

JUDGE DIMITRIOS RAIKOS , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/098, 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 Quijano-Evans and Dedeyne-Amann v. Secretary-General of the United Nations . The Secretary-General filed the appeal on 2 March 2018, and Ms. Nicole Quijano-Evans and Ms. Jo Dedeyne-Amann (Quijano-Evans et al.) filed their answer and cross-appeal on 25 April 2018.¹ On 11 June 2018, the Secretary-General filed his answer to the cross-appeal. On 13 June 2018, the Respondents filed a motion for leave to file a response to the answer to the cross-appeal.

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 69/2 51 of 12 April 2013, 27 December 2013 and 29 December 2014, respectively.

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 (Rules) and an extension of that limit to 25 pages. By Order No. 310 (2018) dated 26 February 2018, 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.

² By Order No. 3178(2018) dated 27 April 2018, the Appeals Tribunal ordered *mero motu* to shorten the time limit for the Secretary-General to file his answer to the cross-appeal from 60 calendar days to 45 calendar days.

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 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) and a special dependency allowance (for disabled

e, the ICSC's 2015 Report, para. 3.8 (Special dependency allowance)).

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 memb

16. The UNDT identified the contested decisions as the Secretary-General's decisions (in implementing the Unified Salary Scale) to pay the Respondents "a salary reduced of the portion which was previously paid on the basis that they have dependent(s)"⁴. 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

well as preceding General Assembly resolutions st

... 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, 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.*¹⁰ and the Administrative Tribunal of the International Labour Organization (ILOAT) in *Ayoub*,¹¹ 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.¹² 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

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.

29. 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

31. 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.

32. 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.

Quijano-Evans *et al.*'s Answer

33. Quijano-Evans *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.

34. 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.

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42. The Respondents submit that neither the General Assembly nor the Secretary-General can impose changes to the contractual terms of a staff member through internal legislation if such amendments would violate the provisions of the Charter of the United Nations, which rests at the top of the legislative hierarchy. The right to equal treatment, including the prohibition of gender discrimination contained in Article 8 of the Charter, forms part of the Respondents' essential terms and conditions of employment.

43. The Respondents claim to have suffered discrimination as a result of their family status relating to them having a non-dependent spouse and dependent children. While other categories of staff are "protected" by the implementation of a dependent spouse allowance or single parent allowance that compensates for the six per cent loss in net remuneration, the Respondents who are not single parents, do not have a dependent spouse and receive a depreciating transitional allowance do not see their salaries protected. The Respondents argue that such disparate treatment is in violation of the Administration's

The Secretary-General's Answer to the Cross-Appeal

46. The Secretary-General submits that the Respondents have not established that the UNDT committed a reversible error of procedure by failing to provide a reasoned decision with respect to their claims of discrimination regarding the transitional allowance. The UNDT did in fact adjudicate the entirety of their case and its Judgment evidences a reasoned basis for its decisions.

47. The Secretary-General further asserts that the Respondents have not established that the UNDT erred by rejecting their claims of discrimination as not receivable.

48. On the merits of the issue, the Secretary-General submits that the Respondents have failed to establish that they have been subject to discrimination on the basis of their family status. The principle of equality requires that "similarly situated" staff members be treated equally while staff members in different situations may be treated differently if such distinction is based on sound administrative reasons or is a fair and reasonable outcome of circumstantial differences. With the introduction of the Unified Salary Scale, all internationally recruited staff members performing work at the same level are to be paid according to the same salary scale rather than according to a salary scale that makes distinctions based on extraneous, personal factors such as whether staff members are married or have children. The newly introduced distinction based on whether a staff member has a high earning spouse stems from the reasonable and legitimate policy decision that there is a recognizable need for additional financial assistance for staff members sustaining a household on a single source of income.

49. Second, the Respondents have not shown discrimination on the basis of gender. They have failed to adequately establish that the transitional allowance has a disproportionate impact on female staff members. The statistics cited by the Respondents in this regard were not presented to the UNDT and should thus, in the absence of exceptional circumstances, be rejected by the Appeals Tribunal. These statistics, even if accepted, do not meet any reasonable evidentiary standard of proof to substantiate their disparate impact claim. Moreover, even assuming such negative impact existed, this would not justify a claim of discrimination as there is a reasonable basis for the differential treatment because staff members who are solely responsible for financially supporting a household are in a greater need of financial support than those living in a dual-income household, irrespective of their gender.

50. Finally, the Secretary-General argues that the Respondents failed to establish a basis for the Appeals Tribunal to award them compensation for alleged moral harm on the ground of gender discrimination. In addition to not having been unlawfully discriminated against, the Respondents have failed to provide evidence of harm. The UNDT's and Appeals Tribunal's statutory power is limited to awarding compensation based on evidence of direct and certain harm rather than based on the general principle of equity.

Quijano-Evans *et al.*'s Response to the Answer to the Cross-Appeal

51. Quijano-Evans et al. submit that the Secretary-General's contention in his answer to their cross-appeal, namely that they had cited 2015 census statistics from the United States of America, which had not been presented to the UNDT, was factually incorrect as the data were indeed presented during the oral hearing before the UNDT.

Considerations

52. The panel finds that there are no significant factual or legal differences to those canvassed in the companion case disposed of by the whole Appeals Tribunal in Lloret Alcañiz et al.¹⁵

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Secretary-General's implementation of the Resolutions involved an administrative decision with an adverse impact.

... In the view of the minority of Judges, the Secretary-General was not vested with any discretionary authority with respect to the implementation of the General Assembly resolutions and thus the actions of the Secretary-General in implementing them were not administrative decisions affecting the contracts of employment or terms of appointment of the Respondents. In their opinion, the Respondents' arguments presume a scope of discretion that the General Assembly did not grant the Secretary-General. The General Assembly's decisions regarding the specific amounts of salary and allowances to be paid to staff members are unambiguous and leave no room for interpretation or variation by the Secretary-General. The minority of Judges therefore hold that the claim that the Unified Salary Scale violated the Respondents' acquired rights is indeed a challenge to the validity of the General Assembly's legislative or regulatory power, and not to any discretion exercised by the Secretary-General. The instruments affecting the contracts of employment and terms of appointment were the regulatory resolutions of the General Assembly which are legislative in nature. It follows that the jurisdictional pre-conditions for judicial review by the UNDT were not fulfilled, and thus the applications ought to have been dismissed as not receivable. These Judges therefore would uphold the appeal of the Secretary-General on this basis.

... The majority of Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in the nature of a duty. However, such exercises of power are administrative in nature and involve a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They are thus administrative decisions that may adversely affect the terms of employment. However, importantly, given that purely mechanical powers entail little choice, they are rarely susceptible to review on the grounds of reasonableness. A review on grounds of reasonableness typically involves examination of the decision-maker's motive, the weighing of competing considerations and the basis for, and effects of, any choice made. An exercise of a purely mechanical power normally does not require the administrator to formulate an independent purpose or basis for action. Nevertheless, purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good

... The mere nature of a decision, however, is not sufficient to classify it as an administrative decision. A decision must have direct adverse consequences in order to be an appealable administrative decision within the meaning of Article 2(1) of the UNDT Statute. The Secretary-General maintains that the UNDT erred in concluding that the Respondents suffered negative consequences at the time the contested decisions were taken or even when the applications were filed. No financial losses had materialized for the Respondents in January 2017. The transitional allowances that were paid in addition to the salaries were higher than the reductions in gross salary for the Respondents, resulting in an increase of the total sum of salary and allowances. Future losses due to further reductions of the transitional allowances, it was contended, do not provide a sufficient basis for review if no actual damage has been demonstrated at the time of the application.

... It is true that in January 2017, the Respondents' take-home pay in fact increased when compared to their December 2016 pay. The figures analyzed by the UNDT in relation to Ms. Lloret Alcañiz, for example, show that in January 2017 she took home USD 367.54 more than she did in December 2016. However, there is no denying that her 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. ^[22] 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 for all the Respondents. In the premises, the majority of Judges hold that the UNDT was correct in finding the applications to be receivable.

The merits

... The question then is whether the Secretary-General's exercise of power was illegal. Although the minority, as stated, would uphold the appeal on the grounds of receivability, they do not disagree with the reasoning of the majority on the merits.

... The UNDT held that the exercise of power by the Secretary-General was illegal because the organs of the Organization are bound by Staff Regulation 12.1, which has a "quasi-constitutional"^[23] value fettering both the legislative power of the General Assembly and the mechanical power of the Secretary-General in implementing resoluti.9(rhh0/24 3a)-5.8(gd)6(t71-5.3(e/26-6.8(u3)(. Hhe)

power to unilaterally reduce the remuneration of existing staff members by virtue of the entrenchment of their acquired rights by resolution 13(I) of 1946.

... The UNDT reasoned that while the Secretary-General was undisputedly bound by General Assembly resolutions 70/244 and 71/263, a normative conflict resulted from the fact that the Secretary-General was equally bound by the contractual obligations with staff members and preceding General Assembly resolutions still in force which protected the Respondents' acquired rights—in particular Staff Regulation 12.1 which provides that the Staff Regulations may be supplemented or amended by the General Assembly, only “without prejudice to the acquired rights of staff members”. The UNDT held that Staff Regulation 12.1 “poses some limits” 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, has quasi-constitutional value and takes precedence over other Staff Regulations and Rules governing the staff members' conditions of

... Judgment No. 273 of the Former Administrative Tribunal was rendered in the Mortished case^[26] Mr. Mortished was an Irish national and staff member of the Organization in Geneva. On retiring he sought to be paid a repatriation grant. The grant and the entitlement to it were established by General Assembly resolution 470 (V) of 1950. Shortly before Mr. Mortished's retirement, the General Assembly adopted two resolutions relating to the repatriation grant. By resolution 33/119 of 1978, it decided that payment of the repatriation grant would be conditional upon the presentation by the staff member of evidence of actual relocation from his or her last duty station on retirement. The Resolution was given effect by an amendment to Staff Rule 109.5 (f), which in addition provided that staff members already in service before 1 July 1979 would retain the entitlement to a repatriation grant without the necessity of production of evidence of relocation. In terms of this provision, Mr. Mortished was exempted (by virtue of his period of service) from producing documentary evidence of his relocation from his last duty station. However, in December 1979, the General Assembly adopted resolution 34/165, which, in paragraph 3 of section II, provided that effective 1 January 1980 no staff member shall be entitled to any repatriation grant unless evidence of relocation away from the country of the last duty station is provided. The former Administrative Tribunal ruled that Mr. Mortished was entitled to receive the grant on the terms

Unified Salary Scale altered staff members' rates of pay for future services without their consent and hence resolutions 70/244 and 71/263 violated their acquired rights as supposedly enshrined by the quasi-constitutional Staff Regulation 12.1.

... The term "acquired rights" and the protection afforded by Staff Regulation 12.1 are inherently vague and ambiguous. The very term "acquired" implies and suggests the idea of protection and the notion that such rights may expect to survive future variation.^[31] But by the

earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to future increases^[32] or pose a legal bar to a reduction in salary.

... The limited purpose of Staff Regulation 12.1, therefore, is to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been at sta713 0 TD97 TD

time they accepted employment for the entirety of their service.^[34] The fact that the unilateral

the Charter and thus invalid. However, neither the UNDT nor this Tribunal is a constitutional court. The establishment of the terms and content of the transitional allowance is a matter for the General Assembly and the allegations of discrimination are directed at the nature and content of the legislative or regulatory choices of the General Assembly. The challenge goes beyond clarification of the resolutions' scope of application; it is directed rather at a policy decision, which the Respondents hope to re-define in accordance with their interpretation of the requirements of Article 8 of the Charter. As such, they indisputably attack the substantive validity of the resolutions or the legislative decisions of the General Assembly. The UNDT was accordingly correct to decline jurisdiction on the basis that only appeals in relation to administrative decisions are receivable by it.

... In the result, the cross-appeal must be dismissed.

The UNDT's observations on the role of the ICSC and OLA

... In light of our vacating the erroneous Judgment of the UNDT entirely, there is strictly no need to rule on the request of the Secretary-General to strike out the UNDT's observations impugning the independence and impartiality of the ICSC and OLA in carrying out their mandates. In fairness though, it must be said, the UNDT erred in making these observations. The request by the ICSC, which is 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, was not improper. We agree with the Secretary-General that a request for non-binding legal advice did not violate the prohibition on seeking instructions as contained in Article 6(1) of the ICSC Statute. There is a difference between receiving instructions and obtaining non-binding legal advice.

Judgment

53. The appeal is upheld, the cross-appeal is dismissed and Judgment No. UNDT/2017/098 is hereby vacated.

Original and Authoritative Version: English

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

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

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

(Signed)

Weicheng Lin, Registrar