INTRODUCTION

1. The Applicants are 269 staff members of the United Nations Secretariat 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 resulting in a pay cut.

2. Identical individual applications ("the application") were initially filed with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Geneva on 16 October 2017, then they were consolidated and transferred to UNDT in Nairobi on 14 November 2017 after the two Geneva-based UNDT Judges recused themselves from the proceedings.[1]

PROCEDURAL HISTORY

3. Pursuant to Order No. 202 (NBI/2017), the Respondent filed a reply on 27 December 2017.

4. The Tribunal held case management discussions on 15 March 2018, 6 June 2018, 17 September 2018 and 19 November 2018. It also held an oral hearing on 22 October 2018 to hear evidence from Ms. Regina Pawlik, Executive Head of the International Civil Service Commission ("ICSC"), and Mr. Maxim Golovinov, Human Resources Officer, Office of Human Resources Management ("OHRM") on the following: (i) the legal framework for the functions of the ICSC vis-à-vis the General Assembly and the Secretary-General; (ii) the methodology used by the ICSC to establish the cost of living; and (iii) the function of the transitional allowance.

5. Between 9 March 2018 and 4 December 2018, the parties filed additional submissions and documents. Pursuant to Order Nos. 186 and 189 (NBI/2018) and Order No. 005 (NBI/2019), the Applicants filed a statement of relevant facts on 11

[1] Order Nos. 210 (GVA/2017) and 215 (GVA/2017).

January 2019 and on 15 February 2019, the Respondent filed his comments on these facts.

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

7. On 22 July 2019, the Applicants filed a motion seeking leave to file submissions on ILOAT Judgment No. 4134 and its relevance to the instant case. By Order No. 105 (NBI/2019), the Tribunal admitted the Applicants' submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the Applicant's submissions on 7 August 2019.

8. The parties filed additional submissions in January and February 2020.

FACTS

9. The following facts are based on the parties' pleadings, additional submissions totalling over 3000 pages and oral evidence adduced at the hearing.

10. At its 38th session in February 2016, the Advisory Committee on Post Adjustment Questions ("ACPAQ")[2] reviewed the methodology for the cost-of-living measurements in preparation for the 2016 round of surveys. The Committee made recommendations on several aspects, including the use of price data collected under the European Comparisons Program ("ECP"). The ICSC approved all the ACPAQ's

recommendations in March 2016.[3]

11. 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[4] index at these locations. Geneva was one of the duty stations included in the survey.[5] 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.[6]

12. 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.[7] 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.[8] 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

[3] 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).
[4] 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).
[5] Application, annex 6 (ICSC/85/CRP.1 – Considerations regarding cost-of-living surveys and post adjustment matters – note by Geneva-based organizations).
[6] ICSC/84/R.7 – Post adjustment issues: results of the 2016 round of surveys; report of the Advisory

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

basis of the present application.

21. On 3 October 2017, MEU responded to the Applicants' management evaluation requests of 17 August and 14 September. MEU informed them that their requests were

multiplicity of applications concerning the same matter, the Applicant's calculation and statement included in the application was erroneous. In fact, the Applicants had received a response from MEU on 3 October 2017. Thus, when they filed their application on 16 October 2017, they had satisfied the requirement of staff rule 11.2(a) regarding requesting management evaluation as a first step to formally challenging an administrative decision.

Considerations

25. The argument on the score of staff rule 11.2(a) is no longer relevant because management evaluation was requested and indeed obtained on 3 October 2017 as required. For completeness, it falls to be noted that as determined by this Tribunal in Judgment No. UNDT/2018/075, designation of advisory bodies lies with the Secretary-General. The issuance of ST/AI/2018/7 (Technical bodies), which happened after the filing of the present application, clarifies the entities that are technical bodies. ICSC is not one of these entities. Accordingly, the question of staff rule 11.2 (b) does not arise.

26. Therefore, the challenge to receivability on this score fails.

Whether the impugned decision is an individual administrative decision causing adverse consequences.

Respondent's submissions

27. The Respondent's submissions on this score seem two-fold. On the one hand, he appears to argue that the application does not challenge an individual decision. He cites the United Nations Appeals Tribunal ("UNAT/the Appeals Tribunal") in Andati-Amwayi, in that:

> […] administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of

appointment or contract of employment. [26]

Considerations

31. In the first wave of Geneva cases, including an application by the present Applicants, the UNDT explored the issue of decisions of general and individual application; in other words, concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts. [28] These considerations are restated here for completeness. At the outset, it is recalled that art. 2.1(a) of the UNDT statute provides as follows:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

32. It is further recalled that in Hamad[29], the UNAT adopted the former United Nations Administrative Tribunal's definition forged in Andronov, which describes an administrative decision as:

> a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry legal consequences. [30]

33. As can be seen from the above, the notion of an administrative decision for proceedings before the UNDT resembles what in the European continental system is

[28] Cardenas Fischer UNDT/2018/022; also, Abd Al-Shakour et al. UNDT/2018/015/Corr.1, para. 49.
[29] Hamad 2012-UNAT-269, para. 23.
[30] Judgment No. 1157, Andronov (2003) V.

UNDT's reasoning that the decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 did not amount to an administrative decision under art. 2.1(a) of the UNDT's Statute, as per the terms of Andronov, because at the moment of their issuance the secondary salary scales were to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. Regarding the appellants' challenge to the freeze of the then-existing salary scales, the UNAT upheld the UNDT's finding that the applications were not receivable ratione materiae because the contested decision was of a general order, in that the circle of persons to whom the salary freeze applied was not defined individually but by reference to the status and category of those persons within the Organisation, at a specific location and at a specific point in time. [34] However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

> … [i]t is only at the occasion of individual applications against the monthly salary/payslip of a staff member that the latter 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

members, including the appellant in that case, received Personnel Action forms confirming their new grade. The UNAT echoed Obino regarding the lack of discretion on the part of the Secretary-General in implementing ICSC decisions. It however concluded:

> Notwithstanding the foregoing, it is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an "administrative decision" falling within the scope of Article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.[44]

38. The Appeals Tribunal accordingly held that the application was receivable and had to be reviewed on the merits. This Tribunal proposes that the reading of Pedicelli part eivable and

40. As shown by the above, without ever withdrawing from the terms of Andronov, the jurisprudence of UNAT affirmed the receivability of applications when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision expressed through a payslip or personnel action. This is precisely the holding of Tintukasiri, the leading case on the issue. The other UNAT judgments, notwithstanding the occasional intertwining of elements pertinent to legality rather than receivability[47], express the same concept and are directed toward the same legal effect.

41. It falls to be noted that the distinguishing decisions of general application and individual decisions taken in the implementation of the former is also adopted and rather painlessly applied in ILOAT jurisprudence, including attaching the moment of individual decision to receipt of a payslip in remuneration matters.[48]

42. In the present case - unlike in previous applications raised by the Applicants in connection with the ICSC decision on post adjustment –an individual decision, namely, to apply the new post adjustment in relation to each of the Applicants, has been issued and implemented, as demonstrated by their salary slip of August.

43. As concerns the Respondent's averment that the transitional allowance eliminates the effect of the contested decision because no financial loss had materialized for the Applicants , the Tribunal holds that the transitional allowance is not a prefatory act[49], but a corollary to the lowering of a pay component. The Tribunal concurs with the Applicants' argument, reproduced in para. 30 above, that, transitional allowance notwithstanding, the decision to lower the post adjustment had been taken and implemented. It also wishes to recall that the Appeals Tribunal has accepted that a decision has direct effect where the applicants

[47] As in Obino, where the question of the Secretary-General being bound by ICSC decision was pertinent to the issue of proving non-compliance with terms of appointment or contract of employment (para 19),

a result of the gradual depreciation of the transitional allowance. Although the loss may not be immediate, a loss of some kind will inevitably afflict all the applicants with the loss of eligibility for the transitional allowance. The inevitability of the loss may be a future event, but it is nonetheless certain and only a matter of time. As such, the decision has an adverse impact.[50]

44. In conclusion, this Tribunal finds that the case involves an individual decision of direct adverse effect on the terms of the Applicant's appointment. The Respondent's argument on this score fails.

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

Respondent's submissions

45. In reproducing arguments advanced in the "first wave" of the Geneva cases, the Respondent points out to disparate outcomes in receivability stemming from the UNAT jurisprudence. In invoking Obino, he proposes that, instead of the criterion of negative effect of the decision, the controlling criterion for receivability of an application before the UNDT should be whether the contested decision of the Secretary-General was issued in the exercise of discretion as opposed to execution of a binding decision of another entity. In accordance with the proposed criterion, implementation of an ICSC decision on post adjustment multipliers is not a reviewable administrative decision. The General Assembly has repeatedly affirmed that decisions of the ICSC are binding on the Secretary-General[51] and the Secretary-General lacks discretionary authority in implementing ICSC decisions on post adjustment.

Applicants' submissions

46. The Applicants' case is that the ICSC's decision was ultra vires, thus the Respondent cannot rely on the absence of discretion in his decision making. Relying

[50] Lloret Alcañiz 2018-UNAT-840, para. 67.
[51] Reply, annex 19 (General Assembly resolutions 66/237, para. 37 and 67/241, para. 3).

on Pedicelli[52], the Applicants submit that the Respondent's decision is reviewable under art. 2(1) of the UNDT Statute because he made an administrative decision that had direct legal consequences for them. To find otherwise would render decisions regarding fundamental contractual rights of staff members' immune from any review regardless of the circumstances. This would be inconsistent with basic human rights and the Organization's obligation to provide staff members with a suitable alternative to recourse in national jurisdictions.

Considerations

47. Still in the same 1st wave of Geneva cases the Dispute Tribunal dealt with the Respondent's proposed use of discretion in an administrative decision as the criterion for determination of the receivability of an application. The Tribunal considers that, first, the criterion of discretion proposed by the Respondent is systemically inappropriate. Second, there is, hopefully, no more contradiction in UNAT jurisprudence as to what constitutes a reviewable administrative decision, as the position taken by this Tribunal has been subsequently confirmed by the Appeals Tribunal in Lloret Alcañiz. This notwithstanding, the Respondent declared that he would not retract his opposition to receivability. The Tribunal, therefore, will discuss the two relevant aspects below.

48. Systemically speaking, the use of discretion as criterion for determination of an administrative decision has no basis in any generally accepted doctrine. Conversely, the doctrine of administrative law recognizes both discretionary decisions and constrained decisions, the latter having basis in substantive law which determines that where elements of a certain legal norm are fulfilled, the administrative authority will issue a specific decision.[53] Substantive law may be a primary or secondary general

[52] Judgment No. 2015-UNAT-555.
[53] For that matter see also: Gorlick UNDT/2016/214 at para. 22. "As a matter of law, administrative decisions may be discretionary or not discretionary, but this does not affect their qualification as administrative decisions. For this purpose, as long as a decision produces legal effects, is of individual application and emanates from the Administration, it is irrelevant whether the decision-maker disposes

legislation or may be an administrative decision of a general order. Where the controlling norm is contained in a decision of general order, which leaves no room for administrative discretion, its implementation is still done through a discrete administrative decision of constrained character, whereby the administration subsumes facts concerning individual addressee under the standard expressed by the general order. Therefore, constrained decisions are as a rule reviewable for legality, i.e., their compliance with the elements of the controlling legal norm. Whereas state systems may conventionally determine that constrained decisions are to be challenged not before an administrative but rather before a civil or labour court, the applicants challenging decisions of the Secretary-General have no such option available. To exclude a limine judicial review of constrained decisions would unjustly restrain the staff members' right to a recourse to court.

case of arbitrariness or abuse of power; formal legality, on the other hand, is always reviewable.[55]

50. 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

acquired rights and causes inequality of pay within the United Nations common system.

57. 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

Applicants' submissions

60. The Applicants' case is that the impugned decision is ultra vires because the ICSC did not have authority under art. 11 of the ICSC statute to unilaterally impose alterations to the survey methodology, operational rules and to the Geneva post adjustment index without approval from the General Assembly. The Applicants submit that art. 10 of the ICSC statute provides it with authority to make recommendations to the General Assembly regarding salary scales and post adjustment for staff in the professional and higher categories, which involves a precise financial calculation. As concerns art. 11, it grants the ICSC authority to make decisions regarding classification of duty stations. Classification, at the current state of affairs, denotes assignment of a duty station within Group I or Group II dependent on whether it concerns countries with hard or soft currencies, a consideration which is not relevant for the case at hand.

61. 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".[58]

62. While the General Assembly appears to have endorsed a departure from post adjustment scales in 1989, its resolutions 44/198 and 45/259 do not represent a legal

[58] Judgment 4134 consideration 39, referring to Judgment 3883, consideration 20; Judgment 3601, consideration 10; and Judgment 3544, consideration 14.

framework providing authority for the contested decision. They are discrete decisions that do not indicate either on ongoing delegation of authority or a regulatory framework for the work of the ICSC. The alleged practical difficulty in seeking General Assembly approval of multipliers does not imply delegated authority. In conclusion, the ICSC operates in a manner inconsistent with its Statute.

Respondent's submissions

challenged the ISCS' authority in respect to post adjustment classification under art. 11(c).

68. 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 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.

69. 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

70. 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.[66] 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

[66] E.g., Scott 2012-UNAT-225.

the word a special meaning.[67] 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 ascribed to the terms "scales" in the same article and "classification" in art. 11. The

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 in the calculation of post adjustment for each grade and step per duty station.

72. 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;[70]
>
> 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 […].

73. 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.

[70] Resolution 3357 (XXIX).

74. The changes, however, were approved by the General Assembly, either expressly or by reference to ICSC written reports[71]; 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 competence for determining the post adjustment in the quantitative sense has never been questioned.[72] 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

> 3. Acceptance of the statute by such an agency or organization shall be notified in writing by its executive head to the Secretary-General.

76. As results from section 2, the United Nations has been juxtaposed with "specialized agencies and other international organizations …which accept the present statute".[73] As results from section 3, it is only "specialized agencies and other international organizations" who have the option of accepting, or not, the ICSC statute and, in accordance with art.30, any ensuing amendments. The United Nations, which, in this context, denotes the Secretariat and funds and programmes, are directly bound by the General Assembly's decisions on the matter of ICSC competencies. This conclusion distinguishes the present case from the case subject to ILOAT Judgment 4134.

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

Applicants' submissions

77. The Appeals Tribunal confirmed reviewability of ICSC decisions in Pedicelli, moreover, ILOAT has consistently reviewed decisions relating to post adjustment. To refuse the applicants' access to judicial review would violate basic human rights and the Organization's obligation to provide a suitable recourse; it would also risk the breakup of the United Nations common system with staff members from one jurisdiction afforded recourse denied in other parts. Moreover, the Secretary-General cannot be obliged to implement ultra vires decisions. If the ICSC can exercise powers for which it has no authority and those actions cannot be checked by either the Secretary-General or the internal justice system, then there is no rule of law within the Organization.[74]

73

Respondent's submissions

78. The Respondent submits that the ILOAT and the UN 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".[75]

79. 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."[76] 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.

80. By contrast, the Respondent's case is that UNAT in Lloret-Alcañiz et al.[77], distinguished claims that challenged the legality of the Secretary-General's execution of legislative decisions from claims that challenged the legality of the legislative decisions themselves. The Respondent proceeds to cite UNAT in that its authority did not include the review of the legality of General Assembly decisions, as it was not established to operate as a constitutional court. Additionally, the General Assembly has directed that UNDT and UNAT decisions "shall conform with General Assembly resolutions on issues related to human resources management".[78] The Respondent derives therefrom that the UNDT lacks jurisdiction to review the legality of legislative

[75] Respondent's submission in response to Order No. 105 (NBI/2019).
[76] Ibid., citing to ILOAT Judgment No. 4134, considerations 8, 26.
[77] 2018-UNAT-840.
[78] A/RES/69/203, para. 37; A/RES/71/266, para. 29.

decisions.

81. The Respondent submits that since ICSC decisions are binding on the Secretary-General, his implementation of these decision is a "purely mechanical exercise of authority". Thus, the Tribunal's review in this case is limited to whether the Secretary-General was authorized by law to implement the ICSC decision and whether he failed to comply with the statutory requirements or preconditions attached to the exercise of that authority. The internal decision-making processes and the methodologies used by the ICSC, on the other hand, do not fall within the jurisdiction of the Dispute Tribunal and that the ICSC is only accountable to the General Assembly.

Considerations

82. At the outset, in his citations from Lloret-Alcañiz, 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.

83. 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.[79] The Tribunal does not deem it necessary to further dwell on this matter.

[79] See Cherif 2011-UNAT-165; Quijano Evans 2018-UNAT-841.

84. 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 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.[80]

85. 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, because this is expressly ruled out, 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.

86. The answer may be readily found in the advisory opinion by the International Court of Justice in relation to the jurisdicion of the former United Nations Adminstrative Tribunal (relied upon by the Appeals Tribunal in Lloret-Alcañiz), 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

[80] Tintukasiri 2015-UNAT-526, paras. 35-37.

> judicial review or appeal in respect of the decisions" taken by the General Assembly (…).[81]

87. 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 Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management".[82]

88. The General Assembly reiterated the same in its 22 December 2018 resolution on the Administration of justice at the United Nations:

> […] all elements of the system of administration of justice, including the Dispute Tribunal and the Appeals Tribunal, must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly, and emphasizes that the decisions of the Assembly related to human resources management and administrative and budgetary matters are subject to review by the Assembly alone.[83]

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

89. The Tribunals are, on the other hand, not bound by acts not originating from the General Assembly, specifically, by issuances of the executive, where these issuances would be found to contradict the framework approved by the General Assembly. This conclusion is logically inevitable not just on the plain language of the General Assembly resolution but results even more forcefully from the nature of the

applied in state systems, where a regular judiciary is bound by statutes only, whereas inferior regulatory acts are binding on the executive and presumed legal, the courts, however, may refuse their application to a case on the score of nonconformity with statutes. There is a rich body of jurisprudence from ILOAT, the former United Nations Administrative Tribunal (including judgments relied upon by the Respondent in this case) and indeed from UNAT [84], that confirm this principle. Therefore, to the extent the Respondent appears to argue the binding nature of all regulatory acts, no matter the placement in the hierarchy, this proposition must be rejected. To accept it would deny the UNDT, and UNAT alike, independence from the executive, reduce its cognizance to a replication of the management evaluation process and deny staff members effective recourse to an independent tribunal, which is clearly against the rationale adopted by the General Assembly resolution 61/261.[85]

from it, what the Appeals Tribunal confirmed in Lloret-Alcañiz was that UNDT and UNAT may need to incidentally review also acts originating from the General Assembly, where a question arises about a conflict of norms.[87] Altogether, with respect to the scope of review of regulatory acts, there is no difference either in statutory regulation or in "approach" between the ILOAT and the UNDT/UNAT system as both concern themselves only with incidental review. This can be clearly seen from the fact that neither ILOAT Judgment 4134 ruled on the illegality of the ICSC decision in the operative part of the judgment nor did UNAT rule on the illegality of staff rule 11.4 in the operative part of its Neault 2013-UNAT-345 judgment, while in both cases the regulatory acts were found unlawful.

91. 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"[88] needs to be corrected on three levels: Firstly, denying receivability is untenable because the Applicants are contesting individual decisions concerning their terms of appointment, as discussed supra, 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 the individual decision and not with a claim to have the regulatory decision stricken. Secondly, determination whether to entertain a challenge to legality of the ICSC decision depends, primarily, on whether it was an exercise of the delegated regulatory authority under art. 11 of the Statute or the ultimate decision had the endorsement of the General Assembly. Thirdly, even in the latter case, an incidental review of the 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.

92. 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

[87] 2018-UNAT-840, paras 80-82, 92.
[88] Respondent's submission in response to Order No. 105 (NBI/2019), para. 8.

content of regulatory decisions under art. 10, 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 test. On the other hand, where the ICSC exercises a delegated regulatory power under art.11, 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 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.[89]

93. Notwithstanding the aforesaid, also where the ICSC exercises its delegated regulatory powers, it remains subordinated to the United Nations General Assembly who 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.[90] 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[91], 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.[92] The ICSC recalled this precedent in its report of 2012.[93] Intervention of the General

[89] Pedicelli 2017-UNAT-758 para 26 "We find no error in [UNDT's finding] that the renumbering exercise "had a legitimate organizational objective of introducing the GCS for GS positions."
[90] General Assembly decision 67/551 of 24 December 2012.
[91] General Assembly Resolution 39/27 of November 1984.
[92] UN Administrative Tribunal Judgment No. 370, Molinier (1986).
[93]

Assembly largely removes the matter from the purview of the Tribunals. This, as noted by the Respondent[94], is confirmed in Ovcharenko, where the Appeals Tribunal confirmed legality of the implementation of the post adjustment freeze because the ICSC decision, subject to implementation by the Secretary-General, had been based on the General Assembly's resolution recommending the freeze.[95] In such cases, the regulatory decision is attributed directly to the General Assembly and thus, in accordance with Lloret-Alcañiz, judicial review is limited to the question of a

Noblemaire principle is introduced through post adjustment and subsequently absorbed into base salary.[100]

97. Relying on ILOAT Judgment No. 832, In re Ayoub (1985), the Applicants submit that the right to a stable salary represents an acquired right that can reasonably be considered to have induced them to enter into and remain in contract. The term relates to the remuneration for work and, particularly, stability in such remuneration, which is a fundamental term. Amendments to the gap closure measure breach this right. The consequences of this breach of the Applicants' acquired right to a stable remuneration are considerable: a salary reduction of 4.7%. The scale of the cut will impact long term financial commitments they entered into based on a stable salary provided over an extended period. Implementation of transitional measures will not mitigate the impact of such a drastic cut.

98. The Applicants submit that the methodology applied by the ICSC raises issues regarding the International Service for Remunerations and Pensions ("ISRP") rent index, domestic services aggregation, place-to-place surveys, cost of education and medical insurance. They further submit that the methodology does not provide for results that are foreseeable, transparent and stable.[101] 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.

99. The Applicants submit that the application of gap closure measures is arbitrary. The way the amended rule operated in the past ensured stability in circumstances where the salary reduction for staff would be within 5%. This has now been revised to an

[100] Applicant's submission of 3 April 2018, annex 11 (ICSC/CIRC/PAC/517 of 15 January 2018).
[101] 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.

augmentation of 3% on changes of 3% or more. No indication has been provided as to why the margin of error might have been reduced at a time when the ICSC have been applying a new and untested methodology.

Respondent's submission

100. The concept of "acquired rights" is enshrined in staff regulation 12.1. They are generally considered to be rights that derive from staff members' contracts of employment and are accrued through service. In determining acquired rights, the former United Nations Administrative Tribunal distinguished between contractual and statutory elements of a staff member's employment, with the guarantee of acquired

102. The Respondent submits that the determination of the post adjustment multiplier is a statutory element of employment. The Applicants have a general right to post adjustment under the terms of their employment, but they are not entitled to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, they do not have an acquired right to the previous system of calculation or to the continuance of any particular methodology.[105]

103. The Respondent recalls that the Secretary-General has no authority to decide on the methodology to be followed by the ICSC and submits that the Tribunal does not

106. The Appeals Tribunal held, first, that Staff Regulations, in particular staff regulation 12.1 establishing protection of acquired rights, did not hold a quasi-constitutional position in the hierarchy in General Assembly's resolutions; as such it was susceptible to amendments through the operation of lex posterior:

> Any protection of contractual rights of staff members in earlier

> normative conflict. Resolutions 70/244 and 71/263 do not retrospectively take away any vested right to receive a benefit for services already rendered.
>
> … In our view, the first interpretation of the term "acquired rights" is the more appropriate as it avoids or reconciles the normative conflict and harmonizes the provisions of the two resolutions. An "acquired" right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the quid pro quo for the promise has been performed or earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to future increases or pose a legal bar to a reduction in salary.

108. 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 unilaterally amended by the General Assembly. Staff members do not have a right, acquired or otherwise, to the continued application of the Staff Regulations and B8F#*rL%;L#D;E;" the system of computation of

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

113. At the outset, it should be noted that the criterion applied in the Kaplan case[115], i.e., sharp delineation between contractual and statutory elements in the employment relation, the former conducive to acquired rights and thus outside the scope of unilateral modification by the employer, did not survive the test of utility over time. Subsequent jurisprudential developments, therefore, explore when individually determined ("contractual") elements might be statutorily modified.

"cause unnecessary forfeiture or deprivation".[126] In the latter aspect, it was also proposed to consider whether the modification is permanent or temporary.[127]

119. 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 right is formally legal, necessary and proportionate) and the resulting stringency of the applicable criteria and the burden of proof. Below, the Tribunal shall undertake to test the reasonability of the disputed regulatory decision of the ICSC against these criteria. As previously explained, this is done in order to evaluate the legality of the impugned individual decisions based on it, and not to hold ICSC "answerable" or exercise a constitutional court-type jurisdiction over its decisions.

Application of the criteria to the impugned decision

120. As to the nature of the entitlement in the present case, it is undisputed that the post adjustment is an element of salary. The post adjustment multiplier, however, is not an individually determined ("contractual") element of the salary, rather, unlike the salary sensu stricto, it is inherently variable in relation to the cost of living, with a view, in addition, to maintaining purchasing power parity of salaries across duty stations, and not to keep pace with inflation at any particular duty station. The Applicants' general right to post adjustment under the terms of their employment[128] is not at issue; rather, the question concerns decisions adopted to give effect to this right. With this respect, the legal benchmarks in place include determining a comparator in accordance r

dispute that the applicable rules do not confer upon the Applicants a right to have the post adjustment multiplier set at any particular rate or to receive any particular amount of post adjustment. Further, they do not have an acquired right to the previous system of calculation or to the continuance of any particular methodology.

121. In light of the holding of the Appeals Tribunal in Lloret-Alcaniz the Tribunal, however, must also find that notwithstanding the 75 years of practice of refraining from downward revision of salary and post adjustment by the Organization, the Applicants do not have an acquired right to protection against such a downward revision of the post adjustment multiplier, through the application of a freeze, gap 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.[130]

122. 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.

123. Regarding the purpose of the disputed modification, it is generally consistent

matter in a professional capacity: experts, ACPAQ members and commissioners themselves, that the post adjustment calculation presents extreme complexity and is

values continued to increase. On this example the independent expert cautioned that this increasing disconnect between the trends of the pay index and the updated post adjustment index over time could lead to unmanaged expectations which can cast doubt

statisticians review, with which it disagreed and considered biased. Still, in the face of arguments put before it, it took decisions to mitigate the post adjustment decrease. To this end, it is noted that, as reflected by the ICSC report for 2017, the Commission decided:

> Taking into account the appeals by representatives of organizations and staff federations, the Commission decided to approve the following 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:

system carried out by the ICSC under the scrutiny of the General Assembly.[140] Retaining an independent expert to examine the methodology was a step toward a comprehensive review that was subsequently launched and which includes establishing a working group on operational rules governing the determination of post adjustment 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 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.

131. 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

[140] General Assembly resolutions 72/255, 73/273 and 74/255 A-B.

> 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 organization has acted unlawfully.

135. 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. This matter is properly before the ICSC and, ultimately, the General Assembly.

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

JUDGMENT

137. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 30th day of June 2020

Entered in the Register on this 30th day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi