



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2019/009, 010,
011, 012, 013, 014, 015, 016,
017, 018, 019 and 020.
Order No.: 039 (NBI/2019)
Date: 21 March 2019
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DOEDENS et al. (UNFPA)
CORREIA REIS et al. (UNOPS)
BETTIGHOFER et al. (UNDP)
AVOIGNON et al. (UNHCR)
ALSAQQAF et al. (UN-Women)
ALIGULA et al (UNICEF)
AKSIOUTINE et al. (UNHQ)
BOZIC et al. (UN-Women)
ANGELOVA et al. (UNHCR)
ANDRES et al. (UNOPS)
ANDREEVA et al. (UNDP)
ABD AL-SHAKOUR et al. (UNHQ)

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE RESPONDENT'S
MOTIONS FOR SUSPENSION OF
PROCEEDINGS**

Counsel for the Applicants:
Robbie Leighton, OSLA

Counsel for the Respondent:
UNFPA, UNOPS, UNDP, UNHCR, UN-Women, UNICEF, HRLU/UNOG

Introduction

1. Between 8 and 10 August 2018, the Geneva Registry of the Dispute Tribunal received 12 applications on behalf of 804 Applicants challenging the decision to implement a post adjustment change in the Geneva duty station resulting in a pay cut. Due to recusals, the 12 cases were transferred to the Dispute Tribunal in Nairobi.

2. On 19 February 2019, the applications were served on the different agencies of the Respondent. The representatives of the Respondent were asked to file their replies to the applications by 21 March 2019.

3. The current applications are the fifth set (“waves”) of appeals by the Applicants with regard to the decision to implement a post adjustment change in the Geneva duty station resulting in a pay cut. The first three “waves” of applications stemming from the same decrease of post adjustment have been disposed of as irreceivable by way of UNDT judgments which became final. The applications belonging to the “fourth wave”, concerning decisions whereby the reduction in post adjustment has been temporarily mitigated by a transitional allowance (gap closure measure), are still pending. The “fifth wave” cases concern decisions whereby an actual reduction in post adjustment had been implemented.

4. On 5 and 8 March 2019, the Counsel for the Respondent filed identical motions requesting that the present matters be held in abeyance until cases belonging to the “fourth wave” (UNDT/NBI/2017/108, UNDT/NBI/2017/110, UNDT/NBI/2018/14, UNDT/NBI/2018/15, UNDT/NBI/2018/17, UNDT/NBI/2018/18 and UNDT/NBI/2018/19) are adjudicated. In support of the motions, the Counsel for the Respondent submit:

- a. A review of the applications in the present, fifth wave of Geneva cases, demonstrates that the need for alternative filings is purely to cover receivability issues, as the Applicants do not accept the Respondent’s position

in the previous litigation, that until communication of a pay slip demonstrating an actual reduction in pay is received no individualized decision has been communicated. In addition, as reflected in para. 31 of the applications, the present applications express the Applicants' view that the impugned decision does not result from a regulatory decision of the General Assembly but, instead, one from the ICSC.

b. The same legal issues raised by the Applicants, including the role of the ICSC, are presently before the Dispute Tribunal for adjudication as part of the fourth wave of Geneva cases.

c. Judicial economy, clarity and the sound administration of justice speak for adjudicating the fourth wave of Geneva cases prior to engaging in further litigation in the cases belonging to the fifth wave which the Applicants themselves recognize are duplicative.

d. Suspending the proceedings in the present cases pending the resolution of the fourth wave of Geneva cases would not affect any of the Applicants' rights.

5. The Respondent further requests that, should the present motions for suspension of the proceedings be denied, the Respondent be afforded three weeks to submit their reply from the date of issuance of the Dispute Tribunal's order.

6. On 12 March 2019, Counsel for the Applicant filed his comments on the Respondent's motions for suspension of proceedings, in which it is submitted:

a. Multiple filings were made necessary due to a lack of clarity as to whether management evaluation request was required as a first step in the challenge and due to a lack of clarity as to when the contested decision would be deemed of individual effect and, therefore, reviewable by the Tribunal.

b. For those Applicants involved in the fourth wave, this fifth filing was made to cover the eventuality that either the UNDT or UNAT might find that the decision was not of individual effect until an actual reduction in pay resulted from the reduction in the transitional allowance. This is the position argued by the Respondent in the fourth wave. For others, this represents their first filing to contest the pay cut resulting from the implementation of the 2016 cost of living survey.

c. The Applicants agree with the Respondent that the substantive issues in these cases mirror those in the fourth wave. The cases differ only in relation to receivability rather than substance. The Applicants agree with the Respondent's position that the interests of judicial economy should be prioritized when deciding on the appropriate manner to deal with these cases but differs in how this can best be achieved.

d. For those Applicants not involved in the fourth wave, the Applicants are unclear how the suspension might serve the interests of judicial economy since, presumably, those cases would still need to be processed and lead to a judgment regardless of the outcome of the fourth wave. However, the suspension of those cases would not remove the burden on the Tribunal, it would merely postpone such burden.

e. In the instant case, for those Applicants involved in the fourth wave, a single judgment dealing with both outstanding cases would serve economy of proceedings, among others, would allow for a single route of appeal.

f. If unsuccessful in both fourth and fifth waves, the Applicants will be obliged to appeal both judgments in order to secure a second instance review. If successful in the fourth wave, the Applicants would still be obliged to appeal the fifth wave as to do otherwise would risk the UNAT agreeing with the Respondent regarding the requirement for an actual decrease in salary before the decision became of individual application. The UNAT might

disagree with the UNDT regarding the receivability of the fourth wave but deem the fifth wave foreclosed in the absence of an appeal.

g. Should the Applicants appeal a negative fifth wave decision following a successful judgment in the fourth wave it is perhaps conceivable that the appeal of a negative judgment when in receipt of a different positive judgment might give rise to a further, novel, argument from the Administration on receivability of that appeal.

h. The procedurally rigorous nature of the jurisdiction already represents a challenge to staff members in exercising their rights. A staff member who has acted assiduously to anticipate the procedural arguments of the Administration should not be rendered yet more vulnerable from having to predict the position that might be taken by the UNAT on such a complex issue. Therefore, the Applicants suggest that for those applicants involved in both fourth and fifth waves, the two applications be disposed of in a single judgment rather than suspending the fifth wave cases.

Considerations

7. Article 10.1 of the UNDT Statute provides that the Dispute Tribunal may suspend proceedings in a case at the request of the parties for a time to be specified by it in writing. The Tribunal interprets this article as authorization to suspend proceedings without showing any legally valid cause other than the parties' request. Neither the Statute nor the Rules of Procedure make provision for any other case of suspending the proceedings. This Tribunal has previously held that, based on art. 19 of the UNDT Rules of Procedure which grant it the power to issue such orders as necessary to ensure proper administration of justice, it may suspend proceedings against the opposition of one of the parties where the resolution of a case would be

necessarily predicated upon the outcome of another pending case.¹

8. In the present case, however, the situation is different. As held by this Tribunal in the “first wave”, every payslip received by a staff member is an expression of a discrete administrative decision, even though it only repetitively applies a more general norm in the individual case.² So interpreted, a decision impugned in the fifth wave of cases may be appealed and adjudicated in itself, without legally requiring prejudication of issues encompassed by the fourth wave, moreover, without entering in the relation of *lis pendens*, or *res judicata*, with cases belonging to the fourth wave. Adjudication of common issues may affect subsequent cases only by force of a pronouncement of the Appeals Tribunal.

9. For the latter reason, although suspending the fifth wave of cases until adjudication of the fourth wave is not indispensable, it would be still rational to do so until such time when the Tribunal and the parties obtain the Appeals Tribunal’s position on the issues involved. The Tribunal will, nevertheless, respect the Applicants’ opposition against the suspension and, instead, will consider attaining the same effect through appropriate prioritization of cases.

IT IS ACCORDINGLY ORDERED

10. The request for suspension of proceedings in the above-listed cases is denied.

11. The Respondent shall file a reply to the applications by 15 April 2019.

¹ *Ross* UNDT/NBI/2016/056, Order No. 010 (NBI/2019).

² E.g., *Andreeva et al.* UNDT/2018/024 at para. 58; see also *Lloret Alcañiz et al.* 2018-UNAT-840 at paras. 65- 67.

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013, 014, 015, 016, 017, 018, 019 and 020.

Order No.: 039 (NBI/2019)

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 21st day of March 2019

Entered in the Register on this 21st day of March 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi