

JUDGE

from the Office of Legal Affairs (OLA)—which is part of the United Nations Secretariat and acts as counsel for the Secretary-General in cases before the Appeals Tribunal.

5. In its 2015 Report, the ICSC made a recommendation for the introduction of one net salary scale for all staff members in the professional and higher categories without regard to family status. Support provided for dependent family members would be separated from salary. Two existing allowances, namely, a child allowance (a fixed amount payable for each dependent child)<sup>2</sup> and a special dependency allowance (for disabled children), would remain unchanged. The ICSC, however, made three important proposals regarding other kinds of family support. Firstly, dependent spouses would be recognized through a spouse allowance at the level of six per cent of net remuneration. Secondly, staff members who are single parents and who provide main and continuous support for their dependent children would in the future receive an allowance in respect of the first dependent child at the level of six per cent of net remuneration in lieu of the ordinary child allowance. Thirdly, staff members with a non-dependent spouse and in receipt of a salary at the dependency rate by virtue of a first dependent child would instead receive the child allowance for such child.

6. In considering the implementation of the new compensation package, the ICSC appreciated that thought needed to be given to the possible need for transitional measures to smooth implementation. In particular, staff members with a non-dependent spouse in receipt of a salary at the dependency rate by virtue of a first dependent child would only receive a child allowance and as a consequence would experience reductions in salary under the proposed system. The ICSC accordingly proposed the introduction of a transitional allowance of six per cent of net remuneration in respect of that first de

spouse allowance and the single parent allowance. Paragraph 10 of section III records the decision of the General Assembly in regard to the transitional allowance. It reads:

(a) Staff members in receipt of the dependency rate of salary in respect of a dependent child at the time of conversion to the unified salary scale structure will receive a transitional allowance of 6 per cent of net remuneration in respect of that dependent child and that no child allowance should be paid concurrently in that case;

(b) The allowance will be reduced by 1 percentage point of net remuneration every 12 months thereafter;

10. Mr. Mirella works as the Chief, Regional Section for South Asia, East Asia and Pacific (P-5),

USD 11,472.33 and a dependency allowance for her two children of USD 457.76. At that time, she was paid at the dependency rate on account of her first child as her husband was not considered her dependent. The deduction for her staff assessment was in the amount of USD 2,347.50. Her January 2017 payslip reflects a monthly gross salary of USD 11,292.17, a dependency allowance for two children of USD 452.85, and a dependency allowance for one child in the amount of USD 920.92 described on her payslip as "ICSC Interim 6% Depend (Adj)". The deduction for her staff assessment was in the amount of USD 2,596. This payslip did not correctly reflect the fact that her husband was now her dependent. The situation was corrected on her February 2017 payslip, which reflected a retroactive payment of USD 237.22 as a child allowance. Payment of the transitional allowance "ICSC Interim 6% Depend (Adj)" on account of her first child was retroactively substituted by payment of a dependent spouse allowance and a dependency allowance was paid for the third child.

14. The Respondents sought management evaluation challenging "the decision of the Administration to alter a fundamental and essential condition" of their employment relating to their salaries. They received a response from the Management Evaluation Unit informing them that the Secretary-General had decided to uphold the contested decisions. Each then filed an application with the UNDT challenging the decisions to reduce his or her contracted salary and the manner of the implementation of the Unified Salary Scale effective 1 January 2017.

## The UNDT Proceedings

15. The UNDT decided to hear the applications of the four Respondents together with seven other similar cases, which also concern the introduction of the Unified Salary Scale but involve staff members with different family situations. The UNDT held a hearing on the merits between 20 September 2017 and 22 September 2017 during which it received testimony from two witnesses, namely: the Chief, Payments and Payroll Unit, UNOG, who explained the financial implications of the Unified Salary Scale, the details of the pay slips and the reconciliation exercise; and a Human Resources Officer, Office of Human Resources Management, who testified as to the background of the adoption of the Unified Salary Scale, and the manner in which it was implemented. The UNDT rendered its Judgment on 29 December 2017, partially granting the applications.

16. The UNDT identified the contested decisions as the Secretary-General's decisions (in implementing the Unified Salary Scale) "to convert a portion of the Applicants' salaries into a separate allowance".<sup>3</sup> The Respondents did not challenge the General Assembly's Resolutions adopting the Unified Salary Scale but solely its implementation by the Secretary-General in their particular cases. They alleged that the reduction of their salary by the Secretary-General violated their individual contract

Secretary-General was equally bound by existing contractual obligations with staff members as well as preceding General Assembly resolutions still in force which protected the Respondents' acquired rights-in particular Staff Regulation 12.1 (adopted by the General Assembly on 13 February 1946 through resolution 13(I)) which provides: "These regulations may be supplemented or amended by the General Assembly without prejudice to the acquired rights of members of the staff."

20. The UNDT concluded that the applications were receivable as they did not seek to review the legality of the General Assembly Resolutions but rather the legality of the administrative decisions implementing the Resolutions in the Respondents' individual cases. The legality of the decisions had to be tested in accordance with all the applicable norms, not only the Resolutions introducing the Unified Salary Scale.

21. On the merits, the UNDT found that the unilateral conversion of a portion of Mirella *et al.*'s salaries into a separate allowance violated their acquired right to a certain quantum of salary. With the implementation of the Unified Salary Scale, the Respondents suffered a reduction of their gross salary and increase of their staff assessment resulting in a reduction of their net base salary by about six per cent. Even if this reduction was compensated by the introduction of a dependent spouse allowance in January 2017 and if the overall take home pay was higher than before the introduction of the new salary scale so as to avoid any immediate financial impact, it still constituted a violation of the Respondents' acquired rights.

22. The UNDT held that Staff Regulation 12.1 enacted by the General Assembly in 1946 "poses some limits"<sup>7</sup> to the Organization's power to amend the Staff Regulations and Rules and that the protection of acquired rights as enshrined in Staff Regulation 12.1 is an intrinsic part of the contractual relationship between the Organization and its staff members. It further held that Staff Regulation 12.1 has quasi-constitutional value and takes precedence over other Staff Regulations and Rules governing the staff members' conditions of employment. It concluded:<sup>8</sup>

... Indeed, the recognition of staff members' acquired rights would have no value and staff regulation 12.1 would be deprived of its meaning if the Organization was allowed to infringe on them by the mere ad

any derogation to staff regulation 12.1 would need to be made explicitly and it may expose the Organization's liability for breach of contracts.

23. Applying the test set out by the World Bank Administrative Tribunal in *De Merode et al.*<sup>9</sup> and the Administrative Tribunal of the International Labour Organization (ILOAT) in *Ayoub*,<sup>10</sup> the UNDT found that the Respondents' salaries were a "fundamental and essential term of

United Nations Secretariat and the advisory body from which the ICSC should have sought submissions under Article 36 of its Statute. When it requested legal advice from OLA, the "ICSC was seeking such advice from [] one of the very organs from which it is expressly established to be independent".<sup>13</sup> The ICSC also failed to give staff representatives the opportunity to provide written statements, thereby only hearing the voice of the Organization, and there is no indication in its 2015 Report that the ICSC had made its own assessment of the issue of acquired rights before presenting its recommendations to the General Assembly.

## Submissions

## The Secretary-General's Appeal

26. The Secretary-General defines the contested decisions as: the decisions to pay the Respondents in accordance with the Unified Salary Scale and the allowances established by the General Assembly in the amended Staff Regulations.

27. The Secretary-General argues that the UNDT erred in concluding that the applications were receivable. First, it erred on a question of law and exceeded its jurisTfT197.1(hdgo(h)2d[jiel0.98 15ae0 -2

the dependent spouse allowances that were paid in addition to the salaries and which were higher than the reductions in gross salary, resulting in an increase of the total sum of salary and allowances. Unlike the transitional allowance applicable to other categories, the dependent spouse allowance is granted at a fixed rate of six per cent and will not be subject to any reduction. Mere speculation about future losses due to further reductions does not provide a sufficient basis for review if no actual damage has been demonstrated at the time of the application.

29. The Secretary-General further asserts that the UNDT erred in concluding on the merits that the payment of salary according to the Unified Salary Scale established by the General Assembly violated the Respondents' acquired rights. First, the UNDT erred in finding that the Respondents had an acquired right to a particular quantum of pay for *future* work when the protection of acquired rights in Staff Regulation 12.1 is intended to protect those rights earned through service already rendered and not prospective benefits including future salaries. Secondly, the UNDT erred in finding that the methodology for calculating the Respondents' respective salaries was a fundamental and essential condition of employment, which could not be unilaterally amended by the Organization. The methodology for the calculation of the Respondents' salaries was not derived from the express terms of their letters of appointment but rather from the Staff Regulations and Rules and thus may be unilaterally amended at any time provided that the change is not applied retroactively to reduce accrued benefits. Staff members do not have a right, acquired or otherwise, 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. Thirdly, the UNDT erred in holding that the terms of the Respondents' letters of appointment, stating that their initial salaries "may rise", created an express promise by the Organization to continue to increase their rate of pay. The UNDT failed to appreciate that the basic conditions of employment of staff members as set out in their letters of employment may and often do change throughout the duration of their service and it erred in holding that a change to an essential term would violate the Respondents' acquired rights, irrespective of the reason for change or the actual impact on the staff members.

30. Finally, the UNDT erred in its observations regarding the mandates of the ICSC and OLA. The observations reflect an erroneous understanding of their mandates. The request by the ICSC, which was established as a subsidiary body of the General Assembly, for legal advice from OLA, whose role is, *inter alia*, to provide legal advice to United Nations organs, constituted the proper performance of the mandated functions of the respective entities. Requesting non-binding legal

advice did not violate the prohibition on seeking instructions as contained in Article 6(1) of the ICSC Statute. Albeit *obiter dicta*, the Secretary-General asks the Appeals Tribunal to strike the observations since leaving them undisturbed might deter the ICSC and other subsidiary organs from seeking legal advice from OLA and thus undermine its mandate.

31. For the foregoing reasons, the Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment in its entirety and to strike the *obiter dicta* regarding the mandates of the ICSC and OLA from the Judgment.

# Mirella *et al*.'s Answer

32. Mirella *et al.* submit that the UNDT was correct in receiving their applications as it lawfully held that the application of the Unified Salary Scale was an administrative act that involved the Secretary-General's exercise of discretion in its implementation. The Secretary-General retained an inherent power of discretion for existing staff with respect to the implementation—as opposed to the introduction—of the Unified Salary Scale and it properly reviewed the manner of implementation of the regulatory measure and specifically its effects on the contractual and acquired rights of the Respondents. The UNDT also did not err in reviewing the manner in which the Secretary-General reconciled the implementation of the Unified Salary Scale with conflicting contractual or higher-ranking statutory obligations.

33. The Respondents maintain that the judicial review was lawful because: (i) the implementation of the Unified Salary Scale required compliance with established procedures and the UNDT identified procedural violations such as the amendment of essential terms of appointment without the consent of the affected staff members; (ii) resolution 70/244 is silent on the higher-ranking protection of acquired rights as enshrined in Staff Regulation 12.1 and this constitutes sufficient ambiguity for the UNDT to judicially review its implementation; and (iii) the absence of any restrictions on the Secretary-General's discretionary authority allows the UNDT to review the manner of implementation so as to ensure compliance with contractual and higher hierarchical norms.

34. The UNDT correctly found that the Respondents did incur negative consequences due to the implementation of the contested decisions as they suffered a loss in their gross and net base salaries, negatively affecting their conditions of employment, and that they will suffer losses in the future. This negative impact also warranted a finding that the applications were receivable.

The Respondents submit that they suffered three types of negative consequences: (i) They have incurred a loss of legal entitlement as the reduction in salary will have an adverse impact on their borrowing power and as a portion of their salary has been converted into an allowance and thus a

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and only a matter of time. As such, the decision has an adverse impact for all the Respondents. (...)

42. The case of *Mirella et al.* differs from *Lloret Alcañiz et al.* in that Mr. Mirella and the other Respondents do not receive a transitional allowance which will be reduced and extinguished in the following years, but a dependent spouse allowance. The fact that "the organization has offered no guarantee whatsoever that the dependent spouse allowance will not be changed over time", as the UNDT stated in paragraph 124 of its Judgment, is not sufficient to regard the implementation of the Unified Salary Scale as an administrative decision towards the Respondents. The UNDT has no jurisdiction to hear appeals against decisions which may potentially affect a staff member's terms of appointment or contract of employment in the future. As the dependent spouse allowance currently compensates Mirella *et al.* for the decrease in salary, and it is yet uncertain whether this allowance will ever be reduced or abolished, there is no direct negative effect.

43. The fact that only the salary but not the dependent spouse allowance is taken into account in the determination of other benefits, contrary to the UNDT's findings in paragraph 124 of the Judgment, does not make the implementation of the Unified Salary Scale an administrative decision. Staff members are entitled to receive the benefits in question only when certain conditions are met: the termination indemnity pursuant to Staff Rule 9.8 will only be paid when the staff member does not receive a retirement benefit (Staff Rule 9.8(c)); the repatriation grant pursuant to Section 5.2 of Administrative Instruction ST/AI/2016/2 (Repatriation grant) will only be paid if the staff member resides outside his or her home country and country of nationality while serving at the last duty station; indemnity in case of death pursuant to Staff Rule 9.11(will only be paid if there is a surviving spouse or dependent child (Staff Rule 9.11(a)(vii)); and a compensation for accrued annual leave pursuant to Staff Rule 9.9(a) will only be paid if the staff member has accumulated annual leave. It is not certain whether the Respondents will ever face any financial losses with regard to such benefits.

44.

## Judgment

45. The appeal is upheld and Judgment No. UNDT/2017/099/Corr.1is hereby vacated.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of June 2018 in New York, United States.

(Signed)	(Signed)	(Signed)
Judge Knierim, Presiding	Judge Murphy	Judge Lussick

Entered in the Register on this 10<sup>th</sup> day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar