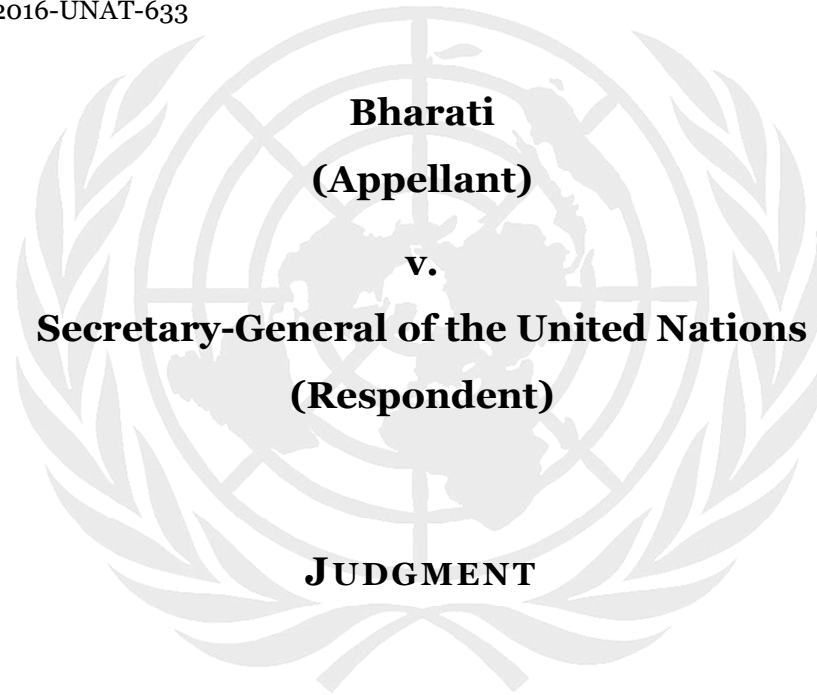




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-633



**Bharati
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Mary Faherty Judge Richard Lussick
Case No.:	2015-839
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Bharati:

Self-represented

Counsel for Secretary-General:

Nathalie Defrasne

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/045, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 5 June 2015. Mr. Muktikanta Bharati filed an appeal on 22 May 2015, and the Secretary-General answered on 10 September 2015.

Facts and Procedure

2. Mr. Bharati is a general service staff member of the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), India.

3. In June 2013, a Comprehensive Local Salary Survey was conducted in New Delhi, India. The results of the survey were published by the Office of Human Resources Management (OHRM) on its website, as reflected in its cable dated 1 October 2014:¹

SUBJECT: NEW DELHI (INDIA) LOCAL SALARIES

(AAA) FOLLOWING THE COMPREHENSIVE SALARY SURVEY CONDUCTED IN NEW DELHI IN JUNE 2013, THIS IS TO ADVISE YOU THAT THE RESULTS OF THE SURVEY INDICATE THAT SALARIES FOR LOCALLY-RECRUITED STAFF ARE ABOVE THE LABOUR MARKET WHEN COMPARED WITH THE REMUNERATION PACKAGE OF THE RETAINED COMPARATORS BY 13.4 PER CENT FOR GENERAL SERVICE (GGSS) CATEGORY AND 19.4 PER CENT FOR NATIONAL OFFICER [(NNOO)] CATEGORY. ACCORDINGLY, THE FOLLOWING SALARY SCALES ARE ISSUED:

(1) GS 62 AND NO 22, BOTH EFFECTIVE 1 JUNE 2013, PAYABLE ONLY TO STAFF RECRUITED ON OR AFTER ONE NOVEMBER 2014. REVISED NET SALARIES REFLECT DOWNWARD ADJUSTMENT OF (-) 13.4 PER CENT FOR GGSS AND (-) 19.4 PER CENT FOR NNOO.

(2) AMEND. ONE TO GS 61 AND NO 21, EFFECTIVE 1 JULY 2012, PAYABLE TO ELIGIBLE STAFF ALREADY ON BOARD PRIOR TO ONE NOVEMBER 2014. THE AMENDMENTS ARE ISSUED TO REFLECT REVISED ALLOWANCES.

(BBB) REVISED ALLOWANCES IN RUPEES NET PER ANNUM ARE AS FOLLOWS:

¹ Appeal, Annex 1.

(1) CHILD, PER CHILD, SUBJECT TO MAXIMUM OF SIX CHILDREN

a. 23,511 APPLICABLE TO STAFF MEMBERS FOR WHOM THE ALLOWANCE BECOMES PAYABLE ON OR AFTER ONE NOVEMBER 2014;

b. 27,156 APPLICABLE TO STAFF MEMBERS FOR WHOM THE ALLOWANCE BECOMES PAYABLE PRIOR TO ONE NOVEMBER 2014;

(2) FIRST LANGUAGE

a. 29,532 APPLICABLE TO STAFF MEMBERS FOR WHOM THE ALLOWANCE BECOMES PAYABLE ON OR AFTER ONE NOVEMBER 2014;

b. 34,104 APPLICABLE TO STAFF MEMBERS FOR WHOM THE ALLOWANCE BECOMES PAYABLE PRIOR TO ONE NOVEMBER 2014;

(3) SECOND LANGUAGE

a. 14,766 APPLICABLE TO STAFF MEMBERS FOR WHOM THE ALLOWANCE BECOMES PAYABLE ON OR AFTER ONE NOVEMBER 2014;

b. 17,052 APPLICABLE TO STAFF MEMBERS FOR WHOM THE ALLOWANCE BECOMES PAYABLE PRIOR TO ONE NOVEMBER 2014.

4. By e-mail dated 30 December 2014, Mr. Bharati submitted a motion for extension of time to file an application against “the decision of [OHRM/International Civil Service Commission] [following] the comprehensive salary survey conducted in New Delhi, India, in June 2013 [finding] that the current salaries for locally-recruited staff are above the labour market”.² That same day, the Geneva Registry advised Mr. Bharati to file his motion via the eFiling portal, and Mr. Bharati did so on 22 May 2015.³

5. Mr. Bharati requested an extension of 90 days to file his application, stating, in part, that the extension was needed so he could obtain “the list of comparators interviewed and retained during the 2013 salary survey”. He further stated that the “above information and inputs are critical for [him to] challeng[e] the comprehensive salary survey conducted in

² Impugned Judgment, para. 1.

³ *Ibid.*, para. 2.

June 2013”. On 5 June 2015, the UNDT rendered Summary Judgment No. UNDT/2015/045, dismissing the proposed application as not receivable *ratione materiae*. In so doing, the UNDT relied on the Appeals Tribunal Judgment in *Tintukasiri et al.*, in which the Appeals Tribunal held that “the decision to freeze the existing salary scales, and to review downward allowances”⁴ is not an administrative decision for the purpose of judicial review under Article 2(1)(a) of the UNDT Statute.

Submissions

Mr. Bharati’s Appeal

6. The UNDT failed to find that despite its general application, the contested decision is an administrative issuance with direct legal consequences on Mr. Bharati’s terms of appointment and contract of employment. The UNDT’s interpretation of “administrative decision” is too narrow and leaves Mr. Bharati without recourse to contest a matter which is in violation of his rights. The freezing of salary scales based on the recommendation of the Headquarters Steering Committee is a decision taken by the Secretary-General to accept the recommendations by the Steering Committee and therefore, it is an “administrative decision”. The UNDT failed to exercise the jurisdiction vested in it and committed an error of law.

7. The UNDT erred in procedure by treating Mr. Bharati’s motion for extension of time as an incomplete application and rendering a judgment without giving Mr. Bharati the opportunity to file a detailed application “enunciating [his] grievance and the manner in which it affected [his] legal rights”.

8. The UNDT erred in fact by failing to appreciate that the facts in *Tintukasiri et al.* were fundamentally and materially different from the facts in Mr. Bharati’s case. Moreover, in the present case, the process of the comprehensive salary survey was “not transparent, was erroneous and faulty leading to a grossly negative result”. The extensive alleged irregularities tainted the survey, resulting in the “[d]eviation from methodology, lack of transparency and faulty data collection”.

⁴ *Ibid.*, para. 11 referring to *Tintukasiri et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526.

9. Mr. Bharati requests that the Appeals Tribunal set aside the impugned Judgment, direct the Secretary-General to conduct a new comprehensive salary survey which follows the proper methodology and procedure, order an adjustment based on the previously held comprehensive salary survey pending the convening of the next comprehensive salary survey, award compensation for the financial losses he suffered due to the implementation of OHRM's decision, and reimburse all legal and administrative costs incurred by him.

The Secretary-General's Answer

10. The Secretary-General contends that the UNDT correctly treated the motion for extension of time as an application and correctly issued a summary judgment. The motion provided the information required under Article 8 of the UNDT Rules of Procedure, including the applicant's full name, date of birth, nationality, address, and employment status. It also identified the date and place of the contested decision and the remedies sought. Furthermore, Article 9 of the UNDT Rules of Procedure provides that the UNDT may determine *proprio motu* that a summary judgment is appropriate and the Appeals Tribunal has consistently allowed summary judgments in matters of law.

11. The UNDT correctly concluded that the decision to freeze salary scales did not constitute an administrative decision and that Mr. Bharati's challenge was irreceivable *ratione materiae*. In reaching its conclusion, the UNDT noted that the facts in *Tintukasiri et al.* were identical to those in the present case and took into account the Appeals Tribunal's confirmation that the decision to freeze an existing salary scale was not an administrative decision for the purpose of judicial review under Article 2(1) of the UNDT Statute. Based on its obligation to abide by the Appeals Tribunal jurisprudence, the UNDT correctly applied the jurisprudence in *Tintukasiri et al.* and found the application not receivable *ratione materiae*.

12. The relief sought by Mr. Bharati is without merit. First, the contested decision to freeze the existing salary scale is of general order and does not constitute an administrative decision susceptible to challenge. Consequently, the Appeals Tribunal should reject the request to order the Administration to conduct a new salary survey. The Appeals Tribunal should also reject Mr. Bharati's request for interim adjustment based on the previously held salary survey. His case does not meet the requirements for interim measures, including a real likelihood of irreparable harm and consistency with the UNDT Judgment.

Further, as the impugned decision is not an administrative decision subject to judicial review, there is no legal basis for the award of compensation for financial losses. Finally, in the present case nothing suggests a manifest abuse of process on behalf of the Secretary-General. Mr. Bharati's request for costs is without legal basis and should not be granted.

Considerations

13. Article 2(1) of the Statute of the UNDT (the Statute) provides, in part:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

14. The Statute was approved by the General Assembly, which in 2007 decided "to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike".⁵ In so doing, the General Assembly reiterated that "a transparent, impartial, independent and effective system of administration of justice is a necessary condition for ensuring fair and just treatment of United Nations staff and is important for the success of [a] human resources reform in the Organization".⁶

15. Article 8(3) of the Statute provides: The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation. This article is to be read in conjunction with Article 7(5) of the UNDT's Rules of Procedure (Rules), which establishes that "[i]n

⁵ A/RES/61/261, para. 4.

⁶ *Ibid.*, preamble.

exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits”.

16. What occurred before the Dispute Tribunal is not contested: the staff member submitted a written request for an extension of time to file an application; the Dispute Tribunal did not address the staff member’s request for an extension of time; the Dispute Tribunal converted *sua sponte* the request for an extension of time into an “incomplete” application; and the Dispute Tribunal summarily adjudged the application was not receivable.

17. As the language of the statutory scheme shows, a request for an extension of time to file an application is not the same document as an application. The request for an extension of time was made so that the staff member could obtain information needed to prepare an application. In other words, the staff member was not ready to submit an application without obtaining additional information to support it. Of course, this does not mean that the Dispute Tribunal must grant the staff member’s request for an extension of time; but it does mean that the Dispute Tribunal cannot convert *sua sponte* a staff member’s request for more time into an application.

18. Under the Dispute Tribunal’s statutory scheme, an application is the document which is required to commence judicial review. The application is the means by which the staff member provides pertinent information, describes the claim or claims he or she is contesting and presents documentary evidence to support his or her claims (if he or she so chooses). The Dispute Tribunal did not afford the staff member the opportunity to file an application.

19. One of the main purposes behind the establishment of the new two-tier system of administration of justice is “to ensure respect for the rights and obligations of staff members”.⁷ When it established the Dispute Tribunal as the first tier of the new two-tier system of the administration of justice, the General Assembly recognized the right of staff members to have access to the Dispute Tribunal. The right of access to the Dispute Tribunal commences with the filing of an application.

⁷ *Ibid.*, para. 4.

20. The Dispute Tribunal has the competence and jurisdiction under Article 8 of the Statute to determine whether an application is receivable. To determine whether an application is receivable, an application is an *a fortiori* requirement. As there was no application before the Dispute Tribunal, the Dispute Tribunal exceeded its competence and jurisdiction and committed errors in procedure when it determined that the request for an extension of time was the “equivalent” of an application; inferred that statements in the request for an extension of time were the equivalent of claims in an application; and summarily adjudged that the converted “application” was not receivable. By exceeding its competence and jurisdiction and committing several procedural errors, the Dispute Tribunal violated the staff member’s statutory rights to file an application and to have access to justice and, more importantly, violated the staff member’s right to due process of law.

21. For these reasons, the Appeals Tribunal concludes that this matter must be remanded to the Dispute Tribunal, with directions to permit the staff member to file an application.

Judgment

22. Judgment No. UNDT/2015/045 is reversed and the matter is remanded to the Dispute Tribunal with directions to permit the staff member to file an application.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar