
UNDT/NBI/2017/118

Judgment No.: UNDT/2018/075

Date: 28 June 2018

Original: English

Before:

Introduction

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

would lead to a reduction of 7.5% in the net remuneration of staff in that duty station as of the survey date (October 2016).³

10. 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:⁴

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 Geneva, effective 1 May 2017 (in lieu of 1 April as initially intended) with the transitional measures foreseen under the methodology and operational rules approved by the General

³ Paragraph 6 and Annex 2 of the reply.

⁴ Paragraph 7 and Annex 3 of the reply.

Assembly, to reduce the immediate impact for currently serving staff members.

Accordingly, the new post adjustment will initially only be applicable to new staff joining the duty station on or after 1 May 2017; and currently serving staff members will not be impacted until August 2017.

During the month of April, further appeals were made to the ICSC by organizations and staff representatives to defer the implementation of the revised post adjustment. On 24 and 25 April 2017, Executive Heads, Heads of Administration and HR Directors of Geneva-based Organizations and UNOG senior management met with the ICSC ViceC

14. On 19 July 2017, an article was posted on the Geneva intranet by the Department of Management indicating that a new decision of the ICSC of 18 July 2017 had amended the Commission's earlier decision with regard to the post-adjustment in Geneva, to the effect 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 less than originally expected. This was followed by a broadcast on 20 July 2017 by the Director General of the United Nations Office at Geneva (UNOG) 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."⁷

15. In its memorandum entitled "Post adjustment classification memo" 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 closure measure that would 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 2018.⁸ The Tribunal has no information as to whether the memorandum was made accessible to the Applicants.

16. 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.⁹

17. In the period from July to September 2017 the post adjustment multiplier has been further revised, mainly as a result of fluctuation of the US dollar. The decision of ICSC of May 2017 has not been implemented. The later decision has been implemented to the extent that the affected staff received a PTA meant to moderate

⁷ Paragraph 4 and Annex 3 of the application.

⁸ Paragraph 13 and Annex 10 of the reply.

⁹ Paragraph 14 and Annex 11 of the reply.

the impact of the decreased post adjustment. This was reflected by pay check at the end of August 2017.¹⁰

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24. 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 May 2017. However, the July 2017 ICSC decision superseded the 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 retroactive payments to staff members who joined on or after 1 May 2017.

25. On 21 and 22 August 2017, the Applicants were informed by the Management Evaluation Unit of the United Nations Secretariat that the July ICSC decision rendered moot the matter raised in their management evaluation request.

26. In its application dated 31 October 2017, OSLA submitted that the July decision “did represent communication of a new decision to change post adjustment”.

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

27. Criterion for receivability of an application in cases of implementation of ICSC decisions should be whether the Secretary-

28. The application is not receivable as the Applicant is not adversely affected by the ICSC decisions on post adjustment multipliers.

29. In order for the application to be receivable, the Applicant must be able to demonstrate that she has been adversely affected by the contested decision. While 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.

30. 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 Applicants should not be allowed to file multiple applications to contest a new post adjustment multiplier for Geneva.

31. The Applicants have filed two separate applications on 3 August 2017 and 6 November 2017 for the purpose of contesting the same May 2017 decision.

32. In the present application, the Applicants assert that “Part of the Applicant’s challenge relate to elements of the 11 May 2017 decision that survive the [July] ‘amendment’, however, in their application of 16 October 2017 the Applicants submitted that the July decision “did represent communication of a new decision to

informed the Applicant's OSLA Counsel that the applicable decision was made on 19 July 2017 and not sooner.

33. Similarly the Applicants have taken contradictory positions to justify the filing of multiple appeals of the same decision based upon the contention that it may or may not have been taken by a technical body. The proper procedure would have been to submit a written request to the UNDT in accordance with art. 8.3 of its Statute to suspend the deadline to file an appeal pending the Applicants being informed whether the contested decision was taken pursuant to advice received from a technical body and then to file a single application to the UNDT rather than the current multiple applications. The purpose of art. 10.6 of the UNDT Statute specifically serves the purpose of avoiding such frivolous proceedings.

Applicants'

further risk the breakup of the common system with staff members from one jurisdiction afforded recourse denied in other parts.

42. Further or in the alternative, as set out below the decision was taken ultra vires. As a consequence, 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.

43. 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.

44. 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 Applicants cannot be certain that this may be relied upon.

45.

Considerations

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.

48. The language of staff rule 11.2(b) indicates that it has been left to the Secretary-General's discretion to determine where he wishes to rely on advice from technical bodies such as he deems fit, be it permanent or ad hoc. As has been already noted by the Dispute Tribunal in *Syrja*¹⁴, making a determination as to what constitutes a technical body is not the function of the Dispute or Appeals Tribunals. The exercise of discretion in reliance on technical bodies might be subject to judicial review only indirectly, through impact that such advice had on individual decisions.

49. At the date of the filing of the application, rather than being determined *a priori* in a publicly accessible act, or, at the latest – at the time of the notification of an individual decision, the designation of technical bodies was being revealed on a case-by-case basis only once litigation has been advanced¹⁵. The situation has only recently been clarified by the issuance of ST/AI/2018/7 (Technical bodies). This Tribunal considers that absent a designation by the Secretary-General, the ICSC is not to be deemed a technical body for the purpose of exempting the impugned decision from the management evaluation requirement. As such, the Applicants acted correctly in bringing the present application in the regime of staff rule 11.2(a), that is,

Whether the application is barred by res judicata

50. As noted by UNDT in *Nadeau*¹⁷, it is questionable whether a matter adjudicated as non-receivable can be said to be *res judicata* if the merits have not been canvassed, considered and determined, and if there is still an actual unresolved controversy between the parties. In this connection, this Tribunal notes that the notion of receivability of applications before UNDT under art. 8 of the UNDT Statute covers 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 resolve 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 all¹⁸ – 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

certainty and economy of proceedings¹⁹ speak for accepting that a final judgment establishing irreceivability for substantive reasons produces *res judicata*.

51. The Tribunal holds, therefore, that the finding of irreceivability due to a failure to request management evaluation would not create *res judicata*, and an application found irreceivable for the lack of management evaluation might be brought and considered after the management evaluation has been received.

52. Conversely, to establish irreceivability for the lack of administrative decision in the sense of art. 2 of the UNDT Statute, the judicial cognizance must go into the substance of the claim, the established defect is inherent to the claim, and as such, the application cannot be cured. As such, despite the same form of the decision, i.e., a judgment in the question of receivability, a judgment issued in this situation produces *res judicata*.

53. Applying the above to the “third wave applications”, the question of existence of an administrative decision capable of being reviewed by the UNDT in relation to the decision of 11 May 2017 has already been determined between the same parties by the virtue of final Judgment No. UNDT/2018/022. Therefore, based on *res judicata*, the application falls to be rejected as irreceivable. This conclusion renders unnecessary discussing and deciding the remainder of the arguments.

CONCLUSION

54.

Annex 1

List of Applicants

1. Maria Cristina CARDENAS FISCHER
2. Jose DE MESA
3. Simone DETTLING
4. Celia Maarit HALLE
5. Tomas HENZLER FERREIRA MARQUES
6. Aeree KIM
7. Juliette KOHLER
8. Katarina MAGULOVA
9. Laura MESZAROS
10. David Milton OGDEN
11. Abiola Ifueko OLANIPEKUN
12. Pascal Michel Edmond PEDUZZI
13. Markus PIKART
14. Diana RIZZOLIO
15. Maliuka Amelie Sonia TAOUFIQ-CAILLIAU
16. Tatiana TEREKHOVA
17. Melisa TIN SIONG LIM
18. Carla VALLE-KLANN
19. Juan Carlos VASQUEZ MURILLO
20. Susanna WINGFIELD