Before: Judge Agnieszka Klonowiecka-Milart

Registry:

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 Applicant filed a motion seeking leave to file submissions on ILOAT Judgment No. 4134 and its relevance to the instant case. By Order No. 105 (NBI/2019), the Tribunal admitted the Applicant's submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the Applicant's submissions on 6 August 2019.

8. The Applicant filed additional submissions on 5 February 2020.

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

16. On 10 July 2017, the Applicant sought management evaluation of the decision to implement the post adjustment change to her salaries effective 1 May 2017 that would result in a 7.7% reduction in her net remuneration.[16] In the ensuing litigation, this Tribunal, in its Judgment No. UNDT/2018/025, dismissed the application as irreceivable, having found that no individual decisions had been taken in the Applicant's case.

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

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

18. On 18 July 2017, the ICSC decided to change the implementation date of the results of the cost-of-living survey in Geneva from 1 May 2017 to 1 August 2017.[22] 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.[23]

19. On 14 September 2017, the Applicant requested management evaluation of the 19 and 20 July 2017 decisions indicating, in the alternative to previous filings,[24] this decision date as being from receipt of the August payslip.[25] This decision forms the basis of the present application.

20. On 27 October 2017, UN Women's Director of Human Resources responded to the Applicant's management evaluation request of 14 September. The Director informed the Applicant that her request was not receivable because the contested decision was of general application to all staff of the United Nations Common System; consequently, it did not satisfy the definition of an administrative decision; it was to take effect in February 2018, thus she had not suffered any loss in her remuneration attributable to the contemplated changes in post adjustment; and that the Secretary-General had no discretion in implementing a binding decision of the ICSC. Consequently, the contested decision did not satisfy the definition of an administrative decision.[26] The Applicant filed the current application on 21 December 2017.

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

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

Respondent's submissions

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

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

Applicant's submissions

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

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

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

Considerations

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

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

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

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

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

salaries for extant staff members at then-existing rates and established a second tier of salaries for staff members hired on or after 1 March 2012. The UNAT agreed with the UNDT's reasoning that the decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 did not amount to an administrative decision under art. 2.1(a) of the UNDT's Statute, as per the terms of *Andronov*

on the aspect that the Secretary-General was bound by the ICSC decision[38], however affirmed the judgment, among other, because "Mr. Obino did not identify an

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

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

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

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

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

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

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

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

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

properly implemented it; the Tribunal lacks competence to review legislative decisions and the Applicant is erroneously asking the Tribunal to assume powers it does not have

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

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

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

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

Respondent's submissions

57. The Respondent explains that the reference to "scales" of post adjustment in art. 10(b) refers to a former method of calculating post adjustment based on schedules of post adjustment that were, in the past, submitted by the ICSC to the General Assembly for approval under art. 10(b) of its Statute and annexed to the Staff Regulations. Post adjustment scales were needed to implement the principle of regressivity, and to indicate how the post adjustment multiplier would be modified, when applied to staff members depending on their gr0ndepedepe0103(be)e0(StC)-341(0(-

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

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

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

Considerations

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

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

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

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

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

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

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

1. *Reaffirms*

been questioned.[72] This considered, the Applicant's 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 Applicant's argument cannot be upheld under the Statute.

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

Article 1

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

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

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

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

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

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

Applicant's submissions

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

Respondent's submissions

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

73. The Respondent submits that, since 1987, the ILOAT has applied the principle that if a "*decision is based on one taken by someone else it is bound to check that the*

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

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

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

Considerations

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

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

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

77. Only in the first case, where a court or tribunal pronounces on the question of legality of an act, in the operative part of a judgment, be it deci7]4platory ra cn(s)-1(t)1(tut(iv,t)1(

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

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

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

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

> [A]ll elements of the system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly" and that "decisions taken by the Dispute Tribunal and the United Nations Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management[82].

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

[81] ICJ, *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*,

the UNDT, and UNAT alike, independence from the executive, reduce its cognizance

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

The scope of review of regulatory decisions on post adjustment.

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

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

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

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

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

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

> Preamble
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> 6. *Notes with serious concern* that some organizations have decided not

> station under article 11 (c) of the statute of the Commission as a matter of priority, and requests the Commission to report on the matter to the General Assembly at its seventy-fifth session […].

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

Whether acquired rights have been violated.

Applicant's submission

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

91. Relying on ILOAT Judgment No. 832, In re *Ayoub* (1985), the Applicant submits that the right to a stable salary represents an acquired right that can reasonably be considered to have induced her 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 Applicant's acquired right to a stable remuneration

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

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

92. The Applicant submits 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. She further submits that the methodology does not provide for results that are foreseeable, transparent and stable.[100] There is no foreseeability because the decision-making process is fragmented, rule changes are adopted in a piecemeal manner and relevant information is dispersed over numerous documents. The findings by the statisticians from the Geneva-based entities show that the lack of transparency extends beyond the ICSC decision making process and into their methodology and treatment of data.

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

Respondent's submission

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

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

tradition dating back to the League of Nations,[108] may be misleading. Strictly speaking,

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

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

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

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

> … The limited purpose of Staff Regulation 12.1, therefore, is to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled. The protection of acquired rights therefore goes no further than guaranteeing that no amendment to the Staff Regulations may affect the benefits that have accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment.[33] Amendments may not retrospectively reduce benefits already earned. In the final analysis, the doctrinal protection of acquired rights is essentially an aspect of the

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

105. On the question of interests involved, there is obviously, interest of staff in stability of employment conditions and protection from arbitrary change and erosion. Here, recognition is due to the fact that international civil servants do not participate in a democratic legislative process and in principle, as mentioned by the Appeals Tribunal in *Quijano-Evans et al*. have no right to strike[113]; thus, enhanced protection is required. It would not be, however, appropriate to place it in sharp opposition with the public interest in "that public authorities retain the freedom to exercise their discretionary or

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

112. Other former United Nations Administrative Tribunal decisions remained on the position that the question of acquired rights does not arise where the modification has no retroactive effect. Instead, a fetter on legislative power to introduce modification with effect for the future was construed through the test of reasonability, applied in light of the principles laid down in the Charter of the United Nations art. 101 para. 3, *i.e.*, that economy measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service.[121] Concerning specific requirements that a modification must meet in order to be reasonable, the following were distinguished: the modifications must not be arbitrary; must be consistent with the object of the system, for example, adjustment to cost-of living changes and protection of purchasing power of staff members[122]

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.

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

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

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

118. As a starting point, it is undisputed and confirmed by all those engaged in the matter in a professional capacity: experts, ACPAQ members and commissioners themselves, that the post adjustment calculation presents extreme complexity and is not applied pursuant to arithmetical or even purely statistical method. To this end, the Geneva statisticians' review, notwithstanding its overall rejection of the methodology

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

123. The Tribunal agrees with the Applicant 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 Applicant, 4.7% of the post adjustment component of the salary - and not 4.7% of the salary as a whole, as it is presented by the Applicant, moreover, delayed by one year through the application of the transitional allowance - is not such that would overly deplete the content of the entitlement or cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".

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

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

Respondent's submissions

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

Considerations

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

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

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

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