Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANGEL[redacted]al.

v.

SECRETARY-GE[redacted]
OF THE UNITED NA[redacted]

JUDGMENT

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Alice Bartholomeusz, UNHCR
Elizabeth Brown, UNHCR

following sections of this Judgment are based on the parties' pleadings, additional submissions totalling over 3000 pages and record of the hearing which the Tribunal held in the fourth wave of cases on 22 October 2018 and where evidence was given by Ms. Regina Pawlik, Executive Head of the International Civil Service Commission ("ICSC") and Mr. Maxim Golovinov, Human Resources Officer, Office of Human Resources Management ("OHRM") on the following: (i) the legal framework for the functions of the ICSC vis-à-vis the General Assembly and the Secretary-General; (ii) the methodology used by the ICSC to establish the cost of living; and (iii) the function of the transitional allowance.

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

7. On 22 July 2019, the Applicants filed a motion seeking leave to file submissions on ILOAT Judgment No. 4134 and its relevance to the instant case. By Order No. 106 (NBI/2019), the Tribunal admitted the Applicants' submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the

Adjustment Questions ("ACPAQ")[3] reviewed the methodology for the cost-of-living measurements in preparation for the 2016 round of surveys. The Committee made recommendations on several aspects, including the use of price data collected under the European Comparisons Program ("ECP"). The ICSC approved all the ACPAQ's recommendations in March 2016.[4]

10. In September/October 2016, the ICSC conducted comprehensive cost-of-living surveys at seven headquarters duty stations outside New York to collect price and expenditure data for the determination of the post adjustment[5] index at these locations. Geneva was one of the duty stations included in the survey.[6] 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.[7]

11. 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.[8] 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.[9] At the same session, representatives of the Human Resources Network, the United Nations Secretariat, other Geneva-based organizations

[3] ACPAQ is an expert subsidiary body of the ICSC which provides technical advice on the methodology of the post adjustment system. It is composed of six members and is chaired by the Vice Chairman of the ICSC. https://www.unicsc.org/Home/ACPAQSubsidiary.
[4] Reply, annex 1, page 3 (ICSC/ACPAQ/39/R.2 – Report on the implementation of the methodology approved by the Commission for cost-of-living surveys at headquarters duty stations).
[5] 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).
[6] Application, annex 13 (ICSC/85/CRP.1 – Considerations regarding cost-of-living surveys and post adjustment matters – note by Geneva-based organizations).
[7] 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.
[8] Reply, annex 2, para. 100 (ICSC/84/R.8 – Report on the work of the International Civil Service Commission at its eighty-fourth session).
[9] Ibid., paras. 105 and 106.

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.[10]

12. In April 2017, the Executive Heads of Geneva-based organizations requested that ICSC provide information regarding the specific impact that the survey components and the changes to the methodology had on the 2016 survey results and proposed the deferral of any implementation until such information was available and validated in a process in which their representatives participated. The ICSC Chair provided the information on 9 May 2017.[11]

13. On 11 May 2017, the Department of Management informed staff members that: (a) the post adjustment index variances for Geneva translated into a decrease of 7.7% in the net remuneration of staff in the professional and higher categories; (b) the post adjustment change would be implemented effective 1 May 2017; (c) the new post adjustment would only be applicable to new staff joining Geneva on or after 1 May 2017; and (d) currently serving staff members would not be impacted until August 2017 due to payment of a personal transition allowance ("PTA").[12] 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.[13]

14. Between 31 May and 2 June 2017, an informal review team of senior statisticians,[14] requested by the Geneva Human Resources Group[15], 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

[10] Ibid., paras. 92-98.
[11] Application, annex 13, paras. 5 - 7. The organizations were: ILO, UNOG, ITU, WIPO, WHO, UPU, IOM, WMO, UNAIDS and UNHCR.
[12] Reply, annexes 3, 4 and 5.
[13] Reply, annex 5, section V.
[14] Application, annex 13, page 18. The review team consisted of two staff members of ILO, one staff member of UNCTAD and an international consultant.
[15] Ibid., page 19.

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 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.[16]

15. 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.[17] 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.

16. Pursuant to a decision made at the ICSC's 85th se20(s)rx in 2016.e59(ierr)-2o(a261rpggad)-14542

limited to the methodology for the post adjustment system, policies and specific issues. [19] The staff associations engaged another independent expert who reviewed and elaborated on selected recommendations from the ICSC's consultant's report.[20]

17. On 18 July 2017, the ICSC decided to change the implementation date of the results of the cost-of-living survey in Geneva from 1 May 2017 to 1 August 2017.[21] Staff members were informed on 19 and 20 July 2017 of the new implementation date, the reintroduction of a 3% margin to reduce the decrease of the post adjustment, postponement of post adjustment-related reduction for serving staff members by extending the transitional measures applicable to serving staff members from three to six months (i.e. 1 February 2018), and that subsequent post adjustment reductions would occur every four months instead of every three months.[22]

18. On 14 September 2017, the Applicants requested management evaluation of the 19 and 20 July 2017 decisions indicating, in the alternative to previous filings[23], the decision date as being from receipt of their August payslip, which reflected reduction of the post adjustment portion of salary and payment of the transitional allowance. That decision formed the basis of the Tribunal's Judgment No. UNDT/2020/118 in the fourth wave case between the parties.

19. On 7 February 2018, the Administration informed staff that the first quantitative reduction in post adjustment would be reflected in the February pay slip, reflecting a 3.5% decrease in net take-home pay.[24] On the same day the ICSC released a document entitled "Post Adjustment Changes for Group 1 Duty Stations – Questions and Answers" which explained the calculation of the pay cut.[25]

20. On 23 February 2018, the Applicants received pay slips indicating

[19] Ibid., pp. 47-54.
[20] Application, annex 17 (Comments on the consultant report – "review of the post adjustment methodology" – and prioritization of its recommendations).
[21] Reply, annex 7, para. 129 (A/72/30 – Report of the International Civil Service Commission for the year 2017).
[22] Application, annexes 2 and 3; reply, annex 8.
[23] See Judgment Nos. UNDT/2018/023, UNDT/2018/064 and UNDT/2018/067.
[24] Application, annex 4.
[25] Ibid., annexes 5 and 6.

implementation of the pay cut.[26] On 13 April 2018, they requested management evaluation of the reduction of their salaries as evidenced in their February pay slips.[27]

21. On 1 May 2018, the Office of the Deputy High Commissioner, UNHCR, acknowledged receipt of the Applicants' management evaluation request of 13 April 2018 but the Applicants did not receive a response.[28] The Applicants filed the current application on 8 August 2018.

RECEIVABILITY

22. The Tribunal finds that the application is timely, having been filed within the applicable deadline following a properly requested management evaluation.

23. On the question whether the application concerns an individual administrative decision with adverse consequences for the Applicants' terms of appointment, as required by art. 2 of the UNDT Statute, the Tribunal recalls its previous holding, the details of which are incorporated here by reference[29] 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. Accordingly, every payslip received by a staff member is an expression of a discrete administrative decision, even where it only repetitively applies a more general norm in the individual case. Since this Tribunal does not pronounce on legality of acts of general order, but, as will be discussed later, only reviews them incidentally, the decisions impugned in the fifth wave of cases may be appealed and adjudicated in itself without entering in the n oa.Se-eg penf ndronov

actual financial detriment was incurred by the Applicants and reflected in their payslip.

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

Respondent's submissions

24. Relying on jurisprudence of the United Nations Appeals Tribunal ("UNAT")[30], the Respondent submits that regulatory decisions of the General Assembly leave no scope for the Secretary-General to exercise discretion. Had the General Assembly required the Secretary-General to confirm the procedural or substantive correctness of the cost of living surveys relied upon by the ICSC before the Secretary-General could implement the post adjustment multipliers set by the ICSC, then the Applicants could legitimately claim that the Secretary-General failed to comply with the preconditions that attach to the exercise of his power.[31] However, the General Assembly set no such preconditions. As such, the present case concerns the mechanical and quasi-automatic implementation of a post adjustment multipliers, issued on a monthly basis by the ICSC through a "post adjustment classification memo". The General Assembly has repeatedly affirmed that decisions of the ICSC are binding on the Secretary-General[32] and the Secretary-General lacks discretionary authority in implementing ICSC decisions on post adjustment.

25. Further, the Respondent submits that the Applicants are challenging the ICSC decision, i.e. how the ICSC reached its decision as well as the internal decision process within the ICSC. The United Nations Dispute Tribunal ("UNDT") and the UNAT have consistently held that legislative or regulatory decisions do not constitute administrative decisions subject to review. The July 2017 decision of the ICSC on post adjustment multipliers is not an administrative decision subject to review pursuant to art. 2 of the UNDT Statute.

[30] See Lloret Alcaniz et al. 2018-UNAT-840, para. 59 referring to Reid 2015-UNAT-563; Tintukasiri 2015-UNAT-526, and Obino 2014-UNAT-405.
[31] Lloret Alcaniz et al. 2018-UNAT-840.
[32] Reply, annex 14 (General Assembly resolutions 66/237, para. 37 and 67/241, para. 3).

Applicants' submissions

26. The Applicants' case is that the ICSC decision was ultra vires, thus the Respondent cannot rely on the absence of discretion in his decision making. Relying on Pedicelli[3], the Applicants submit that the Respondent's decision is reviewable under art. 2(1) of the UNDT Statute because he made an administrative decision that had direct legal consequences for them. To find otherwise would render decisions regarding fundamental contractual rights of staff members' immune from any review regardless of the circumstances. This would be inconsistent with basic human rights and the Organization's obligation to provide staff members with a suitable alternative to recourse in national jurisdictions.

Considerations

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

issue a specific decision.[34] Substantive law may be a primary or secondary general legislation or may be an administrative decision of a general order. However, where the controlling norm is contained in a decision of general order, which leaves no room

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.[36]

30. Receivability of non-discretionary decisions implementing acts of general order is confirmed by the Appeals Tribunal jurisprudence in Tintukasiri[37], Ovcharenko[38] and Pedicelli[39]. Jurisdictionally, the discord on the point in issue seems to have originated from Obino. In Obino, where the UNDT had interpreted the application as directed against the ICSC decision and as such had found grounds to reject it as irreceivable, UNAT apparently agreed with this interpetation of the application. It held:

> 19. In the instant matter, the UNDT correctly found that Mr. Obino did not identify an administrative decision capable of being reviewed, as he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment [emphasis added].
>
> […]
>
> 21. In the instant case the ICSC made a decision binding upon the Secretary-General as to the reclassification of two duty stations and Mr. Obino has not shown that the implementation of this decision affects his contract of employment[40]

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

[36] See Sanwidi 2011-UNAT-104; Frohler 2011-UNAT-141 and Charles 2012-UNAT-242.
[37] 2015-UNAT-526.
[38] 2015-UNAT-530.
[39] 2017-UNAT-758.
[40] 2014-UNAT-405.

32. Similarly, in Kagizi the Appeals Tribunal confirmed that the applicants "lacked capacity" to challenge decisions of the Secretary-General taken pursuant to the decision of the General Assembly to abolish the posts which they encumbered but, eventually, concluded: "Generally speaking, applications against non-renewal decisions are receivable. However, in the present case, the Appellants have intertwined their challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts."[41]

33. These two decisions, therefore, do not articulate any principled approach to receivability in relation to exercise of discretion, but, rather engaged in interpreting the the application.

34. Conversely, in response to similar arguments by the Respondent in Lloret Alcañiz et al., the majority of UNAT held:

> 65. The majority of Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in the nature of a duty. However, such exercises of power are administrative in nature and involve a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They are thus administrative decisions that may adversely affect the terms of employment. However, importantly, given that purely mechanical powers entail little choice, they are rarely susceptible to review on the grounds of reasonableness. A review on grounds of reasonableness typically involves examination of the decision-maker's motive, the weighing of competing considerations and the basis for, and effects of, any choice made. An exercise of a purely mechanical power normally does not require the administrator to formulate an independent purpose or basis for action. Nevertheless, purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality."[42]

35. This Tribunal assumes, therefore, that the claim to have discretion as criterion for receivability has now been set aside.

36. The Tribunal finds, moreover, that the present application is unambigously directed against individual decisions concerning each of the Applicants. Whatever argument the authors used in support, it has no bearing on the identification of the contested decision. To the extent the Tribunal is authorised to individualise and articulate pleadings of an applicant who exhibits difficulty with this respect, it must make such representations bone fidei, consistently with the presumed interest of the applicant. It is, however, not the Tribiunal's role – nor is the Respondent's- to pervert a clearly-articulated application, as the one here, so as to strike it for the lack of receivability.

37. The present application is receivable.

38. The question of the scope of the Tribunal's review of regulatory acts will be addressed in a further section of this judgment.

MERITS

39. There is no dispute that the Secretary-General acted in accordance with the

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?

42. 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 applv6(of s21yeThevice shouations)-48(f

General Assembly resolution alone. There has to be an acceptance procedure for adoption by the participating bodies.[47]

Respondent's submissions

47. The Respondent explains that the reference to "scales" of post adjustment in art. 10(b) refers to a former method of calculating post adjustment based on schedules of post adjustment that were, in the past, submitted by the ICSC to the General Assembly for approval under art. 10(b) of its Statute and annexed to the Staff Regulations. Post adjustment scales were needed to implement the principle of 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.[48] 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.[49]

48. The system for calculating post adjustment changed in 1989, when, by virtue of resolution 44/198, the General Assembly decided to eliminate regressivity from the post adjustment system and discontinued the practice of approving post adjustment.[50] 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.[51] In 1991, the General Assembly, by its resolution 45/259, approved deletion of post adjustment schedules and references to such schedules from the Staff

[47] Ibid.
[48] Respondent's submission in response to Order No. 106 (NBI/2019), annex R/1A (para. 8, diagram 4) and annex R/2.
[49] Respondent's submission in response to Order No. 106 (NBI/2019), annex R/1A para 10.
[50] A/RES/44/198, part D, "post adjustment" para. 3.
[51] Respondent's reply, para. 53.

Regulations.

49. 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 43/226 of 21 December 1988. The "major simplification of the post adjustment system (…)" was one of the elements of that review.

50. 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.[52] 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.[53]

51. 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.[54] The General Assembly has not challenged the ICSC's authority in respect to post adjustment classification under art. 11(c).

[52] Respondent's submission in response to Order No. 106 (NBI/2019), para. 16 and annex 1A.
[53] Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 1.B, p. 13).
[54] Supplement No. 30, para. 241 (A/31/30 – Report of the International Civil Service Commission).

central issue appears to lie in the fact that art. 10 prima facie confirms the competence of the General Assembly to decide post adjustment akin to the way it decides salaries. What does the ICSC ultimately decide upon, however, is conditioned by the meaning ascribed to the terms "scales" in the same article and "classification" in art. 11. The ordinary meaning of these terms is not informative; rather, they are particular to certain technical assumptions underpinning the ICSC Statute. In explaining the relevant competencies, therefore, it would be appropriate to examine the meaning of these terms intended by the parties, as evidenced by practice.

55. As demonstrated by the documents submitted by the Respondent as well as reports available on the ICSC website, the delineation of the relevant competencies was along the lines that the General Assembly decided legal parameters of the post adjustment and the ICSC decided its methodological parameters and applied both to calculating post adjustment at different duty stations. The ICSC has always, ab initio and notwithstanding changes concerning post adjustment schedules, determined the cost of living index as a step in the process of classification and, after abolition of scales in 1989 and subsequent changes in methodology, assigned post adjustment multipliers to duty stations.[57] Thus, the ICSC's decisory powers under art. 11(c) have always involved determination of post adjustment in the quantitative sense without the General Assembly's approval. The General Assembly, on the other hand, until 1985 determined, under its art. 10 powers, two prerequisites for transition from one class to

competence for determining the post adjustment in the quantitative sense has never been questioned.[61] This considered, the Applicants' argument relying on the procedure for express written approval of Statute amendments under art. 30 may raise questions:

in this context, denotes the Secretariat and funds and programmes, are directly bound by the General Assembly's decisions on the matter of ICSC competencies. This conclusion distinguishes the present case from the case subject to ILOAT Judgment 4134.

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

Applicants' submissions

61. The Appeals Tribunal confirmed reviewability of ICSC decisions in Pedicelli, moreover, ILOAT has consistently reviewed decisions relating to post adjustment. To refuse the Applicants' access to judicial review would violate basic human rights and the Organization's obligation to provide a suitable recourse; it would also risk the breakup of the United Nations common system with staff members from one jurisdiction afforded recourse denied in other parts.[63]

Respondent's submissions

62. The Respondent submits that the ILOAT and the United Nations Tribunals (the UNDT and UNAT) have developed divergent approaches with respect to the

understood or transparent. If any flaws in the decisions are established by the ILOAT, the Organization can be found liable for the execution of a flawed legislative decision.

64. By contrast, the Respondent's case is that UNAT in decision. sh lves.hT1( )-18isnhet it decis

> 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.[72]

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

73. The Tribunals are, on the other hand, not bound by acts not originating from the General Assembly, specifically, by issuances of the executive, where these issuances would be found to contradict the framework approved by the General Assembly. This conclusion is logically inevitable not just on the plain language of the General Assembly resolution but results even more forcefully from the nature of the jurisdiction of the Tribunal, which could not be exercised if the very entity appearing as Respondent before the Tribunals could impose rules binding upon them. The same 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 jurisprudence from ILOAT, the former United Nations Administrative Tribunal and indeed from UNAT[73], that confirm this principle. Therefore, to the extent the Respondent appears to argue the binding nature of all regulatory acts, no matter the placement in the hierarchy, this proposition must be rejected. To accept it would deny 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.[74] 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".[75] The Tribunal finds this statement's normative value limited to the importance of a proper application of the lex specialis principle.

74. 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.[76] 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.

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

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

system of post adjustment, requesting the ICSC to maintain the existing level of post adjustment in New York.[79] 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[80], 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.[81] The ICSC recalled this precedent in its report of 2012.[82] Intervention of the General Assembly largely removes the matter from the purview of the Tribunals. This is confirmed in Ovcharenko, where the Appeals Tribunal confirmed legality of the implementation of the post adjustment freeze because the ICSC decision, subject to implementation by the Secretary-General, had been based on the General Assembly's resolution recommending the freeze.[83] In such cases, the regulatory decision is attributed directly to the General Assembly and thus, in accordance with Lloret-Alcañiz et al., judicial review is limited to the question of a normative conflict between the acts of the General Assembly.

78. The Tribunal notes that, with respect to the present dispute, the General Assembly observed in its resolution 72-255[84]:

> **Preamble**
>
> 6. Notes with serious concern that some organizations have decided not to implement the decisions of the Commission regarding the results of

[79] General Assembly decision 67/551 of 24 December 2012.
[80] General Assembly Resolution 39/27 of November 1984.
[81] UN Administrative Tribunal Judgment No. 370, Molinier (1986).
[82] 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

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 CalS97,ms se9989 Tm [.80099g872h0r.-6(of)] TJ 1 09989 Tm [bie ffHlr0wc5(cost-of)5(d

including detailed analysis of the quantitative impact of the ICSC decision on staff remuneration in Geneva. Yet, it did not intervene in any of these specific decisions.

Whether acquired rights have been violated

Applicants' submissions

80. Relying on the Salary Scale cases, UNDT Judgment in Quijano Evans et al.[87], the Applicants submit that tension has been created between a binding decision of the General Assembly and the breach of acquired contractual rights of staff members derived from other General Assembly decisions in that the salary cannot be unilaterally lowered by the employer. Post adjustment is a constituent element of salary; specifically, Annex 1 to the Staff Rules describes post adjustment as a way that "the Secretary-General may adjust the basic salaries". Further, upward revision of base salary resulting from the Noblemaire principle is introduced through post adjustment and subsequently absorbed into base salary.

81. Relying on ILOAT Judgment No. 832, In re Ayoub (1985), the Applicants submit that the right to a stable salary represents an acquired right that can reasonably be considered to have induced them to enter into and remain in contract. The term relates to the remuneration for work and, particularly, stability in such remuneration, which is a fundamental term. Amendments to the gap closure measure breach this right. The consequences of this breach of the Applicants' acquired right to a stable remuneration are considerable: a salary reduction of 4.7%. The scale of the cut will 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.

82. 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

[87] Quijano Evans et al. UNDT/2017/098, paras 60-71.

results that are foreseeable, transparent and stable.[88] 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.

83. 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

84. The Respondent submits that the change in the post adjustment multiplier does not violate the Applicants' acquired rights. Staff members do not have a right to the continued application of the Staff Regulations and Rules, including the system of computation of their salaries, in force at the time they accepted employment for the entirety of their service.[89] Relying on UNAT's pronouncement in Lloret Alcaniz et al.[90], the Respondent asserts that post adjustment is not a benefit accrued in consideration for performance rendered. As defined in Staff Rule 3.7, post adjustment is an amount paid to "ensure equity in purchasing power of staff members across duty stations." The changes to the post adjustment were applied prospectively, having been announced in 2017 but taking effect only in February 2018. Thus, the fact that the post adjustment multiplier resulted in a reduction in net pay for future salaries did not violate

[88] See The Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization Article XI; ILOAT Judgment Nos. 2420, 1821, 1682, 1419, 1265; and ILO Protection of Wages Convention, 1949 (No. 95) Article 14.
[89] Respondent's reply, para 41.
[90] 2018-UNAT-840, para. 87.

the Applicants' acquired rights.[91]

Considerations

85. Noting that in various submissions the parties refer to contractual versus

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 !)!! R) 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 :( ) R) 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

doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory instruments.

…It follows that, absent any normative conflict, the Secretary-General did not act illegally in implementing resolutions 70/244 and 71/263.

… The basic conditions of employment of staff members as set out in their letters of appointment may and often do change throughout the duration of their service. The contentions of the Respondents, if

situations, the plane of reference is the state of the law at the time where the conditions for the entitlement were fulfilled; as a consequence, application of the doctrine of acquired right yields the same interpretative results as the non-retroactivity principle. In relation, however, to salary and other continuing benefits, the matter is more complicated and the jurisprudence, as will be shown below, diverged in addressing it. In rejecting the extension of acquired rights to a future salary, the Lloret Alcaniz et al. and Quijano-Evans et al. judgments place the matter of modifications in the area of regulatory discretion. These judgments did not contemplate - as apparently the issue had not been put before the Tribunal – any limitations on the exercise of this power. This begs the question of where they lie. Relevant issues include: fundamentals of the nature of the performance-remuneration exchange, the public interest in stability of the civil service, and the resulting test or criteria for legitimacy of a modification.

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

92. 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

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.[103] 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.[104]

97. Finally, this jurisprudence recognized that sometimes only the existence of a particular term of appointment may form the subject of an acquired right, whereas the arrangements for giving effect to the term may do so or not.[105]

98. The parallel jurisprudence of the former United Nations Administrative Tribunal was not entirely consistent on the question whether the acquired rights concept extends beyond prohibition of non-retroactivity. Judgment No. 1253 answered in the positive but accepted that modifications are not necessarily inconsistent with the

i.e., that economy measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service.[108] Concerning specific requirements that a modification must meet in order to be reasonable, the following were distinguished: the modifications must not be arbitrary; must be consistent with the object of the system, for example, adjustment to cost-of living changes and protection of purchasing power of staff members[109]; must arise from reasonable motives; must not cause unnecessary or undue injury[110] or "significantly alter the level of basic benefits[111] or "cause unnecessary forfeiture or deprivation".[112] In the latter aspect, it was also proposed to consider whether the modification is permanent or temporary.[113]

100. As it can be seen from the above, the criteria used for the application of the rights concept and reasonable exercise of discretion are not dissimilar, the difference lying in the operation of the attendant presumptions (presumption of regularity of an official act versus the need to demonstrate that the limitation of a right is formally legal, necessary and proportionate) and the resulting stringency of the applicable criteria and the burden of proof. Below, the Tribunal shall undertake to test the reasonability of the disputed regulatory decision of the ICSC against these criteria. As previously explained, this is done in order to evaluate the legality of the impugned individual decisions based on it, and not to hold ICSC "answerable" or exercise a constitutional court-type jurisdiction over its decisions.

Application of the criteria to the impugned decision

101. 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

[108] UN Administrative Tribunal Judgment Nos. 403, 404, 405.
[109] UN Administrative Tribunal Judgment No. 379.
[110] UN Administrative Tribunal Judgment No. 405 adopting after ILOAT in Ayoub.
[111] UN Administrative Tribunal Judgment No. 404.
[112] UN Administrative Tribunal Judgment No. 403.
[113] UN Administrative Tribunal Judgment No. 403, partially dissenting opinion of Judge Pinto.

not to keep pace with inflation at any particular duty station. The Applicants' general right to post adjustment under the terms of their employment[114] 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.[115] 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

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

instructions from the General Assembly that the applicable post adjustment reflect most accurately the cost of living.

107. While the independent expert's review did not encompass the Geneva 2016 survey results, which is regrettable, it furnishes two pertinent observations. First, during the six years preceding the disputed survey, the post adjustment index of Geneva

moreover, delayed by one year through the application of the transitional allowance - is not such that would overly deplete the content of the entitlement or cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".

Considerations

115. 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