UNITED NATIONS DISPUTE TRIBUNAL

Cases No.:	See attached list[1]
Judgment No.:	UNDT/2019/101
Date:	30 May 2019
Original:	English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

GERA et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Mohammed Abdou, OSLA

Counsel for Respondent:
Esther Shamash, UNDP

[1] This judgment applies to 10 cases, the details of which are given in the list attached to it.

Introduction

1. The Tribunal is seized of 80 applications related to a challenge against the result of the comprehensive salary scale survey for local staff in India, conducted in June 2013. The applications involve the United Nations Secretariat, the Office of the United Nations High Commissioner for Refugees, the United Nations Entity for Gender Equality and the Empowerment for Women, and three United Nations Funds and Programmes (the United Nations Development Program ("UNDP"), the United Nations Population Fund and the United Nations Children's Fund).

2. This judgment concerns 10 applications related to 10 Applicants based in New Delhi working for UNDP.

Facts

3. The 2013 Comprehensive Salary Scale Survey for local staff based in India ("2013 India Salary Survey") was conducted pursuant to the methodology adopted by the International Civil Service Commission ("ICSC") (see ICSC/72/R.11, Review of the methodology for surveys of the best prevailing conditions of employment at duty stations other than headquarters and similar duty stations - survey methodology II) and the Manual for the conduct of surveys of the best prevailing conditions of employment at duty stations other than Headquarters and similar duty stations – methodology II.

4. As per the above methodology and art. II of the Memorandum of Understanding ("MOU") between the United Nations and the World Health Organization ("WHO") for 2012-2013, WHO was designated to continue to act as responsible agency for the coordination of the local salary scale survey in New Delhi, India. Therefore, WHO had the overall responsibility for the survey, including the appointment of the salary survey specialists.

5. Pursuant to the above-referenced MOU, the United Nations acted as an agent for WHO in performing activities described in the MOU relating to the 2013 salary survey in India.

6. On 10 July 2014, the Chief, Compensation and Classification Section ("CCS"), Human Resources Policy Service ("HRPS"), Office of Human Resources Management ("OHRM"), United Nations, provided the results of the "comprehensive salary survey that [OHRM] conducted on behalf of WHO in New Delhi, India" to WHO for its approval as the responsible agency.

7. By memorandum dated 17 September 2014, a Human Resources Specialist, Compensation, Human Resources Policy and Administration of Justice Unit ("HPJ"), Human Resources Department ("HRD"), WHO, Geneva, informed the Chief, CCS, HRPS, OHRM, United Nations, of the approval of the survey results.

8. The findings of the survey indicated that the salaries of the General Service and the National Officer categories in New Delhi were higher than the labour market by 13.4 per cent and 19.4 per cent, respectively. Because the salary survey entailed more than a 5% decrease in salaries, existing General Service and National Officer staff appointed prior to 1 November 2014 had their salaries "grandfathered/frozen", and new staff were subject to a new salary scale.

9. Following WHO's approval, OHRM published the above-mentioned new salary scale on its website on 1 October 2014, in the following terms:

> Subject: New Delhi (India) local salaries
>
> (AAA) Following the comprehensive salary survey conducted in New Delhi in June 2013, this is to advice you that the results of the survey indicate that salaries for locally recruited staff are above the labour market when compared with the remuneration package of the retained comparators by 13.4 per cent for general service (GGSS) category and 19.4 per cent for national officer category. Accordingly, the following salary scales are issued:
>
> (1) GS 62 and no 22, both effective 1 June 2013, payable only to staff recruited on or after one November 2014. Revised net salaries reflect downward adjustment of (-) 13.4 per cent for GGSS and (-) 19.4 per cent for NNOO.
>
> (2) Amend. one to GS 61 and no 21, effective 1 July 2012, payable to eligible staff already on board prior to one November 2014, the amendments are issued to reflect revised allowances.

(BBB) Revised allowances in Rupees net per annum are as follows:

(1) Child, per child, subject to maximum of six children

a. 23,511 applicable to staff members for whom the allowance becomes payable on or after one November 2014;

b. 27,156 applicable to staff members for whom the allowance becomes payable prior to one November 2014;

(2) First language

a. 29,532 applicable to staff members for whom the allowance becomes payable on or after one November 2014;

b. 34,104 applicable to staff members for whom the allowance becomes payable prior to one November 2014;

(3) Second language

a. 14,766 applicable to staff members for whom the allowance becomes payable on or after one November 2014;

b. 17,052 applicable to staff members for whom the allowance becomes payable prior to one November 2014.

Procedural History

10. The Applicants filed individual motions for extension of time to file applications before the Dispute Tribunal to challenge the result of the 2013 India Salary Survey. At the time, the Applicants, all self-represented, were General Service staff members of UNDP, based in New Delhi, India, and in the service of the Organization prior to 1 November 2014.

11. The Dispute Tribunal issued a Summary Judgment on 24 March 2015 (*Applicants UNDP* UNDT/2015/022), which concerned 14 UNDP General Service Applicants, whereby it joined the matters, considered the motions as incomplete applications and found them not receivable *ratione materiae* upon reliance on *Tintukasiri et al.* UNDT/2014/026, noting that the decision to freeze the existing

salary scales and to review allowances downward did not constitute an administrative decision for the purpose of art. 2.1(a) of the Tribunal's Statute.

12. By Judgment *Taneja et al.* 2016-UNAT-628, the Appeals Tribunal found that this Tribunal had "exceeded its competence and jurisdiction and committed errors in procedure when it determined that the requests for an extension of time were the 'equivalent' of applications". The Appeals Tribunal therefore reversed the UNDT Judgment and remanded all 14 cases to this Tribunal, with directions to permit the Applicants to file their applications. The Appeals Tribunal also remanded another 84 similar cases to the Dispute Tribunal.[2]

13. Pursuant to this Tribunal's Order No. 125 (GVA/2016) of 15 June 2016, 9 of the 14 Applicants covered by this Tribunal's 24 March 2015 Judgment filed their applications in August and December 2016. The remaining five Applicants did not file an application and their cases were closed by Order No. 238 (GVA/2016).

14. The nine applications received were served on the Respondent on 24 January 2017. On 14 February 2017, the Respondent filed a motion for summary judgment on the ground that the applications were not receivable *ratione materiae*.

15. By Order No. 42 (GVA/2017) of 15 February 2017, the Tribunal ordered the Applicants to file comments, if any, on the Respondent's motion. Only three Applicants (self-represented) responded to this Order.[3]

16. In anticipation of the complexity of the issues to be addressed, and bearing in mind that all applicants whose cases had been remanded were self-represented as well as the low response rate to its Order No. 42 (GVA/2017), the Tribunal instructed its Geneva Registry to contact the Office of Staff Legal Assistance ("OSLA") and request that it reach out to all applicants to assess whether it could

[2] See *Subramanian et al* 2016-UNAT-618, *Prasad et al* 2016-UNAT-629, *Bhatia et al* 2016-UNAT-630, *Thomas et al* 2016-UNAT-631, *Jaishankar* 2016-UNAT-632 and *Bharati* UNAT-2016-633.

[3] Applicant *Berry* (Case No. UNDT/GVA/2015/040/R1), Applicant *Surendran* (Case No. UNDT/GVA/2014/117/R1) and Applicant *Taneja* (Case No. UNDT/GVA/2014/118/R1).

provide legal representation in the proceedings. OSLA confirmed that it would take necessary action in this respect.

17. By Order No. 114 (GVA/2017) of 17 May 2017, the Tribunal, *inter alia*, ordered the Respondent to make additional submissions on the issue of the applications' receivability (see paras. 11 to 15 of the Order). Additionally, the Tribunal requested the Applicants to inform it if they had been successful in retaining OSLA representation and provided them with a deadline to file comments on the forthcoming Respondent's additional submission.

18. On 6 June 2017, OSLA informed the Tribunal that only two Applicants, together with another 53 applicants with identical cases pending before the Tribunal, had retained its services. OSLA further added that it would continue reaching out to applicants. Despite OSLA's efforts, 5 of the 10 Applicants concerned by this judgment remained self-represented.[4]

19. The Respondent filed his response to Order No. 114 (GVA/2017) on 9 June 2017.

20. By motion dated 5 July 2017, OSLA Counsel requested an extension of time to file comments on the issue of receivability of the applications. The Tribunal granted said extension by Order No. 141 (GVA/2017) of 7 July 2017, and OSLA Counsel filed comments on the issue of receivability, together with a request to file additional submissions on the merits, on 10 August 2017.

21. The Tribunal held a Case Management Discussion ("CMD") on 30 October 2018 during which it *inter alia* discussed with the parties the issue of the receivability of the applications.

[4] Applicant *Singh* (Case No. UNDT/GVA/2014/097/R1), Applicant *Srinivasan* (Case No. UNDT/GVA/2014/098/R1), Applicant *Sharma* (Case No. UNDT/GVA/2014/100/R1), Applicant *Thapliyal* (Case No. UNDT/GVA/2014/136/R1) and Applicant *Saxena* (Case No. UNDT/GVA/2014/175/R1).

22. By Order No. 335 (2018) of 23 November 2018, the UNAT Judge President remanded a 10th case to the Dispute Tribunal, namely Case No. UNDT/GVA/2014/87 (Choudhuri), with directions to add it "to the list of appellants named in Judgment No. 2016-UNAT-628". This Applicant retained OSLA's services to represent her.

23. The applications were initially assigned to Judge Rowan Downing, who had set them down for a hearing on the merits on 13 and 14 February 2019. Following Judge Downing's Order No. 2 (GVA/2019) of 18 January 2019, *inter alia* returning the case files to the UNDT Geneva Registrar "for possible reassignment to another judge", the matter was reassigned to the undersigned Judge.

24. By Order No. 6 (GVA/2019), the Tribunal vacated the hearing dates after finding "that it is in the interests of justice to determine the receivability of the applications as a preliminary matter, before entering into an examination of their merits". Furthermore, noting that such an issue is of a purely legal nature on which the parties, the majority of whom was represented by Counsel, had been given ample opportunity to make comments and file submissions, the Tribunal decided to adjudicate them on the papers.

Parties' submissions on Receivability

25. The Applicants' principal contentions are:

a. A request for management evaluation was not required. Staff rule 11.2(b) provides that the Secretary-General must determine if a decision was taken pursuant to the advice from technical bodies. In *Tintukasiri et al.*, the "Administration … found that requests for management evaluation were not receivable 'since the decision was taken pursuant to the advice from [a] Local Salary Survey Committee ("LSSC") in conjunction with salary specialists, and as such of a technical body under the terms of staff rule 11.2(b)". This is the case of the Applicants;

b. Furthermore, the above determination was made on behalf of the Secretary-General as per the language in the letter responding to the requests for management evaluation in *Tintukasiri et al.*;

c. Additionally, staff rule 11.2(b) does not impose a specific formal requirement for the determination of technical bodies. There is no requirement to have a "complete public list of technical bodies" and the determination in *Tintukasiri et al.* was made public in two judgments;

d. Assuming that no determination has been made, the Secretary-General's silence should be interpreted in favour of receivability;

e. The contested decision is an administrative decision affecting the terms of appointment of the Applicants; it is non-compliant with Annex I of the Staff Rules and Regulations, since the Secretary-General, amongst others, failed in his duty to fix the salary scales for staff members at the best prevailing conditions of employment in the locality of the UN office concerned;

f. The Applicants contest (1) the decision to freeze their respective salaries; and (2) the Administration's decision to maintain the salary scale in force prior to the salary freeze, insofar as this decision affects them;

g. Alternatively, the Applicants submit that a general salary freeze decision includes an implied decision to apply the freeze to the affected staff members individually; these implied decisions would therefore be the subject of the present challenge;

h. In the further alternative, the Applicants submit that they have all received oral confirmation from management that the salary freeze is applicable to them individually and thus seek to challenge these specific oral administrative decisions;

i. The Tribunal's Statute makes no distinction between acts of individual application and regulatory measures; art. 2 does not require for the decision to explicitly identify or name the specific individual(s) concerned; rather, what is required is that the staff member be adversely affected by the contested decision; concluding otherwise would allow the Administration to unilaterally define the jurisdictional boundaries of the UNDT by framing its decision in a particular way;

j. Requiring that a document identifies each staff member by name and is individually communicated to each staff member is particularly problematic in cases like the present ones, where the Administration has refrained from submitting individual notifications of the salary freeze;

k. The Respondent's contention that the Applicants ought to have challenged the monthly salary payslips must be dismissed, *inter alia*, since they do not contain or even explicitly refer to the impugned decision—what is challenged in this case is the salary freeze, not the amount of remuneration; further, payslips may reflect the implementation of the contested decision, but do not contain the administrative decision or the reasons for it; it is not logic to ask the Applicants to disregard a clear and unequivocal notification of a salary freeze and seek to challenge the same decision through a document that does not specifically refer to it; time-limits are triggered by notification, not implementation; and

l. Concerning the Respondent's reliance on *Tintukasiri et al.* in support of his argument that the contested decision is not reviewable, the Applicants are of the view that the UNDT is "not bound by a particular judgment but rather by the UNAT jurisprudence as a whole". *Andati-Amwayi* 2010-UNAT-058 and *Pedicelli* 2015-UNAT-555 are also relevant to the Applicants' cases and should be given precedence over *Tintukasiri et al.*.

26. The Respondent's principal contentions are:

a. The applications are not receivable *ratione materiae* because the Applicants failed to request management evaluation, which was required since their claims do not fall within the exception of staff rule 11.2(b), i.e., administrative decisions taken pursuant to advice from technical bodies. WHO did not advise the United Nations of the salary scales, but rather informed it of them;

b. Exceptions to requesting management evaluation should be interpreted restrictively. The Secretary-General has not determined that WHO is a technical body and, therefore, it cannot be considered as such for the purpose of staff rule 11.2(b). Furthermore, designation as a technical body cannot be inferred from the silence of the Organization or by analogy;

c. The Appeals Tribunal has held that absent "a determination by the Secretary-General that a specific decision-making body is a technical body, the exemption from … a management evaluation request under [s]taff [r]ule 11.2(b) does not apply" (see *Faust* 2016-UNAT-695 (para. 39) and *Gehr* 2014-UNAT-479 (paras. 25-26);

d. The Applicants cannot reasonably rely upon the quoted position of the UN Secretariat's Management Evaluation Unit ("UN MEU"), in *Tintukasiri et al.* in support of their not requesting management evaluation. First, the UN MEU has a discrete delegation of authority from the Secretary-General, which does not include the designation of technical bodies. Additionally, the UN MEU's opinions are not binding on the separately administered Funds and Programmes and other UN Entities who conduct their own management evaluation. Second, the *Tintukasiri et al.* Judgment cites another UNDT decision (*Shaia* UNDT/2013/096) where management evaluation was required concerning a challenge to the result of a local salary survey;

e. It follows from the above (para. 26.d), that no estoppel arises given the different employers and staff involved;

f. The applications are also not receivable *ratione materiae* because the challenge concerns "an unreviewable regulatory/legislative enactment", and not an "appealable administrative decision"; *Tintukasiri et al.* is not distinguishable from the instant applications. Also, all the criteria of an unreviewable regulatory enactment are present in the case at hand. The Applicants intend to challenge a "policy decision of general application, which is not an administrative decision subject to judicial review"; and

g. Judgment *Pedicelli* 2015-UNAT-555 does not assist the Applicants. That judgment approved and distinguished *Tintukasiri et al.*, it did not overrule it. In *Pedicelli*, the Applicant did not contest the change from a 9-grade salary scale to a 7-grade one but, instead, the fact that upon conversion she was placed at the wrong grade. *Pedicelli* did not involve a "challenge to the enactment/scale itself".

Consideration

27. The issue of an application's receivability is a matter of law that may be assessed even if not raised by the parties (see *Gehr* 2013-UNAT-313, *Christensen* 2013- UNAT-335). Furthermore, in *Christensen* the Appeals Tribunal held that "the [Dispute Tribunal] is competent to review its own competence or jurisdiction in accordance with Article 2(6) of its Statute" when determining the receivability of an application.

28. Therefore, although the Respondent only raised the issue of receivability *ratione materiae*, the Tribunal will also examine the issue of receivability *ratione temporis*.

Receivability ratione temporis

29. In its Order No. 125 (GVA/2016) of 15 June 2016, the Dispute Tribunal, pursuant to the Appeals Tribunal's direction, requested the Applicants to file their applications. The deadline to do so was set to 11 August 2016.

30. The record shows that six Applicants filed their applications after the above deadline.[5] However, this Tribunal's record also shows that these Applicants experienced technical difficulties filing on 11 August 2016. Furthermore, other

[5] Applicant *Singh* (Case No. UNDT/GVA/2014/97/R1), Applicant *Srinivasan* (Case No. UNDT/GVA/2014/98/R1), Applicant *Sharma* (Case No. UNDT/GVA/2014/100/R1), Applicant *Taneja* (Case No. UNDT/GVA/2014/118/R1), Applicant *Thapliyal* (Case No. UNDT/GVA/2014/136/R1) and Applicant *Saxena* (Case No. UNDT/GVA/2014/175/R1).

applicants with similar applications and the same deadline equally faced technical problems when they attempted to timely file their applications.[6]

31. The Tribunal is of the view that non-compliance with the deadline for technical reasons and supported by evidence falls outside the scope of art. 8.3, which requires a written request for extension from an Applicant. As such, the Tribunal is satisfied that, in this case, the Applicants concerned filed their applications after the set deadline due to reasons outside of their control, which they timely flagged. The Tribunal therefore finds that the applications are receivable *ratione temporis*.

Receivability ratione materiae

32. The Respondent argues that the applications are not receivable *ratione materiae* because the Applicants failed to request management evaluation of the contested decision, and the Tribunal cannot waive such mandatory requirement.

33. The Tribunal recalls that pursuant to staff rule 11.2(b) (emphasis added):

> 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.

34. The Tribunal confirms that a request for management evaluation is a legal and jurisdictional requirement of a compulsory nature that cannot be waived, neither by the parties nor by the Tribunal.

35. Indeed, the purpose of management evaluation is to allow the Organization to correct itself or to provide acceptable remedies to the parties in cases where, upon review, it determines that an administrative decision is unlawful or that the correct procedure was not followed.

[6] See Judgments *Prasad et al.* UNDT/2019/099, *Thomas et al.* UNDT/2019/100, *Bhatia et al.* UNDT/2019/102, *Manoharan, Chandran, Sharma, Subramanian, Naik, Siddiqui* UNDT/2019/103, and *Jaishankar, Bharati* UNDT/2019/104.

36. Management evaluation is *a sine qua non* condition to have access to the internal justice system. Access to justice is not an absolute right and procedural limitations, such as this one, are compatible with the nature and scope of access to justice, provided that they are prescribed by law and do not impair the very essence of such right.

37. Pursuant to staff rule 11.2(b), there are only two situations where the requirement to request management evaluation does not apply: disciplinary cases and decisions taken pursuant to advice obtained from technical bodies as determined by the Secretary-General.

38. The case at hand is not of a disciplinary nature, leaving the Tribunal to assess whether the contested decision, taken upon the advice of the LSSC and Salary Survey specialists, was taken upon the advice of a technical body. Relevantly, staff rule 11.2(b) does not provide for a particular way, e.g., administrative instruction or otherwise, for the Secretary-General to determine technical bodies.

39. The Tribunal notes that at the time of OHRM's cable (see para. 9 above), the Secretary-General had not yet issued an administrative instruction determining what bodies constitute technical ones for the purpose of staff rule 11.2(b). The relevant administrative instruction (ST/AI/2018/7) was issued only on 18 May 2018. Prior to this, staff members had little information, if none at all, concerning what constituted a technical body.

40. It is the Tribunal's view that not requesting management evaluation is an exception to the general rule and, as a consequence, it is incumbent on the Applicants to show that they fall under it.

41. In the present case, the Applicants argue that, at the time they filed their applications, they relied on a previous position by the Administration in *Tintukasiri et al.* whereby "requests for management evaluation were not receivable 'since the decision was taken pursuant to the advice from the [Local Salary Survey Committee ("LSCC")] in conjunction with salary survey specialists, and as such of a technical body under the terms of staff rule 11.2(b)" (brackets in the original).

Furthermore, the Applicants claim that in that case, the UN MEU made a determination about the matter on behalf of the Secretary-General.

42. Administrative practices need to be consistent and uniform over a certain period of time, so that staff members rely on and build legitimate expectations in relation to them. The Tribunal is of the view that the position adopted by the UN MEU in one or two cases does not constitute a consistent and coherent administrative practice that could lead the Applicants to build a legitimate expectation on which they could have relied upon. Furthermore, it does not rise to the level of judicial precedent given the UN MEU's nature as an administrative body within the Organization.

43. Moreover, the fact that the Secretary-General has delegated authority to the UN MEU to perform management evaluations on his behalf under ST/SGB/2010/9 (Organization of the Department of Management), cannot lead to conclude that the Secretary-General is bound by its interpretation of such requirement in one or two specific situations. On the contrary, delegation of powers is defined from top to bottom of the hierarchical chain and not the other way around.

44. To be more precise, sec. 3 of ST/SGB/2010/9 describes the overall functions of the Under-Secretary-General for Management, whereas its sec. 10 describes the core functions of the UN MEU. The definition of "technical bodies" is not specifically contemplated in such description of functions. Instead, delegation of authority, to that effect, is contemplated in two other legal instruments: ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) and, more recently, in ST/AI/2018/7 (Technical bodies).

45. In accordance with sec. 4.2of ST/SGB/2009/4, "[a]dministrative instructions shall be promulgated and signed by the Under-Secretary-General for Management or by other officials to whom the Secretary-General has delegated specific authority".

46. As a consequence, the Tribunal finds that defining a technical body requires a specific delegation of authority to be exercised under the form of an administrative instruction.

47. From the Tribunal's point of view, it is not the role of the UN MEU to replace the legislative or administrative powers of the Secretary-General unless a delegation of authority has been issued.

48. The Tribunal understands that it is the Secretary-General's exclusive prerogative to legislate and to define what "technical bodies" are, as he recently did, through the Under-Secretary General for Management, in ST/AI/2018/7.

49. The Appeals Tribunal had the same view in its Judgment *Gehr* UNAT-2014-479, where it held that:

> 25. There was no evidence before the Dispute Tribunal (nor before this Tribunal) that the Secretary-General had made a determination pursuant to Staff Rule 11.2(b) designating rebuttal panels as "technical bodies".
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> 26. In the absence of such designation and having regard to the specific provisions of Staff Rule 11.2(b) and the overarching import of Staff Rule 11.2(a) (especially when read together with Article 8(1)(c) of the Dispute Tribunal Statute), the Appeals Tribunal finds that the UNDT had no legal nor evidential basis to justify its determination that a rebuttal panel constituted a technical body, thus exempting Mr. Gehr from the mandatory first step of management evaluation. Moreover, even absent any designation process by the Secretary-General, the particular requirements set out in Section 14.1 of ST/AI/2010/5 do not persuade the Appeals Tribunal that the Secretary-General intended that a rebuttal panel should be considered as a technical body.

50. However, the Tribunal is aware of the fact that the UN MEU's determination was reflected in a public judgment of both the Dispute and the Appeals Tribunal (*Tintukasiri et al.* UNDT-2014-026, para. 25, *Tintukasiri et al.* 2015-UNAT-526, para. 6). Nonetheless, the Tribunal underlines that none of these judgments created a "judicial precedent" in respect of the requirement related to the request for management evaluation.

51. In fact, both judgments only addressed the issue of "irreceivablity" from the point of view of the nature of the contested decision and did not adjudicate on the point at stake in the instant applications, i.e., the definition of a technical body, nor did they include a determination on the applicability or not of such legal requirement.

52. In *Ovcharenko et al., Kucherov* UNDT/2014/035, this Tribunal stated in the factual section that:

> 15. Some of the Applicants, including Applicants *Ovcharenko* and *Kucherov*, requested management evaluation of the administrative decision of the Secretary–General to implement the … actions and recommendations of the ICSC and the General Assembly[.]

53. In that Judgment, this Tribunal held that:

> 20. As a preliminary matter, since the applications are being rejected on other grounds below, the Tribunal finds that it is not necessary to examine the question whether the Applicants were in fact obliged to submit a request for management evaluation prior to filling an application with the Tribunal and to determine the Receivability *ratione temporis* of the application.

54. The Tribunal also notes that no official communication was issued by the Secretary-General, following the issuance of the above judgments, to inform staff members that the UN MEU's determination therein with respect to the qualification of the LSSC in conjunction with salary survey specialists as a "technical body", for the purpose of staff rule 11.2(b), was correct or that it reflected the Secretary-General's view with respect to such determination.

55. The Applicants allege that should it be concluded that the Secretary-General has made no determination concerning technical bodies in the context of staff rule 11.2, his "silence should be interpreted in favour of receivability". This argument cannot stand. In this connection, the Tribunal recalls what the Appeals Tribunal held in *Faust* 2016-UNAT-695:

> 31. The plain wording of the Staff Rule cited above makes it clear that the general rule that a request for management evaluation must be submitted prior to seeking judicial review of an administrative decision is only subject to two exceptions: i) when the administrative decision imposes a disciplinary or non-disciplinary measure following the completion of a disciplinary process; and ii) when the administrative decision is taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General.

> 32. As for all exceptions, these situations must be interpreted restrictively. The provisions may not be interpreted broadly such as to conclude, for example, that any technical body could be equated to a "technical bod[y], as determined by the Secretary-General" within the meaning of Staff Rule 11.2(b). Similarly, not every formal panel can be likened to a "technical body". Therefore, an analogy cannot be drawn to determine whether the investigation panel in this case constitutes a "technical body". (footnote omitted)
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> 33. Ms. Faust argues that she was exempt from the requirement of submitting a request for management evaluation as a prerequisite to invoking the jurisdiction of the UNDT. She claims that the determination by the Secretary-General under Staff Rule 11.2(b) is irrelevant. She also contends that in the absence of such determination by the Secretary-General, the remaining "ambiguity" should be assumed by the Organization.
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> 34. Ms. Faust's reliance on these arguments is misconceived. This is a case where we apply the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish (footnote omitted).

56. Finally, it is worth noting that, as pointed out by the Respondent, UN MEU's opinions are not binding on management evaluations that the separately administered Funds and Programmes and other UN Entities conduct. This notwithstanding, the Tribunal took note of the position taken at the 10 October 2018 CMD by Respondent's Counsel representing the separately administered Funds and Programmes and other UN Entities that they would most likely accept a Secretary-General's determination as to what constitutes a technical body for the purpose of staff rule 11.2(b), and not make a separate determination. Indeed, while the authority to review requests for management evaluations has been delegated to the separately administered Funds and Programmes and other UN Entities concerned, the determination of what constitutes a technical body under staff rule 11.2(b) rests solely on the Secretary-General. Any other approach would lead to a system with different standards applying to different employing organizations.

57. Based on the above, the Tribunal finds that requesting management evaluation was, in these cases, a compulsory requirement. Since the Applicants did not do so, their applications are irreceivable.

Self-represented Applicants

58. As noted above (para. 18), five Applicants remained self-represented despite attempts to have them contact OSLA and consider retaining its services for legal representation.

59. The applications of these Applicants are identical to the ones of those represented by OSLA. In the interest of justice, OSLA's arguments concerning receivability of the applications were considered with respect to self-represented Applicants who did not avail themselves of the opportunity to either make additional submissions in this respect and/or to appear before the Tribunal at the CMD.

60. In closing, the Tribunal wishes to commend OSLA for its efforts in reaching out to all self-represented applicants to propose its services, thus assisting in allowing to as many of them proper legal representation in connection with complex legal issues.

Conclusion

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

The applications are rejected as not receivable *ratione materiae*.

(*Signed*)
Judge Teresa Bravo
Dated this 30th day of May 2019

Entered in the Register on this 30th day of May 2019
(*Signed*)
René M. Vargas M., Registrar, Geneva