



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/123

Judgment No.: UNDT/2018/064

Date: 8 June 2018

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANGELOVA et al¹

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicants:

Robbie Leighton, OSLA

Counsel for the Respondent:

Elizabeth Brown, UNHCR

Lance Bartholomeusz, UNHCR

Louis Lapicerella, UNHCR

¹ 14 Applicants from the United Nations High Commissioner for Refugees (UNHCR) whose names appear in Annex 1 to this Judgment.

Introduction

1. On 16 October 2017, the Geneva Registry of the United Nations Dispute Tribunal (UNDT) received, amongst others, 14 similar applications filed by the Office of Staff Legal Assistance (OSLA) on behalf of staff members employed by UNHCR whose claims are herein referred to as “the application”.
2. The Geneva Registry assigned these cases to Judge Teresa Bravo.
3. The Applicants are requesting the rescission of the Organization’s decision dated 19/20 July 2017 to implement a post adjustment change in the Geneva duty station which results in a pay cut. They also seek compensation for any loss accrued.
4. On 30 November 2017, Judge Bravo issued Order No. 227 (GVA/2017) recusing herself from handling this case.
5. On the same day, Judge Rowan Downing, then President of the UNDT, issued Order No. 236 (GVA/2017) accepting the recusal of Judge Bravo, recusing himself from adjudication of the cases, and ordering the transfer of the case to the Dispute Tribunal in Nairobi.

Summary of relevant facts

6. 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).²

7. 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).³

8. 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.

² Paragraph 6 of the reply.

³ Paragraph 7 and Annex 2 of the reply.

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.⁴

9. Subsequently, in a 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 2017.⁵

⁴ Paragraph 8 and Annex 3 of the reply.

⁵ Paragraph 9 and Annexes 4 and 5 of the reply.

10. Following the issuance of the broadcast, Geneva-based organizations expressed concerns regarding the cost of living surveys and post adjustment matters.⁶

11. In August 2017, numerous staff members based in Geneva, including the Applicants, filed management evaluation requests as well as applications on the merits concerning the May 2017 decision. To date, those proceedings for the present Applicants resulted in Judgment No. UNDT/2018/023.

12. 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 of 18 July 2017 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. This was followed by a broadcast on 20 July 2017 by the Director General of the United Nations Office at Geneva (UNOG) 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."⁷

13. In its memorandum entitled "Post adjustment classification memo" 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 2018.⁸ The Tribunal has no information as to whether the memorandum was made accessible to the Applicants.

⁶ Paragraph 11 and Annex 6 of the reply.

⁷ Paragraph 3 and Annex 2 of the application.

⁸ Paragraph 14 and Annex 10 of the reply.

14. 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.⁹

15. In the period from July to September 2017 the post adjustment multiplier has been further revised, mainly as a result of fluctuation of the US dollar. 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. This was reflected by pay check at the end of August 2017.¹⁰

16. On 14 September 2017, OSLA acting on behalf of the Applicants requested a management evaluation of the decision to implement the July 2017 ICSC decision.

17. On 16 October 2017, i.e., before the receipt of management evaluation, OSLA filed the present application contesting the July 2017 decision to “implement a post adjustment change resulting in a pay cut” as conveyed by Broadcast on 19 and 20 July 2017.¹¹

18. On 30 November 2017, the Deputy High Commissioner of UNHCR replied by way of management evaluation that the July 2017 ICSC decision was not a contestable administrative decision.¹²

19. On 5 January 2018, the Respondent filed his reply to the application.

⁹ Paragraph 15 and Annex 11 of the reply.

¹⁰ Application, Annex 4.

¹¹ Paragraph 22 of the reply.

¹² Paragraph 24 of the reply.

Respondent's submissions on receivability

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.

20. 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.

21. 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. 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.

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

23. The July 2017 ICSC decision is not an administrative decision pursuant to art. 2 of the UNDT Statute or pursuant to the Staff Regulations and Rules.

24. 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 Secretary-General has no discretionary authority in proceeding with implementing the ICSC's decisions on post adjustment. The General Assembly has repeatedly reaffirmed that "resolutions of the General Assembly and the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization". In the case of the implementation of the ICSC's decision to revise a post adjustment multiplier, there is no room for interpretation or the exercise of discretion by the Secretary-General. 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.

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

25. 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.

The Applicants should not be allowed to file multiple applications to contest a new post adjustment multiplier for Geneva.

26. The Applicants have submitted that they have deliberately filed multiple applications of the same decision and have taken multiple distinct and contradictory

positions to justify it – that the decision may or may not have been taken by a technical body; that the May 2017 ICSC decision is affecting the Applicants while also attempting to argue that only some parts of that earlier decision survived; and, finally, that the July 2017 ICSC decision was actually a new decision. This latter submission by the Applicants supports the arguments put forward by the Respondent that the May 2017 ICSC decision was rendered moot by the July 2017 ICSC decision. Regarding the question of management evaluation, the proper procedure would have been to submit a written request to the UNDT in accordance with art. 8.3 of its Statute to suspend the deadline to file an appeal pending the Applicants being informed whether the contested decision was taken pursuant to advice received from a technical body. The purpose of art. 10.6 of the UNDT Statute specifically serves the purpose of avoiding such blatantly frivolous proceedings.

Applicants' submissions on receivability

The ICSC may constitute a technical body.

27. 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).

28. 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.

29. 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.

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

31. The 19 and 20 July 2017 communications notified the Applicants of a decision to implement a post adjustment change as of 1 August 2017 with transitional measures applied from that date, meaning that it would not have impact on the amount of salary received until February 2018. As such, it communicated a final decision of individual application which will produce direct negative 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 19 or 20 July 2017 communication.

32. In the alternative, the time limit must run from receipt of the staff members' paychecks for the month of August. Such a decision has direct legal consequences for the Applicants and is properly reviewable.

33. 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.

Considerations

34. This Tribunal has already determined in Judgment No. UNDT/2018/023 involving the same parties and arising from the above-cited communication of 11

May 2017, that, on the basis of the definition of administrative decision adopted by the Appeals Tribunal for the purpose of art. 2.1(a) of the UNDT statute after *Andronov*¹³, applications originating from implementation of acts of general order are receivable when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision, such as in similar cases had been expressed through a pay slip or personnel action.¹⁴ It has also held that the degree of discretion exercised by the Secretary-General in the issuance of an individual decision is inconsequential for the receivability of a decision for a judicial review.¹⁵ The Tribunal incorporates by reference the particular reasons given as substantiation of this holding.

35. Just as was the case with the communication of 11 May 2017, the communication of 19 and 20 July 2017, which announces implementation of a post adjustment change as of 1 August 2017, constitutes a decision of general order. Whereas the Tribunal agrees with the Applicants that communication of a decision, and not its implementation, triggers the running of time limits for the filing of an application, the communication of 19-20 July did not constitute a decision in a “precise individual case” as required under the *Andronov* definition of a reviewable decision. The Tribunal takes it, however, that an individual decision concerning the Applicants would have been issued and subsequently communicated to them through the August 2017 pay check, which is the alternative indication of the impugned decision contained in the application. As such, receivability of the application needs to be examined in the aspect of whether that individual decision should have been submitted for management evaluation.

Did the application require a prior request for management evaluation?

36. The issue arises from the question whether a decision taken pursuant to decisions of ICSC is taken “pursuant to advice obtained from technical bodies”. In

¹³ Judgment No. 1157, *Andronov* (2003) V.

¹⁴ *Andres et al.* UNDT/2018/021 paras. 48-61.

¹⁵ *Ibid.*, at para. 56.

this respect, art. 8 of the UNDT Statute and staff rule 11.2(b), provide, in relevant parts:

Article 8

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required[.]

Staff rule 11.2

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

37. The language of staff rule 11.2(b) indicates that it has been left to the Secretary-General's discretion to determine where he wishes to rely on advice from technical bodies such as he deems fit, be it permanent or ad hoc. As has been already noted by the Dispute Tribunal in *Syrja*¹⁶, making a determination as to what constitutes a technical body is not the function of the Dispute or Appeals Tribunals. The exercise of discretion in reliance on technical bodies might be subject to judicial review only indirectly, through impact that such advice had on individual decisions.

38. At the date of the filing of the application, rather than being determined *a priori* in a publicly accessible act, at the latest – at the time of the notification of an

¹⁶ UNDT/2015/092.

individual decision, the designation of technical bodies was being revealed on a case-by-case basis only once litigation has been advanced.¹⁷ The situation has only recently been clarified by the issuance of ST/AI/2018/7 (Technical bodies), which does not include the ICSC. This Tribunal considers that absent a designation by the Secretary-General, the ICSC is not to be deemed a technical body for the purpose of exempting the impugned decision from the management evaluation requirement. The Tribunal notes, however, that the Applicants had no means of knowing it prior to filing their application, *i.e.*, until relevant representation was made on behalf of the Respondent, especially given that in the past representations different positions were expressed as to the status of the ICSC.¹⁸ The Tribunal, therefore, finds no grounds to attribute to the Applicants abuse of process under 10.6 of the UNDT Statute.

39. Considered that the ICSC is not a technical body for the purpose of exempting the impugned decision from the management evaluation requirement, the impugned decision should have been submitted for management evaluation.

40. Another question is whether an application can be accepted for review by the UNDT when filed without awaiting management evaluation or the expiration of the time limit for it, but subsequently such management evaluation has been obtained, as in this case. With this respect, the Tribunal recalls that in *Omwanda*, the UNDT held that:

[a] matter cannot be before the MEU and the Dispute Tribunal simultaneously [...]” and that “[a]llowing applicants to circumvent this process and file applications with the Tribunal before the deadline for a response to a request for management evaluation has passed would contravene the Tribunal’s Statute and Rules of Procedure, undermine the time lines set out in the Staff Rules, and would be contrary to the intentions of the General Assembly.¹⁹

41. In *Omwanda*, as the application had been filed before MEU completed its management evaluation and the time limit for completing such a response did not yet

¹⁷ See UNDT/2018/036 paras. 41-43 and jurisprudence cited therein

¹⁸ *Ovcharenko* UNAT 2015-UNAT-530 para. 11 *v.* para 24.

¹⁹ *Omwanda* UNDT/2016/098/Corr.1 at para. 24.

expire, the application was dismissed as premature.²⁰ In the present case, a differing element is that by the date of this judgment, the Applicants had obtained management evaluation of the impugned decision, as a result of which their claims were not satisfied. The question before the Tribunal is thus whether a management evaluation so obtained validates the filing of the application so that it becomes receivable for adjudication.

42. In this respect, it is recalled that, although staff rule 11.2 and art. 8 of UNDT Statute require only “requesting” management evaluation and not actually obtaining it, the Appeals Tribunal stressed the obligation to await management evaluation, which process provides the Administration an opportunity to correct any errors in an administrative decision and resolve disputes without the necessity to involve judicial review.²¹ Moreover, another rationale noted by the Appeals Tribunal for management evaluation and the attendant requirement to wait for the period necessary to obtain it²², is that it provides for the applicant an opportunity to consider reasons on the part of the Administration prior to drafting and filing of the application and in this way fosters rationality and completeness of the argument before the Tribunal. In view of this reasoning, the Tribunal considers that the answer to the debated question is negative, and that the application which, as the present one, had been filed without awaiting the result of management evaluation (or expiry of the time limit for it) remains not receivable also after the management evaluation has been issued. Such situation, for an applicant who wishes to pursue his or her claim before the Dispute Tribunal, calls for a new filing made in accordance with the applicable time limits.

CONCLUSION

43. The present application is dismissed as not receivable.

²⁰ *Ibid.*, at para. 23.

²¹ *Kouadio* 2015-UNAT-558 para 17; *Amany* 2015-UNAT-521, para. 17; *Nagayoshi* 2015-UNAT-498 para 36; *Mosha* 2014-UNAT-446, para. 17; Christensen 2013-UNAT-335, para 22; *Pirnea* 2013-UNAT-311, para 42.

²² *Neault* 2013-UNAT-345 at para. 34.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 8th day of June 2018

Entered in the Register on this 8th day of June 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

Annex 1

List of Applicants

1. Valentina Tsvetkova ANGELOVA
2. Nagette BELGACEM
3. Alain CRAUSAZ
4. Jacqueline EATZ
5. Eva GARCIA BOUZAS
6. Luz Adriana GARCIA SALAZAR
7. Meliha HADZIABIC
8. Claire Eloise INDER
9. Elias NTAWURUHUNGA
10. Scott POHL
11. Ritu SHROFF
12. Patricia SLEEMAN
13. Vladimir SMOLJAN
14. Cedric VIDONNE