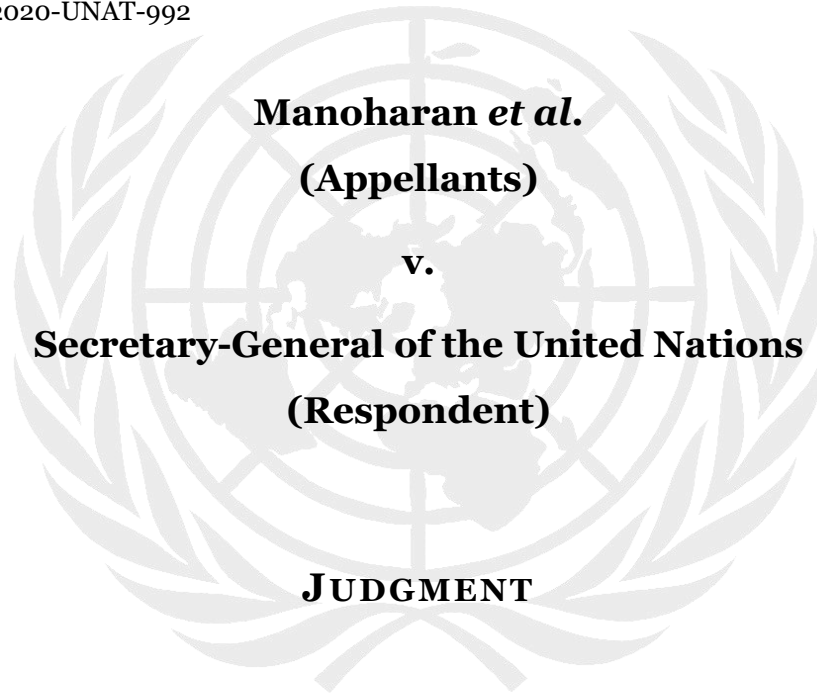




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-992



Manoharan *et al.*

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Sabine Knierim Judge Dimitrios Raikos
Case No.:	2019-1299
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Manoharan *et al.*: Mohamed Abdou, OSLA

Counsel for Secretary-General: Francisca Lagos Pola

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. The present case arose from the June 2013 salary survey conducted in New Delhi, India, which led to a downward salary revision for the Appellants working for different organizations and funds and programmes stationed in India. The Appellants wrote to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) to request an extension of the time limit to file their applications. But the UNDT rejected their time extension requests as not receivable *ratione materiae* by way of a summary judgment. On appeal, the United Nations Appeals Tribunal (Appeals Tribunal) reversed and remanded the cases to the Dispute Tribunal with directions to permit the staff members to file their applications. On remand, the Dispute Tribunal rejected the Appellants' applications as not receivable *ratione materiae* because the Appellants had failed to request management evaluation before applying to the UNDT. For reasons set forth below, we affirm the Dispute Tribunal's decision.

Facts and Procedure

2. The Appellants¹ are general service staff members of the United Nations Department of Public Information (DPI), India. They joined the Organization on a date prior to 1 November 2014.

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

Subject: New Delhi (India) local salaries

(AAA) [F]ollowing the comprehensive salary survey conducted in New Delhi in June 2013, this is to advi[s]e 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. [A]ccordingly, 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. [R]evised net salaries reflect downward adjustment of (-) 13.4 per cent for GGSS and (-) 19.4 per cent for NNOO.

¹ Kuttappan MANOHARAN; Rajiv CHANDRAN; Ravinder SHARMA; Sanjana SUBRAMANIAN; Rineeta NAIK; and Sameer SIDDIQUI.

(2) [A]mend [] 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) [R]evised allowances in rupees net per annum are as follows:

(1) [C]hild, 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. On 29 December 2014, the Appellants filed individual motions for an extension of time to file their applications with the Dispute Tribunal in Geneva against the decisions affecting their salaries. On 24 March 2015, the UNDT issued Summary Judgment No. UNDT/2015/025 in *Manoharan, Chandran, Sharma, Subramanian, Naik and Siddiqui v. Secretary-General of the United Nations*, whereby it joined the matters, considered the motions as incomplete applications and dismissed them as not receivable *ratione materiae*. This UNDT judgment was appealed to this Tribunal.

5. On 24 March 2016, the Appeals Tribunal issued Judgment No. 2016-UNAT-618, *Subramanian et al. v. Secretary-General of the United Nations*, reversing the UNDT findings and remanding the case to the Dispute Tribunal with directions to permit the Appellants to file their applications.

6. On 30 May 2019, the UNDT issued Judgment No. UNDT/2019/103, *Manoharan, Chandran, Sharma, Subramanian, Naik and Siddiqui v. Secretary-General of the United Nations*. The UNDT found that all the applications were not receivable *ratione materiae*, because the Appellants had failed to comply with the compulsory requirement of requesting a management evaluation before applying to the UNDT and the UNDT could not waive such a mandatory requirement. The cases also did not fall under the exception to the requirement to request management evaluation since they neither were of disciplinary nature, nor were they taken by a technical body.

7. While the Appellants argued that they had relied on a previous position taken by the Administration in *Tintukasiri et al.*,² whereby requests for management evaluation were not receivable if a decision was taken pursuant to the advice from the Local Salary Survey Committee (LSSC) in conjunction with salary survey specialists, and as such a technical body under the terms of Staff Rule 11.2.(b), the UNDT held that the position adopted by the Management Evaluation Unit (MEU) could not lead the Appellants to build a legitimate expectation on which they could have relied and moreover it did not rise to the level of judicial precedent given the MEU's nature as an administrative body within the Organization.

8. The UNDT further held that the Secretary-General had delegated authority to the MEU to perform management evaluations on his behalf but had not delegated authority to the MEU to define a technical body. Rather, the delegation of authority to that effect was contemplated in two other legal instruments, i.e., Secretary-General's Bulletin ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) and, more recently, Administrative Instruction ST/AI/2018/7 (Technical bodies). The UNDT concluded that it was the Secretary-General's exclusive prerogative to legislate and define what technical bodies were as he had recently done through the Under-Secretary-General for Management in ST/AI/2018/7. The Dispute Tribunal noted that the Appeals Tribunal adopted the same view in *Gehr*.³

9. The UNDT further held that while the MEU's determination in *Tintukasiri et al.* had been published in a public judgment of both the UNDT and the Appeals Tribunal, none of these judgments created a judicial precedent. They only addressed the issue of receivability from the point of view of the nature of the administrative decisions and did not adjudicate on the definition of technical bodies. Moreover, no official communication was issued by the

² *Tintukasiri et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526.

³ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-479.

Secretary-General following the issuance of the above judgments to endorse the MEU's determination with respect to the qualification of the LSSC in conjunction with salary survey specialists as a "technical body". Finally, the UNDT rejected the Appellants' contention that the fact that the Secretary-General had made no determination concerning technical bodies should be interpreted in their favour.

10. The Appellants filed an appeal on 29 July 2019 and the Secretary-General filed his answer on 14 October 2019.

Submissions

Manoharan et al.'s Appeal

11. The UNDT erred in finding that the Appellants were required to request management evaluation. Staff Rule 11.2(b) requires the Secretary-General to identify administrative decisions taken pursuant to advice obtained from technical bodies. Once the Secretary-General has determined that a particular decision falls under Staff Rule 11.2(b), future similar decisions need not be referred for management evaluation. To find otherwise would render Staff Rule 11.2(b) meaningless as it would mean that all decisions need to be referred to the MEU for it to make an assessment under Staff Rule 11.2(b).

12. In the *Tintukasiri et al.* cases,⁴ the Administration found that requests for management evaluation were not receivable since the decision was taken pursuant to the advice from the LSSC in conjunction with salary survey specialists, and as such of a technical body under the terms of Staff Rule 11.2(b). The decision that the Appellants are seeking to contest was thus taken following advice from the same technical bodies, namely, the LSSC and the relevant salary specialists. It is undisputed that the determination in *Tintukasiri et al.* was made by the Secretary-General or, at least on his behalf, as the authority to carry out management evaluation rests with the Secretary-General.

13. Moreover, Staff Rule 11.2(b) does not impose any formal requirements for the Secretary-General's determination to be effective. There is no requirement that a complete list of technical bodies be promulgated. In any event, the Secretary-General's determination in *Tintukasiri et al.* was made public in two judgments and the Appellants had legitimate reasons to

⁴ *Tintukasiri et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526 and *Tintukasiri et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/026.

rely on these precedents. The UNDT incorrectly applied the Appeals Tribunal's Judgment in the *Gehr* case in which no evidence was before the Tribunals that the Secretary-General had made a determination pursuant to Staff Rule 11.2(b).

14. The UNDT's conclusion that the *Tintukasiri et al.* cases did not constitute a judicial precedent in respect of management evaluation requirements fails to address the Appellants' main arguments that staff members could legitimately rely on the Administration's position as expressed in public judgments. More importantly, the UNDT engaged in a detailed analysis of the mandate of the MEU and disregarded the arguments regarding the presumption of validity of official acts. It is not the role of the Appellants to call into question the determinations made by the entities acting upon delegated authority from the Secretary-General. This is precisely the case in respect of a determination pursuant to Staff Rule 11.2 in respect of which the Secretary-General enjoys a broad discretion.

15. Before the UNDT, the Secretary-General maintained an ambiguous position with respect to the technical nature of the process. The Secretary-General mainly requested that the UNDT disregard his previous determination in *Tintukasiri et al.* and declined to make any determination pursuant to Staff Rule 11.2(b). The Administration has provided no justification as to why the LSSC should no longer be considered as a technical body. The Secretary-General seems to raise a receivability argument by merely casting doubt on the applicable procedure, and absent any clear position from the Administration concerning the nature of the decision, the receivability argument should be dismissed as improperly raised or unsubstantiated.

16. The Secretary-General's position is characteristic of an abuse of process and constitutes an attempt to prevent access to justice for the following reasons: The Administration may not modify or make a new determination pursuant to Staff Rule 11.2(b) and seek to apply it retroactively in the course of judicial proceedings nor may it refrain from promulgating any rule pursuant to Staff Rule 11.2(b) and then advance the non-promulgation as a receivability argument. Similarly, the Administration may not issue a decision on behalf of the Secretary-General through the MEU and subsequently argue that the decision was unlawful without revoking it. Absent any clear revocation from the Administration or rescission by the Tribunal, the Secretary-General's determination in *Tintukasiri et al.* had to be given the full benefit of the presumption of regularity. Furthermore, considering the MEU's position at the time, the Secretary-General has not demonstrated that the MEU would have indeed genuinely undertaken a review of the contested decision. The Secretary-General abused his authority under

Staff Rule 11.2(b) by contradicting his own decisions and by making inconsistent submissions before the Tribunals. By failing to act fairly, justly and transparently, the Administration impermissibly sought to lead the Appellants into error as to the proper procedure for contesting the impugned decisions, which in turn affected their fundamental right to have access to justice. It is a general principle of administrative law that procedural rules regarding time limits and receivability should not unduly impede the right to have access to justice, particularly in situations where such rules have been misused or misapplied by the Administration.

17. Assuming *arguendo* that no determination had been made, the Secretary-General's silence ought to have been interpreted in favour of receivability. Under the Statute of the International Civil Service Commission (ICSC), the ICSC shall establish the methods by which the principles for determining conditions of service should be applied. The methodology makes it clear that the role of salary survey specialists is to provide the technical expertise required to conduct a salary survey and that the conduct of the survey is largely a technical exercise. The Secretary-General has no discretionary power with respect to the decisions by the ICSC. The Administration's duty to implement the methodology requires by implication the recognition of the technical nature of the process and the bodies involved. The contested decision must therefore fall under Staff Rule 11.2(b).

18. All other requirements for receivability are satisfied.

19. The Appellants request that the Appeals Tribunal vacate the impugned Judgment, find their case receivable and remand it to the UNDT for a consideration on the merits.

The Secretary-General's Answer

20. The UNDT properly dismissed the applications as not receivable *ratione materiae*. Staff Rule 11.2(a) requires a staff member who wishes to formally contest an administrative decision to first submit a request for management evaluation of the administrative decision alleged to be in non-compliance with the terms of appointment or contract of employment of the staff member. Article 8(1)(c) of the UNDT Statute similarly provides that an application shall be receivable if the applicant has previously submitted the contested administrative decision for management evaluation. Requesting management evaluation is a mandatory first step in the appeal process and without a request for management evaluation, an application before the UNDT is not receivable *ratione materiae*. In the present case, none of the Appellants submitted

a request for management evaluation of an administrative decision. The applications were therefore not receivable under the above provisions.

21. Staff Rule 11.2(b) allows for an exception to the management evaluation requirement when the challenged administrative decision was taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General. It is the Secretary-General's prerogative to determine which entities constitute technical bodies. In the present case, there is no evidence that the Secretary-General has designated the LSSC as a technical body. Thus, the promulgation of the new salary scale cannot be considered as an administrative decision taken pursuant to advice from a technical body, as determined by the Secretary-General.

22. At the time relevant to this case, the Secretary-General had made a determination as to what constituted a technical body only in two instances, i.e. the Advisory Board on Compensation Claims (ABCC) or the Medical Boards and the Classification Appeals Committee. The Appeals Tribunal has previously determined in *Tintukasiri et al.* that the Secretary-General had not designated the LSSC as a technical body.⁵ The UNDT therefore correctly concluded that requesting management evaluation was a compulsory requirement and since the Appellants had failed to do so, their applications were not receivable *ratione materiae*.

23. The Appellants have failed to demonstrate that the UNDT made any errors warranting a reversal of the Judgment. There is no merit in their contention that the UNDT incorrectly applied the Appeals Tribunal Judgment in *Gehr* since in the present case, there was evidence of previous determinations made by the Secretary-General regarding the technical nature of the LSSC. They do not identify which evidence they are referring to. If they are referring to *Tintukasiri et al.*, the Tribunals made no determination on behalf of the Secretary-General regarding the technical nature of the LSSC. The Tribunals merely recounted that the MEU had rejected the management evaluation requests deeming them not receivable, but they did not endorse the finding on receivability by the MEU.

24. Finally, the UNDT correctly applied the Appeals Tribunal's jurisprudence to this case. As in *Gehr*, there was no evidence before the UNDT that the Secretary-General had made a determination that the LSSC constituted a technical body pursuant to Staff Rule 11.2(b).

⁵ The Secretary-General subsequently states that the outcome of the case was that it was not receivable because the issuance of new salary scales did not constitute an administrative decision under Article 2(1)(a) of the UNDT Statute and that there was no ruling on whether or not the LSSC was a technical body.

Furthermore, the Appellants' contention that the UNDT failed to address their argument that they had legitimately relied on the Tribunals' pronouncements in *Tintukasiri et al.* is misconstrued. As stated above, the Tribunals made no finding on whether or not that case should have been submitted for management evaluation. There was thus no judicial precedent which the UNDT would have had to address. Finally, the argument that the UNDT disregarded their submission regarding the presumption of validity of official acts is not articulated clearly and has not been made before the UNDT. As to the other submissions, the Appellants are merely rearguing their case without identifying any defects and without demonstrating on which grounds the impugned Judgment is erroneous.

25. The Secretary-General requests the Appeals Tribunal to affirm the UNDT Judgment and to dismiss the appeal.

Considerations

26. The appeal remains without success. The UNDT did not commit any errors of law or fact in finding that the applications were irreceivable *ratione materiae*. We agree with this finding.

27. Like the UNDT, the Appeals Tribunal will not examine whether the decision challenged by the Appellants is an administrative decision under Article 2(1)(a) of the UNDT Statute. If the Secretary-General's contention is correct and the appealed decision is not an administrative decision, the applications are irreceivable *ratione materiae* already for this reason.

28. However, assuming, in favor of the Appellants, that what they contest is indeed an administrative decision, their applications are also irreceivable *ratione materiae* because the Appellants did not request management evaluation. Staff Rule 11.2 provides:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

29. The Appeals Tribunal has repeatedly held that an application before the UNDT without a prior request for management evaluation can only be receivable if the contested administrative decision has been taken pursuant to advice from a technical body, as determined by the Secretary-General, or if the administrative decision has been taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2 following the completion of a disciplinary process. In all other cases, where the request for management evaluation is a mandatory first step before coming to the internal justice system, this request and management evaluation provide the Administration with the opportunity to reassess the situation and correct possible mistakes or errors with efficiency. The Tribunals have no jurisdiction to waive deadlines for requests for management evaluation.⁶

30. In the present case, none of the exceptions applies. Particularly, the 1 October 2014 salary freeze and the following implementation were not a decision taken pursuant to the advice of a technical body, as determined by the Secretary-General. As the UNDT Judgment contains a correct, thorough and well-founded reasoning, we mainly refer to it and only add the following:

⁶ *Diallo v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-936, para. 27, citing *Newland v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-820, paras. 28 and 29, and *Khan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-559, para. 25.

Whether the LSSC constitutes a technical body as determined by the Secretary-General under Staff Rule 11.2(b)?

31. The LSSC does not constitute a technical body as determined by the Secretary-General under Staff Rule 11.2(b). The 2012 MEU response cited and published in the *Tintukasiri et al.* Judgments cannot be regarded as a determination of technical bodies by the Secretary-General under Staff Rule 11.2(b). Such a determination, intended not only for a specific situation or case but for general application, falls under ST/SGB/2009/4, which reads:

1.2 Rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions.

...

4.2 Administrative instructions shall be promulgated and signed by the Under-Secretary-General for Management or by other officials to whom the Secretary-General has delegated specific authority.

32. The Secretary-General has thus specified that such rules, policies or procedures which, like the determination of technical bodies under Staff Rule 11.2(b), are intended for general application must be promulgated in a specific formal format (the Secretary-General's bulletin or an administrative instruction) and, additionally, that administrative issuance must be promulgated and signed by either the Under-Secretary-General for Management or by another official to whom the Secretary-General has delegated specific authority. The 2012 MEU response cited and published in the UNDT and Appeals Tribunal judgments does not meet these conditions. Neither does ST/SGB/2009/4 provide for the promulgation of rules, policies or procedures intended for general application in a judgment of the UNDT or the Appeals Tribunal; instead, these particular rules, policies and procedures have to be promulgated in a Secretary-General's bulletin or an administrative instruction. Nor was the 2012 MEU response promulgated and signed as an administrative instruction by the Under-Secretary-General for Management or by another official to whom the Secretary-General has delegated specific authority to designate technical bodies under Staff Rule 11.2(b). It was a response by the MEU on a request for management evaluation in a specific case and forwarded only to the parties.

33. Neither before nor after the issuance of ST/SGB/2009/4 did the Secretary-General determine that the LSSC, in conjunction with salary survey specialists, was a technical body within the meaning of Staff Rule 11.2(b). In his report A/62/294, the Secretary-General stated that,

82. In addition, those administrative decisions taken pursuant to the advice given by technical boards, such as the Advisory Board on Compensation Claims or the Medical Boards, would also not be subject to management evaluation. In all other instances, therefore, the completion of a management evaluation would be a prerequisite before a matter could proceed to the formal system for judicial review.

34. And Administrative Instruction ST/AI/2018/7 reads:⁷

The Under-Secretary-General for Management, pursuant to section 4.2 of Secretary-General's bulletin ST/SGB/2009/4, and for the purpose of clarifying staff rule 11.2 (b), hereby promulgates the following:

1. A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies is not required to request a management evaluation.
2. The list of technical bodies being referred to under staff rule 11.2 (b) are as follows:
 - (a) Medical boards or independent medical practitioners duly authorized to review medical decisions or medical recommendations, including reconsiderations referred to in article 5.1 of appendix D to the Staff Rules;
 - (b) Classification Appeals Committees.

In the absence of any determination by the Secretary-General or another official with delegated authority, and having regard to the specific provisions of Staff Rule 11.2(b) and the overarching import of Staff Rule 11.2(a) (especially when read together with Article 8(1)(c) of the Dispute Tribunal Statute), it is not possible to find that the LSSC constitutes a technical body as determined by the Secretary-General, thus exempting the Appellants from the mandatory first step of requesting management evaluation.⁸

⁷ Administrative Instruction ST/AI/2018/7 titled "Technical bodies", dated 18 May 2018.

⁸ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-479, para. 26. See also *Faust v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-695, paras. 31-34.

Whether the Appellants were exempted from filing a request for management evaluation for other reasons?

35. The Appellants argue that they were exempted from filing a request for management evaluation because an LSSC gives technical advice to the Secretary-General on salary matters, and the Secretary-General is thus obliged to determine that it constitutes a technical body under Staff Rule 11.2(b). We do not agree. It is legally irrelevant whether the LSSC really can be regarded as a technical body. Even if it were a technical body, the Secretary-General would not be obliged to determine that the administrative decisions taken on the advice of such a body fall under Staff Rule 11.2(b) and are exempted from management evaluation. There is no law or regulation requiring the Secretary-General to determine that all technical bodies fall under Staff Rule 11.2(b). On the contrary, Staff Rule 11.2(b) makes it clear that staff members are only exempted from filing a request for management evaluation if the administrative decision was taken on advice of a body which had previously been determined as a technical body by the Secretary-General.

36. The Appellants further contend that the Administration failed to act fairly, justly and transparently, and thus impermissibly sought to lead them into error as to the proper procedure for contesting the impugned decisions, which, in turn, affected their fundamental right to have access to justice. We, however, agree with the UNDT that the Appellants could not rely on the 2012 MEU response cited and published in the *Tintukasiri et al.* Judgments and trust that a request for management evaluation was not required in their case. The MEU response in *Tintukasiri et al.* was addressed to, and concerned, only the staff members in that case; further, it was without legal relevance after the Tribunals had decided that the salary freeze in *Tintukasiri et al.* was not an administrative decision but a regulatory act. The Appellants must have known that such a MEU response in a specific case cannot be regarded as a determination by the Secretary-General under Staff Rule 11.2(b), which is of general application and thus requires a general publication pursuant to ST/SGB/2009/4. To waive the requirement of management evaluation is the prerogative of the Secretary-General, and the Tribunals have no authority in this respect.

Judgment

37. The appeal is dismissed and Judgment No. UNDT/2019/103 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Neven, Presiding
New York, United States

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar