



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANDRES et al.¹

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicants:

Robbie Leighton, OSLA

Counsel for the Respondent:

Kong Leong Toh, UNOPS

¹21 Applicants from UNOPS, whose names appear in Annex 1 to this Judgment.

adjustment 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).

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 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 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 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 res

Geneva survey results, as well as an in-depth explanation of the results of the 2016 baseline cost-of-living surveys at Headquarters²

14.

12 May 2017, the ICSC indicated that Geneva was one of the duty stations whose

Geneva, to the effect that there would be no post adjustment-

Case No.:

United Nations Charter and was established in accordance with General Assembly resolution 3357(XXIX) of 18 December 1974 in which it approved the ICSC Statute.

27. Article 11(c) of the ICSC Statute provides that the Commission shall establish the classification of duty stations for the purpose of applying post adjustments. The ICSC does not advise the Secretary-General on post adjustment; rather, the ICSC takes decisions which have to be implemented by the Secretary-

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 n .66(e)4()-199(I)23(C)-2(S)-3(C)-2()-189(ha)4(s)4(n)approved t .66(he)4()-18 closure measure to address n31(a)4(n)-19(y)20()-129(r)-6(e)4(duc)4(ti)-3(on)-129(in)-n31(ne)4(t) .66

members immune from any review regardless of the circumstances. This is staff members with 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. The 19 and 20 July 2017 communications describe the changes m

not 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 with the approved methodology while simultaneously forwarding a report suggesting the contrary to the Advisory Committee for evaluation.

46. Since the Administration is not clear whether the original decision has been rescinded and replaced, the Applicants, in order to protect their rights, are

obliged to maintain their challenge to the 11 May 2017 communication and may in due course be obliged to contest the 19 and 20 July 2017 communications.

Considerations

47. In the layered argument concerning receivability of the application, the primary question to be addressed is the nature of the decision that the Applicants seek to challenge. The Applicants identified the contested decision as being the 11 May 2017 email from the Administration related to the post adjustment change effective 1 May 2017. Whilst the content of the email relays findings and decisions of ICSC and the Respondent copiously argues irreceivability of an application directed against decisions of ICSC, it is however obvious from the application that the challenge is directed not against the acts of ICSC but against the communication as such, which announces the intent to implement the ICSC directive. The legal issue arising for consideration at this stage is therefore whether the application is properly against an administrative decision in the sense of art. 2.1(a) of the UNDT statute, which provides as follows:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of

include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

48. It is recalled that in *Hamad*¹⁰, the UNAT adopted the former United
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

¹⁰ *Hamad* 2012-UNAT-269, at para. 23.

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* definition reproduced above. When it comes to the requirement of external effect, the UNAT made it explicit in *Andati-Amwayi*¹³ that, in accordance with the UNDT Statute, the proceedings are concerned with decisions having impact not just on the legal order as a whole but on the terms of appointment or contract of employment of the staff member. What

In this regard, the *Andronov* definition was not explicit as to whether the UNAT jurisdiction extends over decisions which, albeit not expressing norms *par excellence* abstract, are nevertheless directed toward general criterion or a defined or definable circle of people (decisions of general disposition or general order).¹⁴

50. The question arose in *Tintukasiri et al.* where the appellants had challenged the Secretary-Headquarters Salary Steering Committee promulgation of revised salary scales for the General Service and National Officer categories of staff in Bangkok, which announced a freeze of the salaries for extant staff members at then-existing rates and established a second tier of salaries for staff members hired on or after 1 March 2012. The decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 did not amount to an administrative decision under art. 2.1(a) of the Statute, as per the terms of *Andronov* because at the moment of their issuance the secondary salary scales were to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. Regarding the freeze of the then-existing salary scales receivable *ratione materiae* because the contested decision was of a general order, in that the circle of persons to whom the salary freeze applied was not defined individually but by reference to the status and category of those persons within the Organisation, at a specific location and at a specific point in time.¹⁵ However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-Headquarters Salary Steering Committee.

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 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 ICSC had made a decision binding upon the Secretary-General¹⁹, affirmed the

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 employment²⁰

52. With minor variation, the UNAT restated the holding in *Tintukasiri et al.* in *Ovcharenko et al.*, where the appellants contested the Secretary-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 sled120()-89(the)-8i3120()-1,ex

discretion on the part of the Secretary-General in implementing ICSC decisions. It however concluded:

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

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.²³

54. In his current argument, the Respondent points out to disparate outcomes

amounting to rescission of the previous one. Absent individual decisions, however, this consideration becomes immaterial for the instant case. Other pertinent questions of receivability need not be resolved at this point.

CONCLUSION

61. This application is dismissed as not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 23rd day of February 2018

Entered in the Register on this 23rd day of February 2018

(Signed)

Eric Muli, Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi

Annex I**List of Applicants**

		Last Name	First Name
1	Mr	Andres	Cedric
2	Mr	Belhassan	Chakib
3	Mr	Broholt	Mikkel
4	Ms	Choi	Hye Lynn
5	Ms	Deschaine	Emily
6	Ms	Grossmann	Marion
7	Mr	Hadjel	Hakim
8	Mr	Herrero Crespo	Ramon
9	Mr	Kaiser	Brian
10	Mr	Karim-Khan	Moin
11	Mr	Langham	Albert Gregory
12	Mr	Lemenez	Guillaume
13	Mr	Lunte	Kaspars
14	Ms	Mathieu Gotch	Clara
15	Mr	Mazza	Paul

