Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BOZIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Melissa Bullen UN Women,
Mylène Spence, UN Women

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

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

8. The results of the surveys were included in the ACPAQ Report presented to the ICSC Secretariat at its 84th meeting in March 2017. The ICSC Secretariat noted

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

12. On 10 July

16. 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 19-20 July 2017 decision has been implemented to the extent that the affected staff received a PTA meant to moderate the impact of the decreased post adjustment. This was reflected by pay check at the end of August 2017.[10] That decision was appealed in the second and the fourth "waves" of Geneva cases.

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was projected to result in a 7.7% decrease in net remuneration, this in fact did not happen because the decision was superseded by the July 2017 ICSC decision.

26. 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 post adjustment multiplier for Geneva.

27. The Applicant has filed two separate applications on 3 August 2017 and 6 November 2017 for the purpose of contesting the same May 2017 decision.

28.

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.

38. 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.

39. 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.

40. 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

41. 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/2018/026, 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

42. 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.

43. 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*[12], 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.

44. 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 advanced[13]. 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 Applicant acted correctly in bringing the present application in the regime of staff rule 11.2(a), that is, having first submitted the impugned decision for management evaluation and, consequently, the application is not belated. The Tribunal notes, however, that the Applicant had no means of ascertaining it prior to filing their "first wave" application, *i.e.*