Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BOZIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Melissa Bullen UN Women,
Mylène Spence, UN Women

Introduction

1. On 6 and 28 November 2017, the Geneva Registry of the United Nations Dispute Tribunal (UNDT) received 344 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 344 applications were grouped into eight cases and were assigned to Judge Teresa Bravo. All the Applicants are requesting the rescission of the Organization's decision to implement a post adjustment change in the Geneva duty station which results in a pay cut. The Applicants also seek compensation for any loss accrued. The present case concerns a staff member of the United Nations Entity for Gender Equality and the Empowerment of Women also known as "UN Women".

3. On 30 November 2017, Judge Bravo issued Orders Nos.: 227, 229, 230, 231, 232, 233, 234, and 235 (GVA/2017) recusing herself from handling the cases. On the same date, Judge Rowan Downing, President of the United Nations Dispute Tribunal, 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 eight cases to the Dispute Tribunal in Nairobi.

4. In order to distinguish this case from other ones stemming from the decrease of the post adjustment in Geneva and for the ease of comprehension of submissions, it falls to be noted that, on 3 August 2017, the Applicant had filed a similar application regarding the same decision of 11 May 2017. In that case the Applicant argued that the decision was not one requiring management evaluation and therefore she had filed the application pursuant to staff rule 11.2(b). That application was the subject of Judgment No. UNDT/2018/026, whereby this Tribunal rejected it on the ground that no individual decisions had been taken, as such the application was not

receivable under art. 2.1(a) of the UNDT Statute. The judgment has since become final ("first wave of Geneva cases").

5. On 16 October 2017, the Applicant filed an application regarding another decision concerning the post adjustment, one conveyed to her in communications dated 19 and 20 July 2017. That application had been filed before the management evaluation was completed. It was the subject of Judgment No. UNDT/2018/035, whereby this Tribunal rejected it on the ground, inter alia, that the decision required a management evaluation and thus the Applicant had an obligation to await management evaluation before filing her application ("second wave of Geneva cases"). This judgment has become final. At the date of this judgment the Tribunal is also seised of applications against the same 19-20 July decision, which have been filed after the receipt of the management evaluation on 23 October 2017 ("fourth wave of Geneva cases").

6. The present case results from the application filed pursuant to staff rule 11.4(a) on the basis that the decision from 11 May 2017 was one requiring management evaluation, after the Applicant obtained a management evaluation on 23 August 2017 ("third wave of Geneva cases").

Summary of relevant facts

7. 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).[1]

8. 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).[2]

9. On 11 May 2017, the Applicant received an email broadcast from the Department of Management, United Nations Headquarters, informing her 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.

[1] Paragraph 5 of the reply.
[2] Paragraph 6 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.[3]

10. 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.[4]

[3] Paragraph 7 and Annex 3 of the reply.
[4] Paragraph 8 and Annexes 4 and 5 of the reply.

11. Following the issuance of the broadcast, Geneva-based organizations expressed concerns regarding the cost of living surveys and post adjustment matters.[5]

12. On 10 July August 2017, numerous staff members based in Geneva, including the Applicants, filed management evaluation requests[6] and, parallel with these, on 3 August 2017, they filed direct applications on the merits concerning the May 2017 decision; the latter proceedings for the present Applicants resulted in Judgment No. UNDT/2018/021 ("first wave Geneva cases").

13. Meanwhile, on 18 July 2017, at its 85th Session, the ICSC determined that its earlier measures would not be implemented as originally proposed. Staff members were then informed by broadcasts dated 19 and 20 July 2017 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 significantly less than originally expected.[7]

14. 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 Applicant.

15. 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]

[5] Paragraph 10 and Annex 6 of the reply.
[6] Application, Annex 2.
[7] Reply, Annexes 8 and 9; paragraph 4 and Annex 3 of the application.
[8] Paragraph 13 and Annex 10 of the reply.
[9] Paragraph 14 and Annex 11 of the reply.

16. 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 19-20 July 2017 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] That decision was appealed in the second and the fourth "waves" of Geneva cases.

17. On 6 November 2017, OSLA filed the present application.

18. On 24 December 2017, the General Assembly adopted resolution A/RES/72/255 on the United Nations common system, calling, inter alia, for the United Nations common system organizations and staff to cooperate in the implementation of the post adjustment system.[11]

19. On 5 January 2018, the Respondent filed a reply in response to this application.

Respondent's submissions on receivability

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

20. 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 that the May 2017 ICSC decision is void.

21. 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

[10] Application, Annex 4.
[11] Reply, Annex 27.

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.

22. On 23 August 2017, the Applicant was informed by the Management Evaluation Unit of the United Nations Secretariat that the July ICSC decision rendered moot the matter raised in their management evaluation request.

23. In its application dated 31 October 2017, OSLA submitted that the July decision "did represent communication of a new decision to change post adjustment".

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

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 Applicant is not adversely affected by the ICSC decisions on post adjustment multipliers.

25. In order for the application to be receivable, the Applicant must be able to demonstrate that she has been adversely affected by the contested decision. While 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.

26. With the July 2017 ICSC decision, the Applicant has 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 Applicant should not be allowed to file multiple applications to contest a new post adjustment multiplier for Geneva.

27. The Applicant has filed two separate applications on 3 August 2017 and 6 November 2017 for the purpose of contesting the same May 2017 decision.

28. In the present application, the Applicant asserts that "Part of the Applicant's challenge relate to elements of the 11 May 2017 decision that survive the [July] 'amendment'", however, in her application of 16 October 2017 the Applicant submitted that the July decision "did represent communication of a new decision to change post adjustment". Whereas on 21 and 22 August 2017, the Respondent informed the Applicant's OSLA Counsel that the applicable decision was made on 19 July 2017 and not sooner.

29. Similarly the Applicant has taken contradictory positions to justify the filing of multiple appeals of the same decision based upon the contention that it may or may not have been taken by a technical body. 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 and then to file a single application to the UNDT rather than the current multiple applications. The purpose of art. 10.6 of the UNDT Statute specifically serves the purpose of avoiding such frivolous proceedings.

Applicants' submissions on receivability

The ICSC may constitute a technical body.

30. 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).

31. Given the difficulty in predicting the position that might be taken by the Respondent in the instant case, the Applicant is obliged to file multiple applications in order to ensure that she is not procedurally barred.

32. The instant application is filed pursuant to staff rule 11.4(a) on the basis that the decision was one requiring management evaluation.

Deadline is triggered by communication of a decision not implementation.

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

34. The Applicant understood the 11 May 2017 email as having notified her of a decision to implement a post adjustment change as of 1 May 2017 with transitional measures applied from that date meaning it would not impact the amount of salary received until August 2017. 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 Applicant considered that the 60-day deadline ran from the 11 May 2017 communication.

35. The email makes clear that the post adjustment change will result in a decrease in net remuneration of 7.7%. As such it communicated a final decision of individual application which will produce direct legal consequences to the Applicant. The case should be distinguished from that in *Obino* 2014-UNAT-405, which dealt with a decision within the ICSC's decisory powers. It may be distinguished from *Tintukasiri et al.* 2015-UNAT-526 which related to a methodology specifically approved by General Assembly Resolution and from *Ovcharenko* 2015-UNAT-530 which similarly related to a decision pursuant to a General Assembly Resolution.

36. In turn, in *Pedicelli* 2015-UNAT-555 it was held 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.

37. Further or in the alternative, as set out below the decision was taken ultra vires. As a consequence, 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.

38. 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.

39. The ICSC are unclear as to whether the 11 May 2017 decision has been rescinded and replaced. The Management Evaluation Unit take the position that challenge to the 11 May 2017 decision has been rendered moot, however, the Applicants cannot be certain that this may be relied upon.

40. Parts of the Applicant's challenge relate to elements of the 11 May 2017 decision that survive the "amendment" and parts relate to elements that were amended. The Applicants are conscious that since receivability is an issue for the Tribunal, the position taken by the Administration is not necessarily dispositive as to whether challenge to the 11 May 2017 decision was rendered moot by the amendment. Through an abundance of caution, the Applicant, therefore, consider it necessary to maintain this challenge even while a further challenge relating to the communications of 19 and 20 July 2017 is filed.

Considerations

41. The layered argument concerning receivability of the application involves the following issues: whether the application required a prior request for management evaluation; whether the application is directed against a reviewable administrative decision in the sense of art. 2.1(a) of the UNDT Statute; and, an issue that the Tribunal takes on *ex officio*, albeit prompted by the Respondent's argument that the Applicants "should not be allowed" to file multiple application against the same decision, i.e., whether by the virtue of final Judgment UNDT/2018/026, which -found

the lack of an administrative decision capable of being reviewed, the adjudication of the present application is barred by *res judicata*.

Whether the application required prior request for management evaluation

42. 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 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.

43. 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*[12], 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.

44. At the date of the filing of the application, rather than being determined *a priori* in a publicly accessible act, or, at the latest – at the time of the notification of an individual decision, the designation of technical bodies was being revealed on a case-by-case basis only once litigation has been advanced[13]. The situation has only recently been clarified by the issuance of ST/AI/2018/7 (Technical bodies). 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. As such, the Applicant acted correctly in bringing the present application in the regime of staff rule 11.2(a), that is, having first submitted the impugned decision for management evaluation and, consequently, the application is not belated. The Tribunal notes, however, that the Applicant had no means of ascertaining it prior to filing their "first wave" application, *i.e.*, until relevant representation was made on behalf of the Respondent, especially given that in the past different positions were expressed by him as to the status of the ICSC.[14] The Tribunal finds no grounds to attribute to the Applicant abuse of process under 10.6 of the UNDT Statute.

Whether the application is barred by res judicata

45. As noted by UNDT in *Nadeau*[15], it is questionable whether a matter adjudicated as non-receivable can be said to be *res judicata* if the merits have not been canvassed, considered and determined, and if there is still an actual unresolved controversy between the parties. In this connection, this Tribunal notes that the notion of receivability of applications before UNDT under art. 8 of the UNDT Statute covers

[12] At para. 39.
[13] See UNDT/2018/036 paras. 41-43 and jurisprudence cited therein
[14] *Ovcharenko* UNAT 2015-UNAT-530 para. 11 *v*. para 24.
[15] UNDT/2018/052 at para. 48.

questions that are purely procedural (compliance with deadlines, art. 8.1c., requesting management evaluation, art. 8.1(d)) but also those involving substantive law, such as existence of a decision capable of being reviewed (art. 8.1(a) in connection with art 2.1(a)), eligibility to file an application (art 8.1(b)), persistence of a claim on the part of the applicant (i.e., "mootness" of an application, introduced by the jurisprudence of the UNAT). This Tribunal considers it obvious that irreceivability for purely procedural reasons is not capable of creating *res judicata sensu stricto, i.e.*, determination made by the court does not reslove the merits of the dispute: the court cognisance and judgment is limited to a narrow issue of procedural obstacle, and the *res judicata* - if the term is to be applied at all[16] – encompasses only the narrow procedural situation within which the obstacle persists. Where the obstacle is removed, nevertheless, *i.e.*, deadline restored or management evaluation obtained, a possibility becomes open for adjudication of the merits of the claim without being foreclosed by the sameness of the adjudicated matter. On the contrary, a rejection of the claim for the substantive reasons extends the court cognisance over the merits of the claim, establishes a substantive defect that cannot be cured, and, as such, a repeated filing would normally bar trying the same matter again. Concerns of legal certainty and economy of proceedings[17] speak for accepting that a final judgment establishing irreceivability for substantive reasons produces *res judicata*.

46. The Tribunal holds, therefore, that the finding of irreceivability due to a failure to request management evaluation would not create *res judicata*, and an

[16] The doctrinal question is whether, in a situation where a lawsuit rejected for the reason of a procedural defect is brought again, such lawsuit falls to be examined afresh and potentially rejected upon a finding of the same defect, or can be *a limine* rejected as *res judicata*. The question is rooted in legal policy: absent determination of the merits, concerns of legal certainty as to substantive rights do not come into play; rather, a balance should be struck between economy of proceedings on the one hand and access to court on the other. In the UNDT practice, due to relatively short deadlines for the filing of the application which render the second application belated anyways, the question of *res judicata* of initial procedural obstacles is effectively rendered moot. While the question has not been explored, at least one UNAT judgement seems to indicate preference for applying the principle of *res judicata* to purely procedural issues as well (*Chaaban* 2015-UNAT-554).

[17] Principles affirmed by UNAT in *Shanks* 2010-UNAT-026*bis* at para. 4, albeit in a different aspect of *rei judicatae* question, and since invoked repeatedly.

application found irreceivable for the lack of management evaluation might be brought and considered after the management evaluation has been received.

47. Conversely, to establish irreceivability for the lack of administrative decision in the sense of art. 2 of the UNDT Statute, the judicial cognizance must go into the substance of the claim, the established defect is inherent to the claim, and as such, the application cannot be cured. As such, despite the same form of the decision, i.e., a judgment in the question of receivability, a judgment issued in this situation produces *res judicata*.

48. Applying the above to the "third wave applications", the question of existence of an administrative decision capable of being reviewed by the UNDT in relation to the decision of 11 May 2017 has already been determined between the same parties by the virtue of final Judgment No. UNDT/2018/026. Therefore, based on *res judicata*, the application falls to be rejected as irreceivable. This conclusion renders unnecessary discussing and deciding the remainder of the arguments.

CONCLUSION

49. The application is rejected as irreceivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 26th day of June 2018

Entered in the Register on this 26th day of June 2018

(Signed)

Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi