



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/081

Judgment No.: UNDT/2018/024

Date: 23 February 2018

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANDREEVA et al.¹

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicants:

Robbie Leighton, OSLA

Counsel for the Respondent:

Thomas Jacob, UNDP

Faiza Zouakri, UNDP

¹ 11 Applicants from UNDP whose names appear in Annex 1 to this Judgment.

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

16. On 10 July 2017, the Applicants filed management evaluation requests against

management evaluation.

17.

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 2018.⁶

20. 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. Staff members who joined after 1 May 2017 have since received the same post adjustment than staff members who joined prior to 1 May 2017.⁷

21. In the period from July to September 2017 the post adjustment multiplier has been further revised.⁸

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bodies. The Applicants are therefore not exempt from the requirement to first request a management evaluation prior to submitting an application with the UNDT.

28. The application is not receivable under staff rule 11.2(b), and should be filed under staff rule 11.2(a), requiring staff members to, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

The 11 May 2017 ICSC decision, or the implementation thereof, is moot.

29. 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evaluation request dated 10 July 2017 relates to the May 2017 ICSC decision, or its implementation, which was superseded by the July 2017 ICSC decision.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 the May 2017 ICSC decision is void.

30. 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

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 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

of *Pedicelli* 2015-UNAT-555, the I -level classification system for General Service staff could be implemented in different ways and therefore involved an exercise of discretion. In the present case, the application has challenged the implementation of the post adjustment multiplier. This implementation does not involve the exercise of discretion on the part of the Secretary-General and therefore is not reviewable.

37. Given the difficulty in predicting the position that might be taken by the Respondent in the instant case, the Applicants are obliged to file multiple applications in order to ensure that they are not procedurally barred.

38. The instant application is filed pursuant to staff rule 11.2(b) on the basis that the ICSC may constitute a technical body. A further application will be made in due course pursuant to the management evaluation request of 10 July 2017.

Deadline is triggered by communication of a decision not implementation.

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

40. The 11 May 2017 email notified the Applicants of a decision to implement a post adjustment change as of 1 May 2017 with transitional measures applied from that date, meaning that it would not have impact on the amount of salary received until August 2017. As such, it communicated a final decision of individual application which will produce direct legal consequences to the Applicant

42. In *Pedicelli* it was found 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 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.

43. Further or in the alternative, the decision was taken *ultra vires*. Consequently, 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.

44.

2017 indicate that the 11 May 2017 decision has been rescinded and replaced by a new administrative decision triggering a further 60-day deadline. However, the Administration has not taken a clear position in this regard.

45.

this latest development amends the occurred. Various elements of the original decision are changed though confusingly the ICSC affirm their decision that the collection and processing of the data from the 2016 baseline cost-of-living surveys were carried out by the Secretariat in accordance

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48. It is recalled that in *Hamad*¹⁰, the UNAT adopted the former United Nations forged in *Andronov*, which describes an administrative decision as:

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 legal consequences.¹¹

49. As seen from the above, the notion of an administrative decision for proceedings before the UNDT resembles what in the European continental system is sometimes referred to as an administrative act *sensu stricto*, and which is reached by an agency to regulate a single case in the area of public law and thus being characterised as unilateral, concrete, individual, and producing direct external effect, *i.e.*, whose legal consequences are not directed inward but outward the administrative apparatus.¹² Concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts, has been explained in the second sentence of the *Andronov de*

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or

determined that its earlier measures would not be implemented as originally proposed. The uncontested submission from the Respondent is that:

.. the July 2017 ICSC decision superseded the [11] May 2017 ICSC 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

