Original: English

efore: Judge [redacted] Klonowiecka-Milart

Case No.: UNDT/NBI/2018/019

egistry: Nairobi

egistrar: Abena Kwakye-Berko

ANDREEVA et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

---

unsel for the Applicant:
bbie Leighton, OSLA

unsel for the Respondent:
hael Apiateng, UNDP

INTRODUCTION

1. The Applicants are 11 staff members of the United Nations Development Programme ("UNDP") 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. 016 (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

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

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

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

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

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

address in turn.

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

Respondent's submissions

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

Applicants' submissions

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

[26] See Judgment Nos. *Andreeva et al.* UNDT/2018/024 and *Andres et al.* UNDT/2018/037.
[27] Respondent's reply, annex 9.

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 *Hamad*[29] the UNAT adopted the former United Nations Administrative Tribunal's definition forged in *Andronov*, which describes an administrative decision as:

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

27. As can be seen from the above, the notion of an administrative decision for

affirmed the judgment, among other, because “Mr. Obino did not identify an

concluded:

> Notwithstanding the foregoing, it is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such

general order has resulted in norm crystallization in relation to individual staff

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 where elements of a certain legal norm are fulfilled, the administrative authority will

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/1A (para. 8, diagram 4) and annex R/2.
[60] Respondent's submission in response to Order No. 105 (NBI/2019), annex R/1A 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.

60. The Respondent argues against ILOAT's interpretation of art. 10 as exclusively governing the *"determination of post adjustments in a quantitative sense"*. According to the Respondent, this reasoning reflects a misunderstanding of how the post adjustment system has operated, before and after the 1989 changes to the post adjustment system.[63] The ICSC has always assigned post adjustment multipliers to duty stations. The Respondent provides examples that before the changes were initiated in 1989 the ICSC did this by assigning each duty station to a class corresponding to a specific post adjustment multiplier. After the changes, the ICSC did this by establishing a specific post adjustment multiplier for each duty station. The Respondent stresses that classification of duty stations has always been linked with the establishment of post adjustment multipliers and, therefore, has always involved a determination of post adjustment in the quantitative sense without the need for General Assembly approval.[64]

61. The Respondent further submits that already in the second annual report of the ICSC, the ICSC emphasized its responsibility under art. 11 for "establishing the methods" for determining conditions of service and the classification of duty stations for the purpose of applying post adjustments. The ICSC stated that "the technical questions of methodology involved in computing post adjustment indexes, in making place-to-place and time-to-time comparisons and in classifying duty stations on the basis of the indexes" fell within its competence.[65] The General Assembly has not challenged the ICSC's authority in respect to post adjustment classification under art. 11(c).

62. Since the removal of classes in 1993, the annual reports of the ICSC have defined the term "post adjustment classification" as follows:

> Post adjustment classification (PAC) is based on the cost-of-living as reflected in the respective post adjustment index (PAI) for each duty

[63] Respondent's submission in response to Order No. 105 (NBI/2019), para. 16 and annex 1A.
[64] Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 1.B, p. 13).
[65] Supplement No. 30, para. 241 (A/31/30 – Report of the International Civil Service Commission).

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

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

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

Considerations

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

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

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

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

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

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.

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

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 applied in state systems, where a regular judiciary is bound by statutes only, whereas inferior regulatory acts are binding on the executive and presumed legal, the courts, however, may refuse their application to a case on the score of nonconformity with statutes. There is a rich body of jurispru135h8c945staa.e1e.rispr2,h8c944(t)1(hec945nfo(herc94e

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.

84. The last pertinent issue on this score is one contemplated in the *Lloret-Alcañiz et al.* judgment. Contrary to the Respondent's linguistic parsing based on selective quotes from it, what the Appeals Tribunal confirmed in *Lloret-Alcañiz* was that UNDT and UNAT may also need to incidentally review acts originating from the General Assembly, where a question arises about a conflict of norms.[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 *Neault* 2013-UNAT-345 judgment, while in both cases the regulatory acts were found unlawful.

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[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.

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

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

[89] *Pedicelli* 2017-UNAT-758 para 26 "We find no error in [UNDT's finding] that the renumbering exercise "had a legitimate organizational objective of introducing the GCS for GS positions."
[90] General Assembly decision 67/551 of 24 December 2012.
[91] General Assembly Resolution 39/27 of November 1984.
[92] UN Administrative Tribunal Judgment No. 370, *Molinier* (1986).
[93] Report of the ICSC for 2012, A/67/30 para 17: "The Commission recalled that measures to constrain or withhold increases in net remuneration of United Nations common system Professional staff already existed. They consisted in the suspension of the normal operation of post adjustment and freezing the post adjustment classification at the base of the system, New York, and, concurrently, at all other duty stations, to the same extent as that to which the New York post adjustment would be frozen. Not only had such measures been established, but they had also been applied in the past, in particular, between 1983 and 1985 […] as a result of the decision by the General Assembly to reduce the net remuneration margin and to bring it within the newly established range. The Commission therefore considered that it was feasible to apply the same approach to reflect the pay freeze of the comparator civil service, if the Assembly so decided."
[94] Respondent's comments pursuant to Order No. 189 (NBI/2018), para. 33.
[95] *Ovcharenko* 2015-UNAT-530, para. 34.

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.[100] There is no foreseeability because the decision-making process is fragmented, rule changes are adopted in a piecemeal manner and relevant information is dispersed over numerous documents. The findings by the statisticians from the Geneva-based entities show that the lack of transparency extends beyond the ICSC decision making process and into their methodology and treatment of data.

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

Respondent's submission

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

[100] See The Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labor Organization Article XI; ILOAT Judgment Nos. 2420, 1821, 16.ct814191, 265;e

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. 64 - 72.

processing of the data from the baseline cost-of-living surveys for 2016 were carried out by the ICSC Secretariat in accordance with the established methodology, and that decisions taken in the context of this review were not taken in isolation, but in the framework of the Commission's overall decisions on methodological and operational matters pertaining to the 2016 round of surveys. The Chairman of the ICSC also concluded that the findings of the Geneva statisticians "*were found to be based on alternative methodologies, data, and scenarios that appeared to be formulated for the purpose of changing the result for one duty station*".[105] Lastly, the ICSC advised that

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

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

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

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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

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]

109. The next development was marked by the ILOAT Judgment in *Ayoub*, where a three-prong test was applied in determining whether the altered term is fundamental or essential. According to *Ayoub*, the first test is the nature of the term. Here, whereas the contract or a decision may give rise to acquired rights, the regulations and rules do not necessarily do so. The second test is the reason for the change. It recognizes that the terms of appointment may often have to be adapted to circumstances, and that there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted. The third test is the consequence of a modification, that is, what effect will the change have on staff pay and benefits.[116] In this regard, financial injury to the complainants, even if serious, is not enough in itself to establish it as a breach of acquired right.[117]

110. Finally, this jurisprudence recognized that sometimes only the existence of a particular term of appointment may form the subject of an acquired right, whereas the arrangements for giving effect to the term may do so or not.[118]

111. The parallel jurisprudence of the former United Nations Administrative Tribunal was not entirely consistent on the question whether the acquired rights concept extends beyond prohibition of non-retroactivity. Judgment No. 1253 answered in the positive but accepted that modifications are not necessarily inconsistent with the acquired rights. The Tribunal contemplated the following criteria: the term of appointment has a statutory, and not a contractual character; amendments do not deny the right as such (in that case the right to pension) but only introduce rules that garnish it; s0n8tn00e(La3,u00452 Tm [e264,2(o)-10(t)1ih1)1(s0n8-8(sta1)-8(aa1 1(endma1 over)-235a1

the entitlement[119]

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 not an individually determined ("contractual") element of the salary, rather, unlike the salary *sensu stricto*, it is inherently variable in relation to the cost of living, with a view, in addition, to maintaining purchasing power parity of salaries across duty stations, and not to keep pace with inflation at any particular duty station. The Applicants' general right to post adjustment under the terms of their employment[127] is not at issue; rather, the question concerns decisions adopted to give effect to this right. With this respect, the legal benchmarks in place include determining a comparator in accordance with the Noblemaire principle and directives to adjust remunerations to accurately reflect differences in the cost of living at various duty stations in observance of the established margin.[128] Otherwise, methods of calculating the post adjustment and establishing procedures for it are delegated to the ICSC. The Tribunal takes it that there is also no dispute that the applicable rules do not confer upon the Applicants a right to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, they do not have an acquired right to the previous system of calculation or to the conv28(applu(e)40(wightr(icula)1(rks) Tma)1(rks) Tm[(12iologyot)-16(h

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]

(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 [..]

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

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 16th day of July 2020

Entered in the Register on this 16th day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi