Original: English

efore: Judge Agnieszka Klonowiecka-Milart

egistry: Nai

egistrar: Ab Berko

ALSAQQAF et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

unsel for the
bbie Leighto

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lissa Buller
lène Spenc

INTRODUCTION

1. The Applicants are two staff members of the United Nations Entity for Gender

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 of the post adjustment system. It is composed of six members and is chaired by the Vice Chairman of the ICSC. https://www.unicsc.org/Home/ACPAQSubsidiary.

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 surveys had been conducted in accordance with the approved methodology, 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

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.

applicable deadline following a properly requested management evaluation.

21. On the question whether the application concerns an individual administrative decision with adverse consequences for the Applicants' terms of appointment, as required by art. 2 of the UNDT Statute, the Tribunal recalls its holding in the previous related cases, the details of which are incorporated here by reference[27], that applications originating from implementation of acts of general order are receivable when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision, such as through a pay slip or personnel action form. Accordingly, every payslip received by a staff member is an expression of a discrete administrative decision, even where it only repetitively applies a more general norm in the individual case. In the fourth wave cases, the Respondent argued that the impugned decisions did not entail negative consequences because of the presence of the transitional allowance. This argument does not apply in the present case, where transitional allowance was not indicated in the payslip and the actual financial detriment was incurred by the Applicants at the same time as it was reflected in their payslip.[28]

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

Respondent's submissions

23. Relying on jurisprudence of the United Nations Appeals Tribunal ("UNAT/the Appeals Tribunal")[29], the Respondent submits that regulatory decisions of the General Assembly leave no scope for the Secretary-General to exercise discretion. Had the General Assembly required the Secretary-General to confirm the procedural or substantive correctness of the cost of living surveys relied upon by the ICSC before implementing the post adjustment multipliers set by the ICSC, then the Applicants

27

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."

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 the nRectonti

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

Article 10

methodology, operational rules and to the Geneva post adjustment index without first 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]

41. 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".[41]

42. The Applicants submit[42] 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

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

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

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]
>
> 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 […].

53. 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.

54. The changes, however, were approved by the General Assembly, either expressly or by reference to ICSC written reports[56]; 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

[55] Resolution 3357 (XXIX).
[56] 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]

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 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.

55. 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).
>
> 3. Acceptance of the statute by such an agency or organization shall be notified in writing by its executive head to the Secretary-General.

56. As results from section 2, the United Nations has been juxtaposed with "specialized agencies and other international organizations …which accept the present statute".[58] 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

57

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

60. The Respondent submits that, since 1987, the ILOAT has applied the principle that if a "decision is based on one taken by someone else it is bound to check that the other one is lawful." Executive heads of Organizations cannot argue before the ILOAT that they are bound by decisions made by legislative bodies or by their subsidiary organs. Rather, the executive heads of Organizations that appear before the ILOAT must demonstrate that they have examined whether such decisions are proper. This examination includes reviewing whether legislative decisions were made based on a "methodology which ensures that the results are stable, foreseeable and clearly understood or transparent."[62] If any flaws in the decisions are established by the

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: "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",[72] the Tribunal finds this statement's normative value limited to the importance of a proper application of the lex specialis principle.

71. The last pertinent issue on this score is one contemplated in the Lloret-Alcañiz et al. judgment. Contrary to the Respondent's linguistic parsing based on selective quotes from it, what the Appeals Tribunal confirmed in Lloret-Alcañiz was that UNDT and UNAT may also need to incidentally review acts originating from the General Assembly, where a question arises about a conflict of norms.[73] Altogether, with respect to the scope of review of regulatory acts, there is no difference either in statutory regulation or in "approach" between the ILOAT and the UNDT/UNAT system as both concern themselves only with incidental review. This can be clearly seen from the fact that neither ILOAT Judgment 4134 ruled on the illegality of the ICSC decision in the operative part of the judgment nor did UNAT rule on the illegality of staff rule 11.4 in

[71] 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 law and there can be no rule of law without an independent judiciary, as declared in article 10 of the Universal Declaration of Human Rights. The United Nations judges must not only be, but be seen to be, wholly independent of management and its lawyers. It goes without saying that one of the functions of an independent judiciary is to subject the unfettered "independence of the administrators" to the rule of law" (A/71/158 dated 15 July 2016).
[72] Respondent's submission in response to Order No. 106 (NBI/2019) para. 7 (citing General Assembly resolutions 69/203, para. 37, and 71/266, para. 29).
[73] 2018-UNAT-840, paras 80-82, 92.

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.

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]onech2

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]

Considerations

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

of civil service, albeit having a tradition dating back to the League of Nations[91], may be misleading. Strictly speaking, in the present relation it would be more accurate to distinguish individually determined elements (nature of appointment, duration, grade

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

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 %) S / / ' (the system of computation of their) ' (S (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.

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

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

been able to quantify the extent of the impact of these problems on the Geneva PAI and recommended further studies.[116] The independent expert likewise stressed the

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

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.

Considerations

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

organization has acted unlawfully.

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. It, however, wishes to observe that divergence in the jurisprudence occurs also within single jurisdictions. The way to ensure integrity of the common system seems to lie mainly in sound determination of competencies and methods for decisions affecting the common system as well as in the determination of staff rights alternatively with self- imposed limitation on the Organization's authority to vary the conditions of service. 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 19th day of August 2020

Entered in the Register on this 19th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi