

UNDT/2021/138, Abalos et al.

UNAT Held or UNDT Pronouncements

Neither party has—rightly so—disputed the Appeals Tribunal’s findings in Al Shakour that the United Nations Secretary-General was bound by the General Assembly’s endorsement and adoption of the ICSC’s determination regarding post-adjustment for United Nations staff in Geneva. In doing so, the Tribunal further notes that, as relevant to the present case and following Al Shakour, the General Assembly provided no alternatives for the United Nations Secretary-General on how to compute the relevant post-adjustment payment than by following the ICSC’s determination. Accordingly, as relevant to the present case, a textual interpretation of WMO staff regulation 3.3 leads to the Tribunal to conclude that the reference to “United Nations post adjustment” (emphasis added) unmistakably equals the organization established as “the United Nations” as spelled out in its Charter. As relevant to the present case, the decision of the General Assembly to follow ICSC’s determination thereon, as determined by the Appeals Tribunal in Al Shakour, was therefore the relevant standard to be applied for the WMO Secretary-General in accordance with WMO staff regulation 3.3. This was, furthermore, also in line with the stipulations of WMO staff rule 133.1(c). Consequently, in application of WMO staff rule 133.1(c), the WMO Secretary-General therefore acted within his discretion when he decided to apply ICSC’s determination regarding the post-adjustment for United Nations staff in Geneva to WMO. Essentially, pursuant to WMO staff regulation 3.3 read together with Al Shakour, the WMO Secretary-General had no other choice. Pursuant to the Merriam-Webster online dictionary, the word “appropriate” essentially means “right or suited for some purpose or situation”. The question is then whether, as argued by the Applicants, the word attributed a discretion to the WMO Secretary-General in the present case, when it is stated that “[t]he basic salary rates for Professional category staff shall be adjusted by application of the appropriate United Nations post adjustments” (emphasis added) in WMO staff regulation 3.3. 37. The Tribunal does not find so. The Applicants’ argument would only make sense if the WMO Secretary-General had a choice between different alternative United Nations post-adjustment standards in which

case s/he could decide which one would be best suited, or “appropriate”, one for WMO. This is, however, not the case, as already explained in the above. Accordingly, based on the language of WMO staff regulation 3.3, the word “appropriate” means that the WMO Secretary-General was limited to this single standard for post-adjustment applied by the United Nations, which was the one the General Assembly adopted in accordance with the ICSC’s determination in accordance with Al Shakour. The Applicants’ references to WMO staff regulations 3.1 and 3.2 do not change this finding. WMO staff regulation 3.1 concerns the basic salaries of the WMO staff members—and not the additional payment for post-adjustment—and solely provides that these salaries shall be “determined” by the WMO Secretary-General “in accordance with the grades and corresponding gross and net salary scales applicable to United Nations personnel”. WMO staff regulation 3.2 is about “assessment”—a general deduction from the salaries with no impact on the postadjustment remuneration. Such an assessment for WMO staff is simply determined in WMO staff regulation 3.2 to “be subject to an assessment as determined by the United Nations”. Neither provision therefore even as much as implies that the WMO Secretary-General should possess a discretion to depart from the standard “United Nations post adjustment” in accordance with WMO staff regulation 3.3, as promulgated by Congress. Similarly, the Agreement between the United Nations and WMO makes no difference to the Tribunal’s findings above. In art. IX(1) of this Agreement, it is merely stipulated that the United Nations and WMO “agree to develop as far as practicable common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel, and to facilitate any mutually desirable interchange of personnel in order to obtain the maximum benefit from their services”. This does in no possible manner affect the conclusion that in accordance with WMO staff regulation 3.3, the WMO Secretary-General was bound to follow the General Assembly’s decision as per Al Shakour. If anything, art. IX(1) rather affirms WMO’s general commitment to apply the United Nations standards as also done by Congress in WMO staff regulation 3.3. The decision for WMO to follow “the appropriate United Nations post adjustment”, and therefore also Al Shakour, was basically made by Congress when adopting WMO staff regulation 3.3. Thereafter, WMO was unconditionally bound to follow the applicable standard for the United Nations staff, and the WMO’s internal legal framework provided no discretion to the WMO Secretary-General when executing or administering this provision for the WMO staff in Geneva. Al Shakour therefore also applies to the present case, because the Appeals Tribunal decided therein that for the United Nations staff in

Geneva, the postadjustment payment was to be based on ICSC's determination as endorsed by the General Assembly. Since Congress adopted WMO staff regulation 3.3, WMO's "independence" or "sovereignty" from the United Nations was not affected by following the findings of the Appeals Tribunal in Al Shakour—only Congress, and no one else, made the decision to follow the United Nations standard for post-adjustment and did so without any further reservations. The WMO Secretary-General's possible personal opinions and assurances in this regard are therefore irrelevant, because in accordance with the internal hierarchy of WMO, s/he must follow the directions given to her/him by Congress in the WMO Staff Regulations. Furthermore, WMO is under the jurisdiction of the Dispute Tribunal and not ILOAT, and ILOAT judgments are only of persuasive authority to the Dispute Tribunal, whereas it is bound by those of the Appeals Tribunal under the doctrine of stare decisis. Similarly, other judgments of the Dispute Tribunal, like the first instance judgment in Al Shakour are not binding, but simply persuasive, for this Tribunal. Accordingly, it falls outside the scope of the present case to reargue the Appeals Tribunal's findings in Al-Shakour, which the Tribunal must therefore follow. Even if deviations exist between how the United Nations Secretariat and WMO administer certain "compensation schemes", this does not affect the remuneration for post-adjustment in accordance with WMO staff regulation 3.3. Congress made that clear when adopting this provision and unreservedly refer to the "appropriate United Nations post adjustment". Also, under WMO staff regulation 3.3, Congress did not contemplate that Congress or the Executive Council needed to endorse or otherwise approve any of the contested administrative decisions for them to be lawful. Had the Executive Council done so, it would have overstepped its authority within the internal hierarchy of WMO, since it was Congress that adopted WMO staff regulation 3.3. If Congress disagreed with the General Assembly's decision to endorse ICSC's determination on post-adjustment, the simple solution would be to amend WMO staff regulation 3.3, but it has not done so.

Decision Contested or Judgment/Order Appealed

The WMO Secretary-General's decision of 19 July 2019 to maintain the original decision of WMO to implement a post-adjustment multiplier determined by the International Civil Service Commission ("ICSC") based on its 2016 cost-of-living survey, resulting in a pay cut for its staff in Geneva.

Legal Principle(s)

Whereas the Administration is bestowed with a certain margin of appreciation, this discretion is generally not unfettered. As the Appeals Tribunal stated in its seminal judgment in Sanwidi 2010-UNAT-084, at para. 40, “when judging the validity of the exercise of discretionary authority, ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. This means that the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”. 14. The Appeals Tribunal, however, also underlined that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General” (see Sanwidi, para. 40). In this regard, “the Dispute Tribunal is not conducting a ‘merit-based review, but a judicial review’ explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker’s decision” (see Sanwidi, para. 42). Among the circumstances to consider when assessing the Administration’s exercise of its discretion, the Appeals Tribunal stated “[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see Sanwidi, para. 38). The Appeals Tribunal has consistently held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Case No. UNDT/NY/2020/049 Judgment No. UNDT/2021/138 Page 6 of 18 Dispute Tribunal may consider the application as a whole”. See Fasanella 2017-UNAT-765, para. 20, as affirmed in Cardwell 2018-UNAT-876, para. 23. The Appeals Tribunal has affirmed the application of the principle of stare decisis. This means that the Dispute Tribunal as the first instance court in a two-tier judicial system shall “recognize, respect and abide by the Appeals Tribunal’s jurisprudence” (see para. 24 of Igbiniedion 2014-UNAT-410 as also affirmed in, for instance, Hepworth 2015-UNAT-503 and Gehr 2016-UNAT-613). The governance structure of the WMO is the following: a. Congress is the supreme body of the WMO. Congress is empowered to determine, among

other responsibilities, general policy for the Organization, regulations prescribing the procedures of the various bodies of the Organization, in particular the General, Technical, Financial and Staff Regulations, and take any other appropriate action on matters affecting the Organization; b. The Executive Council is second to Congress in the internal hierarchy of WMO. It is the executive body of the Organization and is led by a President. The Executive Council is responsible to Congress for activities including the budgetary resources of the Organization, implementation of decisions taken by Members, making recommendations on any matter affecting the activities of the Organization and performing any other function as may be conferred on it by Congress or by its members collectively; c. The WMO Secretary-General is appointed by Congress and is responsible to the President of WMO for the technical and administrative work of the Secretariat. S/he consequently reports to Congress and the Executive Council. The WMO Secretary-General remains obligated to carry out his/her duties pursuant to the Convention [of WMO], Regulations of the Organization as well as direction given by Congress, the Executive Council and President of the Organization. The Appeals Tribunal has consistently held that when interpreting a legal provision, the point of departure is the “literal terms of the norm”, which means that “[w]hen the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation” (see Scott 2012-UNAT-225, para. 28, as affirmed in, for instance, De Aguirre 2016-UNAT-705, Timothy 2018-UNAT-847 and Ozturk 2018-UNAT-892, as well as also stated in Sidell 2013-UNAT-348 (para. 23), Scheepers et al. 2015-UNAT-556 (para. 31), Al-Mussader 2017-UNAT-771 (para. 28), Faye 2017-UNAT-801 (para. 23), Rockcliffe 2017-UNAT-807 (para. 28), Mohamed 2020-UNAT-985 (para. 31)). This principle of interpretation is occasionally also referred as the plain meaning rule. If the meaning of a word or text in a provision is, however, unclear or ambiguous, “it is necessary to interpret the law teleologically, beyond its literal meaning”. By this, the word or text “must be read in context” to understand what its purported meaning is (see para. 43 of Collins 2020-UNAT-1021). This is also known as a teleological interpretation. The Charter of the United Nations is the founding document of the Organization, and it also establishes its organs, including the General Assembly and the United Nations Secretariat, which is led by the United Nations Secretary-General (see Chapters I, II, IV and XV)

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Abalos et al.

Entity

WMO

Case Number(s)

UNDT/NY/2020/49

Tribunal

UNDT

Registry

New York

Date of Judgement

22 Nov 2021

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Salary

Post-adjustment

Applicable Law

Laws of other entities (rules, regulations etc.)

UN Charter

Related Judgments and Orders

2021-UNAT-1107

2021-UNAT-1108

2021-UNAT-1110

2021-UNAT-1111

2010-UNAT-084

2017-UNAT-765

2018-UNAT-876

2014-UNAT-410

2015-UNAT-503

2016-UNAT-613

2012-UNAT-225

2016-UNAT-705

2018-UNAT-847

2018-UNAT-892

2013-UNAT-348

2015-UNAT-556

2017-UNAT-771

2017-UNAT-801

2020-UNAT-985

2020-UNAT-1021