INTRODUCTION

1. The Applicants are 21 staff members of the United Nations Office for Project Services ("UNOPS") who were based in Geneva, Switzerland, at the time of the contested decision. They are challenging the Administration's decision to implement a post adjustment multiplier resulting in a pay cut.

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

PROCEDURAL HISTORY

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

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

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

[1] Order Nos. 019 (GVA/2018) and 027 (GVA/2018).

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

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

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

FACTS

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

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

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

11. In September/October 2016, the ICSC conducted comprehensive cost-of-living surveys at seven headquarters duty stations outside New York to collect price and expenditure data for the determination of the post adjustment 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

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

16. On 10 July 2017, the Applicants sought management evaluation of the decision to implement the post adjustment change to their salaries effective 1 May 2017 that would result in a 7.7% reduction in their net remuneration.[16] In the ensuing litigation, this Tribunal, in its Judgment No. UNDT/2018/021, dismissed the application as irreceivable, having found that no individual decisions had been taken in the Applicants' cases.

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

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

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

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.

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 , applications originating from implementation of acts of general order are receivable when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision, such as through a pay slip or personnel action form. The Applicants in the current case have not alleged any such crystallization.

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

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

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

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

Considerations

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

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

26. It is further recalled that in [29], the UNAT adopted the former United Nations Administrative Tribunal's definition forged in , 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]

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[28] UNDT/2018/025, para. 58.
[29] 2012-UNAT-269, para. 23.
[30] UN Administrative Tribunal Judgment No. 1157, (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 , because at the moment of their issuance the secondary salary scales were to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. The UNAT upheld the UNDT's finding that the applications were not receivable . [34] However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

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

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

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

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

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

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

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

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

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.

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, , 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

44. Jurisdictionally, the discord on the point in issue seems to have originated from . In , 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, 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

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

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

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

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

> The Commission shall make recommendations to the General Assembly on:
>
> (a) The broad principles for the determination of the conditions of service of the staff;
>
> (b) The scales of salaries and post adjustments for staff in the Professional and higher categories;
>
> (c) Allowances and benefits of staff which are determined by the General Assembly;
>
> (d) Staff assessment.

> The Commission shall establish:
>
> (a) The methods by which the principles for determining conditions of service should be applied;
>
> (b) Rates of allowances and benefits, other than pensions and those referred to in article 10 (c), the conditions of entitlement thereto and standards of travel;
>
> (c) The classification of duty stations for the purpose of applying post adjustments.

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

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

55. The Applicants further echo ILOAT Judgment 4134 in its analysis of art. 10 of the ICSC statute as exclusively governing the

and its conclusion that because articles 10 and 11 cover

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

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

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

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. the authority of the International Civil Service Commission to continue to establish post adjustment multipliers for duty stations in the United Nations common system, under article 11 (c) of the statute of the Commission;[70]
>
> 2. that, in its resolutions 44/198 and 45/259, it abolished the post adjustment scales mentioned in article 10 (b) of the statute of the Commission, and reaffirms the authority of the Commission to continue to take decisions on the number of post adjustment multiplier points per duty station, under article 11 (c) of its statute […].

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

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

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

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

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

> 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, (1986), also UNAT in , 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.

must demonstrate that they have examined whether such decisions are proper. This

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 examination for the purpose of examining legality of an idividual decision based on a regulatory one. In consequence, the Respondent mixes the question of receivability with the question of legality.

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

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

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

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

[79] See 2011-UNAT-165; 2018-UNAT-841.
[80] 2015-UNAT-526, paras. 35-37.

Respondent's argument is not, therefore, about jurisdiction to pronounce on the illegality of regulatory acts akin to a constitutional court, because this is expressly ruled out, and is, thus, not about "receivability of challenges to decisions by legislative bodies and by their subsidiary organs". Rather, the question properly articulated would

on the administration of justice at the United Nations:

> […] all elements of the system of administration of justice, including the Dispute Tribunal and the Appeals Tribunal, must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly, and emphasizes that the decisions of the Assembly related to human resources management and administrative and budgetary matters are subject to review by the Assembly alone.[83]

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

83. The Tribunals are, on the other hand, not bound by acts not originating from the General Assembly, specifically, by issuances of the executive, where these issuances would be found to contradict the framework approved by the General Assembly. This conclusion is logically inevitable not just on the plain language of the General Assembly resolution but results even more forcefully from the nature of the jurisdiction of the Tribunal, which could not be exercised if the very entity appearing as Respondent before the Tribunals could impose rules binding upon them. The same principle, forming one of the cornerstones of the doctrine of separation of powers, is

the UNDT, and UNAT alike, independence from the executive, reduce its cognizance to a replication of the management evaluation process and deny staff members effective recourse to an independent tribunal, which is clearly against the rationale adopted by the General Assembly resolution 61/261.[85] Noting that the Respondent seeks support in the quote:

"[86], the Tribunal finds this statement's normative value limited to the importance of a proper application of the principle.

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

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

85. In conclusion, the Respondent's assertion that that the "Applicants' claims must

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 , 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

> 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.

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

91. Relying on ILOAT Judgment No. 832, In re (1985), the Applicants

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

92. The Applicants submit that the methodology applied by the ICSC raises issues regarding the International Service for Remunerations and Pensions ("ISRP") rent index, domestic services aggregation, place-to-place surveys, cost of education and medical insurance. They further submit that the methodology does not provide for results that are foreseeable, transparent and stable. There is no foreseeability because

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

95. The Respondent further recalls that the World Bank Administrative Tribunal in has distinguished between "fundamental or essential and non-fundamental or non-essential conditions of employment"[103]

processing of the data from the baseline cost-of-living surveys for 2016 were carried

tradition dating back to the League of Nations,[108] may be misleading. Strictly speaking, in the present relation it would be more accurate to distinguish individually determined elements (nature of appointment, duration, grade and step, duties and responsibilities) and generally applicable statutory elements. Salaries, in particular, as briefly

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

> 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 fFAAAAH

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

104. On the first issue, consideration must be given to the fact that the employment relation by definition presupposes continuality and durability, whether during a pre-determined finite period or indefinitely, with salary playing a central role in it; in this respect, periodical render of salary does not transform employment into a series of

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 [113] have no right to strike, thus, enhanced protection is required. It would not be, however, appropriate to place it in sharp opposition with the public interest in "that public authorities retain the freedom to exercise their discretionary or legislative powers", given that public interest lies also in guarantying stability to cadre and in attracting the most highly qualified personnel, as recognized by the United Nations Charter in article 101. The point lies rather in striking a balance between the competing interest of staff and the Organization's need to adapt its functioning and employment conditions to evolving circumstances.

106. On the en.8809he e im6[1 0 33.297004f(nin)-24(the r(nit)1opr-24(the1(li)miacting)0 33

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

109. The next development was marked by the ILOAT Judgment in , where a three-prong test was applied in determining whether the altered term is fundamental or essential. According to , 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 variablesepe0Buch

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, , 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

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

Application of the criteria to the impugned decision

114. As to the nature of the entitlement in the present case, it is undisputed that the post adjustment is an element of salary. The post adjustment multiplier, however, is

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

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

120. While the independent expert's review did not encompass the Geneva 2016 survey results, which is regrettable, it furnishes two pertinent observations. First, during the six years preceding the disputed survey, the post adjustment index of Geneva remained consistently lower than its pay index and, since March 2015, the gap between the two values continued to increase. On this example the independent expert cautioned that this increasing disconnect between the trends of the pay index and the updated post

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

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

124. Finally, the modification is temporary. As evidenced by ICSC reports 2017-2019, the impugned decision occurs in the context of a review of the post adjustment system carried out by the ICSC under the scrutiny of the General Assembly.[139] Retaining an independent expert to examine the methodology was a step toward a comprehensive review that was subsequently launched and which includes establishing

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

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

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

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

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

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

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

JUDGMENT

131. The application is dismissed.