Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar

Procedural background

1. On 6 November 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. The Geneva Registry assigned these cases to Judge Teresa Bravo.

3. This case concerns 14 Applicants from UNHCR. All the Applicants in the eight cases are requesting the rescission of the Organization's decision dated 11 May 2017 to implement a post adjustment change in the Geneva duty station effective 1 May 2017 which results in a pay cut of 7.7%. The Applicants also seek compensation for any loss accrued.

4. On 30 November 2017, Judge Bravo issued Orders Nos.: 227, 229, 230, 231, 232, 233, 234, and 235 (GVA/2017) recusing herself from handling the cases. On the same date, Judge Rowan Downing, President of the United Nations Dispute Tribunal, issued Order No. 236 (GVA/2017) accepting the recusal of Judge Bravo, recusing himself from adjudication of the cases, and ordering the transfer of the eight cases to the Dispute Tribunal in Nairobi.

5. In order to distinguish this case from other ones stemming from the decrease of the post adjustment in Geneva and for the 2

10. On 11 May 2017, the Applicant 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 salary surveys' process and the high response rates provided by staff in the duty stations provide assurance that the results

staff members until 1 February 2018, and that from February 2018, the decrease in the post adjustment would be significantly less than originally expected.[8]

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

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

25. 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 Secretary-General has no discretionary authority in proceeding with implementi

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.

28. 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.

29. 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 they submitted that the July decision "did represent communication of a new decision to change post adjustment". Whereas on 9 August 2017, the Deputy High Commissioner clarified that the May 2017 ICSC decision had been superseded by the July 2017 decision. Therefore, and contrary to the Applicants' contentions they were not obliged to file multiple application to ensure that they were not procedurally barred.

30. 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 submissions on receivability

The ICSC may constitute a technical body.

31. 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 made by technical bodies falling under staff rule 11.2(b). The Administration's 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).

32. 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.

33. The instant application is filed pursuant to staff rule 11.4(a) on the basis that the decision was one requiring management evaluation.

Deadline is triggered by communication of a decision not implementation.

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

35. The Applicants understood the 11 May 2017 email as having notified them 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 Applicants 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 remuner 517.2o4(Tf1 0 0l 624.1 Tm0 g80.1 2t.7%.1 . Ba)O9T/F1 12 2t.7%.1 .dBa faio

Ovcharenko 2015-UNAT-530 which similarly related to a decision pursuant to a General Assembly Resolution.

37. In turn, in *Pedicelli*

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 Applicants, 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.

on behalf of the Respondent, especially given that in the past different positions were expressed by him as to the status of the ICSC.[15] The Tribunal finds no grounds to attribute to the Applicants abuse of process under art. 10.6 of the UNDT Statute.

Whether the application is barred by res judicata

46. As noted by UNDT in *Nadeau*[16], 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 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[17] – 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

[15] *Ovcharenko* UNAT 2015-UNAT-530 para. 11 *v*. para 24.
[16] UNDT/2018/052 at para. 48.
[17] The doctrinal question is whether, in a situation where a lawsuit rejected for the reason of a procedural defect is brought again, such lawsuit falls to be examined afresh and potentially rejected upon a finding of the same defect, or can be *a limine* rejected as *res judicata*. The question is rooted in legal policy: absent determination of the merits, concerns of legal certainty as to substantive rights do not come into play; rather, a balance should be struck between economy of proceedings on the one hand and access to court on the other. In the UNDT practice, due to relatively short deadlines for the filing of the application which render the second application belated anyways, the question of *res judicata* of initial procedural obstacles is effectively rendered moot. While the question has not been explored, at least one UNAT judgement seems to indicate preference for applying the principle of *res judicata* to purely procedural issues as well (*Chaaban* 2015-UNAT-554).

Annex I

List of Applicants

	Last Name	**First Name**
1	Angelova	Valentina Tsvetkova
2	Belgacem	Nagette
3	Crausaz	Alain
4	Eatz	Jacqueline
5	Garcia Bouzas	Eva
6	Garcia Salazar	Luz Adriana