Procedural background

1. On 6 and 28 November 2017, the Geneva Registry of the United Nations Dispute Tribunal (UNDT) received 344 similar applications filed by the Office of Staff Legal Assistance (OSLA) on behalf of staff members employed by different United Nations entities at the Geneva duty station.

2. The 344 applications were grouped into eight cases and were assigned to Judge Teresa Bravo.

No.

methodology based on recommendations of the Advisory Committee on Post Adjustment Questions (ACPAQ).[1]

9. The results of the surveys were included in the ACPAQ Report presented to

Case No.

12. Following the issuance of the broadcast, Geneva-based organizations expressed concerns regarding the cost of living surveys and post adjustment matters.[5]

13. On 10 July August 2017, numerous staff members based in Geneva, including the Applicant, filed management evaluation requests[6] and, parallel with these, on 3 August 2017, she filed direct applications on the merits concerning the May 2017 decision; the latter proceedings for the present Applicant resulted in Judgment No. UNDT/2018/025 ("first wave Geneva cases").

14. Meanwhile, on 18 July 2017, at its 85th Session, the ICSC determined that its earlier measures would not be implemented as originally proposed. Staff members were then informed by broadcasts dated 19 and 20 July 2017 that there would be no post adjustment-related reduction in net remuneration for serving staff members until 1 February 2018, and that from February 2018, the decrease in the post adjustment would be significantly less than originally expected.[7]

15.

17. In the period from July to September 2017 the post adjustment multiplier has

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 retroactive payments to staff members who joined on or after 1 May 2017.

23. On 21 and 22 August 2017, the Applicant was informed by the Management Evaluation Unit of the United Nations Secretariat that the July ICSC decision rendered moot the matter raised in her management evaluation request.

24. In its application dated 31 October 2017, OSLA submitted that the July

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was projected to result in a 7.7% decrease in net remuneration, this in fact did not happen because the decision was superseded by the July 2017 ICSC decision.

27. With the July 2017 ICSC decision, the Applicant has 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 Applicant should not be allowed to file multiple applications to contest a new
gin 7n9 tive ev(the)7-129(a)3c)(9)5(a)4dj19s5(D9(pe)4c)4ted)4nt)-2 Tm( )]TJET EMC 0 0 (ve)4)BDC BT 2 Tf1

35. The Applicant understood the 11 May 2017 email as having notified her of a decision to implement a post adjustment change as of 1 May 2017 with transitional measures applied from that date meaning it would not impact the amount of salary received until August 2017. Since the time limit runs from communication rather than implementation of a decision and no rule specifies the means of communication required to trigger that deadline, the Applicant considered that the 60-day deadline ran from the 11 May 2017 communication.

36. The email makes clear that the post adjustment change will result in a decrease in net remuneration of 7.7%. As such it communicated a final decision of individual application which will produce direct legal consequences to the Applicant. The case should be distinguished from that in *Obino* 2014-UNAT-405, which dealt with a decision within the ICSC's decisory powers. It may be distinguished from *Tintukasiri et al.* 2015-UNAT-526 which related to a methodology specifically approved by General Assembly Resolution and from *Ovcharenko* 2015-UNAT-530 which similarly related to a decision pursuant to a General Assembly Resolution.

37. In turn, in *Pedicelli*

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.

39. It is possible that the Administration's communications of 19 and 20 July 2017 indicate that the 11 May 2017 decision has been rescinded and replaced by a new administrative decision triggering a further 60-day deadline.

40. The ICSC are unclear as to whether the 11 May 2017 decision has been rescinded and replaced. The Management Evaluation Unit take the position that challenge to the 11 May 2017 decision has been rendered moot, however, the Applicant cannot be certain that this may be relied upon.

41. Parts of the Applicant's challenge relate to elements of the 11 May 2017 decision that survive the "amendment" and parts relate to elements that were amended. The Applicants are conscious that since receivability is an issue for the Tribunal, the position taken by the Administration is not necessarily dispositive as to whether challenge to the 11 May 2017 decision was rendered moot by the amendment. Through an abundance of caution, the Applicant, therefore, consider it necessary to maintain this challenge even while a further challenge relating to the communications of 19 and 20 July 2017 is filed.

Considerations

42. The layered argument concerning receivability of the application involves the following issues: whether the application required a prior request for management evaluation; whether the application is directed against a reviewable administrative decision in the sense of art. 2.1(a) of the UNDT Statute; and, an issue that the Tribunal takes on *ex officio*, albeit prompted by the Respondent's argument that the Applicants "should not be allowed" to file multiple application against the same decision, i.e., whether by the virtue of final Judgment UNDT/2018/025, which found

the lack of an administrative decision capable of being reviewed, the adjudication of the present application is barred by *res judicata*.

Whether the application required prior request for management evaluation

43. The issue arises from the question whether a decision taken pursuant to decisions of ICSC is taken "pursuant to advice obtained from technical bodies". In this respect, art. 8 of the UNDT Statute and staff rule 11.2(b), provide, in relevant parts:

> Article 8
>
> (a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;
>
> (b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;
>
> (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required[.]

Staff rule 11.2

> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
>
> (b) 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.

44.

questions that are purely procedural (compliance with deadlines, art. 8.1c., requesting management evaluation, art. 8.1(d)) but also those involving substantive law, such as existence of a decision capable of being reviewed (art. 8.1(a) in connection with art 2.1(a)), eligibility to file an application (art 8.1(b)), persistence of a claim on the part of the applicant (i.e., "mootness" of an application, introduced by the jurisprudence of the UNAT). This Tribunal considers it obvious that irreceivability for purely procedural reasons is not capable of creating *res judicata sensu stricto*, *i.e.,* determination made by the court does not reslove the merits of the dispute: the court cognisance and judgment is limited to a narrow issue of procedural obstacle, and the *res judicata* - if the term is to be applied at all[16] – encompasses only the narrow procedural situation within which the obstacle persists. Where the obstacle is removed, nevertheless, *i.e*., deadline restored or management evaluation obtained, a possibility becomes open for adjudication of the merits of the claim without being foreclosed by the sameness of the adjudicated matter. On the contrary, a rejection of the claim for the substantive reasons extends the court cognisance over the merits of the claim, establishes a substantive defect that cannot be cured, and, as such, a