



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/119

Judgment No.: UNDT/2018/072

Date: 27 June 2018

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANDREEVA et al.¹

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicants:

Robbie Leighton, OSLA

Counsel for the Respondent:

Thomas Jacob, UNDP

¹ 11 Applicants from the United Nations Development Programme (UNDP) whose names appear in Annex 1 to this Judgment.

Procedural background

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

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August 2017, they filed direct applications on the merits concerning the May 2017 decision; the latter proceedings for the present Applicants resulted in Judgment No. UNDT/2018/024

check at the end of August 2017.¹¹ That decision was appealed in the second and the fourth “waves” of Geneva cases.

18. On 6 November 2017, OSLA filed the present application.

19. On 24 December 2017, the General Assembly adopted resolution A/RES/72/255 on

23. On 23 August 2017, the Applicants were informed that the 18 July ICSC decision rendered moot the matter raised in their management evaluation request.

24. 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.

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 implementing the ICSC’s decisions on post adjustment. The General Assembly has repeatedly reaffirmed that “resolutions of the General Assembly and

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.

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”.

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

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.

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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 all¹⁷ – 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 repeated filing would normally bar trying the same matter again. Concerns of legal certainty and economy of proceedings¹⁸ speak for accepting that a final judgment establishing irreceivability for substantive reasons produces *res judicata*.

47. 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.

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*.

48. Conversely, to establish irreceivability for the lack of administrative decision

Annex 1

List of Applicants

1. Yulia ANDREEVA
2. Sarah BEL
3. Luisa Eugenia BERNAL IBARRA
4. Hakan Magnus BJORKMAN
5. Tijana DRAGICEVIC
6. Estelle Monique FACH
7. Joseph A. GARI
8. Leslie OUARZAZI
9. Berta PESTI
10. Clement SAN SEBASTIAN
11. Mariam TRAORE