

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1205

Case No. 1282: Alaj et al.

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Pranvera Alaj, a staff member of the United Nations (the named Applicant), along with 97 other staff members and former staff members¹, the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 September and 31 December 2002 the time-limit for the filing of an Application with the Tribunal;

Whereas, on 23 December 2002, the Applicants filed an application containing the following pleas:

¹. A. Ademi, A. Ajeti, B. Alaj, N. Alija, F. Alishani, A. Alo, I. Bajgora, M. Balaj, L. Basholli, S. Beiqi, I. Bejtullahu, M. Beqiri, E. Berisha, L. Berisha, T. Beselica-Berbati, E. Bilibani, L. Bratotini, I. Bytyci, L. Cana, Z. Dauti, A. Dermaku, Z. Duli, A. Dushi, S. Emrullahu, N. Gafuri, B. Gashi, G. Gashi, V. Gaxheri, M. Gjigoli, V. Gjonbalaj, V. Gjuraj, M. Gojani, D. Gorcaj, E. Gota, I. Grubi, A. Hajdini, P. Halili, A. Hasani, D. Hasani, F. Hashani, A. Haxhibrahimi, A. Haxhikadrija, A. Haxhosaj, D. Haxhosaj, A. Hoxha, V. Jaha, M. Kajdomcaj, A. Kastrati, F. Kazazi, F. Kondirolli, G. Krasniqi, H. Krasniqi, S. Krasniqi, Y. Krasniqi, A. Kuci, R. Kullashi, E. Kusari, X. Kusari, B. Laiq, A. Lila, B. Llalloshi, F. Llalloshi, J. Loci, R. Marmullahu, D. Metushi, F. Murati, G. Musa, B. Nahi, A. Nela, L. Nimoni, A. Osmani, K. Peci, V. Peric, P. Pervizaj, A. Pirku, B. Prebreza, V. Qeta, B. Reshtani, A. Rexhepi, B. Rexhepi, D. Rrecaj, M. Sadikovic, A. Sahatqija, A. Salihu, A. Salihu, F. Saraqini, S. Shehu, L. Shkodra, A. Smailovic, Y. Soba, M. Stamenkovic, V. Stavileci, L. Sylaj, L. Tashi, E. Xhema, F. Zeqiri, A. Zhushi.

“II. Pleas*Request for Discovery and Witnesses*

...

2. The Applicants respectfully request the Tribunal to order the Administration to produce ... information, items, documents or records ...

3. The Applicants request an oral hearing in order to call witnesses ...

Redress sought

4. The Applicants ... request the following redress:

- that the impugned decision, taken on 17 June 1999, to impose a new salary scale in Kosovo be quashed;
- that the original Federal Republic of Yugoslavia (FRY) salary scale be retroactively reintroduced with interest until a comprehensive salary scale has been implemented ...
- ... indemnification of US\$ 15,000.00 for legal fees incurred ...
- the award to each of the Applicants of the sum of US\$ 50,000.00 as compensation for the moral injury the Applicants have suffered ...
- the award of the sum of US\$ 200,000.00 as punitive damages against the [Office of the United Nations High Commissioner for Refugees (UNHCR)] for its ... egregious actions; and,
- such other relief as the Tribunal deems just, fair and equitable ...”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 30 April 2003 and periodically thereafter until 18 January 2004;

Whereas, on 19 September 2003, an additional 56 staff members² filed an Application for intervention in the case in accordance with article 19 of the Rules of the Tribunal, requesting

². M. Jovanivic, F. Bilacaku, J. Vitija, X. Kusari, M. Bazdar, H. Feri, V. Avdiu, A. Voca, M. Ahma, N. Baliu, B. Beqiri, V. Halili, L. Salihu, I. Hasani, A. Koci, G. Hyseni, B. Dragovic, R. Arlov, L. Neziri, F. Lyta, A. Shkodra, L. Kqiku, A. Aliu, F. Pomaku, B. Shijaku, A. Kurti, M. Cemerikic, Z. Arsic, A. Jedrash, I. Krasniqi, P. Bilica, B. Susuri, G. Musliu, N. Saliaga, R. Krasniqi, A. Zherka-Hoxha, R. Limani, M. Gjergjizi, K. Plakolli, B. Kelmendi, Sh. Zeqiri, L. Saraci, N. Zymberi, M. Hoxha-Krasniqi, B. Asani, S. Salaji, A. Avdiu, B. Ibishi, B. Orlic, D. Shita, A. Pavic, V. Idrizi, F. Kroqi, U. Muhaxheri, E. Kala, S. Calakovic.

“to be joined as Interveners in this action due to their status as employees who have joined the UNHCR Kosovo office after the impugned decision taken on 17 June 1999, by the Director-General of [UNHCR] to retroactively impose a new salary scale upon employees in Kosovo and the effect in law of this illegal decision”.

Whereas the Respondent filed his Answer on 18 January 2004;

Whereas the Applicants filed Written Observations on 11 May 2004;

Whereas, on 22 July 2004, the Tribunal decided to postpone consideration of this case until its autumn session and to hold oral proceedings in the case;

Whereas, on 11 November 2004, the Tribunal held an oral hearing during which it requested the Respondent to provide it with a number of documents

Whereas, on 15 November 2004, the Respondent provided the requested documents;

Whereas the facts in the case are as follows:

On 23 March 1999, in view of the outbreak of hostilities and the NATO bombing campaigns, the UNHCR Office in Kosovo was closed. On 10 June 1999, the Security Council in resolution 1244(1999) authorized the Secretary-General to establish in Kosovo an interim civilian administration led by the United Nations. On the same date, the Security Council adopted resolution S/1999/661, authorizing the Secretary-General with the assistance of relevant international organizations, to establish an international civil presence in Kosovo. Subsequently, the United Nations Interim Administration Mission in Kosovo (UNMIK) was established. In June 1999, a high-level mission was sent to Kosovo by the Office of Human Resources Management (OHRM) to undertake a review of the available salary information from the region, including the FRY, Macedonia and Albania, as well as fresh information from the prevailing conditions in Kosovo. On this basis, a provisional salary scale for locally-recruited staff members was set up.

By telegram dated 16 June 1999 (received on 17 June), OHRM advised UNHCR Headquarters of the approval of a provisional General Service salary scale subject to adjustment upon completion of a comprehensive salary survey of best prevailing conditions of employment in the locality.

On 17 June 1999, OHRM informed the Executive Officer, Office for the Coordination of Humanitarian Affairs (OCHA), of the new salary scale, effective 1 June 1999, payable to locally-recruited staff in the General Service category under the 100 Series appointments, and that the base salary rates and service allowance payable

to General Service staff in Kosovo serving under appointments of limited duration (ALD) had been derived from this provisional scale.

On 22 June 1999, the new salary scale was sent from UNHCR Headquarters to the Kosovo Office, which objected to the scale on 10 July.

On 14 July 1999, UNHCR Headquarters wrote to OHRM regarding the implementation of the provisional salary scale.

On 15 July 1999, the Chief Administrative Officer, UNMIK, Pristina, was advised that an OHRM "Survey Specialist" would arrive shortly to review "the level of mission subsistence allowance (MSA) in the mission area of UNMIK and [to conduct] a survey of best prevailing conditions of employment for the locally-recruited staff in Kosovo". He was asked for his assistance in compiling data for the Survey Specialist.

On 16 July 1999, OHRM provided the Head of Administration, UNMIK, with the provisional General Service salary scale, "pending an on-site review scheduled for 26 July 1999".

On 20 July 1999, OHRM replied to the 14 July letter from UNHCR, advising as follows:

"All locally-recruited staff of the common system in the General Service category recruited on or after 1 June 1999 shall be paid based on the new Provisional Salary Scale for Kosovo.

Those staff members in the General Service category recruited prior to 1 June 1999 and paid under the Belgrade salary scale shall receive, in addition to the salary based on the Kosovo scale, a personal transitional allowance (PTA) representing the difference between the Belgrade salary scale ... and the Kosovo scale. The PTA should be phased out at the expiration of the staff member's current short term contract."

On 23 July 1999, the above-mentioned clarification was forwarded by UNHCR Headquarters to the UNHCR Kosovo Office. Subsequently, 29 staff members recruited after the opening of the UNHCR Kosovo Office had their contracts changed to take into account the new provisional salary scale.

On 27 July 1999, the Survey Specialist arrived in Kosovo.

On 13 August 1999, the Applicants wrote to the Secretary-General requesting him to review the decision dated 17 June 1999 to change the salary scales for locally-recruited staff members, and pending this review requested a suspension of its application. On 20 August, the Applicants wrote again to the Secretary-General reiterating the request made in their previous letter dated 13 August 1999, and asking for direct submission of the case to the Administrative Tribunal.

By memorandum dated 26 August 1999, the United Nations High Commissioner for Refugees wrote to the Secretary-General expressing her dismay that the United Nations Secretariat had unilaterally decided to reduce, effective 1 June 1999, the local salary scale established for the whole of the FRY and requested him to intervene and take the necessary action he considered appropriate to remedy the situation. On 8 October 1999, the Assistant Secretary-General, OHRM, responded that established procedures had been fully followed.

The Applicants lodged an appeal with the Joint Appeals Board in Geneva on 18 February 2000. The JAB submitted its report on 14 March 2002. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

Salary survey

...

68. While it considers that the Secretary-General has the discretion to set initial levels of pay at a new duty station on the basis of the information available at the time, the Panel noted that in this case the provisional salary scale had first been promulgated ‘subject to adjustment on completion of a comprehensive salary survey of best prevailing conditions of employment in the locality’. Therefore, the Secretary-General’s discretion in the initial phase notwithstanding, if no such comprehensive survey was carried out, the legality of maintaining the provisional salary scale could be called into question.

69. Having examined the salary survey Manual, the Panel noted, that a central requirement for a comprehensive survey of best prevailing conditions is the establishment of a Local Salary Survey Committee (LSSC), representing the staff and administrations of all United Nations organisations with local employees at the duty station, in order to ensure equitable participation (...).

70. The Panel ... found no evidence that an LSSC was in fact established ...

72. Therefore, although it does not accept the Administration’s assertion that a ‘comprehensive survey was carried out’, the Panel is persuaded that the Administration acted in good faith and that UNHCR staff were involved in the work of the survey specialist, and thus have a certain amount of responsibility for the results.

73. The Panel also noted that other features of salary surveys were adhered to ...

74. The Panel further noted that the outcome of the survey indicated that the provisional scale was in fact higher than prevailing conditions would allow, and that it should have been set lower. In the absence of a properly conducted comprehensive survey, the Panel considered that, notwithstanding the assertions of the Administration, this could only be a provisional assessment, and would need to be verified by a survey involving technically

competent and fully representative bodies. In particular, the absence of an LSSC undermines the credibility of the survey and therefore of the continued use of the provisional salary scale. At the same time, however, the Panel found no evidence that either the local staff or the UNHCR Administration in Kosovo had pressed for another survey to be held promptly to replace the apparently 'flawed' survey.

75. Finally, the fact that the Administration decided to maintain the provisional scale rather than make a downward adjustment, based on the results of the survey tends, in the Panel's opinion, to demonstrate good faith on the part of the Administration.

Retroactivity of the application

...

79. The Panel noted that staff members were notified of a change in their salary status 'effective 1 June 1999' only at the end of July 1999. It was of the opinion, however, that this was an effect, not of the decision, but of its implementation by UNHCR, and that the decision itself did not violate the acquired rights of staff members recruited after 17 June 1999.

Implementation of the decision

...

81. ... The Panel found that UNHCR failed to implement the provisional salary scale in timely fashion in the field.

...

The three categories of appellants

86. The Panel ... reached the following conclusions:

Category A

87. The Panel took into account that 29 locally-recruited staff members had their contracts changed only at the end of July 1999, despite the sending of the telegram to all UN offices and agencies, including UNHCR Headquarters on 16 June 1999.

88. The Panel found that UNHCR made an administrative error by implementing a wrong salary scale although the provisional salary scale had been received as of 17 June 1999. It considered that UNHCR had an obligation to correct this error, that is to say to change the contracts which were based on the wrong salary scale. The Panel found that the correction of this administrative error did not undermine the acquired rights of these 29 appellants, since there is no entitlement to the maintenance of contracts based on a wrong salary scale.

Category B

89. Considering the case of the 20 staff members who were already working for UNHCR before the opening of the UNHCR office, Kosovo, in June 1999, the Panel took note that the instruction promulgating the provisional salary scale provided for them to be awarded a personal transitional allowance (PTA) until expiry of their current contracts, to cover the difference between the Belgrade scale, on which their salaries had previously been based, and the provisional Kosovo scale. Since these staff

members suffered no loss of pay, the Panel considered that their appeal is groundless. Furthermore, the Panel was particularly concerned to discover that, contrary to the instructions, the PTA appears never to have been applied: instead, these staff members were paid directly on the Belgrade scale again - in some cases retroactively - and continue to be paid on the Belgrade scale, despite the fact that their initial contracts expired long ago. In this way the UNHCR office in Kosovo has opened itself to charges of discrimination in applying two salary scales.

Category C

90. As far as the 49 staff members of the category C are concerned, the Panel found that since they all arrived after the opening of the UNHCR Office or started new contracts after having been assigned to other duty stations, there were consequently, and for the reasons given above, no grounds for applying any other salary scale than the one promulgated on 16 June 1999.

Conclusions and Recommendations

91. For the foregoing reasons, the Panel concluded that the detailed examination of the circumstances surrounding the establishment of the provisional salary scale and its application to the locally-recruited staff members in Kosovo did not reveal any violation of the rights of the 98 appellants. It did consider that:

The established procedure, as detailed in the “Manual for Salary Surveys for Non-Headquarters Duty Stations” did not apply to the promulgation of the provisional salary scale and therefore was not violated;

[T]he retroactivity of the decision did not cause any violation of the appellants’ rights;

[T]he change in the contract of 20 staff members did not entail any violation of the acquired rights;

[C]ategory B did not suffer any harm and therefore their appeal is groundless;

[T]he appeal of category C is without merit;

92. Accordingly the Panel makes **no recommendation** in support of the present appeal.

...”

In April 2002 and in 2003, comprehensive salary surveys were carried out in Kosovo.

On 22 August 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicants and informed them that the Secretary-General agreed with the JAB’s findings and conclusions and had decided to accept the JAB’s unanimous recommendation and to take no further action on their appeal.

On 23 December 2002, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants principal contentions are:

1. The decision to reduce the salary scales of locally-recruited, General Service staff in Kosovo was taken without proper staff consultation and in violation of established procedures.
2. The impugned salary scale reduction was based on an incorrect and arbitrary assessment of Kosovo salaries, and therefore should be considered null and void.
3. The Administration committed breach of contract by cancelling the Applicants' contracts without their consultation and replacing the terms with reduced salary scales.
4. The retroactive effect of the new salary scale violates the acquired rights of staff members and is thus illegal.

Whereas the Respondent's principal contentions are:

1. The Respondent was justified by the events then prevailing in Kosovo in taking the decision of 17 June 1999 to establish a provisional salary scale for United Nations national staff in Kosovo pending an on-site review.
2. The provisional salary scale was confirmed by the on-site review which was conducted in good faith and in all material respects in accordance with established procedures.
3. The provisional salary scale was re-confirmed by a comprehensive salary survey conducted in April 2002 fully in accordance with the Manual for Salary Surveys for Non-Headquarters Duty Stations.
4. The introduction of the provisional salary scale did not breach the contractual or acquired rights of the United Nations national staff in Kosovo.
5. There are no exceptional circumstances that would warrant awarding costs to the Applicants.

The Tribunal, having deliberated from 30 June to 23 July 2004 in Geneva and from 27 October to 24 November 2004 in New York, now pronounces the following Judgement:

I. The Tribunal shall address, first, two preliminary issues. The Applicants have requested production of a large number of documents. Had the Applicants requested a reasonable number of documents of particular and individual interest, the Tribunal might have granted the request. As it is, however, the Tribunal is not prepared to order

the blanket release of what appears to be all documentation even remotely related to the matter for the Applicants' perusal just in case one or more of these documents might be useful to them. The Tribunal, for its part, is satisfied that it has sufficient documentation before it to render judgement.

The other question concerns the Application for intervention made by fifty-six staff members claiming to be in a position similar to that of the Applicants. As it advances similar contentions to that of the Applicants, the Tribunal has decided to admit the Application for intervention.

II. The Applicants attack the "unilateral decision to reduce the national staff salary scales of locally-recruited Kosovo staff members" which was applied with retroactive effect. Such decision, they claim, was taken "without staff consultation and without following proper salary survey procedures". It was apparently communicated to the Applicants on different dates in late July 1999 via their respective monthly "Statement of Earnings and Deductions" and "despite requests, the Administration failed to explain how it calculated and established the new salary scales".

III. The Tribunal considers that the three surveys undertaken by the Administration, namely the provisional one undertaken just prior to 17 June, the July 1999 salary survey conducted by the Survey Specialist and the survey of 2002 must be considered jointly, as from a legal viewpoint the three of them are intimately related.

The Tribunal will first address the issue of the so-called "unilateralism" of the decision to undertake a survey with a view to a new salary scale. The Tribunal is satisfied that the Administration does not need, legally speaking, to consult the staff about a decision to conduct a survey in order to ratify or modify an existing salary scale. After all, it is the Administration who pays the staff members their salary and it stands to reason that it takes stock, from time to time, of what the salary situation is in the local market to compare it to the salaries paid to locally contracted staff members. Properly conducted surveys tend to adjust the level of salaries to "the best prevailing conditions" of the market, and the Administration is therefore amply justified in verifying, from time to time, if that premise is complied with in the different localities where United Nations bodies or programmes are active. In the particular case of UNMIK, it was totally reasonable that the Administration would seek to verify the conditions prevailing in a zone that had suffered a veritable man-made cataclysm, a zone where a vast new United Nations presence was to be established (the new mission would comprise, as explained by the Respondent "four component pillars including the

United Nations-led Civil Administration, UNHCR-led Humanitarian Affairs, European Union-led Reconstruction and Organization for Security and Cooperation in Europe-led Institution Building”). Moreover, the conditions prevailing in that zone in the aftermath of a civil war might very well be quite different from those existing in Belgrade.

The Tribunal considers that “consultation” with the staff must not be confounded with staff “participation”, the latter being normally required for surveys like those at issue now, both under the United Nations Common System Manual for Salary Surveys in Non-Headquarters Duty Stations (the Manual) as well as under the criteria set out by the International Civil Service Commission (ICSC). Thus, the Tribunal must address whether or not there was proper staff participation in the surveys.

IV. The question of staff participation in the surveys is, in its turn, part of a wider issue, namely whether the terms stipulated in the above-mentioned Manual must be rigorously applied or whether they allow for certain flexibility in exceptional circumstances, such as the establishment of UNMIK. The Tribunal is satisfied that, in the present case, a flexible approach was justified for two reasons, namely the essentially provisional nature of the first salary scale and the decidedly exceptional circumstances of the establishment of a new mission in Kosovo, namely the “interim civilian administration” as decided by Security Council resolution 1244. This is borne out by the language contained in paragraph 9 of ICSC/45/R.15/Rev.1 dated 5 January 1998 entitled “Remuneration of the General Service and related categories: general methodology for surveys for best prevailing conditions at non-headquarters duty stations”:

“Notwithstanding the degree of flexibility provided for in the methodology, it is impossible to legislate for all conceivable conditions. By the very nature of the diversity of countries involved, there must be some exceptions, owing ... to ... the need to react to specific local conditions. Special measures may, therefore, be required in some instances. ...”

V. If the three surveys must be considered part of the same process, the first two are decidedly complementary, and the Tribunal is satisfied that by undertaking the second one the Administration showed that it was acting in good faith. The first survey was done on the spur of the moment. A high-level delegation was sent to Pristina on an urgent basis, as the UNMIK office was to be established within a very short time-

span. The review of the prevailing conditions as well as the actual setting up of a provisional salary scale were entrusted to the experience of the then Director of Administration, UNOG. His assessment, however, seems to have been rather generous, as it emerged from the salary survey exercise conducted by the Survey Specialist in July 1999 that the provisional salaries were on average 12.1 per cent higher than the salaries of comparable local employers. The comprehensive survey of 2002 determined that the salary scale was even higher: 14.3 per cent higher than the salaries of the comparator entities. In this regard, the Tribunal notes that only international organizations were retained (five of them: USAID, Save the Children, Mercy Corps, Doctors of the World and CARE) for the second survey as few, if any, large employers comparable with UNMIK existed in the area at that time.

VI. Be that as it may, the important point for the Tribunal is that the shortcomings of the first provisional survey were mostly corrected by the second. The Applicants are decidedly mistaken that the Survey Specialist was not sent to Kosovo “to do a salary survey”, as indicated in the “Note for the file” signed by the Chairman of the Staff Council on 30 July 1999. Indeed, the record shows that on 15 July 1999, the Survey Specialist advised the Chief Administrative Officer, UNMIK, that

“the purpose of my upcoming mission to UNMIK will be to review the level of mission subsistence allowance (MSA) in the mission area of UNMIK *and to conduct a survey of best prevailing conditions of employment for the locally recruited staff in Kosovo*”. (Emphasis added.)

He worked diligently in this regard and it is clear from the same 30 July “Note to the file” that the Chief of Staff, UNMIK - the above-mentioned Director of Administration, UNOG, - welcomed the participation in the survey works of “two experienced UNHCR national staff, a G-6 Field Assistant (...) and a G-6 [Administrative] Assistant (...)”. In fact, one of them accompanied the Survey Specialist to his interviews with three would-be comparators and then had a long working session with him, of about five hours, in which they evaluated the data received from the comparators and entered them in a computer in order to calculate the salary scale to be applied. It appears that the other staff member who had the opportunity to participate failed to avail himself of that opportunity.

VII. Both the June 1999 and the July 1999 salary exercises show that the Administration tried to follow the Manual as closely as possible. Admittedly, the

participation of the staff was not channelled through an LSSC, and the Tribunal finds that the JAB correctly pointed out that it was necessary to confirm the results with another salary survey conducted in accordance with the requirements of the Manual, such as the participation of the staff through an LSSC. This was done in 2002.

However, the Applicants also attack the 2002 survey, mainly on the ground that only four comparators were retained, instead of the five suggested by the Manual. The Tribunal notes the Respondent's allegations - and the Tribunal is inclined to believe him - that only four of the six entities listed responded to the criteria required for a comparator, and that therefore only four could be retained. The Tribunal finds this argument satisfactory, taking into account the conditions in Kosovo. In any case, the Respondent has stated, and was not contradicted, that "the average of all six comparators was 7 [per cent] lower than the [United Nations] salaries".

The Tribunal is of the view that the rules governing the surveys cannot always be applied as rigorously as suggested by the Applicants, since comparators are seldom comparable to the United Nations. As the Tribunal held in Judgement No. 1100, *Hasanat Schmoeltzer et al.* (2003), the Flemming principle is not an end in itself, but only a means of fulfilling an objective expressed by Article 101.3 of the Charter:

"the recommendations of the Flemming Committee are subject to and must be seen in the context of the provisions of Article 101.3 of the Charter, which establishes as *paramount consideration* 'securing the highest standards of efficiency, competence and integrity' both in the local recruitment of staff and in the 'determination of the conditions of service'. That is the real objective of Article 101.3 of the Charter: securing the highest standards of efficiency, competence and integrity of United Nations staff. This is what the Organization must accomplish and to that end, the Organization must apply the mechanism recommended by the Flemming Committee."

The Tribunal held in the same case: "Being competitive, then, is the way suggested in order to obtain staff among the best in the local labour market".

Obviously, UNMIK is competitive in the local labour market. According to the declaration of one of the intervening parties in the oral hearing of 11 November 2004, no one resigned because of the new salary scale, nor did any of the staff who were paid according to the Belgrade scale until termination of their original contracts refuse to sign the new contracts with the lower salary scale.

VIII. The Applicants' argument is two-fold. They attack the validity of the Kosovo scale because of procedural defects and maintain that the Belgrade scale should have

continued to apply. According to them, because the June 1999 survey was defective, and because the July 1999 one was improperly conducted, both surveys were null and void: thus, the Belgrade scale was the one to be applied. This reasoning fails on several grounds. It fails logically, because in the Tribunal's view, the 2002 survey confirms the results of the two earlier ones. Had the latter survey, which followed the provisions of the Manual, shown a different result, say a level of conditions - not only of salaries, but of conditions of employment - of UNMIK which was not among the best prevailing in the market, then the Applicants might have shown some prejudice.

Moreover, and this is important, the staff did not request that a new survey be conducted, which is what they should have done. If the Applicants felt that the June/July surveys were defective, they should not have tried to force the Administration to maintain the Belgrade scale, but they should have insisted that a new survey be conducted with the participation of an LSSC; this is what the Administration did in 2002. Even admitting, by way of hypothesis, that the procedure applied in June 1999 was defective, and ignoring the difficult circumstances making the strict application of the Manual difficult, if not impossible, the legal consequence could not have been an obligation of the Administration to apply the Belgrade scale forever after, but to conduct a new survey with all the guarantees of the Manual.

In addition, not only were the 1999 scales confirmed by the 2002 survey, but a new survey conducted in 2003 added further confirmation of their salary levels. Finally, while it may be true that the Administration could have ordered the new survey sooner than it did, it is also true that the subsequent confirmation of the soundness of the original provisional salary scale cures all defects. It proves that no prejudice was suffered by the staff on account of the delay, since had the final survey been conducted sooner, it would not have altered the outcome.

IX. The Applicants also contend that the Administration erroneously applied the provisional June scale retroactive as of 1 June 1999. It was explained to the Tribunal, in the oral hearing, that such is the practice followed by the Administration for budgetary reasons. However, the Tribunal feels that the provisional scale could not have been in vigour before the actual adoption of the resolution creating the office in Pristina, for the simple reason that, at that moment, there was another applicable scale, namely that of Belgrade, which was thirty per cent higher than the other one. The Tribunal finds that the new scale should have started to be applied from the moment when it was promulgated, i.e., 17 June 1999. At the same time, the Tribunal finds that

the issue of retroactivity was moot, as no contracts were signed by any of the Applicants prior to 17 June.

Thus, those staff members whose contracts were entered into before that date should be paid under the Belgrade scale - or under the Kosovo scale plus a PTA to compensate for the difference - until the date of termination of their contract. Those with contracts entered into after that date, 17 June, should be paid according to the Kosovo salary scale: if they were paid at the Belgrade scale, this was a mistake that the Administration was fully justified to correct, as it did. (See Judgement No. 1195, *Newton* (2004).)

X. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio Barboza
President

Omer Yousif Bireedo
Member

Jacqueline R. Scott
Member

New York, 24 November 2004

Maritza Struyvenberg
Executive Secretary