UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2021-UNAT-1112

Doedens *et al.*[1]

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2020-1476
Date:	19 March 2021
Registrar:	Weicheng Lin

Counsel for Appellants:	Robbie Leighton, OSLA
Counsel for Respondent:	Susanne Malmström, Kathryn Alford, Jay Pozenel

[1]Annex 1 to this Judgment sets forth the names of the Appellants which were submitted by the Appellants' Counsel, the Office of Staff Legal Assistance.

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal against Judgment No. UNDT/2020/148 rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi in the matter of *Doedens et al. v. Secretary-General of the United Nations*. This Judgment upheld the Secretary-General's decision to implement a Post-Adjustment Multiplier (PAM)[2] following, what was expressed by it to be, a decision of the International Civil Service Commission (ICSC), which the Appellants assert had resulted in a pay cut for staff members serving in Geneva.

2. In addition to the appeals addressed in this Judgment, the Appeals Tribunal had received appeals against several other UNDT Judgments also addressing the PAM. One of those matters, *Abd Al-Shakour et al. v. Secretary-General of the United Nations,* was decided by this Tribunal sitting full bench.[3] In that matter, we issued Judgment No. 2021-UNAT-1107 and affirmed the UNDT's Judgment Nos. UNDT/2020/106, UNDT/2020/107, UNDT/2020/133 and UNDT/2020/154 and dismissed the appeals. This panel having reviewed the record before the UNDT and the parties' briefs on appeal, find that the Appellants in the instant matter before us have raised neither factual differences nor legal issues different from those canvassed in companion cases and disposed of by our full bench in Judgment No. 2021-UNAT-1107 (*Abd Al-Shakour et al.*). Accordingly, we adopt the facts, parties' submissions and reasoning set forth in that Judgment, reproduced below, and dismiss the instant appeals. For clarity, the reproduction below when citing to the "Impugned Judgment" refers to the impugned Judgment No. UNDT/2020/106 (*Abd Al-Shakour et al.*).

Facts and Procedure

3. In 2017 and 2018, the UNDT in Geneva received what it referred to as "5 waves" of applications challenging the Administration's implementation of the PAM, which had resulted in a pay cut for United Nations staff members based in Geneva. These cases have also been referred to as the "salary scale" cases. The applications, all filed by individual staff, were consolidated and

[2] Post-Adjustment is an amount paid to staff members serving in the Professional and higher categories and in the Field Service categories to ensure equity in purchasing power of staff members across duty stations in accordance with annex I, para. 8 of the Staff Regulations. See Staff Rule 3.7(a) of ST/SGB/2017/1.

[3] The full bench did not include Judge Jean-François Neven.

then transferred from the UNDT in Geneva to the UNDT in Nairobi on account of recusal by two Geneva-based Judges.[4]

4. Throughout the summer of 2020, the UNDT in Nairobi issued 19 Judgments on these applications. This Judgment addresses the appeal against one of those Judgments: Judgment No. UNDT/2020/148, (*Doedens et al. v. Secretary-General of the United Nations*) involving an appeal filed by staff members serving at the United Nations Population Fund (UNFPA) on 16 October 2020. The remaining UNDT Judgments, which have been appealed separately, are disposed of by this Tribunal in other Judgments.

5. Before issuing its Judgments, the UNDT reviewed over 3000 documents and heard oral evidence on 22 October 2018 from the Executive Head of the ICSC and from a representative of the United Nations Office of Human Resources Management. According to the record established by the UNDT, the facts and events leading to the implementation of the PAM are as follows:

a) In 2016, the ICSC conducted a cost-of-living survey (the survey) at seven headquarter duty stations, including Geneva;

b) Prior to the survey, the ICSC had removed the Gap Closure Measure which was a rule that provided for a five per cent augmentation when implementing a PAM adjustment that reduced pay in excess of 5 per cent. Based upon the survey, the ICSC revised the PAM downward from 81.1 to 67.1[5];

c) In order to mitigate the impact of such a revision, staff serving in Geneva before 1 May 2017 would receive a personal transitional allowance (PTA), which would be revised in August 2017;

d) In February 2017, the Advisory Committee on Post Adjustment Questions (ACPAQ) confirmed that the survey had been conducted in accordance with the approved methodology and recommended the ICSC's approval of the survey results that had been conducted in Geneva;

e) In March 2017, the ICSC approved the results of the survey noting that the adjusted PAM had resulted in a reduction of 7.5 per cent USD net remuneration for Geneva-based staff;

f) In June 2017, an informal review team of senior statisticians requested by the Geneva Human Resources Group reviewed the survey to see if it was "fit for purpose" and concluded *inter alia* that due to serious calculation and

[4] See UNDT Order Nos. 018 (GVA/2018) and 027 (GVA/2018).
[5] See the ICSC's *Post Adjustment Classification Memo*, dated 12 May 2017.

systemic errors in the compilation of the results, the ICSC calculations could not be considered "sufficiently good quality to designate them fit for purpose" and the implementation did not always correspond with the approved methodology;[6]

g) The ICSC thereafter engaged an independent consultant to review the methodology. The consultant's report made 64 recommendations, some of which related to the methodology for the PAM;[7]

h) The applicants contested the Secretary-General's administrative decision to implement the PAM, resulting in a pay cut for Geneva-based staff members. The applicants in UNDT Judgment Nos. 106, 107 and 133 asserted the decision date was 1 August 2017, the date of their August 2017 pay-slips.[8] They requested management evaluation of the decision on 14 September 2017.

i) The ICSC changed the implementation date of the PAM from 1 May 2017 to 1 August 2017 and staff were informed of the reintroduction of a three per cent margin to reduce the PAM for current staff by extending the transitional measure.

UNDT's Impugned Judgments

6. The UNDT held that the applications were receivable.[9] In particular, the UNDT found there had been an individual decision made to apply the new PAM, which was implemented by the staff members' pay-slips and had adverse impact on the terms of their appointment.[10] The UNDT also held that the applications were receivable in line with the holdings of the Appeals Tribunal's Judgments in *Lloret Alcañiz et al.,*[11] and *Quijano-Evans*[12] namely, that even if the Secretary-General had little discretion to implement the PAM the Secretary-General's "mechanical power" was administrative in nature and therefore, reviewable on grounds of legality.

[6] See impugned Judgment, para. 15 for additional findings.
[7] See ICSC Consultant's Report dated 19 February2018, ICSC/ACPAQ/40/R.2.
[8] See *Abd-Al Shakour et al. v. Secretary-General of the United Nations,* Judgment No. UNDT/2018/015 Corr. 1, which dismissed the applicants' applications on grounds that no individual decision had been taken in their case.
[9] See impugned Judgment, para. 25 whereby the UNDT noted that the ICSC is not a technical body and thus Staff Rule 11.2(b) was not applicable. In turn, a management evaluation was in fact necessary per Staff Rule 11.2(a), which the UNDT found had been requested and answered timely.
[10] Impugned Judgment, para. 44.
[11] *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840.
[12] *Quijano-Evans v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-841.

7. On the merits, the UNDT dismissed the applications finding that the Secretary-General had correctly implemented the PAM and that the ICSC had not acted *ultra vires* its statutory authority, as it always had the authority under Article 11(c) of its Statute to decide on the PAM without the General Assembly 's further approval or action.

ILOAT

8. On 3 July 2019, nearly a year prior to the UNDT's issuance of the impugned Judgments, the International Labor Organization Administrative Tribunal (ILOAT) issued Judgment No. 4134 regarding applications from ILO staff members based in Geneva, which challenged the same PAM.[13] ILOAT set aside the PAM on grounds that the ICSC's decisions were without legal foundation and thus the action of the ILO to reduce the salaries of the staff based on the ICSC decision, was legally flawed. It held that the ICSC acted outside its statutory authority and that the removal of the Gap Closure Measure was without real explanation in statistical and methodological terms. ILOAT's remedy has since been applied to Geneva-based staff at United Nations entities with jurisdiction before ILOAT. This has resulted in two levels of pay in Geneva (one for United Nations entities under ILOAT jurisdiction and another for those under the UNDT's jurisdiction).

Procedure Before the Appeals Tribunal

9. On 7 October 2020, the Secretary-General had filed a motion for submission of a consolidated answer, a time limit extension to file the answer and a page limit increase for the answer in respect of the salary scale related appeals already filed as well as any future appeals relating to the same matter. The Respondent stated that, the 19 Judgments issued by the same UNDT Judge used almost exactly the same words and reasoning in the considerations and conclusions, and that it was in the interest of judicial efficiency to allow the Respondent to file the same consolidated answer in all related appeals, and to grant the Respondent a short extension of time until 1 December 2020 to submit his answer. Further, the Respondent requested an increase in page limit to 30 pages so that he could address all the appeals and complex legal issues in the consolidated answer brief.

[13] ILOAT Judgment No. 4134 (2019).

10. On 13 October 2020, the Appellants through the Office of Staff Legal Assistance filed an objection to the motion arguing it had been able to file timely appeals within the page limit and that allowing the Secretary-General more time and page limit was not consistent with the principle of equality of arms.

11. On 16 October 2020, two staff members of the UNFPA, through the Office of Staff Legal Assistance, filed the instant appeal against Judgment No. UNDT/2020/148. This appeal was registered with the Appeals Tribunal as Case No. 2020-1476.

12. On 23 October 2020, the Appeals Tribunal issued Order No. 386 (2020) on the salary scale cases, which *inter alia* denied the Secretary-General's request for extension of page limit and required the Secretary-General to file separate answers to the appeals.

13. On 21 December 2020, the Secretary-General filed the instant Answer.

Submissions

The Appeal

14. The Appellants argue that the UNDT erred in law in not finding that the ICSC's decision had been taken *ultra vires* its Statute. The ICSC's power derives from its Statute, namely Articles 10(b) and 11(c), which grant it recommendatory authority on "scales of salaries and post adjustments" and decisory authority on classification of duty stations for the purpose of applying the post adjustment. Since the PAM decision did not involve the General Assembly, the ICSC acted outside its statutory authority. The ICSC Statute reflected a process that had ceased to be used after 1989, when the General Assembly discontinued the practice of approving the post adjustment. This migrated the decisory power from that of both ICSC and the General Assembly to the ICSC alone. The UNDT erred in finding that the alteration of this procedure in turn altered the meaning of the Statute. Since the practice no longer matched the Statute, the ICSC had acted *ultra vires*.

15. The Appellants also argue that the UNDT erred in interpreting the ICSC Statute. The UNDT had accepted, that on its face, the Statute did not give the ICSC decisory authority,[14] yet the UNDT analyzed the technical assumption underpinning the Statute based on a review of General Assembly resolutions that were adopted 45 years after the Statute. In contrast,

[14] Impugned Judgment, paras. 70-73.

ILOAT refused to base their interpretation of the Statute on General Assembly resolutions that post-dated the Statute. To consider the meaning of a Statute based on subsequent practice or subsequent resolutions would render the Statute fluid and risk legal uncertainty.

16. The UNDT applied two wrong standards when reviewing the decision: 1-whether the ICSC's action contravened a written rule; and 2-whether the ICSC's action usurped power. Rather, the issue was whether or not the ICSC had statutory authority. Further, the UNDT erred in fact and law in determining that the ICSC's responsibility for measuring the cost of living amounted to a quantitative determination of post adjustment. This conflicts with the UNDT's own finding that the General Assembly, up until 1985, had determined that the two prerequisites for transitioning from one class to another, are the required percentage variation in the cost-of-living index and the required period for which it had to be maintained.[15] Determining such prerequisites is a decision on the quantitative determination of post adjustment. Thus, prior to 1985, the calculation was a function of both ICSC and General Assembly decisions. It follows that since the decision is only in the domain of the ICSC, there has been a usurpation of power. Regardless, the ICSC action was *ultra vires* the Statute.

17. The UNDT erroneously indicated that the absence of prior challenges to the ICSC's competence had precluded their ability to raise their current challenge; however, the UNDT acknowledged that there was a 75-year practice refraining from downward revision of salary, meaning that staff have never encountered this issue before. Also the challenges in the *Molinier*[16] and *Ovcharenko*[17] cases, cited by the UNDT, pertained to the General Assembly, not the ICSC. Thus, they do not reflect an acquiescence in the UNDT's interpretation of the ICSC Statute. The Statute itself has a mechanism for authorizing the new post adjustment practice but this process was not utilized.

18. The UNDT erred in law in finding that the UNDT's scope of review of an ICSC decision implemented by the Secretary-General could not be reviewed for legality under the *Sanwidi*[18] test because, per the *Ovcharenko* case, the intervention of the General Assembly had removed the decision from such review. Firstly, the UNDT's reliance on *Ovcharenko* is erroneous as that case dealt with implementation of a General Assembly decision, whereas

[15] *Id.*, para. 71.
[16] Former Administrative Tribunal Judgment No. 370, *Molinier* (1986).
[17] *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530.
[18] *Sanwidi v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-084.

the decision at issue in this case was taken by the ICSC. Secondly, the General Assembly resolutions that were issued after the ICSC decision are a mere expression of an opinion on those decisions and do not alter the UNDT's scope of review.

19. The Appellants further claim that the UNDT erred in fact and law in finding no violation of their acquired rights and in finding that the Secretary-General's regulatory discretion had been reasonably exercised. The UNDT erred in fact and law when it applied incorrect standards to test the reasonability of the disputed regulatory decision. In its analysis of regulatory discretion, the UNDT assessed "the nature of performance-remuneration exchange, the public interest in stability of the civil service, and the resulting test or criteria for legitimacy of a modification".[19] The UNDT indicated that an acquired right to a stable salary should be protected to the extent of "strik[ing] a balance between competing interests of staff and the Organization's need to adapt its functioning and employment conditions to evolving circumstances".[20] The UNDT held that the revision downward of salary was a question of good governance, which should consider a margin of error in calculations and the avoidance of sudden major salary drops and their demoralizing effect.

20. With regard to good governance, the ICSC operated under a Statute that did not reflect the procedure it used to calculate the PAM. The ACPAQ is supposed to provide independent expert advice to the ICSC on PAM, however, the members had ignored their term-limits and served beyond these. Further, the ICSC's agreed methodology had applied indices in a manner that did not correspond to their description. For instance, the ICSC hired a consultant following the report by the Geneva Statisticians but prevented the consultant from seeing the data regarding the PAM calculation so all he could review was methodology. Nonetheless, their own consultant agreed with the errors in methodology found by the Geneva Statisticians. The ICSC's numerous changes demonstrate they did not take a principled approach to ensure relative purchasing power. They first indicated a 7.7 per cent pay cut without transitional measures, then decided there would be transitional measures, and finally reinstated the Gap Closure Measure but without any reasoning for it being at a lower level.

21. The UNDT failed to review whether regulatory discretion was exercised lawfully. The UNDT noted that the ICSC consultant's review of the methodology, which did not include the Geneva 2016 survey results, was "regrettable". Further, it failed to exercise its jurisdiction to

[19] Impugned Judgment, para. 109.
[20] *Id.*, para. 111.

consider whether the methodology and its application to the survey was reasonable. The UNDT was offered the opportunity to hear testimony from the ICSC expert or request comments from him about the Geneva Statisticians' report, but did not take up these opportunities. The UNDT failed to properly examine the findings of the Geneva Statisticians and instead erroneously disagreed with those findings.

22. The UNDT erred in fact by finding the disparity between the Pay Index and the Post Adjustment Index from 2010-2016 resulted in a "fair part in the negative post adjustment outcome in Geneva".[21] This conclusion only makes sense if the survey correctly measured the Geneva cost of living relative to New York. If the survey delivered the type of result the Geneva Statisticians suggested, the disparity would have resolved through a rise in the Post Adjustment Index. The Geneva Statisticians alleged a miscalculation on the rental sub-index, namely the failure to use expenditure weights in the sub-index correction of which would result in an estimated 1.3 per cent increase to the Geneva Post Adjustment Index. However, the UNDT mischaracterized this finding. The ICSC noted they did not have sufficient information to apply expenditure weights but this contention was contradicted by their own experts who agreed with the Geneva Statisticians' findings. The UNDT, however, found that the expenditure weights were the only issue raised by the Geneva Statisticians regarding the sub-index and that it resulted in a 4.1 per cent downward miscalculation.[22] This is factually inaccurate as the expenditure weight suggested corresponded to only a 1.3 per cent miscalculation. Furthermore, the UNDT ignored that the Geneva Statisticians had determined that the rent data upon which the index was based had generated "implausible results" and dismissed the Geneva Statistician's findings. Erroneously the UNDT indicated that Appendix 3 to the ICSC Consultant's report showed an increase of only 0.3 per cent when expenditure weights were applied to the housing sub-index using 2010 data. However, the purpose of Appendix 3 was to show the information necessary to apply expenditure weights was in fact available to the ICSC, which they previously had denied. The UNDT ignored that the rental data caused the downward miscalculation which was an issue the ICSC consultant could not speak to as the ICSC had not given him access to the data. In conclusion, the Appellants argue that the UNDT's refusal to address the Geneva Statisticians reasonable concerns about the rental data and the decision of the ICSC to engage a consultant, yet prevent him from reviewing the survey results, indicated a

[27] *Id.*, para. 126.
[22] *Id.*, para. 127.

manifestly unreasonable decision-making process by the ICSC. The UNDT ignored this together with the errors identified by the Geneva Statisticians.

23. The UNDT erred in fact and law in its treatment of whether the methodology was fit for purpose. The ICSC consultant concluded that the methodology for calculating the relative cost of living did not meet the threshold test of being "fit for purpose". The ICSC consultant made 64 recommendations to improve the ICSC methodology. This is directly relevant to the reasonableness of the exercise of regulatory discretion.

24. The UNDT erred in fact and law in finding that the ICSC's decision making concerning the Gap Closure Measure, was a lawful exercise of regulatory discretion. The five per cent Gap Closure Measure in place since 1990 protected staff from a margin of error in the calculation of relative cost of living.[23] The ICSC removed this buffer only to reinstate it at the ICSC 2017 session at the three per cent level in response to political pressure as there was no discussion of its purpose of covering the margin of error. Such arbitrary decision-making is the opposite of lawful exercise of discretion.

25. The UNDT erred in fact and law as it misunderstood the extent of the financial consequences of the ICSC's conclusions to the Appellants. The UNDT suggested the pay cut was 4.7 per cent of the post adjustment component and not 4.7 per cent of the salary as a whole. This misunderstands how a multiplier works. A percentage reduction in the multiplier results in a corresponding percentage reduction in salary. It was not contested by the parties that there was a 4.7 per cent cut in staff members' net take home pay. Also, the UNDT erred in suggesting that the ICSC's efforts to correct errors in the survey are relevant to the legality of the decision.[24] Corrections apply to the next (2021) survey and not retroactively to the Appellants. The corrections demonstrate the shortcomings of the contested decision and support that such regulatory discretion was unlawful.

26. The Appellants request the contested decision be found unlawful and rescinded. They request retroactive pay on the basis of a PAM not based on the revised Post Adjustment Index resulting from the survey. In the alternative, they request a remand to the UNDT for correction of errors identified and a proper examination of the issues not addressed in the impugned Judgment.

[23] ICSC Annual Report, 1990, para. 140.
[24] Impugned Judgment, paras. 129 and 130.

The Answer

27. The Appellants argue that the UNDT erred in law in not finding that the ICSC's decision had been taken *ultra vires* its Statute. The ICSC's power derives from its Statute, namely Articles 10(b) and 11(c), which grant it recommendatory authority on "scales of salaries and post adjustments" and decisory authority on classification of duty stations for the purpose of applying the post adjustment. Since the PAM decision did not involve the General Assembly, the ICSC acted outside its statutory authority. The ICSC Statute reflected a process that had ceased to be used after 1989, when the General Assembly discontinued the practice of approving the post adjustment. This migrated the decisory power from that of both ICSC and the General Assembly to the ICSC alone. The UNDT erred in finding that the alteration of this procedure in turn altered the meaning of the Statute. Since the practice no longer matched the Statute, the ICSC had acted *ultra vires*.

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29. The UNDT applied two wrong standards when reviewing the decision: 1-whether the ICSC's action contravened a written rule; and 2-whether the ICSC's action usurped power. Rather, the issue was whether or not the ICSC had statutory authority. Further, the UNDT erred in fact and law in determining that the ICSC's responsibility for measuring the cost of living amounted to a quantitative determination of post adjustment. This conflicts with the UNDT's own finding that the General Assembly, up until 1985, had determined that the two prerequisites for transitioning from one class to another, are the required percentage variation in the cost-of-living index and the required period for which it had to be maintained.[26] Determining such prerequisites is a decision on the quantitative determination of post adjustment. Thus, prior to 1985, the calculation was a function of both ICSC and General Assembly decisions.

[25] *Id.*, paras. 70-73.
[26] *Id.*, para. 71.

It follows that since the decision is only in the domain of the ICSC, there has been a usurpation of power. Regardless, the ICSC action was *ultra vires* the Statute.

30. The UNDT erroneously indicated that the absence of prior challenges to the ICSC's competence had precluded their ability to raise their current challenge; however, the UNDT acknowledged that there was a 75-year practice refraining from downward revision of salary, meaning that staff have never encountered this issue before. Also the challenges in the *Molinier*[27] and *Ovcharenko*[28] cases, cited by the UNDT, pertained to the General Assembly, not the ICSC. Thus, they do not reflect an acquiescence in the UNDT's interpretation of the ICSC Statute. The Statute itself has a mechanism for authorizing the new post adjustment practice but this process was not utilized.

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32. The Appellants further claim that the UNDT erred in fact and law in finding no violation of their acquired rights and in finding that the Secretary-General's regulatory discretion had been reasonably exercised. The UNDT erred in fact and law when it applied incorrect standards to test the reasonability of the disputed regulatory decision. In its analysis of regulatory discretion, the UNDT assessed "the nature of performance-remuneration exchange, the public interest in stability of the civil service, and the resulting test or criteria for legitimacy of a modification".[30] The UNDT indicated that an acquired right to a stable salary should be protected to the extent of "strik[ing] a balance between competing interests of staff and the Organization's need to adapt its functioning and employment conditions to evolving circumstances".[31] The UNDT held that the revision downward of salary was a question of good governance, which should consider a

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margin of error in calculations and the avoidance of sudden major salary drops and their demoralizing effect.

33. With regard to good governance, the ICSC operated under a Statute that did not reflect the procedure it used to calculate the PAM. The ACPAQ is supposed to provide independent expert advice to the ICSC on PAM, however, the members had ignored their term-limits and served beyond these. Further, the ICSC's agreed methodology had applied indices in a manner that did not correspond to their description. For instance, the ICSC hired a consultant following the report by the Geneva Statisticians but prevented the consultant from seeing the data regarding the PAM calculation so all he could review was methodology. Nonetheless, their own consultant agreed with the errors in methodology found by the Geneva Statisticians. The ICSC's numerous changes demonstrate they did not take a principled approach to ensure relative purchasing power. They first indicated a 7.7 per cent pay cut without transitional measures, then decided there would be transitional measures, and finally reinstated the Gap Closure Measure but without any reasoning for it being at a lower level.

34. The UNDT failed to review whether regulatory discretion was exercised lawfully. The UNDT noted that the ICSC consultant's review of the methodology, which did not include the Geneva 2016 survey results, was "regrettable". Further, it failed to exercise its jurisdiction to consider whether the methodology and its application to the survey was reasonable. The UNDT was offered the opportunity to hear testimony from the ICSC expert or request comments from him about the Geneva Statisticians' report, but did not take up these opportunities. The UNDT failed to properly examine the findings of the Geneva Statisticians and instead erroneously disagreed with those findings.

35. The UNDT erred in fact by finding the disparity between the Pay Index and the Post Adjustment Index from 2010-2016 resulted in a "fair part in the negative post adjustment outcome in Geneva".[32] This conclusion only makes sense if the survey correctly measured the Geneva cost of living relative to New York. If the survey delivered the type of result the Geneva Statisticians suggested, the disparity would have resolved through a rise in the Post Adjustment Index. The Geneva Statisticians alleged a miscalculation on the rental sub-index, namely the failure to use expenditure weights in the sub-index correction of which would result in an estimated 1.3 per cent increase to the Geneva Post Adjustment Index.

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However, the UNDT mischaracterized this finding. The ICSC noted they did not have sufficient information to apply expenditure weights but this contention was contradicted by their own experts who agreed with the Geneva Statisticians' findings. The UNDT, however, found that the expenditure weights were the only issue raised by the Geneva Statisticians regarding the sub-index and that it resulted in a 4.1 per cent downward miscalculation.[33] This is factually inaccurate as the expenditure weight suggested corresponded to only a 1.3 per cent miscalculation. Furthermore, the UNDT ignored that the Geneva Statisticians had determined that the rent data upon which the index was based had generated "implausible results" and dismissed the Geneva Statistician's findings. Erroneously the UNDT indicated that Appendix 3 to the ICSC Consultant's report showed an increase of only 0.3 per cent when expenditure weights were applied to the housing sub-index using 2010 data. However, the purpose of Appendix 3 was to show the information necessary to apply expenditure weights was in fact available to the ICSC, which they previously had denied. The UNDT ignored that the rental data caused the downward miscalculation which was an issue the ICSC consultant could not speak to as the ICSC had not given him access to the data. In conclusion, the Appellants argue that the UNDT's refusal to address the Geneva Statisticians reasonable concerns about the rental data and the decision of the ICSC to engage a consultant, yet prevent him from reviewing the survey results, indicated a manifestly unreasonable decision-making process by the ICSC. The UNDT ignored this together with the errors identified by the Geneva Statisticians.

36. The UNDT erred in fact and law in its treatment of whether the methodology was fit for purpose. The ICSC consultant concluded that the methodology for calculating the relative cost of living did not meet the threshold test of being "fit for purpose". The ICSC consultant made 64 recommendations to improve the ICSC methodology. This is directly relevant to the reasonableness of the exercise of regulatory discretion.

37. The UNDT erred in fact and law in finding that the ICSC's decision making concerning the Gap Closure Measure, was a lawful exercise of regulatory discretion. The five per cent Gap Closure Measure in place since 1990 protected staff from a margin of error in the calculation of relative cost of living.[34] The ICSC removed this buffer only to reinstate it at the ICSC 2017 session at the three per cent level in response to political pressure as there

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[34] ICSC Annual Report, 1990, para. 140.

was no discussion of its purpose of covering the margin of error. Such arbitrary decision-making is the opposite of lawful exercise of discretion.

38. The UNDT erred in fact and law as it misunderstood the extent of the financial consequences of the ICSC's conclusions to the Appellants. The UNDT suggested the pay cut was 4.7 per cent of the post adjustment component and not 4.7 per cent of the salary as a whole. This misunderstands how a multiplier works. A percentage reduction in the multiplier results in a corresponding percentage reduction in salary. It was not contested by the parties that there was a 4.7 per cent cut in staff members' net take home pay. Also, the UNDT erred in suggesting that the ICSC's efforts to correct errors in the survey are relevant to the legality of the decision.[35] Corrections apply to the next (2021) survey and not retroactively to the Appellants. The corrections demonstrate the shortcomings of the contested decision and support that such regulatory discretion was unlawful.

39. The Appellants request the contested decision be found unlawful and rescinded. They request retroactive pay on the basis of a PAM not based on the revised Post Adjustment Index resulting from the survey. In the alternative, they request a remand to the UNDT for correction of errors identified and a proper examination of the issues not addressed in the impugned Judgment.

Considerations

40. As indicated at the start, we adopt the reasoning of *Abd Al-Shakour et al.*, *supra*, as reproduced below.

Scope of the appeal

41. This is one of a series of cases dealing with a sensitive issue deriving from a reduction in the remuneration of staff in Geneva as a result of a downward revision in the Post Adjustment Index (PAI) originated from an ICSC decision.

42. There are two features of the remuneration packages of affected United Nations staff members that underpin the decision in these cases. First, unlike in labour law, remuneration is not the subject of negotiation or bargaining between the employer and the employee directly, or with the employee's staff association or union. Rather, remuneration is

[35] Impugned Judgment, paras. 129 and 130.

determined by the General Assembly resolutions, as well as the terms of the appointment. Second, the post allowance element of the remuneration is a feature separate to the other components that go to make up a salary that reflect such considerations as qualifications, experience, seniority, responsibility, and the like. The post adjustment allowance reflects the cost of living at a particular duty station at which a staff member is based. It takes account of and reflects the very different costs of living borne by other staff in equivalent roles at different locations around the world and who are otherwise equally remunerated. So, not only may a staff member's total remuneration for the same role within the Organisation differ from those of an equivalent colleague depending upon where he or she is posted, but costs of living at particular posts also rise and fall reflecting a myriad of economic circumstances affecting each duty station such that an individual's total remuneration may rise or fall accordingly. Given the dynamic nature of these costs of living, post allowance and their adjustment are not a ratchet mechanism in the sense that they can stay stable or rise, even if the cost of living at a particular duty station falls.

43. As a general rule, the post-adjustment allowance is set by the United Nations as a percentage of the base salary with the aim of ensuring that all staff members at the same salary level have a similar purchasing power in every duty station by compensating for the differences in cost of living. The PAI for a given location is a measure of the cost of living of staff at that location relative to the base city, New York. Its very purpose is thus that the take-home pay of United Nations staff has a purchasing power equivalent to that at the base of the system, New York. The post adjustment allowance adds to the net base salary in order to form the net remuneration, or take-home pay. The main components of the PAI are: i) rental/housing; ii) medical insurance; iii) pension contribution; iv) out-of-area expenditures; v) and in-area costs (excluding housing/incurred at the duty station).[36] To obtain the inputs for these calculations, the Cost-of-Living Division of the ICSC Secretariat organizes the collection of data through cost-of-living surveys, while taking currency fluctuations into account.

44. The ICSC decision was based on new intercity cost-of-living differential coefficients among relevant reference headquarters locations which led to a revision in the post adjustment multiplier. A Gap Closure Measure was applicable to affected personnel based in Geneva in order to mitigate the impact of this revision and remedy the significant lower PAI resulting from the application of the place-to-place survey. In this regard, the PAI was augmented by a

[36] See ICSC website https://icsc.un.org/Home/PostAdjustment.

percentage, resulting in the PAM, which was implemented for all staff members at the duty station. Existing staff members, already at the duty station before the implementation date of the survey results, received the revised PAM together with a personal transitional allowance (PTA) calculated from the difference between the new PAM and the existing PAM, and adjusted every three months until it was phased out.[37]

45. In the appeals now under consideration, the Appellants claim that: i) the ICSC acted *ultra vires* to its statute; ii) the ICSC applied an incorrect methodology in calculating the PAM and committed several calculation errors; and iii) the decision is in normative conflict with staff members' acquired rights.

46. In his answers to the appeals, the Secretary-General claims that i) the ICSC did not act *ultra vires*, because its decision was in accordance with its statute; ii) he properly implemented it; iii) the Tribunals lack competence (jurisdiction) to review legislative acts and cannot review the decision for alleged flaws in methodology; and iv) the issue of acquired rights does not arise.

47. It should be noted at the outset that on appeal the parties did not contest the receivability of the applications. The UNDT found that an individualized decision was made in relation to each applicant as the change in PAM to their salary was implemented in their August 2017 pay-slip. The Appellants seem to agree with this date when they argued that the pay slip shows the implementation of an individual adverse administrative decision in August 2017.[38] However, apart from the date of the effective reduction on the pay-slip, the UNDT Judgment and the parties' arguments at times seem to conflict as to which decision is actually under review and/or reviewable: the Secretary-General's decision to implement the PAM and/or the ICSC's decision to alter the PAM, which the Appellants claim was *ultra vires*. What is certain is that the UNDT treated the issue of the Secretary-General's lack of discretion in implementing the PAM as limiting the scope of review, which is in accordance with the Appeals Tribunal jurisprudence set in *Lloret Alcañiz et al.*[39]

[37] Consolidated Post Adjustment Circular, ICSC/CIRC/PAC/509, paras. 3 and 4.
[38] Impugned Judgment, paras. 30 and 42.
[39] *Id.*, paras. 92 and 93.

Merits of the appeal

48. The Appellants claim that the ICSC decision, which led to a pay reduction, was *ultra vires* because it conflicted with the powers conferred upon it by its own Statute. They submit that, for this cost-cutting measure to be viable in law, the statutory legal procedure must be followed.

49. In this regard, the UNDT concluded that the ICSC decision was lawful and not *ultra vires*, reasoning that subsequently issued General Assembly resolutions together with past practice, served to alter the statutory limits.[40]

50. By General Assembly resolution 3042 issued in 1972, the General Assembly established the ICSC with the aim of regulating and coordinating the conditions of service of the United Nations Common System and answerable as a body to the General Assembly.[41] Further, the resolution stated that the ICSC should be provided with the report of the Special Committee for the review of the United Nations salary system, together with the comments of the then ICSC Advisory Board and other related documentation "for its consideration and the submission of recommendations for actions at the earliest possible date".[42]

51. The Statute of the ICSC was approved by General Assembly resolution 3357, dated 18 December 1974. This Statute also refers to the mandate of the ICSC as aiming to regulate and coordinate the conditions of service of the United Nations Common System.[43] At the same time, it reiterates its function of developing a single unified international civil service through the application of common personnel standards, methods and arrangements.[44] As per Article 6, para. 1 of the same legal instrument, the ICSC was to be responsible as a body to the General Assembly. The ICSC Statute also contains the following pertinent provisions (footnote omitted):

> Article 10
>
> The Commission shall make recommendations to the General Assembly on:

[40] *Id.*, para. 74.
[41] General Assembly resolution 3042 (XXVII) 18 December 1982, *Consideranda* and para. 1. The same resolution also set forth that the ICSC would be composed of experts appointed in their individual capacities, including personal qualifications and experience and of broad geographical representation, and who should be independent of executive heads, staff associations and Governments, but accountable as a body to the General Assembly.
[42] *Id.*, para. 5.
[43] ICSC Statute, Article 1, para. 1.
[44] *Id.,* Article 9.

(a) The broad principles for the determination of the conditions of service of the staff;

(b) The scales of salaries and post adjustments for staff in the Professional and higher categories;

(c) Allowances and benefits of staff which are determined by the General Assembly;

(d) Staff assessment.

Article 11

The Commission shall establish:

(a) The methods by which the principles for determining conditions of service should be applied;

(b) Rates of allowances and benefits, other than pensions and those referred to in article 10(c), the conditions of entitlement thereto and standards of travel;

(c) The classification of duty stations for the purpose of applying post adjustments.

52. On some matters, the ICSC itself may take decisions per Article 11 of its Statute. In other areas, it makes recommendations to the General Assembly which then acts as the legislator for the rest of the common system per Article 10 of its Statute. In the present case, however, there is no need to investigate whether or not the ICSC acted on its own behalf or on delegation by the General Assembly. This is because, as highlighted by the UNDT, the General Assembly, in its resolution 72/255, endorsed the ICSC decisions "regarding the results of the cost-of-living surveys for 2016", calling upon the Organisation's members to "fully cooperate with the Commission in the application of the post adjustment system and implement its decisions regarding the results of the cost-of-living surveys …", also requesting the ICSC to report specifically on the "implementation of decisions … regarding the results of the cost-of-living surveys for 2016".[45]

53. As there is a direct order of the General Assembly to the Secretary-General to apply the ICSC decision, the United Nations Tribunals do not have the authority to review the lawfulness of such a general determination.

54. The UNDT correctly pointed out that the General Assembly was cognizant of the arguments advanced against the methodology for calculating the post adjustment and its financial impact on staff remuneration in Geneva. In this regard, the General Assembly, in its resolution 74/255, even expressed concern at the application of two concurrent post adjustment

[45] General Assembly resolution 72/255, 12 January 2018, cited in impugned Judgment, para. 94.

multipliers for the Geneva duty station, having urged the ICSC and members to the Organisation to uphold the unified post adjustment multiplier as a matter of priority.[46]

55. We draw two conclusions from the above. First, that the ICSC is a technical subsidiary organ of the General Assembly, whose decisions[47] to and approval by the General Assembly are binding upon the Secretary-General.[48] As this Appeals Tribunal has consistently held, where the General Assembly takes regulatory decisions, which leave no scope for the Secretary-General to exercise discretion, the Secretary-General's decision to execute such regulatory decisions, depending on the circumstances, do not constitute administrative decisions subject to judicial review.[49]

56. Therefore, judicial review is limited to the question of possible normative conflict between acts of the General Assembly or their implementation, and their execution by the Secretary-General.[50] In the present case, as correctly found by the UNDT, there is no dispute that the Secretary-General acted in accordance with the ICSC decision,[51] which, in turn, was subsequently endorsed and adopted by the General Assembly. This alone could be sufficient grounds for dismissing the appeal.

57. This conclusion is not disallowed by the Appellants' argument that the UNDT erred when it found that the ICSC had not acted *ultra vires* or against its own Statute by determining itself the calculation of the post adjustment. According to the Appellants, General Assembly resolutions post-dating the ICSC Statute could not have the consequence of altering its terms. The Appeals Tribunal finds that these subsequent resolutions did not indeed have the effect of modifying the ICSC Statute. A statute cannot generally be modified or abrogated by a side wind. Only a subsequent statute or other express abrogation of an earlier statute can have this effect.

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[46] General Assembly resolution, 74/255, 27 December 2019, para. 7, cited in impugned Judgment, para. 94.
[47] The General Assembly clearly resolved that the ICSC report is a decision binding on the Secretary-General. While there may be doubts whether the ICSC, in issuing its report, acted in accordance with Article 10 of its Statute, this consideration is superseded by the General Assembly's resolutions clearly determining the ICSC shall issue decisions on this matter.
[48] See also General Assembly resolution 67/241, 24 December 2012, "the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization."
[49] *Reid v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-563, para. 36; *Tintukasiri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526, paras. 38-39; *Obino v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-405, para. 21; and *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 59.
[50] *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 65.
[51] Impugned Judgment, para. 56.

However, it is true that the subsequent General Assembly resolutions have interpreted the ICSC in an evolutionary manner according to the practice over the years, by means of what is called an *authentic interpretation*. In other words, the same law-making authority issued the legal texts at stake (the ICSC Statute and the above-mentioned General Assembly resolutions), which are only apparently in conflict. This interpretation by the same legal authority to issue the legislative provisions improves the accuracy of legal interpretation and contributes to enhancing the coherence and consistency of the system.[52] Therefore, the Appeals Tribunal concludes that the UNDT did not err when it found that the subsequently issued General Assembly resolutions served to legitimize any errors about previous *de facto* decisions and thereby to corroborate the practice.

58. However, the Appeals Tribunal finds that the UNDT erred when it found that these subsequent resolutions altered the statutory limits of the ICSC. According to Article 30 of the ICSC Statute, it is true that the General Assembly may amend the ICSC Statute.[53] But this has not been the case yet. What the General Assembly has done is to interpret the terms of the Statute in accordance with the usual practice of over twenty-five years, thereby rendering any possible amendment to the ICSC Statute in this regard simply a formality to adapt it to the custom.

59. Likewise, even though this has no bearing on the outcome, the UNDT on this matter seems to have made an error of law when it invoked the doctrine of estoppel resulting from the twenty-five years of acquiescence.[54] This is because it is not the absence of previous challenge to the practice of the ICSC's determination of the calculation of the post adjustment which precluded this issue from being raised. As discussed above, the relevant element here is the fact that the General Assembly, as holder of the ultimate power to resolve such issues, has endorsed the ICSC practice over the years. Any *ultra vires* action of the ICSC over its past practices on PAM was, thus, corrected in law by the subsequent General Assembly's endorsement as final decider on the matter.

[52] To bring clarity and to avoid future similar misconstructions, it is incumbent upon the competent authority to formally update the ICSC Statute to the current operational reality.
[53] See ICSC Statute, Article 30, which states in part, "The present statute may be amended by the General Assembly. Amendments shall be subject to the same acceptance procedure as the present statute."
[54] Impugned Judgment, para. 74.

60. Moreover, the Appeals Tribunal agrees with the Secretary-General in that there appears to be an inherent inconsistency in the Appellants' claim, when, on the one hand, they argue that the ICSC acted *ultra vires* when deciding the 2016 PAM and, on the other hand, they request implementation of the higher PAM which was in place prior to 2016 as a result of the same ICSC legal framework which had underpinned the ICSC authority for decades. That is to say that the same ICSC authority to decide on the PAM cannot be considered illegal only from 2016 onwards, or only when it resulted in a downwards adjustment. If there were any kind of illegality in the way the PAM was calculated, this illegality would affect any calculation, regardless of whether it refers to the period before or after 2016.

61. The second conclusion to be drawn from the legal framework cited above is that the very purpose of the establishment of the ICSC is to regulate the United Nations Salary System in order to co-ordinate the conditions of service within the Organisation. The institution of a common system for the United Nations personnel, relating to salaries, allowances and other conditions of service has the main purposes of avoiding serious discrepancies in terms of conditions of employment and avoiding competition in recruitment of personnel and facilitating the interchange of personnel. The calculation of post adjustment indices reflecting cost-of-living and currency movements at the different locations in the United Nations Common System is one of the ICSC'S main responsibilities. Preserving as far as possible equal conditions of remuneration of service of the United Nations Common System, in order to reflect the international character of the Organisation personnel, was thus among the pivotal aims for the creation of the ICSC. Any double standard or concurrent index applicable to salaries may endanger the equity of treatment among civil servants of the Organisation.

62. Having said the above, the question that arises in the present case is not exactly that deriving from any possible non-compliance with the terms of the ICSC decision or the General Assembly's determination. Nor is it related to any sort of conflict of norms. The UNDT was correct in its Judgment when it held that the Appellants' general right to post adjustment under the terms of their employment is not at issue; rather, the question concerns decisions adopted to give effect to this right.[55] Indeed, the very existence of the right to the post-adjustment allowance is not at stake. There is thus, no discussion about whether or not the implementation would eventually have an impact on the permanence of this type of remuneration. What remains to be discussed here, as raised in the appeals, is whether the

[55] *Id.,* para. 120.

reduction in the post adjustment allowance was: i) was based on methodological errors and miscalculations; and ii) harmed the staff members' stability of salary, thereby endangering the staff members' acquired rights.

63. In this regard, a comprehensive review of the methodology by the ICSC, as recommended by its consultant, seems to be still ongoing.[56] More importantly, however, as discussed above and highlighted by the UNDT itself, is the fact that the General Assembly, as sovereign legislator, by means of some of its relevant resolutions, has issued a clear command in order for the ICSC decisions to be implemented. Specifically, the Appeals Tribunal refers to the following resolutions and its extracts, which were issued over the last years:

> **General Assembly resolution 67/241 (24 December 2012):**
>
> the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization
>
> **General Assembly resolution 72/255 (12 January 2018):**
>
> 6. Notes with serious concern that some organizations have decided not to implement the decisions of the Commission regarding the results of the cost-of-living surveys for 2016 and the mandatory age of separation;
>
> 7. Calls upon the United Nations common system organizations and staff to fully cooperate with the Commission in the application of the post adjustment system and implement its decisions regarding the results of the cost-of-living surveys and the mandatory age of separation without undue delay;
>
> **General Assembly resolution 74/255 A-B (27 December 2019):**
>
> Expressing its concern over the inconsistencies in the application of the 2016 post adjustment results at the Geneva duty station of the United Nations common system,
>
> 1. Reaffirms the authority of the International Civil Service Commission to continue to establish post adjustment multipliers for duty stations in the United Nations common system, under article 11 (c) of the statute of the Commission;
>
> 2. Recalls that, in its resolutions 44/198 and 45/259, it abolished the post adjustment scales mentioned in article 10 (b) of the statute of the Commission, and reaffirms the authority of the Commission to continue to take decisions on the number of post adjustment multiplier points per duty station, under article 11 (c) of its statute;
>
> 3. Urges the member organizations of the United Nations common system to cooperate fully with the Commission in line with its statute to restore consistency and unity of the post adjustment system as a matter of priority and as early as practicable;

[56] *Id.*, para. 123.

> 4. Recalls its resolution 41/207 of 11 December 1986, and reaffirms the importance of ensuring that the governing organs of the specialized agencies do not take, on matters of concern to the common system, positions conflicting with those taken by the General Assembly;
>
> 5. Also recalls its resolution 48/224, reiterates its request that the executive heads of organizations of the common system consult with the Commission in cases involving recommendations and decisions of the Commission before the tribunals in the United Nations system, and once again urges the governing bodies of the organizations to ensure that the executive heads comply with that request.
>
> …
>
> 7. Expresses concern at the application of two concurrent post adjustment multipliers in the United Nations common system at the Geneva duty station, urges the Commission and member organizations to uphold the unified post adjustment multiplier for the Geneva duty station under article 11 (c) of the statute of the Commission as a matter of priority, and requests the Commission to report on the matter to the General Assembly at its seventy-fifth session;
>
> 8. Notes with concern that the organizations of the United Nations common system face the challenge of having two independent administrative tribunals with concurrent jurisdiction among the organizations of the common system, as highlighted in the report of the Commission, and requests the Secretary-General, in his capacity as Chair of the United Nations System Chief Executives Board for Coordination, to conduct a review of the jurisdictional setup of the common system and submit the findings of the review and recommendations to the General Assembly as soon as practicable;

64. Therefore, by means of General Assembly resolution 74/255 issued a few months after a similar case had been delt with by the ILOAT, the General Assembly, even though well aware of the arguments put forward against it, approved of the methodology for calculating the post adjustment, as well as its financial impact on staff remuneration in Geneva.[57] This alone would be sufficient grounds for dismissing the appeal, in light of the restricted scope of competence of the United Nations Tribunals to review legislative texts originating from the General Assembly. As the Appeals Tribunal has stated in *Ovcharenko*, "Decisions of the General Assembly are binding on the Secretary-General and therefore, the administrative decision under challenge must be considered lawful, having been taken by the Secretary-General in accordance with the content of higher norms."[58] In this regard, we conclude that UNDT's reliance on a passage from the Judgment in *Tintukasiri* is not applicable here. This is because the extract quoted in the

[57] *Id.,* para. 95.
[58] *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530, para. 35.

impugned Judgment is a quotation from the earlier UNDT *Tintukasiri* judgment, not a conclusion from the Appeals Tribunal's Judgment in that case. [59]

65. Indeed, ordinarily, there is little or no margin for the Tribunals to apply the reasonableness test to legislative texts issued by the General Assembly, particularly when it comes to decisions related to human resources management and administrative and budgetary matters, as emphasized by General Assembly resolutions 67/241, 71/266, and 73/276.[60] Hence the UNDT was wrong to have delved into an examination of the reasonableness of the ICSC decision in its considerations. In this regard, the powers of both the Dispute Tribunal and the Appeals Tribunal, as judicial bodies of the United Nations internal justice system, must conform to their respective Statutes. These have been explicitly confirmed by such other General Assembly resolutions, as the following:

> **General Assembly resolution 69/203 (18 December 2014):**
>
> 37. Also reaffirms that recourse to general principles of law and the Charter of the United Nations by the Tribunals is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances;"
>
> **General Assembly resolution 71/266 (23 December 2016):**
>
> 29. Recalls its decision, contained in paragraph 5 of its resolution 68/254, and reiterates that decisions taken by the Dispute Tribunal and the United Nations Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management;
>
> **General Assembly resolution 73/276 (22 December 2018):**
>
> 44. Also stresses that all elements of the system of administration of justice, including the Dispute Tribunal and the Appeals Tribunal, must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly, *and emphasizes that the decisions of the Assembly related to human resources management and administrative and budgetary matters are subject to review by the Assembly alone;* (emphasis added)
>
> 45. Reaffirms that, in accordance with paragraph 5 of its resolution 67/241 and paragraph 28 of its resolution 63/253, the Dispute Tribunal and the Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes;

[59] *Tintukasiri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526, para. 37.
[60] General Assembly resolution 67/241, 24 December 2012, para. 6; General Assembly resolution 71/266, 23 December 2016, para. 29; General Assembly resolution 73/276, 22 December 2018, para. 44.

> **General Assembly resolution 75/248 (31 December 2020):**
>
> 5. Acknowledges the evolving nature of the system of administration of justice and the need to carefully monitor its implementation to ensure that it remains within the parameters set out by the General Assembly;

66. In light of the above, we conclude that the UNDT therefore did not err in not calling ICSC experts to discuss the reports of the Geneva Statisticians, nor did it err when it did not request further evidence on this topic.[61]

67. The Appellants also claim that there has been infringement of his acquired rights by the change in the post-adjustment. The Appeals Tribunal finds that the fact that there has been no challenge to the Secretary-General's mechanical power being in compliance with the ICSC's decision, which in turn was endorsed by General Assembly's resolutions, together with the restricted scope of judicial review in the present case, is sufficient to rule out any argument related to the notion of "acquired rights".

68. Moreover, in *Lloret Alcañiz et al.*, the Appeals Tribunal has established that the term "acquired" implies and suggests the idea of protection and the notion that such vested rights may expect to survive future variation.[62] The aim of the intended protection would be to ensure that staff members' terms and conditions may not be amended in a way that would deprive them of a benefit once the legal requirements for claiming the benefit have been fulfilled.[63]

69. In the present case, while the legal framework does provide for the right to a post-based allowance, it does not require that it remain the same. Apart from the individual negative impact on staff members' pay slips deriving from the diminished amount of the PAM, nothing has been revoked retroactively, neither the type of remuneration, nor the way it has been calculated over the years. More fundamental is the fact that the amount of the PAI seems to be, by its very nature, conditional upon the existence of certain circumstances, whose permanence is uncertain throughout each individual staff member's appointment.

70. The concept of conditional salary distribution (which we consider in the circumstances of this case is more apt than the notion of acquired rights) means that certain types of compensation are conditional upon meeting the requirements for such an allowance or bonus. Sometimes, the

[61] Impugned Judgment, para. 123.
[62] *Lloret Alcañiz et al. v. Secretary-General of the United Nations,* Judgment No. 2018-UNAT-840, para. 86.
[63] *Id.*, para. 87.

requirements depend on the worker's performance (e.g., bonus for good performance), sometimes on other events not subject to the worker's acts (e.g., student grants for parents up to a certain age of the student). In general, these types of remuneration can be removed or otherwise adjusted, including downwards, once the circumstance which determines their payment disappears or changes.

71. In the case at hand, the PAM is inherently changeable, depending on the circumstances of a certain time-period and place. Although the continued existence of the allowance might not be at stake, its nominal value or percentage amount is. This is what attracts its categorisation as "conditional compensation" rather than the notion of "acquired rights". The permanence of conditional compensation in terms of figure or amount is uncertain, since it derives from a myriad of elements that most significantly affect the cost-of-living of the Organisation's staff in a given location at a particular moment.

72. This judgment should not be thought to express a conclusion that affected staff are without the ability to influence post-adjustments because there is no jurisdiction to judicially review the recommendatory and decision-making bodies (the ICSC and the General Assembly) in the United Nations' internal justice system. Those opportunities exist at the first two stages of the post-adjustment process, that is by having input into the ICSC's deliberations and seeking to persuade the General Assembly.

73. Having considered all elements *sub judice*, the Appeals Tribunal finds that there was no error in the UNDT's judgment, when it concluded that there was no unlawfulness of the Secretary-General's decision, the effects of which were only applied prospectively. The ICSC decisions under scrutiny are not reviewable and the Secretary-General's exercise of mechanical power is reviewable on narrow grounds but evinces no illegality in the present case. Moreover, even though the UNDT erred by reviewing the decision of the ICSC on grounds of reasonableness, the outcome of its judgment was correct. The appeal must therefore fail.

74. There is one last aspect of this litigation upon which we comment briefly. We are aware that we have reached a decision which is apparently at odds with an earlier decision on the same questions reached by the International Labour Organisation's Administrative Tribunal (ILOAT). We will not comment on the ILOAT's judgment because it was reached on different grounds to those which we have decided these appeals. We do note, nevertheless, that the fundamental structures under which each of the United Nations and International Labour Organisation

judicial bodies operate differ considerably. The ILOAT, which was established well before the United Nations, is not part of the United Nations Administration of Justice system; its judges are not elected by the General Assembly; and this Appeals Tribunal is bound by United Nations General Assembly resolutions, some of which were cited in this Judgment, and particularly as they specifically refer to both the United Nations Dispute and Appeals Tribunals, but not the ILOAT. As such, these resolutions together with the Statute of the Appeals Tribunal limit its scope of judicial review in the present case. The ILOAT is not constrained by these significant jurisdictional characteristics. The Appeals Tribunal recognizes this may be an undesirable situation. However, the remedy for the situation lies not in ignoring current statutory and legislative imperatives, but rather in the ability of the governing bodies of the two Organisations to effect change if they consider this is warranted.

Judgment

75. The appeal is dismissed and Judgment No. UNDT/2020/148 is hereby affirmed. `

Original and Authoritative Version: English

Dated this 19th day of March 2021.

(Signed)	*(Signed)*	*(Signed)*
Judge Halfeld, Presiding Juiz de Fora, Brazil	Judge Colgan Auckland, New Zealand	Judge Sandhu Vancouver, Canada

Entered in the Register on this 21st day of May 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar

ANNEX 1.

DOEDENS ET AL. V. SECRETARY-GENERAL

1. Doedens, Wilhelmina Josephine
2. ten Hoope-Bender, Petra Marisa