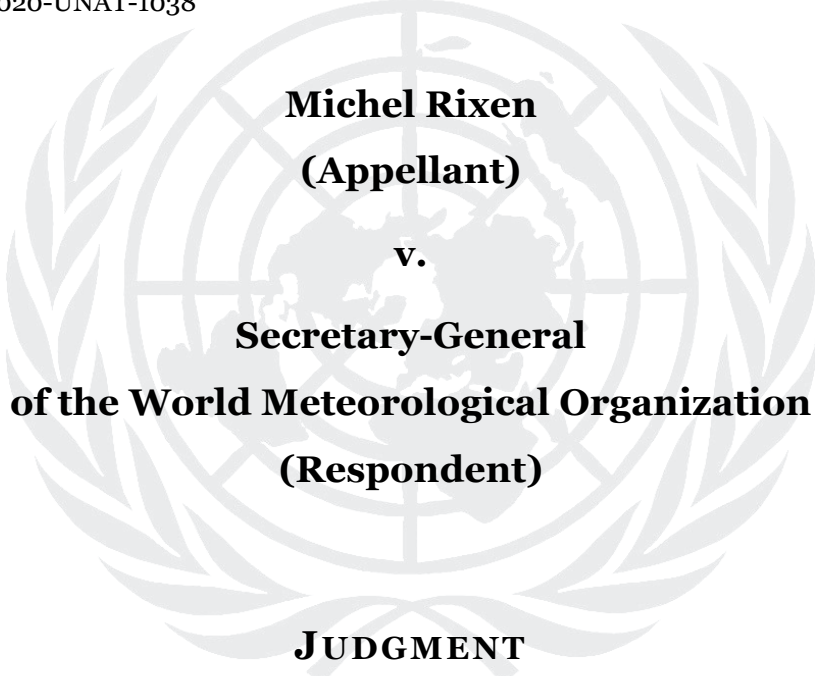




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-1038



**Michel Rixen  
(Appellant)**  
v.  
**Secretary-General  
of the World Meteorological Organization  
(Respondent)**

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2019-1326
Date:	26 June 2020
Registrar:	Weicheng Lin

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Counsel for Mr. Rixen:	Jean-Didier Sicault
Counsel for WMO Secretary-General:	Brigitta Exterkate

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Appellant, a staff member of the World Meteorological Organization (WMO) in Geneva, appeals the decision of the Secretary-General of the WMO to accept the recommendation of the WMO's Joint Appeals Board (JAB/WMO) to implement the reduced post adjustment multiplier (PAM) for staff members of the WMO. In addition, the JAB/WMO recommended that staff members challenging the PAM pursue their grievances using the United Nations' Internal Justice System, which the Appellant now does.

2. For reasons below, we remand the matter back to the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) to ensure that this case is dealt with in a manner that produces a written decision from a neutral first instance process as required by the Special Agreement between the WMO and the United Nations, dated 20 January 2020 bestowing jurisdiction on the UNDT as the neutral first instance process for the WMO (the Special Agreement).

**Facts and Procedure**

3. On 4 May 2018, the Appellant, along with other staff members of the WMO, submitted to the Secretary-General of the WMO a request for review of a March 2018 implementation of the PAM.

4. The PAM was implemented because of recommendations of the International Civil Service Commission (ICSC) to the United Nations General Assembly on remuneration and post adjustment scales to the United Nations Common System.

5. General Assembly Resolution 72/255 approved the recommendation of the ICSC to revise the unified base/floor scale for staff in the Professional and higher categories and requested the ICSC continue its efforts to improve the post adjustment system. The resolution also "stressed" the importance and obligations of all organizations in the United Nations Common System to consult and cooperate fully with the ICSC on matters relating to remuneration and conditions of service. The ICSC is supported by the Advisory Committee on Post Adjustment Questions (ACPAQ) that advises the ICSC on the methodology underpinning the post adjustment system.

6. At headquarter duty stations such as Geneva, cost of living surveys are conducted at least once every five years with the survey relevant to the matters under appeal in occurring in September/October 2016. As a result, the ICSC recommended an implementation of a 6.7 per cent reduction to the post adjustment multiplier in August and November 2017.

7. Following this, the majority of United Nations organizations in Geneva sought clarification and explanations from the ICSC of this reduction and tasked experts to review the results of the survey. This resulted in a report submitted to the ICSC in July 2017 outlining issues with the methodology and results of the survey.

8. The ICSC subsequently decided to reintroduce gap closure measures to mitigate the negative impacts on salaries resulting from the cost of living surveys by augmenting the post adjustment index derived from the 2016 survey by 3 per cent. In addition, the ICSC approved a personal transitional allowance equivalent to the difference between the revised and prevailing PAM for a period of six months and thereafter reduced at four-month intervals by 3 per cent until phased out.

9. The impact of the post adjustment reduction was reflected in the Appellant's March and June 2018 salaries.

10. Appeals to the JAB/WMO were submitted on 25 June 2018 and 15 August 2018. In his appeals to the JAB/WMO, the Appellant argued that the calculation of the updated PAM carried out by the ICSC was:

- Against established case law for the international civil service;
- Was not reviewed for legality;
- Unjustified and unjustifiable;
- Resulting from factual errors;
- A consequence of other prior inadmissible decisions;
- Violated fundamental principles for changes in conditions of service;
- Violated acquired staff rights;
- Caused unnecessary and/or undue injury;
- Procedurally flawed; and

- Because of the above, illegal and void as a whole.

11. On or about 20 June 2019, the JAB/WMO issued its report and found it did not have the competence to decide on the decisions taken by the ICSC pursuant to Staff Rule 1111.3(e). It “noted” that the WMO’s seventh congress decided to accept the ICSC Statute and consequently was bound to respect the decisions taken by the United Nations General Assembly on the ICSC’s recommendations (emphasized by General Assembly resolutions 72/55 and 73/273). It “concluded” that the Secretary-General of the WMO was required to implement the ICSC’s decision by the relevant statutes and governing body decisions and that his actions were within his mandate. The JAB/WMO was of the “opinion” that the Secretary-General of the WMO acted reasonably through due diligence efforts made to understand the reasons for the post adjustment reduction and the efforts made to convince the ICSC to reconsider. The JAB/WMO then recommended the Appellants pursue their grievances using other avenues of the United Nations’ Internal Justice System but in the interim, recommended that the Secretary-General of the WMO maintain his decision to implement the PAM issued by the ICSC in March and June, 2018.

12. In a letter dated 19 July 2019, the Secretary-General of the WMO informed the Appellant to follow the JAB/WMO’s recommendations and suggested the organization receive a “legal analysis by the [United Nations Appeals Tribunal] in order to properly address the appeal, namely the legality of the ICSC decision with respect to the Geneva post adjustment multiplier.”

13. On 3 July 2019, the International Labour Organization Administrative Tribunal (ILOAT) delivered a series of judgments regarding the lawfulness of the reductions in post adjustments implemented by other international specialized organizations because of ICSC’s “decisions”. These organizations included the International Labour Organization, International Organization for Migration, the World Health Organization, the Joint United Nations Programme on HIV/AIDS, and the World Intellectual Property Organization. These organizations submitted to ILOAT extensive observations made by the ICSC on the complaints and rejoinders from their concerned staff members. The ILOAT found that the reductions in question were unlawful and ordered them rescinded.

14. The Appellant filed an appeal before this Tribunal on 18 October 2019 pursuant to a 2017 special agreement wherein the WMO agreed that the Appeals Tribunal may receive appeals from the JAB/WMO process.

15. On 20 January 2020, the WMO joined the United Nations' Internal Justice System accepting the jurisdiction of not only the Appeals Tribunal but also the Dispute Tribunal as a result of the Special Agreement.

16. On 21 February 2020, the Secretary-General of the United Nations requested an opportunity to present his views in the appeal on issues of general importance to the organization, in the alternative, to file a friend-of-the-court brief pursuant to Article 17 of the Appeals Tribunal's Rules of Procedure as it would "assist the Appeals Tribunals in its deliberations."

### **Submissions**

#### **The Appellant's Appeal**

17. The Appellant says the issue is the legality of the two-tier reduction that affected his remuneration from March 2018 and June 2018. The Appellant relies on the decisions of the ILOAT, namely, Judgment 4137, to argue that the ICSC lacks authority to decide on PAM. The ILOAT Judgments are cited to support the Appellant's submission that the ICSC's power in relation to the quantification of post adjustments is limited to making recommendations to the General Assembly and not to decide, itself, the amounts of post adjustments. In addition, the Appellant says the ILOAT Judgments confirm that the ICSC decisions on the matter are without legal foundation and that the General Assembly did not consider and act on a recommendation in adopting resolution 72/255 but assumed the decision had already been made.

18. In addition, the Appellant challenges the lack of adequate justification for the reductions proffered by the ICSC. The Appellant submits that the post adjustment process underpins a significant element of the Noblemaire principle applicable to the salaries of international civil servants, namely that the pay of international civil servants should be equivalent by making its real value, or purchasing power, as uniform as possible from one duty station to another. Therefore, the Appellant submits the 3 per cent gap closure measure adopted was a reduction from earlier thresholds of 5 per cent and this alteration by the ICSC was without real explanation as to the rationale in statistical, mathematical, methodological or otherwise scientific terms and this was upheld by ILOAT Judgment 4137.

19. The Appellant argues violation of the general principles of law applicable to salaries adjustments as outlined by ILOAT Judgment 4137 in particular the principle that the methodology adopted by international organizations for determining salary adjustments must ensure that the results are stable, foreseeable, and clearly understood or transparent. The Geneva based organizations and the report of experts they retained indicate that there were errors in the calculations and methodology employed by the ICSC leading to unstable results and was neither foreseeable nor understandable.

20. The Appellant also submits that the chain of decisions by the ICSC violated his acquired rights and legitimate expectations by affecting the benefits that have accrued to, or have been earned, by a staff member for services rendered before the entry into force of the amendment and by failing to take into account the WMO staff's legitimate expectations.

21. By doing so, the Appellant says the impugned decision violated the obligation of the WMO not to cause unnecessary harm to the Appellant. An international organization must treat its officials with proper consideration, care for them, and not cause them unnecessary disappointment where this could be avoided. More specifically, an organization breaches its duty of care when it fails to ensure that its decision does not place the concerned officials in unnecessary financial difficulties.<sup>1</sup> This implies that when organizations take decisions concerning the situation of officials, they must take into consideration all the factors which may affect their decisions, and when doing so they should take into account not only the interests of the organizations themselves but also those of the officials concerned. The impugned decision was adopted in breach of the principles of good faith, respect, and transparency.

22. Finally, the Appellant submits that it is of the utmost importance that due attention be paid to the consequences of a judgment which would significantly diverge from the ILOAT Judgments in order to avoid jeopardizing the common system and general principles. Because of the difference in post adjustments, staff members of the WMO earn significantly less than their counterparts of the Geneva-based specialized agencies which have executed the ILOAT Judgments. In addition, there is the need to uphold the Noblemaire principle which upholds the rule to keep the international civil service as one, its employees shall get equal pay for work of equal value.<sup>2</sup>

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<sup>1</sup> ILOAT, Judgment Nos. 3373, 3688, 4171.

<sup>2</sup> ILOAT Judgment Nos. 4137/391.

**The Secretary-General of the WMO's Answer**

23. The Secretary-General of the WMO submits that only if the impugned decision of the Secretary-General is set aside by the Appeals Tribunal will WMO have a legal basis to pay WMO staff the same salary as their colleagues in other United Nations organizations in Geneva.

24. First, the Secretary-General of the WMO submits the JAB/WMO erred in finding the appeals were receivable.

25. Second, he requests this case be remanded to the first instance process, the Dispute Tribunal, as the WMO has joined the United Nations Internal Justice System as a result of the Special Agreement of 20 January 2020.

26. Third, the Secretary-General of the WMO submits that the ILOAT Judgments on the matter are based on principles developed in ILOAT's jurisprudence that are inconsistent with the legal framework applicable to the United Nations Secretariat and its Funds and Programmes and the WMO, which include the staff regulations and rules, related administrative issuances, General Assembly resolutions and the Appeals Tribunal's jurisprudence. This includes WMO Staff Rule 133.1 which explicitly stipulates that the ICSC determines the PAM.

27. The ILOAT and the United Nations Dispute and Appeals Tribunals have developed divergent approaches with respect to the receivability of challenges to decisions by legislative bodies and their subsidiary organs. The ILOAT has developed the principle that it is bound to consider whether the decision is lawful and proper including reviewing whether legislative decision were based on "methodology which ensures that the results are stable, foreseeable and clearly understood or transparent". This is a different approach from the Appeals Tribunal that distinguishes claims that challenge the legality of the Secretary-General's execution of legislative decisions from claims that challenge the legality of the legislative decisions themselves.<sup>3</sup>

28. The Appellant's claims wholly relate to alleged flaws in the decisions of the ICSC and the methodology employed by the ICSC in making such decisions. The Appellant has not alleged that the Secretary-General of the WMO failed to comply with any statutory requirement or preconditions that attach to the exercise of his authority to execute ICSC decisions; in fact, there are no such statutory preconditions or requirements here. The General Assembly has reaffirmed

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<sup>3</sup> See *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840.

unequivocally that “resolutions of the General Assembly and the decisions of the ICSC are binding on the Secretary-General and on the Organization.”<sup>4</sup> The General Assembly has not qualified this directive by stating that the Secretary-General is bound by ICSC decisions only when they are correct and “based on methodology which ensures that the results are stable, foreseeable, and clearly understood or transparent”; this only exists in the ILOAT jurisprudence.

29. As a result, the Secretary-General of the WMO submits that the Appellant’s claim must be rejected as non-receivable as they seek review of the legality of the ICSC’s decisions based on arguments related to the authority of and methodology used by the ICSC.

30. In the alternative, the Secretary-General of the WMO submits that the ILOAT erred in concluding that the ICSC can only make recommendations about post adjustment multipliers. Under Article 10 of the ICSC Statute, the ICSC makes recommendations regarding the “scales of salaries and post adjustments” for approval of the General Assembly. Under Article 11(c) of its Statute, the ICSC establishes the “classifications of duty stations for the purpose of applying post adjustments” without the need for General Assembly approval.

31. In 1990, the General Assembly discontinued the practice of approving post adjustment scales and ordered the establishment of a post adjustment multiplier and post adjustment index for each duty station.<sup>5</sup> The post adjustment classification (PAC) is defined by the ICSC as [...] “based on the cost-of-living as reflected in the respective post adjustment index (PAI) for each duty station. The classification is expressed in terms of multiplier points. Staff members at a duty station classified as multiplier 5 would receive a post adjustment amount equivalent to 5 per cent of net base salary as a supplement of base pay.”

32. The General Assembly and ICSC share a common understanding that the ICSC has decision making authority pursuant to Article 11(c) to establish post adjustment multipliers for duty stations as a means of classifying duty stations. The classification of the duty stations has always been linked to the establishment of post adjustment multipliers and therefore, has always involved a determination of post adjustment in the quantitative sense without the need for General Assembly approval.

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<sup>4</sup> General Assembly resolutions 66/237 and 67/241.

<sup>5</sup> General Assembly resolution 44/198.



33. The Secretary-General of the WMO requests the Appeals Tribunal to:
- a) remand the appeal to the UNDT to hear and pass judgment; or
  - b) in the alternative, confirm whether the impugned judgment is in line with the ICSC's decisions and the resolutions of the General Assembly or whether the principle of equal pay for equal work is of fundamental importance and represents a sound reason for the Appeals Tribunal to set aside the impugned decision and adopt the ruling of the ILOAT; and
  - c) reject the Appellant's request for costs because no specifications for costs were made by the Appellant.
34. In response to the request to remand the appeal to the Dispute Tribunal, the Appellant says his appeal was filed before the conclusion of the Special Agreement in January 2020.

### **Considerations**

#### *I. Preliminary Issues*

35. On 3 May 2018, the JAB/WMO held that the Appellant's appeal was receivable as the Appellant e-mailed his Request for Administrative Review within the two month time limit set out by Staff Rule 11.2(a) and recommended the Secretary-General of the WMO conduct a review of the decision. On 16 May 2018, the Secretary-General of the WMO declined to follow the JAB/WMO's recommendation and disputed the JAB/WMO's decision on receivability. The Respondent continues to argue the receivability issue before the Appeals Tribunal.

36. However, due to our decision to remand the matter to the Dispute Tribunal, we make no finding as to whether the JAB/WMO erred on its finding of receivability.

37. Similarly, as to the request of the Secretary-General of the United Nations to be allowed to present his views on issues of general importance to the organization, or, in the alternative, to file a friend-of-the-court brief, we find no need to make a determination on this application because the case is remanded to the Dispute Tribunal.

II. *Does the JAB/WMO process comply with the Requirements of Article 2(10) of the Appeals Tribunal Statute?*

38. More fundamentally, we are concerned that the contested “decision”, whether that is the JAB/WMO report or the Secretary-General of the WMO’s final decision resulting from the report, does not conform to the requirements of Article 2(10) of the Statute of the Appeals Tribunal and the Special Agreement, both which provide that the WMO “utilizes a neutral first instance process that includes a written record and a written decision providing reasons, facts, and law”.

39. Article 2(10) of the Appeals Tribunal Statute provides that:

The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. ... Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law....

40. In *Rolli*<sup>6</sup> the Appeals Tribunal reviewed the application of Article 2(10) and the role of the JAB/WMO in the appeal process.

41. Rule 1111.1 of the WMO Staff Regulations and Rules establishes the JAB/WMO “to consider and advise the Secretary-General regarding appeals filed by staff members ...”. Rule 1111.3(n) of the WMO Staff Regulations and Rules provides that the JAB/WMO shall submit a report to the Secretary-General of the WMO with the JAB/WMO’s recommendation. Rule 1113.1(o) confirms that the final decision on the appeal shall be taken by the Secretary-General of the WMO. Rule 1112.1 and Regulation 11.2 provides that the application to the Administrative Tribunal is not receivable unless the applicant has previously submitted the dispute to the JAB/WMO and the JAB/WMO has communicated its “opinion” to the Secretary-General of the WMO.

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<sup>6</sup> *Rolli v. Secretary-General of the World Meteorological Organization*, Judgment No. 2019-UNAT-952.

42. In *Rolli*,<sup>7</sup> the Appeals Tribunal ruled:

[...] the intention of Article 2(10) is to allow specialized agencies by agreement to accept and submit to the terms of the jurisdiction of the Appeals Tribunal consonant with the Statute of the Appeals Tribunal. As the ordinary jurisdiction of the Appeals Tribunal is to hear and pass judgement on appeals against a judgement rendered by the United Nations Dispute Tribunal, Article 2(10) requires the special agreement to include provisions establishing a neutral first instance process that includes a written record and a written decision providing reasons, based on factual and legal findings. It is intended that the neutral first instance process will result in a decision based on a record that can be the subject of a possible appeal. Appeals before the Appeals Tribunal are appeals on the record.

43. The Appeals Tribunal further held that JAB/WMO failed to make the necessary factual and legal findings in relation to the evidence produced and the final decision was taken by the Secretary-General of the WMO, who as employer, was not a neutral body. The Appeals Tribunal then remanded the matter back to the JAB/WMO to reconsider and re-determine by a neutral process that produces a record of decision and a written decision including a statement of the relevant facts, the relevant law and reasons for the decision.

44. The same concern applies to the case at bar. Based on the legal framework under the Special Agreement, the JAB/WMO's report is not a "decision" from a "neutral first instance process" but simply provides advice or recommendations to the Secretary-General of the WMO, who can adopt the recommendations or ignore them. The role of the Secretary-General of the WMO cannot be regarded as a neutral body in the appeal process.<sup>8</sup>

45. The JAB/WMO's report may provide a written record of events and some findings, however, the report is not a "decision" from a neutral first instance process as it simply provides non-binding "recommendations" or "opinions". As stated in *Spinardi*, we are not satisfied that the essential elements of a neutral first instance process are present to have constituted a decision that could be appealed to the Appeals Tribunal.

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<sup>7</sup> *Id.*, para 27.

<sup>8</sup> See *Rolli*, *supra*; *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957; *Dispert & Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-958; *Sheffer v. Secretary-General of the International Maritime Organization*, Judgment No 2019-UNAT-949.

46. The Special Agreement extended the jurisdiction of the Dispute Tribunal and Appeals Tribunal to the WMO with effect on 20 January 2020. As a transitional measure, the Special Agreement provides that all cases pending before the JAB/WMO shall be transferred to the Dispute Tribunal from the effective date of the Agreement. It is silent on cases pending before the Appeals Tribunal. However, in the preamble, the Special Agreement confirms the Appeals Tribunal's jurisdiction is now to hear and pass judgment on appeals filed against a judgment rendered by the Dispute Tribunal and this Agreement supersedes the 2017 special agreement. Therefore, we remand the matter to the Dispute Tribunal under Article 2(10) of the Appeals Tribunal Statute for a decision from the Dispute Tribunal which now constitutes the neutral first instance process for the WMO.

**Judgment**

47. The case is remanded to the UNDT for appropriate consideration.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of June 2020.

*(Signed)*

Judge Sandhu, Presiding  
Vancouver, Canada

*(Signed)*

Judge Knierim  
Hamburg, Germany

*(Signed)*

Judge Halfeld  
Bournemouth, United Kingdom

Entered in the Register on this 14<sup>th</sup> day of August 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar