UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos:	UNDT/GVA/2014/088/R1, 089/R1, 096/R1, 123/R1, 137/R1
Order No.:	114 (GVA/2017)
Date:	17 May 2017
Original:	English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

PRASAD et al.[1]

GERA et al.

JAISHANKAR et al.

THOMAS et al.

BHATIA et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON CASE MANAGEMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Federica Midiri, UNFPA, Faiza Zouakri, UNDP
Yun Hwa Ko, UN-Women, Miles Hastie, UNICEF
Elizabeth Brown, UNHCR, Alexandre Tavadian, UNHCR

[1] The present Order applies to sixty-nine Applicants whose case was remanded by UNAT to the UNDT. A list showing each Applicant's last name and case number is attached.

Introduction

1. After the present cases were remanded back to the Dispute Tribunal by the Appeals Tribunal, the Applicants filed their applications with this Tribunal, which were served on the Respondents. The Respondents filed motions for summary judgment and for additional time to file a reply on the merits. Pursuant to Orders made by the Tribunal, the Applicants filed comments on the Respondents' motions in March 2017.

Consideration

2. Having reviewed the parties' submissions, the Tribunal considers that it is necessary that Counsel for the Respondent file a complete reply. In it, the Respondent is urged to also file comments with respect to the elements concerning the receivability of the cases, as developed below.

3. The Tribunal recalls that the Appeals Tribunal stated in *Massabni* 2012-UNAT-238 that:

> [T]he authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

4. It further notes that the Appeals Tribunal relies on the United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003) for the following definition of an administrative decision:

> There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact

> that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

5. It is the considered view of the Tribunal that the definition provided in *Andronov* cannot be read in isolation from the rest of that judgment, and recalls that before providing the definition of an administrative decision, the former Administrative Tribunal of the United Nations was cautious to state the following:

> The Tribunal believes that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without *lacunae* and failures, so that the final objective, which is the protection of staff members against alleged non-observance of their contracts of employment, is guaranteed. The Tribunal furthermore finds that the Administration has to act fairly vis-à-vis its employees, their procedural rights and legal protection, and to do everything in its power to make sure that every employee gets full legal and judicial protection.

6. The Appeals Tribunal has further held in *Andati-Amwayi* 2010-UNAT-058 that:

> What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

7. The Appeals Tribunal further held in *Pedicelli* 2015-UNAT-555 that:

> Notwithstanding the foregoing, it is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an "administrative decision " falling within the scope of article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.

8. Under the definition applied in *Andronov*, it may thus appear that administrative acts of regulatory nature (such as Secretary-General's bulletins or administrative instructions) have to be differentiated from administrative decisions that, although formulated in form of a general order, are nevertheless directed at a defined group of people or one definable on the basis of general

characteristics, and which have direct legal consequences for each individual of that group.

9. In light of the foregoing, the Respondent is invited to make submissions on the view that what the Applicants are in fact contesting are the individual decisions to apply to each of them the earlier salary scales before the comprehensive salary survey in June 2013, hence, the "freeze" of their salaries, as applied to them individually, on a monthly basis, starting from the issuance of the new salary scales. Indeed, the Applicants stated in their applications that "[t]his has resulted in a freeze on the salary scales for staff on board prior to 1 November 2014, including to myself".

10. Counsel for the Respondent stated in their reply that "[t]his survey resulted in a downward adjustment of 13.4 percent for staff members in the General Service category and 19.4 percent for staff members in the National Officer category for those staff recruited after 1 November 2014. *For staff recruited before that date, like the Applicants, salaries were frozen*" (emphasis added). This, in the Tribunal's view may be read as an admission that the decisions do individually apply to each Applicant and that, as a result, they have an individual effect on each of them. In other words, it is arguable that the decisions that the Applicants are contesting have individual effect and the applications include a contestation of the lawfulness of the general or prior decision, that is, the new salary scales issued as a result of the survey, which constitutes the basis for the individual decision to freeze each Applicant's salary.

11. Counsel for the Respondent further argue in their motions for summary judgment that the applications are not receivable because the Applicants failed to undergo management evaluation of the contested decision under staff rule 11.2(a), referring, *inter alia*, to Judgments *Faust* 2016-UNAT-695, *Gehr* 2014-UNAT-479, *Chawla* 2016/UNDT/200 and *Wahi* 2016/UNDT/201.

12. The Tribunal notes that in a similar case, the Management Evaluation Unit had informed the Applicants that their requests for management evaluation were not receivable "since the decision was taken pursuant to the advice from the

[Local Salary Survey Committee ("LSSC")] in conjunction with salary survey specialists, and as such of a technical body under the terms of staff rule 11.2(b)" (see *Tintukasiri et al*. UNDT-2014-026, para. 25, *Tintukasiri et al.* 2015-UNAT-526, para. 6). The Tribunal is aware that in the case at hand, unlike in the case of *Tintukasiri et al.,* the salary scales were published following the approval by the World Health Organization ("WHO"), and not by the Headquarters Salary Steering Committee ("HSSC").

13. The foregoing notwithstanding, the Tribunal finds it appropriate to ask the Respondent to file submissions on whether in the case at hand, the Applicants could rely on the above described position of the Management Evaluation Unit, as reflected in the publically available judgments in the case of *Tintukasiri et al*. This is particularly so since in both cases, the survey had been carried out by a LSSC. The Respondent should also comment on whether, and as a consequence, the Administration is estopped from raising the requirement for a request for management evaluation in the case at hand, if applicable.

14. In this respect, the Respondent should provide a detailed explanation as to why and under which legal authority the salary scales that are at the basis of the present applications were approved by WHO, instead of by the HSSC (as in *Tintukasiri et al.*). The Respondent is further requested to comment on whether and if so, why, this different approval procedure—WHO on the one hand, HSSC on the other hand—has an impact on the requirement for a request for management evaluation, if any, in light of the position of the Management Evaluation Unit expressed in that respect in *Tintukasiri et al.* and the involvement of a LSSC and salary survey specialists in both cases.

15. The Respondent should also provide a list or otherwise a determination by the Secretary-General of technical bodies for the purpose of staff rule 11.2(b) and inform the Tribunal whether and if so, where, such list is published or can otherwise be obtained by staff members.

16. After receiving the Respondent's reply, including on the matters raised above, the Applicants are to be given the opportunity to comment thereon. The

Tribunal thinks that in light of the complexity and technical nature of the issues in these cases, the Applicants may want to seek the assistance of the Office of Staff Legal Assistance ("OSLA"). The present Order shall be transmitted to OSLA for its information and attention.

17. Further, in order to streamline proceedings in these cases, Counsel for the Respondent are asked to designate lead, in consultation with Counsel acting on behalf of the Respondent for other agencies (cf. Order No. 115 (GVA/2017), para. 16).

IT IS ORDERED THAT:

18. By **Friday, 9 June 2017**, the Respondent file a full reply, including comments and information on the issues raised under paras. 9 to 15 above.

19. By **Monday, 6 June 2017**, the Applicants shall inform the Tribunal whether they were successful in retaining OSLA assistance. In the affirmative, the Applicants are given four weeks as from the date of getting confirmation of such assistance or as of 6 June 2017, whichever is later, to file comments on the Respondent's reply under para. 18 above. Otherwise, the Applicants are given four weeks from the filing of the Respondent's reply under para. 18 above, or from the date they were informed that OSLA would not provide them assistance, whichever is later, to file their comments on that reply.

(*Signed*)

Judge Rowan Downing
Dated this 17th day of May 2017

Entered in the Register on this 17th day of May 2017

(*Signed*)

René M. Vargas M., Registrar, Geneva