Original: English

efore: Judge Agnieszka Klonowiecka-Milart

egistry: Nairobi

egistrar: Abena Kwakye-Berko

CORREIA REIS et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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unsel for the Applicant:
bbie Leighton, OSLA

unsel for the Respondent:
ng Leong Toh, UNOPS

INTRODUCTION

1. The Applicants are 12 staff members of the United Nations Office for Project Services ("UNOPS") who were based in Geneva, Switzerland, at the time of the contested decision. They are challenging the Administration's decision to implement a post adjustment multiplier determined by the ICSC based on its 2016 cost-of-living survey, resulting in a pay cut.

2. Identical individual applications were initially filed with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Geneva on 8 August 2018, and then consolidated (henceforth: the application) and transferred to UNDT in Nairobi on 14 February 2019 after the Geneva-based UNDT Judge President recused herself from the proceedings.[1]

PROCEDURAL HISTORY

3. The applications belong to the fifth set ("waves") of appeals by staff members posted in Geneva regarding the decision to implement a post adjustment change resulting in a pay cut.

4. Pursuant to Order No. 039 (NBI/2019), the Respondent filed a reply on 15 April 2019.

5. Whereas the present Applicants did not participate in any of the previous waves of litigation, it is noted that the parties agreed to accept as part of the record all evidence and arguments presented by the parties in the fourth wave of cases.[2] The facts described in the following sections of this Judgment are also 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 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 same post adjustment which is disputed in the present case. The ILOAT set aside the impugned decision after concluding that the ICSC's decisions were taken without outside their legal competence and thus, the action of ILO to reduce the salaries of the complainants based on the ICSC's decisions was legally flawed.

7. On 22 July 2019, the Applicants filed a motion seeking leave to file submissions on ILOAT Judgment No. 4134 and its relevance to the instant case. By Order No. 106 (NBI/2019), the Tribunal admitted the Applicants' submissions regarding ILOAT Judgment No. 4134 into the case record. The Respondent filed a response to the Applicants' submissions on 7 August 2019.

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

FACTS

9. At its 38th session in February 2016, the Advisory Committee on Post Adjustment Questions ("ACPAQ")[3] reviewed the methodology for the cost-of-living measurements in preparation for the 2016 round of surveys. The Committee made recommendations on several aspects, including the use of price data collected under the European Comparisons Program ("ECP"). The ICSC approved all the ACPAQ's

[3] ACPAQ is an expert subsidiary body of the ICSC which provides technical advice on the methodology

recommendations in March 2016.[4]

10. In September/October 2016, the ICSC conducted comprehensive cost-of-living surveys at seven headquarters duty stations outside New York to collect price and expenditure data for the determination of the post adjustment[5] index at these locations. Geneva was one of the duty stations included in the survey.[6] After confirming that the

adjustment index caught up with the prevailing pay index.[10]

12. In April 2017, the Executive Heads of Geneva-based organizations requested that ICSC provide information regarding the specific impact that the survey components and the changes to the methodology had on the 2016 survey results and proposed the deferral of any implementation until such information was available and validated in a process in which their representatives participated. The ICSC Chair provided the information on 9 May 2017.[11]

13. On 11 May 2017, the Department of Management informed staff members that: (a) the post adjustment index variances for Geneva translated into a decrease of 7.7% in the net remuneration of staff in the professional and higher categories; (b) the post adjustment change would be implemented effective 1 May 2017; (c) the new post adjustment would only be applicable to new staff joining Geneva on or after 1 May 2017; and (d) currently serving staff members would not be impacted until August 2017 due to payment of a personal transition allowance ("PTA").[12] The PTA reflected the difference between the new and the existing post adjustment multiplier and was supposed to be adjusted every three months until it was phased out.[13]

14. Between 31 May and 2 June 2017, an informal review team of senior statisticians,[14] requested by the Geneva Human Resources Group[15], conducted a

compilation of the ICSC results, the ICSC calculations for Geneva could not be considered of "sufficiently good quality to designate them 'fit for purpose'; (b) implementation by the ICSC does not always correspond with the "approved" methodology described in the formal documentation; (c) many important compilation methodologies were not described in the formal documentation; and (d) several methodological changes introduced since 2010 had increased the instability and volatility of the indices used to calculate the cost-of-living comparisons. These changes appear to have almost universally reduced the Geneva post adjustment index in 2016.[16]

15. 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 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 […]".[17] The consultant made 64 recommendations, including but not limited to the methodology for the post adjustment system, policies and specific issues.[18] The staff associations engaged another independent expert who reviewed and elaborated on selected recommendations from the ICSC's consultant's report.[19]

16. 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.[20] 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

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extending the transitional measures applicable to serving staff members from three to six months (i.e. 1 February 2018), and that subsequent post adjustment reductions would occur every four months instead of every three months.[21]

17. On 7 February 2018, the Administration informed staff that the first quantitative reduction in post adjustment would be reflected in the February pay slip, reflecting a 3.5% decrease in net take-home pay.[22] On the same day the ICSC released a document entitled "Post Adjustment Changes for Group 1 Duty Stations – Questions and Answers" which explained the calculation of the pay cut.[23]

18. On 23 February 2018, the Applicants received pay slips indicating implementation of the pay cut.[24] On 13 April 2018, they requested management evaluation of the reduction of their salaries as evidenced in their February pay slips.

could legitimately claim that the Secretary-General failed to comply with the

26. The Tribunal recalls that receivability of non-discretionary decisions that implement acts of general order is confirmed by the Appeals Tribunal jurisprudence in *Tintukasiri*[33], *Ovcharenko*[34] and *Pedicelli*[35]. Jurisdictionally, the discord on the point in issue seems to have originated from *Obino*. In *Obino*, where the UNDT had interpreted the application as directed against the ICSC decision and as such had found grounds to reject it as irreceivable, UNAT apparently agreed with this interpetation of the application. It held:

> 19. In the instant matter, the UNDT correctly found that Mr. Obino did not identify an administrative decision capable of being reviewed, *as* he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment [emphasis added].
>
> […]
>
> 21. In the instant case the ICSC made a decision binding upon the Secretary-General as to the reclassification of two duty stations and Mr. Obino has not shown that the implementation of this decision affects his contract of employment[36]

27. Thus, the *Obino* UNAT Judgment, in five paragraphs committed to considering the grievance of Mr. Obino, rejected it as irreceivable on three grounds at the same 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.

28. 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

[33] 2015-UNAT-526.
[34] 2015-UNAT-530.
[35] 2017-UNAT-758.
[36] 2014-UNAT-405.

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

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

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

> 65. The majority of Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly 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 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."[38]

31. In the present case there is no dispute that the Secretary-General was exercising a "mechanical power"; this, however, as discussed above, does not remove the decision from judicial cognizance.

32. 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 of the application, it has no bearing on the identification of the contested decision. To the extent the Tribunal is authorised to

[37] *Kagizi* 2017-UNAT-750 para. 22.
[38] 2018-UNAT-840, reiterated in *Quijano-Evans* 2018-UNAT-841.

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

39. The Applicants' case is that the Secretary-General is not obliged to implement decisions taken without proper authority.[39]

40. 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 decisory authority regarding classification of duty station under art. 11(c) pertains to determining bands in which duty stations would be placed. Whereas a decision regarding the appropriate multiplier to apply to a duty station corresponds with an art. 10(b) decision rather than an art. 11(c) decision since it indicates a precise financial calculation. Thus, the ICSC cannot unilaterally impose alterations to the survey methodology, operational rules and to the Geneva post adjustment index without first

[39] Application, para 36-38.

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

Respondent's submissions

43. 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 Assembly for approval under art. 10(b) of its Statute and annexed to the Staff Regulations. Post adjustment scales were needed to implement the principle of regressivity, and to indicate how the post adjustment multiplier would be modified, when applied to staff members depending on their grade level and step. The Respondent shows that the post adjustment scale, reflecting the regressive factors, was

43/226 of 21 December 1988. The "major simplification of the post adjustment system (…)" was one of the elements of that review.

46. The Respondent argues against ILOAT's interpretation of art. 10 as exclusively governing the "*determination of post adjustments in a quantitative sense*". According to the Respondent, this reasoning reflects a misunderstanding of how the post adjustment system has operated, before and after the 1989 changes to the post adjustment system.[48] The ICSC has always assigned post adjustment multipliers to duty stations. The Respondent provides examples that before the changes were initiated in 1989 the ICSC did this by assigning each duty station to a class corresponding to a specific post adjustment multiplier. After the changes, the ICSC did this by establishing a specific post adjustment multiplier for each duty station. The Respondent stresses that classification of duty stations has always been linked with the establishment of post adjustment multipliers and, therefore, has always involved a determination of post adjustment in the quantitative sense without the need for General Assembly approval.[49]

47. The Respondent further submits that already in the second annual report of the ICSC, the ICSC emphasized its responsibility under art. 11 for "establishing the methods" for determining conditions of service and the classification of duty stations for the purpose of applying post adjustments. The ICSC stated that "the technical questions of methodology involved in computing post adjustment indexes, in making place-to-place and time-to-time comparisons and in classifying duty stations on the basis of the indexes" fell within its competence.[50] The General Assembly has not challenged the ICSC's authority in respect to post adjustment classification under art. 11(c).

48. 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

[48] Respondent's submission in response to Order No. 106 (NBI/2019), para. 16 and annex 1A.
[49] Ibid., referring to 14 March 1985 Post Adjustment Classification Memorandum (annex 1.B, p. 13).
[50] Supplement No. 30, para. 241 (A/31/30 – Report of the International Civil Service Commission).

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

51. As demonstrated by the documents submitted by the Respondent as well as reports available on the ICSC website, the delineation of the relevant competencies was along the lines that the General Assembly decided legal parameters of the post adjustment and the ICSC decided its methodological parameters and applied both to calculating post adjustment at different duty stations. The ICSC has always, *ab initio* and notwithstanding changes concerning post adjustment schedules, determined the cost of living index as a step in the process of classification and, after abolition of scales in 1989 and subsequent changes in methodology, assigned post adjustment multipliers to duty stations.[53] Thus, the ICSC's decisory powers under art. 11(c) have always involved determination of post adjustment in the quantitative sense without the General Assembly's approval. The General Assembly, on the other hand, until 1985 determined, under its art. 10 powers, two prerequisites for transition from one class to another: the required percentage variation in the cost of living index and required period for which it had to be maintained, the so-called schedules for post adjustment.[54] Moreover, until 1989 the General Assembly determined regressivity scales. The latter involved a "precise financial calculation" in terms of US dollars per index point for each grade and step; the calculations, however, were related to the salary scales only. The exercise of the General Assembly powers under art. 10 did not involve either confirming the determination of index points for duty stations or the calculation of post adjustment for each grade and step per duty station.

[53] See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).
[54] 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.

52. The post-1989 practice, therefore, does not "contravene a written rule that is already in force", in the sense that there has not been a shift in the subject matter 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;[55]

been questioned.[57] This considered, the Applicants' argument relying on the procedure for express written approval of Statute amendments under art. 30 may raise questions: one about legitimacy to invoke insufficiency of the form, which appears to lie not with individual staff members but with executive heads of the participating organizations; a related one about a possibility to validate the change; yet another one about estoppel

by the General Assembly's decisions on the matter of ICSC competencies. This conclusion distinguishes the present case from the case subject to ILOAT Judgment 4134.

57. Finally, with respect to the Applicant's argument about the ICSC not respecting its own Rules of Procedure regarding signatures required for the promulgation of the decision[59], the Tribunal finds no support for the claim that a lack of the ICSC Chairman's signature on the transmittal memorandum would render the decision null

management".[68]

regulatory acts, no matter the placement in the hierarchy, this proposition must be rejected. To accept it would deny the UNDT, and UNAT alike, independence from the executive, reduce its cognizance to a replication of the management evaluation process and deny staff members effective recourse to an independent tribunal, which is clearly against the rationale adopted by the General Assembly resolution 61/261.[71] Noting that the Respondent seeks support in the quote:

the operative part of its *Neault* 2013-UNAT-345 judgment, while in both cases the regulatory acts were found unlawful.

72. 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"[74] needs to be corrected on three levels: Firstly, denying receivability is untenable because the Applicants are contesting individual decisions concerning their terms of appointment, 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 that 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

73. 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 content of regulatory decisions under art. 10 of the Statute, 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 et al.* test. On the other hand, where the ICSC exercises a delegated regulatory power under art. 11 of the Statute, 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

[74] Respondent's submission in response to Order No. 106 (NBI/2019), para. 8.

merits, an individual decision, based on the conversion of a salary scale then applied to General Service staff in Montreal promulgated by the ICSC under art. 11, entailed an examination of the ICSC decision for reasonableness.[75]

74. Notwithstanding the aforesaid, also where the ICSC exercises its delegated regulatory powers, it remains subordinated to the United Nations General Assembly which may intervene and indeed does so, mainly in the policy stage but also after the ICSC decision has been taken. Thus, the General Assembly interfered in 2012 in the system of post adjustment, requesting the ICSC to maintain the existing level of post adjustment in New York.[76] Also, in August 1984, the ICSC decided that the post adjustment in New York would be increased by 9.6%. However, the General Assembly, in paragraph 1(c) of its resolution 39/27 of 30 November 1984[77], requested the ICSC to maintain the level of the post adjustment and not to introduce the new one. The power of the General Assembly to intervene in the implementation of the post adjustment was confirmed by the former United Nations Administrative Tribunal.[78] The ICSC recalled this precedent in its report of 2012.[79] Intervention of the General Assembly largely removes the matter from the purview of the Tribunals. This 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.[80] In such cases, the regulatory decision is attributed directly to the General Assembly and thus, in accordance with *Lloret-Alcañiz*

[75] *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."
[76] General Assembly decision 67/551 of 24 December 2012.
[77] General Assembly Resolution 39/27 of November 1984.
[78] UN Administrative Tribunal Judgment No. 370, *Molinier* (1986).
[79] Report of the ICSC for 2012, A/67/30 para 17: "The Commission recalled that measures to constrain or withhold increases in net remuneration of United Nations common system Professional staff already existed. They consisted in the suspension of the normal operation of post adjustment and freezing the post adjustment classification at the base of the system, New York, and, concurrently, at all other duty stations, to the same extent as that to which the New York post adjustment would be frozen. Not only had such measures been established, but they had also been applied in the past, in particular, between 1983 and 1985 […] as a result of the decision by the General Assembly to reduce the net remuneration margin and to bring it within the newly established range. The Commission therefore considered that it was feasible to apply the same approach to reflect the pay freeze of the comparator civil service, if the Assembly so decided."
[80] *Ovcharenko* 2015-UNAT-530, para. 34.

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

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

> **Preamble**
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> 6. *Notes with serious concern* that some organizations have decided not to implement the decisions of the Commission regarding the results of the cost -of-living surveys for 2016 and the mandatory age of separation;
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> 7. *Calls upon* the United Nations common system organizations and staff to fully cooperate with the Commission in the application of the post adjustment system and implement its decisions regarding the results of the cost-of-living surveys and the mandatory age of separation without undue delay;
>
> […]
>
> **C. Post adjustment issues**
>
> 1. *Notes* the efforts by the Commission to improve the post adjustment system;
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> 2. *Requests* the Commission to report no later than at the seventy-fourth session of the General Assembly on the implementation of decisions of the Commission regarding the results of the cost -of-living surveys for 2016, including any financial implications;
>
> 3. *Also requests* the Commission to continue its efforts to improve the post adjustment system in order to minimize any gap between the pay indices and the post adjustment indices and, in this context, to consider the feasibility of more frequent reviews of post adjustment classifications of duty stations;
>
> 4. *Further requests* the Commission to review the gap closure measure in the post adjustment system during its next round of cost -of-living surveys […].

Further, in resolution A-RES-74-255[82], the General Assembly:

> 7. *Expresses concern* at the application of two concurrent post adjustment multipliers in the United Nations common system at the Geneva duty station, urges the Commission and member organizations to uphold the unified post adjustment multiplier for the Geneva duty

[81] A/RES/72/255, published 12 January 2018.
[82] A/RES/74/255, para. 7.

why the margin of error might have been reduced at a time when the ICSC have been applying a new and untested methodology.

79. The consequences of this breach of the Applicants' acquired right to a stable remuneration are considerable: a salary reduction currently estimated at 5.2%. The scale of the cut will impact long term financial commitments they entered into based on a stable salary provided over an extended period. Implementation of transitional measures will not mitigate the impact of such a drastic cut.

80. The Applicants further submit that the methodology applied by the ICSC raises issues because of errors regarding the use of the International Service for Remunerations and Pensions ("ISRP") rent index, domestic services aggregation, place-to-place surveys, cost of education and medical insurance. They further submit that the methodology does not provide for results that are foreseeable, transparent and stable.[84] There is no foreseeability because the decision-making process is fragmented, rule changes are adopted in a piecemeal manner and relevant information is dispersed over numerous documents. The findings by the statisticians from the Geneva-based entities show that the lack of transparency extends beyond the ICSC decision making process and into their methodology and treatment of data.

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

Respondent's submission

82. The Respondent submits that the change in the post adjustment multiplier does not violate the Applicants' acquired rights. Staff members do not have a right to the continued application of the Staff Regulations and Rules, including the system of computation of their salaries, in force at the time they accepted employment for the entirety of their service.[85] Relying on UNAT's pronouncement in *Lloret Alcaniz et*

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

al.[86], the Respondent asserts that post adjustment is not a benefit accrued in consideration for performance rendered. As defined in Staff Rule 3.7, post adjustment is an amount paid to "ensure equity in purchasing power of staff members across duty stations." The changes to the post adjustment were applied prospectively, having been announced in 2017 but taking effect only in February 2018. Thus, the fact that the post adjustment multiplier resulted in a reduction in net pay for future salaries did not violate the Applicants' acquired rights.[87]

. . . . . .

83. Noting that in various submissions the parties refer to contractual versus statutory elements of the employment relation, as distinguished by the former United

normative conflict or an irreconcilable inconsistency between staff regulation 12.1 protecting acquired rights and the subsequent resolutions of the General Assembly on salary scale, which resulted in the lowering of the salary of the applicants. It held (internal references omitted):

87. The Appeals Tribunal concluded that the concept of acquired rights was, in essence, a prohibition of retroactivity of legislative amendments:

> … The limited purpose of Staff Regulation 12.1, therefore, is to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled. The protection of acquired rights therefore goes no further than guaranteeing that no amendment to the Staff Regulations may affect the benefits that have accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment.[33] Amendments may not retrospectively reduce benefits already earned. In the final analysis, the doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory instruments.
>
> …It follows that, absent any normative conflict, the Secretary-General did not act illegally in implementing resolutions 70/244 and 71/263.
>
> … The basic conditions of employment of staff members as set out in their letters of appointment may and often do change throughout the duration of their service. The contentions of the Respondents, if accepted, would constitute a contractual fetter upon the authority and powers of the General Assembly. In accordance with universally accepted principles, contracts which purport to fetter in advance the future exercise of constitutional, statutory or prerogative powers are *contra bonos mores* and not valid or enforceable. It is in the public interest that public authorities retain the freedom to exercise their discretionary or legislative powers. It can never be in the international public interest to contractually fetter the General Assembly in the exercise of its powers to make policy for the Organization. A body such as the General Assembly cannot be compelled to uphold a promise not to exercise its regulatory powers so as not to interfere with its contractual arrangements.
>
> … In the context of the United Nations system, the salary entitlements of staff members are therefore statutory in nature and may be 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.

88. 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.[95] 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 relation, however, to salary and other continuing benefits, the matter is more complicated and the jurisprudence, as will be shown below, diverged in addressing it. In rejecting the extension of acquired rights to a future salary, the *Lloret Alcaniz et al.* and *Quijano-Evans et al.* judgments place the matter of modifications in the area of regulatory discretion. These judgments did not contemplate - as apparently the issue had not been put before the Tribunal – any limitations on the exercise of this power. This begs the question of where they lie. Relevant issues include: fundamentals of the nature of the performance-remuneration exchange, the public interest in stability of the civil service, and the resulting test or criteria for legitimacy of a modification.

89. 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-

93. First, a criterion was introduced according to which modifications were allowed insofar as they do not adversely affect the balance of contractual obligations or infringe the "essential" or "fundamental" terms of appointment.[98]

94. The next development was marked by the ILOAT Judgment in *Ayoub*, where a three-prong test was applied in determining whether the altered term is fundamental or essential. According to *Ayoub*, the first test is the nature of the term. Here, whereas the contract or a decision may give rise to acquired rights, the regulations and rules do not necessarily do so. The second test is the reason for the change. It recognizes that the terms of appointment may often have to be adapted to circumstances, and that there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted. The third test is the consequence of a modification, that is, what effect will the change have on staff pay and benefits.[99] In this regard, financial injury to the complainants, even if serious, is not enough in itself to establish it as a breach of acquired right.[100]

95. Finally, this jurisprudence recognized that sometimes only the existence of a particular term of appointment may form the subject of an acquired right, whereas the arrangements for giving effect to the term may do so or not.[101]

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

the entitlement[102] or, as it was alternatively proposed, do not cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".[103]

97. Other former United Nations Administrative Tribunal decisions remained on the position that the question of acquired rights does not arise where the modification has no retroactive effect. Instead, a fetter on legislative power to introduce modification with effect for the future was construed through the test of reasonability, applied in light of the principles laid down in the Charter of the United Nations art. 101 para. 3, *i.e.*, that economy measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service.[104] Concerning specific requirements that a modification must meet in order to be reasonable, the following were distinguished: the modifications must not be arbitrary; must be consistent with the object of the system, for example, adjustment to cost-of living changes and protection of purchasing power of staff members[105]; must arise from reasonable motives; must not cause unnecessary or undue injury[106] or "significantly alter the level of basic benefits[107] or "cause unnecessary forfeiture or deprivation".[108] In the latter aspect, it was also proposed to consider whether the modification is permanent or temporary.[109]

98. As it can be seen from the above, the criteria used for the application of the rights concept and reasonable exercise of discretion are not dissimilar, the difference lying in the operation of the attendant presumptions (presumption of regularity of an official act versus the need to demonstrate that the limitation of a right is formally legal, necessary and proportionate) and the resulting stringency of the applicable criteria and the burden of proof. Below, the Tribunal shall undertake to test the reasonability of the

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

disputed regulatory decision of the ICSC against these criteria. As previously explained, this is done in order to evaluate the legality of the impugned individual decisions based on it, and not to hold ICSC "answerable" or exercise a constitutional court-type jurisdiction over its decisions.

Application of the criteria to the impugned decision

> modification of the gap closure measure, an operational rule designed to mitigate the negative impact on salaries of the results of cost-of-living surveys that are significantly lower than the prevailing pay indices:
>
> (a) In accordance with the Commission's decision in paragraph 128 (a), the post adjustment index derived from the survey (updated to the month of implementation) is augmented by 3 per cent to derive a revised post adjustment multiplier for the duty station;
>
> (b) The revised post adjustment multiplier is applicable to all Professional staff members in the duty station. Existing staff members already at the duty station on or before the implementation date of the survey results receive the revised post adjustment multiplier, plus a personal transition allowance;
>
> c) The personal transitional allowance is the difference between the revised and prevailing post adjustment multipliers. It is paid in full for the first six months after the implementation date; and adjusted downward every four months until it is phased out [..]

110. The Tribunal agrees with the Applicants that the mitigation, on both counts, the augmentation of the post adjustment multiplier and the transitional allowance, appears more as a rule of thumb than actual calculation of a margin of error. However, the resulting financial loss for the Applicants, 4.7% of the salary - or even 5.2%, as it is presented by the Applicants[123], moreover, delayed by one year through the application of the transitional allowance - is not such that would overly deplete the content of the entitlement or cause "extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest".

111. Finally, the modification is temporary. As evidenced by ICSC reports 2017-2019, the impugned decision occurs in the context of a review of the post adjustment system carried out by the ICSC under the scrutiny of the General Assembly.[124] 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

[123] The application refers to the document of Post Adjustment Changes for Group 1 Duty Stations Q and A, Question 7, which indicates that the 5,2% reduction was speculative based on an "(unrealistic) assumption that the CHF/USD exchange rate will remain the same"; however, the figure was attributed to the fluctuation in operational exchange rates and not to any particular feature of the applied methodology.
[124] General Assembly resolutions 72/255, 73/273 and 74/255 A-B.

multipliers, with the full participation of organizations and staff federations as well as a task force on the review of the conceptual framework of the post adjustment index methodology, composed of statisticians nominated by organizations, staff federations and the Commission, as well as top-level consultants in the field of economics and price statistics. The latter produced a report on a wide array of technical and procedural issues, covering, in general terms, elements disputed by the Geneva statisticians. The ICSC report for 2019 shows, in particular, that the problem of generalized decreases in the post adjustment index attributable to methodological change is taken very seriously and neutralizing such effects are to be addressed either through a compensatory mechanism on a no-gain, no-loss basis, or through statistical solutions formed in the same context of statistical methodology in which it originated. The results are to be applied in the 2021 round of surveys.

112. Everything considered: the nature of the entitlement, consistency of procedure with internal rules ("approved methodology"), high complexity, multiple alternatives and absence of outright arbitrariness in the methodology, mitigation applied and, above all, the temporary character of the modification, the ICSC decision does not disclose unreasonableness in the sense of risking deterioration of the international civil service. This Tribunal concedes that the application of rights construct would pose more stringent requirements as to the quality and stability of the methodology and could have brought about a different conclusion.

Whether there is a normative conflict with the principle of equality in remuneration

Applicants' submissions

113. The Protocol concerning the entry into force of the Agreement between the United Nations and the International Labour Organization, which was adopted by the General Assembly, referenced the undesirability of serious discrepancies in the terms and conditions of employment which could lead to competition in recruitment. This demonstrates the intention of the General Assembly that staff members across the common system should have equal rights inc6.089-124(en,0 0nm62 Tf 1 ibl)1c(s)-1(t2(s)-1A1oulst)tucond

failure to agree with the ILOAT judgment would lead to staff members at the same level being paid differently depending on the jurisdiction their employer is subject to. This would represent a threat to the United Nations common system. [125]

Respondent's submissions

114. The Respondent points out that, on critical matters, the UNAT has been willing to depart from the jurisprudence of the ILOAT where there are sound reasons for doing so.[126] As there is no appellate review to address decisions of the ILOAT, Judgment No. 4134 is final and binding for the organizations that have accepted the jurisdiction of that Tribunal but there is no legal imperative for the UNDT to adopt an incorrect ruling of the ILOAT.

115. On the matter of upholding the common system, this Tribunal cannot but agree, *mutatis mutandis*, with ILOAT Judgment No 4134:

> 29. In its judgments the Tribunal has recognised and accepted the existence of the United Nations common system and respected its objectives. However, the existence of the United Nations common system and a desire to maintain its integrity should not, in itself, compromise the Tribunal's adjudication of individual disputes in any particular case or series of cases involving the application of its principles. Indeed, in Judgment 2303, consideration 7, the Tribunal acknowledged the argument of the organization that considerable inconvenience arose from an earlier judgment (Judgment 1713) and it was virtually impossible for the organization to depart from the scale recommended by the ICSC. The Tribunal has to recognise that an organization's legal obligations arising from the operation of the common system could have legal ramifications for an organization that inform or even determine the resolution of any particular dispute. However notwithstanding these matters, the Tribunal must uphold a plea from a staff member or members if it is established that the

[125] Applicants' motion of 22 July 2019 to file submissions regarding ILOAT Judgment No. 4134.
[126] *Molari* 2011-UNAT-164, para. 1 ("We will not follow the Administrative Tribunal of the International Labour Organization (ILOAT) in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT, this has never been the standard at the United Nations.").

organization has acted unlawfully.