

!

- f) In June 2017, an informal review team of senior statisticians requested by the Geneva Human Resources Group reviewed the survey to see if it was “fit for purpose” and concluded *inter alia* that due to serious calculation and systemic errors in the compilation of the results, the ICSC calculations could not be considered “sufficiently good quality to designate them fit for purpose” and the implementation did not always correspond with the approved methodology;
- g) The ICSC thereafter engaged an independent consultant to review the methodology. The consultant’s report made 64 recommendations, some of which related to the methodology for the PAM;
- h) The applicants contested the Secretary-General’s administrative decision to implement the PAM, resulting in a pay cut for Geneva-based staff members. The applicants in UNDT Judgment Nos. 106, 107 and 133 asserted the decision date was 1 August 2017, the date of their August 2017 pay-slips. They requested management evaluation of the decision on 14 September 2017.
- i) The ICSC changed the implementation date of the PAM from 1 May 2017 to 1 August 2017 and staff were informed of the reintroduction of a three per cent margin to reduce the PAM for current staff by extending the transitional measure.

UNDT’s Impugned Judgments

7. The UNDT held that the applications were receivable. In particular, the UNDT found there had been an individual decision made to apply the new PAM, which was implemented by the staff members’ pay-slips and had adverse impact on the terms of their appointment. The UNDT also held

!
8.

!
page-

! " # \$

!

function of both ICSC and General Assembly decisions. It follows that since the decision is only in the domain of the ICSC, there has been a usurpation of power. Regardless, the ICSC action was ultra vires the Statute.

22. The UNDT erroneously indicated that the absence of prior challenges to the ICSC's competence had precluded their ability to raise their current challenge; however, the UNDT acknowledged that there was a 75-year practice refraining from downward revision of salary, meaning that staff have never encountered this issue before. Also, the challenges in the *Molinier* and *Ovcharenko*¹ cases, cited by the UNDT, pertained to the General Assembly, not the ICSC. Thus, they do not reflect an acquiescence in the UNDT's interpretation of the ICSC Statute. The Statute itself has a mechanism for authorizing the new post adjustment practice but this process was not utilized.

23. The UNDT erred in law in finding that the UNDT's scope of review of an ICSC decision implemented by the Secretary-General could not be reviewed for legality under the *Sanwidi*¹ test because, per the *Ovcharenko* case, the intervention of the General Assembly had removed the decision from such review. Firstly, the UNDT's reliance on *Ovcharenko* is erroneous as that case dealt with implementation of a General Assembly decision, whereas the decision at issue in this case was taken by the ICSC. Secondly, the General Assembly resolutions that were issued after the ICSC decision are a mere expression of an opinion on those decisions and do not alter the UNDT's scope of review.

24. The Appellants further claim that the UNDT erred in fact and law in finding no violation of their acquired rights and in finding that the Secretary-General's regulatory discretion had been reasonably exercised. The UNDT erred in fact and law when it applied incorrect standards to test the reasonability of the disputed regulatory decision. In its analysis of regulatory discretion, the UNDT assessed "the nature of performance-remuneration exchange, the public interest in stability of the civil service, and the resulting test or criteria for legitimacy of a modification".¹ The UNDT indicated that an acquired right to a stable salary should be protected to the extent of "striking a balance between competing interests of staff and the Organization's need to adapt its functioning and employment conditions to evolving circumstances".¹ The UNDT held that the revision

¹

Former Administrative Tribunal Judgment No. 370, *Molinier* (1986).

Ovcharenko et al. v. Secretary-General of the United Nations, Judgment No. 2015-UNAT-530.

Sanwidi v. Secretary-General of the United Nations, Judgment No. 2010-UNAT-084.

Impugned Judgment, para. 109.

Id., para. 111.

! " # \$ %

Judgment No. 202

!

The ICSC noted they did not have sufficient informa

!

Recalls that, in its resolution 44/198 and 45/259, it abolished the post adjustment scales mentioned in article 10(b) of the statute of the Commission, and reaffirms the authority of the Commission to continue to take decisions on the number of post adjustment multiplier points per duty station, under article 11(c) of its statute

!

35. In this situation, the Secretary-General had exercised “mechanical” powers, which entail little choice, and per the *Lloret Alcañiz et al.*, standard, such mechanical powers support implied duties to act lawfully and in accordance with good administrative practice. Mechanical powers are thus reviewable on grounds of legality. The UNDT erroneously suggested that it had authority to review the ICSC decision on grounds of reasonableness per the *Sanwidi* test, and erroneously suggested that the implementation decision by the Secretary-General was an exercise of discretionary power. The Secretary-General has no discretion in implementing decisions of the ICSC and consequently there is no authority for the UNDT to review the implementation. The correct legal standard for this case is set out in

!

application, the issue of infringed acquired rights does not arise but instead a test of reasonableness applies, similar to the *Sanwidi* test. ¹ The Secretary-General argues, however, that there is no reasonableness test applicable to decisions emanating from legislative power.

39. We reproduce below

!

42. As a general rule, the post-adjustment allowance is set by the United Nations as a percentage of the base salary with the aim of ensuring that all staff members at the same salary level have a similar purchasing power in every duty station by compensating for the differences in cost of living. The PAI for a given location is a measure of the cost of living of staff at that location relative to the base city, New York. Its very purpose is thus that the take-home pay

!

the resolution stated that the ICSC should be provided with the report of the Special Committee for the review of the United Nations salary system, together with the comments of the then ICSC Advisory Board and other related documentation “for its consideration and the submission of recommendations for actions at the earliest possible date”.

50. The Statute of the ICSC was approved by General Assembly resolution 3357, dated 18 December 1974. This Statute also refers to the mandate of the ICSC as aiming to regulate and coordinate the conditions of service of the United Nations Common System. At the same time, it

! " # \$ %

Judgment No. 2021-UNAT

! " # \$ %

Judgment No. 2021-UNAT-1108

!

! " # \$

!

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

!

jurisdictional setup of the common system and submit the findings of the review and recommendations to the General Assembly as soon as practicable;!

63. Therefore, by means of General Assembly resolution 74/255 issued a few months after a similar case had been dealt with by the ILOAT, the General Assembly, even though well aware of the arguments put forward against it, approved of the methodology for calculating the post adjustment, as well as its financial impact on staff remuneration in Geneva. This alone would be sufficient grounds for dismissing the appeal, in light of the restricted scope of competence of the

!

A 71/266 (23 2016):

29. Recalls its decision, contained in paragraph 5 of its resolution 68/254, and reiterates that decisions taken by the Dispute Tribunal and the United Nations Appeals Tribunal shall

!

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.

68. In the present case, while the legal framework does provide for the right to a post-based allowance, it does not require that it remain the same. Apart from the individual negative impact on staff members' pay slips deriving from the diminished amount of the PAM, nothing has been revoked retroactively, neither the type of remuneration, nor the way it has been calculated over the years. More fundamental is the fact that the amount of the PAI seems to be, by its very nature, conditional upon the existence of certain circumstances, whose permanence is uncertain throughout each individual staff member's appointment.

69. The concept of conditional salary distribution (which we consider in the circumstances of this case is more apt than the notion of acquired rights) means that certain types of compensation are conditional upon meeting the requirements for such an allowance or bonus. Sometimes, the requirements depend on the worker's performance (e.g., bonus for good performance), sometimes on other events not subject to the worker's acts (e.g., student grants for parents up to a certain age of the student). In general, these types of remuneration can be removed or otherwise adjusted, including downwards, once the circumstance which determines their payment disappears or changes.

70. In the case at hand, the PAM is inherently changeable, depending on the circumstances of a certain time-period and place. Although the continued existence of the allowance might not be at stake, its nominal value or percentage amount is. This is what attracts its categorisation as "conditional compensation" rather than the notion of "acquired rights". The permanence of conditional compensation in terms of figure or amount is uncertain, since it derives from a myriad of elements that most significantly affect the cost-of-living of the Organisation's staff in a given location at a particular moment.

71. This judgment should not be thought to express a conclusion that affected staff are without the ability to influence post-adjustments because there is no jurisdiction to judicially review the recommendatory and decision-making bodies (the ICSC and the General Assembly) in the United Nations' internal justice system. Those opportunities exist at the first two stages of the

Id., para. 87.

! " # \$ %

Judgment No. 2021-UNAT-1108

!

74. The appeals are dismissed and the UNDT Judgment Nos. UNDT/2020/117, UNDT/2020/131 and UNDT/2020/149 are affirmed.

Original and Authoritative Version: English

Dated this 19 day of March 2021.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 21 day of May 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar

!
!
!

!

NNEX

NDRES ET AL V SECRETARY GENERAL

1. Andres, Cedric
2. Belhassan, Chakib
3. Broholt, Mikkel
4. Choi, Hye Lynn
5. Deschaine, Emily
6. Grossmann, Marion
7. Hadjel, Hakim
8. Herrero Crespo, Ramon
9. Kaiser, Brian
10. Karim-Khan, Moin
11. Langham, Albert Gregory
12. Lemenez, Guillaume
13. Lunte, Kaspars
14. Mathieu Gotch, Clara
15. Mazza, Paul
16. Mochinova, Elena
17. Muratore, Enrico
18. Muzafarova, Nigorsulton
19. Nasser, Mohammad
- 20.

! " # \$ %

Judgment No. 2021-UNAT-1108

!