	UNDT/NBI/2017/077
Judgment No.:	UNDT/2018/015/Corr.1
Date:	2 February 2018
Original:	English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar:

13. 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.
>
> 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[illegible]

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

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expected. [4] This was followed by a broadcast on 20 July 2017 by the UNOG Director-General 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.[5]

19. In its memorandum entitled "Post adjustment classification memo" for August 2017, 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

evaluation", and that, pursuant to staff rule 11.2 (d), the management evaluation was to be completed no later than 1 October 2017.

A matter cannot be before the MEU and the Dispute Tribunal simultaneously.

23. The application relates to the implementation of the May 2017 ICSC decision. A request for management evaluation was submitted on 10 July 2017 and as of the date of the filing of the application on 3 August 2017, the response from the management evaluation was not completed. The response of the management evaluation was subsequently sent to the Applicants on 21 and 22 August 2017.

24. It is uncontested that the Applicants submitted the present application without awaiting the result of their request for management evaluation. It is further uncontested that the Applicant stated that they may appeal the MEU's response to their request for management evaluation.

25. Allowing the Applicants to file multiple applications is contrary to the efficient use of judicial resources. As the Applicants requested management

31. On 21 and 22 August 2017, the Applicants were informed by MEU that the July 2017 ICSC decision rendered moot the matter raised in their management evaluation request.

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

32. The May 2017 ICSC decision and the July 2017 ICSC decision are not administrative decisions pursuant to art. 2 of the UNDT Statute or pursuant to the Staff Regulations and Rules. The setting of the post adjustment multipliers by the ICSC, as reflected in its May 2017 and July 2017 decisions, must be implemented by the Secretary-General, there is no room for interpretation or the exercise of discretion. 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.

33. 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 United Nations Appeals Tribunal (UNAT) confirmed in *Obino* that the application was not receivable and there was no room for discretion in implementing the change in the hardship classification of a duty station mandated by the ICSC; this was notwithstanding that the change had a negative impact on the staff member. The case needs to be distinguished from *Ovcharenko et al.* 2015-UNAT-530 where the Secretary-General declined to implement the ICSC decision, because the General Assembly had adopted a ded ə شي يه

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

34. 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.

35. Even 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 ICSC may constitute a technical body.

36. Staff rule 11.2(b) indicates that the Secretary-General is competent to

referred to as rules or regulations), as w

whether the applicant's pay had been affected at the time; although it likely had, the argument was rather about negative impact on the salaries of the Addis Ababa staff in general.[17] The UNDT interpreted the challenge as directed against the decision of the ICSC and held that such challenges are not receivable insofar as the ICSC is answerable and accountable only to the General Assembly and not the Secretary-General, to whom ICSC decisions cannot be imputed in the absence of any discretionary authority to execute such decisions.[18] The UNAT, who agreed that the ICSC had made a decision binding upon the Secretary-General[19], affirmed the judgment because "Mr. Obino did not identify an administrative decision capable of being reviewed, as he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment."[20]

52. With minor variation, the UNAT restated the holding in *Tintukasiri et al.* in *Ovcharenko et al.,* where the appellants contested the Secretary-General's refusal to pay post adjustment based on a multiplier promulgated by the ICSC. The UNAT found that the administrative decision not to pay the appellants their salary with the post adjustment increase, the execution of which was temporarily postponed, was a challengeable administrative decision, despite its general application because it had a direct impact on the actual salary of each of the appellants who filed their application after receiving their pay slips for the relevant period. [21] The UNAT held also: "It was not the ICSC or the General Assembly's decision to freeze their salaries, but the execution of that decision that was challenged insofar as it affected the staff members' pay slips."[22]

53. Last, in *Pedicelli*, the administration announced that it would commence conversion from the nine-level salary scale then applied to GS staff in Montreal to the seven-level salary scale promulgated by the ICSC. A number of staff members, including the appellant in that case, received Personnel Action forms confirming their new grade. The UNAT echoed *Obino* regarding the lack of

[17] *Obino* UNDT-2013-008 at para 30.
[18] *Ibid*., at para 34 and para. 47.
[19] *Obino* 17

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58. The UNAT jurisprudence confirms these conclusions. Without ever withdrawing from the terms of *Andronov*, it affirmed receivability of applications when an act of general order has resulted in norm crystalisation in relation to individual staff members by way of a concrete decision expressed through a payslip or personnel action. This is precisely the holding of *Tintukasiri*, the leading case on the issue. The other UNAT judgments, notwithstanding occasional intertwining elements pertinent to legality rather than receivability[28] , express the same concept and are directed toward the same legal effect.

59. From the foregoing, it is evident that by applying the test of *Andronov*, and even assuming that the 11 May 2017 communication confers a general intent to implement the ICSC decision with respect to each and every staff member based in Geneva, such individual decisions have not yet been taken. This renders the applications irreceivable. Moreover, even the decision of general order would have been rescinded by the next communication of 18 July 2017 in which the ICSC determined that its earlier measures would not be implemented as originally

CONCLUSION

61. This application is dismissed as not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 2nd day of February 2018

Entered in the Register on this 2nd day of February 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

67	Mr	Dzioubinski	Oleg	ECE	P4	XII
68	Ms	Eam-On	Pitchaya	INTRACEN	P1	XI

101	Ms	Haggar	Nathalie	UNOG	P4	I
102	Mr	Harrison	Daniel	UNOG	P4	IV
103	Mr	Hauser	Benjamin	UNOG	P3	III
[redacted]						

152	Ms	Maniu	Daniela Elisabeta	OHCHR	P4	XII
153	Ms	Mansion	Sabrina	ECE	P3	Other
154	Ms	Markides	Olga	UNOG	P5	III
155	Ms	Marshall	Fiona	ECE	P3	XI
156	Ms	Marx Medvedowsky	Saskia	INTRACEN	P3	VI
157	Mr	Maystre	Nicolas	UNCTAD	P3	VIII
158	Mr	Meyer	Olivier	UNOG	P3	XI
159	Mr	Meyer	Stephane	UNOG	P3	VII
160	Mr	Michalak	Roman Witold	ECE	P4	XII
161	Mr	Millet	Fabrice	UNCTAD	D1	X
162	Ms	Miquel Gelabert	Jo399..16 reV			

185	Ms	Parrondo	Cristina	UNOG	P3	X
186	Ms	Pavlova	Antoanela	OHCHR	P3	Other
187	Mr	Pelerins	David Gregory	UNOG	P3	I
188	Mr	Pierron	Mathieu	UNJSPF	P3	VI
189	Mr	Piski	Gabor Karel	UNCTAD	P3	Other
190	Ms	Pla Huberti	Maria Rosa	UNOG	P5	V
191	Ms	Rakotondravao	Clotilde	UNOG	P3	Other
192	Mr	Ramoul	Khairedine	UNCTAD	P4	X
193	Ms	Redigolo	Theresia	OHCHR	P4	III
194	Mr	Reisons	Edvins	UNCTAD	P2	XII
195	Mr	Rodas Arellano	Leonel Sebastian	INTRACEN	P3	IX
196	Ms	Rodier	Benedicte	OHCHR	P3	XII
197	Mr	Rodriguez or Rodriguez-Martinez	Esteban	UNOG	P4	VIII
198	Ms	Rodriguez Perez	Beatriz	INTRACEN	TC	3
199	Ms	Rondeau	Veronique	INTRACEN	P3	I
200	Ms	Rossi	Karina	UNOG	P4	VIII
201	Ms					

202	Mr	Said	Anton	INTRACEN	P5	X
203	Ms	Sainz Goutard	Veronica	UNOG	P4	III
204	Mr	Saiovici	Gady	ECE	P2	VII
205	Mr	Salathe	Edouard Michel	DGACM	P4	IV
206	Mr	Sambucini	Gianluca	ECE	P4	Other
207	Ms	Sanchez Bou	Ana Isabel	UNOG	P3	X
208	Mr	Sanchez Perez	Juan Ignacio	UNOG		

219	Ms	Sharma	Vishal	UNOG	P4	XI
220	Ms	Siari	Mahdia	ECE	P2	IX
221	Mr	Solchaga Zubillaga	Juan	OCHA	P3	IX
222	Mr	Souto-Maior	Alexandre	OHCHR	P4	XI
223	Mr	Steierer	Florian			

236	Mr	Usabiaga Flores	Mikel	OCHA	P3	XI
237	Mr	Valente	Paolo	ECE	P4	Other
238	Ms	Valls Senties	Laia	OHCHR	P3	Other