



Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

TINTUKASIRI ET AL.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Alan Gutman, ALS, UN Secretariat

Sarahi Lim Baro, ALS, UN Secretariat

Introduction

1. On 2 May 2012, the New York Registry received a motion for an extension of time to file an application from a group of staff members stationed in Bangkok, Thailand. By Order No. 90 (NY/2012) of 3 May 2012, the Tribunal directed the Applicants to file their application by 30 July 2012. Eighty six of the staff members who had submitted the motion for extension of time filed an application on 30 July 2012, which was registered under Case No. UNDT/NY/2012/030.
2. In their application, the Applicants contest the promulgation of new salary scales for General Service and National Officer staff in Bangkok, as communicated to them on 6 February 2012.
3. The Applicants request the Tribunal:
 - a. “to order the immediate invalidation of the salary scales resulting from the 2011 salary survey and the continuation of interim salary adjustments based upon the salary scale promulgated in 2010 until such time that the next comprehensive salary survey is due and can be conducted with due process”;
 - b. “to order the Respondent to initiate a review of the methodology and its application in order to avoid similar problems in future salary surveys ... and adequate preparation for the next comprehensive survey to be undertaken” and
 - c. “reasonable compensation for the stress this decision has caused and for the violation of their right to due process and fair treatment”.
4. The Respondent filed his reply on 14 September 2012.

Summary of procedure before the Tribunal

Proceedings in New York

5. A case management hearing was held on 10 October 2012. By Order No. 211 (NY/2012) of 12 October 2012, the Tribunal ordered that the Applicants file and serve a detailed list of records they were seeking from the Respondent, which they did on 31 October 2012.

6. By Order No. 236 (NY/2012) of 26 November 2012, the Tribunal ordered that the parties express their objection, if any, to a transfer of the case to the Geneva Registry. The Tribunal stressed that in raising the issue of change of venue, it was mindful that on the basis of the views expressed by the parties during the case management hearing, the case would need a hearing on the merits.

7. By Order No. 73 (NY/2013) of 20 March 2013, the Tribunal noted that three preliminary matters were still outstanding, namely (a) whether the Tribunal should grant the Applicants' request for production of additional documents; (b) whether it should grant the Applicants' request that the case be considered on an expedited basis, and (c) whether it should be transferred to the Geneva Registry to facilitate an expeditious and effective hearing. It ordered that the Respondent file copies of the documents requested by the Applicants on an *ex parte* basis.

8. On 16 April 2013, the Respondent replied to Order No. 73 (NY/2013), and filed the requested documents on an *ex parte* basis.

9. By Order No. 107 (NY/2013) of 23 April 2013, the Tribunal convoked the parties to a case management discussion on 7 May 2013, subsequently rescheduled to 17 May 2013.

10. By Order No. 128 (NY/2013) of 22 May 2013, the Tribunal ordered the Respondent to file and serve a copy of the audit report of the Office of Internal Oversight Services ("OIOS") regarding the salary survey process within two weeks of its forthcoming issuance. The Respondent filed said report, transmitted to him by OIOS on 27 August 2013, on 6 September 2013.

11. By Order No. 269 (NY/2013) of 23 October 2013, the Tribunal convoked the parties to a case management discussion to address, *inter alia*, the transfer of the case to Geneva. The case management hearing was held on 13 November 2013 and by Order No. 314 (NY/2013) of 15 November 2013, the Tribunal directed the parties to file a joint submission on all outstanding matters, including whether they had any objections to a transfer of the case to the Geneva Registry.

12. In a joint submission filed by the parties on 9 December 2013, the Respondent did not object to the transfer of the case to the Geneva Registry. The Applicants noted that they were not confident that the transfer to Geneva would expedite the case given the anticipated need for hearings on technical issues, since most potential witnesses were in New York and Bangkok. They stressed, however, that they would have no objection in principle, should the Tribunal consider that the request for expedition could be best ensured by the transfer. By Order No. 333 (NY/2013) of the same day, the Tribunal ordered the transfer of the case to the Geneva Registry, where it was registered under case No. UNDT/GVA/2013/069, and assigned to the undersigned Judge.

Proceedings in Geneva

13. By Order No. 14 (GVA/2014) of 22 January 2014, the Tribunal informed the parties that the Judge now in charge of the case had decided to raise at his own motion the issue of the application's receivability *ratione materiae*; it therefore requested the parties to submit comments thereon by Wednesday, 12 February 2014. In that Order, the Tribunal also informed the parties that the case would be decided on the papers, without an oral hearing.

14. Both parties submitted their comments on the issue of the application's receivability *ratione materiae* on 12 February 2014.

Summary of main facts

15. On 7 February 2011, the first meeting of the Local Salary Survey Committee ("LSSC"), comprising 60 members appointed by both staff

representatives and management, took place, in preparation of the 2011 Comprehensive Local Salary Survey.

16. On 26 April 2011, the 48th meeting of the United Nations Operations Management Team (“OMT”) took place in Bangkok, at which it was indicated that “the National Officer scale appeared to be on the high side” and that “the General Service scale also appeared high”.

17. The 2011 Comprehensive Local Salary Survey was conducted from June to December 2011.

18. On 10 January 2012, an LSSC meeting was held, to consider and sign the LSSC report prepared by the salary survey specialists, by 11 January 2013, for presentation to the Headquarters Salary Steering Committee. The results of the survey indicated that United Nations salaries for the General Service and National Officer categories were higher than those of the retained comparators, by 27.2% and 41.4% respectively.

19. On 13 January 2012, the findings of the salary survey specialists were presented to the Headquarters Salary Steering Committee, which unanimously approved the survey results and recommended freezing of salaries for staff members already on board and the implementation of secondary salary scales for staff member recruited after 1 March 2012.

20. The Office for Human Resources Management (“OHRM”) promulgated the salary survey results on its website on 6 February 2012, indicating that the salary scale applicable to staff already on board would be frozen “until the gap is closed”, whereas secondary salary scales would be applied to staff recruited on or after 1 March 2012.

21. On 15 February 2012, the Chairperson, ESCAP Staff Council, wrote to the Executive Secretary, ESCAP, asking the latter to seek that the results of the 2011 Comprehensive Local Salary Survey be invalidated and that a new survey be conducted with full transparency and accountability. He sent another letter, dated 18 February 2012, to the Executive Secretary, ESCAP, reiterating concerns that

the survey was conducted by certain Management representatives with the pre-determined agenda to reduce the salary scale for staff in the General Service and National Officer categories.

22. On 29 February 2012 and 2 March 2012, town hall meetings took place with the Under Secretary-General, Department of Management, and the Assistant Secretary-General for Human Resources Management, respectively, at which the 2011 Comprehensive Local Salary Survey was discussed.

23. Some members of the LSSC wrote to the Assistant Secretary-General for Human Resources Management on 5 April 2012, expressing their support to staff and their view that the work of the LSSC and the integrity of the survey process were compromised by several shortcomings.

24. On 5 April 2012, 167 staff member based in Bangkok submitted a request for management evaluation of the decision by the Secretary-General to accept the recommendation of the UN Headquarters Salary Steering Committee to issue salary scales to be applied to staff recruited as of 1 March 2012 and to freeze the salary scales for staff on board prior to that date.

25. On 27 April 2012, the Chief, Management Evaluation Unit (“MEU”), wrote to the ESCAP Staff Council, referring to the correspondence transmitted on behalf of 162 staff members—at that time, five staff members had withdrawn their request for management evaluation—based in Bangkok dated 5 April 2012, by which they contested the decision of OHRM to promulgate new salary scales for General Service and National Officer staff members in Bangkok, on the basis of the results of the 2011 Comprehensive Local Salary Survey in Thailand. The MEU stated that the request for management evaluation was not receivable, since the decision was taken pursuant to the advice from the LSSC in conjunction with salary survey specialists, and as such of a technical body under the terms of staff rule 11.2(b).

26. Pursuant to a request by the Department of Management, the Office of Internal Oversight Services (“OIOS”) conducted an independent review of the salary survey process, and, on 23 August 2013, issued its report 2013/069 “Audit

of the process for determining locally recruited staff salary scales at non-Headquarters duty stations”.

Parties' submissions

27. The Applicants' principal contentions are:

a. The Respondent has not contested the Tribunal's jurisdiction to consider claims with respect to the application of the ICSC methodology by the Secretary-General when establishing salary scales for the Applicant and the Tribunal in *Shaia* UNDT/2013/096 has confirmed its competence to consider the matter;

b. The former Administrative Tribunal in its Judgment No. 1100 *Hasanat Schmoeltzer et al* (2003) found in connection with a local salary survey in Vienna that the manner in which the International Civil Service Commission (“ICSC”) methodology is applied is a valid subject for judicial review; in its Judgment No. 590 *Abdala et al* (1993) and No. 670 *Abdala et al* (1994), the former Administrative Tribunal further found that it was competent to review salary and benefit claims of internationally recruited General Service staff in ESCWA. In the same vein, the former Administrative Tribunal considered itself competent to examine a claim on behalf of a large number of General Service staff over the determent of cost of living adjustments for General Service salary scales in seven headquarters duty stations (cf. Judgment No. 395, *Oummih et al* (1987));

c. Equally, the Administrative Tribunal of the International Labour Organisation (“ILOAT”) found itself competent to consider appeals from staff over the application of ICSC methodology to local salary surveys, upholding the staff members' right for the full and fair application of the Flemming principle (Judgment No. 1713 *re Coretta et al*). The ILOAT found that since the application of the methodology requires some discretion, the Tribunal was only competent to consider an abuse of authority in the exercise of such discretion;

d. The process and result of the salary survey has to respect the principle determined by the Flemming Committee in 1949, namely that for the General Service category, “the conditions of service including both paid remuneration and other basic elements of compensation, are to be among the best of the locality, without being the absolute best”;

e. The Applicants do not contest the methodology for the survey in itself, but its application by the Respondent to the 2011 Bangkok survey, which seriously compromised the results and are at variance with the Flemming principle; Management ensured that the survey took into account comparators which were known to be uncompetitive, whereas a best comparator was excluded; the job matching exercise in 2011 was irregular and inconsistent with the one of 2006; the financial situation of the Organization was unduly taken into account; staff was not consulted in the implementation of dual salary scales;

f. Evidence shows that the entire process was unduly influenced by extraneous considerations; this led to an incorrect process and flawed technical decisions, with the aim to ensure a predetermined outcome, which was to lower salaries;

g. The use of dual salary scales is not provided for in the ICSC methodology; such change in policy was done without consulting the General Assembly or with staff; it constitutes a violation of principle of equal pay for equal work, provided for in the Universal Declaration of Human Rights;

h. If left implemented, it will take between four and fourteen years until salaries start to increase again, while at the same time, cost of living continues to increase; that kind of severe fluctuation is exactly what the ICSC methodology is meant to avoid;

i. The freeze of salary has an impact on the final average remuneration of the Applicants, which is the basis for calculation of pension benefits; it also impacts the reimbursement ceiling for medical insurance coverage;

j. The dual salary scale also impacts the Applicants in that they are paid a lower dependency allowance for their dependents born after 1 March 2012 according to the secondary salary scale;

k. The methodology does not provide for a dispute resolution mechanism in case of dispute; unless a new comprehensive survey is conducted, there is little chance that the situation will improve;

l. In view of the important policy implications, the large number of staff affected and the consequences of the present situation on the job security and financial well being of local staff, the Applicants request an expedited hearing of the case; they request the Tribunal to order the immediate invalidation of the salary scales resulting from the 2011 survey and the continuation of interim salary adjustments based upon the salary scale promulgated in 2010, until the next comprehensive salary survey is due and conducted in accordance with due process;

m. The Tribunal shall further order that the Respondent initiate a review of the methodology and its application, so as to avoid similar problems arising in future salary surveys; this includes the need for adequate preparation for the next comprehensive survey;

n. The Applicants further request reasonable compensation for the stress the decision has caused to them and for the violation of their right to due process and fair treatment.

28. The Respondent's principal contentions are:

a. The Applicants, who were all recruited before 1 March 2012 do not have legal standing to contest that the secondary salary scale would affect the rights of staff members recruited on or after 1 March 2012. As such, the implementation of the secondary salary scale does not affect the terms of appointment or contract of employment of the Applicants. Therefore, this part of the application is not receivable, *ratione personae*;

- b. On the merits, the Respondent notes that the scope of the Tribunal's review is limited, since the Secretary-General has discretion to fix the salaries of staff members, and the Tribunal cannot substitute its judgment to that of the Secretary-General. It is limited to examine if the decision was made in good faith, and respecting the applicable rules and policies;
- c. Acts of the Administration enjoy a presumption of regularity, and the Respondent made a minimal showing that the rights of the Applicants were observed. Therefore, the Applicants did not meet the burden of proof which fell on them, that is, they did not show through clear and convincing evidence that their rights have been violated;
- d. The decision was not based on extraneous circumstances, such as bias; the methodology for non-headquarters duty stations, established by the ICSC, was correctly applied; the Applicants breached the confidentiality requirement governing the survey, when they released the list of comparator employers;
- e. Differences of opinion of the members of the LSSC who participated in the survey are usual in these kind of surveys; they were presented to the Headquarters Salary Steering Committee for its review, which found that the survey had been conducted transparently and in accordance with the methodology; it therefore recommended that salaries be frozen for staff hired before 1 March 2012 and that salaries for staff member recruited as of 1 March 2012 be reduced;
- f. The Applicants have not provided any evidence allowing to conclude that the salary survey methodology was applied improperly and was flawed; there was no deliberate attempt to lower the Bangkok salary scales;
- g. The freezing of salaries and the institution of dual salary scales has already been applied by the Organization in the past, in duty stations such as Geneva, Montreal, Bonn, London, Baghdad, and others; this is done to safeguard the acquired rights of staff member already on board;

- h. The revised salary scales for Bangkok, Thailand, as promulgated on 6 February 2012 respect the Flemming Principle, which implies that the salaries have to be among the best, without being the absolute best, at the duty station; the revised salary scales for Bangkok remain among the best of the locality;
- i. The application should be dismissed in its entirety.

Consideration

29. The Applicants request the rescission of the results of the 2011 Comprehensive Local Salary Survey, as reflected in the decision of 6 February 2012 by OHRM, which reads as follows:

“(AAA) Following the comprehensive salary survey in Bangkok in 2011, this is to advise you that the results of the survey indicate that current salaries for locally recruited staff are above the labour market when compared with the remuneration package of the retained comparators by 27.2% (General Service) and 41.4% (National Officer).

(BBB) For eligible staff already on board prior to 1 March 2012, existing salary scales, effective 1 August 2010 (revisions 42 Amend. 1 for general service and 14 Amend.1 for National Officer), will be frozen until the gap is closed. Allowances remain unchanged.

(CCC) For staff recruited on or after 1 March 2012, secondary salary scales, effective 1 June 2011 (revisions 43 for General Service and 15 for National Officer) will be issued ...”

30. As such, the Secretary-General has made use of the powers conferred to him by the Staff Rules and Regulations. Indeed, 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, para. 6, of the Staff Regulations, 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 ...”

31. The subject of the above-referenced decision is, on the one hand, the freeze of salary scales of staff members in the General Service and National Officers category recruited before 1 March 2012 and, on the other hand, the issuance of secondary salary scales for staff members in the General Service and National Officer category recruited on or after 1 March 2012.

32. The scope of the Tribunal's jurisdiction is clearly determined and limited by its Statute, which provides in art. 2.1(a) that 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". It follows that for an application to be receivable, the decision that is being challenged has to be an "administrative decision" under art. 2.1(a) of the Tribunal's Statute.

33. The Tribunal considers that when the Appeals Tribunal has determined its jurisprudence on a precise legal question, it is not appropriate for this Tribunal to examine the jurisprudence developed by other jurisdictions.

34. The Appeals Tribunal has adopted the terms of an administrative decision as defined by the former Administrative Tribunal of the United Nations in its Judgement *Andronov* No. 1157 (2003); in its recent Judgment *Al Surkhi et al* 2013-UNAT-304, it recalled once again the terms of the relevant definition, as follows:

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to,

within administrative law systems, as *implied* administrative decisions.

Issuance of secondary salary scales for staff recruited on or after 1 March 2012

35. 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 Tribunal's Statute, as per the terms of the above-quoted 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 and 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 as per the above criteria adopted by the Appeals Tribunal. Therefore, this part of the application is not receivable, *ratione materiae* and has to be dismissed.

Freeze of existing salary scales in effect since 1 August 2010

36. The Tribunal now has to consider whether it is competent to examine the application with respect to the decision to freeze existing salary scales.

37. The Tribunal notes that that 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 when the gap flagged by the survey will be closed, hence the actual duration of the salary freeze is unknown.

38. The Tribunal is aware of the jurisprudence of the Appeals Tribunal in *Al Surkhi et al* (Judgment No. 2013-UNAT-304). In that Judgment, the Appeals Tribunal held that an UNRWA Area Staff Circular—providing that the absence of

staff members who had been on strike on two specific days, would be covered by a 50% payroll deduction from the next payroll and a 50% deduction from annual leave, and that 100% payroll deduction would be made for all staff who were absent from work on another specific day—constitutes an appealable administrative decision. The Appeals Tribunal found that the Circular contained “all the necessary components referred to in *Andronov* to give rise to legal consequences for the striking staff” and that “it contained information which affected the rights of the staff members in question, given that it was being clearly communicated to the relevant staff members that deductions were going to be made from their salaries”, hence, “vis-à-vis the striking staff members it had individual application”.

39. It is the considered view of this Tribunal that the situation in the case at hand differs from the case of *Al Surkhi et al.* The Circular in *Al Surkhi et al.* was addressed and applied to a certain and clearly definable group of staff members who had been on strike on two or three specific days, and who, therefore, by their own concrete action, were subjected to a certain decision by the Administration—to wit, a deduction from payroll/annual leave on the basis of the principle of no pay for days not worked. Thus, the decision, though collective, was of individual application, and its application was clearly defined in scope and time. In the present case, however, the salary freeze applies to a group of staff members defined exclusively by their status and category within the Organization, and, as noted above, its application in time and duration cannot be determined. 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 Tribunal’s Statute.

40. This part of the application is therefore equally not receivable, and has to be dismissed.

41. Moreover, the Tribunal recalls that decisions by which the Secretary-General fixes salary scales in accordance with the above-quoted

provisions of the Staff Regulations, are measures with regulatory power which the Tribunal has no competence to rescind.

42. 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.

Conclusion

43. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

Signed

Judge Jean-François Cousin

Dated this 5th day of March 2014

Entered in the Register on this 5th day of March 2014

Signed

René M. Vargas M., Registrar, Geneva