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Registry: Vienna

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CARDENAS FISCHER et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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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 Committee on Post Adjustment Questions on its thirty-ninth session and agenda for the fortieth session.
[7] Reply, annex 2, para. 100 (ICSC/84/R.8 – Report on the work of the International Civil Service Commission at its eighty-fourth session).
[8] Ibid., paras. 105 and 106.

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.[15]

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]

28. The Respondent proceeds to show "disparate outcomes in receivability" resulting from the Appeals Tribunal's judgments in *Obino* 2014-UNAT-405, *Ovcharenko* 2015-UNAT-530 and *Pedicelli* 2015-UNAT-555.

29. On the other hand, the Respondent contends that the application is not

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

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

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

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 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

51. Thus, the *Obino* UNAT Judgment, in five paragraphs committed to considering the grievance of Mr. Obino, rejected it as irreceivable on three grounds at the same time: because the application was directed against the ICSC and not the Secretary-General's decision; because Mr. Obino did not meet the burden of proving illegality while the Secretary-General was bound to implement the ICSC decision; and because Mr. Obino did not show that the implementation affected his contract of employment.

52. Similarly, in *Kagizi* the Appeals Tribunal confirmed that the applicants "lacked capacity" to challenge decisions of the Secretary-General taken pursuant to the decision of the General Assembly to abolish the posts which they encumbered but, eventually, concluded: "Generally speaking, applications against non-renewal decisions are receivable. However, in the present case, the Appellants have intertwined their challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts."[56]

[55] See *Sanwidi* 2011-UNAT-104; *Frohler* 2011-UNAT-141 and *Charles* 2012-UNAT-242.
[56] *Kagizi* 2017-UNAT-750 para. 22.

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

58. 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 decision regarding a reduction in the post adjustment multiplier?

59. The parties' arguments pertain to the following provisions of the ICSC Statute:

> *Article 10*
>
> The Commission shall make recommendations to the General Assembly on:
>
> (a) The broad principles for the determination of the conditions of service of the staff;
>
> (b) The scales of salaries and post adjustments for staff in the Professional and higher categories;
>
> (c) Allowances and benefits of staff which are determined by the General Assembly;
>
> (d) Staff assessment.
>
> *Article 11*
>
> The Commission shall establish:
>
> (a) The methods by which the principles for determining conditions of service should be applied;
>
> (b) Rates of allowances and benefits, other than pensions and those referred to in article 10 (c), the conditions of entitlement thereto and standards of travel;
>
> (c) The classification of duty stations for the purpose of applying post adjustments.

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

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 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.

71. 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.[68] 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.[69]

[67] 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".
[68] See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).
[69] It would seem that the General Assembly in its resolution 40/244 conferred on the Commission the power to "take steps to prevent the rules relating to a post adjustment increase" from adversely affecting the margin defined by the same resolution and thus, effectively authorised it to depart from schedules in case where post adjustment calculation indicated that it could be decreased.

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 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 Applicant's argument cannot be upheld under the Statute.

75. 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 Nations and of those specialized agencies and other international organizations which participate in the United Nations common system and which accept the present statute (hereinafter referred to as the organizations).

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

[72] Rather, it was disputed whether the General Assembly had the power to overrule the Commission's decision; see UN Administrative Tribunal Judgment No. 370, *Molinier* (1986), also UNAT in *Ovcharenko*, ibid.

> 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,

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*

judicial review or appeal in respect of t,a0 001c-Tions”0(of)-2akedic10(in 1(by0(of)-210dic f 5

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] Noting that the Respondent seeks support in the quote: *"recourse to general principles of law and the Charter of the United Nations by the Tribunals is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances*"[86], the Tribunal finds this statement's normative value limited to the importance of a proper application of the *lex specialis* principle.

90. The last pertinent issue on this score is one contemplated in the *Lloret-Alcañiz* judgment. Contrary to the Respondent's linguistic parsing based on selective quotes

[84] In addition to *Tintukasiri Pedicelli*, and *Lloret-Alcañiz* cases cited in the text of this Judgment, see e.g. *Scott* 2012-UNAT-225 accepting to review a challenge to literal reading of a staff rule based on general principle of law; *Neault* 2013-UNAT-345, para. 31 declaring staff rule inapplicable because of inconsistency with the Statute; *Gehr* 2013-UNAT-293 stating where there is ambiguity or a contradiction, the UNDT Statute prevails over the Staff Rules; *Couquet* 2015-UNAT-574 citing *Gehr* to support that staff rules prevail over administrative issuances; *Lemonnier* 2016-UNAT-679 citing *Neault* 2013-UNAT-345 and *Gehr* 2013-UNAT-293.

[85] Also, as recognized in Internal Justice Council reports "If the Dispute Tribunal and the Appeals Tribunal are seen simply as an arm of the Secretary-General's administration then they will not serve the purpose envisaged by the Redesign Panel on the United Nations system of administration of justice, which called for an open, professional and transparent system of internal justice" (A/70/188 dated 10 August 2015) and "The administration of any justice system worthy of the name is based on the rule of

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]

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 normative conflict between the acts of the General Assembly.

94. The Tribunal notes that, with respect to the present dispute, the General Assembly observed in its (oln BT /FAAAAH 121i41(tAmbl98 Tm 3up in iTm [mm 9010a[(nor256(ran)1(r

the feasibility of more frequent reviews of post adjustment classifications of duty stations;

4. *Further requests*

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.

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 have jurisdiction to review the methodology or the data used. The collection and processing of the data from the baseline cost-of-living surveys for 2016 were carried out by the ICSC Secretariat in accordance with the established methodology, and that decisions taken in the context of this review were not taken in isolation, but in the framework of the Commission's overall decisions on methodological and operational matters pertaining to the 2016 round of surveys. The Chairman of the ICSC also concluded that the findings of the Geneva statisticians "*were found to be based on alternative methodologies, data, and scenarios that appeared to be formulated for the purpose of changing the result for one duty station*".[106] Lastly, the ICSC advised that an independent review of the core methodological issues of the post adjustment system is ongoing.

Considerations

104. It will be useful to begin with a general clarification regarding contractual versus statutory elements of the employment relation. A contractual relationship refers to the relationship between the staff member and the international organisation as evidenced in a contract, i.e., a bilateral act. The statutory relationship, on the other hand, is based on status, i.e., refers to the appointment of civil servants by acts of authority, which forms a relation in accordance with statutorily defined terms and conditions. An individual who agrees to enter the public service gives full consent to

[105] Respondent's reply, paras 65 to 73.
[106] Letter dated 4 October 2017 from the Chairman of the ICSC to the Senior Inter-Agency Advisor on Human Resources Management, United Nations Chief Executives Board for coordination.

these terms and conditions, in other words, joins by adherence. Consensus – in the case of statutory relationship – is therefore a *de facto* precondition of appointment, which

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 resolutions would have to yield, as a matter of general principle and doctrine, to an evident intention by the General Assembly, the sovereign lawmaker in the United Nations system, to amend those rights or to substitute them with others. Any normative conflict would have to be decided in favour of the later resolution."

107. The Appeals Tribunal proceeded to discuss whether there was indeed a 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 &7D&CDD#8qC: other words once the right to counter-performance (the salary or benefit) has vested or been acquired through services already rendered. Alternatively, it might be argued, an acquired right may include the right to receive a specific counter-performance in exchange for a promised future performance prior to performance being rendered. The UNDT preferred this second interpretation.
>
> … If one were to accept the UNDT's interpretation (the second interpretation) as correct, then there is indeed a normative conflict between resolution 13(I) of 1946 and resolutions 70/244 and 71/263. The later resolutions have varied the contractual UB%9C*#qC: which case, for the reasons just explained, contrary to the finding of the UNDT that the "quasi-constitutional" earlier resolution should prevail, the later resolutions and not the earlier one would have to take precedence. Resolutions 70/244 and 71/263 undeniably alter the contractual rights of staff members to receive an agreed future salary. However, if the first interpretation of "acquired rights" is preferred there will be no

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 @7D#*qJ%:J#B:C:" the system of computation of their *!D!BC#*qC: force at the time they accepted employment for the

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

dispute that the applicable rules do not confer upon the Applicants a right to have the

matter in a professional capacity: experts, ACPAQ members and commissioners themselves, that the post adjustment calculation presents extreme complexity and is not applied pursuant to arithmetical or even purely statistical method. To this end, the Geneva statisticians' review, notwithstanding its overall rejection of the methodology applied in Geneva, begins and ends with a caveat that it is not thorough or comprehensive[131]; that their estimates are indicative – proper estimation of the updated series would need to be computed by ICSC using October 2016 as the base and updated to May 2017[132]; that certain alternative calculations should first be tested within the ICSC system, to ensure that they are precise[133]; and that with regard to multiple issues of importance, believed to have statistically biased the 2016 results, the report was not been able to quantify the extent of the impact of these problems on the Geneva PAI and recommended further studies.[134] The independent expert likewise stressed the complexity of adjusting pay of staff in all duty stations in a way that is fair, equitable and meets standards of compensation policies, which are related not only to the actual cost of living but also to equivalence of purchasing power.[135] As evidenced by both reports, regarding numerous components relevant for the ultimate calculation, there are available alternative policies and methodological approaches.

125. It is also undisputed that from since a survey carried out in 2010, the ICSC adopted certain methodological modifications. Clearly, the ICSC has been acting on instructions from the General Assembly that the applicable post adjustment reflect most accurately the cost of living.

126. While the independent expert's review did not encompass Geneva 2016 survey results, which is regrettable, it furnishes two pertinent observations. First, during the six years preceding the disputed survey, the post adjustment index of Geneva remained consistently lower than its pay index and, since March 2015, the gap between the two

[131] Application, annex 6, page 4, paras. 10 and 69.
[132] Ibid., page 37, para. 57.
[133] Ibid., page 43, para. 71.
[134] Ibid., pages 65-66, paras 162 & 164.
[135] Applicant's submission of 19 October 2018, annex 14, para. 10, p. 37 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).

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 on the validity of the subsequent survey and create shocks in the system".[136] With this regard, the recommended solution was more frequent surveys. The Tribunal considers it safe to conclude that a fair part in the negative post adjustment outcome in Geneva is attributable to the accumulation of the said disparity over the period of 6 years.

127. The second observation is relevant to the report of the Geneva statisticians, where the main point of contention was the housing component, alleged to have been responsible for up to 4,1% downward miscalculation. In this regard, concerning the

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:
>
> (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 [..]

129. 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. The resulting financial loss for the Applicants, 4,7% of the post adjustment component of the salary - and not 4,7% of the salary as a whole, as it is presented by the Applicants, moreover,

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