



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

Judgment No. 2022-UNAT-1233

**Yndira Natividad Gonzalez Vasquez
(Respondent/Applicant)**

v.

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

Judgment

Before: Judge Graeme Colgan, Presiding
Judge John Raymond Murphy
Judge Dimitrios Raikos

Case No.: 2021-1551

Date: 18 March 2022

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Maryam Kamali
Counsel for Appellant/Respondent: George G Irving

JUDGE GRAEME COLGAN, PRESIDING.

1. The Secretary-General of the United Nations appeals against the Judgment of the United Nations Dispute Tribunal (subsequently also referred to as the UNDT or the Tribunal) delivered on 26 February 2021 under Judgment No. UNDT/2021/015. The UNDT had concluded that Yndira Natividad Gonzalez Vasquez (subsequently also called the Respondent) had been wrongly placed at Step 1 at the P-2 level following a promotion from her G-6 level, Step 11, and in particular that any post adjustment should not have been part of her base salary calculation. For the reasons set out below, we uphold the Secretary-General's appeal.

Facts and Procedure

Undisputed Facts

2. In 2017, the Respondent passed successfully the United Nations' Young Professional Programme's (YPP's) examination. In June 2019, she was appointed from her previous G-6 level (with remuneration set at Step 11 of that level) to an Associate Human Resources Officer post. This entailed changing from the G (General Services) category of employment to the P (Professional) category. Her formal offer of employment in her new role indicated that she would be remunerated at Step 1 of the P-2 level. The Respondent challenged this proposed setting, saying that this would entail a significant reduction (in the order of 30 per cent) in her "net salary" which was not only inherently inconsistent with a promotion, but also wrongly calculated.

3. The Appellant referred to his calculation methodology as being a long standing practice for YPP personnel in the Respondent's position and that in fact her total salary would increase over her previous remuneration when the New York post adjustment figure was included in its calculations.

4. The dispute remained unresolved, and the Respondent appealed to the UNDT against the decision to so allocate her remuneration.

The UNDT Judgment

5. The UNDT recorded that the parties agreed that the case turned on the interpretation of Staff Rule 3.4(b) (and in particular on the words "net base salary" within it) which provides materially: "On promotion, a staff member who holds a fixed-term or continuing appointment

shall be placed at the lowest step of the level to which he or she has been promoted that provides an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps at the lower level.”

6. The UNDT identified the subsequent “key question” as being whether it was lawful to include the Respondent’s P category post adjustment payment in the calculation of net base salary when determining what step she was to be remunerated at.

7. The UNDT considered that the phrase or term “net base salary” was, in isolation, meaningless, but also that it was not defined elsewhere relevant to the Respondent’s situation, including in her contract although this did contain several remuneration definitions. Noting that the Secretary-General referred frequently to the Respondent’s “net remuneration” meaning the actual amount received by her at the end of each month, the UNDT declined to equate this with “net base salary”. Indeed, the Tribunal could not locate any documented reference to the phrase “net remuneration”.

8. The UNDT identified the use of the phrase “net base salary” elsewhere in the Staff Regulations and Rules, including its use in calculating benefits and entitlements and where it appears in conjunction with the phrase “plus post adjustment”: see, for example, Staff Regulations 3.4 and 3.5 and Staff Rules 3.6(b)(i) and (ii), 9.9(a)(i) and (ii) and 13.11(a). The UNDT inferred from this, that post adjustment was not to be included as an element of net base salary but was a separate, distinctive and potentially additional amount.

9. In the Respondent’s offer of employment, “post adjustment” was identified separately from “gross base salary” and from the phrase “net base salary after deduction of Staff Assessment”. So too it was in Staff Rule 3.7(a), the objective of which was to ensure “equity in purchasing power of staff members across duty stations” and at paragraph 9 of Annex 1 to the Staff Regulations allowing the Appellant to adjust “the basic salaries” by the application of non-pensionable post adjustments based on relative costs of living and related factors at the office concerned and as compared to those factors in New York. Post adjustments are said there to be not subject to staff assessment, that is by reference to the circumstances of individual staff members. This was reiterated in effect by the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) in *Kasyanov*.¹ The UNDT held that base salary for a role and step is the same across all duty stations for all staff.

¹ *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076.

10. The UNDT also identified a reference to net base salary in the International Civil Service Commission's (ICSC's) February 2021 publication entitled *United Nations Common System of Salaries, Allowances and Benefits* as being a floor or minimum salary from which no deductions or, we assume, further deductions are made.

11. The UNDT also had regard to its pertinent Judgment in *Valentine*² in which net base salary was defined as "gross salary minus staff assessment" but did not include post adjustment. Likewise, in *Lloret Alcañiz*³ and in a passage that was not upset on appeal (and arguably confirmed) in that case,⁴ net base salary and post adjustment were confirmed as being separate elements of a staff member's remuneration. A like result was reached in *Kasyanov* although for the different purpose of calculating compensation by reference to a net base salary but without inclusion of a post adjustment set by calculating the difference between two duty stations' post adjustments.

12. The UNDT accepted the Respondent's case that post adjustment should not be taken into account in assessing her net base salary because, if she were to move between duty stations attracting different post adjustments, there would be a risk that her income would be lower than it had been at the former G Level, Step 11.

13. The UNDT relied also on a long-abolished Staff Rule that had been the subject of interpretation by the former United Nations Administrative Tribunal (UNAdT) but on essentially the same issues as in this case. In that case, *Garnett*,⁵ the Tribunal emphasised that the purpose of the interpretation now advanced by the Respondent was to ensure that a staff member was not disadvantaged financially by being promoted. The UNDT acknowledged, however, the differences between the rules' wordings and the "only persuasive" nature of Judgments of that former tribunal meant that it was not bound to follow *Garnett*.

14. Accordingly, the UNDT concluded that it was unlawful for the Headquarters Client Services Service to take post adjustment into account when deciding the Respondent's step following her promotion from G-6, Step 11 to the P-2 level. This was said because, as the UNDT

² *Valentine v. Secretary-General of the United Nations*, Judgment No. UNDT/2018/050.

³ *Lloret-Alcañiz v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/097.

⁴ *Lloret-Alcañiz v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840.

⁵ UNAdT, Judgment No. 175, *Garnett* (1973).

expressed it, “net base salary’ is correctly determined as ‘gross base salary’, as per the offer of appointment, minus staff assessment”.⁶

15. Remedially, the Respondent was awarded specific performance of her contract’s remuneration provisions as interpreted by the Tribunal.

16. Finally, the UNDT urged staff members and the Administration to provide better guidance by publishing easily understood and consistent statutory definitions of the different salary terms throughout the Organization’s legal framework.

Procedure before the Appeals Tribunal

17. On 27 April 2021, the Secretary-General filed an appeal against the UNDT’s Judgment, and the appeal was registered with the Appeals Tribunal as Case No. 2021-1551. On 21 June 2021, the Respondent filed her answer.

Submissions

The Secretary-General’s Appeal

18. The UNDT erred in its application of Staff Rule 3.4(b) to the calculation of Ms. Gonzalez Vasquez’ step when appointed to the P-2 level. While the UNDT was correct to define the term “net base salary” as gross salary minus staff assessment, it failed to observe that the term “net base salary” was a term used exclusively for the Professional category. For the GS category, the term “net salary” is used because staff in the GS category are not entitled to post adjustment to supplement their “net base salary”. As a result, the definition of “net base salary” in the context of Staff Rule 3.4(b) is only appropriate when comparing salaries within the Professional category, rather than for a change of appointment from the GS and Professional categories.

19. The salary scales of the Professional and GS categories differ in how they account for the cost of living at a duty station. The major difference between the GS salary and the Professional salary categories is that the GS salary includes in its salary calculation a cost-of-living component based on each duty station, whereas in the Professional category, cost of living is added to the net base salary as “post adjustment.” This is because GS staff are locally

⁶ Impugned Judgment, para. 29.

recruited, whereas Professional level staff most often are internationally recruited. GS salaries, therefore, differ depending on the duty station. Professional salaries do not differ depending on the duty station; only the post adjustments differ.

20. Therefore, the longstanding practice of the Organization is to reconcile the two categories of salary by removing the cost-of-living component from the GS salary and compare it to the net base salary (without the post adjustment component) of the Professional salary. This is what was done in Ms. Gonzalez Vasquez' case. When Ms. Gonzalez Vasquez' step was calculated, the GS-to-P promotion calculation formula was used which works as follows: the multiplier used at the time of the promotion for the New York duty station's cost of living component is used to calculate and deduct the portion of the GS salary that would represent the cost-of-living component in the GS salary after the addition of two steps. The result is then compared to the net base salary at the P-level to determine the step that should be given at the P-level.

21. In this case, the amount that resulted after the application of the multiplier and deduction of cost-of-living component at the GS level yielded a figure that was lower than the net base salary at the P-2, step 1 level, but it was still higher than what Ms. Gonzalez Vasquez had received at the G-6, step 11 level. Therefore, only after the post adjustment was excluded to calculate the step at the P-2 level, and in order to ensure that there would be no financial loss for Ms. Gonzalez Vasquez in terms of take-home salary, did the Organization verify that the step level chosen at the P-2 level was correct by adding the post adjustment and comparing it to what the staff member would have made prior to passing the G to P exam, plus two steps at her former level.

22. If the Organization were to interpret Staff Rule 3.4(b) the way Ms. Gonzalez Vasquez argued and the UNDT concluded it should be interpreted, the outcome would be that her step at the P-2 category would be so high that it would have to be recalculated to a nonexistent step in the P-2 salary scale because the resulting calculation would exceed the level associated with the highest existing step. The Organization would then have no choice but to place Ms. Gonzalez Vasquez at the highest step in the P-2 category. This would be untenable for the G-to-P programme and was not what the drafters of Staff Rule 3.4(b) intended for a promotion or appointment from the GS category to the Professional category.

23. Ms. Gonzalez Vasquez' assertions that she had a reduced net base salary as a result of passing the G to P exam is not relevant to the application of Staff Rule 3.4(b), because as the UNAdT explained in *Garnett*, the intention of that staff rule is to give the staff member an increase in her remuneration compared to that which she would have received in her former position. Furthermore, such assertions are not even true. While the UNDT was correct in finding that the Judgment in *Garnett* was "only of persuasive value" to the UNDT, it should have analyzed the rationale behind that Judgment carefully to understand the intent behind Staff Rule 3.4(b). In view of the foregoing, the UNDT erred in finding that the Organization had not properly applied Staff Rule 3.4(b) in Ms. Gonzalez Vasquez' case.

24. Moreover, the UNDT's interpretation of Staff Rule 3.4(b) would lead to discrimination against staff at different duty stations. As summarized above, the Administration did not consider the post adjustment component in determining Ms. Gonzalez Vasquez' step at the P-2 level. However, in order to compare two like categories, the Administration had to remove the cost-of-living component from the GS category to make it comparable to the Professional category. Not going through this additional step would result in a comparison of two different categories of salary, whereby the GS category of salary would include the cost-of-living adjustment, but the P category of salary would not. The result would be an unfair comparison that would result in a higher salary for Ms. Gonzalez Vasquez, and a lower calculation of steps for a similarly situated G-6, step 11 G-to-P exam candidate at a duty station with a lower cost of living. In such a scenario, the candidate from a duty station with a lower cost of living would receive a lower step than Ms. Gonzalez Vasquez solely by the reason of where he or she was located. This would be the case even if the staff member from the lower cost of living duty station was going to then move to New York or Geneva, for example, where the cost of living is much higher.

25. The UNDT's interpretation of Staff Rule 3.4(b) and the ensuing calculation of steps would result in discrimination against, and inequities between, successful candidates of the G-to-P exam at duty stations with a lower cost of living. There would not be equal pay for equal work for such candidates and no uniformity in pay for staff members passing the G-to-P exam. Such an interpretation would run counter to the *Noblemaire* Principle, which holds that an international organization must remunerate its entire staff equally for work of equal value, irrespective of differences in levels of pay in the various countries from which they are drawn. The UNDT's interpretation of Staff Rule 3.4(b) is neither feasible from a practical standpoint, nor consistent with the fundamental value of equal pay for equal work.

26. The Secretary-General requests the UNAT to vacate the Judgment in its entirety.

The Respondent's Answer

27. The Appellant's appeal is merely an attempt to reargue the case that was presented in full before the UNDT. It fails to meet the standard set by the Appeals Tribunal to overturn a reasoned judgment.

28. The "longstanding practice" by the Secretary-General to depart from the clear meaning of Staff Rule 3.4(b) in order to place Ms. Gonzalez Vasquez at the lowest step in the P-2 scale consists of a formula "invented and applied to the few [GS] staff who succeed in being competitively selected for a handful of Professional posts". This appears to be designed to place staff at the lowest possible step of the salary scale and thereby achieve the minimum increase in pay possible as a result of their "promotion". The Secretary-General has never explained the origin or basis for this interpretation and there is no indication how long it has been applied and if it has ever been the subject of staff-management consultation.

29. The underlying fallacy behind the formula is that movement from the GS to the Professional category is not just a promotion to a higher level, but it is a change of category and the essential conditions of service in which locally recruited staff then accept all obligations of being internationally recruited. While recognizing that the salaries of the two categories are determined differently, the Appellant's grounds of appeal draw the wrong conclusion. GS salaries are set according to the best prevailing local rates while Professional salaries are determined by comparison with the comparator civil service. Post adjustment is meant to equalise costs of living or purchasing power between duty stations and as such only applies to Professional staff. Post adjustment is not relevant to GS remuneration. The Secretary-General's argument that without the application of the formula, steps would be granted depending on which duty station they have served, is untrue since the Staff Rule only compares net base salary.

30. A further anomaly not noted in the Judgment is the fact that the formula used for recruitment of candidates to the P-2 level takes into account years of experience, so had Ms. Gonzalez Vasquez been recruited instead of promoted, she would have been placed at least at P-2, step VI instead of step I. The Secretary-General is unable or unwilling to acknowledge that since movement from one category of staff to another entails the granting of a new appointment, applying normal recruitment standards would be more appropriate and equitable

instead of inventing a special formula which is neither. When offers of appointment from G to P are made in the INSPIRA system, it has to be done manually in order to override the recruitment guidelines embedded in the system; until the Organization is prepared to consider an alternative methodology that is properly approved and promulgated for movement between categories, he must apply the Staff Rule as it is written. Contrary to the Secretary-General's argument, GS salaries do not include a cost-of-living component equivalent to post adjustment. The multiplier used by the Organization in his formula to deduct a portion of the GS salary is a post adjustment methodology and has nothing to do with locally determined salaries.

31. The UNDT correctly noted that the Secretary-General repeatedly used the term "net remuneration" in his arguments which is "another facile invention not found anywhere in the Staff Rules or in the contract of employment". The UNDT carefully focused on the meaning of the term *net base salary* as used in the Staff Rules and referenced jurisprudence confirming the meaning of the term.

32. The UNDT identified the anomaly that would occur under the Secretary-General's analysis if Ms. Gonzalez Vasquez were to relocate to another duty station, possibly resulting in a significant loss of remuneration since post adjustment may vary considerably from one duty station to another. This suggests that the Secretary-General's formula is inherently discriminatory. Moreover, a P-1 staff member with ten years of experience who is promoted to P-2 will earn more than a GS-6 staff member with the same experience who is promoted to the P-2 level. The Secretary-General arbitrarily applies an artificial formula in place of the Staff Rule and thereby perpetuates a class distinction, for the sole purpose of reducing Ms. Gonzalez Vasquez' salary.

33. The Secretary-General provides no proof or example for his contention that the result would create an unfair comparison resulting in a lower step for staff from duty stations with a lower cost of living. Locally recruited staff in duty stations with lower costs of living have lower base pay by virtue of the prevailing local conditions. Were they to be reappointed to the Professional category, they would likely benefit from higher net base pay. The amounts would differ because the starting points differ. The equal pay for equal work argument does not apply. Equality does not mean that all are paid the same, but rather that all are paid in accordance with the same rules.

34. Ms. Gonzalez Vasquez asks that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Considerations

35. This is a case in which both parties have advanced arguments about why their interpretations should be adopted as the best and fairest solution to the dispute. In these circumstances we need to be particular to decide not what the rule should mean (including what we consider it should mean), but rather to decide what it does mean.

36. Staff Rule 3.4(b) governs these issues and we repeat it here: “On promotion, a staff member who holds a fixed-term or continuing appointment shall be placed at the lowest step of the level to which he or she has been promoted that provides an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps at the lower level.”

37. The Rule contains the following essential provisions. First, on a promotion (apparently irrespective of whether that is within the G or P levels or from G to P), a staff member must receive a minimum net base salary increase. Second, that net base salary increase is to be calculated by taking the staff member’s immediately previous net base salary and adding at least 2 steps within that level. Finally, the level at which the staff member’s new (promoted) salary shall be fixed must be no less than the previous salary plus the notional increase provided for by those two steps. Although not allowed for expressly by the Rule and despite its directory language, it appears to be the Appellant’s position that a higher-step allocation and thereby a greater salary increase than this can be allowed for in the discretion of the Secretary-General. Finally in this analysis, and because all salaries are specified as set figures, unless the minimum increase equates to one of these precisely, most appointees will in practice receive somewhat more than that minimum increase so calculated.

38. We note that the Rule does not, however, appear to allow for the situation where the staff member is at the highest, or second highest, step within that grade so that it is not possible to calculate what would have been earned at two steps higher within that grade. The Respondent was at the highest step within her GS level. From the evidence before the UNDT, it appears that, in her case, this minimum calculation was made by applying a formula contained in a document called “Spreadsheet for Determining Salary Level on Promotion or

SPA from General Service to Professional Level”. This purported to substitute for the two additional steps within the present GS level the following formula: “If at the last step of level, add to [net base salary (single rate) at lower grade] the difference between the last step and the previous step.” The Respondent was at the highest step (11) within grade G-6 at that time. The Administration appears to have added the difference between Steps 10 and 11 to the Respondent’s previous “net base salary” (USD 69,991) producing the minimum increase figure of USD 73,847. Because the salary for a P-2 position was said to be USD 77,512, the Appellant considered that there had been compliance with the Rule. But to do so it had to, and did, identify two components making up that increased salary level, a “net base salary” component of USD 47,292 and the New York post adjustment component of USD 30,220. It calculated that there was thereby an increase in the Respondent’s remuneration of USD 3,935. It justified this methodology as being a long-standing practice and support from case law. We will return to that latter element in this Judgment.

39. The Administration’s practice in such a situation (to calculate the differential by reference to the difference only between the penultimate and the final G level steps) appears not only not to be addressed by the Rule, but, if the sum of the two steps within the level is more than the sum of the single step between the one-lower step and the final step at the level, to also not comply with the Staff Rule. That is not to say, however, that the Appellant’s practice of adding in the staff member’s particular post adjustment in the calculation of salary is itself wrong. That is because the Rule does not address this issue expressly.

40. The difficulties identified by this case arise where there is the infrequent, but certainly not unknown or unique, transition by appointment of a staff member from the GS category to the P category. That is because while GS staff roles are generally filled by “local” personnel and are remunerated by a salary which includes, seamlessly and integrally, a notional sum that takes account of the costs of living at the post where that staff member lives and works, the position with P category staff is different. They are “international staff” who are generally domiciled elsewhere and “posted” to a post. However, they come to and live at their posts for a period (sometimes fixed, sometimes infinite) and their costs of living there are compensated for by a separate allowance (called a “post adjustment”) which differs between cities reflecting those cities’ very different costs of living. Post adjustments are calculated independently of the remuneration attaching to the role a P category staff member holds. As recent cases show, post adjustments are adjustable, up and down, reflecting variations in costs of living, as well as

being significantly variable between posts in different parts of the world. So, it follows that while it is possible, it is also unfair and even pointless, to compare in an unrefined way, a GS staff member's remuneration to a P category staff member's.

41. The UNDT identified the two contentious elements in the case as being, first, the definition of the phrase "net base salary" and, second, whether the relevant post adjustment applicable to the Respondent's situation was included within this calculation. We will refer to this second issue as the comparator methodology issue. We will examine each sequentially.

42. First, what does the phrase "net base salary" mean? While the literal words and phrases of a Regulation or Rule should be given effect to where possible, all such documented regulation should be read and understood in its context, against any relevant historical background information and considering its application in practice. If a literal interpretation is unworkable or ridiculous in its application, then it may be that its expression was mistaken. The operation in practice of such a provision, especially over a long period without doubt being cast on it, may also be an indicator of its intended meaning.

43. In the absence of a definition of the phrase "net base salary", we interpret it as follows. It is most conveniently broken down into two elements and approached in reverse order. First, the words "base salary" mean the salary attaching to the role held by the staff member and, in this case, also the role to which the staff member has been appointed. This base salary does not include any elements of cost of living (COL) allowances which may be identifiable separately as an element of it, any post adjustment (PA), any additional allowances for skills, qualifications or the like. It does not include any particular allowances to which the staff member may be entitled, for example reimbursement of dependent children's educational costs. Nor does it take account of what are known as "assessments", deductions made by the employing Agency depending on both the staff member's common and individual circumstances. So, to use the Respondent's circumstances as an example, her base salary was what she was paid formerly in her GS role as defined above.

44. Next, the element of "net" must be factored into that definition of 'base salary' to constitute the full phrase 'net base salary'. Again, in the absence of any specific definition of this, we consider that it means the sum periodically or regularly received by the staff member "in the hand" (or more probably now, in the bank account) from that base salary (as defined). So, in practice, the individual staff member's "assessments" (deductions for such things as

pension contributions, medical insurance premiums and the like) will be deducted from the base salary to calculate the staff member's net base salary in her previous GS position.

45. Next, we move to the comparator methodology issue.

46. As the full Appeals Tribunal has recently decided, the P category post adjustment element of a staff member's remuneration is an amount that is both variable as between duty stations and may both increase and decrease periodically as it reflects the different costs of living at those duty stations. It is therefore in effect a form of reimbursement for those costs of living incurred by those staff stationed there.⁷

47. When searching for the meaning of words or phrases by comparing other words or phrases in associated documents, it is important to compare like with like, "apples with apples and not with oranges" as the saying goes.

48. The Appellant relies for authority supporting its practice, on previous judgments of the UNDT and, particularly, the UNAT and its predecessor, the UNAdT. The first in time of these was *Garnett*⁸. It dealt with an earlier and different Staff Rule governing this issue, Rule 103.9(i) which provided materially that, except in circumstances which are not applicable to the current case, a promoted staff member's initial "salary" would amount to at least one full step in the level to which the staff member had been promoted, above the salary that would have been received without the promotion. The most significant difference between that Rule and the current Rule 3.4 is that the earlier word "salary" has been replaced by the phrase "net base salary".

49. The passages in the *Garnett* Judgment on which the Appellant relies principally, however, relate to whether post adjustment or cost of living factors are to be taken into account when comparing the salaries to ensure that a sufficient increase has been provided. The UNAdT wrote:

Staff Rule 103.9 (i) does not specifically define "salary", and there is no basis for the Applicant's contention that the term, as used in comparing General Service remuneration and Professional category remuneration, means only base salary prior to post adjustment. Furthermore, Annex I, paragraph 9 to the Staff Regulations implies

⁷ See *Abd Al-Shakour et al v Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1107.

⁸ UNAdT, Judgment No. 175, *Garnett* (1973), Section III.

that as a general rule post adjustments are factors in calculating Professional category salaries.

Furthermore, the obvious purpose of Staff Rule 103.9 is to ensure that a staff member shall not suffer financially by reason of a promotion. It provides in effect that during the first year of service in the new position the staff member's remuneration shall exceed the remuneration which would have been received during the year in the old position by the amount of one full step in the new position—in other words, that the year shall yield the staff member an increment equal to one step in the new position over what would have been received during the year in the old position.

In comparing remuneration in the new position with remuneration in the old, the Rule must have intended in both cases to include all amounts actually received, whether by way of base salary or cost of living allowances. General Service salary scales are related to local costs of living, since they are based on the best prevailing conditions of employment in the locality concerned (see Staff Regulations, Annex I, paragraph 7, and witness the upward revision of the General Service salary scale as of 1 January 1970), and Professional category remuneration is similarly related through post adjustment. To omit the latter in calculations under Staff Rule 103.9 (i) would be to compare unlikes, and would distort the purpose of the Rule.

The Tribunal accordingly holds that the receipt of post adjustment by Professional category personnel should be taken into account in calculations under Staff Rule 103.9 (i).

50. Although the UNDT in the Judgment appealed from here downplayed the significance of that earlier Judgment, we consider that on the broad questions at issue in both cases, it is still a valuable and very persuasive precedent. Despite the UNDT also noting that it could only be of “persuasive value” in this case and that is technically correct, it is nevertheless on point in largely unchanged UN remuneration arrangements.

51. The second case relied on by the Appellant is *Ihekwaba*⁹ which was affirmed on appeal.¹⁰ In that case, the staff member was the recipient of a special post allowance (SPA) for an academic achievement which moved her salary from G-7, Step 10, to P-2, Step 1. She challenged the calculation of her salary grading saying that although she received more net, she was paid less in gross terms than she had previously received on the GS scale. The UNDT held that hers was not a case of promotion but rather of an assignment as provisional staff on an SPA although what was then provisional Rule 3.4 (which is at issue in this case in the same

⁹ *Ihekwaba v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/043.

¹⁰ *Ihekwaba v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-083.

form) governed the question. The parties in that case agreed that the calculation was based on “net base salary”, as did the UNDT, and the term was not examined further.

52. On appeal to the UNAT in *Ihekwaba*, it was accepted by the Appellant staff member that her P-2 salary had been calculated in accordance with provisional Staff Rule 3.4 and the appeal turned on another point not at issue in this case. Although, in one sense, the Secretary-General was not proven wrong on his methodology in calculating salary in such cases, the point was not argued and so we do not consider that *Ihekwaba* is authority, or at least considered and strong authority, for the Appellant’s position.

53. How is the comparison to be made to ensure that the minimum increase in net base salary is achieved for the staff member? There are (at least) three ways of structuring that before-and-after comparison.

54. The first is the methodology which the UNDT favoured and the Respondent supports. It is to compare the Respondent’s total salary at her former G level with her PA-excluded P level salary. Doing so creates a clear and substantial theoretical (but in our conclusion, unrealistic) reduction in her income upon promotion.

55. The second method is to compare the full remunerations of both positions, that is including all COL and PA elements. This provides a discernible increase in the Respondent’s remuneration but it is difficult, if not impossible to reconcile this with the requirement to consider “net base salary”.

56. The third way to make this comparison is to compare both remunerations shorn of their COL and post adjustment elements and of the Respondent’s assessments under each. Although not perfect because of the potential variability of the Respondent’s personal assessments under each, it both achieves the required comparator using the GS net base salary and ensures a like-for-like (or apples-with-apples) comparison as emphasised by the judgment in *Garnett*. In our conclusion, this is the correct approach to determining compliance with Staff Rule 3.4.

57. The UNDT’s Judgment based on the first of these methodologies was erroneous in law and despite the lack of clarity of expression of the test, misinterpreted and misapplied Staff Rule 3.4.

58. There are two submissions (one from each of the parties) with which we disagree and, although the decision of the case does not turn on them directly, we should nevertheless address briefly. First the Appellant says that Staff Rule 3.4(b) is applicable only to P level staff and its provisions are inapplicable to GS staff. The Appellant does not say why that is so. Read both in its context of the Staff Rules and stating one of the policy principles of staff remuneration, the Rule does not differentiate between P, GS staff or Field Staff (FS). More particularly, the contents of Staff Rule 3.4(b) refer to levels and steps within these without distinction between GS and P levels. We do not accept this unsubstantiated submission.

59. Second, the Respondent contends, that the Appellant's interpretation of the issues would create significant inequalities between staff promoted from GS to P levels in the event that such staff members were thereafter moved to another duty station with a lower post adjustment and thereby lose significant income. In addition to attempting to seduce us into falling into the trap, identified by us earlier, of advocating for another solution, this too is an unsustainable submission. That is because the very point of adjustable post adjustments is that they apply between and, in a temporal sense, within duty stations, in effect as a flexible tool to reimburse for different and fluctuating costs of living. So, such a duty station move may well result in a loss of post adjustment remuneration, but this is to allow for the lower costs of living at the new duty station. We likewise reject this argument advanced by the Respondent.

60. We reiterate and endorse the UNDT's urging of the Secretary-General, following consultation with staff, to revise the terminology of these provisions of the Rules to provide both staff and the Administration with clear and easily-understood definitions of key words and phrases and, if necessary also, to adopt clear transitional arrangements not only within GS and P grades, but in promotion from GS to P. We also commend for consideration the apparently unaddressed question identified in this case where a staff member is at the highest or second highest step of a salary level and the consequent difficulties of applying Staff Rule 3.4 as currently written.

61. For the foregoing reasons, we allow the Secretary-General's appeal and set aside the UNDT's Judgment. It follows from our reasoning that when the correct comparison of net base salaries was applied, Ms. Gonzalez Vasquez's remuneration in her P-2 role was not miscalculated.

Judgment

62. The Secretary-General's appeal is allowed and the UNDT's Judgment is set aside.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 19th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar