UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/018
Judgment No.: UNDT/2020/118
Date: 14 July 2020
Original: English

**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ANGELOVA et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**
Robbie Leighton, OSLA

**Counsel for the Respondent:**
Elizabeth Brown, UNHCR
Lance Bartholomeusz, UNHCR

## INTRODUCTION

1. The Applicants are 14 staff members of the United Nations High Commissioner for Refugees ("UNHCR") who were based in Geneva, Switzerland, at the time of the contested decision. They are challenging the Administration's decision to implement a post adjustment multiplier resulting in a pay cut.

2. The application was initially filed with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Geneva on 21 December 2017, and then transferred to UNDT in Nairobi on 1 February 2018 after the two Geneva-based UNDT Judges recused themselves from the proceedings.[1]

## PROCEDURAL HISTORY

3. Pursuant to Order No. 17 (NBI/2018), the Respondent filed a reply on 12 March 2018.

4. The Tribunal held case management discussions on 6 June 2018, 17 September 2018 and 19 November 2018. It also held an oral hearing on 22 October 2018 to hear evidence from Ms. Regina Pawlik, Executive Head of the International Civil Service Commission ("ICSC") and Mr. Maxim Golovinov, Human Resources Officer, Office of Human Resources Management ("OHRM") on the following: (i) the legal framework for the functions of the ICSC vis-à-vis the General Assembly and the Secretary-General; (ii) the methodology used by the ICSC to establish the cost of living; and (iii) the function of the transitional allowance.

5. Between 13 September 2018 and 13 December 2018, the parties filed additional submissions and documents. Pursuant to Order Nos. 186 and 189 (NBI/2018) and 005 (NBI/2019), the Applicants filed a statement of relevant facts on 11 January 2019 and on 15 February 2019, the Respondent filed his comments on these facts.

[1] Order Nos. 018 (GVA/2018) and 027 (GVA/2018).

6. On 3 July 2019, the International Labour Organization Administrative Tribunal ("ILOAT") rendered its Judgment No. 4134 in relation to complaints filed by International Labour Organization ("ILO") staff members based in Geneva challenging the ILO's decision to apply to their salaries, as of April 2018, the post adjustment multiplier determined by the ICSC based on its 2016 cost-of-living survey, which resulted in their salaries being reduced. The ILOAT set aside the impugned decision after concluding that the ICSC's decisions were without legal foundation and thus, the action of ILO to reduce the salaries of the complainants based on the ICSC's decisions was legally flawed.

7. On 22 July 2019, the Applicants filed a motion seeking leave to file submissions on ILOAT Judgment No. 4134 and its relevance to the instant case. By Order No. 105 (NBI/2019), the Tribunal admitted the Applicants' submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the Applicants' submissions on 7 August 2019.

8. The parties filed additional submissions in January and February 2020.

**FACTS**

9. The following facts are based on the parties' pleadings, additional submissions totalling over 3000 pages and oral evidence adduced at the hearing.

10. At its 38th session in February 2016, the Advisory Committee on Post Adjustment Questions ("ACPAQ")[2] reviewed the methodology for the cost-of-living measurements in preparation for the 2016 round of surveys. The Committee made recommendations on several aspects, including the use of price data collected under the European Comparisons Program ("ECP"). The ICSC approved all the ACPAQ's recommendations in March 2016.[3]

[2] ACPAQ is an expert subsidiary body of the ICSC which provides technical advice on the methodology of the post adjustment system. It is composed of six members and is chaired by the Vice Chairman of the ICSC. https://www.unicsc.org/Home/ACPAQSubsidiary.
[3] Reply, annex 1, page 3 (ICSC/ACPAQ/39/R.2 – Report on the implementation of the methodology approved by the Commission for cost-of-living surveys at headquarters duty stations).

11. In September/October 2016, the ICSC conducted comprehensive cost-of-living surveys at seven headquarters duty stations outside New York to collect price and expenditure data for the determination of the post adjustment[4] index at these locations. Geneva was one of the duty stations included in the survey.[5] After confirming that the surveys had been conducted in accordance with the approved methodology, the ACPAQ recommended the ICSC's approval of the survey results for duty stations not covered by the ECP in February 2017. This recommendation included the Geneva duty station.[6]

12. At the ICSC's 84th session in March 2017, it approved the results of the cost-of-living survey in Geneva while noting that implementation of the new post adjustment would result in a reduction of 7.5 percent in United States dollars ("USD") in the net remuneration of staff in Geneva as of the survey date.[7] The ICSC decided that: (a) the new post adjustment multiplier would be implemented on 1 May 2017; and (b) that if the results were negative for staff, they would be implemented based on established transitional measures.[8] At the same session, representatives of the Human Resources Network, the United Nations Secretariat, other Geneva-based organizations and staff federations expressed concern about the negative impact of a drastic reduction in post adjustment. The staff federations urged the ICSC to reinstate the 5 percent augmentation of the survey post adjustment index as part of the gap closure measure. Alternatively, they suggested a freeze on the multiplier for Geneva until the lower post adjustment index caught up with the prevailing pay index.[9]

13. In April 2017, the Executive Heads of Geneva-based organizations requested that ICSC provide information regarding the specific impact that the survey

[4] Post adjustment is an amount paid to staff members serving in the Professional and higher categories and in the Field Service category, in accordance with annex I, paragraph 8, of the Staff Regulations, to ensure equity in purchasing power of staff members across duty stations. ST/SGB/2017/1, rule 3.7(a).
[5] Application, annex 8 (ICSC/85/CRP.1 – Considerations regarding cost-of-living surveys and post adjustment matters – note by Geneva-based organizations).
[6] ICSC/84/R.7 – Post adjustment issues: results of the 2016 round of surveys; report of the Advisory Committee on Post Adjustment Questions on its thirty-ninth session and agenda for the fortieth session.
[7] Reply, annex 2, para. 100 (ICSC/84/R.8 – Report on the work of the International Civil Service Commission at its eighty-fourth session).
[8] Ibid., paras. 105 and 106.
[9] Ibid., paras. 92-98.

components and the changes to the methodology had on the 2016 survey results and proposed the deferral of any implementation until such information was available and validated in a process in which their representatives participated. The ICSC Chair provided the information on 9 May 2017.[10]

14. On 11 May 2017, the Department of Management informed staff members that: (a) the post adjustment index variances for Geneva translated into a decrease of 7.7% in the net remuneration of staff in the professional and higher categories; (b) the post adjustment change would be implemented effective 1 May 2017; (c) the new post adjustment would only be applicable to new staff joining Geneva on or after 1 May 2017; and (d) currently serving staff members would not be impacted until August 2017 due to payment of a personal transition allowance ("PTA").[11] The PTA reflected the difference between the new and the existing post adjustment multiplier and was supposed to be adjusted every three months until it was phased out.[12]

15. Between 31 May and 2 June 2017, an informal review team of senior statisticians,[13] requested by the Geneva Human Resources Group[14], conducted a targeted review of the 2016 cost-of-living survey in Geneva to ascertain "whether, from a statistical perspective, the calculations used in the 2016 survey could be considered of good quality and sufficiently robust to be designated 'fit for purpose'". Given the relatively short time, the review was not a comprehensive review of all elements of the ICSC methodology or implementation of the methodology. However, the reviewers concluded that: (a) due to several serious calculation and systemic errors in the compilation of the ICSC results, the ICSC calculations for Geneva could not be considered of "sufficiently good quality to designate them 'fit for purpose'; (b) implementation by the ICSC does not always correspond with the "approved" methodology described in the formal documentation; (c) many important compilation

[10] Application, annex 8, paras. 5 and 6. The organizations were: ILO, UNOG, ITU, WIPO, WHO, UPU, IOM, WMO, UNAIDS and UNHCR.
[11] Reply, annexes 3, 4 and 5.
[12] Reply, annex 5, section V.
[13] Application, annex 8, page 18. The review team consisted of two staff members of ILO, one staff member of UNCTAD and an international consultant.
[14] Ibid., page 19.

methodologies were not described in the formal documentation; and (d) several methodological changes introduced since 2010 had increased the instability and volatility of the indices used to calculate the cost-of-living comparisons. These changes appear to have almost universally reduced the Geneva post adjustment index in 2016.[15]

16. On 10 July 2017, the Applicants sought management evaluation of the decision to implement the post adjustment change to their salaries effective 1 May 2017 that would result in a 7.7% reduction in their net remuneration.[16] In the ensuing litigation, this Tribunal, in its Judgment No. UNDT/2018/023, dismissed the application as irreceivable, having found that no individual decisions had been taken in the Applicants' cases.

17. Pursuant to a decision made at the ICSC's 85th session in July 2017, the ICSC engaged an independent consultant to review the methodology underlying the post adjustment system and assess, *inter alia*, whether it was "fit for purpose". In a report dated 6 February 2018, the consultant noted that the purpose of the post adjustment system "is to adjust salaries of UN Common System professional staff in all duty stations in a way that is fair, equitable and meets standards of compensation policies. To this extent it can be said that these procedures and the approved methodology go a long way to meet the criterion of 'fit for purpose'. There are however clearly areas for improvement […]".[17] The consultant made 64 recommendations, including but not limited to the methodology for the post adjustment system, policies and specific issues.[18] The Applicants assert that the Geneva-based organizations were not consulted regarding the terms of reference for the review or the appointment of the consultant as expected.[19] The staff associations engaged another independent expert who reviewed and elaborated on selected recommendations from the ICSC's consultant's report.[20]

[15] Ibid., page 23.
[16] Reply, annex 7.
[17] Applicants' submission of 19 October 2018, annex 14, page 37, para. 10 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).
[18] Report of the consultant, ibid., pp. 47-54.
[19] Applicants' submission of 11 January 2019, para. 79.
[20] Applicants' submission of 19 October 2018, annex 15 (Comments on the consultant report – "review of the post adjustment methodology" – and prioritization of its recommendations).

18. On 18 July 2017, the ICSC decided to change the implementation date of the results of the cost-of-living survey in Geneva from 1 May 2017 to 1 August 2017.[21] Staff members were informed on 19 and 20 July 2017 of the new implementation date, the reintroduction of a 3% margin to reduce the decrease of the post adjustment, postponement of post adjustment-related reduction for serving staff members by extending the transitional measures applicable to serving staff members from three to six months (i.e. 1 February 2018), and that subsequent post adjustment reductions would occur every four months instead of every three months.[22]

19. On 14 September 2017, the Applicants requested management evaluation of the 19 and 20 July 2017 decisions indicating, in the alternative to previous filings[23], the decision date as being from receipt of their August payslip.[24] This decision forms the basis of the present application.

20. On 30 November 2017, the Deputy High Commissioner, UNHCR, responded to the Applicants' management evaluation request of 14 September 2017. The Deputy High Commissioner informed the Applicants that their request was not receivable because: the ICSC decision to revise the Geneva post adjustment multiplier left no room for interpretation or the exercise of discretion by UNHCR in its implementation. Thus, there was no administrative decision pursuant to staff rule 11.2(a) and art. 2.1(a) of the UNDT Statute. Further, since the ICSC has approved payment of a personal transitional allowance as a gap closure measure, the ICSC decision had not had any negative effect on their remuneration and any potential reduction after that date had yet to be quantified.[25] The Applicants filed the current application on 21 December 2017.

**RECEIVABILITY**

21. The Tribunal finds that the application is timely, having been filed within the applicable deadline following a properly requested management evaluation. Still,

[21] Reply, annex 8, para. 129 (A/72/30 – Report of the International Civil Service Commission for the year 2017).
[22] Application, annex 3; reply, annex 9.
[23] See Judgment Nos. UNDT/2018/023; UNDT/2018/064 and UNDT/2018/067.
[24] Application, annex 4.
[25] Application, annex 5.

receivability of the application is contested on several grounds, which the Tribunal will address in turn.

**Whether the impugned decision is an individual administrative decision causing adverse consequences.**

*Respondent's submissions*

22. The Respondent's submissions on this score is that the application does not challenge an individual decision. The Respondent refers to this Tribunal's previous holding [26] that after *Andronov*, applications originating from implementation of acts of general order are receivable when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision, such as through a pay slip or personnel action form. The Applicants in the current case have not alleged any such crystallization.

23. On the other hand, the Respondent contends that the application is not receivable because the Applicants have not been adversely affected by the July 2017 ICSC decision since the ICSC approved the payment of the PTA as a gap closure measure to address any reduction in net remuneration as a result of the revised post adjustment multiplier.[27]

*Applicants' submissions*

24. The Applicants point out that in *Tintukasiri et al.* 2015-UNAT-526, the Appeals Tribunal indicated that a pay slip reflecting a pay freeze would represent a reviewable decision. This suggests that a quantitative alteration in pay received is not required. Thus, even if the PTA initially provided 100% relief from the pay cut, the communication of the August 2017 pay slip reflected a reduction in post adjustment. A decision of general application was communicated in July 2017; it was implemented in August 2017 and its individual application was communicated by the August 2017 pay slip. The Applicants further submit that the pay slip received for February 2018

[26] See Judgment Nos. *Andres et al.* UNDT/2018/021 and *Andres et al.* UNDT/2018/036.
[27] Respondent's reply, annex 9.

reflected an actual reduction in their net salary resulting from the contested decision. This is evidence of damage.

***Considerations***

25. In the first wave of Geneva cases, including an application by the present Applicants, the UNDT explored the issue of decisions of general and individual application; in other words, concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts. [28] These considerations are restated here for completeness. At the outset, it is recalled that art. 2.1(a) of the UNDT statute provides as follows:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

26. It is further recalled that in *Hamad*[29], the UNAT adopted the former United Nations Administrative Tribunal's definition forged in *Andronov*, which describes an administrative decision as:

> a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry legal consequences. [30]

[28] *Steinbach* UNDT/2018/025, para. 58.
[29] *Hamad* 2012-UNAT-269, para. 23.
[30] UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003) V.

27. As can be seen from the above, the notion of an administrative decision for proceedings before the UNDT resembles what in the European continental system is sometimes referred to as an administrative act *sensu stricto,* and which is reached by an agency to regulate a single case in the area of public law and thus being characterised as unilateral, concrete, individual, and producing direct external effect, *i.e.*, whose legal consequences are not directed inward but outward the administrative apparatus.[31] Concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts, has been explained in the second sentence of the *Andronov* definition reproduced above. When it comes to the requirement of external effect, the UNAT made it explicit in *Andati-Amwayi*[32] that, in accordance with the UNDT Statute, the proceedings are concerned with decisions having impact not just on the legal order as a whole but on the terms of appointment or contract of employment of the staff member. What has proven to require interpretation though, is the criterion of "precise individual case" and direct effect. In this regard, the *Andronov* definition was not explicit as to whether the UNAT jurisdiction extends over decisions which, albeit not expressing norms *par excellence* abstract, are nevertheless directed toward general criterion or a defined or definable circle of people (decisions of general disposition or general order).[33]

28. The question arose in *Tintukasiri et al.,* where the appellants had challenged the Secretary-General's decision to accept the Headquarters Salary Steering Committee's recommendations for the promulgation of revised salary scales for the General Service and National Officer categories of staff in Bangkok, which announced a freeze of the

[31] See *e.g.*, section 35 of the German VwVfG, 1st sentence: "An administrative act is any decision, order or other unilateral measure taken by an authority to settle an individual case in the field of public law and which is directed to the external legal effect"; see also Polish High Administrative Court decision SA/Wr 367/83, ONSA 1983, no 2m, item 75, p. 183 '"unilateral decision issued by state administration which has binding consequences for an individually determined entity and a specific case, given by this authority in external relations".

[32] *Andati-Amwayi* 2010-UNAT-058, para. 17.

[33] For comparison, see section 35 of the German VwVfG 2nd sentence: "A general order is an act of administration addressed to a group of persons determined or determinable by general characteristics or concerning public property or its use by the general public"; also, in French administrative law, décisions collectives (concernant plusieurs personnes dont la situation est solidaire) et les décisions particulières (pour une situation individualisée qui a des effets sur un nombre indéterminé de personnes (Yves Gaudemet, *Traité de Droit administratif* Tome 116e édition, 2001).

salaries for extant staff members at then-existing rates and established a second tier of salaries for staff members hired on or after 1 March 2012. The UNAT agreed with the UNDT's reasoning that the decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 did not amount to an administrative decision under art. 2.1(a) of the UNDT's Statute, as per the terms of *Andronov*, because at the moment of their issuance the secondary salary scales were to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. The UNAT upheld the UNDT's finding that the applications were not receivable *ratione materiae*.[34] However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

> … [i]t is only at the occasion of individual applications against the monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it. As such, the Tribunal confirm[ed] its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.[35]

29. In the jurisprudence that followed, the issue may have to some extent become obscured where applications were not precise as to whether they were directed against acts of general order or individual decisions. Such was the case in *Obino*, where the application contested a decision to implement ICSC's reclassification of the Addis Ababa duty station..[36] The UNDT interpreted the challenge as directed against the decision of the ICSC and held that such challenges are not receivable insofar as the ICSC is answerable and accountable only to the General Assembly and not the Secretary-General, to whom ICSC decisions cannot be imputed in the absence of any discretionary authority to execute such decisions.[37] The UNAT, who focused mainly

[34] *Tintukasiri et al.* 2015-UNAT-526, paras. 35-37.
[35] Ibid., para. 38.
[36] *Obino* UNDT/2013/008, para. 30.
[37] Ibid., at para. 34 and para. 47.

on the aspect that the Secretary-General was bound by the ICSC decision[38], however affirmed the judgment, among other, because "Mr. Obino did not identify an administrative decision capable of being reviewed".[39] Similarly, in *Kagizi et al.* 2017-UNAT-750 UNAT found that "the Appellants have intertwined their challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts".[40]

30. With minor variation, the UNAT restated the holding in *Tintukasiri et al.* in *Ovcharenko et al.,* where the appellants contested the Secretary-General's refusal to pay post adjustment based on a multiplier promulgated by the ICSC. The UNAT found that the administrative decision not to pay the appellants their salary with the post adjustment increase, the execution of which was temporarily postponed, was a challengeable administrative decision, despite its general application because it had a direct impact on the actual salary of each of the appellants who filed their application after receiving their pay slips for the relevant period.[41] The UNAT held that "[i]t was not the ICSC or the General Assembly's decision to freeze their salaries, but the execution of that decision that was challenged insofar as it affected the staff members' pay slips"[42] and that "[…] the Dispute Tribunal was right when it examined the merits of the application and concluded that the administrative decision was lawful."[43]

31. In *Pedicelli*, in turn, the Administration announced that it would commence conversion from the nine-level salary scale then applied to General Service ("GS") staff in Montreal to the seven-level salary scale promulgated by the ICSC. A number of staff members, including the appellant in that case, received Personnel Action forms confirming their new grade. The UNAT echoed *Obino* regarding the lack of discretion

[38] *Obino* 2014-UNAT-405, para. 21. "The ICSC takes decisions in some matters (e.g. establishment of daily subsistence allowance; schedules of post adjustment, i.e. cost-of-living element; hardship entitlements); in other areas, it makes recommendations to the General Assembly which then acts as the legislator for the rest of the common system. Such matters include professional salary scales, the level of dependency allowances and education grant. On still other matters, the ICSC makes recommendations to the executive heads of the organizations; these include, in particular, human resources policy issues.
[39] Ibid., at para. 19.
[40] *Kagizi* 2017-UNAT-750, see also para. 22 *infra*.
[41] *Ovcharenko* 2015-UNAT-530, para. 30.
[42] Ibid., para. 32.
[43] Ibid., para. 33.

on the part of the Secretary-General in implementing ICSC decisions. It however concluded:

> Notwithstanding the foregoing, it is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an "administrative decision" falling within the scope of Article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.[44]

32. The Appeals Tribunal accordingly held that the application was receivable and had to be reviewed on the merits. This Tribunal proposes that the reading of *Pedicelli*, in order for it to conform with the tenets of *Andronov,* should be: "where a decision of general application *is implemented through a decision in an individual case, so that* it negatively affects the terms of appointment [..] such decision *is* as an "administrative decision etc …".

33. Last, the UNDT in the series of Geneva cases dealing with an ICSC-established salary scale, such as *Lloret Alcañiz*, with regard to applicants who received their payslips, concluded in echoing *Ovcharenko*:

> 69. It follows that the implementation by the Secretary-General of a decision of general application taken by the General Assembly constitutes an administrative decision within the meaning of art. 2 of the Tribunal's Statute if it has "a direct impact on the terms of appointment or contract of employment of the individual staff member". [45]

In response to which, the Appeals Tribunal affirmed "[t]he characterization of the contested decisions […] as being the decisions to pay the Respondents in accordance with the Unified Salary Scale and the transitional allowance is a correct and adequate rendition of the decisions in issue. [46]

34. As shown by the above, without ever withdrawing from the terms of *Andronov*,

[44] *Pedicelli* 2015-UNAT-555, para. 29.
[45] *Lloret Alcañiz* UNDT/2017/097.
[46] *Lloret Alcañiz et al.* 2018-UNAT-840, para. 57.

the jurisprudence of UNAT affirmed the receivability of applications when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision expressed through a payslip or personnel action. This is precisely the holding of *Tintukasiri*, the leading case on the issue. The other UNAT judgments, notwithstanding the occasional intertwining of elements pertinent to legality rather than receivability[47], express the same concept and are directed toward the same legal effect.

35. It falls to be noted that the distinguishing decisions of general application and individual decisions taken in the implementation of the former is also adopted and rather painlessly applied in ILOAT jurisprudence, including attaching the moment of individual decision to receipt of a payslip in remuneration matters.[48]

36. In the present case - unlike in the previous applications filed by the Applicants in connection with the ICSC decision on post adjustment, an individual decision, namely, to apply the new post adjustment in relation to them, has been issued and implemented, as demonstrated by their salary slip of August.

37. As concerns the Respondent's averment that the transitional allowance eliminates the effect of the contested decision because no financial loss had materialized for the Applicants at the time of the application, the Tribunal holds that the transitional allowance is not a prefatory act[49], but a corollary to the lowering of a pay component. The Tribunal concurs with the Applicants' argument, reproduced in para. 24 above, that, transitional allowance notwithstanding, the decision to lower the post adjustment had been taken and implemented. It also wishes to recall that the Appeals Tribunal has accepted that a decision has direct effect where the applicants incur a pecuniary loss as a result of the gradual depreciation of the transitional allowance. Although the loss may not be immediate, a loss of some kind will inevitably

[47] As in *Obino*, where the question of the Secretary-General being bound by ICSC decision was pertinent to the issue of proving non-compliance with terms of appointment or contract of employment (para 19), that is, legality of the constrained decision, rather than to non-existence of a reviewable administrative decision; The judgment, however, prominently citing to *Andati-Amwayi*, indicates that the question of general versus individual decision was alive.
[48] ILOAT Judgment Nos. 1798 and 4134.
[49] See *Lee* 2014-UNAT-481; *Loeber* 2018-UNAT-844.

afflict all the applicants with the loss of eligibility for the transitional allowance. The inevitability of the loss may be a future event, but it is nonetheless certain and only a matter of time. As such, the decision has an adverse impact.[50]

38. In conclusion, this Tribunal finds that the case involves an individual decision of direct adverse effect on the terms of the Applicants' appointments. The Respondent's argument on this score fails.

**Is receivability to be denied because the Secretary-General lacks discretionary authority in implementing the post adjustment multiplier?**

*Respondent's submissions*

39. In reproducing arguments advanced in the "first wave" of the Geneva cases, the Respondent points out to disparate outcomes in receivability stemming from the UNAT jurisprudence. In invoking *Obino*, he proposes that, instead of the criterion of negative effect of the decision, the controlling criterion for receivability of an application before the UNDT should be whether the contested decision of the Secretary-General was issued in the exercise of discretion as opposed to execution of a binding decision of another entity. In accordance with the proposed criterion, implementation of an ICSC decision on post adjustment multipliers is not a reviewable administrative decision. The General Assembly has repeatedly affirmed that decisions of the ICSC are binding on the Secretary-General[51] and the Secretary-General lacks discretionary authority in implementing ICSC decisions on post adjustment.

*Applicants' submissions*

40. The Applicants' case is that the ICSC's decision was *ultra vires*, thus the Respondent cannot rely on the absence of discretion in his decision making. Relying on *Pedicelli*[52], the Applicants submit that the Respondent's decision is reviewable under art. 2(1) of the UNDT Statute because he made an administrative decision that

[50] *Lloret Alcañiz et al.* 2018-UNAT-840, para. 67.
[51] Reply, annex 19 (General Assembly resolutions 66/237, para. 37 and 67/241, para. 3).
[52] Judgment No. 2015-UNAT-555.

had direct legal consequences for them. To find otherwise would render decisions regarding fundamental contractual rights of staff members' immune from any review regardless of the circumstances. This would be inconsistent with basic human rights and the Organization's obligation to provide staff members with a suitable alternative to recourse in national jurisdictions.

***Considerations***

41. Still in the same first wave of Geneva cases, the Dispute Tribunal dealt with the Respondent's proposed use of discretion in an administrative decision as the criterion for determination of the receivability of an application. The Tribunal considers that, first, the criterion of discretion proposed by the Respondent is systemically inappropriate. Second, there is, hopefully, no more contradiction in UNAT jurisprudence as to what constitutes a reviewable administrative decision, as the position taken by this Tribunal has been subsequently confirmed by the Appeals Tribunal in *Lloret Alcañiz et al.* . This notwithstanding, the Respondent declared that he would not retract his opposition to receivability. The Tribunal, therefore, will discuss the two relevant aspects below.

42. Systemically speaking, the use of discretion as criterion for determination of an administrative decision has no basis in any generally accepted doctrine. Conversely, the doctrine of administrative law recognizes both discretionary decisions and constrained decisions, the latter having basis in substantive law which determines that where elements of a certain legal norm are fulfilled, the administrative authority will issue a specific decision.[53] Substantive law may be a primary or secondary general legislation or may be an administrative decision of a general order. However, where the controlling norm is contained in a decision of general order, which leaves no room for administrative discretion, its implementation is still done through a discrete

[53] For that matter see also: *Gorlick* UNDT/2016/214 at para. 22. *"*As a matter of law, administrative decisions may be discretionary or not discretionary, but this does not affect their qualification as administrative decisions. For this purpose, as long as a decision produces legal effects, is of individual application and emanates from the Administration, it is irrelevant whether the decision-maker disposes of a large latitude or whether its action is tightly dictated by the legislation or, as in this case, by a judicial ruling."

administrative decision of constrained character, whereby the administration subsumes facts concerning individual addressee under the standard expressed by the general order. Therefore, constrained decisions are as a rule reviewable for legality, *i.e.*, their compliance with the elements of the controlling legal norm. Whereas state systems may conventionally determine that constrained decisions are to be challenged not before an administrative but rather before a civil or labour court, the applicants challenging decisions of the Secretary-General have no such option available. To exclude *a limine* judicial review of constrained decisions would unjustly restrain the staff members' right to a recourse to court.

43. Moreover, exclusion of non-discretionary decisions from the Tribunal's cognisance would be a major policy decision, requiring articulation in the UNDT statute. Such exclusion has neither support in the UNDT statute, nor in the seminal *Andronov* definition. Thus, for the past ten years, the UNDT has been reviewing applications directed against constrained decisions, such as, for the most part, those pertaining to entitlements. The UNAT confirmed that highly constrained decisions, such as placement of reports on staff member's file, are reviewable for legality.[54] In factual scenarios like the ones contemplated here, assuming that an ICSC decision would have been binding on the Secretary-General, judicial review of legality of an individual decision would still be required, at minimum, to determine whether the premises of the general order are satisfied, e.g., whether indeed the applicant was posted in Bangkok, Addis Ababa or Geneva; whether he or she joined before or after a given date; and, as noted by the Respondent, whether the calculation was arithmetically correct. If anything, it is judicial review of discretionary decisions which is limited, because, as an expression of separation of powers and prohibition of "co-administration by courts", UNDT intervenes in the substance of administrative discretion only in the case of arbitrariness or abuse of power; formal legality, on the other hand, is always reviewable.[55]

[54] *Oummih* 2014-UNAT-420 at paras. 19-20.
[55] See *Sanwidi* 2011-UNAT-104; *Frohler* 2011-UNAT-141 and *Charles* 2012-UNAT-242.

44. Jurisdictionally, the discord on the point in issue seems to have originated from *Obino*. In *Obino*, where the UNDT had interpreted the application as directed against the ICSC decision and as such had found grounds to reject it as irreceivable, UNAT apparently agreed with this interpetation of the application. It held:

> 19. In the instant matter, the UNDT correctly found that Mr. Obino did not identify an administrative decision capable of being reviewed, *as* he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment [emphasis added].
>
> […]
>
> 21. In the instant case the ICSC made a decision binding upon the Secretary-General as to the reclassification of two duty stations and Mr. Obino has not shown that the implementation of this decision affects his contract of employment

45. Thus, the *Obino* UNAT Judgment, in five paragraphs committed to considering the grievance of Mr. Obino, rejected it as irreceivable on three grounds at the same time: because the application was directed against the ICSC and not the Secretary-General's decision; because Mr. Obino did not meet the burden of proving illegality while the Secretary-General was bound to implement the ICSC decision; and because Mr. Obino did not show that the implementation affected his contract of employment.

46. Similarly, in *Kagizi* the Appeals Tribunal confirmed that the applicants "lacked capacity" to challenge decisions of the Secretary-General taken pursuant to the decision of the General Assembly to abolish the posts which they encumbered but, eventually, concluded: "Generally speaking, applications against non-renewal decisions are receivable. However, in the present case, the Appellants have intertwined their challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts."[56]

47. These two decisions, therefore, do not articulate any principled approach to receivability in relation to exercise of discretion.

[56] *Kagizi* 2017-UNAT-750 para. 22.

48. Conversely, in response to similar arguments by the Respondent in *Lloret Alcañiz et al.*, the majority of UNAT has recently held:

> 65. The majority of Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in the nature of a duty. However, such exercises of power are administrative in nature and involve a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They are thus administrative decisions that may adversely affect the terms of employment. However, importantly, given that purely mechanical powers entail little choice, they are rarely susceptible to review on the grounds of reasonableness. A review on grounds of reasonableness typically involves examination of the decision-maker's motive, the weighing of competing considerations and the basis for, and effects of, any choice made. An exercise of a purely mechanical power normally does not require the administrator to formulate an independent purpose or basis for action. Nevertheless, purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality."[57]

49. This Tribunal assumes, therefore, that the claim to have discretion as criterion for receivability has now been set aside. It concludes, accordingly, that the present application is receivable.

**MERITS**

50. There is no dispute that the Secretary-General acted in accordance with the ICSC decision. The merits of his decision are contested by the Applicants on the following grounds: in deciding on the post adjustment the ICSC acted outside its statutory authority, which vitiates individual decisions taken by the Secretary-General; the applied methodology was inappropriate, including that factual errors were committed in applying it; the decision is in normative conflict with staff members' acquired rights and causes inequality of pay within the United Nations common system.

51. The Respondent replies that the ICSC decision on post adjustment reduction was taken in accordance with its statutory competence and the impugned decision

[57] 2018-UNAT-840. reiterated in *Quijano-Evans* 2018-UNAT-841.

properly implemented it; the Tribunal lacks competence to review legislative decisions and the Applicants are erroneously asking the Tribunal to assume powers it does not have by asking for a review of alleged flaws in the decisions by the ICSC and the methodology that it used; the issue of acquired rights does not arise.

52. The Tribunal will address the relevant arguments in turn.

**Did the ICSC have the requisite authority, under art. 11 of its Statute, to make a decision regarding a reduction in the post adjustment multiplier?**

53. The parties' arguments pertain to the following provisions of the ICSC Statute:

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

*Applicants' submissions*

54. The Applicants' case is that the impugned decision is *ultra vires* because the ICSC did not have authority under art. 11 of the ICSC statute to unilaterally impose alterations to the survey methodology, operational rules and to the Geneva post

adjustment index without approval from the General Assembly. The Applicants submit that art. 10 of the ICSC statute provides it with authority to make recommendations to the General Assembly regarding salary scales and post adjustment for staff in the professional and higher categories, which involves a precise financial calculation. As concerns art. 11, it grants the ICSC authority to make decisions regarding classification of duty stations. Classification, at the current state of affairs, denotes assignment of a duty station within Group I or Group II dependent on whether it concerns countries with hard or soft currencies, a consideration which is not relevant for the case at hand.

55. The Applicants further echo ILOAT Judgment 4134 in its analysis of art. 10 of the ICSC statute as exclusively governing the *"determination of post adjustments in a quantitative sense"* and its conclusion that because articles 10 and 11 cover *"mutually exclusive matters",* art. 11 cannot cover any matter that affects the quantification of post adjustment. There has been no change to the ICSC statute in accordance with the prescribed procedure. In the absence of an amendment to the ICSC statute, the ILOAT rejected the Respondent's argument that the migration of the decisory authority had been accepted by the General Assembly by virtue of its acceptance of the alteration to the manner of calculating the post adjustment. The ILOAT similarly rejected the suggestion that the practice itself had broadened the scope of the ICSC's powers beyond those contained in the ICSC statute, as per its established position that "a practice cannot become legally binding if it contravenes a written rule that is already in force".[58]

56. While the General Assembly appears to have endorsed a departure from post adjustment scales in 1989, its resolutions 44/198 and 45/259 do not represent a legal framework providing authority for the contested decision. They are discrete decisions that do not indicate either on ongoing delegation of authority or a regulatory framework for the work of the ICSC. The alleged practical difficulty in seeking General Assembly approval of multipliers does not imply delegated authority. In conclusion, the ICSC operates in a manner inconsistent with its Statute.

[58] Judgment 4134 consideration 39, referring to Judgment 3883, consideration 20; Judgment 3601, consideration 10; and Judgment 3544, consideration 14.

*Respondent's submissions*

57. The Respondent explains that the reference to "scales" of post adjustment in art. 10(b) refers to a former method of calculating post adjustment based on schedules of post adjustment that were, in the past, submitted by the ICSC to the General Assembly for approval under art. 10(b) of its Statute and annexed to the Staff Regulations. Post adjustment scales were needed to implement the principle of regressivity, and to indicate how the post adjustment multiplier would be modified, when applied to staff members depending on their grade level and step. The Respondent shows that the post adjustment scale, reflecting the regressive factors, was expressed as an amount in US dollars per index point for each grade and step.[59] The approval by the General Assembly of the post adjustment scale was, in effect, an approval of the regressive factors applicable to each grade level and step.[60]

58. The system for calculating post adjustment changed in 1989, when, by virtue of resolution 44/198, the General Assembly decided to eliminate regressivity from the post adjustment system and discontinued the practice of approving post adjustment.[61] The Respondent underlines that in paragraph 2 of resolution 44/198 I D, the General Assembly took note "of all other decisions taken by the ICSC in respect of the operation of the post adjustment system as reflected in chapter VI of volume II of its report", except one issue, not relevant for the matter at hand, which means that it approved the establishment of a post adjustment multiplier for each duty station. The Respondent asserts that the General Assembly saw no reason to additionally endorse/approve these decisions.[62] In 1991, the General Assembly, by its resolution 45/259, approved deletion of post adjustment schedules and references to such schedules from the Staff Regulations.

59. The Respondent explains that the review of the post adjustment system was an integral part of the comprehensive review provided for in General Assembly resolution

[59] Respondent's submission in response to Order No. 105 (NBI/2019), annex R/21 (para. 8, diagram 4) and annex R/22.
[60] Respondent's submission in response to Order No. 105 (NBI/2019), annex R/21 para 10.
[61] A/RES/44/198, part D, "post adjustment" para. 3.
[62] Respondent's submission in response to Order No. 189 (NBI/2018), paras. 30 and 31.

43/226 of 21 December 1988. The "major simplification of the post adjustment system (…)" was one of the elements of that review.

60. The Respondent argues against ILOAT's interpretation of art. 10 as exclusively governing the *"determination of post adjustments in a quantitative sense"*. According to the Respondent, this reasoning reflects a misunderstanding of how the post adjustment system has operated, before and after the 1989 changes to the post adjustment system.[63] The ICSC has always assigned post adjustment multipliers to duty stations. The Respondent provides examples that before the changes were initiated in 1989 the ICSC did this by assigning each duty station to a class corresponding to a specific post adjustment multiplier. After the changes, the ICSC did this by establishing a specific post adjustment multiplier for each duty station. The Respondent stresses that classification of duty stations has always been linked with the establishment of post adjustment multipliers and, therefore, has always involved a determination of post adjustment in the quantitative sense without the need for General Assembly approval.[64]

61. The Respondent further submits that already in the second annual report of the ICSC, the ICSC emphasized its responsibility under art. 11 for "establishing the methods" for determining conditions of service and the classification of duty stations for the purpose of applying post adjustments. The ICSC stated that "the technical questions of methodology involved in computing post adjustment indexes, in making place-to-place and time-to-time comparisons and in classifying duty stations on the basis of the indexes" fell within its competence.[65] The General Assembly has not challenged the ICSC's authority in respect to post adjustment classification under art. 11(c).

62. Since the removal of classes in 1993, the annual reports of the ICSC have defined the term "post adjustment classification" as follows:

> Post adjustment classification (PAC) is based on the cost-of-living as reflected in the respective post adjustment index (PAI) for each duty

[63] Respondent's submission in response to Order No. 105 (NBI/2019), para. 14 and annex 21.
[64] Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 21 bis, p. 13).
[65] Supplement No. 30, para. 241 (A/31/30 – Report of the International Civil Service Commission).

> station. **The classification is expressed in terms of multiplier points.** Staff members at a duty station classified at multiplier 5 would receive a post adjustment amount equivalent to 5 per cent of net base salary as a supplement to base pay (emphasis added).

Reports of the ICSC containing this definition have been submitted to the General Assembly annually. Moreover, the post adjustment multipliers for each duty station are issued by the ICSC in post adjustment classification memoranda being used by the ICSC on at least a monthly basis. Post adjustment classification memoranda do not require General Assembly's approval. It would be, moreover, impracticable, given that in 2017 alone, the ICSC issued 16 memoranda on post adjustment classifications.

63. Finally, the Respondent puts forth that the ICSC Statute was approved by General Assembly resolution 3357 (XXIX), and should, therefore, be read in conjunction with subsequent General Assembly resolutions that added to and elaborated on the decision-making powers of the ICSC. The ICSC Statute was not amended because there was no need for it.

***Considerations***

64. At the outset, the Tribunal finds it useful to recall an established principle that when the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation.[66] This follows general international practice, which refers to interpretation according to the 'ordinary meaning' of the terms 'in their context and in the light of [their] object and purpose' unless the parties intended to give the word a special meaning.[67] In the argument on ICSC's statutory competences, the central issue appears to lie in the fact that art. 10 *prima facie* confirms the competence of the General Assembly to decide post adjustment akin to the way it decides salaries. What does the ICSC ultimately decide upon, however, is conditioned by the meaning

[66] E.g., *Scott* 2012-UNAT-225.

[67] See UN Administrative Tribunal Judgment No. 942 (1999) para. VII, citing to Vienna Convention on the Law of Treaties, Articles 31.1 & 31.4, see also UN Administrative Tribunal Judgement No. 852, *Balogun* (1997); I.C.J. Reports 1950, p. 8 "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur".

ascribed to the terms "scales" in the same article and "classification" in art. 11. The ordinary meaning of these terms is not informative; rather, they are particular to certain technical assumptions underpinning the ICSC Statute. In explaining the relevant competencies, therefore, it would be appropriate to examine the meaning of these terms intended by the parties, as evidenced by practice.

65. As demonstrated by the documents submitted by the Respondent as well as reports available on the ICSC website, the delineation of the relevant competencies was along the lines that the General Assembly decided legal parameters of the post adjustment and the ICSC decided its methodological parameters and applied both to calculating post adjustment at different duty stations. The ICSC has always, *ab initio* and notwithstanding changes concerning post adjustment schedules, determined the cost of living index as a step in the process of classification and, after abolition of scales in 1989 and subsequent changes in methodology, assigned post adjustment multipliers to duty stations.[68] Thus, the ICSC's decisory powers under art. 11(c) have always involved determination of post adjustment in the quantitative sense without the General Assembly's approval. The General Assembly, on the other hand, until 1985 determined, under its art. 10 powers, two prerequisites for transition from one class to another: the required percentage variation in the cost of living index and required period for which it had to be maintained, the so-called schedules for post adjustment.[69] Moreover, until 1989 the General Assembly determined regressivity scales. The latter involved a "precise financial calculation" in terms of US dollars per index point for each grade and step; the calculations, however, were related to the salary scales only. The exercise of the General Assembly powers under art. 10 did not involve either confirming the determination of index points for duty stations or the calculation of post adjustment for each grade and step per duty station.

[68] See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).
[69] It would seem that the General Assembly in its resolution 40/244 conferred on the Commission the power to "take steps to prevent the rules relating to a post adjustment increase" from adversely affecting the margin defined by the same resolution and thus, effectively authorised it to depart from schedules in case where post adjustment calculation indicated that it could be decreased.

66. The post-1989 practice, therefore, does not "contravene a written rule that is already in force", in the sense that there has not been a shift in the subject matter competence. While the General Assembly gradually relinquished determining scales and schedules, so that post adjustment became the function of post adjustment index and the salary, there has not been usurpation of power on the part of the ICSC. The Tribunal's conclusion has been recently confirmed by General Assembly resolution 74/255 A-B of 27 December 2019:

> 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;[70]
>
> 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 […].

67. It is clear, nevertheless that the ICSC statute had been crafted with a different method of determining post adjustment in mind. Resignation of post adjustment scales amounts to a change to the Statute. Retaining in the ICSC statute references to elements of methodology that have been abolished is confusing and non-transparent and is partially responsible for the present disputes.

68. The changes, however, were approved by the General Assembly, either expressly or by reference to ICSC written reports[71]; took effect, in that they have been applied for over 25 years by all participating organizations; and, while there have been challenges brought before the tribunals regarding post adjustment, the ICSC's competence for determining the post adjustment in the quantitative sense has never

[70] Resolution 3357 (XXIX).
[71] The Tribunal notes that the Respondent did not provide clear information about the elimination of post adjustment classes; it appears that this was decided by the ICSC itself in 1993: "ICSC considered an ACPAQ recommendation that a CCAQ proposal for the elimination of the use of post adjustment classes in the system should be adopted. It was noted that, since the 1989 comprehensive review, multipliers had a direct relationship to pay. Classes were difficult to understand and no longer appeared to serve a useful purpose; their elimination would simplify the post adjustment system *[ICSC/38/R.19, para. 72]*

been questioned.[72] This considered, the Applicants' argument relying on the procedure for express written approval of Statute amendments under art. 30 may raise questions: one about legitimacy to invoke insufficiency of the form, which appears to lie not with individual staff members but with executive heads of the participating organizations; a related one about a possibility to validate the change; yet another one about estoppel resulting from the 25 years of acquiescence. However, the alleged procedural defect may produce claims only to relative ineffectiveness, rather than absolute invalidity, of the changes. In this regard, specifically, the Applicants' argument cannot be upheld under the Statute.

69. It is useful to recall the provision of the Statute:

> *Article 1*
>
> 1. The General Assembly of the United Nations establishes, in accordance with the present statute, an International Civil Service Commission (hereinafter referred to as the Commission) for the regulation and coordination of the conditions of service of the United Nations common system.
>
> 2. The Commission shall perform its functions in respect of the United Nations and of those specialized agencies and other international organizations which participate in the United Nations common system and which accept the present statute (hereinafter referred to as the organizations).
>
> 3. Acceptance of the statute by such an agency or organization shall be notified in writing by its executive head to the Secretary-General.

70. As results from section 2, the United Nations has been juxtaposed with "specialized agencies and other international organizations …which accept the present statute".[73] As results from section 3, it is only "specialized agencies and other international organizations" who have the option of accepting, or not, the ICSC statute and, in accordance with art.30, any ensuing amendments. The United Nations, which, in this context, denotes the Secretariat and funds and programmes, are directly bound

[72] Rather, it was disputed whether the General Assembly had the power to overrule the Commission's decision; see UN Administrative Tribunal Judgment No. 370, *Molinier* (1986), also UNAT in *Ovcharenko*, ibid.

[73] This delineation is recalled in the annual reports of the ICSC which distinguish organizations who have accepted the statute of the Commission and the United Nations itself, see e.g., Report for 2017, Chapter I para 2.

by the General Assembly's decisions on the matter of ICSC competencies. This conclusion distinguishes the present case from the case subject to ILOAT Judgment 4134.

**Whether the Dispute Tribunal's jurisdiction excludes review of regulatory decisions**

*Applicants' submissions*

71. The Appeals Tribunal confirmed reviewability of ICSC decisions in *Pedicelli,* moreover, ILOAT has consistently reviewed decisions relating to post adjustment. To refuse the Applicants' access to judicial review would violate basic human rights and the Organization's obligation to provide a suitable recourse; it would also risk the breakup of the United Nations common system with staff members from one jurisdiction afforded recourse denied in other parts. Moreover, the Secretary-General cannot be obliged to implement *ultra vires* decisions. If the ICSC can exercise powers for which it has no authority and those actions cannot be checked by either the Secretary-General or the internal justice system, then there is no rule of law within the Organization.[74]

*Respondent's submissions*

72. The Respondent submits that the ILOAT and the United Nations Tribunals (the UNDT and UNAT) have developed divergent approaches with respect to the "receivability of challenges to decisions by legislative bodies and by their subsidiary organs".[75]

73. The Respondent submits that, since 1987, the ILOAT has applied the principle that if a *"decision is based on one taken by someone else it is bound to check that the other one is lawful."* Executive heads of Organizations cannot argue before the ILOAT that they are bound by decisions made by legislative bodies or by their subsidiary organs. Rather, the executive heads of Organizations that appear before the ILOAT

[74] Application, page 7, paras.11-13.
[75] Respondent's submission in response to Order No. 105 (NBI/2019).

must demonstrate that they have examined whether such decisions are proper. This examination includes reviewing whether legislative decisions were made based on a *"methodology which ensures that the results are stable, foreseeable and clearly understood or transparent."*[76] If any flaws in the decisions are established by the ILOAT, the Organization can be found liable for the execution of a flawed legislative decision.

74. By contrast, the Respondent's case is that UNAT in *Lloret-Alcañiz et al.*[77], distinguished claims that challenged the legality of the Secretary-General's execution of legislative decisions from claims that challenged the legality of the legislative decisions themselves. The Respondent proceeds to cite UNAT in that its authority did not include the review of the legality of General Assembly decisions, as it was not established to operate as a constitutional court. Additionally, the General Assembly has directed that UNDT and UNAT decisions "shall conform with General Assembly resolutions on issues related to human resources management".[78] The Respondent derives therefrom that the UNDT lacks jurisdiction to review the legality of legislative decisions.

75. The Respondent refers to *Lloret-Alcañiz et al.* in submitting that the present case involves a mechanical exercise of authority. Thus, the Tribunal's review in this case is limited to whether the Secretary-General was authorized by law to implement the ICSC decision and whether he failed to comply with the statutory requirements or preconditions attached to the exercise of that authority. The internal decision-making processes and the methodologies used by the ICSC, on the other hand, do not fall within the jurisdiction of the Dispute Tribunal and that the ICSC is only accountable to the General Assembly.

***Considerations***

76. At the outset, in his citations from *Lloret-Alcañiz et al.*, and conclusions drawn,

[76] Ibid., citing to ILOAT Judgment No. 4134, considerations 8, 26.
[77] 2018-UNAT-840.
[78] A/RES/69/203, para. 37; A/RES/71/266, para. 29.

the Respondent seems to blur the difference between a review for the purpose of pronouncing on the question of legality of regulatory acts being a first and final subject of the exercise of judicial power, and a review involving an *incidental* examination for the purpose of examining legality of an idividual decision based on a regulatory one. In consequence, the Respondent mixes the question of receivability with the question of legality.

77. Only in the first case, where a court or tribunal pronounces on the question of legality of an act, in the operative part of a judgment, be it declaratory or constitutive, but with a binding effect on the legal system as a whole, would the judicial review amount to "a bill of rights or consitutional court's review". An application requesting such a pronouncement from UNDT would be irreceivable, because of the lack of the Tribunal's jurisdiction to pronounce on legality of regulatory acts, whether such would be coming from a legislative (the General Assembly) or an executive body. The absence of such jurisdction is clear upon the UNDT Statute and confirmed as a principle arising from *Andronov* and there does not seem to be a genuine dispute over it.[79] The Tribunal does not deem it necessary to further dwell on this matter.

78. As concerns the second situation, applications directed against an individual decision which is based, however, on a challenge to the legality of regulatory acts, may involve an incidental examination of a regulatory act for the purpose of evaluating the legality of an individual decision. Such review would be in accordance with the principle confirmed by UNAT in *Tintukasiri*:

> [The applicant] may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it.. [T]he Tribunal confirms its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.[80]

79. The question arising on the basis on *Tintukasiri* in connection with the

[79] See *Cherif* 2011-UNAT-165; *Quijano Evans et al.* 2018-UNAT-841.
[80] *Tintukasiri* 2015-UNAT-526, paras. 35-37.

Respondent's argument is not, therefore, about jurisdiction to pronounce on the illegality of regulatory acts akin to a constitutional court, because this is expressly ruled out, and is, thus, not about "receivability of challenges to decisions by legislative bodies and by their subsidiary organs". Rather, the question properly articulated would be about the binding force of regulatory acts upon the Tribunal. In other words, the question is whether the UNDT and UNAT in exercising their jurisdiction over individual cases are bound to apply regulatory acts issued by the Organization without any further iquiry into their legality and, if so, whether the question turns on the hierarchy of the act.

80. The answer may be readily found in the advisory opinion by the International Court of Justice in relation to the jurisdiction of the former United Nations Adminstrative Tribunal (relied upon by the Appeals Tribunal in *Lloret-Alcañiz et al.*), where the IJC held:

> Certainly the [former Administrative Tribunal] must accept and apply the decisions of the General Assembly made in accordance with Article 101 of the United Nations Charter. Certainly there can be no question of the [former Administrative Tribunal] possessing any "powers of judicial review or appeal in respect of the decisions" taken by the General Assembly (…).[81]

81. There is no claim that the UNDT may exercise any more power. Moreover, as rightly pointed out by the Respondent, the General Assembly confirmed in 2014 that:

> [A]ll elements of the system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly" and 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".[82]

82. The General Assembly reiterated the same in its 22 December 2018 resolution

[81] ICJ, *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, page 325, para. 74.
[82] A/RES/68/254 of January 2014 para. 4 and 5.

on the administration of justice at the United Nations:

> […] 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.[83]

It is thus clear that the Dispute and Appeals Tribunals are bound by acts originated from, or approved by, the General Assembly.

83. The Tribunals are, on the other hand, not bound by acts not originating from the General Assembly, specifically, by issuances of the executive, where these issuances would be found to contradict the framework approved by the General Assembly. This conclusion is logically inevitable not just on the plain language of the General Assembly resolution but results even more forcefully from the nature of the jurisdiction of the Tribunal, which could not be exercised if the very entity appearing as Respondent before the Tribunals could impose rules binding upon them. The same principle, forming one of the cornerstones of the doctrine of separation of powers, is applied in state systems, where a regular judiciary is bound by statutes only, whereas inferior regulatory acts are binding on the executive and presumed legal, the courts, however, may refuse their application to a case on the score of nonconformity with statutes. There is a rich body of jurisprudence from ILOAT, the former United Nations Administrative Tribunal (including judgments relied upon by the Respondent in this case) and indeed from UNAT [84], that confirm this principle. Therefore, to the extent the Respondent appears to argue the binding nature of all regulatory acts, no matter the placement in the hierarchy, this proposition must be rejected. To accept it would deny

[83] A/RES/73/276 adopted on 22 December 2018.
[84] In addition to *Tintukasiri, Pedicelli*, and *Lloret-Alcañiz* cases cited in the text of this Judgment, see e.g. *Scott* 2012-UNAT-225 accepting to review a challenge to literal reading of a staff rule based on general principle of law; *Neault* 2013-UNAT-345, para. 31 declaring staff rule inapplicable because of inconsistency with the Statute; *Gehr* 2013-UNAT-293 stating where there is ambiguity or a contradiction, the UNDT Statute prevails over the Staff Rules; *Couquet* 2015-UNAT-574 citing *Gehr* to support that staff rules prevail over administrative issuances; *Lemonnier* 2016-UNAT-679 citing *Neault* 2013-UNAT-345 and *Gehr* 2013-UNAT-293.

the UNDT, and UNAT alike, independence from the executive, reduce its cognizance to a replication of the management evaluation process and deny staff members effective recourse to an independent tribunal, which is clearly against the rationale adopted by the General Assembly resolution 61/261.[85] Noting that the Respondent seeks support in the quote: *"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*"[86], the Tribunal finds this statement's normative value limited to the importance of a proper application of the *lex specialis* principle.

84. The last pertinent issue on this score is one contemplated in the *Lloret-Alcañiz et al.* judgment. Contrary to the Respondent's linguistic parsing based on selective quotes from it, what the Appeals Tribunal confirmed in *Lloret-Alcañiz* was that UNDT and UNAT may also need to incidentally review acts originating from the General Assembly, where a question arises about a conflict of norms.[87] Altogether, with respect to the scope of review of regulatory acts, there is no difference either in statutory regulation or in "approach" between the ILOAT and the UNDT/UNAT system as both concern themselves only with incidental review. This can be clearly seen from the fact that neither ILOAT Judgment 4134 ruled on the illegality of the ICSC decision in the operative part of the judgment nor did UNAT rule on the illegality of staff rule 11.4 in the operative part of its *Neault* 2013-UNAT-345 judgment, while in both cases the regulatory acts were found unlawful.

[85] Also, as recognized in Internal Justice Council reports "If the Dispute Tribunal and the Appeals Tribunal are seen simply as an arm of the Secretary-General's administration then they will not serve the purpose envisaged by the Redesign Panel on the United Nations system of administration of justice, which called for an open, professional and transparent system of internal justice" (A/70/188 dated 10 August 2015) and "The administration of any justice system worthy of the name is based on the rule of law and there can be no rule of law without an independent judiciary, as declared in article 10 of the Universal Declaration of Human Rights. The United Nations judges must not only be, but be seen to be, wholly independent of management and its lawyers. It goes without saying that one of the functions of an independent judiciary is to subject the unfettered "independence of the administrators" to the rule of law" (A/71/158 dated 15 July 2016).
[86] Respondent's submission in response to Order No. 105 (NBI/2019) para. 7 (citing General Assembly resolutions 69/203, para. 37, and 71/266, para. 29).
[87] 2018-UNAT-840, paras 80-82, 92.

85. In conclusion, the Respondent's assertion that that the "Applicants' claims must be rejected as non-receivable as they seek a review of the legality of the ICSC's decisions"[88] needs to be corrected on three levels: Firstly, denying receivability is untenable because the Applicants are contesting individual decisions concerning their terms of appointment, as discussed *supra*, and, while they contest the legality of the regulatory decision by the ICSC, they contest it as a premise for the claim of illegality of the individual decision and not with a claim to have the regulatory decision stricken. Secondly, determination whether to entertain a challenge to legality of the ICSC decision depends, primarily, on whether it was an exercise of the delegated regulatory authority under art. 11 of the Statute or the ultimate decision had the endorsement of the General Assembly. Thirdly, even in the latter case, an incidental review of the controlling regulatory decision may be warranted if legality of an individual decision based upon it is being challenged on the ground of a normative conflict with other acts emanating from the General Assembly.

**The scope of review of regulatory decisions on post adjustment.**

86. It is useful to record that the ICSC, as a subsidiary organ of the United Nations General Assembly, is subject to its supervision. Where the ICSC recommends the content of regulatory decisions under art. 10 of the Statute, the ultimate regulatory decision emanates from the General Assembly. Such a decision is binding on the Tribunals and may only be reviewed incidentally pursuant to the narrow *Lloret-Alcañiz et al.* test. On the other hand, where the ICSC exercises a delegated regulatory power under art. 11 of the Statute, its decision, while undisputedly binding on the Secretary-General, may be subject to incidental examination for legality, including that where the contested matter belongs in the field of discretion, the applicable test will be that pertinent to discretionary decisions i.e., the *Sanwidi* test. This is confirmed by the Appeals Tribunal in *Pedicelli*, where, following a remand for consideration of the merits, an individual decision, based on the conversion of a salary scale then applied

[88] Respondent's submission in response to Order No. 105 (NBI/2019), para. 8.

to General Service staff in Montreal promulgated by the ICSC under art. 11, entailed an examination of the ICSC decision for reasonableness.[89]

87. Notwithstanding the aforesaid, also where the ICSC exercises its delegated regulatory powers, it remains subordinated to the United Nations General Assembly which may intervene and indeed does so, mainly in the policy stage but also after the ICSC decision has been taken. Thus, the General Assembly interfered in 2012 in the system of post adjustment, requesting the ICSC to maintain the existing level of post adjustment in New York.[90] Also, in August 1984, the ICSC decided that the post adjustment in New York would be increased by 9.6%. However, the General Assembly, in paragraph 1(c) of its resolution 39/27 of 30 November 1984[91], requested the ICSC to maintain the level of the post adjustment and not to introduce the new one. The power of the General Assembly to intervene in the implementation of the post adjustment was confirmed by the former United Nations Administrative Tribunal.[92] The ICSC recalled this precedent in its report of 2012.[93] Intervention of the General Assembly largely removes the matter from the purview of the Tribunals. This, as noted by the Respondent[94], is confirmed in *Ovcharenko*, where the Appeals Tribunal confirmed legality of the implementation of the post adjustment freeze because the ICSC decision, subject to implementation by the Secretary-General, had been based on the General Assembly's resolution recommending the freeze.[95] In such cases, the regulatory decision is attributed directly to the General Assembly and thus, in

[89] *Pedicelli* 2017-UNAT-758 para 26 "We find no error in [UNDT's finding] that the renumbering exercise "had a legitimate organizational objective of introducing the GCS for GS positions."
[90] General Assembly decision 67/551 of 24 December 2012.
[91] General Assembly Resolution 39/27 of November 1984.
[92] UN Administrative Tribunal Judgment No. 370, *Molinier* (1986).
[93] Report of the ICSC for 2012, A/67/30 para 17: "The Commission recalled that measures to constrain or withhold increases in net remuneration of United Nations common system Professional staff already existed. They consisted in the suspension of the normal operation of post adjustment and freezing the post adjustment classification at the base of the system, New York, and, concurrently, at all other duty stations, to the same extent as that to which the New York post adjustment would be frozen. Not only had such measures been established, but they had also been applied in the past, in particular, between 1983 and 1985 […] as a result of the decision by the General Assembly to reduce the net remuneration margin and to bring it within the newly established range. The Commission therefore considered that it was feasible to apply the same approach to reflect the pay freeze of the comparator civil service, if the Assembly so decided."
[94] Respondent's comments pursuant to Order No. 189 (NBI/2018), para. 33.
[95] *Ovcharenko* 2015-UNAT-530, para. 34.

accordance with *Lloret-Alcañiz et al.*, judicial review is limited to the question of a normative conflict between the acts of the General Assembly.

88. The Tribunal notes that, with respect to the present dispute, the General Assembly observed in its resolution 72-255[96]:

> **Preamble**
>
> 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;
>
> […]
>
> **C. Post adjustment issues**
>
> 1. *Notes* the efforts by the Commission to improve the post adjustment system;
>
> 2. *Requests* the Commission to report no later than at the seventy-fourth session of the General Assembly on the implementation of decisions of the Commission regarding the results of the cost -of-living surveys for 2016, including any financial implications;
>
> 3. *Also requests* the Commission to continue its efforts to improve the post adjustment system in order to minimize any gap between the pay indices and the post adjustment indices and, in this context, to consider the feasibility of more frequent reviews of post adjustment classifications of duty stations;
>
> 4. *Further requests* the Commission to review the gap closure measure in the post adjustment system during its next round of cost -of-living surveys […].

Further, in resolution A-RES-74-255[97], the General Assembly:

> 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

[96] A/RES/72/255, published 12 January 2018.
[97] A/RES/74/255, para. 7.

> 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 […].

89. Accompanying documents, in particular, the Report of the ICSC for 2017 and its Addendum [98] show that in arriving at this decision the General Assembly was alive to the arguments advanced against the methodology and the application of the gap closure measure and had available to it materials relevant to the post adjustment, including detailed analysis of the quantitative impact of the ICSC decision on staff remuneration in Geneva. Yet, it did not intervene in any of these specific decisions.

**Whether acquired rights have been violated.**

*Applicants' submissions*

90. Relying on the Salary Scale cases, UNDT Judgment in *Quijano Evans et al.*[99], the Applicants submit that tension has been created between a binding decision of the General Assembly and the breach of acquired rights of staff members derived from other General Assembly decisions in that the salary cannot be unilaterally lowered by the employer. Post adjustment is a constituent element of salary; specifically, Annex 1 to the Staff Rules describes post adjustment as a way that "the Secretary-General may adjust the basic salaries". Further, upward revision of base salary resulting from the Noblemaire principle is introduced through post adjustment and subsequently absorbed into base salary.

91. Relying on ILOAT Judgment No. 832, In re *Ayoub* (1985), the Applicants submit that the right to a stable salary represents an acquired right that can reasonably be considered to have induced them to enter into and remain in contract. The term relates to the remuneration for work and, particularly, stability in such remuneration, which is a fundamental term. Amendments to the gap closure measure breach this right. The consequences of this breach of the Applicants' acquired right to a stable

[98] A/72/30 and A/72/30/Corr.1, Add.1, Annex 2 to Respondent's submission pursuant to Order No. 189 (NBI/2018).
[99] *Quijano Evans et al.* UNDT/2017/098, paras 60-71.

remuneration are considerable: a salary reduction of 4.7%. The scale of the cut will impact long term financial commitments they entered into based on a stable salary provided over an extended period. Implementation of transitional measures will not mitigate the impact of such a drastic cut.

92. The Applicants submit that the methodology applied by the ICSC raises issues regarding the International Service for Remunerations and Pensions ("ISRP") rent index, domestic services aggregation, place-to-place surveys, cost of education and medical insurance. They further submit that the methodology does not provide for results that are foreseeable, transparent and stable.[100] There is no foreseeability because the decision-making process is fragmented, rule changes are adopted in a piecemeal manner and relevant information is dispersed over numerous documents. The findings by the statisticians from the Geneva-based entities show that the lack of transparency extends beyond the ICSC decision making process and into their methodology and treatment of data.

93. The Applicants submit that the application of gap closure measures is arbitrary. The way the amended rule operated in the past ensured stability in circumstances where the salary reduction for staff would be within 5%. This has now been revised to an augmentation of 3% on changes of 3% or more. No indication has been provided as to why the margin of error might have been reduced at a time when the ICSC have been applying a new and untested methodology.

*Respondent's submission*

94. The concept of "acquired rights" is enshrined in staff regulation 12.1. They are generally considered to be rights that derive from staff members' contracts of employment and are accrued through service. In determining acquired rights, the former United Nations Administrative Tribunal distinguished between contractual and statutory elements of a staff member's employment, with the guarantee of acquired

[100] See The Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labor Organization Article XI; ILOAT Judgment Nos. 2420, 1821, 1682, 1419, 1265; and ILO Protection of Wages Convention, 1949 (No. 95) Article 14.

rights extending only to contractual elements. Contractual elements relate to matters that affect the personal status of each staff member (e.g. the nature of contract, salary and grade) whereas statutory elements relate to matters that generally affect the organization of the international civil service. Relying on the judgment in *Kaplan*, the Respondent submits that contractual elements cannot be changed without the agreement of the two parties, but statutory elements may always be changed through regulations established by the General Assembly.[101] The former United Nations Administrative Tribunal found that "the rules of post adjustment are statutory".[102]

95. The Respondent further recalls that the World Bank Administrative Tribunal in *de Merode* has distinguished between "fundamental or essential and non-fundamental or non-essential conditions of employment"[103] with fundamental conditions of employment not being open to change without the staff member's consent. A fundamental condition is one that induces a person to enter the service of the Organization. The Respondent cites former United Nations Administrative Tribunal Judgment No 1253's concurring opinion of Judge Stern, that a modification is allowed unless it would cause "grave consequences" for the staff member beyond "mere prejudice to his or her financial interests."

96. The Respondent submits that the determination of the post adjustment multiplier is a statutory element of employment. The Applicants have a general right to post adjustment under the terms of their employment, but they are not entitled to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, they do not have an acquired right to the previous system of calculation or to the continuance of any particular methodology.[104]

97. The Respondent recalls that the Secretary-General has no authority to decide on the methodology to be followed by the ICSC and submits that the Tribunal does not have jurisdiction to review the methodology or the data used. The collection and

[101] UN Administrative Tribunal Judgment No. 19, *Kaplan* (1953).
[102] UN Administrative Tribunal Judgment No. 370, *Molinier et al*. (1986), para. XMI.
[103] World Bank Administrative Tribunal Decision No. 1, *de Merode et al*. (1981), para. 42.
[104] Respondent's reply, paras. 62 - 70.

processing of the data from the baseline cost-of-living surveys for 2016 were carried out by the ICSC Secretariat in accordance with the established methodology, and that decisions taken in the context of this review were not taken in isolation, but in the framework of the Commission's overall decisions on methodological and operational matters pertaining to the 2016 round of surveys. The Chairman of the ICSC also concluded that the findings of the Geneva statisticians "*were found to be based on alternative methodologies, data, and scenarios that appeared to be formulated for the purpose of changing the result for one duty station"*.[105] Lastly, the ICSC advised that an independent review of the core methodological issues of the post adjustment system is ongoing.

***Considerations***

98. It will be useful to begin with a general clarification regarding contractual versus statutory elements of the employment relation. A contractual relationship refers to the relationship between the staff member and the international organisation as evidenced in a contract, i.e., a bilateral act. The statutory relationship, on the other hand, is based on status, i.e., refers to the appointment of civil servants by acts of authority, which forms a relation in accordance with statutorily defined terms and conditions. An individual who agrees to enter the public service gives full consent to these terms and conditions, in other words, joins by adherence. Consensus – in the case of statutory relationship – is therefore a *de facto* precondition of appointment, which nevertheless is formally based on an act of authority, hence, at times, the expression used is "contract of appointment"[106]. In the relation between the staff members and the United Nations, while the Appeals Tribunal recognized that the terms of conditions of appointment could at times be supplemented by a bi-lateral arrangement[107], the *sensu stricto* contractual elements are rare and *ad hoc*. As such, juxtaposing "contractual elements" and "statutory elements," in the context of civil service, albeit having a

[105] Letter dated 4 October 2017 from the Chairman of the ICSC to the Senior Inter-Agency Advisor on Human Resources Management, United Nations Chief Executives Board for coordination.
[106] E.g., UN Administrative Tribunal Judgment 1253; ILOAT *Ayoub* (1987), consideration 13.
[107] *Farzin* 2019-UNAT-917, *Faust* 2017-UNAT-777 and *Jemiai* 2011-UNAT-137; *Avramoski* UNDT/2019/085.

tradition dating back to the League of Nations[108], may be misleading. Strictly speaking, in the present relation it would be more accurate to distinguish individually determined elements (nature of appointment, duration, grade and step, duties and responsibilities) and generally applicable statutory elements. Salaries, in particular, as briefly mentioned above in the discussion on ICSC competencies, are regulated on a statutory level for each grade and step. Once a staff member consents to appointment at a particular grade and step, the salary is applied automatically as per the statute. It was in this context that the judgment of the former United Nations Administrative Tribunal in the *Kaplan* case determined that salary was a contractual element, which could not be unilaterally modified by the Organization.[109]

99. Another matter that needs to be noted at the outset is that, subsequent to the pleadings in this case, the contractual versus statutory character of the staff salary in the context of acquired rights was discussed by the Appeals Tribunal in the *Lloret-Alcaniz et al.* judgment[110] and reiterated in *Quijano-Evans et al.*[111]. The approach of the Appeals Tribunal's pronouncements on the concept of acquired rights merit citing them extensively.

100. The Appeals Tribunal held, first, that Staff Regulations, in particular staff regulation 12.1 establishing protection of acquired rights, did not hold a quasi-constitutional position in the hierarchy in General Assembly's resolutions; as such it was susceptible to amendments through the operation of *lex posterior*:

> Any protection of contractual rights of staff members in earlier resolutions would have to yield, as a matter of general principle and doctrine, to an evident intention by the General Assembly, the sovereign lawmaker in the United Nations system, to amend those rights or to substitute them with others. Any normative conflict would have to be decided in favour of the later resolution.

[108] The 1932 report by the Committee of Jurists to the Chair of the 1st Committee of the Assembly of the League of Nations stating that maintenance of staff salaries was an acquired right in that it was stipulated in contracts; League of Nations Judgment No. 29.
[109] Judgment No. 19/1953.
[110] Ibid.
[111] *Quijano-Evans et al.* 2018-UNAT-841.

101. The Appeals Tribunal proceeded to discuss whether there was indeed a normative conflict or an irreconcilable inconsistency between staff regulation 12.1 protecting acquired rights and the subsequent resolutions of the General Assembly on salary scale, which resulted in the lowering of the salary of the applicants. It held (internal references omitted):

> The term "acquired rights" therefore must be construed in the context of the peculiar statutory employment relationships prevailing at the United Nations. In any contract of employment, an acquired right might firstly mean a party's right to receive counter-performance in consideration for performance rendered. Thus, the aim of the intended protection would be merely 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−in other words once the right to counter-performance (the salary or benefit) has vested or been acquired through services already rendered. Alternatively, it might be argued, an acquired right may include the right to receive a specific counter-performance in exchange for a promised future performance prior to performance being rendered. The UNDT preferred this second interpretation.
>
> … If one were to accept the UNDT's interpretation (the second interpretation) as correct, then there is indeed a normative conflict between resolution 13(I) of 1946 and resolutions 70/244 and 71/263. The later resolutions have varied the contractual promise−in which case, for the reasons just explained, contrary to the finding of the UNDT that the "quasi-constitutional" earlier resolution should prevail, the later resolutions and not the earlier one would have to take precedence. Resolutions 70/244 and 71/263 undeniably alter the contractual rights of staff members to receive an agreed future salary. However, if the first interpretation of "acquired rights" is preferred there will be no normative conflict. Resolutions 70/244 and 71/263 do not retrospectively take away any vested right to receive a benefit for services already rendered.
>
> … In our view, the first interpretation of the term "acquired rights" is the more appropriate as it avoids or reconciles the normative conflict and harmonizes the provisions of the two resolutions. An "acquired" right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the *quid pro quo* for the promise has been performed or earned. Moreover, the fact that increases have been

> granted in the past does not create an acquired right to future increases or pose a legal bar to a reduction in salary.

102. The Appeals Tribunal concluded that the concept of acquired rights was, in essence, a prohibition of retroactivity of legislative amendments:

> … The limited purpose of Staff Regulation 12.1, therefore, is to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled. The protection of acquired rights therefore goes no further than guaranteeing that no amendment to the Staff Regulations may affect the benefits that have accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment.[33] Amendments may not retrospectively reduce benefits already earned. In the final analysis, the doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory instruments.
>
> …It follows that, absent any normative conflict, the Secretary-General did not act illegally in implementing resolutions 70/244 and 71/263.
>
> … The basic conditions of employment of staff members as set out in their letters of appointment may and often do change throughout the duration of their service. The contentions of the Respondents, if accepted, would constitute a contractual fetter upon the authority and powers of the General Assembly. In accordance with universally accepted principles, contracts which purport to fetter in advance the future exercise of constitutional, statutory or prerogative powers are *contra bonos mores* and not valid or enforceable. It is in the public interest that public authorities retain the freedom to exercise their discretionary or legislative powers. It can never be in the international public interest to contractually fetter the General Assembly in the exercise of its powers to make policy for the Organization. A body such as the General Assembly cannot be compelled to uphold a promise not to exercise its regulatory powers so as not to interfere with its contractual arrangements.
>
> … In the context of the United Nations system, the salary entitlements of staff members are therefore statutory in nature and may be unilaterally amended by the General Assembly. Staff members do not have a right, acquired or otherwise, to the continued application of the Staff Regulations and Rules−concerning the system of computation of their salaries−in force at the time they accepted employment for the entirety of their service. The fact that the unilateral variation of a validly concluded contract may cause individual loss poses no legal obstacle to the exercise of regulatory power.

103. It falls to be noted that referring the concept of acquired rights to entitlements already accrued was well-established in the jurisprudence of the former United Nations Administrative Tribunal such as the *Mortished* judgment and other ones, which were usually concerned with entitlements of a peripheral or occasional nature.[112] In such situations, the plane of reference is the state of the law at the time where the conditions for the entitlement were fulfilled; as a consequence, application of the doctrine of acquired right yields the same interpretative results as the non-retroactivity principle. In relation, however, to salary and other continuing benefits, the matter is more complicated and the jurisprudence, as will be shown below, diverged in addressing it. In rejecting the extension of acquired rights to a future salary, the *Lloret Alcaniz et al.* and *Quijano-Evans et al.* judgments place the matter of modifications in the area of regulatory discretion. These judgments did not contemplate - as apparently the issue had not been put before the Tribunal – any limitations on the exercise of this power. This begs the question of where they lie. Relevant issues include: fundamentals of the nature of the performance-remuneration exchange, the public interest in stability of the civil service, and the resulting test or criteria for legitimacy of a modification.

104. On the first issue, consideration must be given to the fact that the employment relation by definition presupposes continuality and durability, whether during a pre-determined finite period or indefinitely, with salary playing a central role in it; in this respect, periodical render of salary does not transform employment into a series of consecutive contracts where each subsequent one could be renegotiated. Another consideration must be given to inherent inequality of the parties and the socio-economic function of salary as a source of maintenance, thus giving reason for a specific protection by law. Yet another consideration is due to the fact that the employment relation, and especially in civil service, presupposes equivalence of

[112] UN Administrative Tribunal Judgment No. 273, *Mortished* (1981), cited by UNAT in *Lloret-Alcaniz et al.* at para. 74, and by *Quijano-Evans et al.,* para. 22; see also UN Administrative Tribunal Judgment No. 82, *Puvrez* (1961); UN Administrative Tribunal Judgment No. 1333, *Varchaver* (2007); UN Administrative Tribunal Judgment No. 1197, *Meron* (2004), para. XIV; UN Administrative Tribunal Judgment No. 202, *Queguiner* (1975); UN Administrative Tribunal Judgment No. 634, *Horlacher* (1994).

service and the counter-performance; downward amendment of remuneration distorts this equivalence. All these concerns speak in favour of protection against unilateral and unfettered downward revision of salary to extend throughout the duration of service.

105. On the question of interests involved, there is obviously, interest of staff in stability of employment conditions and protection from arbitrary change and erosion. Here, recognition is due to the fact that international civil servants do not participate in a democratic legislative process and in principle, as mentioned by the Appeals Tribunal in *Quijano-Evans et al.* have no right to strike[113]; thus, enhanced protection is required. It would not be, however, appropriate to place it in sharp opposition with the public interest in "that public authorities retain the freedom to exercise their discretionary or legislative powers", given that public interest lies also in guarantying stability to cadre and in attracting the most highly qualified personnel, as recognized by the United Nations Charter in article 101. The point lies rather in striking a balance between the competing interest of staff and the Organization's need to adapt its functioning and employment conditions to evolving circumstances.

106. On the ensuing question of test or criteria limiting the power to introduce legislative amendments to salary, in the absence of legal provisions beside staff regulation 12.1, the Tribunal turns to jurisprudence.

107. At the outset, it should be noted that the criterion applied in the *Kaplan* case[114], i.e., sharp delineation between contractual and statutory elements in the employment relation, the former conducive to acquired rights and thus outside the scope of unilateral modification by the employer, did not survive the test of utility over time. Subsequent jurisprudential developments, therefore, explore when individually determined ("contractual") elements might be statutorily modified.

[113] *Lloret Alcaniz et al.*, ibid., para. 94, *Quijano*-Evans et al, ibid., at para. 52, p. 27.
[114] See also ILOAT Judgment No. 29, in re *Sherif* (1957); UN Administrative Tribunal Judgment No. 202, *Queguiner* (1975).

108. First, a criterion was introduced according to which modifications were allowed insofar as they do not adversely affect the balance of contractual obligations or infringe the "essential" or "fundamental" terms of appointment.[115]

109. The next development was marked by the ILOAT Judgment in *Ayoub*, where a three-prong test was applied in determining whether the altered term is fundamental or essential. According to *Ayoub*, the first test is the nature of the term. Here, whereas the contract or a decision may give rise to acquired rights, the regulations and rules do not necessarily do so. The second test is the reason for the change. It recognizes that the terms of appointment may often have to be adapted to circumstances, and that there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted. The third test is the consequence of a modification, that is, what effect will the change have on staff pay and benefits.[116] In this regard, financial injury to the complainants, even if serious, is not enough in itself to establish it as a breach of acquired right.[117]

110. Finally, this jurisprudence recognized that sometimes only the existence of a particular term of appointment may form the subject of an acquired right, whereas the arrangements for giving effect to the term may do so or not.[118]

111. The parallel jurisprudence of the former United Nations Administrative Tribunal was not entirely consistent on the question whether the acquired rights concept extends beyond prohibition of non-retroactivity. Judgment No. 1253 answered in the positive but accepted that modifications are not necessarily inconsistent with the acquired rights. The Tribunal contemplated the following criteria: the term of appointment has a statutory, and not a contractual character; amendments do not deny the right as such (in that case the right to pension) but only introduce rules that garnish it; amendments serve a legitimate objective and do not overly deplete the content of

[115] ILOAT *Lindsay*, Judgment No. 61 (1962), followed by WBAT in *de Merode*, ibid.
[116] ILOAT *Ayoub* (1987), consideration 14.
[117] *Ayoub* ibid., consideration 15.
[118] *Ayoub*, ibid., consideration 13; *de Merode*, ibid., para 43.

the entitlement[119] or, as it was alternatively proposed, do not cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".[120]

112. Other former United Nations Administrative Tribunal decisions remained on the position that the question of acquired rights does not arise where the modification has no retroactive effect. Instead, a fetter on legislative power to introduce modification with effect for the future was construed through the test of reasonability, applied in light of the principles laid down in the Charter of the United Nations art. 101 para. 3, *i.e.*, that economy measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service.[121] Concerning specific requirements that a modification must meet in order to be reasonable, the following were distinguished: the modifications must not be arbitrary; must be consistent with the object of the system, for example, adjustment to cost-of living changes and protection of purchasing power of staff members[122]; must arise from reasonable motives; must not cause unnecessary or undue injury[123] or "significantly alter the level of basic benefits[124] or "cause unnecessary forfeiture or deprivation".[125] In the latter aspect, it was also proposed to consider whether the modification is permanent or temporary.[126]

113. As it can be seen from the above, the criteria used for the application of the rights concept and reasonable exercise of discretion are not dissimilar, the difference lying in the operation of the attendant presumptions (presumption of regularity of an official act versus the need to demonstrate that the limitation of a right is formally legal, necessary and proportionate) and the resulting stringency of the applicable criteria and the burden of proof. Below, the Tribunal shall undertake to test the reasonability of the

[119] UN Administrative Tribunal Judgment No 1253, consideration V.
[120] UN Administrative Tribunal Judgment No 1253, concurring opinion of Judge Stern who proposes the criterion of "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".
[121] UN Administrative Tribunal Judgment Nos. 403, 404, 405.
[122] UN Administrative Tribunal Judgment No. 379.
[123] UN Administrative Tribunal Judgment No. 405 adopting after ILOAT in *Ayoub.*
[124] UN Administrative Tribunal Judgment No. 404.
[125] UN Administrative Tribunal Judgment No. 403.
[126] UN Administrative Tribunal Judgment No. 403, partially dissenting opinion of Judge Pinto.

disputed regulatory decision of the ICSC against these criteria. As previously explained, this is done in order to evaluate the legality of the impugned individual decisions based on it, and not to hold ICSC "answerable" or exercise a constitutional court-type jurisdiction over its decisions.

**Application of the criteria to the impugned decision**

114. As to the nature of the entitlement in the present case, it is undisputed that the post adjustment is an element of salary. The post adjustment multiplier, however, is not an individually determined ("contractual") element of the salary, rather, unlike the salary *sensu stricto*, it is inherently variable in relation to the cost of living, with a view, in addition, to maintaining purchasing power parity of salaries across duty stations, and not to keep pace with inflation at any particular duty station. The Applicants' general right to post adjustment under the terms of their employment[127] is not at issue; rather, the question concerns decisions adopted to give effect to this right. With this respect, the legal benchmarks in place include determining a comparator in accordance with the Noblemaire principle and directives to adjust remunerations to accurately reflect differences in the cost of living at various duty stations in observance of the established margin.[128] Otherwise, methods of calculating the post adjustment and establishing procedures for it are delegated to the ICSC. The Tribunal takes it that there is also no dispute that the applicable rules do not confer upon the Applicants a right to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, they do not have an acquired right to the previous system of calculation or to the continuance of any particular methodology.

115. In light of the holding of the Appeals Tribunal in *Lloret-Alcaniz et al.* the Tribunal, however, must also find that notwithstanding the 75 years of practice of refraining from downward revision of salary and post adjustment by the Organization, the Applicants do not have an acquired right to protection against such a downward revision of the post adjustment multiplier, through the application of a freeze, gap

[127] Staff rule 3.7.
[128] General Assembly resolutions 38/232; 44/198, 72/255, 73/273

closure or other conservatory measures. Application of such measures, therefore, remains only a question of good governance, which should take into account a margin of error in calculations, as well as avoidance of sudden major drops in salary value and its destabilising and demoralising effect.[129]

116. These traits of the post adjustment entitlement and the scarcity of relevant legal framework render it generally open to modifications in relation to fluctuations in cost of living and relative purchasing power.

117. Regarding the purpose of the disputed modification, it is generally consistent with the object of the system. The central issue remains in the criticism of the methodology applied in the calculation of the post adjustment following the 2016 survey. This Tribunal, obviously, has no expertise to evaluate by itself the disputed elements of this methodology. It would be, in any event, entirely unreasonable to attempt to retain yet another costly and time-consuming expertise while the methodology is under a comprehensive review by the ICSC. The Tribunal finds that the material put before it allows determinations for the limited purpose of its review.

118. As a starting point, it is undisputed and confirmed by all those engaged in the matter in a professional capacity: experts, ACPAQ members and commissioners themselves, that the post adjustment calculation presents extreme complexity and is not applied pursuant to arithmetical or even purely statistical method. To this end, the Geneva statisticians' review, notwithstanding its overall rejection of the methodology applied in Geneva, begins and ends with a caveat that it is not thorough or comprehensive[130]; that their estimates are indicative – proper estimation of the updated series would need to be computed by ICSC using October 2016 as the base and updated to May 2017[131]; that certain alternative calculations should first be tested within the ICSC system, to ensure that they are precise[132]; and that with regard to multiple issues

[129] See also Applicants' submission of 19 October 2018, annex 14, Chapter 6, para. 27 and Chapter 4, para 4-6 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).
[130] Application, annex 8, page 4, paras. 10 and 69.
[131] Ibid., page 37, para. 57.
[132] Ibid., page 43, para. 71.

of importance, believed to have statistically biased the 2016 results, the report has not been able to quantify the extent of the impact of these problems on the Geneva PAI and recommended further studies.[133] The independent expert likewise stressed the complexity of adjusting pay of staff in all duty stations in a way that is fair, equitable and meets standards of compensation policies, which are related not only to the actual cost of living but also to equivalence of purchasing power.[134] As evidenced by both reports, regarding numerous components relevant for the ultimate calculation, there are available alternative policies and methodological approaches.

119. It is also undisputed that since a survey carried out in 2010, the ICSC adopted certain methodological modifications. Clearly, the ICSC has been acting on instructions from the General Assembly that the applicable post adjustment reflect most accurately the cost of living.

120. While the independent expert's review did not encompass the Geneva 2016 survey results, which is regrettable, it furnishes two pertinent observations. First, during the six years preceding the disputed survey, the post adjustment index of Geneva remained consistently lower than its pay index and, since March 2015, the gap between the two values continued to increase. On this example the independent expert cautioned that this increasing disconnect between the trends of the pay index and the updated post adjustment index over time could lead to unmanaged expectations which can cast doubt on the validity of the subsequent survey and create shocks in the system".[135] With this regard, the recommended solution was more frequent surveys. The Tribunal considers it safe to conclude that a fair part in the negative post adjustment outcome in Geneva is attributable to the accumulation of the said disparity over the period of 6 years.

121. The second observation is relevant to the report of the Geneva statisticians, where the main point of contention was the housing component, alleged to have been responsible for up to 4.1% downward miscalculation. In this regard, concerning the

[133] Ibid., pages 65-66, paras 162 & 164.
[134] Applicants' submission of 19 October 2018, annex 14, para. 10, p. 37 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).
[135] ICSC report for 2017; independent expert report, Chapter 4 para 17.

disputed use of quantity weights, the independent expert's reservations point out to an inconsistent application of the chosen indexation formula to rent but not to other in-area components, moreover, improper designation of the applied method as the Fisher index, which it was not, and should instead be referred to as "Fisher-type" index. Eventually, for coherence and feasibility of use, the expert recommends the use of the so-called Walsh index, based on expenditure weights.[136] Appendix 3 of the review demonstrates, however, that the use of the recommended Walsh index applied to the 2010 survey in Geneva would result in the housing expenditure value increase by 0.3%. [137] This recommendation, therefore, does not lend support to a claim that the application of the actually applied Fisher-type index, as opposed to the preferred Walsh index, would have been responsible for the disputed 4.1% of the housing component. As to the remaining part, the independent expert review, albeit identifying numerous areas for improvement, concludes that the procedures applied by the ICSC Secretariat were consistent with the "approved methodology", and that both "the procedures and the approved methodology go a long way to meet the criterion of fit for purpose." [138]

122. At the time of deciding, however, the ICSC had available to it only the Geneva statisticians' review, with which it disagreed and considered biased. Still, in the face of arguments put before it, it took decisions to mitigate the post adjustment decrease. To this end, it is noted that, as reflected by the ICSC report for 2017, the Commission decided:

> Taking into account the appeals by representatives of organizations and staff federations, the Commission decided to approve the following modification of the gap closure measure, an operational rule designed to mitigate the negative impact on salaries of the results of cost-of-living surveys that are significantly lower than the prevailing pay indices:
>
> (a) In accordance with the Commission's decision in paragraph 128 (a), the post adjustment index derived from the survey (updated to the month of implementation) is augmented by 3 per cent to derive a revised post adjustment multiplier for the duty station;

[136] Applicants' submission of 19 October 2018, annex 14, Chapter 2 paras 33-49 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).
[137] Ibid., p. 78.
[138] Ibid., Chapter 6, para. 10.

> (b) The revised post adjustment multiplier is applicable to all Professional staff members in the duty station. Existing staff members already at the duty station on or before the implementation date of the survey results receive the revised post adjustment multiplier, plus a personal transition allowance;
>
> c) The personal transitional allowance is the difference between the revised and prevailing post adjustment multipliers. It is paid in full for the first six months after the implementation date; and adjusted downward every four months until it is phased out [..]

123. The Tribunal agrees with the Applicants that the mitigation, on both counts, the augmentation of the post adjustment multiplier and the transitional allowance, appears more as a rule of thumb than actual calculation of a margin of error. However, the resulting financial loss for the Applicants, 4.7% of the post adjustment component of the salary - and not 4.7% of the salary as a whole, as it is presented by the Applicants, moreover, delayed by one year through the application of the transitional allowance - is not such that would overly deplete the content of the entitlement or cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".

124. Finally, the modification is temporary. As evidenced by ICSC reports 2017-2019, the impugned decision occurs in the context of a review of the post adjustment system carried out by the ICSC under the scrutiny of the General Assembly.[139] Retaining an independent expert to examine the methodology was a step toward a comprehensive review that was subsequently launched and which includes establishing a working group on operational rules governing the determination of post adjustment multipliers, with the full participation of organizations and staff federations as well as a task force on the review of the conceptual framework of the post adjustment index methodology, composed of statisticians nominated by organizations, staff federations and the Commission, as well as top-level consultants in the field of economics and price statistics. The latter produced a report on a wide array of technical and procedural issues, covering, in general terms, elements disputed by the Geneva statisticians. The ICSC report for 2019 shows, in particular, that the problem of generalized decreases in

[139] General Assembly resolutions 72/255, 73/273 and 74/255 A-B.

the post adjustment index attributable to methodological change is taken very seriously and neutralizing such effects are to be addressed either through a compensatory mechanism on a no-gain, no-loss basis, or through statistical solutions formed in the same context of statistical methodology in which it originated. The results are to be applied in the 2021 round of surveys.

125. Everything considered: the nature of the entitlement, consistency of procedure with internal rules ("approved methodology"), high complexity, multiple alternatives and absence of outright arbitrariness in the methodology, mitigation applied and, above all, the temporary character of the modification, the ICSC decision does not disclose unreasonableness in the sense of risking deterioration of the international civil service. This Tribunal concedes that the application of rights construct would pose more stringent requirements as to the quality and stability of the methodology and could have brought about a different conclusion.

**Whether there is a normative conflict with the principle of equality in remuneration**

*Applicants' submissions*

126. The Protocol concerning the entry into force of the Agreement between the United Nations and the International Labour Organization, which was adopted by the General Assembly, referenced the undesirability of serious discrepancies in the terms and conditions of employment which could lead to competition in recruitment. This demonstrates the intention of the General Assembly that staff members across the common system should have equal rights including in relation to dispute resolution. A failure to agree with the ILOAT judgment would lead to staff members at the same level being paid differently depending on the jurisdiction their employer is subject to. This would represent a threat to the United Nations common system. [140]

[140] Applicants' motion to file submissions regarding ILOAT Judgment No. 4134.

*Respondent's submissions*

127. The Respondent points out that, on critical matters, the UNAT has been willing to depart from the jurisprudence of the ILOAT where there are sound reasons for doing so.[141] As there is no appellate review to address decisions of the ILOAT, Judgment No. 4134 is final and binding for the organizations that have accepted the jurisdiction of that Tribunal but there is no legal imperative for the UNDT to adopt an incorrect ruling of the ILOAT.

***Considerations***

128. On the matter of upholding the common system, this Tribunal cannot but agree, *mutatis mutandis*, with ILOAT Judgment No 4134:

> 29. In its judgments the Tribunal has recognised and accepted the existence of the United Nations common system and respected its objectives. However, the existence of the United Nations common system and a desire to maintain its integrity should not, in itself, compromise the Tribunal's adjudication of individual disputes in any particular case or series of cases involving the application of its principles. Indeed, in Judgment 2303, consideration 7, the Tribunal acknowledged the argument of the organization that considerable inconvenience arose from an earlier judgment (Judgment 1713) and it was virtually impossible for the organization to depart from the scale recommended by the ICSC. The Tribunal has to recognise that an organization's legal obligations arising from the operation of the common system could have legal ramifications for an organization that inform or even determine the resolution of any particular dispute. However notwithstanding these matters, the Tribunal must uphold a plea from a staff member or members if it is established that the organization has acted unlawfully.

129. The Tribunal wishes to add that the impugned decision subject to its review does not involve a question of integrity of the United Nations common system. This matter is properly before the ICSC and, ultimately, the General Assembly.

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[141] *Molari* 2011-UNAT-164, para. 1 ("We will not follow the Administrative Tribunal of the International Labour Organization (ILOAT) in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT, this has never been the standard at the United Nations.").

130. Absent a finding of illegality of the regulatory decision, there is no basis for a rescission of the decision impugned in this case.

**JUDGMENT**

131. The application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 14th day of July 2020

Entered in the Register on this 14th day of July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi