



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-842

Mirella *et al.*
(Respondents/Applicants)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge John Murphy Judge Richard Lussick
Case No.:	2018-1150
Date:	29 June 2018
Registrar:	Weicheng Lin

Counsel for Mr. Mirella <i>et al.</i> :	Daniel Trup/Natalie Dyjakon, OSLA
Counsel for Secretary-General:	Jay Pozenel/Phyllis Hwang/ Susanne Malmström/Amy Wood

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/099/Corr.1, rendered by a panel of three Judges of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 29 December 2017, in the cases of *Mirella, Ben Said, Santini, Keating v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 2 March 2018, and Mr. Flavio Mirella, Mr. Mohamed Ben Said, Mr. Tullio Santini and Ms. Michelle Keating (Mirella *et al.*) filed their answer on 25 April 2018.¹

Facts and Procedure

2. The uncontested facts are set out in the Judgment of the UNDT and can be summarized as follows.

3. Prior to 1 January 2017, staff members of the Organization in the professional and higher categories were paid their net salary at either a single or a dependency rate, depending on their family status. They were also entitled to dependency allowances, depending on their family status, as defined in Administrative Instruction ST/AI/2011/5 (Dependency status and dependency benefits). In 2012, the International Civil Service Commission (ICSC) initiated a comprehensive review of the compensation package for common system staff members, including the salary scale for staff members in the professional and higher categories, “to ensure that the pay and benefits provided to staff continued to be fit for purpose”. The General Assembly endorsed this initiative in its resolution 67/257 of 12 April 2013 and provided some parameters for the conduct of the review, *inter alia*, in its resolutions 67/257, 68/253 and 69/251 of 12 April 2013, 27 December 2013 and 29 December 2014, respectively.

4. The review process involved data collection from common system organizations and staff, as well as external entities. Working groups composed of ICSC members, representatives from common system organizations and staff representatives were created. The Secretary-General was represented at these working groups’ meetings, as well as at the ICSC’s sessions. In considering the implementation of the new compensation package, the ICSC also sought and received advice

¹ On 9 February 2018, the Secretary-General filed a motion with the Appeals Tribunal, seeking a waiver of the 15-page limit of the appeal brief stipulated in Article 8(2)(a) of the Rules of Procedure of the Appeals Tribunal and an extension of that limit to 25 pages. By Order No. 311 (2018) dated 26 February 2016, the Appeals Tribunal granted the Secretary-General’s motion, permitted both parties to file briefs of up to 35 pages and granted a 10-day extension of the time limit for filing the appeal.

from the Office of Legal Affairs (OLA)—which is part of the United Nations Secretariat and acts as counsel for the Secretary-General in cases before the Appeals Tribunal.

5. In its 2015 Report, the ICSC made a recommendation for the introduction of one net salary scale for all staff members in the professional and higher categories without regard to family status. Support provided for dependent family members would be separated from salary. Two existing allowances, namely, a child allowance (a fixed amount payable for each dependent child)² and a special dependency allowance (for disabled children), would remain unchanged. The ICSC, however, made three important proposals regarding other kinds of family support. Firstly, dependent spouses would be recognized through a spouse allowance at the level of six per cent of net remuneration. Secondly, staff members who are single parents and who provide main and continuous support for their dependent children would in the future receive an allowance in respect of the first dependent child at the level of six per cent of net remuneration in lieu of the ordinary child allowance. Thirdly, staff members with a non-dependent spouse and in receipt of a salary at the dependency rate by virtue of a first dependent child would instead receive the child allowance for such child.

6. In considering the implementation of the new compensation package, the ICSC appreciated that thought needed to be given to the possible need for transitional measures to smooth implementation. In particular, staff members with a non-dependent spouse in receipt of a salary at the dependency rate by virtue of a first dependent child would only receive a child allowance and as a consequence would experience reductions in salary under the proposed system. The ICSC accordingly proposed the introduction of a transitional allowance of six per cent of net remuneration in respect of that first dependent child but in respect of whom no child allowance would be paid concurrently. The allowance would be reduced by one percentage point every 12 months thereafter. When the amount of the transitional measure became equal to, or less than, the amount of the child allowance, the child allowance would be payable in lieu. The transitional allowance would be discontinued once the child in respect of whom the allowance was payable lost eligibility by ceasing to be dependent.

7. These recommendations were adopted by the General Assembly in its resolution 70/244 of 23 December 2015. Paragraph 6 of section III of the Resolution approved the proposed unified salary scale structure. Paragraphs 17-19 of section III of the Resolution introduced the dependent

² Staff Rule 3.6(b)(iii) provides that eligible staff shall receive a dependent child allowance for each recognized dependent child under certain conditions.

spouse allowance and the single parent allowance. Paragraph 10 of section III records the decision of the General Assembly in regard to the transitional allowance. It reads:

(a) Staff members in receipt of the dependency rate of salary in respect of a dependent child at the time of conversion to the unified salary scale structure will receive a transitional allowance of 6 per cent of net remuneration in respect of that dependent child and that no child allowance should be paid concurrently in that case;

(b) The allowance will be reduced by 1 percentage point of net remuneration every 12 months thereafter;

(c) When the amount of the transitional allowance becomes equal to or less than the amount of the child allowance, the latter amount will be payable in lieu thereof;

(d) The transitional allowance will be discontinued if the child in respect of whom the allowance is payable loses eligibility[.]

8. In his report A/71/258 of 29 July 2016, the Secretary-General proposed amendments to the Staff Regulations for the implementation of the changes as approved by the General Assembly in resolution 70/244 of 23 December 2015. Through its resolution 71/263 of 23 December 2016, the General Assembly acceded to the Secretary-General's request. On 30 December 2016, the Secretary-General promulgated Secretary-General's Bulletin ST/SGB/2017/1 (Staff Regulations and Rules of the United Nations), which amended both the Staff Regulations and the Staff Rules. In consequence of these measures, the new salary scale as of 1 January 2017 (the Unified Salary Scale) no longer provides different net base salaries for staff members who have dependents and for those who do not. The gross and net base salaries of staff members previously paid at the dependency rate now exclude the dependency component. That dependency component is now provided for by the dependent spouse allowance in Staff Regulation 3.4, the single parent allowance in Staff Regulation 3.5 and the transitional allowance providing for dependent children of staff members with a non-dependent spouse in Staff Rule 13.11. The allowances (i.e., dependent spouse, single parent and transitional)—calculated at six per cent of the net base salary and post adjustment of a staff member—are equivalent to the difference between the new unified rate of salary and the dependency rate of the previous salary scale.

9. This appeal is concerned with staff members who were previously paid at the dependency rate on account of having a dependent spouse and are now eligible for a dependent spouse allowance.

10. Mr. Mirella works as the Chief, Regional Section for South Asia, East Asia and Pacific (P-5), at the United Nations Office for Drugs and Crime (UNODC) in Vienna. He has a dependent spouse and a dependent child. His December 2016 payslip reflects a monthly gross salary at the dependency rate in the amount of USD 11,219.33 and a dependency allowance for his child of USD 197.19. The deduction for his staff assessment was in the amount of USD 2,279.25. His January 2017 payslip reflects a monthly gross salary of USD 11,040.50, a dependency allowance for his child of USD 194.30, and a dependent spouse allowance in the amount of USD 668.65 described on his payslip as “ICSC Interim 6% Depend (Adj)”. The deduction for his staff assessment was in the amount of USD 2,520.50. It is noted that the post adjustment for Vienna was reduced from 33.9 to 30.8 per cent, which impacted on the calculation of the dependent spouse allowance.

11. Mr. Ben Said is an Interpreter (P-4), at the United Nations Office at Geneva (UNOG). He has a dependent spouse and three dependent children. His December 2016 payslip indicates a monthly gross salary at the dependency rate in the amount of USD 8,907.92 and a dependency allowance for his three children of USD 774.90. The deduction for his staff assessment was in the amount of USD 1,655.17. His January 2017 payslip indicates a monthly gross salary of USD 8,743.25, a dependency allowance for his children of USD 766.59, and a dependent spouse allowance in the amount of USD 731.97 described on his payslip as “ICSC Interim 6% Depend (Adj)”. The deduction for his staff assessment was in the amount of USD 1,831.33. It is noted that the post adjustment for Geneva was reduced from 80 to 76.5 per cent, which impacted on the calculation of the dependent spouse allowance.

12. Mr. Santini is the Chief, Regional Section for Latin America and the Caribbean (P-5), at UNODC in Vienna. He has a dependent spouse. His December 2016 payslip reflects a monthly gross salary at the dependency rate in the amount of USD 10,837.92. The deduction for his staff assessment was in the amount of USD 2,176.25. His January 2017 payslip reflects a monthly gross salary of USD 10,661.42 and a dependent spouse allowance in the amount of USD 647.83 described on his payslip as “ICSC Interim 6% Depend (Adj)”. The deduction for his staff assessment was in the amount of USD 2,406.75.

13. Ms. Keating is the Chief, Languages Service, Division of Conference Management (D-1), at UNOG. As at December 2016, she had a non-dependent spouse and three dependent children. On 1 January 2017, her husband became eligible to be considered as her dependent. Her December 2016 payslip reflects a monthly gross salary at the dependency rate in the amount of

USD 11,472.33 and a dependency allowance for her two children of USD 457.76. At that time, she was paid at the dependency rate on account of her first child as her husband was not considered her dependent. The deduction for her staff assessment was in the amount of USD 2,347.50. Her January 2017 payslip reflects a monthly gross salary of USD 11,292.17, a dependency allowance for two children of USD 452.85, and a dependency allowance for one child in the amount of USD 920.92 described on her payslip as “ICSC Interim 6% Depend (Adj)”. The deduction for her staff assessment was in the amount of USD 2,596. This payslip did not correctly reflect the fact that her husband was now her dependent. The situation was corrected on her February 2017 payslip, which reflected a retroactive payment of USD 237.22 as a child allowance. Payment of the transitional allowance “ICSC Interim 6% Depend (Adj)” on account of her first child was retroactively substituted by payment of a dependent spouse allowance and a dependency allowance was paid for the third child.

14. The Respondents sought management evaluation challenging “the decision of the Administration to alter a fundamental and essential condition” of their employment relating to their salaries. They received a response from the Management Evaluation Unit informing them that the Secretary-General had decided to uphold the contested decisions. Each then filed an application with the UNDT challenging the decisions to reduce his or her contracted salary and the manner of the implementation of the Unified Salary Scale effective 1 January 2017.

The UNDT Proceedings

15. The UNDT decided to hear the applications of the four Respondents together with seven other similar cases, which also concern the introduction of the Unified Salary Scale but involve staff members with different family situations. The UNDT held a hearing on the merits between 20 September 2017 and 22 September 2017 during which it received testimony from two witnesses, namely: the Chief, Payments and Payroll Unit, UNOG, who explained the financial implications of the Unified Salary Scale, the details of the pay slips and the reconciliation exercise; and a Human Resources Officer, Office of Human Resources Management, who testified as to the background of the adoption of the Unified Salary Scale, and the manner in which it was implemented. The UNDT rendered its Judgment on 29 December 2017, partially granting the applications.

16. The UNDT identified the contested decisions as the Secretary-General's decisions (in implementing the Unified Salary Scale) "to convert a portion of the Applicants' salaries into a separate allowance".³ The Respondents did not challenge the General Assembly's Resolutions adopting the Unified Salary Scale but solely its implementation by the Secretary-General in their particular cases. They alleged that the reduction of their salary by the Secretary-General violated their individual contractual and acquired rights.

17. The UNDT held that a decision of general application negatively or adversely affecting the terms of appointment or contract of employment may constitute an administrative decision⁴ and that a pragmatic and casuistic approach should be taken in distinguishing regulatory (legislative) decisions from administrative decisions on the basis of whether they involved a challenge to the legality of the regulatory decision or a violation of rights as a result of the implementation of the regulatory measure.⁵

18. The UNDT concluded that the contested decisions constituted administrative decisions in terms of Article 2(1) of the UNDT Statute because the Respondents' gross and net base salaries were reduced by their loss of the entitlement to be paid at the dependency rate and the conversion of a portion of their salary into a separate allowance, which, unlike the salary, was subject to change at the discretion of the Organization and thus the decisions had an adverse impact on their terms of employment. Thus, it held that the jurisdictional pre-conditions had been established. It then proceeded to examine whether there was any bar to reviewing the decisions on the basis of their possibly regulatory nature.

19. The non-discretionary implementation by the Secretary-General of regulatory decisions of the General Assembly must be presumptively considered lawful in that he is normally obliged to mechanically implement them in accordance with the content of higher norms.⁶ In the present matter, the UNDT maintained that the presumption of legality may be rebutted when it is alleged that the implementation conflicts with other norms or contractual obligations equally applicable. While the Secretary-General was undisputedly bound by General Assembly resolutions 70/244 and 71/263 (which adopted the Unified Salary Scale and the consequent modifications to the Staff Regulations and Staff Rules), a normative conflict resulted from the fact that the

³ Impugned Judgment, para. 44.

⁴ The UNDT cites *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530; and *Pedicelli v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-555.

⁵ The UNDT cites *Tintukasiri et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526.

⁶ The UNDT cites *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530.

Secretary-General was equally bound by existing contractual obligations with staff members as well as preceding General Assembly resolutions still in force which protected the Respondents' acquired rights—in particular Staff Regulation 12.1 (adopted by the General Assembly on 13 February 1946 through resolution 13(I)) which provides: “These regulations may be supplemented or amended by the General Assembly without prejudice to the acquired rights of members of the staff.”

20. The UNDT concluded that the applications were receivable as they did not seek to review the legality of the General Assembly Resolutions but rather the legality of the administrative decisions implementing the Resolutions in the Respondents' individual cases. The legality of the decisions had to be tested in accordance with all the applicable norms, not only the Resolutions introducing the Unified Salary Scale.

21. On the merits, the UNDT found that the unilateral conversion of a portion of Mirella *et al.*'s salaries into a separate allowance violated their acquired right to a certain quantum of salary. With the implementation of the Unified Salary Scale, the Respondents suffered a reduction of their gross salary and increase of their staff assessment resulting in a reduction of their net base salary by about six per cent. Even if this reduction was compensated by the introduction of a dependent spouse allowance in January 2017 and if the overall take home pay was higher than before the introduction of the new salary scale so as to avoid any immediate financial impact, it still constituted a violation of the Respondents' acquired rights.

22. The UNDT held that Staff Regulation 12.1 enacted by the General Assembly in 1946 “poses some limits”⁷ to the Organization's power to amend the Staff Regulations and Rules and that the protection of acquired rights as enshrined in Staff Regulation 12.1 is an intrinsic part of the contractual relationship between the Organization and its staff members. It further held that Staff Regulation 12.1 has quasi-constitutional value and takes precedence over other Staff Regulations and Rules governing the staff members' conditions of employment. It concluded:⁸

... Indeed, the recognition of staff members' acquired rights would have no value and staff regulation 12.1 would be deprived of its meaning if the Organization was allowed to infringe on them by the mere adoption of conflicting staff regulations. (...) At the very least,

⁷ Impugned Judgment, para. 105.

⁸ *Ibid.*, para. 108.

any derogation to staff regulation 12.1 would need to be made explicitly and it may expose the Organization's liability for breach of contracts.

23. Applying the test set out by the World Bank Administrative Tribunal in *De Merode et al.*⁹ and the Administrative Tribunal of the International Labour Organization (ILOAT) in *Ayoub*,¹⁰ the UNDT found that the Respondents' salaries were a "fundamental and essential term of employment" as they are explicitly set out in their letters of appointment, and therefore an acquired right which could not be unilaterally altered by the Administration.¹¹ The UNDT considered that this inviolable right to salary necessarily extends to its quantum. With salaries having increased over time and the letters of appointment explicitly stating that the salaries were subject to increase, the Respondents accrued an inviolable right to be paid the newly determined salaries. On that basis, the UNDT concluded that because the additional payment made to the Respondents on account of their dependents was initially embedded in their salaries, the unilateral reduction violated their acquired right to receive the gross and net salaries set out in their letters of appointment.

24. It held furthermore that the financial loss is not sufficiently mitigated by the dependent spouse allowance paid instead of the salary at the dependency rate. It considered that the allowance was included in a statutory provision and could hardly be considered as a fundamental term of employment and that it may thus be subject to change at the discretion of the Organization. Moreover, the UNDT considered that as the dependent spouse allowance was not part of the salary, it would also not be taken into account in the determination of several other allowances in case of separation, which are all based on the staff members' net base salary. In light of the foregoing, the UNDT concluded that the Respondents' acquired rights had been violated. By way of remedy, the UNDT rescinded the contested decisions and rejected all other claims.

25. During the course of its Judgment, when discussing the question of acquired rights, the UNDT made certain observations about a supposed lack of independence of the ICSC. It noted that by consulting the Secretary-General through OLA on possible issues of violation of acquired rights stemming from the adoption of the Unified Salary Scale, the ICSC acted "in a most inappropriate manner"¹² which compromised its independence. In its view, pursuant to the ICSC's legal framework, a clear distinction was supposed to be maintained between the

⁹ World Bank Administrative Tribunal, Judgment No. 1, *de Merode et al.* (1981), paras. 42-44.

¹⁰ ILOAT, Judgment No. 832, *Ayoub et al.* (1987), paras. 12-14.

¹¹ Impugned Judgment, para. 120.

¹² *Ibid.*, para. 127.

United Nations Secretariat and the advisory body from which the ICSC should have sought submissions under Article 36 of its Statute. When it requested legal advice from OLA, the “ICSC was seeking such advice from [] one of the very organs from which it is expressly established to be independent”.¹³ The ICSC also failed to give staff representatives the opportunity to provide written statements, thereby only hearing the voice of the Organization, and there is no indication in its 2015 Report that the ICSC had made its own assessment of the issue of acquired rights before presenting its recommendations to the General Assembly.

Submissions

The Secretary-General’s Appeal

26. The Secretary-General defines the contested decisions as: the decisions to pay the Respondents in accordance with the Unified Salary Scale and the allowances established by the General Assembly in the amended Staff Regulations.

27. The Secretary-General argues that the UNDT erred in concluding that the applications were receivable. First, it erred on a question of law and exceeded its jurisdiction by reviewing an administrative act that did not involve the Secretary-General’s exercise of discretion in implementing the General Assembly’s regulatory decisions. The implementation of the regulatory decision is subject to judicial review only where the implementation involves an exercise of discretion by the Administration—including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria. In the present case, however, the General Assembly’s decisions regarding the specific amounts to be paid to staff members were unambiguous and left no room for interpretation or any exercise of discretion by the Secretary-General. The Respondents are in fact challenging the regulatory decisions themselves and not the implementation by the Secretary-General.

28. The Secretary-General further submits that the UNDT erred by holding that the applications were receivable although the Respondents had not suffered any negative consequences at the time the contested decisions were taken or even when the applications were filed in that they had suffered no financial losses in January 2017. The UNDT erred in concluding that the contested decisions had negatively affected the staff members’ conditions of appointment. In fact, the figures provided by the UNDT were erroneous as they disregarded

¹³ *Ibid.*, para. 133.

the dependent spouse allowances that were paid in addition to the salaries and which were higher than the reductions in gross salary, resulting in an increase of the total sum of salary and allowances. Unlike the transitional allowance applicable to other categories, the dependent spouse allowance is granted at a fixed rate of six per cent and will not be subject to any reduction. Mere speculation about future losses due to further reductions does not provide a sufficient basis for review if no actual damage has been demonstrated at the time of the application.

29. The Secretary-General further asserts that the UNDT erred in concluding on the merits that the payment of salary according to the Unified Salary Scale established by the General Assembly violated the Respondents' acquired rights. First, the UNDT erred in finding that the Respondents had an acquired right to a particular quantum of pay for *future* work when the protection of acquired rights in Staff Regulation 12.1 is intended to protect those rights earned through service already rendered and not prospective benefits including future salaries. Secondly, the UNDT erred in finding that the methodology for calculating the Respondents' respective salaries was a fundamental and essential condition of employment, which could not be unilaterally amended by the Organization. The methodology for the calculation of the Respondents' salaries was not derived from the express terms of their letters of appointment but rather from the Staff Regulations and Rules and thus may be unilaterally amended at any time provided that the change is not applied retroactively to reduce accrued benefits. Staff members do not have a right, acquired or otherwise, to the continued application of the Staff Regulations and Rules—including the system of computation of their salaries—in force at the time they accepted employment for the entirety of their service. Thirdly, the UNDT erred in holding that the terms of the Respondents' letters of appointment, stating that their initial salaries “may rise”, created an express promise by the Organization to continue to increase their rate of pay. The UNDT failed to appreciate that the basic conditions of employment of staff members as set out in their letters of employment may and often do change throughout the duration of their service and it erred in holding that a change to an essential term would violate the Respondents' acquired rights, irrespective of the reason for change or the actual impact on the staff members.

30. Finally, the UNDT erred in its observations regarding the mandates of the ICSC and OLA. The observations reflect an erroneous understanding of their mandates. The request by the ICSC, which was established as a subsidiary body of the General Assembly, for legal advice from OLA, whose role is, *inter alia*, to provide legal advice to United Nations organs, constituted the proper performance of the mandated functions of the respective entities. Requesting non-binding legal

advice did not violate the prohibition on seeking instructions as contained in Article 6(1) of the ICSC Statute. Albeit *obiter dicta*, the Secretary-General asks the Appeals Tribunal to strike the observations since leaving them undisturbed might deter the ICSC and other subsidiary organs from seeking legal advice from OLA and thus undermine its mandate.

31. For the foregoing reasons, the Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment in its entirety and to strike the *obiter dicta* regarding the mandates of the ICSC and OLA from the Judgment.

Mirella *et al.*'s Answer

32. Mirella *et al.* submit that the UNDT was correct in receiving their applications as it lawfully held that the application of the Unified Salary Scale was an administrative act that involved the Secretary-General's exercise of discretion in its implementation. The Secretary-General retained an inherent power of discretion for existing staff with respect to the implementation—as opposed to the introduction—of the Unified Salary Scale and it properly reviewed the manner of implementation of the regulatory measure and specifically its effects on the contractual and acquired rights of the Respondents. The UNDT also did not err in reviewing the manner in which the Secretary-General reconciled the implementation of the Unified Salary Scale with conflicting contractual or higher-ranking statutory obligations.

33. The Respondents maintain that the judicial review was lawful because: (i) the implementation of the Unified Salary Scale required compliance with established procedures and the UNDT identified procedural violations such as the amendment of essential terms of appointment without the consent of the affected staff members; (ii) resolution 70/244 is silent on the higher-ranking protection of acquired rights as enshrined in Staff Regulation 12.1 and this constitutes sufficient ambiguity for the UNDT to judicially review its implementation; and (iii) the absence of any restrictions on the Secretary-General's discretionary authority allows the UNDT to review the manner of implementation so as to ensure compliance with contractual and higher hierarchical norms.

34. The UNDT correctly found that the Respondents did incur negative consequences due to the implementation of the contested decisions as they suffered a loss in their gross and net base salaries, negatively affecting their conditions of employment, and that they will suffer losses in the future. This negative impact also warranted a finding that the applications were receivable.

The Respondents submit that they suffered three types of negative consequences: (i) They have incurred a loss of legal entitlement as the reduction in salary will have an adverse impact on their borrowing power and as a portion of their salary has been converted into an allowance and thus a non-essential term which could be unilaterally altered at any time; (ii) They suffered immediate financial loss in monthly and annual gross and net base salary, salary apportionment totals and loss in earnings from December 2016 to January 2017 which also resulted in a loss of other connected benefits such as separation payments or payments in commutation of accrued annual leave upon separation and led to a higher amount in staff assessment; and (iii) They might incur pecuniary losses in the future as the dependent spouse allowance could be reduced at any time and they might no longer receive a dependent spouse allowance due to changes in the eligibility requirements. The dependent spouse allowance does not adequately compensate for the loss of legal entitlements and the injury caused by the mere breach of acquired rights.

35. On the merits, the Respondents assert that the UNDT was correct in its finding that the reduction in salary by way of implementation of the Unified Salary Scale violated the staff members' acquired rights. The UNDT correctly identified the principle that terms of conditions of employment explicitly set out in the staff members' letters of appointment were acquired rights and contractual elements requiring mutual consent prior to amendment as opposed to statutory conditions which are subject to unilateral change. The UNDT correctly considered, in line with national and international norms and jurisprudence, that salary and its quantum are essential terms and conditions of appointment, which could not be unilaterally altered. The Secretary-General's submissions merely focus on the issue of acquired rights while in fact it is already the staff members' contractual entitlement to their salary as contained in their letters of appointment that placed restrictions on the manner of implementation of the Unified Salary Scale.

36. With respect to acquired rights, the Respondents assert that these are intended to protect both those rights earned through service already rendered and prospective benefits, including salary, as nothing suggests such a temporal restriction and narrowing the scope in this way would render the term meaningless. Moreover, the Secretary-General misinterprets the UNDT in suggesting that the methodology for the calculation of a salary is an essential condition of employment and that the Respondents' letters of appointment created an express promise by the Organization to continue increasing their pay, while in fact the UNDT only held that they have a right to protection of the increases that had already been given.

37. Finally, the Respondents submit that the UNDT's observations regarding the role of the ICSC and its decision to seek legal advice from OLA are legitimate and should stand. The ICSC failed to seek independent legal advice on the impact of the Unified Salary Scale on staff but only requested advice from OLA which does not act impartially but rather represents the interests of one party as illustrated by the fact that OLA represents the Secretary-General in this case.

38. In view of the foregoing, the Respondents request that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

39. The characterization of the contested decisions by the Secretary-General as being the decisions to pay the Respondents in accordance with the Unified Salary Scale and the allowances established by the General Assembly in the amended Staff Regulations is a correct and adequate rendition of the decisions in issue.

40. The UNDT erred (and thus exceeded its jurisdiction) in concluding that the applications were receivable. The jurisdiction of the UNDT is limited by Article 2(1) of the UNDT Statute to hearing appeals against "administrative decisions". An administrative decision is a unilateral decision of an administrative nature taken by the administration involving the exercise of a power or the performance of a function in terms of a statutory instrument, which adversely affects the rights of a staff member and produces direct legal consequences.¹⁴

41. In the full bench decision of *Lloret Alcañiz et al.*, the Appeals Tribunal stated:¹⁵

... there is no denying that [Ms. Lloret Alcañiz] salary will reduce over time with the annual one per cent decrease of the transitional allowance. All the Respondents will incur a pecuniary loss as a result of the gradual depreciation of the transitional allowance, which is further compounded by the fact that once their first child ceases to be dependent, the Respondents will not receive the transitional allowance for the entire period despite having other dependent children. Thus, although the loss may not be immediate, a loss of some kind will inevitably afflict all the Respondents with the loss of eligibility for the transitional allowance. The inevitability of the loss may be a future event but it is nonetheless certain

¹⁴ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 48, citing Former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.

¹⁵ *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 67 (internal footnote omitted).

and only a matter of time. As such, the decision has an adverse impact for all the Respondents. (...)

42. The case of *Mirella et al.* differs from *Lloret Alcañiz et al.* in that Mr. Mirella and the other Respondents do not receive a transitional allowance which will be reduced and extinguished in the following years, but a dependent spouse allowance. The fact that “the organization has offered no guarantee whatsoever that the dependent spouse allowance will not be changed over time”, as the UNDT stated in paragraph 124 of its Judgment, is not sufficient to regard the implementation of the Unified Salary Scale as an administrative decision towards the Respondents. The UNDT has no jurisdiction to hear appeals against decisions which may potentially affect a staff member’s terms of appointment or contract of employment in the future. As the dependent spouse allowance currently compensates *Mirella et al.* for the decrease in salary, and it is yet uncertain whether this allowance will ever be reduced or abolished, there is no direct negative effect.

43. The fact that only the salary but not the dependent spouse allowance is taken into account in the determination of other benefits, contrary to the UNDT’s findings in paragraph 124 of the Judgment, does not make the implementation of the Unified Salary Scale an administrative decision. Staff members are entitled to receive the benefits in question only when certain conditions are met: the termination indemnity pursuant to Staff Rule 9.8 will only be paid when the staff member does not receive a retirement benefit (Staff Rule 9.8(c)); the repatriation grant pursuant to Section 5.2 of Administrative Instruction ST/AI/2016/2 (Repatriation grant) will only be paid if the staff member resides outside his or her home country and country of nationality while serving at the last duty station; indemnity in case of death pursuant to Staff Rule 9.11 will only be paid if there is a surviving spouse or dependent child (Staff Rule 9.11(a)(vii)); and a compensation for accrued annual leave pursuant to Staff Rule 9.9(a) will only be paid if the staff member has accumulated annual leave. It is not certain whether the Respondents will ever face any financial losses with regard to such benefits.

44. Consequently, the implementation of the Unified Salary Scale has no direct adverse consequences for the Respondents and hence is not an administrative decision within the meaning of Article 2(1) of the UNDT Statute. It follows that the UNDT erred in finding *Mirella et al.*’s applications receivable.

Judgment

45. The appeal is upheld and Judgment No. UNDT/2017/099/Corr.1 is hereby vacated.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Lussick

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar