

UNDT/2017/098, Quijano-Evans, **Dedeyne-Amann**

UNAT Held or UNDT Pronouncements

Receivability Contested decisions Considering the Applicants' submissions as a whole, the contested decisions are to be identified as Secretary-General's decisions, in implementing the Unified Salary Scale, to convert a portion of the Applicants' salaries into a separate allowance. The Applicants do not challenge the General Assembly's resolution adopting the Unified Salary Scale as a measure of general application. Whether the contested decisions constitute administrative decisions In interpreting its jurisdiction, the Tribunal must take into account the Organization's duty to provide access to justice to its staff members. Whilst it would be outside the scope of its jurisdiction to create avenues of recourse where they are not foreseen in the law, it shall take into consideration the Organization's duty to provide access to justice to its staff members in interpreting the jurisdiction that is vested in it by virtue of its Statute. By art. 2 of its Statute, the Tribunal is clearly only competent to hear applications against "administrative decisions". The implementation by the Secretary-General of a decision of general application taken by the General Assembly constitutes an administrative decision within the meaning of art. 2 of the Tribunal's Statute if it has "a direct impact on the terms of appointment or contract of employment of the individual staff member". In the present cases, the Applicants directed their challenges against the implementation of the Unified Salary Scale in their individual situations. The Tribunal preliminary found that the change in the Applicants' mode of remuneration, which entails a reduction of their gross and net base salaries, negatively impacts their terms and conditions of employment. Therefore, the Tribunal found that the contested decisions constituted administrative decisions within the meaning of art. 2 of its Statute. Whether the Tribunal has the power to review the contested decisions There can be no doubt that the Secretary-General was bound by Resolutions 70/244 and 71/263, where the General Assembly adopted the Unified Salary Scale and the consequent modifications to the Staff Regulations and Rules. However, the Secretary-General was equally bound by the

contractual obligations stemming from the contracts he signed with staff members on behalf of the Organization. The Secretary-General is also bound by preceding resolutions adopted by the General Assembly that are still in force and may conflict with earlier extant ones, as it is alleged to be the case in the present cases. The alleged conflict between these norms or obligations cannot be ignored by the Secretary-General nor by this Tribunal, notably in light of the Applicants' right to access to justice. Actions taken in the implementation of decisions of the General Assembly may be lawful insofar as they comply with a regulatory measure. However, this does not mean that they are not in breach of the staff members' terms and conditions of employment. What the Respondent is in fact asking the Tribunal to do is to take into account only the General Assembly resolutions that enacted the Unified Salary Scale and to disregard any other rule that may be relevant to the cases. This cannot be done. The system allows the Secretary-General to play an important role in ensuring that proposed modifications to staff members' conditions of service are in line with the Organization's existing obligations. The Tribunal can certainly not review the role played by the Secretary-General in the process that led to the adoption of the Unified Salary Scale, but it would be equally unfair to staff members if the Tribunal were to conclude that alleged violations of their contractual or acquired rights are exempt from any judicial review because the Secretary-General is duty bound to apply decisions of the General Assembly. In view of the foregoing, the presumption of legality set out in *Ovcharenko et al.* may be rebutted when an applicant alleges that the implementation of a regulatory measure adopted by the General Assembly conflicts with other norms or contractual obligations equally applicable. Hence, the Tribunal shall fully exercise its jurisdiction to review the contested decisions and the issues raised insofar as they effectively seek to impugn these decisions. In conducting this type of review in the present cases, the Tribunal is not engaging in a review of the legality of the General Assembly resolutions. It is only reviewing the administrative decisions taken by the Administration to implement these resolutions in the Applicants' individual cases given the contractual matrix and the broader legal context. Merits The nub of the matter is whether the unilateral conversion of a portion of the Applicants' salaries into an allowance, which causes no immediate financial impact, constitutes a violation of their acquired rights. When issuing letters of appointment to the Applicants, the Organization entered into a contractual relationship with them. Pursuant to art. 101 of the UN Charter and staff regulation 12.1, the contracts between the Organization and the Applicants are composed of the terms explicitly set out in the letters of appointment and are also governed by the internal laws of

the Organization, which the latter has the power to unilaterally modify, subject to the Applicants' acquired rights. In accepting their letter of appointment, staff members agree that their conditions of service may be subject to unilateral change by the Organization but only insofar as they do not touch upon their acquired rights. By its nature and content, staff regulation 12.1 and the acquired rights guaranteed therein take precedence over other staff regulations and rules governing the staff members' conditions of employment. 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. 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. No derogation from staff regulation 12.1 was made, or can be implied, in adopting the Unified Salary Scale and thus, the said provision fully applies and takes precedence. The notion of acquired rights is used in a broad sense to examine staff members' alleged violations of their contracts of employment through amendments to rules of general application given the limits posed by staff regulation 12.1 in respect of acquired rights, which are also to be found in the constitutive documents of several other international organizations. Initially, the former United Nations Administrative Tribunal and the ILOAT found that only the terms set out in the staff members' letters of appointment were protected against unilateral changes. Then, the protection was extended to prevent retroactive amendments to statutory elements, namely those which would deprive staff members of accrued rights for services already rendered. The salary is a fundamental and essential term of employment of the Applicants. It is explicitly set out in their letters of appointment and there can be no doubt that it goes to the root of the Applicants' contract of employment. Indeed, the right to payment of salary has long been considered an acquired right and it necessarily extends to its quantum. The balance between the rights and obligations of the parties would be broken if the Organization was allowed to unilaterally modify the level of salary. The Organization indeed committed not to reduce the Applicants' salaries in specifying the initial amount in their letters of appointment and explicitly stating that this amount is "subject to increase", making this term of employment inviolable. The protection of salary must therefore be distinguished from allowances for which the quantum is not specified and which are not directly linked to the services performed. Further, as their salaries increased over time as per their letter of appointment, the Applicants accrued a right to be paid the newly determined salaries. The new quantum being substituted for the initial ones set out in the letters of appointment

and forming part of the contractual relationship between each Applicant and the Organization as it evolved throughout time. The quantum of the Applicants' new salaries thus enjoys the same protection as their initial ones. The implementation of the Unified Salary Scale to the Applicants led to a reduction of their gross salaries. Because the additional payment made to the Applicants on account of their dependents was initially embedded in their salaries, which is a fundamental and essential term of employment, it could not be unilaterally reduced by the Organization or discontinued for that matter, irrespective of the reason for the change or its impact. By removing a component of the Applicants' salary, the Organization unilaterally altered the composition and methodology for the calculation of the Applicants' gross and net base salaries to their detriment, without their consent or agreement in any manner first obtained. The introduction of a spouse allowance is insufficient to safeguard the Applicant's acquired rights. This allowance was not included in the Applicants' letters of appointment or otherwise been explicitly recognized as an immutable term of employment. It is included in a statutory provision and, as an allowance, it can hardly be considered as a fundamental term of employment. It may thus be subject to change at the discretion of the Organization, subject to the limits described above. Furthermore, the spouse allowance is not part of the Applicants' salary, so it will also not be taken into account in the determination of other allowances in case of separation. Accordingly, in converting into an allowance the portion of the Applicants' salary which was previously paid on the basis that they have a dependent spouse, the Secretary-General violated their right to receive the gross and net salaries set out in their letters of appointment with increases thereafter, which is a fundamental and essential term of their contract of employment and, as such, constitutes an acquired right. The Secretary-General had an obligation to act lawfully in implementing the Unified Salary Scale for the Applicants and to respect their acquired rights, which took precedence over the new conditions of employment set out in the amendments to the Staff Regulations and Rules. For the purpose of the present proceedings, the Secretary-General's implementation of the Unified Salary Scale for the Applicants, which triggered their payment of reduced gross and net base salaries from 1 January 2017, is unlawful insofar as it breaches their acquired rights protected under staff regulation 12.1. Observation on the lack of independence of the ICSC The Secretary-General was in fact indirectly consulted by the ICSC on possible issues of violation of acquired rights stemming from the adoption of the Unified Salary Scale, as the ICSC sought legal advice from OLA, which is under the govern of the Secretary-General. However, this consultation was done in a most inappropriate manner which

compromised the independence of the ICSC. A clear distinction was supposed to be maintained between the UN secretariat and the advisory body during the consultation stage for the revision of the remuneration scheme. The independence and impartiality of the ICSC in the consideration of implications of the Unified Salary Scale on the acquired rights of serving staff members would appear to have been compromised, both by the actions of the ICSC and the Respondent. The ICSC did not give the staff representatives the opportunity to provide written statements on the issue, thereby hearing only the voice of the Organization. There is no indication in the ICSC 2015 Report that the Commission made its own assessment of the issue of acquired rights in making its recommendations to the General Assembly, as it was directed to do. Rather, the report can only be read as being such that the advice provided by OLA was to be considered the state of the law and there is no analysis by the ICSC as to how the legal principles set forth by OLA applied in the circumstances. The appropriate course of action was for the ICSC to either seek the respective views of all parties involved, as part of its consultative process, and/or to seek legal advice from an independent expert on possible issues of acquired rights. The ICSC sought and received legal advice from part of the organization it was supposed to independently advise. It abrogated the nature of the mission it was supposed to perform and compromised the independence and impartiality expected from it. Remedies Having found that the Secretary-General's decisions to convert a portion of the Applicants' salary into a separate spouse allowance were unlawful, the Tribunal rescinds them.; For practical purposes, the Administration may continue to pay the Applicants as per the present remuneration scheme but the spouse allowance they receive shall legally be considered part of their salary. It shall thus continue to be protected as an acquired right and shall be taken into consideration for any entitlement that is calculated on the basis of the net base salary. By the rescission of the contested decisions, the Applicants are fully compensated for their prejudice. The Applicants suffered no financial loss prior to the issuance of the present judgment as they received the spouse allowance, which was and remains as of today equivalent to the reduction of their salary. Their situation for the future is fully remedied by the rescission. The Applicants are thus not entitled to any compensation for harm under art. 10(5)(b) of the Tribunal's Statute.

Decision Contested or Judgment/Order Appealed

The Applicants challenge the Secretary-General's decisions, in implementing the Unified Salary Scale, to pay the Applicants a salary reduced of the portion that was previously paid on the basis that they have dependent(s).

Legal Principle(s)

It falls under the Tribunal's role "to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review, which could lead to grant or not to grant, the requested judgment" (Massabni 2012-UNAT-238). The right to access to justice, and its subsidiary right of access to a court, are fundamental rights recognized by human rights instruments adopted by the General Assembly. The Organization's immunity from jurisdiction may impair the staff members' right to access to court if the Organization does not provide them with a reasonable alternative dispute resolution mechanism. In *Ovcharenko et al.* the Appeals Tribunal held that decisions taken by the Secretary-General based on regulatory decisions of the General Assembly "must be considered lawful" as the Secretary-General is duty bound to comply with General Assembly resolutions.; A convergent and uniform interpretation of rules or legal principles applying all across the common system when the factual situations at hand raise similar legal issues is desirable and proper. The obligation of an International Organization to respect its staff members' acquired rights is a general principle of international civil service law. In interpreting the terms of a staff member's appointment, one may draw upon general principles of law insofar as they apply to the international civil service. An acquired right is understood to be "one the staff member may expect to survive any amendment of the staff rules". In determining whether a modification to a term or condition of service violates an acquired right, the Tribunal must determine if the modification to the rules alters a term of employment that is "fundamental and essential in the balance of rights and duties of the staff member". The agreed remuneration of an employee constitutes an essential element of the contract of employment which cannot be modified unilaterally by the employer.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Judgment vacated by UNAT by Judgment Quijano-Evans et al. 2018-UNAT-841.

Full judgment

[Full judgment](#)

Applicants/Appellants

Quijano-Evans
Dedeyne-Amann

Entity

UNOG

Case Number(s)

UNDT/GVA/2017/032
UNDT/GVA/2017/036

Tribunal

UNDT

Registry

Geneva

Date of Judgement

29 Dec 2017

Duty Judge

Judge Downing
Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Administrative decision

Definition

Benefits and entitlements

Dependency benefits

Jurisdiction / receivability (UNDT or first instance)

Subject matter (ratione materiae)

Salary

Salary scales

Applicable Law

Administrative Instructions

- ST/AI/2016/2
- ST/AI/2016/8

Agreements, conventions, treaties (etc.)

- Convention on the Privileges and Immunities of the United Nations
- International Covenant on Civil and Political Rights

GA Resolutions

- A/RES/67/257
- A/RES/68/253
- A/RES/69/251
- A/RES/70/244
- A/RES/71/263

Laws of other entities (rules, regulations etc.)

- ICSC RoP

Staff Regulations

- Regulation 12.1
- Regulation 3.3(a)

Staff Rules

- Rule 4.1
- Rule 9.11
- Rule 9.8
- Rule 9.9

UN Charter

- Article 101
- Article 105

UNDT Statute

- Article 10.5
- Article 10.9
- Article 2

Related Judgments and Orders

2012-UNAT-238

2016-UNAT-663

2010-UNAT-058

2014-UNAT-481

2015-UNAT-530

2015-UNAT-555

2015-UNAT-526

2017-UNAT-750

2015-UNAT-563

2010-UNAT-029

2016-UNAT-705

UNDT/2017/097