INTRODUCTION

1. The Applicants are 12 staff members of the United Nations Development Programme ("UNDP") who were based in Geneva, Switzerland, at the time of the contested decision. They are challenging the Administration's decision to implement a post adjustment multiplier 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 February 2019 after the Geneva-based UNDT Judge President recused herself from the proceedings.[1]

PROCEDURAL HISTORY

3. The applications belong to the fifth set ("waves") of appeals by staff members

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 same post adjustment which is disputed in the present case. The ILOAT set aside the impugned decision after concluding that the ICSC's decisions were taken without outside their legal competence 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 Applicants' submissions on 7 August 2019.

8. The Respondent sought leave on 21 January 2020 to file General Assembly resolution 74/255 A-B (United Nations Common System). The Applicants filed a response to the motion on 5 February 2020.

FACTS

9. At its 38th session in February 2016, the Advisory Committee on Post 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

[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.

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 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

[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.

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:

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]

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.[21]

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.[22] 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.[23]

18. On 23 February 2018, the Applicants received pay slips indicating implementation of the pay cut.[24] On 24 April 2018, they requested management evaluation of the reduction of their salaries as evidenced in their February pay slips.[25]

19. On 6 June 2018, the Assistant Administrator and Director, Bureau for Management Services, UNDP, responded to the Applicants' management evaluation request of 24 April 2018. The Assistant Administrator informed the Applicants that: challenges to the ICSC's decisions were not receivable as the ICSC is "answerable and accountable" only to the General Assembly; ICSC decisions cannot be imputed to the Secretary-General in the absence of any discretionary authority to execute such decisions; the ICSC's 18 July 2017 decision was binding on the Secretary-General; the payment of post adjustment in accordance with the post adjustment multiplier established by the ICSC is not an administrative decision; and they did not have an acquired right to post adjustment.[26] 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

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

26. The Tribunal recalls that receivability of non-discretionary decisions that implement acts of general order is confirmed by the Appeals Tribunal jurisprudence in *Tintukasiri*[33], *Ovcharenko*[34] and *Pedicelli*[35]. 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[36]

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

challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts."[37]

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 have by asking for a review of alleged flaws in the decisions by the ICSC and the methodology that it used; that methodology did not contain errors alleged by the applicants; and, the issue of acquired rights does not arise.

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

Did the ICSC have the requisite authority, under art. 11 of its Statute, to make a

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;

seeking approval for the same from the General Assembly. The ICSC granted itself decisory powers in all matters contrary, thereby exceeding its delegated power.[40]

41. The Applicants further echo ILOAT Judgment 4134 in its analysis of art. 10 of the ICSC statute as exclusively governing the *"determination of post adjustments in a quantitative sense"* and its conclusion that because articles 10 and 11 cover *"mutually exclusive matters"*, art. 11 cannot cover any matter that affects the quantification of post adjustment. There has been no change to the ICSC statute in accordance with the prescribed procedure. In the absence of an amendment to the ICSC statute, the ILOAT rejected the Respondent's argument that the migration of the decisory authority had been accepted by the General Assembly by virtue of its acceptance of the alteration to the manner of calculating the post adjustment. The ILOAT similarly rejected the suggestion that the practice itself had broadened the scope of the ICSC's powers beyond those contained in the ICSC statute, as per its established position that "a practice cannot become legally binding if it contravenes a written rule that is already in force".[41]

42. The Applicants submit[42] that General Assembly resolution 74/255 A-B is based exclusively on the ICSC 2019 annual report (A/74/30). The ICSC relitigated the 2016 post adjustment results before the General Assembly in complete usurpation of the role, function, authority and independence of the internal justice system. The resolution fails to recognize the independence of UNDT and UNAT because statutory interpretation is not within the authority of the General Assembly. A/RES/74/255 A-B cannot change the authority of the ICSC nor can it change the meaning of articles 10(b) and 11(c). The ICSC Statute includes a mechanism for amendment, which is not achieved by General Assembly resolution alone. There has to be an acceptance procedure for adoption by the participating bodies.[43]

[40] Application, paras. 42 - 49.
[41] Judgment 4134 consideration 33 and consideration 39, referring to Judgment 3883, consideration 20; Judgment 3601, consideration 10; and Judgment 3544, consideration 14.
[42] Applicants' submission of 5 February 2020.
[43] Applicants' submission of 5 February 2020.

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.[48] The ICSC has always assigned post adjustment multipliers to duty

> 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

50. At the outset, the Tribunal finds it useful to recall an established principle that when the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation.[51] This follows general international practice, which refers to interpretation according to the 'ordinary meaning' of the terms 'in their context and in the light of [their] object and purpose' unless the parties intended to give the word a special meaning.[52] In the argument on ICSC's statutory competences, the central issue appears to lie in the fact that art. 10 *prima facie* confirms the competence of the General Assembly to decide post adjustment akin to the way it decides salaries. What does the ICSC ultimately decide upon, however, is conditioned by the meaning

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

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

ascribed to the terms "scales" in the same article and "classification" in art. 11. The ordinary meaning of these terms is not informative; rather, they are particular to certain technical assumptions underpinning the ICSC Statute. In explaining the relevant competencies, therefore, it would be appropriate to examine the meaning of these terms 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.[53] 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.[54] 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.

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

been questioned.[57] This considered, the Applicants' argument relying on the procedure for express written approval of Statute amendments under art. 30 may raise questions: one about legitimacy to invoke insufficiency of the form, which appears to lie not with individual staff members but with executive heads of the participating organizations; a related one about a possibility to validate the change; yet another one about estoppel resulting from the 25 years of acquiescence. However, the alleged procedural defect may produce claims only to relative ineffectiveness, rather than absolute invalidity, of the changes. In this regard, specifically, the Applicants' argument cannot be upheld under the Statute.

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 referred to as the Commission) for the regulation and coordination of the conditions of service of the United Nations common system.
>
> 2. The Commission shall perform its functions in respect of the United

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[59], 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.[60]

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".[61]

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

60. The Respondent submits that, since 1987, the ILOAT has applied the principle that if a "*decision is based on one taken by someone else it is bound to check that the other one is lawful.*" Executive heads of Organizations cannot argue before the ILOAT that they are bound by decisions made by legislative bodies or by their subsidiary organs. Rather, the executive heads of Organizations that appear before the ILOAT must demonstrate that they have examined whether such decisions are proper. This examination includes reviewing whether legislative decisions were made based on a "*methodology which ensures that the results are stable, foreseeable and clearly understood or transparent.*"[62] 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.

61. By contrast, the Respondent's case is that UNAT in *Lloret-Alcañiz et al.*

management".[68]

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

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.[75]

74. Notwithstanding the aforesaid, also where the ICSC exercises its delegated regulatory powers, it remains subordinated to the United Nations General Assembly which may intervene and indeed does so, mainly in the policy stage but also after the ICSC decision has been taken. Thus, the General Assembly interfered in 2012 in the system of post adjustment, requesting the ICSC to maintain the existing level of post adjustment in New York.[76] 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[77], 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.[78] The ICSC recalled this precedent in its report of 2012.[79] Intervention of the General

et al., judicial review is limited to the question of a normative conflict between the acts of the General Assembly.

75. The Tribunal notes that, with respect to the present dispute, the General Assembly observed in its resolution 72-255[81]

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 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.

80. The Applicants further submit that the methodology applied by the ICSC raises issues because of errors regarding the use of the International Service for Remunerations and Pensions ("ISRP") rent index, domestic services aggregation, place-to-place surveys, cost of education and medical insurance. They further submit that the methodology does not provide for results that are foreseeable, transparent and stable.[84] 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.

81. The Applicants conclude that the way changes in Geneva post adjustment were implemented indicates absence of good faith dealings.

Respondent's submission

82. 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.[85] Relying on UNAT's pronouncement in *Lloret Alcaniz et*

[84] See The Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labor Organization Article XI; ILOAT Judgment Nos. 2420, 1821, 1682, 1419, 1265; and ILO Protection of Wages Convention, 1949 (No. 95) Article 14.
[85] Respondent's reply, para 41.

al.[86], 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.[87]

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

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
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> ('((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.
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> … If one were to accept the UNDT's interpretation (the second of05and05
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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 accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment.[33] Amendments may not retrospectively reduce benefits already earned. In the final analysis, the 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 accepted, would constitute a contractual fetter upon the authority and powers of the General Assembly. In accordance with universally accepted principles, contracts which purport to fetter in advance the future exercise of constitutional, statutory or prerogative powers are *contra bonos mores* and not valid or enforceable. It is in the public interest that public authorities retain the freedom to exercise their discretionary or legislative powers. It can never be in the international public interest to contractually fetter the General Assembly in the exercise of its powers to make policy for the Organization. A body such as the General Assembly cannot be compelled to uphold a promise not to exercise its regulatory powers so as not to interfere with its contractual arrangements.
>
> … In the context of the United Nations system, the salary entitlements of staff members are therefore statutory in nature and may be

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.[98]

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 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.[99] 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.[100]

95. 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.[101]

96. The parallel jurisprudence of the former United Nations Administrative Tribunal was not entirely consistent on the question whether the acquired rights concept extends beyond prohibition of non-retroactivity. Judgment No. 1253 answered in the positive but accepted that modifications are not necessarily inconsistent with the acquired rights. The Tribunal contemplated the following criteria: the term of appointment has a statutory, and not a contractual character; amendments do not deny the right as rig6oo 361 Tm [(cosTonsistg ef1( )17a(term.] TJ ET Q] TJ ET Q5)14(rig6oo-67(6oopens(crit

the entitlement[102] 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".[103]

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.[104] 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[105]; must arise from reasonable motives; must not cause unnecessary or undue injury[106] or "significantly alter the level of basic benefits[107] or "cause unnecessary forfeiture or deprivation".[108] In the latter aspect, it was also proposed to consider whether the modification is permanent or temporary.[109]

98. 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

[102] UN Administrative Tribunal Judgment No 1253, consideration V.
[103] UN Administrative Tribunal Judgment No 1253, concurring opinion of Judge Stern who proposes the criterion of "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".
[104] UN Administrative Tribunal Judgment Nos. 403, 404, 405.
[105] UN Administrative Tribunal Judgment No. 379.
[106] UN Administrative Tribunal Judgment No. 405 adopting after ILOAT in *Ayoub.*
[107] UN Administrative Tribunal Judgment No. 404.
[108] UN Administrative Tribunal Judgment No. 403.
[109] UN Administrative Tribunal Judgment No. 403, partially dissenting opinion of Judge Pinto.

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

> 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 augmentation of the post adjustment multiplier and the transitional allowance, appears more as a rule of thumb than actual calculation of a margin of error. However, the resulting financial loss for the Applicants, 4.7% of the salary - or even 5.2%, as it is presented by the Applicants[123], moreover, delayed by one year through the application

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. [125]

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.[126] 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

[125] Applicants' motion of 22 July 2019 to file submissions regarding ILOAT Judgment No. 4134.
[126] *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.