INTRODUCTION

1. The Applicants are 286 staff members from several United Nations entities

arguments presented by them in the fourth wave case.[3] The facts described in the following sections of this Judgment are based on the parties' pleadings, additional submissions totalling over 3000 pages and record of the hearing which the Tribunal held in the fourth wave of cases on 22 October 2018 and where evidence was given by 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.

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. 106 (NBI/2019), the Tribunal admitted the Applicants' submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the Applicants' submissions on 7 August 2019.

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

---

[3] Reply, para. 9.

established transitional measures.[10] 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 adjustment index caught up with the prevailing pay index.[11]

12. In April 2017, the Executive Heads of Geneva-based organizations requested that ICSC provide information regarding the specific impact that the survey components and the changes to the methodology had on the 2016 survey results and proposed the deferral of any implementation until such information was available and validated in a process in which their representatives participated. The ICSC Chair

statisticians,[15] requested by the Geneva Human Resources Group[16], conducted a targeted review of the 2016 cost-of-living survey in Geneva to ascertain "whether, from a statistical perspective, the calculations used in the 2016 survey could be considered of good quality and sufficiently robust to be designated 'fit for purpose'". Given the relatively short time, the review was not a comprehensive review of all elements of the ICSC methodology or implementation of the methodology. However, the reviewers concluded that: (a) due to several serious calculation and systemic errors in the 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.[17]

15. On 10 July 2017, the Applicants sought management evaluation of the decision to implement the post adjustment change to their salaries effective 1 May 2017 that would result in a 7.7% reduction in their net remuneration.[18] In the ensuing litigation, this Tribunal, in its Judgment No. UNDT/2018/015/Corr.1, dismissed the application as irreceivable, having found that no individual decisions had been taken in the Applicants' cases.

16. Pursuant to a decision made at the ICSC's 85th session in July 2017, the ICSC engaged an independent consultant to review the methodology underlying the post adjustment system and assess, *inter alia*, whether it was "fit for purpose". In a report dated 6 February 2018, the consultant noted that the purpose of the post adjustment system "is to adjust salaries of UN Common System professional staff in all duty

---

[15] Application, annex 13, page 18. The review team consisted of two staff members of ILO, one staff member of UNCTAD and an international consultant.
[16] Ibid., page 19.
[17] Ibid., page 23.
[18] Application, annex 8.

stations in a way that is fair, equitable and meets standards of compensation policies. To this extent it can be said that these procedures and the approved methodology go a long way to meet the criterion of 'fit for purpose'. There are however clearly areas for improvement […]".[19] The consultant made 64 recommendations, including but not limited to the methodology for the post adjustment system, policies and specific issues. [20] The staff associations engaged another independent expert who reviewed and elaborated on selected recommendations from the ICSC's consultant's report.[21]

17. On 18 July 2017, the ICSC decided to change the implementation date of the results of the cost-of-living survey in Geneva from 1 May 2017 to 1 August 2017.[22] Staff members were informed on 19 and 20 July 2017 of the new implementation date, the reintroduction of a 3% margin to reduce the decrease of the post adjustment, postponement of post adjustment-related reduction for serving staff members by extending the transitional measures applicable to serving staff members from three to six months (i.e. 1 February 2018), and that subsequent post adjustment reductions would occur every four months instead of every three months.[23]

18. On 14 September 2017, the Applicants requested management evaluation of the 19 and 20 July 2017 decisions indicating, in the alternative to previous filings[24], the decision date as being from receipt of their August payslip, which reflected reduction of the post adjustment portion of salary and payment of the transitional allowance. That decision formed the basis of the Tribunal's Judgment No. UNDT/2020/117 in the fourth wave case between the parties.

19. On 7 February 2018, the Administration informed staff that the first quantitative reduction in post adjustment would be reflected in the February pay slip, reflecting a

---

[19] Application, annex 16, page 37, para. 10 (ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).
[20] Ibid., pp. 47-54.
[21] Application, annex 17 (Comments on the consultant report – "review of the post adjustment methodology" – and prioritization of its recommendations).
[22] Reply, annex 7, para. 129 (A/72/30 – Report of the International Civil Service Commission for the year 2017).
[23] Application, annexes 2 and 3; reply, annex 8.
[24] See Judgment Nos. UNDT/2018/015/Corr.; and UNDT/2018/076.

discrete administrative decision, even where it only repetitively applies a more general norm in the individual case. Since this Tribunal does not pronounce on legality of acts

25. Further, the Respondent submits that the Applicants are challenging the ICSC decision, *i.e.* how the ICSC reached its decision as well as the internal decision process within the ICSC. The United Nations Dispute Tribunal ("UNDT") and the UNAT have consistently held that legislative or regulatory decisions do not constitute administrative decisions subject to review. The July 2017 decision of the ICSC on post adjustment multipliers is not an administrative decision subject to review pursuant to art. 2 of the UNDT Statute.

Applicants' submissions

26. The Applicants' case is that the ICSC decision was *ultra vires*, thus the Respondent cannot rely on the absence of discretion in his decision making. Relying on *Pedicelli*[34], 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

pertaining to entitlements. The UNAT confirmed that highly constrained decisions, such as placement of reports on staff member's file, are reviewable for legality.[36] In factual scenarios like the ones contemplated here, assuming that an ICSC decision would have been binding on the Secretary-General, judicial review of legality of an individual decision would still be required, at minimum, to determine whether the premises of the general order are satisfied, e.g., whether indeed the applicant was posted in Bangkok, Addis Ababa or Geneva; whether he or she joined before or after a given date; and, as noted by the Respondent, whether the calculation was arithmetically correct. If anything, it is judicial review of discretionary decisions which is limited, because, as an expression of separation of powers and prohibition of "co-administration by courts", UNDT intervenes in the substance of administrative discretion only in the case of arbitrariness or abuse of power; formal legality, on the other hand, is always reviewable.[37]

30. Receivability of non-discretionary decisions implementing acts of general order is confirmed by the Appeals Tribunal jurisprudence in *Tintukasiri*[38], *Ovcharenko*[39] and *Pedicelli*[40]. 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.

---

[36] *Oummih* 2014-UNAT-420 at paras. 19-20.
[37] See *Sanwidi* 2011-UNAT-104; *Frohler* 2011-UNAT-141 and *Charles* 2012-UNAT-242.
[38] 2015-UNAT-526.
[39] 2015-UNAT-530.
[40] 2017-UNAT-758.

> Obino has not shown that the implementation of this decision affects his contract of employment[41]

31. 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.

32. 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."[42]

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

34. Conversely, in response to similar arguments by the Respondent in *Lloret Alcañiz et al.*, the majority of UNAT held:

> 65. The majority of Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in the nature of a duty. However, such exercises of power are administrative in nature and involve a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They are thus administrative decisions that may adversely affect the terms of employment. However, importantly, given that purely mechanical powers entail little choice, they are rarely susceptible to review on the grounds of reasonableness. A review on grounds of

[41] 2014-UNAT-405.

[42] *Kagizi* 2017-UNAT-750 para. 22.

> reasonableness typically involves examination of the decision-maker's motive, the weighing of competing considerations and the basis for, and effects of, any choice made. An exercise of a purely mechanical power normally does not require the administrator to formulate an independent purpose or basis for action. Nevertheless, purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality."[43]

35. This Tribunal assumes, therefore, that the claim to have discretion as criterion for receivability has now been set aside.

36. The Tribunal finds, moreover, that the present application is unambigously directed against individual decisions concerning each of the Applicants. Whatever argument the authors used in support, it has no bearing on the identification of the contested decision. To the extent the Tribunal is authorised to individualise and articulate pleadings of an applicant who exhibits difficulty with this respect, it must make such representations *bone fidei*, consistently with the presumed interest of the applicant. It is, however, not the Tribiunal's role – nor is the Respondent's- to pervert a clearly-articulated application, as the one here, so as to strike it for the lack of receivability.

37. The present application is receivable.

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

MERITS

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

[43] 2018-UNAT-840. reiterated in *Quijano-Evans* 2018-UNAT-841.

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

40. 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.

41. 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?

42. 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

43. The Applicants' case is that the Secretary-General is not obliged to implement decisions taken without proper authority.[44]

44. 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

practice cannot become legally binding if it contravenes a written rule that is already in force".[46]

46. The Applicants submit[47] that General Assembly resolution 74/255 A-B is based exclusively on the ICSC 2019 annual report (A/74/30). The ICSC relitigated the 2016 post adjustment results before the General Assembly in complete usurpation of the role, function, authority and independence of the internal justice system. The resolution fails to recognize the independence of UNDT and UNAT because statutory interpretation is not within the authority of the General Assembly. A/RES/74/255 A-B cannot change the authority of the ICSC nor can it change the meaning of articles 10(b) and 11(c). The ICSC Statute includes a mechanism for amendment, which is not achieved by General Assembly resolution alone. There has to be an acceptance procedure for adoption by the participating bodies.[48]

Respondent's submissions

47. The Respondent explains that the reference to "scales" of post adjustment in art. 10(b) refers to a former method of calculating post adjustment based on schedules of post adjustment that were, in the past, submitted by the ICSC to the General

48. The system for calculating post adjustment changed in 1989, when, by virtue of resolution 44/198, the General Assembly decided to eliminate regressivity from the post adjustment system and discontinued the practice of approving post adjustment.[51] The Respondent underlines that in paragraph 2 of resolution 44/198 I D, the General Assembly took note "of all other decisions taken by the ICSC in respect of the operation of the post adjustment system as reflected in chapter VI of volume II of its report", except one issue, not relevant for the matter at hand, which means that it approved the establishment of a post adjustment multiplier for each duty station. The Respondent asserts that the General Assembly saw no reason to additionally endorse/approve these decisions.[52] In 1991, the General Assembly, by its resolution 45/259, approved deletion of post adjustment schedules and references to such schedules from the Staff Regulations.

49. The Respondent explains that the review of the post adjustment system was an integral part of the comprehensive review provided for in General Assembly resolution 43/226 of 21 December 1988. The "major simplification of the post adjustment system (…)" was one of the elements of that review.

50. The Respondent argues against ILOAT's interpretation of art.Tt,etionart.Tart1p

amended because there was no need for it.

Considerations

54. 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.[56] This follows general international practice, which refers to interpretation according to the 'ordinary meaning' of the terms 'in their context and in the light of [their] object and purpose' unless the parties intended to give the word a special meaning.[57] 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.

55. 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

---

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

[57] 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".

57. 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.

58. The changes, however, were approved by the General Assembly, either expressly or by reference to ICSC written reports[61]; took effect, in that they have been applied for over 25 years by all participating organizations; and, while there have been challenges brought before the tribunals regarding post adjustment, the ICSC's competence for determining the post adjustment in the quantitative sense has never been questioned.[62] This considered, the Applicants' argument relying on the procedure for express written approval of Statute amendments under art. 30 may raise questions: one about legitimacy to invoke insufficiency of the form, which appears to lie not with individual staff members but with executive heads of the participating organizations; a related one about a possibility to validate the change; yet another one about estoppel resulting from the 25 years of acquiescence. However, the alleged procedural defect may produce claims only to relative ineffectiveness, rather than absolute invalidity, of the changes. In this regard, specifically, the Applicants' argument cannot be upheld under the Statute.

59. 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

[61] 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]*
[62] 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.

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

60. As results from section 2, the United Nations has been juxtaposed with "specialized agencies and other international organizations …which accept the present statute".[63] 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

61. 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.[64]

---

[63] This delineation is recalled in the annual reports of the ICSC which distinguish organizations who have accepted the statute of the Commission and the United Nations itself, see e.g., Report for 2017, Chapter I para 2.

[64] Application, paras. 36 and 47.

Respondent's submissions

62. The Respondent submits that the ILOAT and the United Nations Tribunals (the UNDT and UNAT) have developed divergent approaches with respect to the "receivability of challenges to decisions by legislative bodies and by their subsidiary organs".[65]

63. 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

65. The Respondent refers to *Lloret-Alcañiz et al.* in submitting that the present case involves a mechanical exercise of authority. Thus, the Tribunal's review in this

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

General Assembly (…).[71]

71. 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:

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 and indeed from UNAT[74], 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.[75] Noting that the Respondent seeks support in the quote: *"recourse to general principles of law and*

the feasibility of more frequent reviews of post adjustment

applying a new and untested methodology.

Respondent's submission

84. The Respondent submits that the change in the post adjustment multiplier does not violate the Applicants' acquired rights. Staff members do not have a right to the continued application of the Staff Regulations and Rules, including the system of computation of their salaries, in force at the time they accepted employment for the entirety of their service.[90] Relying on UNAT's pronouncement in *Lloret Alcaniz et al.*[91], the Respondent asserts that post adjustment is not a benefit accrued in consideration for performance rendered. As defined in Staff Rule 3.7, post adjustment is an amount paid to "ensure equity in purchasing power of staff members across duty stations." The changes to the post adjustment were applied prospectively, having been announced in 2017 but taking effect only in February 2018. Thus, the fact that the post adjustment multiplier resulted in a reduction in net pay for future salaries did not violate the Applicants' acquired rights.[92]

Considerations

85. Noting that in various submissions the parties refer to contractual versus statutory elements of the employment relation as distinguished by the former United Nations Administrative Tribunal in the *Kaplan* case[93], it will be useful to begin with a general clarification . A contractual relationship refers to the relationship between the staff member and the international organisation as evidenced in a contract, i.e., a

facto precondition of appointment, which nevertheless is formally based on an act of authority, hence, at times, the expression used is "contract of appointment".[94] In the relation between the staff members and the United Nations, while the Appeals Tribunal recognized that the terms of conditions of appointment could at times be supplemented by a bi-lateral arrangement[95], the *sensu stricto* contractual elements are rare and *ad hoc*. As such, juxtaposing "contractual elements" and "statutory elements," in the context

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.

… In our view, the first interpretation of the term “acquired rights” is

> … 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 Rules–concerning the system of computation of their salaries–in force at the time they accepted employment for the entirety of their service. The fact that the unilateral variation of a validly concluded contract may cause individual loss poses no legal obstacle to the exercise of regulatory power.

1994).

naturof the 202(pe(foraencn-rem)1ueneration 202exchangc,d 239(t)1(he 239pu(blcn 202i(nte-esn 202i(e 2

90. It falls to be noted that referring the concept of acquired rights to entitlements already accrued was well-established in the jurisprudence of the former United Nations Administrative Tribunal such as the *Mortished* judgment and other ones, which were usually concerned with entitlements of a peripheral or occasional nature.[100] In such situations, the plane of reference is the state of the law at the time where the conditions for the entitlement were fulfilled; as a consequence, application of the doctrine of acquired right yields the same interpretative results as the non-retroactivity principle. In rel-112(or)gnditi9wt A9.l-11o23.202tnurpre3(th-(ar-11o23.202(and 3.202(othe-11o23.202(continring)

determined finite period or indefinitely, with salary playing a central role in it; in this respect, 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 speak in favour of protection against unilateral and unfettered downward revision of salary to extend throughout the duration of service.

92. On the question of interests involved, there is obviously, interest of staff in stability of employment conditions and protection from arbitrary change and erosion. Here, recognition is due to the fact that international civil servants do not participate in a democratic legislative process and in principle, as mentioned by the Appeals Tribunal in *Quijano-Evans et al.* have no right to strike[101]; thus, enhanced protection is required. It would not be, however, appropriate to place it in sharp opposition with the public interest in "that public authorities retain the freedom to exercise their discretionary or legislative powers", given that public interest lies also in guarantying stability to cadre and in attracting the most highly qualified personnel, as recognized by the United Nations Charter in article 101. The point lies rather in striking a balance between the competing interest of staff and the Organization's need to adapt its functioning and employment conditions to evolving circumstances.

93. On the ensuing question of test or criteria limiting the power to introduce legislative amendments to salary, in the absence of legal provisions beside staff regulation 12.1, the Tribunal turns to jurisprudence.

94. At the outset, it should be noted that the criterion applied in the *Kaplan* case[102], i.e., sharp delineation between contractual and statutory elements in the employment

[101] *Lloret Alcaniz et al.*, ibid., para. 94, *Quijano*-Evans et al, ibid., at para. 52, p. 27.
[102] UN Administrative Tribunal Judgment No. 19, *Kaplan* (1953); see also ILOAT Judgment No. 29, in re *Sherif* (1957); UN Administrative Tribunal Judgment No. 202, *Queguiner* (1975).

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.

95. First, a criterion was introduced according to which modifications were allowed insofar as they do not adversely affect the balance of contractual obligations or infringe the "essential" or "fundamental" terms of appointment.[103]

96. The next development was marked by the ILOAT Judgment in *Ayoub*, where a three-prong test was applied in determining whether the altered term is fundamental or essential. According to *Ayoub*, the first test is the nature of the term. Here, whereas the contract or a decision may give rise to acquired rights, the regulations and rules do not necessarily do so. The second test is the reason for the change. It recognizes that the terms of appointment may often have to be adapted to circumstances, and that there will ordinarily be no acquired right when a rule or a clause depends on variables such

lying in the operation of the attendant presumptions (presumption of regularity of an official act versus the need to demonstrate that the limitation of a right is formally legal, necessary and proportionate) and the resulting stringency of the applicable criteria and the burden of proof. Below, the Tribunal shall undertake to test the reasonability of the 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

101. 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[115] 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 with the Noblemaire principle and directives to adjust remunerations to accurately reflect differences in the cost of living at various duty stations in observance of the established margin.[116] Otherwise, methods of calculating the post adjustment and establishing procedures for it are delegated to the ICSC. The Tribunal takes it that there is also no 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.

102. In light of the holding of the Appeals Tribunal in *Lloret-Alcaniz et al.* the

[115] Staff rule 3.7.
[116] General Assembly resolutions 38/232; 44/198, 72/255, 73/273

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,

116. The Tribunal wishes to add that the impugned decision subject to its review does not involve a question of integrity of the United Nations common system. This matter is properly before the ICSC and, ultimately, the General Assembly.

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

JUDGMENT

118. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 29th day of July 2020

Entered in the Register on this 29th day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi