INTRODUCTION

1. The Applicants[1] are staff members of the United Nations Entity for Gender Equality and the Empowerment of Women ("UN Women") who were based in Geneva, Switzerland, at the time of the contested decision. They are challenging the Administration's decision to implement a post adjustment multiplier resulting in a pay cut.

2. The current application was initially filed with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Geneva on 8 August 2018, and then transferred to UNDT in Nairobi on 14 February 2019 after the Geneva-based UNDT Judge President recused herself from the proceedings.[2]

PROCEDURAL HISTORY

3. The application belongs 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 application belonging to the fourth wave was accepted as receivable being directed against an individual decision on reduction of post adjustment and application of transitional allowance. It was dismissed on the merits, by way of a judgment which is not yet final. The fifth wave case concerns a different individual decision 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

[1] The Applicants are Lana Bozic and Rahel Steinbach. See Application, annex 7 & annex 9, footnote 1.
[2] Order No. 008 (GVA/2019).

arguments presented by them in the fourth wave case.[3] The facts described in the 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.

[3] Reply, para. 9.

FACTS

9. At its 38th session in February 2016, the Advisory Committee on Post Adjustment Questions ("ACPAQ")[4] 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.[5]

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 adjustment[6] index at these locations. Geneva was one of the duty stations included in the survey.[7]

established transitional measures.[10] 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.[11]

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.[12]

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").[13] 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.[14]

14. Between 31 May and 2 June 2017, an informal review team of senior

[10] Ibid., paras. 105 and 106.
[11] Ibid., paras. 92-98.
[12] Application, annex 13, paras. 5 - 7. The organizations were: ILO, UNOG, ITU, WIPO, WHO, UPU, IOM, WMO, UNAIDS and UNHCR.
[13] Reply, annexes 3, 4 and 5.
[14] Reply, annex 5, section V.

statisticians,[15] requested by the Geneva Human Resources Group[16], conducted a

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 […]".[19] The consultant made 64 recommendations, including but not limited to the methodology for the post adjustment system, policies and specific issues. [20] The staff associations engaged another independent expert who reviewed and elaborated on selected recommendations from the ICSC's consultant's report.[21]

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.[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]

18. On 14 September 2017, the Applicants requested management evaluation of the 19 and 20 July 2017 decisions indicating, in the alternative to previous filings[24], the decision date as being from receipt of their August payslips, 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 Nos. UNDT/2020/114 and UNDT/2020/115 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

[19] Application, annex 16, page 37, para. 10 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).
[20] Ibid., pp. 47-54.
[21] Application, annex 17 (Comments on the consultant report – "review of the post adjustment methodology" – and prioritization of its recommendations).
[22] Reply, annex 7, para. 129 (A/72/30 – Report of the International Civil Service Commission for the year 2017).
[23] Application, annexes 2 and 3; reply, annex 8.
[24] See Judgment Nos. UNDT/2018/025, UNDT/2018/026, UNDT/2018/034, UNDT/2018/035, UNDT/2018/069 and UNDT/2018/073.

through a "post adjustment classification memo". The General Assembly has repeatedly affirmed that decisions of the ICSC are binding on the Secretary-General[33] 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 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*[34], 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

[33] Reply, annex 14 (General Assembly resolutions 66/237, para. 37 and 67/241, para. 3).
[34] Judgment No. 2015-UNAT-555.

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.

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.[35] 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 wctse(of unjtse1(ffe)1(w)-memb)-7’ 12 Tf [( )] T

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.[36] 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.[37]

30. Receivability of non-discretionary decisions implementing acts of general order is confirmed by the Appeals Tribunal jurisprudence in *Tintukasiri*[38], *Ovcharenko*[39] and *Pedicelli*[40]. 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

[36] *Oummih* 2014-UNAT-420 at paras. 19-20.
[37] See *Sanwidi* 2011-UNAT-104; *Frohler* 2011-UNAT-141 and *Charles* 2012-UNAT-242.
[38] 2015-UNAT-526.
[39] 2015-UNAT-530.
[40] 2017-UNAT-758.

> 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[41]

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 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."[42]

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

[41] 2014-UNAT-405.
[42] *Kagizi* 2017-UNAT-750 para. 22.

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

practice cannot become legally binding if it contravenes a written rule that is already in force".[46]

46. The Applicants submit[47] 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.[48]

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

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.[51] 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 9-86(a)1(ter2256 Tpost he)] TJ 1 0 0 -se1(tghesof r)5g176.eal Ass adjufperation

amended because there was no need for it.

Considerations

54. 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.[56] 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.[57] 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

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

[57] 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".

to duty stations.[58] 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.[59] 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;[60]
>
> 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 […].

[58] See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).
[59] 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.
[60] Resolution 3357 (XXIX).

> 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.

60. As results from section 2, the United Nations has been juxtaposed with "specialized agencies and other international organizations …which accept the present statute".[63] 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.[64]

[63] 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.
[64] Application, paras. 36 and 47.

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 "receivability of challenges to decisions by legislative bodies and by their subsidiary organs".[65]

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."*[66] 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.*[67], 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".[68] The Respondent derives therefrom that the UNDT lacks jurisdiction to review the legality of legislative decisions.

[65] Respondent's submission in response to Order No. 106 (NBI/2019).
[66] Ibid., citing to ILOAT Judgment No. 4134, considerations 8, 26.
[67] 2018-UNAT-840.
[68]

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

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

> [The applicant] may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it.. [T]he Tribunal confirms its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.[70]

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 iquiry 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 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 reg [(0 -1 ,e)] TJ 1 0 0 -1 0 52.59999847 Tm [(winistra)"poaa15014

> General Assembly (…).[71]

71. 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".[72]

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.[73]

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

Assembly largely removes the matter from the purview of the Tribunals. This 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.[84] 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 72-255[85]:

> **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

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1983 and 1985 […] as a result of the decision by the General Assembly to reduce the net remunera0 52.59999847 Tm [(sep] TJ

> the feasibility of more frequent reviews of post adjustment classifications of duty stations;
>
> 4. *Further requests* the Commission to review the gap closure measure in the post adjustment system during its next round of cost -of-living surveys […].

Further, in resolution A-RES-74-255[86], 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

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 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

applying a new and untested methodology.

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.[90] Relying on UNAT's pronouncement in *Lloret Alcaniz et al.*[91], 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.[92]

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* case[93], it will be useful to begin with a general clarification. A contractual relationship refers to the relationship between the

facto precondition of appointment, which nevertheless is formally based on an act of authority, hence, at times, the expression used is "contract of appointment".[94] In the relation between the staff members and the United Nations, while the Appeals Tribunal recognized that the terms of conditions of appointment could at times be supplemented

was susceptible to amendments through the operation of *lex posterior*:

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

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 intende4(to)-494(receive)-4intena8l

> … 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

> … 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 C8›#*qK%;K#=;E;" the system of computation of their *!›!=E#*qE; 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.[100] 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 continuality and durability, whether during a pre-

[100] 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).

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

relation, the former conducive to acquired rights and thus outside the scope of unilateral modification by the employer, did not survive the test of utility over time. Subsequent jurisprudential developments, therefore, explore when individually determined ("contractual") elements might be statutorily modified.

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.[103]

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.[104] 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.[105]

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.[106]

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

[103] ILOAT *Lindsay*, Judgment No. 61 (1962), followed by WBAT in *de Merode*, ibid.
[104] ILOAT *Ayoub* (1987), consideration 14.
[105] *Ayoub* ibid., consideration 15.
[106] *Ayoub*, ibid., consideration 13; *de Merode*, ibid., para 43.

acquired rights. The Tribunal contemplated the following criteria: the term of appointment has a statutory, and not a contractual character; amendments do not deny the right as such (in that case the right to pension) but only introduce rules that garnish it; amendments serve a legitimate objective and do not overly deplete the content of the entitlement[107] or, as it was alternatively proposed, do not cause "extreme grave

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 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.[124] 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%. [125] 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

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 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 demonstrateants dlecantsnon c competitik pn6lmsssembtl(stafc)-124tmehe

116. 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.

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