



## **Introduction**

1. On 3 August 2017, the

7. On 15, 16 and 18 September 2017, the Counsel for the Respondent filed identical Motions requesting the Tribunal:

a. For a joint consideration of the 332 applications on the grounds that: the Applicants in all nine cases are challenging the same decision; they all claim the exact same relief; the material facts in all nine cases are identical; the Tribunal has been requested to determine substantially the same questions of law and fact; the Counsel for the Respondent wish to file a single reply; and a joint consideration of the cases would promote judicial economy by minimizing duplication of proceedings.

b. To submit a single reply on the issue of receivability only.

c. For a six-week extension of the deadline to file a single reply should the Tribunal consider that a response on the merits is required at this stage.

8. On 18 September 2017, the Tribunal issued Order No. 152 (NBI/2017) in which it granted the Respondent leave to file a single reply on receivability and on the merits in relation to the nine cases and extended the deadline for filing the single reply until 31 October 2017.

9. The reply was filed on 31 October 2017.

10. The Tribunal has decided that an oral hearing is not required in determining the preliminary issue of receivability in this case. tcal9(on )] tw9(a)4(n )-Oeao3(ue)0 0 1 51o1 0 0 i111

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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.<sup>6</sup>

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.<sup>7</sup>

21. In the period from July to September 2017 the post adjustment multiplier has been further revised.<sup>8</sup> 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 the impact of the decreased post adjustment.<sup>9</sup>

22. On 9 August August 2017, the MEU response was sent to the UNHCR Applicant informing them that the new determination of the ICSC rendered moot the matter raised in the management evaluation request of 10 July 2017. MEU further indicated that the additional submed ional19(th7m0 g01lthat )-6(b29(2017 )-22OS( )-1L)jo

24. It is uncontested that the Applicants submitted the present application without



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 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.

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

~~84, Sections 1 and 2 of the Constitution of the State of Rwanda, 1991 (Rwanda) and the 1992 Constitution of the State of Rwanda, 1992 (Rwanda).~~

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.

### **Applicant's submissions on receivability**

*The ICSC may constitute a technical body.*

36. Staff rule 11.2(b) indicates that the Secretary-General is competent to determine what represents a technical body for purposes of determining if a decision requires management evaluation or is contestable directly to the UNDT. The Secretary-General has not published a list of such technical bodies. In similar cases the Administration has alternately taken the position that decisions were and were not

interpretation as to what constitutes a technical body has been subject to change over time and is not necessarily consistent between the MEU and Counsel representing the Respondent before the UNDT (for example as illustrated by *Syrja* UNDT/2015/092).

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 Applicants. 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 Applicants considered that the 60-day deadline ran from the 11 May 2017 communication.

41. Such a decision has direct legal consequences for the Applicants and is properly reviewable. The instant case can be distinguished from that in *Obino* which *Tintukasiri et al.* 2015-UNAT-526 which related to a methodology specifically approved by a General Assembly Resolution and from *Ovcharenko et al.*, which similarly related to a decision pursuant to a a

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 Organiz(rna)7(1 j)-3(6ti2n358 55y)] TJETBT

## 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 6.4mpute3a and pass judgement on an application filed by an individual, as provided for in article 3, pute3aagraph 1, of the present statute, against the Secretary Genete3aal 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 fore at the time of alleged non-compliance.

48. It is recalled that in *Hamad*<sup>10</sup>, the UNAT adopted the for 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

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50. The question arose in *Tintukasiri et al.*, where the appellants had challenged the Secretary-Headquarters Salary Steering Committee

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.

he decision to issue secondary salary scales for staff members re6002 Tm[0037004B0048forfor7KHfor52.



Ababa duty station. The factual narrative of the judgment is silent as to whether the  
was rather about negative impact on the salaries of the Addis Ababa staff in general.<sup>17</sup>  
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.<sup>18</sup> The UNAT, who agreed that ICSC had made a decision  
binding upon the Secretary-General<sup>19</sup>  
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

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systemically inappropriate. Second, there is no genuine contradiction in UNAT jurisprudence as to what constitutes a reviewable administrative decision.

56. The use of discretion as criterion for determination of the being of an administrative decision, or for its reviewability by the UNDT, has no basis in the



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

60. present an amendment of the original decision rather than a new one, the Tribunal agrees with the Respondent that replacing most of the essential elements of the previous administrative act with new ones constitutes a new administrative decision, 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 23<sup>rd</sup> day of February 2018

Entered in the Register on this 23<sup>rd</sup> day of February 2018

*(Signed)*

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

**Annex 1**

**List of Applicants**

1. Valentina Tsvetkova ANGELOVA
2. Nagette BELGACEM
3. Alain CRAUSAZ
4. Jacqueline EATZ
5. Eva GARCIA BOUZAS
6. Luz Adriana GARCIA SALAZAR
7. Meliha HADZIABIC
8. Claire Eloise INDER
9. Elias NTAWURUHUNGA
10. Scott POHL
11. Ritu SHROFF
12. Patricia SLEEMAN
13. Vladimir SMOLJAN
14. Cedric VIDONNE