

UNDT/2020/150, Bettighofer et al.

UNAT Held or UNDT Pronouncements

Receivability The Applications were found receivable for the following reasons: 1) Staff rule 11.2(a) had been observed because the Applicants requested management evaluation timeously. 2) Individual administrative decisions, namely, to apply the new post adjustment in relation to the Applicants, had been issued and implemented, as demonstrated by their salary slips of February 2018. 3) The transitional allowance was not a prefatory act, but a corollary to the lowering of a pay component. 4) The Tribunal rejected the claim that discretion is a criterion for receivability. Merits The ICSC's decisory powers under art. 11(c) of its Statute always involved determination of post adjustment in the quantitative sense without the General Assembly's approval. The exercise of the General Assembly powers under art. 10 of the ICSC Statute did not involve either confirming the determination of index points for duty stations or in the calculation of post adjustment for each grade and step per duty station. The Tribunal held that retaining in the ICSC Statute references to elements of methodology that have been abolished was confusing and non-transparent and was partially responsible for the disputes. The Report of the ICSC for 2017 and its Addendum 98 show that in arriving at the decision in A/RES/74/255, the General Assembly was alive to the arguments advanced against the ICSC methodology and its application of the gap closure measure and had available to it materials relevant to the post adjustment, including detailed analysis of the quantitative impact of the ICSC decision on staff remuneration in Geneva. Yet, it did not intervene in any of these specific decisions. There was no dispute that the applicable rules did not confer upon the Applicants a right to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, they did not have an acquired right to the previous system of calculation or to the continuance of any particular methodology. Additionally, the Applicants did not have an acquired right to protection against a downward revision of the post adjustment multiplier, through the application of a freeze, gap closure or other conservatory measures. Application of such measures, therefore, remained only a question of good governance, which took into account a

margin of error in calculations, as well as avoidance of sudden major drops in salary value and its destabilising and demoralising effect. The Tribunal agreed with the Applicants that the mitigation, on both counts, the augmentation of the post adjustment multiplier and the transitional allowance, appeared more as a rule of thumb than an actual calculation of a margin of error. The resulting financial loss for the Applicants, which was a percentage of the post adjustment component of the salary and not the salary as a whole - delayed by one year through the application of the transitional allowance - was not such that would overly deplete the content of the entitlement or cause “extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest”. Finally, the modification was temporary. The impugned decision occurred in the context of a review of the post adjustment system carried out by the ICSC under the scrutiny of the General Assembly. The Tribunal noted that the impugned decision did not involve a question of integrity of the United Nations common system. The matter was properly before the ICSC and, ultimately, the General Assembly. Absent a finding of illegality of the regulatory decision, there was no basis for a rescission of the decision impugned in this case.

Decision Contested or Judgment/Order Appealed

The Applicant challenged the Administration’s decision to implement a post adjustment multiplier, resulting in a pay cut.

Legal Principle(s)

Receivability UNAT jurisprudence has affirmed the receivability of applications when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision expressed through a payslip or personnel action. A decision has direct effect where the applicants incur a pecuniary loss as a result of the gradual depreciation of the transitional allowance. The use of discretion as criterion for determination of an administrative decision has no basis in any generally accepted doctrine. Exclusion of non-discretionary decisions from the Tribunal’s cognisance would be a major policy decision, requiring articulation in the UNDT statute. Such an exclusion has neither support in the UNDT statute, nor in the seminal Andronov definition. A decision has direct effect where the applicants incur a pecuniary loss as a result of the gradual depreciation of the transitional allowance.

Although the loss may not be immediate, a loss of some kind will inevitably afflict all the applicants with the loss of eligibility for the transitional allowance. The inevitability of the loss may be a future event, but it is nonetheless certain and only a matter of time. As such, the decision has an adverse impact. Merits While the General Assembly gradually relinquished determining scales and schedules, so that post adjustment became the function of post adjustment index and the salary, there has not been usurpation of power on the part of the International Civil Service Commission (ICSC) (see A/RES/74/255 A-B). Applications directed against an individual decision which is based on a challenge to the legality of regulatory acts, may involve an incidental examination of a regulatory act for the purpose of evaluating the legality of an individual decision. The Tribunals are not bound by acts not originating from the General Assembly, specifically, by issuances of the executive, where these issuances would be found to contradict the framework approved by the General Assembly. Where the ICSC recommends the content of regulatory decisions under art. 10, the ultimate regulatory decision emanates from the General Assembly. Such a decision is binding on the Tribunals and may only be reviewed incidentally pursuant to the narrow Lloret-Alcañiz (2018-UNAT-840) test. On the other hand, where the ICSC exercises a delegated regulatory power under art.11, its decision, while undisputedly binding on the Secretary-General, may be subject to incidental examination for legality, including that where the contested matter belongs in the field of discretion, the applicable test will be that pertinent to discretionary decisions. The Appeals Tribunal has held that Staff Regulations, in particular staff regulation 12.1 establishing protection of acquired rights, did not hold a quasi-constitutional position in the hierarchy in General Assembly's resolutions; as such it was susceptible to amendments through the operation of *lex posterior*.

Outcome

Dismissed on merits

Outcome Extra Text

The Tribunal did not find that the regulatory decision was illegal.

Full judgment

[Full judgment](#)

Applicants/Appellants

Bettighofer et al.

Entity

UNDP

Case Number(s)

UNDT/NBI/2019/011

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

19 Aug 2020

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Administrative decision

Benefits and entitlements

Personal Transitional Allowance (PTA)

Jurisdiction / receivability (UNDT or first instance)

Salary

Applicable Law

Administrative Instructions

- ST/AI/2018/7

GA Resolutions

- A/RES/3357(XXIX)
- A/RES/39/27
- A/RES/43/226
- A/RES/44/198
- A/RES/45/259
- A/RES/66/237
- A/RES/67/241
- A/RES/68/254
- A/RES/72/255
- A/RES/74/255

Laws of other entities (rules, regulations etc.)

- ICSC Statute

Other UN issuances (guidelines, policies etc.)

- A/31/30
- A/72/30
- ICSC/84/R.7
- ICSC/84/R.8
- ICSC/85/CRP.1
- ICSC/ACPAQ/39/R.2
- ICSC/ACPAQ/40/R.2

Secretary-General's bulletins

- ST/SGB/2017/1

Staff Regulations

- Regulation 12.1

Staff Rules

- Rule 11.2(a)
- Rule 11.2(b)

Related Judgments and Orders

2018-UNAT-840