



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/018

Judgment No.: UNDT/2020/131

Date: 29 July 2020

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANDRES et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Kong Leong Toh, UNOPS

INTRODUCTION

1. The Applicants are 21 staff members of the United Nations Office for Project Services (“UNOPS”) 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. Identical individual applications were initially filed with the United Nations Dispute Tribunal (“UNDT/the Tribunal”) in Geneva on 8 August 2018, and then consolidated (henceforth: the application) and transferred to UNDT in Nairobi on 14 February 2019 after the Geneva-based UNDT Judge President recused herself from the proceedings.¹

PROCEDURAL HISTORY

3. The applications belong to the fifth set (“waves”) of appeals by the Applicants regarding the decision to implement a post adjustment change in the Geneva duty station resulting in a pay cut. The first three waves of applications stemming from the same decrease of post adjustment have been disposed of as irreceivable by way of UNDT judgments which became final. The applications belonging to the fourth wave were accepted as receivable being directed against individual decisions on reduction of post adjustment and application of transitional allowance. These were dismissed on the merits, by way of judgments which are not yet final. The fifth wave cases concern different individual decisions whereby an actual reduction in post adjustment had been implemented.

4. Pursuant to Order No. 039 (NBI/2019), the Respondent filed a reply on 15 April 2019.

5. It is noted that the parties agreed to accept as part of the record all evidence and arguments presented by them in the fourth wave case.² The facts described in the

¹ Order No. 008 (GVA/2019).

² Reply, para. 9.

following sections of this Judgment are based on the parties' pleadings, additional submissions totalling over 3000 pages and record of the hearing which the Tribunal held in the fourth wave of cases on 22 October 2018 and where evidence was given by 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.

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. 106 (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 Respondent sought leave on 21 January 2020 to file General Assembly resolution 74/255 A-B (United Nations Common System). The Applicants filed a response to the motion on 5 February 2020.

FACTS

9. At its 38th session in February 2016, the Advisory Committee on Post

Adjustment Questions (“ACPAQ”)³ 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 2016.⁴

10. 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 adjustment⁵ index at these locations. Geneva was one of the duty stations included in the survey.⁶ 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.⁷

11. 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.⁸ 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.⁹ At the same session, representatives of the Human Resources Network, the United Nations Secretariat, other Geneva-based organizations

³ 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>.

⁴ 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).

⁵ 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).

⁶ Application, annex 13 (ICSC/85/CRP.1 – Considerations regarding cost-of-living surveys and post adjustment matters – note by Geneva-based organizations).

⁷ 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.

⁸ Reply, annex 2, para. 100 (ICSC/84/R.8 – Report on the work of the International Civil Service Commission at its eighty-fourth session).

⁹ Ibid., paras. 105 and 106.

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.¹⁰

12. In April 2017, the Executive Heads of Geneva-based organizations requested that ICSC provide information regarding the specific impact that the survey 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 2017.¹¹

13. 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”).¹² 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.¹³

14. Between 31 May and 2 June 2017, an informal review team of senior statisticians,¹⁴ requested by the Geneva Human Resources Group¹⁵, 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

¹⁰ Ibid., paras. 92-98.

¹¹ Application, annex 13, paras. 5 - 7. The organizations were: ILO, UNOG, ITU, WIPO, WHO, UPU, IOM, WMO, UNAIDS and UNHCR.

¹² Reply, annexes 3, 4 and 5.

¹³ Reply, annex 5, section V.

¹⁴ Application, annex 13, page 18. The review team consisted of two staff members of ILO, one staff member of UNCTAD and an international consultant.

¹⁵ Ibid., page 19.

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 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 2016.¹⁶

15. 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.¹⁷ In the ensuing litigation, this Tribunal, in its Judgment No. UNDT/2018/021, dismissed the application as irreceivable, having found that no individual decisions had been taken in the Applicants’ cases.

16. 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 [...]”.¹⁸ The consultant made 64 recommendations, including but not

¹⁶ Ibid., page 23.

¹⁷ Application, annex 8.

¹⁸ Application, annex 16, page 37, para. 10 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).

limited to the methodology for the post adjustment system, policies and specific issues.

¹⁹ The staff associations engaged another independent expert who reviewed and elaborated on selected recommendations from the ICSC's consultant's report.²⁰

17. 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

18. On 14 September 2017, the Applicants requested management evaluation of the 19 and 20 July 2017 decisions indicating, in the alternative to previous filings²³, the decision date as being from receipt of their August payslip, which reflected reduction of the post adjustment portion of salary and payment of the transitional allowance. That decision formed the basis of the Tribunal's Judgment No. UNDT/2020/117 in the fourth wave case between the parties.

19. On 7 February 2018, the Administration informed staff that the first quantitative reduction in post adjustment would be reflected in the February pay slip, reflecting a 3.5% decrease in net take-home pay.²⁴ On the same day the ICSC released a document entitled "Post Adjustment Changes for Group 1 Duty Stations – Questions and Answers" which explained the calculation of the pay cut.²⁵

20. On 23 February 2018, the Applicants received pay slips indicating

¹⁹ Ibid., pp. 47-54.

²⁰ Application, annex 17 (Comments on the consultant report – "review of the post adjustment methodology" – and prioritization of its recommendations).

²¹ Reply, annex 7, para. 129 (A/72/30 – Report of the International Civil Service Commission for the year 2017).

²² Application, annexes 2 and 3; reply, annex 8.

²³ See Judgment Nos. UNDT/2018/021; UNDT/2018/036 and UNDT/2018/062.

²⁴ Application, annex 4.

²⁵ Ibid., annexes 5 and 6.

implementation of the pay cut.²⁶ On 13 April 2018, they requested management evaluation of the reduction of their salaries as evidenced in their February pay slips.²⁷

21. On 19 July 2018, the General Counsel for UNOPS responded to the Applicants' management evaluation request of 13 April 2018. The General Counsel informed the Applicants that: challenges to the ICSC's decisions were not receivable as the ICSC is "answerable and accountable" only to the General Assembly; ICSC decisions cannot be imputed to the Secretary-General in the absence of any discretionary authority to execute such decisions; the ICSC's 18 July 2017 decision was binding on the Secretary-General; the payment of post adjustment in accordance with the post adjustment multiplier established by the ICSC is not an administrative decision; and they did not have an acquired right to post adjustment.²⁸ The Applicants filed the current application on 8 August 2018.

RECEIVABILITY

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

23. On the question whether the application concerns an individual administrative decision with adverse consequences for the Applicants' terms of appointment, as required by art. 2 of the UNDT Statute, the Tribunal recalls its previous holding, the details of which are incorporated here by reference²⁹ 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. Accordingly, every payslip received by a staff member is an expression of a discrete administrative decision, even where it only repetitively applies a more general norm in the individual case. Since this Tribunal does not pronounce on legality of acts of general order, but, as will be discussed later, only reviews them incidentally, the

²⁶ Ibid., annex 7.

²⁷ Ibid., annex 8.

²⁸ Ibid., annex 9.

²⁹ See Judgment Nos. *Andres et al.* UNDT/2018/021 and *Andres et al.* UNDT/2018/036.

decisions impugned in the fifth wave of cases may be appealed and adjudicated in itself without entering in the relation of *lis pendens*, or *res judicata*, with cases belonging to the fourth wave. In the fourth wave cases, the Respondent argued that the impugned decisions did not entail negative consequences because of the presence of the transitional allowance. This argument does not apply in the present case, where an actual financial detriment was incurred by the Applicants and reflected in their payslip.

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

Respondent's submissions

24. Relying on jurisprudence of the United Nations Appeals Tribunal (“UNAT”)³⁰, the Respondent submits that regulatory decisions of the General Assembly leave no scope for the Secretary-General to exercise discretion. Had the General Assembly required the Secretary-General to confirm the procedural or substantive correctness of the cost of living surveys relied upon by the ICSC before the Secretary-General could implement the post adjustment multipliers set by the ICSC, then the Applicants could legitimately claim that the Secretary-General failed to comply with the preconditions that attach to the exercise of his power.³¹ However, the General Assembly set no such preconditions. As such, the present case concerns the mechanical and quasi-automatic implementation of a post adjustment multipliers, issued on a monthly basis by the ICSC through a “post adjustment classification memo”. The General Assembly has repeatedly affirmed that decisions of the ICSC are binding on the Secretary-General³² and the Secretary-General lacks discretionary authority in implementing ICSC decisions on post adjustment.

25. Further, the Respondent submits that the Applicants are challenging the ICSC decision, *i.e.* how the ICSC reached its decision as well as the internal decision process

³⁰ See *Lloret Alcaniz et al.* 2018-UNAT-840, para. 59 referring to *Reid* 2015-UNAT-563; *Tintukasiri* 2015-UNAT-526, and *Obino* 2014-UNAT-405.

³¹ *Lloret Alcaniz et al.* 2018-UNAT-840.

³² Reply, annex 14 (General Assembly resolutions 66/237, para. 37 and 67/241, para. 3).

within the ICSC. The United Nations Dispute Tribunal (“UNDT”) and the UNAT have consistently held that legislative or regulatory decisions do not constitute administrative decisions subject to review. The July 2017 decision of the ICSC on post adjustment multipliers is not an administrative decision subject to review pursuant to art. 2 of the UNDT Statute.

Applicants’ submissions

26. The Applicants’ case is that the ICSC decision was *ultra vires*, thus the Respondent cannot rely on the absence of discretion in his decision making. Relying on *Pedicelli*³³, 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 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

27. In the first and fourth waves of the 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 once again discuss the two relevant aspects below.

³³ Judgment No. 2015-UNAT-555.

28. 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.³⁴ 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 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.

29. 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.³⁵ In factual scenarios like the ones contemplated here, assuming that an ICSC decision

³⁴ 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."

³⁵ *Oummih* 2014-UNAT-420 at paras. 19-20.

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.³⁶

30. Receivability of non-discretionary decisions implementing acts of general order is confirmed by the Appeals Tribunal jurisprudence in *Tintukasiri*³⁷, *Ovcharenko*³⁸ and *Pedicelli*³⁹. 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 interpretation 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 employment⁴⁰

31. 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

³⁶ See *Sanwidi* 2011-UNAT-104; *Frohler* 2011-UNAT-141 and *Charles* 2012-UNAT-242.

³⁷ 2015-UNAT-526.

³⁸ 2015-UNAT-530.

³⁹ 2017-UNAT-758.

⁴⁰ 2014-UNAT-405.

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.

32. 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."⁴¹

33. These two decisions, therefore, do not articulate any principled approach to receivability in relation to exercise of discretion, but, rather engaged in interpreting the the application.

34. Conversely, in response to similar arguments by the Respondent in *Lloret Alcañiz et al.*, the majority of UNAT 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

⁴¹ *Kagizi* 2017-UNAT-750 para. 22.

standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality.”⁴²

35. This Tribunal assumes, therefore, that the claim to have discretion as criterion for receivability has now been set aside.

36. The Tribunal finds, moreover, that the present application is unambiguously directed against individual decisions concerning each of the Applicants. Whatever argument the authors used in support, it has no bearing on the identification of the contested decision. To the extent the Tribunal is authorised to individualise and articulate pleadings of an applicant who exhibits difficulty with this respect, it must make such representations *bone fidei*, consistently with the presumed interest of the applicant. It is, however, not the Tribunal’s role – nor is the Respondent’s- to pervert a clearly-articulated application, as the one here, so as to strike it for the lack of receivability.

37. The present application is receivable.

38. The question of the scope of the Tribunal’s review of regulatory acts will be addressed in a further section of this judgment.

MERITS

39. 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.

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

⁴² 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.

41. 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?

42. 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

43. The Applicants' case is that the Secretary-General is not obliged to implement

decisions taken without proper authority.⁴³

44. 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 decisory authority regarding classification of duty station under art. 11(c) pertains to determining bands in which duty stations would be placed. Whereas a decision regarding the appropriate multiplier to apply to a duty station corresponds with an art. 10(b) decision rather than an art. 11(c) decision since it indicates a precise financial calculation. Thus, the ICSC cannot unilaterally impose alterations to the survey methodology, operational rules and to the Geneva post adjustment index without first seeking approval for the same from the General Assembly. The ICSC granted itself decisory powers in all matters contrary, thereby exceeding its delegated power.⁴⁴

45. 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”.⁴⁵

⁴³ Application, page 7, paras.11-13.

⁴⁴ Application, paras. 42 - 46.

⁴⁵ Judgment 4134 consideration 33 and consideration 39, referring to Judgment 3883, consideration 20; Judgment 3601, consideration 10; and Judgment 3544, consideration 14.

46. The Applicants submit⁴⁶ that General Assembly resolution 74/255 A-B is based exclusively on the ICSC 2019 annual report (A/74/30). The ICSC relitigated the 2016 post adjustment results before the General Assembly in complete usurpation of the role, function, authority and independence of the internal justice system. The resolution fails to recognize the independence of UNDT and UNAT because statutory interpretation is not within the authority of the General Assembly. A/RES/74/255 A-B cannot change the authority of the ICSC nor can it change the meaning of articles 10(b) and 11(c). The ICSC Statute includes a mechanism for amendment, which is not achieved by General Assembly resolution alone. There has to be an acceptance procedure for adoption by the participating bodies.⁴⁷

Respondent's submissions

47. 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.⁴⁸ 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.⁴⁹

48. 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.⁵⁰

⁴⁶ Applicants' submission of 5 February 2020.

⁴⁷ Applicants' submission of 5 February 2020.

⁴⁸ Respondent's submission in response to Order No. 106 (NBI/2019), annex R/1A (para. 8, diagram 4) and annex R/2.

⁴⁹ Respondent's submission in response to Order No. 106 (NBI/2019), annex R/1A para 10.

⁵⁰ A/RES/44/198, part D, “post adjustment” para. 3.

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.⁵¹ 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.

49. 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 43/226 of 21 December 1988. The “major simplification of the post adjustment system (...)” was one of the elements of that review.

50. 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.⁵² 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.⁵³

51. 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

⁵¹ Respondent’s reply, para. 53.

⁵² Respondent’s submission in response to Order No. 106 (NBI/2019), para. 16 and annex 1A.

⁵³ Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 1.B, p. 13).

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.⁵⁴ The General Assembly has not challenged the ICSC’s authority in respect to post adjustment classification under art. 11(c).

52. 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 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.

53. 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

54. At the outset, the Tribunal finds it useful to recall an established principle that

⁵⁴ Supplement No. 30, para. 241 (A/31/30 – Report of the International Civil Service Commission).

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.⁵⁵ 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.⁵⁶ 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 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.

55. 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.⁵⁷ 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

⁵⁵ E.g., *Scott* 2012-UNAT-225.

⁵⁶ 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”.

⁵⁷ See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).

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.⁵⁸ 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.

56. 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;⁵⁹

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 [...].

57. 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

⁵⁸ 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.

⁵⁹ Resolution 3357 (XXIX).

of methodology that have been abolished is confusing and non-transparent and is partially responsible for the present disputes.

58. The changes, however, were approved by the General Assembly, either expressly or by reference to ICSC written reports⁶⁰; 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 been questioned.⁶¹ 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.

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

Article I

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

⁶⁰ 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*]"

⁶¹ 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.*

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.

60. As results from section 2, the United Nations has been juxtaposed with “specialized agencies and other international organizations ... which accept the present statute”.⁶² 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 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

61. 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.⁶³

Respondent’s submissions

62. The Respondent submits that the ILOAT and the United Nations Tribunals (the UNDT and UNAT) have developed divergent approaches with respect to the

⁶² 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.

⁶³ Application, paras. 36 and 47.

“receivability of challenges to decisions by legislative bodies and by their subsidiary organs”.⁶⁴

63. 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 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.*”⁶⁵ 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.

64. By contrast, the Respondent’s case is that UNAT in *Lloret-Alcañiz et al.*⁶⁶, 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”.⁶⁷ The Respondent derives therefrom that the UNDT lacks jurisdiction to review the legality of legislative decisions.

65. 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

⁶⁴ Respondent’s submission in response to Order No. 106 (NBI/2019).

⁶⁵ Ibid., citing to ILOAT Judgment No. 4134, considerations 8, 26.

⁶⁶ 2018-UNAT-840.

⁶⁷ A/RES/69/203, para. 37; A/RES/71/266, para. 29.

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

66. At the outset, in his citations from *Lloret-Alcañiz et al.*, and conclusions drawn, 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 individual decision based on a regulatory one. In consequence, the Respondent mixes the question of receivability with the question of legality.

67. 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 constitutional 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 jurisdiction 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.⁶⁸ The Tribunal does not deem it necessary to further dwell on this matter.

68. 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

⁶⁸ See *Cherif* 2011-UNAT-165; *Quijano Evans et al.* 2018-UNAT-841.

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.⁶⁹

69. The question arising on the basis on *Tintukasiri* in connection with the 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 inquiry into their legality and, if so, whether the question turns on the hierarchy of the act.

70. 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 Administrative 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 (...).⁷⁰

71. There is no claim that the UNDT may exercise any more power. Moreover, as

⁶⁹ *Tintukasiri* 2015-UNAT-526, paras. 35-37.

⁷⁰ 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.

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”.⁷¹

72. The General Assembly reiterated the same in its 22 December 2018 resolution 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.⁷²

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

73. 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

⁷¹ A/RES/68/254 of January 2014 para. 4 and 5.

⁷² A/RES/73/276 adopted on 22 December 2018.

Administrative Tribunal and indeed from UNAT⁷³, 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 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 61/261.⁷⁴ 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*”⁷⁵, the Tribunal finds this statement’s normative value limited to the importance of a proper application of the *lex specialis* principle.

74. 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.⁷⁶ Altogether, with respect

⁷³ 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.

⁷⁴ 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).

⁷⁵ Respondent’s submission in response to Order No. 106 (NBI/2019) para. 7 (citing General Assembly resolutions 69/203, para. 37, and 71/266, para. 29).

⁷⁶ 2018-UNAT-840, paras 80-82, 92.

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.

75. 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”⁷⁷ 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

76. 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

⁷⁷ Respondent’s submission in response to Order No. 106 (NBI/2019), para. 8.

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 to General Service staff in Montreal promulgated by the ICSC under art. 11, entailed an examination of the ICSC decision for reasonableness.⁷⁸

77. 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.⁷⁹ 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 1984⁸⁰, 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.⁸¹ The ICSC recalled this precedent in its report of 2012.⁸² Intervention of the General Assembly largely removes the matter from the purview of the Tribunals. This is confirmed in *Ovcharenko*, where the Appeals Tribunal confirmed legality of the

⁷⁸ *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.”

⁷⁹ General Assembly decision 67/551 of 24 December 2012.

⁸⁰ General Assembly Resolution 39/27 of November 1984.

⁸¹ UN Administrative Tribunal Judgment No. 370, *Molinier* (1986).

⁸² 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.”

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.⁸³ In such cases, the regulatory decision is attributed directly to the General Assembly and thus, in accordance with *Lloret-Alcañiz et al.*, judicial review is limited to the question of a normative conflict between the acts of the General Assembly.

78. The Tribunal notes that, with respect to the present dispute, the General Assembly observed in its resolution 72-255⁸⁴:

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 [...].

⁸³ *Ovcharenko* 2015-UNAT-530, para. 34.

⁸⁴ A/RES/72/255, published 12 January 2018.

Further, in resolution A-RES-74-255⁸⁵, 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 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 [...].

79. Accompanying documents, in particular, the Report of the ICSC for 2017 and its Addendum⁸⁶ 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

80. Relying on the Salary Scale cases, UNDT Judgment in *Quijano Evans et al.*⁸⁷, the Applicants submit that tension has been created between a binding decision of the General Assembly and the breach of acquired contractual 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.

81. 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

⁸⁵ A/RES/74/255, para. 7.

⁸⁶ A/72/30 and A/72/30/Corr.1, Add.1, Annex 2 to Respondent's submission pursuant to Order No. 189 (NBI/2018).

⁸⁷ *Quijano Evans et al.* UNDT/2017/098, paras 60-71.

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 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.

82. 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.⁸⁸ 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.

83. 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.

⁸⁸ See The Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization Article XI; ILOAT Judgment Nos. 2420, 1821, 1682, 1419, 1265; and ILO Protection of Wages Convention, 1949 (No. 95) Article 14.

Respondent's submission

84. The Respondent submits that the change in the post adjustment multiplier does not violate the Applicants' acquired rights. Staff members do not have a right to the continued application of the Staff Regulations and Rules, including the system of computation of their salaries, in force at the time they accepted employment for the entirety of their service.⁸⁹ Relying on UNAT's pronouncement in *Lloret Alcaniz et al.*⁹⁰, the Respondent asserts that post adjustment is not a benefit accrued in consideration for performance rendered. As defined in Staff Rule 3.7, post adjustment is an amount paid to "ensure equity in purchasing power of staff members across duty stations." The changes to the post adjustment were applied prospectively, having been announced in 2017 but taking effect only in February 2018. Thus, the fact that the post adjustment multiplier resulted in a reduction in net pay for future salaries did not violate the Applicants' acquired rights.⁹¹

Considerations

85. Noting that in various submissions the parties refer to contractual versus statutory elements of the employment relation as distinguished by the former United Nations Administrative Tribunal in the *Kaplan* case⁹², it will be useful to begin with a general clarification. 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".⁹³ In the

⁸⁹ Respondent's reply, para 41.

⁹⁰ 2018-UNAT-840, para. 87.

⁹¹ Respondent's reply, para. 43.

⁹² UN Administrative Tribunal Judgment No. 19, *Kaplan* (1953)

⁹³ E.g., UN Administrative Tribunal Judgment 1253; ILOAT *Ayoub* (1987), consideration 13.

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 arrangement⁹⁴, 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 tradition dating back to the League of Nations⁹⁵, 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.⁹⁶

86. Another matter that needs to be noted indeed at the outset is that 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.* judgment⁹⁷ and reiterated in *Quijano-Evans et al.*⁹⁸. The approach of the Appeals Tribunal’s pronouncements on the concept of acquired rights merit citing them extensively.

87. 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

⁹⁴ *Farzin* 2019-UNAT-917, *Faust* 2017-UNAT-777 and *Jemiai* 2011-UNAT-137; *Avramoski* UNDT/2019/085.

⁹⁵ 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.

⁹⁶ Judgment No. 19 (1953).

⁹⁷ *Ibid.*

⁹⁸ *Quijano-Evans et al.* 2018-UNAT-841.

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.

88. 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.

89. 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.

90. 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.⁹⁹ 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.

91. On the first issue, consideration must be given to the fact that the employment relation by definition presupposes continuity 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-

⁹⁹ 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).

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 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.

92. 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 strike¹⁰⁰; 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.

93. 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.

94. At the outset, it should be noted that the criterion applied in the *Kaplan* case¹⁰¹, 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

¹⁰⁰ *Lloret Alcaniz et al.*, *ibid.*, para. 94, *Quijano-Evans et al.*, *ibid.*, at para. 52, p. 27.

¹⁰¹ UN Administrative Tribunal Judgment No. 19, *Kaplan* (1953); see also ILOAT Judgment No. 29, *in re Sherif* (1957); UN Administrative Tribunal Judgment No. 202, *Queguiner* (1975).

jurisprudential developments, therefore, explore when individually determined (“contractual”) elements might be statutorily modified.

95. 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.¹⁰²

96. 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.¹⁰³ 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.¹⁰⁴

97. 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.¹⁰⁵

98. 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

¹⁰² ILOAT *Lindsay*, Judgment No. 61 (1962), followed by WBAT in *de Merode*, *ibid.*

¹⁰³ ILOAT *Ayoub* (1987), consideration 14.

¹⁰⁴ *Ayoub* *ibid.*, consideration 15.

¹⁰⁵ *Ayoub*, *ibid.*, consideration 13; *de Merode*, *ibid.*, para 43.

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 the entitlement¹⁰⁶ 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”.¹⁰⁷

99. 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.¹⁰⁸ 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 members¹⁰⁹; must arise from reasonable motives; must not cause unnecessary or undue injury¹¹⁰ or “significantly alter the level of basic benefits¹¹¹ or “cause unnecessary forfeiture or deprivation”.¹¹² In the latter aspect, it was also proposed to consider whether the modification is permanent or temporary.¹¹³

100. 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,

¹⁰⁶ UN Administrative Tribunal Judgment No 1253, consideration V.

¹⁰⁷ 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”.

¹⁰⁸ UN Administrative Tribunal Judgment Nos. 403, 404, 405.

¹⁰⁹ UN Administrative Tribunal Judgment No. 379.

¹¹⁰ UN Administrative Tribunal Judgment No. 405 adopting after ILOAT in *Ayoub*.

¹¹¹ UN Administrative Tribunal Judgment No. 404.

¹¹² UN Administrative Tribunal Judgment No. 403.

¹¹³ UN Administrative Tribunal Judgment No. 403, partially dissenting opinion of Judge Pinto.

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 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

101. 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 employment¹¹⁴ 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.¹¹⁵ 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.

102. 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,

¹¹⁴ Staff rule 3.7.

¹¹⁵ General Assembly resolutions 38/232; 44/198, 72/255, 73/273

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 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.¹¹⁶

103. 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.

104. 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.

105. 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 comprehensive¹¹⁷; 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 2017¹¹⁸; that certain alternative calculations should first be tested within the

¹¹⁶ See also Application, annex 16, 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).

¹¹⁷ Application, annex 13, page 4, paras. 10 and 69.

¹¹⁸ Ibid., page 37, para. 57.

ICSC system, to ensure that they are precise¹¹⁹; and that with regard to multiple issues 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.¹²⁰ 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.¹²¹ As evidenced by both reports, regarding numerous components relevant for the ultimate calculation, there are available alternative policies and methodological approaches.

106. 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.

107. 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".¹²² 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.

108. 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

¹¹⁹ Ibid., page 43, para. 71.

¹²⁰ Ibid., pages 65-66, paras 162 & 164.

¹²¹ Application, annex 16, para. 10, p. 37 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).

¹²² ICSC report for 2017; independent expert report, Chapter 4 para 17.

responsible for up to 4.1% downward miscalculation. In this regard, concerning the 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.¹²³ 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%.¹²⁴ 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."¹²⁵

109. 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

¹²³ Application, annex 16, Chapter 2 paras 33-49 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).

¹²⁴ Ibid., p. 78.

¹²⁵ Ibid., Chapter 6, para. 10.

month of implementation) is augmented by 3 per cent to derive a revised post adjustment multiplier for the duty station;

(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 [..]

110. 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 5.2% of the salary as a whole, as it is presented by the Applicants¹²⁶, 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”.

111. 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.¹²⁷ 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

¹²⁶ Statement in para. 86 of the application refers to the document of Post Adjustment Changes for Group I Duty Stations Q and A, Question 7, which indicates that the 5,2% reduction was speculative based on an “(unrealistic) assumption that the CHF/USD exchange rate will remain the same”, however, attributed to the fluctuation in operational exchange rates and not to any particular feature of the applied methodology.

¹²⁷ General Assembly resolutions 72/255, 73/273 and 74/255 A-B.

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 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.

112. 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

113. 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.¹²⁸

Respondent's submissions

114. 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.¹²⁹ 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

115. 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.

116. The Tribunal wishes to add that the impugned decision subject to its review

¹²⁸ Applicants' motion to file submissions regarding ILOAT Judgment No. 4134.

¹²⁹ *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.").

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.

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

JUDGMENT

118. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 29th day of July 2020

Entered in the Register on this 29th day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi