Original: Englis[redacted]

efore: Judge Agnieszka Klonowiecka-Milart

egistry: Nairobi

egistrar: Abena Kwakye-Berko

AKSIOUTINE et al.

v.

SECRETARY [redacted]ENERAL
OF THE UNIT[redacted]ATIONS

JU[redacted]NT

unsel for the Applicant:
bie Leighton, OSLA

unsel for the Respondent:
ôme Blanchard, Human Reso[redacted]Legal Unit, UNOG

INTRODUCTION

1. The Applicants are 164 staff members from several United Nations entities[1] 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 determined by the ICSC based on its 2016 cost-of-living survey, resulting in a pay cut.

2. Identical individual applications were initially filed with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Geneva on 10 August 2018, and then consolidated (henceforth: the application) and transferred to UNDT in Nairobi on 14

adjustment index caught up with the prevailing pay index.[11]

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.[12]

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").[13] 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.[14]

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]

17. 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.[23] 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.[24]

18. On 23 February 2018, the Applicants received pay slips indicating implementation of the pay cut.[25] On 13 April 2018, they requested management evaluation of the reduction of their salaries as evidenced in their February pay slips.[26]

19. On 10 July 2018, the Under-Secretary-General for Management ("USG/DM") responded to the Applicants' management evaluation request of 13 April 2018. The USG/DM informed the Applicants that their request was not receivable because decisions of the ICSC are binding on the Secretary-General and on the Organization. Thus, payment of the post adjustment according to the post adjusment multiplier established by the ICSC is not an administrative decision subject to review.[27] The Applicants filed the current application on 8 August 2018.

RECEIVABILITY

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

21. On the question whether the application concerns an individual administrative decision with adverse consequences for the Applicants' terms of appointment, as

[22] Application, annexes 2 and 3; reply, annex 8.
[23] Application, annex 4.
[24] Ibid., annexes 5 and 6.
[25] Ibid., annex 7.
[26] Ibid., annex 8.
[27] Ibid., annex 9.

required by art. 2 of the UNDT Statute, the Tribunal recalls its holding in the previous related cases, the details of which are incorporated here by reference[28], that 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. In the fourth wave cases, the Respondent argued that the impugned decisions did not entail negative consequences because of the presence of

automatic implementation[31] of 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.

Applicants' submissions

24. The Applicants' case is that the prevailing UNAT jurisprudence affirms reviewability of the non-discretionary decisions where such decisions, even though formally consistent with a higher-ranking regulatory act, nevertheless substantively violate staff members' "contractual and acquired rights". To find otherwise would render decisions regarding fundamental contractual rights of staff members' immune from any review, regardless of the circumstances. Moreover, the ICSC decision was ultra vires, thus, the Respondent cannot rely on the absence of discretion in his decision making.

Considerations

25. 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 found, first, the criterion of discretion proposed by the Respondent is systemically inappropriate. These considerations are incorporated here by reference.[33] Second, there is, hopefully, no more contradiction in UNAT jurisprudence as to what constitutes a

Tintukasiri[34], Ovcharenko[35] and Pedicelli[36]. 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[37]

27. 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.

28. 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

[34] 2015-UNAT-526.
[35] 2015-UNAT-530.
[36] 2017-UNAT-758.
[37] 2014-UNAT-405.

challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts."[38]

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

30. 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

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 the Respondent's - to pervert a clearly-articulated application, as the one here, so as to strike it for the lack of receivability.

33. The present application is receivable.

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

MERITS

35. There is no dispute that the Secretary-General acted in accordance with the ICSC decision. The merits of his decision are contested by the Applicants on the following grounds: in deciding on the post adjustment the ICSC acted outside its statutory authority, which vitiates individual decisions taken by the Secretary-General; the applied methodology was obscure and inappropriate, including that factual errors were committed in applying it; the decision is in normative conflict with staff members' acquired rights and causes inequality of pay within the United Nations common system.

36. The Respondent replies that the ICSC decision on post adjustment reduction was taken in accordance with its statutory competence and the impugned decision properly implemented it; the Tribunal lacks competence to review legislative decisions and the Applicants are erroneously asking the Tribunal to assume powers it does not

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;

Respondent's submissions

43. 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

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

46. 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.[49] 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.[50]

47. 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.[51] The General Assembly has not challenged the ICSC's authority in respect to post adjustment classification under art. 11(c).

48. 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

[49] Respondent's submission in response to Order No. 106 (NBI/2019), para. 16 and annex 1A.
[50] Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 1.B, p. 13).
[51] 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.

49. 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

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.

51. 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.[54] 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 another: the required percentage variation in the cost of living index and required period for which it had to be maintained, the so-called schedules for post adjustment.[55] Moreover, until 1989 the General Assembly determined regressivity scales. The latter involved a "precise financial calculation" in terms of US dollars per index point for each grade and step; the calculations, however, were related to the salary scales only. The exercise of the General Assembly powers under art. 10 did not involve either confirming the determination of index points for duty stations or the calculation of post adjustment for each grade and step per duty station.

[54] See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).
[55] It would seem that the General Assembly in its resolution 40/244 conferred on the Commission the power to "take steps to prevent the rules relating to a post adjustment increase" from adversely affecting the margin defined by the same resolution and thus, effectively authorised it to depart from schedules in case where post adjustment calculation indicated that it could be decreased.

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

> 1. Reaffirms the authority of the International Civil Service Commission to continue to establish post adjustment multipliers for duty stations in the United Nations common system, under article 11 (c) of the statute of the Commission;[56]
>
> 2. Recalls that, in its resolutions 44/198 and 45/259, it abolished the post adjustment scales mentioned in article 10 (b) of the statute of the Commission, and reaffirms the authority of the Commission to continue to take decisions on the number of post adjustment multiplier points per duty station, under article 11 (c) of its statute […].

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

54. The changes, however, were approved by the General Assembly, either expressly or by reference to ICSC written reports[57]; took effect, in that they have been applied for over 25 years by all participating organizations; and, while there have been challenges brought before the tribunals regarding post adjustment, the ICSC's competence for determining the post adjustment in the quantitative sense has never

[56] Resolution 3357 (XXIX).
[57] The Tribunal notes that the Respondent did not provide clear information about the elimination of post adjustment classes; it appears that this was decided by the ICSC itself in 1993: "ICSC considered an ACPAQ recommendation that a CCAQ proposal for the elimination of the use of post adjustment classes in the system should be adopted. It was noted that, since the 1989 comprehensive review, multipliers had a direct relationship to pay. Classes were difficult to understand and no longer appeared to serve a useful purpose; their elimination would simplify the post adjustment system [ICSC/38/R.19, para. 72]

been questioned.[58] This considered, the Applicants' argument relying on the Commission's for express written approval of Statute amendments under art. 30 may raise questions: one about legitimacy to invoke insufficiency of the form, which appears to lie not with individual staff members but with executive heads of the participating organizations; a related one about a possibility to validate the change; yet another one about estoppel resulting from the 25 years of acquiescence. However, the alleged procedural defect may produce claims only to relative ineffectiveness, rather than absolute invalidity, of the changes. In this regard, specifically, the Applicants' argument cannot be upheld under the Statute.

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

> Article 1
>
> 1. The General Assembly of the United Nations establishes, in accordance with the present statute, an International Civil Service Commission (hereinafter to the Comasswi for the rguelatned ccorein(tiog)1( )-34(of)-37(the)1( )-37(coiditions)724(of)-37sServic

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.

57. Finally, with respect to the Applicant's argument about the ICSC not respecting its own Rules of Procedure regarding signatures required for the promulgation of the decision[60], the Tribunal finds no support for the claim that a lack of the ICSC Chairman's signature on the transmittal memorandum would render the decision null and void.

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

Applicants' submissions

58. The Applicants submit that decisions taken pursuant to regulatory acts are reviewable where "tension" occurs between the disposition of the regulatory act and staff members' rights deriving from acts of the General Assembly. In the present case, the regulatory decision does not emanate from the General Assembly but from the ICSC. It thus has a lower status, meriting a deeper review. 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.[61]

Respondent's submissions

59. The Respondent submits that the ILOAT and the United Nations Tribunals (the UNDT and UNAT) have developed divergent approaches with respect to the "receivability of challenges to decisions by legislative bodies and by their subsidiary organs".[62]

[60] Application, paras 50-51.
[61] Application, para. 39.
[62] Respondent's submission in response to Order No. 106 (NBI/2019).

the jurisdiction of the Dispute Tribunal and that the ICSC is only accountable to the General Assembly.

Considerations

63. At the outset, in his citations from Lloret-Alcañiz et al., and conclusions drawn, the Respondent seems to blur the difference between a review for the purpose of pronouncing on the question of legality of regulatory acts being a first and final subject of the exercise of judicial power, and a review involving an incidental examination for the purpose of examining legality of an idividual decision based on a regulatory one. In consequence, the Respondent mixes the question of receivability with the question of legality.

64. Only in the first case, where a court or tribunal pronounces on the question of legality of an act, in the operative part of a judgment, be it declaratory or constitutive, but with a binding effect on the legal system as a whole, would the judicial review amount to "a bill of rights or consitutional court's review". An application requesting such a pronouncement from UNDT would be irreceivable, because of the lack of the Tribunal's jurisdiction to pronounce on legality of regulatory acts, whether such would be coming from a legislative (the General Assembly) or an executive body. The absence of such jurisdction is clear upon the UNDT Statute and confirmed as a principle arising from Andronov and there does not seem to be a genuine dispute over it.[66] The Tribunal does not deem it necessary to further dwell on this matter.

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

> [The applicant] may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale

[66] See Cherif 2011-UNAT-165; Quijano Evans et al. 2018-UNAT-841.

> without rescinding it.. [T]he Tribunal confirms its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.[67]

66. The question arising on the basis on Tintukasiri in connection with the Respondent's argument is not, therefore, about jurisdiction to pronounce on the illegality of regulatory acts akin to a constitutional court, 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.

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

> Certainly the [former Administrative Tribunal] must accept and apply the decisions of the General Assembly made in accordance with Article 101 of the United Nations Charter. Certainly there can be no question of the [former Administrative Tribunal] possessing any "powers of judicial review or appeal in respect of the decisions" taken by the General Assembly (…).[68]

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

> [A]ll elements of the system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly" and that "decisions taken by the Dispute Tribunal and the United Nations Appeal Q0Tribunal1(le114(Q0Tsalle114(Q0Tonfirme114(Q0Tith)24(Q0Tof)-48(j1( )-114nts)-4 1

management".[69]

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.[72] 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",[73] the Tribunal finds this statement's normative value limited to the importance of a proper application of the lex specialis principle.

71. 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.[74] 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

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the operative part of its Neault 2013-UNAT-345 judgment, while in both cases the regulatory acts were found unlawful.

72. In conclusion, the Respondent's assertion that that the "Applicants' claims must be rejected as non-receivable as they seek a review of the legality of the ICSC's decisions"[75] needs to be corrected on three levels: Firstly, denying receivability is untenable because the Applicants are contesting individual decisions concerning their terms of appointment, and, while they contest the legality of the regulatory decision by the ICSC, they contest it as a premise for the claim of illegality of that individual decision and not with a claim to have the regulatory decision stricken. Secondly, determination whether to entertain a challenge to legality of the ICSC decision depends, primarily, on whether it was an exercise of the delegated regulatory authority under art. 11 of the Statute or the ultimate decision had the endorsement of the General Assembly. Thirdly, even in the latter case, an incidental review of the controlling regulatory decision may be warranted if legality of an individual decision based upon it is being challenged on the ground of a normative conflict with other acts emanating from the General Assembly.

The scope of review of regulatory decisions on post adjustment

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

[75] Respondent's submission in response to Order No. 106 (NBI/2019), para. 8.

merits, an individual decision, based on the conversion of a salary scale then applied to General Service staff in Montreal promulgated by the ICSC under art. 11, entailed an examination of the ICSC decision for reasonableness.[76]

why the margin of error might have been reduced at a time when the ICSC have been applying a new and untested methodology.

79. The consequences of this breach of the Applicants' acquired right to a stable remuneration are considerable: a salary reduction currently estimated at 5.2%. The

al.[87], 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 the Applicants' acquired rights.[88]

Considerations

83. Noting that in various submissions the parties refer to contractual versus statutory elements of the employment relation, as distinguished by the former United Nations Administrative Tribunal in the Kaplan case[89], it will be useful to begin with a general clarification. A contractual relationship refers to the relationship between the staff member and the international organisation as evidenced in a contract, i.e., a bilateral act. The statutory relationship, on the other hand, is based on status, i.e., refers to the appointment of civil servants by acts of authority, which forms a relation in accordance with statutorily defined terms and conditions. An individual who agrees to

of civil service, albeit having a tradition dating back to the League of Nations[92], may be misleading. Strictly speaking, in the present relation it would be more accurate to distinguish individually determined elements (nature of appointment, duration, grade

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 ('((T' 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 ;& ' T' 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"

87. 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

93. 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.[99]

94. 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

the entitlement[103] or, as it was alternatively proposed, do not cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".[104]

97. Other former United Nations Administrative Tribunal decisions remained on the position that the question of acquired rights does not arise where the modification has no retroactive effect. Instead, a fetter on legislative power to introduce modification with effect for the future was construed through the test of reasonability, applied in light of the principles laid down in the Charter of the United Nations art. 101 para. 3, i.e., that economy measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service.[105] Concerning specific requirements that a modification must meet in order to be reasonable, the following were distinguished:

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

99. 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,

closure or other conservatory measures. Application of such measures, therefore, remains only a question of good governance, which should take into account a margin of error in calculations, as well as avoidance of sudden major drops in salary value and its destabilising and demoralising effect.[113]

101. These traits of the post adjustment entitlement and the scarcity of relevant legal framework render it generally open to modifications in relation to fluctuations in cost of living and relative purchasing power.

102. Regarding the purpose of the disputed modification, it is generally consistent with the object of the system. The central issue remains in the criticism of the 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.

103. As a starting point, it is undisputed and confirmed by all those engaged in the matter in a professional capacity: experts, ACPAQ members and commissioners themselves, that the post adjustment calculation presents extreme complexity and is not applied pursuant to arithmetical or even purely statistical method. To this end, the Geneva statisticians' review, notwithstanding its overall rejection of the methodology applied in Geneva, begins and ends with a caveat that it is not thorough or comprehensive[114]; that their estimates are indicative – proper estimation of the updated series would need to be computed by ICSC using October 2016 as the base and updated to May 2017[115]; that certain alternative calculations should first be tested within the ICSC system, to ensure that they are precise[116]

been able to quantify the extent of the impact of these problems on the Geneva PAI and recommended further studies.[117] 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.[118] As evidenced by both

> modification of the gap closure measure, an operational rule designed to mitigate the negative impact on salaries of the results of cost-of-living surveys that are significantly lower than the prevailing pay indices:
>
> (a) In accordance with the Commission's decision in paragraph 128 (a), the post adjustment index derived from the survey (updated to the month of implementation) is augmented by 3 per cent to derive a revised post adjustment multiplier for the duty station;
>
> (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 [..]

110. The Tribunal agrees with the Applicants that the mitigation, on both counts, the he

multipliers, with the full participation of organizations and staff federations as well as a task force on the review of the conceptual framework of the post adjustment index methodology, composed of statisticians nominated by organizations, staff federations and the Commission, as well as top-level consultants in the field of economics and price statistics. The latter produced a report on a wide array of technical and procedural issues, covering, in general terms, elements disputed by the Geneva statisticians. The ICSC report for 2019 shows, in particular, that the problem of generalized decreases in 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.

112. 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

113. The Protocol concerning the entry into force of the Agreement between the United Nations and the International Labour Organization, which was adopted by the

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. [126]

Respondent's submissions

114. 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.[127] 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

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

[126] Applicants' motion of 22 July 2019 to file submissions regarding ILOAT Judgment No. 4134.
[127] Molari 2011-UNAT-164, para. 1 ("We will not follow the Administrative Tribunal of the International Labour Organization (ILOAT) in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT, this has never been the standard at the United Nations.").

organization has acted unlawfully.

116. The Tribunal wishes to add that the impugned decision subject to its review does not involve a question of integrity of the United Nations common system. It, however, wishes to observe that divergence in the jurisprudence occurs also within single jurisdictions. The way to ensure integrity of the common system seems to lie mainly in sound determination of competencies and methods for decisions affecting the common system as well as in the determination of staff rights alternatively with self- imposed limitation on the Organization's authority to vary the conditions of service. This matter is properly before the ICSC and, ultimately, the General Assembly.

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

JUDGMENT

118. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 19th day of August 2020

Entered in the Register on this 19th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi