Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SAMOULADA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicants:
Robbie Leighton, OSLA

Counsel for the Respondent:
Stéphanie Cochard, Human Resources Legal Unit, UNOG
Jérôme Blanchard, Human Resources Legal Unit, UNOG

Introduction

1. On 3 August 2017, the Geneva Registry of the United Nations Dispute Tribunal (UNDT) received 332 similar applications filed by the Office of Staff Legal Assistance (OSLA) on behalf of staff members employed by different United Nations entities at the Geneva duty station.

2. The 332 applications were grouped into nine cases and served on six different Counsel acting for the Respondent for their respective entities. These cases were assigned to Judge Bravo on 24 August 2017, and the Respondent's replies were due by 27 and 28 September 2017. The present case concerns a staff member of the United Nations Office in Geneva (UNOG).

3. All the 332 Applicants in the nine cases are requesting the rescission of the "decision to implement a post adjustment change resulting in a pay cut" notified to the Applicants on 11 May 2017. The Applicants also seek compensation for any loss accrued prior to such rescission.

4. On 30 August 2017, Judge Bravo issued Orders Nos.: 157, 158, 159, 160, 161, 162, 163, 164 and 165 (GVA/2017) recusing herself from the cases.

5. On 5 September 2017, Judge Downing, President of the United Nations Dispute Tribunal, issued Order No. 169 (GVA/2017) accepting the recusal of Judge Bravo, recusing himself from adjudication of the cases, and ordering the transfer of the nine cases to the Dispute Tribunal in Nairobi.

6. On 13 and 14 September 2017, the Counsel for the Respondent were notified that the cases had been transferred to the Nairobi Registry.

7. On 15, 16 and 18 September 2017, the Counsel for the Respondent filed identical Motions requesting the Tribunal:

a. For a joint consideration of the 332 applications on the grounds that: the Applicants in all nine cases are challenging the same decision; they all claim the exact same relief; the material facts in all nine cases are identical; the Tribunal has been requested to determine substantially the same questions of law and fact; the Counsel for the Respondent wish to file a single reply; and a joint consideration of the cases would promote judicial economy by minimizing duplication of proceedings.

b. To submit a single reply on the issue of receivability only.

c. For a six-week extension of the deadline to file a single reply should the Tribunal consider that a response on the merits is required at this stage.

8. On 18 September 2017, the Tribunal issued Order No. 152 (NBI/2017) in which it granted the Respondent leave to file a single reply on receivability and on the merits in relation to the nine cases and extended the deadline for filing the single reply until 31 October 2017.

9. The reply was filed on 31 October 2017.

10. The Tribunal has decided that an oral hearing is not required in determining the preliminary issue of receivability in this case and will rely on the parties' pleadings and written submissions.

Summary of relevant facts

11. In September and October 2016, cost-of-living surveys were conducted by the International Civil Service Commission (ICSC) at seven headquarter duty stations outside New York (Geneva, London, Madrid, Montreal, Paris, Rome and Vienna). The purpose of these surveys was to gather price and expenditures data to be used for 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).

12. 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).

13. 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.
>
> The post adjustment index variance for Geneva has translated into a decrease in the net remuneration of staff in the professional and higher categories of 7.7%.
>
> The Commission, having heard the concerns expressed by the UN Secretariat and other Geneva-based organizations as well as staff

> representatives has decided to implement the post adjustment change for Geneva, effective 1 May 2017 (in lieu of 1 April as initially intended) with the transitional measures foreseen under the methodology and operational rules approved by the General Assembly, to reduce the immediate impact for currently serving staff members.
>
> Accordingly, the new post adjustment will initially only be applicable to new staff joining the duty station on or after 1 May 2017; and currently serving staff members will not be impacted until August 2017.
>
> During the month of April, further appeals were made to the ICSC by organizations and staff representatives to defer the implementation of the revised post adjustment. On 24 and 25 April 2017, Executive Heads, Heads of Administration and HR Directors of Geneva-based Organizations and UNOG senior management met with the ICSC Vice-Chairman and the Chief of the Cost-of-Living Division of the ICSC in Geneva to reiterate their concerns. During the meeting, a number of UN system-wide repercussions were identified.
>
> The ICSC has taken due note of the concerns expressed and in response to the questions raised, the ICSC has posted a "Questions & Answers" section on their website dealing specifically with the Geneva survey results, as well as an in-depth explanation of the results of the 2016 baseline cost-of-living surveys at Headquarters duty stations…[1]

14. In its memorandum entitled "Post adjustment classification memo" dated 12 May 2017, the ICSC indicated that Geneva was one of the duty stations whose post adjustment multipliers had been revised as a result of cost-of-living surveys. The post adjustment multiplier was set at 67.1. The memorandum also indicated that staff serving in Geneva before 1 May 2017 would receive a personal transitional allowance (PTA), which would be revised in August 2017.[2]

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

16. On 10 July 2017, the Applicants filed management evaluation requests against the same decision however only "in the event the ICSC is deemed not a technical

[1] Application, Annex 1.
[2] Reply para. 9; Annexes 4 and 5.

body". The present application was filed without awaiting the result of the management evaluation.

17. On 18 July 2017, at its 85th Session, the ICSC determined that its earlier measures would not be implemented as originally proposed.

18. 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 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. [3] This was followed by a broadcast on 20 July 2017 by the UNOG Director General which also indicated that a further decision of the ICSC had amended their earlier decision and that "[f]urther detailed information on implementation of the reduction in the post adjustment for Geneva will be communicated in due course.[4]

19. In its memorandum entitled "Post adjustment classification memo" for August 2017, dated 31 July 2017, the ICSC indicated that post adjustment multipliers for Geneva had been revised as a result of cost-of-living surveys approved by the ICSC during its 85th session. The post adjustment multiplier for Geneva was now set at 77.5 as of August 2017. The memorandum also indicated that staff serving in Geneva before 1 August 2017 would receive a PTA as a gap closure measure that would totally offset for a six-month period any negative impact of the reduction in the post adjustment amount; and that this allowance would be revised in February 2018.[5]

20. 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.

[3] Application, Annex 3.
[4] Application, Annex 4.
[5] Reply, para. 14; Annex 10.

Staff members who joined after 1 May 2017 have since received the same post adjustment than staff members who joined prior to 1 May 2017.[6]

21. In the period from July to September 2017 the post adjustment multiplier has been further revised.[7] 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.[8]

22. On 21 and 22 August 2017, MEU informed that the new determination of the ICSC rendered moot the matter raised in the management evaluation request of 10 July 2017. MEU further indicated that the additional submission filed by OSLA on 17 August 2017 was considered as a "new request for a management evaluation", and that, pursuant to staff rule 11.2 (d), the management evaluation was to be completed no later than 1 October 2017.

Respondent's submissions on receivability

A matter cannot be before the MEU and the Dispute Tribunal simultaneously.

23. The application relates to the implementation of the May 2017 ICSC decision. A request for management evaluation was submitted on 10 July 2017 and as of the date of the filing of the application on 3 August 2017, the response from the management evaluation was not completed. The response of the management evaluation was subsequently sent to the Applicants on 21 and 22 August 2017.

24. It is uncontested that the Applicants submitted the present application without awaiting the result of their request for management evaluation. It is further uncontested that the Applicant stated that they may appeal the MEU's response to their request for management evaluation.

[6] Reply, para. 15; Annex 11.
[7] Reply, para. 16; Annexes12-14.
[8] Reply, para. 20.

25. Allowing the Applicants to file multiple applications is contrary to the efficient use of judicial resources. As the Applicants requested management evaluation of the contested decision on 10 July 2017 and received the response to the management evaluation on 21 August 2017, the present application is premature and not receivable. To find otherwise could result in the Dispute Tribunal finding itself effectively seized of two appeals of the same contested decision.

The contested decision does not constitute an "administrative decision taken pursuant to advice obtained from technical bodies", which is exempt under staff rule 11.2(b) from the requirement to request a management evaluation.

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

27. 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. The Applicants are therefore not exempt from the requirement to first request a management evaluation prior to submitting an application with the UNDT.

28. 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.

The 11 May 2017 ICSC decision, or the implementation thereof, is moot.

29. The management evaluation request dated 10 July 2017 relates to the May 2017 ICSC decision, or its implementation, which was superseded by the July 2017 ICSC decision. The July 2017 decision constitutes a new decision of the ICSC and the May 2017 ICSC decision is void.

30. The July 2017 ICSC decision cannot be considered as a continuation of the May 2017 decision. The May 2017 decision was initially projected to result in a decrease of 7.7% in net remuneration. The payment of a post adjustment based on the revised multiplier was to be paid to new staff joining the Organization on or after 1 May 2017. However, the July 2017 ICSC decision superseded the May 2017 ICSC decision, by increasing the post adjustment multiplier, establishing different gap closure measures and a different implementation date for the payment of post adjustment at the new rate, i.e., 1 August 2017. The cancellation of the May 2017 ICSC decision also resulted in retroactive payments to staff members who joined on or after 1 May 2017.

31. On 21 and 22 August 2017, the Applicants were informed by MEU that the July 2017 ICSC decision rendered moot the matter raised in their management evaluation request.

The implementation of an ICSC decision on post adjustment multipliers is not an administrative decision subject to review pursuant to the UNDT Statute.

32. The May 2017 ICSC decision and the July 2017 ICSC decision are not administrative decisions pursuant to art. 2 of the UNDT Statute or pursuant to the Staff Regulations and Rules. The setting of the post adjustment multipliers by the ICSC, as reflected in its May 2017 and July 2017 decisions, must be implemented by the Secretary-General, there is no room for interpretation or the exercise of discretion. The only action taken to implement such a decision is to make a payment by calculating the post adjustment based on the multiplier set by the ICSC.

33. Criterion for receivability of an application in cases of implementation of ICSC decisions should be whether the Secretary-General has room for discretion in implementing them. The United Nations Appeals Tribunal (UNAT) confirmed in *Obino* that the application was not receivable and there was no room for discretion in implementing the change in the hardship classification of a duty station mandated by ICSC; this was notwithstanding that the change had a negative impact on the staff member. The case needs to be distinguished from *Ovcharenko et al.* 2015-UNAT-530 where the Secretary-General declined to implement the ICSC decision, because the General Assembly had adopted a decision contrary to the ICSC's decision. In the case of *Pedicelli* 2015-UNAT-555, the ICSC's decision to promulgate a seven-level classification system for General Service staff could be implemented in different ways and therefore involved an exercise of discretion. In the present case, the application has challenged the implementation of the ICSC's decision to revise the post adjustment multiplier. This implementation does not involve the exercise of discretion on the part of the Secretary-General and therefore is not reviewable.

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

34. The May 2017 ICSC decision was projected to result in a 7.7% decrease in net remuneration, this in fact did not happen because the decision was superseded by the July 2017 ICSC decision.

35. Even 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.

Applicant's submissions on receivability

The ICSC may constitute a technical body.

36. 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).

37. 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.

38. 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.

39. Staff rule 11.2(c) provides that the time limit for contesting an administrative decision runs from notification rather than implementation.

40. The 11 May 2017 email notified the Applicants of a decision to implement a post adjustment change as of 1 May 2017 with transitional measures applied from that date, meaning that it would not have impact on the amount of salary received

until August 2017. As such, it communicated a final decision of individual application which will produce direct legal consequences to the Applicants. Since the time limit runs from communication rather than implementation of a decision and no rule specifies the means of communication required to trigger that deadline, the Applicants considered that the 60-day deadline ran from the 11 May 2017 communication.

41. Such a decision has direct legal consequences for the Applicants and is properly reviewable. The instant case can be distinguished from that in *Obino* which dealt with a decision within the ICSC's decisory powers, from *Tintukasiri et al.* 2015-UNAT-526 which related to a methodology specifically approved by a General Assembly Resolution and from *Ovcharenko et al.*, which similarly related to a decision pursuant to a General Assembly Resolution. Whereas the decision challenged here falls within the ICSC's advisory powers and was not subject to approval by the General Assembly.

42. In *Pedicelli* it was found that notwithstanding a finding that the Secretary-General had no discretion in the implementation of an ICSC decision, the negative impact of that decision still rendered it capable of review. To find otherwise would be to render decisions regarding fundamental contractual rights of staff members immune from any review regardless of the circumstances. This is inconsistent with basic human rights and the Organization's obligation to provide staff members with a suitable alternative to recourse in national jurisdictions. Since the International Labour Organization Administrative Tribunal (ILOAT) has consistently reviewed decisions relating to post adjustment it would further risk the breakup of the common system with staff members from one jurisdiction afforded recourse denied in other parts.

43. Further or in the alternative, the decision was taken *ultra vires*. Consequently, any argument on receivability relying on the absence of discretion on the part of the Secretary-General must fail. If the ICSC can exercise powers for which it has no

authority and those actions cannot be checked by either the Secretary-General or the internal justice system, then there is no rule of law within the Organization.

Effect of the 19 and 20 July 2017 communications.

44. It is possible that the Administration's communications of 19 and 20 July 2017 indicate that the 11 May 2017 decision has been rescinded and replaced by a new administrative decision triggering a further 60-day deadline. However, the Administration has not taken a clear position in this regard.

45. The 19 and 20 July 2017 communications describe the changes made as "a decision" but go on to indicate that "this latest development amends the Commission's earlier decision". The word "amends" suggests that rescission has not occurred. Various elements of the original decision are changed though confusingly the ICSC affirm their decision that the collection and processing of the data from the 2016 baseline cost-of-living surveys were carried out by the Secretariat in accordance with the approved methodology while simultaneously forwarding a report suggesting the contrary to the Advisory Committee for evaluation.

46. Since the Administration is not clear whether the original decision has been rescinded and replaced, the Applicants, in order to protect their rights, are obliged to maintain their challenge to the 11 May 2017 communication and may in due course be obliged to contest the 19 and 20 July 2017 communications.

Considerations

47. In the layered argument concerning receivability of the application, the primary question to be addressed is the nature of the decision that the Applicants seek to challenge. The Applicants identified the contested decision as being the 11 May 2017 email from the Administration related to the post adjustment change effective 1 May 2017. Whilst the content of the email relays findings and decisions of ICSC and the Respondent copiously argues irreceivability of an application directed against decisions of ICSC, it is however obvious from the application that the challenge is

directed not against the acts of ICSC but against the communication as such, which announces the intent to implement the ICSC directive. The legal issue arising for consideration at this stage is therefore whether the application is properly against an administrative decision in the sense of art. 2.1(a) of the UNDT statute, which provides as follows:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

48. It is recalled that in *Hamad*[9], the UNAT adopted the former United Nations Administrative Tribunal's definition forged in *Andronov*, which describes an administrative decision as:

> 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 legal consequences. [10]

49. As seen from the above, the notion of an administrative decision for proceedings before the UNDT resembles what in the European continental system is sometimes referred to as an administrative act *sensu stricto,* and which is reached by an agency to regulate a single case in the area of public law and thus being characterised as unilateral, concrete, individual, and producing direct external effect,

[9] *Hamad* 2012-UNAT-269, at para. 23.
[10] Judgment No. 1157, *Andronov* (2003) V.

i.e., whose legal consequences are not directed inward but outward the administrative apparatus.[11] Concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts, has been explained in the second sentence of the *Andronov* definition reproduced above. When it comes to the requirement of external effect, the UNAT made it explicit in *Andati-Amwayi*[12] that, in accordance with the UNDT Statute, the proceedings are concerned with decisions having impact not just on the legal order as a whole but on the terms of appointment or contract of employment of the staff member. What has proven to require interpretation though, is the criterion of "precise individual case" and direct effect. In this regard, the *Andronov* definition was not explicit as to whether the UNAT jurisdiction extends over decisions which, albeit not expressing norms *par excellence* abstract, are nevertheless directed toward general criterion or a defined or definable circle of people (decisions of general disposition or general order).[13]

50. The question arose in *Tintukasiri et al.*, where the appellants had challenged the Secretary-General's decision to accept the Headquarters Salary Steering Committee's recommendations for the promulgation of revised salary scales for the General Service and National Officer categories of staff in Bangkok, which announced a freeze of the salaries for extant staff members at then-existing rates and established a second tier of salaries for staff members hired on or after 1 March 2012. The UNAT agreed with the UNDT's reasoning that the decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 did not amount to an administrative decision under art. 2.1(a) of the UNDT's Statute, as per the terms of

[11] See *e.g.*, section 35 of the German VwVfG, 1st sentence: "An administrative act is any decision, order or other unilateral measure taken by an authority to settle an individual case in the field of public law and which is directed to the external legal effect, see also Polish High Administrative Court decision SA/Wr 367/83, ONSA 1983, no 2m, item 75, p. 183 '"unilateral decision issued by state administration which has binding consequences for an individually determined entity and a specific case, given by this authority in external relations".

[12] *Andati-Amwayi* 2010-UNAT-058, at para 17.

[13] For comparison, see section 35 of the German VwVfG 2nd sentence: "A general order is an act of administration addressed to a group of persons determined or determinable by general characteristics or concerning public property or its use by the general public"; also, in French administrative law, décisions collectives (concernant plusieurs personnes dont la situation est solidaire) et les décisions particulières (pour une situation individualisée qui a des effets sur un nombre indéterminé de personnes (Yves Gaudemet, *Traité de Droit administratif* Tome 1 16e édition, 2001).

Andronov because at the moment of their issuance the secondary salary scales were to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. Regarding the appellants' challenge to the freeze of the then-existing salary scales, the UNAT upheld the UNDT's finding that the applications were not receivable *ratione materiae* because the contested decision was of a general order, in that the circle of persons to whom the salary freeze applied was not defined individually but by reference to the status and category of those persons within the Organisation, at a specific location and at a specific point in time. [14] However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

> … [i]t 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 confirm[ed] 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.[15]

51. The issue may have to some extent become obscured in *Obino*, where the application contested a decision to implement ICSC's reclassification of the Addis Ababa duty station. The factual narrative of the judgment is silent as to whether the applicant's pay had been affected at the time; although it likely had, the argument was rather about negative impact on the salaries of the Addis Ababa staff in general.[16] The UNDT interpreted the challenge as directed against the decision of ICSC and held that such challenges are 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

[14] *Tintukasiri et al.* 2015-UNAT-526, paras. 35-37.
[15] *Ibid*., at para. 38.
[16] *Obino* UNDT-2013-008 at para. 30.

execute such decisions.[17] The UNAT, who agreed that ICSC had made a decision binding upon the Secretary-General[18], affirmed the judgment because "Mr. Obino did not identify an administrative decision capable of being reviewed, as he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment."[19]

52. With minor variation, the UNAT restated the holding in *Tintukasiri et al.* in *Ovcharenko et al.*, where the appellants contested the Secretary-General's refusal to pay post adjustment based on a multiplier promulgated by the ICSC. The UNAT found that the administrative decision not to pay the appellants their salary with the post adjustment increase, the execution of which was temporarily postponed, 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 pay slips for the relevant period. [20] The UNAT held also: "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."[21]

53. Last, in *Pedicelli*, the administration announced that it would commence conversion from the nine-level salary scale then applied to GS staff in Montreal to the seven-level salary scale promulgated by the ICSC. A number of staff members, including the appellant in that case, received Personnel Action forms confirming their new grade. The UNAT echoed *Obino* regarding the lack of discretion on the part of the Secretary-General in implementing ICSC decisions. It however concluded:

> 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

[17] *Ibid*., at para. 34 and para. 47.
[18] *Obino* 2014-UNAT-405 at para. 21.
[19] *Ibid*., at para. 19.
[20] *Ovcharenko* 2015-UNAT-530 at para. 30.
[21] *Ibid*., at para. 32.

> 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.[22]

54. In his current argument, the Respondent points out to disparate outcomes in receivability stemming from the UNAT jurisprudence. In invoking *Obino* he proposes that, instead of the criterion of negative effect of the decision on the terms of appointment or contract of employment of a staff member, the controlling criterion for receivability of an application concerning decisions of general order should be whether the contested decision of the Secretary-General was issued in the exercise of discretion as opposed to execution of a binding decision of another entity. [23] For the reasons that follow, this Tribunal cannot accept these propositions.

55. This Tribunal agrees that negative effect on the terms of appointment or contract is not a criterion sufficiently disposing of the question at hand. Onerousness, or *gravamen*, of an administrative decision for the applicant is a basic requirement determining the applicant's standing in any proceedings before the UNDT. As confirmed by the UNAT, where an applicant has no stake in the contested administrative decision, since his rights and terms of employment were not affected by it, the application must be rejected for the lack of legal standing.[24] This said, the Tribunal considers that, first, the criterion proposed by the Respondent is systemically inappropriate. Second, there is no genuine contradiction in UNAT jurisprudence as to what constitutes a reviewable administrative decision.

56. The use of discretion as criterion for determination of the being of an administrative decision, or for its reviewability by the UNDT, has no basis in the applicable law nor in any generally accepted doctrine. Conversely, the doctrine of administrative law recognizes both discretionary decisions and constrained decisions, the latter having basis in substantive law which determines that where elements of a certain legal norm are fulfilled, the administrative authority will issue a specific

[22] *Pedicelli* 2015-UNAT-555 at para. 29.
[23] Reply, para. 45.
[24] *Pellet* 2010-UNAT-073, at para. 20.

decision.[25] Substantive law may be a primary or secondary general legislation or may be an administrative decision of a general order. Constrained decisions are as a rule reviewable for legality, *i.e.*, their compliance with the elements of the controlling legal norm. The UNDT reviews daily applications directed against constrained decisions, such as, for the most part, those pertaining to entitlements. The UNAT confirmed that highly constrained decisions, such as placement of reports on staff member's file, are reviewable for legality.[26] If anything, it is judicial review of discretionary decisions which, as expression of separation of powers and prohibition of "co-administration by courts", is limited and even in individualizing discretionary decisions usually focuses on arbitrariness or abuse of power.[27]

57. Where the controlling norm is contained in a decision of general order, which leaves no room for administrative discretion, its implementation is still done through a discrete administrative decision of constrained character, whereby the administration subsumes facts concerning individual addressee under the standard expressed by the general order. In factual scenarios discussed here, assuming, for the sake of argument, that a given ICSC decision would have been binding on the Secretary-General, judicial review would at minimum need to extend over the matter whether the premises of the general order are satisfied, *e.g.*, whether indeed the applicant was posted in Bangkok, Addis Ababa or Geneva, whether he or she joined before or after a given date and, as noted by the Respondent, whether the calculation was arithmetically correct. To exclude *a limine* judicial review of constrained decisions would unjustly restrain the staff members' right to a recourse to court.

58. UNAT jurisprudence confirms these conclusions. Without ever withdrawing from the terms of *Andronov*, it affirmed receivability of applications when an act of

[25] For that matter see also: Gorlick UNDT/2016/214 at para. 22. "As a matter of law, administrative decisions may be discretionary or not discretionary, but this does not affect their qualification as administrative decisions. For this purpose, as long as a decision produces legal effects, is of individual application and emanates from the Administration, it is irrelevant whether the decision-maker disposes of a large latitude or whether its action is tightly dictated by the legislation or, as in this case, by a judicial ruling."
[26] *Oummih* 2014-UNAT-420 at paras. 19-20.
[27] See, *e.g.*, *Frohler* 2011-UNAT-141 and *Charles* 2012-UNAT-242.

general order has resulted in norm crystalisation in relation to individual staff members by way of a concrete decision expressed through a payslip or personnel action. This is precisely the holding of *Tintukasiri*, the leading case on the issue. The other UNAT judgments, notwithstanding occasional intertwining elements pertinent to legality rather than receivability[28], express the same concept and are directed toward the same legal effect.

59. From the foregoing, it is evident that by applying the test of *Andronov*, and even assuming that the 11 May 2017 communication confers a general intent to implement the ICSC decision with respect to each and every staff member based in Geneva, such individual decisions have not yet been taken. This renders the applications irreceivable. Moreover, even the decision of general order would have been rescinded by the next communication of 18 July 2017 in which the ICSC determined that its earlier measures would not be implemented as originally proposed. The uncontested submission from the Respondent is that:

> .. the July 2017 ICSC decision superseded the [11] May 2017 ICSC decision, by increasing the post adjustment multiplier, establishing different gap closure measures and a different implementation date for the payment of post adjustment at the new rate, i.e., 1 August 2017. The cancellation of the May 2017 ICSC decision also resulted in retroactive payments to staff members who joined on or after 1 May 2017.

60. Regarding the Applicant's contention that the communication may present an amendment of the original decision rather than a new one, the Tribunal agrees with the Respondent that replacing most of the essential elements of the previous administrative act with new ones constitutes a new administrative decision, amounting to rescission of the previous one. Absent individual decisions, however, this consideration becomes immaterial for the instant case. Other pertinent questions of receivability need not be resolved at this point.

[28] As in *Obino*, where the question of the Secretary-General being bound by ICSC decision was pertinent to the issue of proving non-compliance with terms of appointment or contract of employment (para 19), that is, legality of the constrained decision, rather than to non-existence of a reviewable administrative decision.

CONCLUSION

61. This application is dismissed as not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 23rd day of February 2018

Entered in the Register on this 23rd day of February 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi