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

INTRODUCTION

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

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

PROCEDURAL HISTORY

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

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

5. Between 13 September 2018 and 13 December 2018, the parties filed additional submissions and documents. Pursuant to Order Nos. 186 and 189 (NBI/2018) and 005

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

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

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

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

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

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

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

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

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

17. Pursuant to a decision made at the ICSC's 85th session in July 2017, 2017,

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)61(a h W npNUT2pNre

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

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

29. In the jurisprudence that followed, the issue may have to some ext BT 1a1(thag)ud reed.

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

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

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

Respondent's submissions

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

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

Considerations

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

42. Systemically speaking, the use of discretion as criterion for determination of an administrative decision has no basis in any generally accepted doctrine. Conversely, the doctrine of administrative law recognizes both discretionary decisions and constrained decisions, the latter having basis in substantive law which determines that

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

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

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

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

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

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

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

> *Article 10*
>
> The Commission shall make recommendations to the General Assembly on:
>
> (a) The broad principles for the determination of the conditions of service of the staff;
>
> (b) The scales of salaries and post adjustments for staff in the Professional and higher categories;
>
> (c) Allowances and benefits of staff which are determined by the General Assembly;
>
> (d) Staff assessment.
>
> *Article 11*
>
> The Commission shall establish:
>
> (a) The methods by which the principles for determining conditions of service should be applied;
>
> (b) Rates of allowances and benefits, other than pensions and those referred to in article 10 (c), the conditions of entitlement thereto and standards of travel;
>
> (c) The classification of duty stations for the purpose of applying post adjustments.

Applicants' submissions

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

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

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

56. While the General Assembly appears to have endorsed a departure from post adjustment scales in 1989, its resolutions 44/198 and 45/259 do not represent a legal

Respondent's submissions

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

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

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

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

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

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

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

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

Considerations

64. At the outset, the Tribunal finds it useful to recall an established principle that when the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation.[66] This follows general international practice, which refers to interpretation according to the 'ordinary meaning' of the terms 'in their context and in the light of [their] object and purpose' unless the parties intended to give the word a special meaning.[67] In the argument on ICSC's statutory competences, the

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

65. As demonstrated by the documents submitted by the Respondent as well as

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

> 1. *Reaffirms* the authority of the International Civil Service Commission to continue to establish post adjustment multipliers for duty stations in the United Nations common system, under article 11 (c) of the statute of the Commission;[70]
>
> 2. *Recalls* that, in its resolutions 44/198 and 45/259, it abolished the post adjustment scales mentioned in article 10 (b) of the statute of the Commission, and reaffirms the authority of the Commission to continue to take decisions on the number of post adjustment multiplier points per duty station, under article 11 (c) of its statute […].

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

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

[70] Resolution 3357 (XXIX).

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

been questioned.[73] This considered, the Applicants' argument relying on the procedure for express written approval of Statute amendments under art. 30 may raise questions: one about legitimacy to invoke insufficiency of the form, which appears to lie not with individual staff members but with executive heads of the participating organizations; a related one about a possibility to validate the change; yet another one about estoppel resulting from the 25 years of acquiescence. However, the alleged procedural defect may produce claims only to relative ineffectiveness, rather than absolute invalidity, of the changes. In this regard, specifically, the Applicants' argument cannot be upheld under the Statute.

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

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

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

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

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

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

Considerations

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

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

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

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

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

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

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

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

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

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

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

on the administration of justice at the United Nations:

the UNDT, and UNAT alike, independence from the executive, reduce its cognizance to a replication of the management evaluation process and deny staff members effective recourse to an independent tribunal, which is clearly against the rationale adopted by the General Assembly resolution 61/261.[85] Noting that the Respondent seeks support in the quote: *"recourse to general principles of law and the Charter of the United Nations by the Tribunals is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances"*[86], the Tribunal finds this statement's normative value limited to the importance of a proper application of the *lex specialis* principle.

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

The scope of review of regulatory decisions on post adjustment.

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

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

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

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

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

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

> Preamble
>
> 6. *Notes with serious concern* that some organizations have decided not to implement the decisions of the Commission regarding the results of the cost -of-living surveys for 2016 and the mandatory age of separation;
>
> 7. *Calls upon* the United Nations common system organizations and staff to fully cooperate with the Commission in the application of the post adjustment system and implement its decisions regarding the results of the cost-of-living surveys and the mandatory age of separation without undue delay;
>
> […]
>
> C. Post adjustment issues
>
> 1. *Notes* the efforts by the Commission to improve the post adjustment system;
>
> 2. *Requests* the Commission to report no later than at the seventy-fourth session of the General Assembly on the implementation of decisions of the Commission regarding the results of the cost -of-living surveys for 2016, including any financial implications;
>
> 3. *Also requests* the Commission to continue its efforts to improve the post adjustment system in order to minimize any gap between the pay indices and the post adjustment indices and, in this context, to consider the feasibility of more frequent reviews of post adjustment classifications of duty stations;
>
> 4. *Further requests* the Commission to review the gap closure measure in the post adjustment system during its next round of cost -of-living surveys […].

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

> 7. *Expresses concern* at the application of two concurrent post adjustment multipliers in the United Nations common system at the Geneva duty station, urges the Commission and member organizations to uphold the unified post adjustment multiplier for the Geneva duty

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

station under article 11 (c) of the statute of the Commission as a matter

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 the decision-making process is fragmented, rule changes are adopted in a piecemeal manner and relevant information is dispersed over numerous documents. The findings

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

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

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

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

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

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

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

granted in the past does not create an acquired right to future increases

103. It falls to be noted that referring the concept of acquired rights to entitlements already accrued was well-established in the jurisprudence of the former United Nations Administrative Tribunal such as the *Mortished* judgment and other ones, which were usually concerned with entitlements of a peripheral or occasional nature.[112] In such situations, the plane of reference is the state of the law at the time where the conditions for the entitlement were fulfilled; as a consequence, application of the doctrine of acquired right yields the same interpretative results as the non-retroactivity principle. In relation, however, to salary and other continuing benefits, the matter is more complicated and the jurisprudence, as will be shown below, diverged in addressing it. In rejecting the extension of acquired rights to a future salary, the *Lloret Alcaniz et al.* and *Quijano-Evans et al.* judgments place the matter of modifications in the area of regulatory discretion. These judgments did not contemplate - as apparently the ias speias spei

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

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

106. On the ensuing question of test or criteria limiting the power to introduce

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].

the entitlement

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

> (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

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

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

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

Applicants' submissions

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

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

Respondent's submissions

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

Considerations

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

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

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

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

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

JUDGMENT

131. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 14th day of July 2020

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi