al. and McIlwraith*,³ the Appeals Tribunal recognized that a decision of a general application may be challenged by those who are individually affected by it.

15. The UNDT also erred by misstating the facts of the case, as well as the nature of the Appellant's claim. Contrary to the UNDT Judgment, the Appellant does not challenge the authority of the SCBD to introduce the ICSC's seven-level Global Classification Standard for GS-positions, or the subsequent classification of her post at the G-6 level, but rather the change to her own personal grade level contrary to the terms of her permanent appointment. The UNDT failed to address this claim. It also overlooked the general principle that reclassification of a post,

¹ Advisory Opinion of the ICJ of 13 July 1954, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*.

² *Al Surkhi et al. 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.

even if it would result in a post being classified at a lower grade, should not adversely affect the incumbent of that post. The UNDT also erred in stating that Ms. Pedicelli refused to authorise the classification review of her post whereas she cooperated with the subsequent classification review.

16. Ms. Pedicelli requests that this Tribunal find that her UNDT application was receivable, that the renumbering exercise was an “administrative decision” that affected her and that she is entitled to retain her previous personal grade level and the commensurate salary.

The Secretary-General’s Answer

17. The Dispute Tribunal correctly concluded that Ms. Pedicelli’s application was not receivable because she was not contesting an administrative decision within the meaning of Article 2(1)(a) of the UNDT Statute and the definition espoused by the former Administrative Tribunal in *Andronov*⁴ and since adopted by this Tribunal. Since Ms. Pedicelli contested the Secretary-General’s *implementation* of an ICSC decision, the UNDT correctly determined that the contested decision was not made by or imputable to the Secretary-General, but by the ICSC, an independent entity accountable to the General Assembly. Consequently, it correctly found, in accordance with the jurisprudence of the Appeals Tribunal, that the decision was not subject to judicial review by the UNDT, and Ms. Pedicelli’s reliance on the ICJ’s 1954 Advisory Opinion is not pertinent to the facts of the present case.

18. The UNDT correctly dismissed the application as non-receivable, finding that Ms. Pedicelli had failed to establish any direct and adverse legal consequence arising from the renumbering exercise, as required by the definition of an “administrative decision”. Despite Ms. Pedicelli’s assertions, her post was neither downgraded nor was she demoted. The level of her post was simply renumbered. As there had been no alteration to her functions, salary and emoluments, the renumbering exercise did not bring about any direct or adverse legal consequences in connection with her terms of appointment and her conditions of employment. Ms. Pedicelli correctly raised her concerns regarding the proper classification of her post based on the nature of her functions through the available review mechanism pursuant to ST/AI/1998/9 in July 2013, which process was still ongoing in October 2014.

⁴ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.

19. Ms. Pedicelli's remaining submissions do not demonstrate any error warranting reversal of the UNDT Judgment. Firstly, she wrongly relies on *Al Surkhi et al.* and *Ademagic et al. and McIlwraith* as both decisions concerned decisions taken by the Secretary-General, and were thus open to judicial review by the UNDT. The other alleged errors of fact she raised, even if admitted, do not result in a manifestly unreasonable decision warranting reversal of the Judgment. Lastly, the UNDT's alleged mischaracterization of her claim does not alter the critical fact that the contested decision is not imputable to the Secretary-General and, on this basis alone, the application was not receivable.

20. The Secretary-General requests that this Tribunal dismiss Ms. Pedicelli's appeal in its entirety and affirm the UNDT Judgment.

Considerations

21. In Articles 10 and 12 of the ICSC Statute, the ICSC is given functions and powers related to the establishment of salaries for staff members in the General Service and related categories. 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 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".

22. By resolution 67/241 (Administration of Justice at the United Nations), the General Assembly reaffirmed that "the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization".⁵

23. Ms. Pedicelli contested the Secretary-General's implementation of the ICSC's decision to harmonize the numbering of posts at the GS level across the United Nations Common System.

24. The Dispute Tribunal dismissed the application on the basis that Ms. Pedicelli had failed to challenge an "appealable administrative decision" in that the contested decision was made by the ICSC and not the Secretary-General, and the latter had no discretionary authority in proceeding with implementing the ICSC's decision. The Dispute Tribunal further found that the

⁵ Resolution 67/241 (Administration of Justice at the United Nations), 24 December 2012, para. 3.

contested decision was not taken solely with respect to Ms. Pedicelli, and that Ms. Pedicelli did not establish that the renumbering exercise gave rise to legal consequences that adversely affected her given that her functions, salary and emoluments remained the same even after her post was renumbered at the G-6 level. Consequently, it found that Ms. Pedicelli had no standing to contest the decision.

25. Article 2(1)(a) of the Dispute Tribunal Statute provides that the Dispute Tribunal is competent to review an application contesting an administrative decision that is alleged to be in non-compliance with an applicant's terms of appointment or the contract of employment. The Appeals Tribunal has had the opportunity to define what constitutes an administrative decision susceptible to challenge. In *Andati-Amwayi*, the Appeals Tribunal considered:⁶

... What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

... In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

26. In *Lee*, this Tribunal held:⁷

... [T]he 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'.

⁶ *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-58, paras. 17-19.

⁷ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49.

27. In the framework of the foregoing principles, we have found that several challenges to the ICSC's decisions were not receivable insofar as the ICSC is "answerable and accountable" only to the General Assembly and not the Secretary-General, to whom ICSC decisions cannot be imputed in the absence of any discretionary authority to execute such decisions.⁸

28. In the present case, the Appeals Tribunal concurs that the Secretary-General was duty bound to implement decisions of the ICSC as directed by the General Assembly in resolution 67/241. For the most part, such decisions are of a general application and therefore are not reviewable.

29. Notwithstanding the foregoing, it is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an "administrative decision" falling within the scope of Article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.

30. The substantive argument put forward by Ms. Pedicelli was that the renumbering exercise resulting in the downgrading of her personal grade from the G-7 level to the G-6 level adversely affected her contractual rights under her permanent appointment. She contends that the finding by the Dispute Tribunal that the decision had no adverse effect on her is not based on fact.

31. The Secretary-General submits that the UNDT correctly dismissed the application as non-receivable, finding that the Appellant failed to establish any direct and adverse legal consequence arising from the renumbering exercise, as required by the definition of an "administrative decision".

32. Contrary to the Secretary-General's submission, the Appeals Tribunal finds that Ms. Pedicelli has demonstrated that the renumbering exercise had an adverse and direct impact on her. Annexed to her UNDT application as well as her appeal brief were Ms. Pedicelli's Personnel Action Forms, the first approved on 23 February 2011, before the renumbering exercise, and the second approved on 4 May 2012, after implementation of the renumbering exercise. Her Personnel Action Forms reflected her respective salary scale and level for the

⁸ See *Ovcharenko v Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530 (challenging the implementation of a pay-freeze pursuant to an ICSC decision); *Tintukasiri v Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526 (challenging the implementation of a freeze on salary scales pursuant to an ICSC decision); *Obino v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-405 (challenging implementation of the ICSC's decision to reclassify two duty stations).

periods under contest and evidence, as Ms. Pedicelli claims, that after implementation of the renumbering exercise her salary was reduced.

33. The UNDT failed to give any consideration to them and thus erred on a question of fact leading to a manifestly unreasonable decision, and erred in law in concluding that Ms. Pedicelli's application was not receivable.

34. This error alone warrants remand of the matter to the UNDT for *de novo* consideration.

Judgment

35. The appeal is allowed and the Judgment of the Dispute Tribunal is vacated. The matter is remanded to the Dispute Tribunal for hearing before another Judge.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Faherty

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar