



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-840

Lloret Alcañiz *et al.*
(Respondents and Appellants on Cross-Appeal)

v.

Secretary-General of the United Nations
(Appellant and Respondent on Cross-Appeal)

JUDGMENT

Before: Judge John Murphy, Presiding
Judge Dimitrios Raikos
Judge Sabine Knierim
Judge Richard Lussick
Judge Deborah Thomas-Felix
Judge Martha Halfeld

Case No.: 2018-1148

Date: 29 June 2018

Registrar: Weicheng Lin

Counsel for Ms. Lloret Alcañiz *et al.*: Daniel Trup/Natalie Dyjakon, OSLA

Counsel for Secretary-General: Jay Pozenel/Phyllis Hwang/
Susanne Malmström/Amy Wood

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/097, rendered by a panel of three Judges of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 29 December 2017, in the cases of *Lloret Alcañiz, Zhao, Xie, Kutner, and Krings v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 2 March 2018, and Ms. Maria Jose Lloret Alcañiz, Mr. Junxiang Zhao, Ms. Qiong Xie, Mr. Daniel Kutner and Ms. Livia Krings (Lloret Alcañiz *et al.*) filed their answer and cross-appeal on 25 April 2018.¹ On 11 June 2018, the Secretary-General filed his answer to the cross-appeal.² On 13 June 2018, Lloret Alcañiz *et al.* filed a motion for leave to file a response to the answer to the cross-appeal.

Facts and Procedure

2. The uncontested facts are set out in the Judgment of the UNDT and can be summarized as follows.

3. Prior to 1 January 2017, staff members of the Organization in the professional and higher categories were paid their net salary at either a single or a dependency rate, depending on their family status. They were also entitled to dependency allowances, depending on their family status, as defined in Administrative Instruction ST/AI/2011/5 (Dependency status and dependency benefits). In 2012, the International Civil Service Commission (ICSC) initiated a comprehensive review of the compensation package for common system staff members, including the salary scale for staff members in the professional and higher categories, “to ensure that the pay and benefits provided to staff continued to be fit for purpose”. The General Assembly endorsed this initiative in its resolution 67/257 of 12 April 2013 and provided some parameters for the conduct of the review, *inter alia*, in its resolutions 67/257, 68/253 and 69/251 of 12 April 2013, 27 December 2013 and 29 December 2014, respectively.

¹ On 9 February 2018, the Secretary-General filed a motion with the Appeals Tribunal, seeking a waiver of the 15-page limit of the appeal brief stipulated in Article 8(2)(a) of the Rules of Procedure of the Appeals Tribunal (Rules) and an extension of that limit to 25 pages. By Order No. 309 (2018) dated 26 February 2018, the Appeals Tribunal granted the Secretary-General’s motion, permitted both parties to file briefs of up to 35 pages and granted a 10-day extension of the time limit for filing the appeal.

² By Order No. 317 (2018) dated 27 April 2018, the Appeals Tribunal ordered *mero motu* to shorten the time limit for the Secretary-General to file his answer to the cross-appeal from 60 calendar days to 45 calendar days.

4. The review process involved data collection from common system organizations and staff, as well as external entities. Working groups composed of ICSC members, representatives from common system organizations and staff representatives were created. The Secretary-General was represented at these working groups' meetings, as well as at the ICSC's sessions. In considering the implementation of the new compensation package, the ICSC also sought and received advice from the Office of Legal Affairs (OLA)—which is part of the United Nations Secretariat and acts as counsel for the Secretary-General in cases before the Appeals Tribunal.

5. In its 2015 Report, the ICSC made a recommendation for the introduction of one net salary scale for all staff members in the professional and higher categories without regard to family status. Support provided for dependent family members would be separated from salary. Two existing allowances, namely a child allowance (a fixed amount payable for each dependent child)³ and a special dependency allowance (for disabled children) would remain unchanged. The ICSC, however, made three important proposals regarding other kinds of family support. Firstly, dependent spouses would be recognized through a spouse allowance at the level of six per cent of net remuneration. Secondly, staff members who are single parents and who provide main and continuous support for their dependent children would in the future receive an allowance in respect of the first dependent child at the level of six per cent of net remuneration in lieu of the ordinary child allowance. Thirdly, staff members with a non-dependent spouse and in receipt of a salary at the dependency rate by virtue of a first dependent child would instead receive the child allowance for such child.

6. In considering the implementation of the new compensation package, the ICSC appreciated that thought needed to be given to the possible need for transitional measures to smooth implementation. In particular, and of most relevance to this appeal, staff members with a non-dependent spouse in receipt of a salary at the dependency rate by virtue of a first dependent child would only receive a child allowance and as a consequence would experience reductions in salary under the proposed system. The ICSC accordingly proposed the introduction of a transitional allowance of six per cent of net remuneration in respect of that first dependent child but in respect of whom no child allowance would be paid concurrently. The allowance would be reduced by one percentage point every 12 months thereafter. When the amount of the transitional measure became equal to, or less than, the amount of the child allowance, the child

³ Staff Rule 3.6(b)(iii) provides that eligible staff shall receive a dependent child allowance for each recognized dependent child under certain conditions.

allowance would be payable in lieu. The transitional allowance would be discontinued once the child in respect of whom the allowance was payable lost eligibility by ceasing to be dependent.

7. These recommendations were adopted by the General Assembly in its resolution 70/244 of 23 December 2015. Paragraph 6 of section III of the Resolution approved the proposed unified salary scale structure. Paragraphs 17-19 of section III of the Resolution introduced the dependent spouse allowance and the single parent allowance. Paragraph 10 of section III records the decision of the General Assembly in regard to the transitional allowance. It reads:

(a) Staff members in receipt of the dependency rate of salary in respect of a dependent child at the time of conversion to the unified salary scale structure will receive a transitional allowance of 6 per cent of net remuneration in respect of that dependent child and that no child allowance should be paid concurrently in that case;

(b) The allowance will be reduced by 1 percentage point of net remuneration every 12 months thereafter;

(c) When the amount of the transitional allowance becomes equal to or less than the amount of the child allowance, the latter amount will be payable in lieu thereof;

(d) The transitional allowance will be discontinued if the child in respect of whom the allowance is payable loses eligibility[.]

8. In his report A/71/258 of 29 July 2016, the Secretary-General proposed amendments to the Staff Regulations for the implementation of the changes as approved by the General Assembly in resolution 70/244 of 23 December 2015. Through its resolution 71/263 of 23 December 2016, the General Assembly acceded to the Secretary-General's request. On 30 December 2016, the Secretary-General promulgated Secretary-General's Bulletin ST/SGB/2017/1 (Staff Regulations and Rules of the United Nations), which amended both the Staff Regulations and the Staff Rules. In consequence of these measures, the new salary scale as of 1 January 2017 (the Unified Salary Scale) no longer provides different net base salaries for staff members who have dependents and for those who do not. The gross and net base salaries of staff members previously paid at the dependency rate now exclude the dependency component. That dependency component is now provided for by the dependent spouse allowance in Staff Regulation 3.4, the single parent allowance in Staff Regulation 3.5 and the transitional allowance providing for dependent children of staff members with a non-dependent spouse in Staff Rule 13.11. The allowances (i.e., dependent spouse, single parent and transitional)—calculated at six per cent of the net base salary and post adjustment of a staff member—are

equivalent to the difference between the new unified rate of salary and the dependency rate of the previous salary scale.

9. This appeal is concerned with staff members with non-dependent spouses who were previously paid at the dependency rate on account of their first child (because they had a non-dependent spouse) and are now eligible for a child allowance and the progressively depreciating transitional allowance for a six-year period.

10. The transitional allowance and its payment modalities approved and enacted in paragraph 10 of section III of General Assembly resolution 70/244 of 23 December 2015 are provided for in Staff Rule 13.11 as follows:

(a) A staff member in the Professional and higher categories or in the Field Service category, who is not in receipt of the single parent allowance but was in receipt of the dependent rate of salary in respect of a first dependent child as at 31 December 2016, shall be eligible for a transitional allowance in the amount of 6 per cent of net base salary plus post adjustment in respect of that child, effective 1 January 2017.

(b) While in receipt of the transitional allowance, no concurrent payment of the dependent child allowance under staff regulation 3.6 (a) shall be paid in respect of that child, except where the child qualifies for a special dependency allowance for a disabled child under staff regulation 3.6 (a) (ii).

(c) The amount of the transitional allowance shall be reduced by one percentage point every 12 months thereafter, until the amount of the transitional allowance is equal or less than the amount of the dependent child allowance provided for under staff regulation 3.6 (a), at which time the dependent child allowance shall be payable instead.

(d) The transitional allowance shall be discontinued earlier if the first dependent child in respect of whom the transitional allowance is payable is no longer recognized as a dependent child.

11. The progressive elimination of the transitional allowance during the first six years of the implementation of the Unified Salary Scale will ultimately result in a loss of net take-home pay for working parents whose spouses are not recognized as dependents. The UNDT provided an analysis of the position of the Respondents before and after the implementation of the Unified Salary Scale, which reveals that initially there would be no negative impact but that the one per cent reduction would eventually lead to a reduction of the net take-home pay.

12. Ms. Lloret Alcañiz is an Information Systems Officer (P-3), at the United Nations Office at Geneva (UNOG). She has two dependent children, aged 20 and 15. Her first dependent child turned 21 in February 2018. On or about 31 December 2016, she received her pay slip indicating a monthly gross salary at the dependency rate in the amount of USD 8,375.42 and a dependency allowance for her second child of USD 261.42. The deduction for her staff assessment was in the amount of USD 1,511.33. She received a pay slip for January 2017 indicating a monthly gross salary of USD 8,223.67, a dependency allowance for her second child of USD 258.62 and a transitional allowance in the amount of USD 692.76 described on her pay slip as “ICSC Interim 6% Depend (Adj)”. The deduction for her staff assessment was in the amount of USD 1,682.

13. Mr. Zhao is an Interpreter (P-4), at UNOG. He has two dependent children, aged 19 and 6. His first dependent child will turn 21 on 28 November 2019. His pay slip for December 2016 reflects a monthly gross salary at the dependency rate in the amount of USD 9,828.42. The deduction for his staff assessment was in the amount of USD 1,903.67. His pay slip for January 2017 reflects a monthly gross salary of USD 9658.25 and a transitional allowance in the amount of USD 799.80 described on his pay slip as “ICSC Interim 6% Depend (Adj)”. The deduction for his staff assessment was in the amount of USD 2,105.83. His December 2016 and January 2017 pay slips did not correctly reflect the fact that he has a second dependent child. This situation was rectified on his pay slip of 31 March 2017, where a dependency allowance of USD 230.47 was added in respect of his second dependent child, in addition to a retroactive payment of USD 752.55.

14. Ms. Xie is an Interpreter (P-4), at UNOG. She has two dependent children, aged 19 and 14. Her first dependent child will turn 21 on 31 December 2018. Her pay slip for December 2016 reflects a monthly gross salary at the dependency rate in the amount of USD 9,644.17 and a dependency allowance for her second child of USD 261.42. The deduction for her staff assessment was in the amount of USD 1,853.92. Her pay slip for January 2017 reflects a monthly gross salary of USD 9,475.08, a dependency allowance for her second child of USD 258.62 and a transitional allowance in the amount of USD 786.23 described on her pay slip as “ICSC Interim 6% Depend (Adj)”. The deduction for her staff assessment was in the amount of USD 2,050.83.

15. Mr. Kutner is a Reviser (P-4), at UNOG. He has three dependent children, aged 19, 15 and 5. His first dependent child will turn 21 on 10 May 2019. His pay slip for December 2016 reflects a monthly gross salary at the dependency rate in the amount of USD 9,460.08 and dependency allowances for his second and third child in the total amount of USD 490.30. The

deduction for his staff assessment was in the amount of USD 1,804.25. His pay slip for January 2017 indicates a monthly gross salary of USD 9,292.00, a dependency allowance for his second and third child of USD 485.04 and a transitional allowance in the amount of USD 772.65 described on his pay slip as “ICSC Interim 6% Depend (Adj)”. The deduction for his staff assessment was in the amount of USD 1,995.92.

16. Ms. Krings is a Crime Prevention and Criminal Justice Officer (P-4), at the United Nations Office on Drugs and Crime (UNODC) in Vienna. She has three dependent children, aged 19, 10 and 7. Her first dependent child will turn 21 on 21 December 2018. Her pay slip for December 2016 reflects a monthly gross salary at the dependency rate in the amount of USD 9,460.08 and a dependency allowance for her second and third child of USD 490.30. The deduction for her staff assessment was in the amount of USD 1,804.25. Her pay slip for January 2017 reflects a monthly gross salary of USD 9,292.00, a dependency allowance for her second and third child of USD 485.04 and a transitional allowance in the amount of USD 772.65 described on her pay slip as “ICSC Interim 6% Depend (Adj)”. The deduction for her staff assessment was in the amount of USD 1,995.92.

17. The Respondents sought management evaluation challenging “the decision of the Administration to alter a fundamental and essential condition” of their employment relating to their salaries. They received a response from the Management Evaluation Unit informing them that the Secretary-General had decided to uphold the contested decisions. Each then filed an application with the UNDT challenging the decisions to reduce his or her contracted salaries and the manner of the implementation of the Unified Salary Scale effective 1 January 2017.

The UNDT Proceedings

18. The UNDT decided to hear the applications of the five Respondents together with six other similar cases, which also concern the introduction of the Unified Salary Scale but involve staff members with different family situations. The UNDT held a hearing on the merits between 20 September 2017 and 22 September 2017 during which it received testimony from two witnesses, namely: the Chief, Payments and Payroll Unit, UNOG, who explained the financial implications of the Unified Salary Scale, the details of the pay slips and the reconciliation exercise; and a Human Resources Officer, Office of Human Resources Management, who testified as to the background of the adoption of the Unified Salary Scale, and the manner in

which it was implemented. The UNDT rendered its Judgment on 29 December 2017, partially granting the applications.

19. The UNDT identified the contested decisions as the Secretary-General's decisions (in implementing the Unified Salary Scale) to pay the Respondents "a salary reduced from the portion which was previously paid on the basis that they have a dependent child entitling them to be paid at the dependency rate".⁴ The Respondents did not challenge the General Assembly's Resolutions adopting the Unified Salary Scale but solely its implementation by the Secretary-General in their particular cases. They alleged that the reduction of their salary by the Secretary-General violated their individual contractual and acquired rights and that the transitional allowance did not fully mitigate their loss in salary.

20. The UNDT held that a decision of general application negatively or adversely affecting the terms of appointment or contract of employment may constitute an administrative decision⁵ and that a pragmatic and casuistic approach should be taken in distinguishing regulatory (legislative) decisions from administrative decisions on the basis of whether they involved a challenge to the legality of the regulatory decision or a violation of rights as a result of the implementation of the regulatory measure.⁶

21. The UNDT concluded that the contested decisions constituted administrative decisions in terms of Article 2(1) of the UNDT Statute because the Respondents' gross and net base salaries were reduced by their loss of the entitlement to be paid at the dependency rate, and thus the decisions had an adverse impact on their terms of employment. Thus, it held that the jurisdictional pre-conditions had been established. It then proceeded to examine whether there was any bar to reviewing the decisions on the basis of their possibly regulatory nature.

22. The non-discretionary implementation by the Secretary-General of regulatory decisions of the General Assembly must be presumptively considered lawful in that he is normally obliged to mechanically implement them in accordance with the content of higher norms.⁷ In the present

⁴ Impugned Judgment, para. 52.

⁵ The UNDT cites *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530; and *Pedicelli v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-555.

⁶ The UNDT cites *Tintukasiri et al v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526.

⁷ The UNDT cites *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530, para. 35.

matter, the UNDT maintained that the presumption of legality may be rebutted when it is alleged that the implementation conflicts with other norms or contractual obligations equally applicable. While the Secretary-General was undisputedly bound by General Assembly resolutions 70/244 and 71/263 (which adopted the Unified Salary Scale and the consequent modifications to the Staff Regulations and Staff Rules), a normative conflict resulted from the fact that the Secretary-General was equally bound by existing contractual obligations with staff members as well as preceding General Assembly resolutions still in force which protected the Respondents' acquired rights—in particular Staff Regulation 12.1 (adopted by the General Assembly on 13 February 1946 through resolution 13(I)) which provides: “These regulations may be supplemented or amended by the General Assembly without prejudice to the acquired rights of members of the staff.”

23. The UNDT concluded that the applications were receivable as they did not seek to review the legality of the General Assembly Resolutions but rather the legality of the administrative decisions implementing the Resolutions in the Respondents' individual cases. The legality of the decisions had to be tested in accordance with all the applicable norms, not only the Resolutions introducing the Unified Salary Scale.

24. The UNDT identified the core issue on the merits as being whether the Secretary-General's decisions to pay the Respondents a salary reduced by the portion which was previously paid on the basis that they have a dependent child infringed upon their contractual rights or acquired rights. It held that the decisions violated the Respondents' acquired right to a certain quantum of salary. With the implementation of the Unified Salary Scale, the Respondents suffered a reduction of their gross salary and increase of their staff assessment resulting in a reduction of their net base salary by about six per cent. This reduction was compensated by the introduction of the transitional allowance. But with the reduction in the allowance from January 2018, or with its discontinuance when the first child lost eligibility as a dependent child (e.g. upon reaching age 21), the net take-home pay would be reduced. According to the estimation tool made available by the Administration, the Respondents will receive between approximately USD 28,598.88 and USD 65,563.48 less than their entitlement under the previous dispensation.

25. The UNDT held that Staff Regulation 12.1 enacted by the General Assembly in 1946 “poses some limits”⁸ to the Organization’s power to amend the Staff Regulations and Rules and that the protection of acquired rights as enshrined in Staff Regulation 12.1 is an intrinsic part of the contractual relationship between the Organization and its staff members. It further held that Staff Regulation 12.1 has quasi-constitutional value and takes precedence over other Staff Regulations and Rules governing the staff members’ conditions of employment. It concluded:⁹

... Indeed, the recognition of staff members’ acquired rights would have no value and staff regulation 12.1 would be deprived of its meaning if the Organization was allowed to infringe on them by the mere adoption of conflicting staff regulations. (...) .At the very least, any derogation to staff regulation 12.1 would need to be made explicitly and it may expose the Organization’s liability for breach of contracts.

26. Applying the test set out by the World Bank Administrative Tribunal in *De Merode et al.*¹⁰ and the Administrative Tribunal of the International Labour Organization (ILOAT) in *Ayoub*,¹¹ the UNDT found that the Respondents’ salaries were a “fundamental and essential term of employment” as they are explicitly set out in their letters of appointment, and therefore an acquired right which could not be unilaterally altered by the Administration.¹² The UNDT considered that this inviolable right to salary necessarily extends to its quantum. With salaries having increased over time and the letters of appointment explicitly stating that the salaries were subject to increase, the Respondents accrued an inviolable right to be paid the newly determined salaries. On that basis, the UNDT concluded that because the additional payment made to the Respondents on account of their dependents was initially embedded in their salaries, the unilateral reduction violated their acquired right to receive the gross and net salaries set out in their letters of appointment.

27. It held furthermore that the financial loss is not sufficiently mitigated by the progressively depreciating transitional allowance or the significantly lower child allowance paid instead of the salary at the dependency rate.

⁸ Impugned Judgment, para. 122.

⁹ *Ibid.*, para. 125.

¹⁰ World Bank Administrative Tribunal, Judgment No. 1, *de Merode et al.* (1981), paras. 42-44.

¹¹ ILOAT Judgment No. 832, *Ayoub et al.* (1987), paras. 12-14.

¹² Impugned Judgment, para. 137.

28. The UNDT made two findings in relation to the transitional allowance. Firstly, it decided that it would not examine the legality of any policy decision taken by the General Assembly regarding the way it designed the transitional allowance and in particular the Respondents' claim that the transitional allowance has a discriminatory effect on them. It held that such claims sought to impugn the Resolution of the General Assembly to establish the transitional allowance. Though not stated as such, the UNDT in effect found that the claims were not receivable in terms of the UNDT Statute because they concerned a legislative or regulatory decision and not an administrative decision. Secondly, the UNDT found no merit in the ground that the Secretary-General had "misinterpreted Resolution 70/244 in adopting Staff Rule 13.11 which prevents the transitional allowance to be transferred to a second dependent child when the one in respect of which the transitional allowance is paid turns 21."¹³ It stated that it was clear from General Assembly resolution 70/244 that by granting the transitional allowance at the moment of conversion of the system to the child in respect of whom the dependency rate was previously paid and stipulating that it would cease when this child loses eligibility, the General Assembly intended that it would not be transferred to any other child. Whether or not this was a sound policy decision or discriminatory, it ruled, was beyond the scope of review.

29. By way of remedy, the UNDT rescinded the contested decisions and rejected all other claims. It clarified (i) that the effect of the rescission entailed that the six per cent reduction of the Respondents' net salary plus post adjustment should be reintegrated as part of their salary from 1 January 2017 onwards; (ii) that this amount would not be subject to any reduction as long as the Respondents continue to meet the eligibility criteria for payment at the dependency rate as defined under the previous regime; (iii) that the amount should be taken into account in the calculation of any other allowance or benefit that is based on the net base salary; (iv) that the Respondents would not receive the transitional allowance so as not to receive the six per cent twice; and (v) that as the Respondents had been paid the transitional allowance for the year 2017, no retroactive payment was due to them and the rescission of the contested decision would, for all practical purposes, only have a prospective effect. Finally, the UNDT held that the Respondents were fully compensated by the rescission as they suffered no financial loss for 2017 since they had received the transitional allowance and that they were, therefore, not entitled to any compensation under Article 10(5)(b) of the UNDT Statute.

¹³ *Ibid.*, paras. 93-94.

30. During the course of its Judgment, when discussing the question of acquired rights, the UNDT made certain observations about a supposed lack of independence of the ICSC. It noted that by consulting the Secretary-General through OLA on possible issues of violation of acquired rights stemming from the adoption of the Unified Salary Scale, the ICSC acted “in a most inappropriate manner”¹⁴ which compromised its independence. In its view, pursuant to the ICSC’s legal framework, a clear distinction was supposed to be maintained between the United Nations Secretariat and the advisory body from which the ICSC should have sought submissions under Article 36 of its Statute. When it requested legal advice from OLA, the “ICSC was seeking such advice from one of the very organs from which it is expressly established to be independent”.¹⁵ The ICSC also failed to give staff representatives the opportunity to provide written statements, thereby only hearing the voice of the Organization, and there is no indication in its 2015 Report that the ICSC had made its own assessment of the issue of acquired rights before presenting its recommendations to the General Assembly.

Submissions

The Secretary-General’s Appeal

31. The Secretary-General defines the contested decisions as: the decisions to pay the Respondents in accordance with the Unified Salary Scale and a transitional allowance established by the General Assembly in the amended Staff Regulations.

32. The Secretary-General argues that the UNDT erred in concluding that the applications were receivable. First, it erred on a question of law and exceeded its jurisdiction by reviewing an administrative act that did not involve the Secretary-General’s exercise of discretion in implementing the General Assembly’s regulatory decisions. The implementation of the regulatory decision is subject to judicial review only where the implementation involves an exercise of discretion by the Administration—including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria. In the present case, however, the General Assembly’s decisions regarding the specific amounts to be paid to staff members were unambiguous and left no room for interpretation or any exercise of discretion by the Secretary-General. The Respondents are in fact challenging the regulatory decisions themselves and not the implementation by the Secretary-General.

¹⁴ *Ibid.*, para. 144.

¹⁵ *Ibid.*, para. 150.

33. The Secretary-General further submits that the UNDT erred by holding that the applications were receivable although the Respondents had not suffered any negative consequences at the time the contested decisions were taken or even when the applications were filed in that they had suffered no financial losses in January 2017. The possibility of future losses due to further reductions does not provide a sufficient basis for review if no damages have been suffered at the time of the application.

34. The Secretary-General further asserts that the UNDT erred in concluding on the merits that the payment of salary according to the Unified Salary Scale established by the General Assembly violated the Respondents' acquired rights. First, the UNDT erred in finding that the Respondents had an acquired right to a particular quantum of pay for *future* work when the protection of acquired rights in Staff Regulation 12.1 is intended to protect those rights earned through service already rendered and not prospective benefits including future salaries. Secondly, the UNDT erred in finding that the methodology for calculating the Respondents' respective salaries was a fundamental and essential condition of employment, which could not be unilaterally amended by the Organization. The methodology for the calculation of the Respondents' salaries was not derived from the express terms of their letters of appointment but rather from the Staff Regulations and Rules and thus may be unilaterally amended at any time provided that the change is not applied retroactively to reduce accrued benefits. Staff members do not have a right, acquired or otherwise, 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. Thirdly, the UNDT erred in holding that the terms of the Respondents' letters of appointment, stating that their initial salaries “may rise”, created an express promise by the Organization to continue to increase their rate of pay. The UNDT failed to appreciate that the basic conditions of employment of staff members as set out in their letters of employment may and often do change throughout the duration of their service and it erred in holding that a change to an essential term would violate the Respondents' acquired rights, irrespective of the reason for change or the actual impact on the staff members.

35. Finally, the UNDT erred in its observations regarding the mandates of the ICSC and OLA. The observations reflect an erroneous understanding of their mandates. The request by the ICSC, which was established as a subsidiary body of the General Assembly, for legal advice from OLA, whose role is, *inter alia*, to provide legal advice to United Nations organs, constituted the proper performance of the mandated functions of the respective entities.

Requesting non-binding legal advice did not violate the prohibition on seeking instructions as contained in Article 6(1) of the ICSC Statute. Albeit *obiter dicta*, the Secretary-General asks the Appeals Tribunal to strike the observations since leaving them undisturbed might deter the ICSC and other subsidiary organs from seeking legal advice from OLA and thus undermine its mandate.

36. For the foregoing reasons, the Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment in its entirety and to strike the *obiter dicta* regarding the mandates of the ICSC and OLA from the Judgment.

Lloret Alcañiz *et al.*'s Answer

37. Lloret Alcañiz *et al.* submit that the UNDT was correct in receiving their applications as it lawfully held that the application of the Unified Salary Scale was an administrative act that involved the Secretary-General's exercise of discretion in its implementation. The Secretary-General retained an inherent power of discretion for existing staff with respect to the implementation—as opposed to the introduction—of the Unified Salary Scale and it properly reviewed the manner of implementation of the regulatory measure and specifically its effects on the contractual and acquired rights of the Respondents. The UNDT also did not err in reviewing the manner in which the Secretary-General reconciled the implementation of the Unified Salary Scale with conflicting contractual or higher-ranking statutory obligations.

38. The Respondents maintain that the judicial review was lawful because: (i) the implementation of the Unified Salary Scale required compliance with established procedures and the UNDT identified procedural violations such as the amendment of essential terms of appointment without the consent of the affected staff members; (ii) resolution 70/244 is silent on the higher-ranking protection of acquired rights as enshrined in Staff Regulation 12.1 and this constitutes sufficient ambiguity for the UNDT to judicially review its implementation; and (iii) the absence of any restrictions on the Secretary-General's discretionary authority allows the UNDT to review the manner of implementation so as to ensure compliance with contractual and higher hierarchical norms.

39. The UNDT correctly found that the Respondents did incur negative consequences due to the implementation of the contested decisions as they suffered a loss in their gross and net base salaries, negatively affecting their conditions of employment, and that they will suffer losses in

the future. This negative impact also warranted a finding that the applications were receivable. The Respondents submit that they suffered three types of negative consequences: (i) They have incurred a loss of legal entitlement as the reduction in salary will have an adverse impact on their borrowing power and as a portion of their salary has been converted into an allowance and thus a non-essential term which could be unilaterally altered at any time; (ii) They suffered immediate financial loss in monthly and annual gross and net base salary, salary apportionment totals and loss in earnings from December 2016 to January 2017 which also resulted in a loss of other connected benefits such as separation payments, affected the commutation of accrued annual leave upon separation and led to a higher amount in staff assessment; and (iii) They will incur a pecuniary loss in the future as the transitional allowance started depreciating by one per cent annually as of 1 January 2018 until it is eviscerated, which is further compounded by the fact that once their first child ceases to be dependent, the Respondents will lose eligibility and not receive the transitional allowance for the entire period despite having other dependent children. The transitional allowance does not adequately compensate for the loss as it decreases over time and does not compensate for the aforementioned loss of legal entitlements and the loss caused by the mere breach of acquired rights.

40. On the merits, the Respondents assert that the UNDT was correct in its finding that the reduction in salary by way of implementation of the Unified Salary Scale violated the staff members' acquired rights. The UNDT correctly identified the principle that terms of conditions of employment explicitly set out in the staff members' letters of appointment were acquired rights and contractual elements requiring mutual consent prior to amendment as opposed to statutory conditions which are subject to unilateral change. The UNDT correctly considered, in line with national and international norms and jurisprudence, that salary and its quantum are essential terms and conditions of appointment, which could not be unilaterally altered. The Secretary-General's submissions merely focus on the issue of acquired rights while in fact it is already the staff members' contractual entitlement to their salary as contained in their letters of appointment that placed restrictions on the manner of implementation of the Unified Salary Scale.

41. With respect to acquired rights, the Respondents assert that these are intended to protect both those rights earned through service already rendered and prospective benefits, including salary, as nothing suggests such a temporal restriction and narrowing the scope in this way would render the term meaningless. Even if acquired rights relate solely to a right in the past, the

Respondents do not seek protection of possible future increases but rather of their current quantum of salary. Moreover, the Secretary-General misinterprets the UNDT in suggesting that the methodology for the calculation of a salary is an essential condition of employment and that the Respondents' letters of appointment created an express promise by the Organization to continue increasing their pay, while in fact the UNDT only held that they have a right to protection of the increases that had already been given.

42. Finally, the Respondents submit that the UNDT's observations regarding the role of the ICSC and its decision to seek legal advice from OLA are legitimate and should stand. The ICSC failed to seek independent legal advice on the impact of the Unified Salary Scale on staff but only requested advice from OLA which does not act impartially but rather represents the interests of one party as illustrated by the fact that OLA represents the Secretary-General in this case.

43. In view of the foregoing, the Respondents request that the Appeals Tribunal dismiss the appeal in its entirety.

Lloret Alcañiz *et al.*'s Cross-Appeal

44. Lloret Alcañiz *et al.* submit that the UNDT erred on a question of procedure and law when concluding that the manner of implementation of the transitional allowance constituted a policy decision taken by the General Assembly and, as such, was not subject to review.

45. The UNDT erred in procedure affecting the ultimate decision of the case in failing to provide a full and reasoned decision with regard to an important element of the Respondents' case, namely the discriminatory effect of the transitional allowance as a specific element of the Unified Salary Scale. The UNDT failed to give any reasons as to why it considered the implementation of the transitional allowance to be a policy matter not subject to incidental review rather than examining whether it violated the conflicting, higher-ranking prohibition of gender discrimination enshrined in Article 8 of the United Nations Charter.

46. The Respondents submit that neither the General Assembly nor the Secretary-General can impose changes to the contractual terms of a staff member through internal legislation if such amendments would violate the provisions of the Charter of the United Nations, which rests at the top of the legislative hierarchy. The right to equal treatment, including the prohibition of gender discrimination contained in Article 8 of the Charter, forms part of the Respondents' essential terms and conditions of employment.

47. The Respondents claim to have suffered discrimination as a result of their family status relating to them having a non-dependent spouse and dependent children. While other categories of staff are “protected” by the implementation of a dependent spouse allowance or single parent allowance that compensates for the six per cent loss in net remuneration, the Respondents who are not single parents, do not have a dependent spouse and receive a depreciating transitional allowance do not see their salaries protected. The Respondents argue that such disparate treatment is in violation of the Administration’s contractual obligation to ensure equal treatment of staff members. Such different treatment may only be considered lawful if it was made on the basis of a legitimate aim, which the Administration has failed to proffer.

48. Moreover, the female Respondents Ms. Lloret Alcañiz, Ms. Xie and Ms. Krings submit that they have been disproportionately affected and thus indirectly discriminated by the prejudicial implementation of the transitional allowance, as women make up the majority of the aforementioned discriminated group of staff members with spouses who work and are thus non-dependent. In support of this argument, they claim that in the context of cases received by the Office of Staff Legal Assistance (OSLA) approximately 70 per cent of the cases with staff members in the non-dependent spouse and dependent children category are comprised of women. In addition, the Respondents cite 2015 census data from the United States which they assert indicate that only 7.9 per cent of households have a working wife and an unemployed husband.

49. By way of remedy for the discrimination suffered as a result of their family status, the Respondents seek the freezing of the transitional allowance at the current six per cent rate until their respective youngest child is no longer recognized as a dependent child and, therefore, they ask the Appeals Tribunal to reaffirm the remedy granted by the UNDT. In addition, the female Respondents request moral damages for the indirect discrimination suffered as a result of their gender arguing that the measures caused objective harm to their dignity *per se* warranting compensation. As the quantum of such damages cannot be easily assessed in the absence of a prescribed mode of calculation, they ask the Appeals Tribunal to calculate it *ex aequo et bono*.

The Secretary-General's Answer to the Cross-Appeal

50. The Secretary-General submits that the Respondents have not established that the UNDT committed a reversible error of procedure by failing to provide a reasoned decision with respect to their claims of discrimination regarding the transitional allowance. The UNDT did in fact adjudicate the entirety of their case and its Judgment evidences a reasoned basis for its decisions.

51. The Secretary-General further asserts that the Respondents have not established that the UNDT erred by rejecting their claims of discrimination as not receivable.

52. On the merits of the issue, the Secretary-General submits that the Respondents have failed to establish that they have been subject to discrimination on the basis of their family status. The principle of equality requires that “similarly situated” staff members be treated equally while staff members in different situations may be treated differently if such distinction is based on sound administrative reasons or is a fair and reasonable outcome of circumstantial differences. With the introduction of the Unified Salary Scale, all internationally recruited staff members performing work at the same level are to be paid according to the same salary scale rather than according to a salary scale that makes distinctions based on extraneous, personal factors such as whether staff members are married or have children. The newly introduced distinction based on whether a staff member has a high earning spouse stems from the reasonable and legitimate policy decision that there is a recognizable need for additional financial assistance for staff members sustaining a household on a single source of income.

53. Second, the Respondents have not shown discrimination on the basis of gender. They have failed to adequately establish that the transitional allowance has a disproportionate impact on female staff members. The statistics cited by the Respondents in this regard were not presented to the UNDT and should thus, in the absence of exceptional circumstances, be rejected by the Appeals Tribunal. These statistics, even if accepted, do not meet any reasonable evidentiary standard of proof to substantiate their disparate impact claim. Moreover, even assuming such negative impact existed, this would not justify a claim of discrimination as there is a reasonable basis for the differential treatment because staff members who are solely responsible for financially supporting a household are in a greater need of financial support than those living in a dual-income household, irrespective of their gender.

54. Finally, the Secretary-General argues that the Respondents failed to establish a basis for the Appeals Tribunal to award them compensation for alleged moral harm on the ground of gender discrimination. In addition to not having been unlawfully discriminated against, the Respondents have failed to provide evidence of harm. The UNDT's and Appeals Tribunal's statutory power is limited to awarding compensation based on evidence of direct and certain harm rather than based on the general principle of equity.

Lloret Alcañiz *et al.*'s Response to the Answer to the Cross-Appeal

55. Lloret Alcañiz *et al.* submit that the Secretary-General's contention in his answer to their cross-appeal, namely that they had cited 2015 census statistics from the United States of America, which had not been presented to the UNDT, was factually incorrect as the data were indeed presented during the oral hearing before the UNDT.

Considerations

56. This appeal raises significant questions of law about the power of the Organization to unilaterally alter or reduce the compensation of staff members of the Organization. For that reason, the President of the Appeals Tribunal in terms of Article 10(2) of the Statute of the Appeals Tribunal, elected to refer the appeal for consideration by the full bench of the Appeals Tribunal.

57. The characterization of the contested decisions by the Secretary-General in his submissions as being the decisions to pay the Respondents in accordance with the Unified Salary Scale and the transitional allowance is a correct and adequate rendition of the decisions in issue.

The issue of receivability

58. The first question for determination is whether the UNDT erred (and thus exceeded its jurisdiction) in concluding that the applications were receivable.

59. The jurisdiction of the UNDT is limited by Article 2(1) of the UNDT Statute to hearing appeals against "administrative decisions". This Tribunal has consistently held that where the General Assembly takes regulatory decisions, which leave no scope for the Secretary-General to exercise discretion, the Secretary-General's decision to execute such regulatory decisions,

depending on the circumstances, may not constitute administrative decisions subject to judicial review.¹⁶ Discretionary powers are characterized by the element of choice that they confer on their holders. An administrator has discretion whenever the effective limits of his or her power leave him or her free to make a choice among possible courses of action and inaction.¹⁷ Only in cases where the implementation of the regulatory decision involves an exercise of discretion by the Administration—including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria—is it subject to judicial review.

60. The Secretary-General maintains that his implementation of the General Assembly Resolutions introducing the Unified Salary Scale falls into this category of non-reviewable decisions. The Resolutions regarding the specific amounts to be paid to staff members were unambiguous and left no room for interpretation or any exercise of discretion by the Secretary-General. Consequently, he submits, the Respondents are in fact challenging the regulatory decisions themselves and not the implementation by the Secretary-General. The Respondents contend in effect that the ambiguity arising from the normative conflict of the different resolutions brings into doubt the scope of application of the Unified Salary Scale and thus the legality of its implementation by the Secretary-General.

61. An administrative decision is a unilateral decision of an administrative nature taken by the administration involving the exercise of a power or the performance of a function in terms of a statutory instrument, which adversely affects the rights of another and produces direct legal consequences. A decision of an administrative nature is distinguished from other governmental action of a regulatory, legislative or executive nature.¹⁸

62. Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative

¹⁶ *Reid v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-563, para. 36; *Tintukasiri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-526, paras. 38-39; and *Obino v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-405, para. 21.

¹⁷ Kenneth Culp Davis, *Discretionary Justice* (1971), page 4.

¹⁸ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 48, citing Former United Nations Administrative Tribunal (former Administrative Tribunal) Judgment No. 1157, *Andronov* (2003), para. V.

decision.¹⁹ What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

63. The Judges of the Appeals Tribunal differ on whether the UNDT had jurisdiction to receive the application. A minority of the Judges (Judges Knierim, Lussick and Thomas-Felix) accept the submission of the Secretary-General that the UNDT erred and exceeded its jurisdiction by accepting the Respondents' applications as receivable. In their opinion, there was no administrative decision affecting the terms of appointment or contracts of employment of the Respondents, as required by Article 2(1) of the UNDT Statute. The majority of Judges (Judge Murphy, Presiding and Judges Raikos and Halfeld), however, hold that the Secretary-General's implementation of the Resolutions involved an administrative decision with an adverse impact.

64. In the view of the minority of Judges, the Secretary-General was not vested with any discretionary authority with respect to the implementation of the General Assembly resolutions and thus the actions of the Secretary-General in implementing them were not administrative decisions affecting the contracts of employment or terms of appointment of the Respondents. In their opinion, the Respondents' arguments presume a scope of discretion that the General Assembly did not grant the Secretary-General. The General Assembly's decisions regarding the specific amounts of salary and allowances to be paid to staff members are unambiguous and leave no room for interpretation or variation by the Secretary-General. The minority of Judges therefore hold that the claim that the Unified Salary Scale violated the Respondents' acquired rights is indeed a challenge to the validity of the General Assembly's legislative or regulatory power, and not to any discretion exercised by the Secretary-General. The instruments affecting the contracts of employment and terms of appointment were the regulatory resolutions of the General Assembly which are legislative in nature. It follows that the jurisdictional pre-conditions for judicial review by the UNDT were not fulfilled, and thus the applications ought to have been dismissed as not receivable. These Judges therefore would uphold the appeal of the Secretary-General on this basis.

¹⁹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50, citing *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18 and citations therein. See also *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661, para. 25.

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.²⁰

66. The mere nature of a decision, however, is not sufficient to classify it as an administrative decision. A decision must have direct adverse consequences in order to be an appealable administrative decision within the meaning of Article 2(1) of the UNDT Statute. The Secretary-General maintains that the UNDT erred in concluding that the Respondents suffered negative consequences at the time the contested decisions were taken or even when the applications were filed. No financial losses had materialized for the Respondents in January 2017. The transitional allowances that were paid in addition to the salaries were higher than the reductions in gross salary for the Respondents, resulting in an increase of the total sum of salary and allowances. Future losses due to further reductions of the transitional allowances,

²⁰ The Secretary-General relies on our decision in *Kagizi et al. (Kagizi et al. v. Secretary-General of the United Nations, Judgment No. 2017-UNAT-750)* to support his submission that the application before the UNDT is not receivable. In that case it was common cause that the resolution in question (which abolished the posts of the appellants) was applicable to all the appellants who impugned not the scope of its application but essentially the reasonableness of applying it to them individually. In the present case, as will appear more fully in the ensuing argument, the staff members contend that resolutions 70/244 and 71/263 cannot apply to them as a matter of law since resolution 13(I) of 1946 enshrining their acquired rights removes them from the scope of the more recent resolutions. The contention is thus that the Secretary-General has gone beyond the powers impliedly conferred upon him by resolutions 70/244 and 71/263 by applying the new salary scales to staff members excluded from their scope by the protective provisions of resolution 13(I) of 1946. It is argued that the Secretary-General is not duly authorized by law and has not complied with the statutory requirements or preconditions that attach to the exercise of power. The narrow issue is then one of strict legality that, in keeping with the principle of the rule of law, is subject to challenge on review. No such challenge was made in the *Kagizi et al.* case, which is therefore distinguishable.

it was contended, do not provide a sufficient basis for review if no actual damage has been demonstrated at the time of the application.

67. It is true that in January 2017, the Respondents' take-home pay in fact increased when compared to their December 2016 pay. The figures analyzed by the UNDT in relation to Ms. Lloret Alcañiz, for example, show that in January 2017 she took home USD 367.54 more than she did in December 2016. However, there is no denying that her salary will reduce over time with the annual one per cent decrease of the transitional allowance. All the Respondents will incur a pecuniary loss as a result of the gradual depreciation of the transitional allowance, which is further compounded by the fact that once their first child ceases to be dependent, the Respondents will not receive the transitional allowance for the entire period despite having other dependent children. Thus, although the loss may not be immediate, a loss of some kind will inevitably afflict all the Respondents with the loss of eligibility for the transitional allowance.²¹ The inevitability of the loss may be a future event but it is nonetheless certain and only a matter of time. As such, the decision has an adverse impact for all the Respondents. In the premises, the majority of Judges hold that the UNDT was correct in finding the applications to be receivable.

The merits

68. The question then is whether the Secretary-General's exercise of power was illegal. Although the minority, as stated, would uphold the appeal on the grounds of receivability, they do not disagree with the reasoning of the majority on the merits.

69. The UNDT held that the exercise of power by the Secretary-General was illegal because the organs of the Organization are bound by Staff Regulation 12.1, which has a "quasi-constitutional"²² value fettering both the legislative power of the General Assembly and the mechanical power of the Secretary-General in implementing resolutions 70/244 and 71/263. The UNDT's finding is to the effect that neither the General Assembly nor the Secretary-General has power to unilaterally reduce the remuneration of existing staff members by virtue of the entrenchment of their acquired rights by resolution 13(I) of 1946.

²¹ The situation will be different in relation to staff members who receive the dependent spouse allowance. That allowance will not decrease over time and it is yet uncertain whether the staff members will ever suffer any adverse consequences. See *Mirella et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-842.

²² Impugned Judgment, para. 122.

70. The UNDT reasoned that while the Secretary-General was undisputedly bound by General Assembly resolutions 70/244 and 71/263, a normative conflict resulted from the fact that the Secretary-General was equally bound by the contractual obligations with staff members and preceding General Assembly resolutions still in force which protected the Respondents' acquired rights—in particular Staff Regulation 12.1 which provides that the Staff Regulations may be supplemented or amended by the General Assembly, only “without prejudice to the acquired rights of staff members”. The UNDT held that Staff Regulation 12.1 “poses some limits” to the Organization's power to amend the Staff Regulations and Rules and that the protection of acquired rights as enshrined in Staff Regulation 12.1 is an intrinsic part of the contractual relationship between the Organization and its staff members, has quasi-constitutional value and takes precedence over other Staff Regulations and Rules governing the staff members' conditions of employment. It held further that any derogation from Staff Regulation 12.1 needed to be made explicitly and possibly would expose the Organization to liability for breach of contract.

71. It follows, in accordance with this line of reasoning, and as a matter of logic, that the UNDT in effect held that when the Secretary-General came to implement resolutions 70/244 and 71/263 he was constrained by resolution 13(I) of 1946 (introducing Staff Regulation 12.1) to apply the later resolutions exclusively to staff members appointed after the adoption of resolutions 70/244 and 71/263 who would not have “acquired rights” to their salaries as fixed at the date of the resolution. It is thus, in effect, contended that the scope of resolutions 70/244 and 71/263 is restricted in application to staff members employed after their adoption.

72. The correctness of that proposition, and the notion that Staff Regulation 12.1 takes precedence over or fetters all subsequent General Assembly resolutions, depend on whether Resolution 13(I) of 1946 is indeed possessed of a “quasi-constitutional value” or, alternatively, that an appropriate harmonization of the three resolutions leads to that result. Of importance in this regard are the contention of the UNDT that “any derogation to staff regulation 12.1 would need to be made explicitly”²³ and its finding that the level or quantum of a staff member's salary is a fundamental and essential term of employment that is not legally susceptible to unilateral alteration by the Organization.

²³ *Ibid.*, para. 125.

73. The UNDT's assertion that resolution 13(I) of 1946 is of quasi-constitutional value rests largely upon its interpretation of earlier pronouncements of other international administrative tribunals. It also relied upon the International Court of Justice's (ICJ) *Advisory Opinion on the application for review of Judgment No. 273 of the United Nations Administrative Tribunal*²⁴ to conclude that the Organization has an obligation to respect its staff members' acquired rights, which include a protection against the unilateral reduction of staff remuneration.

74. Judgment No. 273 of the former Administrative Tribunal was rendered in the *Mortished* case.²⁵ Mr. Mortished was an Irish national and staff member of the Organization in Geneva. On retiring he sought to be paid a repatriation grant. The grant and the entitlement to it were established by General Assembly resolution 470 (V) of 1950. Shortly before Mr. Mortished's retirement, the General Assembly adopted two resolutions relating to the repatriation grant. By resolution 33/119 of 1978, it decided that payment of the repatriation grant would be conditional upon the presentation by the staff member of evidence of actual relocation from his or her last duty station on retirement. The Resolution was given effect by an amendment to Staff Rule 109.5 (f), which in addition provided that staff members already in service before 1 July 1979 would retain the entitlement to a repatriation grant without the necessity of production of evidence of relocation. In terms of this provision, Mr. Mortished was exempted (by virtue of his period of service) from producing documentary evidence of his relocation from his last duty station. However, in December 1979, the General Assembly adopted resolution 34/165, which, in paragraph 3 of section II, provided that effective 1 January 1980 no staff member shall be entitled to any repatriation grant unless evidence of relocation away from the country of the last duty station is provided. The former Administrative Tribunal ruled that Mr. Mortished was entitled to receive the grant on the terms defined in Staff Rule 109.5 (f) which had been amended by the first Resolution, despite the fact that the rule was no longer in force on the date of his separation from service, and that he was entitled to compensation as a result of the disregard of Staff Regulation 12.1 which protected his acquired right to the grant.

75. In its Advisory Opinion, the ICJ noted that the judgment of the former Administrative Tribunal in no way sought to call into question the legal validity and effectiveness of resolution 34/165. The former Administrative Tribunal had not denied the full effect of decisions of the General Assembly and thus did not exceed its jurisdiction. Moreover, it

²⁴ ICJ, *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, page 325.

²⁵ Former Administrative Tribunal Judgment No. 273, *Mortished* (1981).

recognized that the former Administrative Tribunal was required to apply all the relevant General Assembly resolutions and Staff Regulations enacted under Article 101 of the United Nations Charter. The former Administrative Tribunal, unlike the UNDT in the present case, had not found that there was any opposition between Staff Regulation 12.1 and paragraph 3 of section II of resolution 34/165. It had merely, through a process of interpretation and application, reconciled the various resolutions and reached a result that Mr. Mortished had an acquired right to the repatriation grant without the necessity to produce evidence of his relocation.

76. The ICJ clarified the nature of its own jurisdiction in relation to the issue before it as excluding an assessment of whether the interpretation and application of the various resolutions, Staff Regulations and Staff Rules by the former Administrative Tribunal were correct or not. The jurisdiction of the ICJ was limited to deciding if the former Administrative Tribunal had erred on a question of law relating to the provisions of the Charter. In paragraph 74 it stated:²⁶

... (...) It is not the business of this Court to decide whether the [former Administrative Tribunal]’s Judgement involves an error in its interpretation of the relevant instruments, unless it involves an error on a question of law relating to the provisions of the United Nations Charter.

77. The ICJ concluded in paragraph 76 as follows:²⁷

Certainly the [former Administrative Tribunal] must accept and apply the decisions of the General Assembly made in accordance with Article 101 of the United Nations Charter. Certainly there can be no question of the [former Administrative Tribunal] possessing any “powers of judicial review or appeal in respect of the decisions” taken by the General Assembly (...). Nor did the [former Administrative Tribunal] suppose that it had any such competence. It was faced, however, not only with resolution 34/165 and the 1980 Staff Rules made thereunder, but also with Staff Regulation 12.1 also *made no less by and with the authority* of the General Assembly. On the basis of its finding that Mr. Mortished had an acquired right, it had therefore to interpret and apply these two sets of rules, both of which were applicable to Mr. Mortished’s situation. *The question is not whether the [former Administrative Tribunal] was right or wrong in the way it performed this task in the case before it; the question – indeed, the only matter on which the [ICJ] can pass – is whether the [former Administrative Tribunal] erred on a question of law relating to the provisions of the Charter of the United Nations.* This it clearly did not do when

²⁶ ICJ, *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, page 325, para. 74.

²⁷ *Ibid.*, para. 76 (emphasis added).

it attempted only to apply to Mr. Mortished's case what it found to be the relevant Staff Regulations and Rules made under the authority of the General Assembly.

78. The ICJ's Advisory Opinion is thus not authority for the proposition that Staff Regulation 12.1 has a quasi-constitutional value against which other instruments must be reviewed on grounds of legality. On the contrary, it is authority for the proposition that General Assembly resolution 13 (I) of 1946 and Staff Regulation 12.1 enjoy the same status in the normative hierarchy as all other General Assembly resolutions, including resolutions 70/244 and 71/263. It also did not uphold the decision of the former Administrative Tribunal in *Mortished* as correct. It merely found that the former Administrative Tribunal, by engaging in the interpretative exercise of reconciling the relevant statutory instruments, had not violated the United Nations Charter. It expressly refrained from pronouncing on the correctness of the ruling of the former Administrative Tribunal. It did, however, usefully point to the appropriate legal method in reconciling apparently conflicting General Assembly resolutions of equal normative value.

79. In determining the legal relationship between resolution 13(I) of 1946 and resolutions 70/244 and 71/263, in order to ascertain whether there is indeed a normative conflict as the UNDT believed, it will help to reflect upon the applicable basic principles of statutory interpretation.

80. There is a legal presumption that enactments are intended not to alter the existing law more than is necessary. It is presumed that the lawmaker respects the legal order as a product of historical growth and evolution, and that alterations to it can therefore only be concluded if clear indications of their inevitability exist. This implies, as the ICJ recognized, that, as a starting point, an enactment must be interpreted in light of the existing law in that its provisions must as far as possible be reconciled with related precepts of existing statutory instruments. The provisions that stand to be interpreted must be so construed that they are capable of co-existing with similar and/or related provisions of other instruments. This presumption is rebuttable expressly or by necessary implication in instances where the logical correlation between the provisions of an enactment and the concrete situation in which these provisions are to obtain, excludes application of the said provisions to the said situation. In other words, a rebuttal will be established if the position created by the earlier enactment would be irreconcilable with the

legal position called into being by the provisions of the later enactment, which represent a developmental process of altering the existing law.²⁸

81. In short, statutory instruments must be read together and the later one may be construed as repealing the provisions of the earlier one but only where that intention is explicit or alteration is a necessary inference from the terms of the later statutory instrument. The principle is captured in the rule *lex posterior priori derogat*—should there be an irreconcilable conflict between two enactments, the later enactment will take precedence over the earlier enactment and be held to have impliedly repealed the earlier enactment to the extent of the inconsistency. There is accordingly no doctrinal basis for the UNDT’s finding that revocation or amendment of the earlier provision is required to be explicit or express.

82. Were it to be established that the provisions of resolutions 70/244 and 71/263 are irreconcilably inconsistent with the provisions of resolution 13(I) of 1946, it is the later Resolutions which will take precedence. 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.

83. That brings us to the question of whether there is indeed a normative conflict or an irreconcilable inconsistency between resolution 13(I) of 1946 and resolutions 70/244 and 71/263. The answer depends on the interpretation of the term “acquired rights” in Staff Regulation 12.1.

84. The purpose of introducing Staff Regulation 12.1 was to afford staff members some degree of protection from subsequent amendments to the Staff Regulations prejudicing their acquired rights.

85. The UNDT held that the Respondents had an acquired right to a fixed level of salary with respect to future work on two bases: firstly, because their salaries in the past had increased over time; and secondly, on account of their letters of appointment recording that their salaries were subject to increases. It found that “a term of employment which is explicitly set out in a letter of employment is presumed to be fundamental and essential”²⁹ and thus constitutes an acquired

²⁸ Lourens Marthinus du Plessis, *The Interpretation of Statutes*, pages 69 *et seq.*

²⁹ Impugned Judgment, para. 133.

right which may not be amended unilaterally. It held further that the “acquired right” to a salary necessarily extends to its quantum with respect to *future* work. Thus, it reasoned, the Unified Salary Scale altered staff members’ rates of pay for future services without their consent and hence resolutions 70/244 and 71/263 violated their acquired rights as supposedly enshrined by the quasi-constitutional Staff Regulation 12.1.

86. The term “acquired rights” and the protection afforded by Staff Regulation 12.1 are inherently vague and ambiguous. The very term “acquired” implies and suggests the idea of protection and the notion that such rights may expect to survive future variation.³⁰ But by the same token, all rights are acquired in one way or another, with the result that the term evades common or exact definition. Acquired rights are essentially individual or subjective rights meaning that all existing rights are acquired rights.

87. The term “acquired rights” therefore must be construed in the context of the peculiar statutory employment relationships prevailing at the United Nations. In any contract of employment, an acquired right might firstly mean a party’s right to receive counter-performance in consideration for performance rendered. Thus, the aim of the intended protection would be merely to ensure that staff members’ terms and conditions may not be amended in a way that would deprive them of a benefit once the legal requirements for claiming the benefit have been fulfilled—in other words once the right to counter-performance (the salary or benefit) has vested or been acquired through services already rendered. Alternatively, it might be argued, an acquired right may include the right to receive a specific counter-performance in exchange for a promised future performance prior to performance being rendered. The UNDT preferred this second interpretation.

88. Both possibilities give rise to contractual rights, which may be enforceable. The question though is whether those contractual rights are possessed of the enhanced protection flowing from the quality of being “acquired”.

89. If one were to accept the UNDT’s interpretation (the second interpretation) as correct, then there is indeed a normative conflict between resolution 13(I) of 1946 and resolutions 70/244 and 71/263. The later resolutions have varied the contractual promise—in which case, for the reasons just explained, contrary to the finding of the UNDT that the “quasi-constitutional” earlier resolution should prevail, the later resolutions and not the earlier one would have to

³⁰ ILOAT, Judgment No. 832, *Ayoub et al.* (1987), para. 12.

take precedence. Resolutions 70/244 and 71/263 undeniably alter the contractual rights of staff members to receive an agreed future salary. However, if the first interpretation of “acquired rights” is preferred there will be no normative conflict. Resolutions 70/244 and 71/263 do not retrospectively take away any vested right to receive a benefit for services already rendered.

90. In our view, the first interpretation of the term “acquired rights” is the more appropriate as it avoids or reconciles the normative conflict and harmonizes the provisions of the two resolutions. An “acquired” right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not *acquired* rights until such time as the *quid pro quo* for the promise has been performed or earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to future increases³¹ or pose a legal bar to a reduction in salary.

91. 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.³² 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.

92. It follows that, absent any normative conflict, the Secretary-General did not act illegally in implementing resolutions 70/244 and 71/263. Resolution 13(I) of 1946 imposed no legal constraint requiring implementation to be restricted to staff members who entered service after the adoption of resolutions 70/244 and 71/263.

93. Furthermore, the fact that the Respondents’ letters of appointment state that their initial salary “may rise” does not constitute an express promise by the Organization to continue to increase their rate of pay and never to reduce it, as the UNDT concluded. The statement cannot

³¹ ILOAT, Judgment No. 2632 (2007), para. 13.

³² Former Administrative Tribunal Judgment No. 82, *Puvrez* (1961); Former Administrative Tribunal Judgment No. 202, *Quéguiner* (1975); and Former Administrative Tribunal Judgment No. 266, *Capio* (1980).

be construed as a promise that staff members' salaries will necessarily rise and continue to do so. 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. The fetter proposed by the Respondents, and accepted by the UNDT, would be wholly incompatible with the powers conferred upon the General Assembly by the Charter of the United Nations.

94. 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.³³ 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.

95. In the result, there is no basis to review, on the grounds of legality, the Secretary-General's exercise of power in the implementation of resolutions 70/244 and 71/263. The appeal must accordingly be upheld and the Judgment of the UNDT be vacated.

³³ In labour law systems typified by collective bargaining, the right of the employer to unilaterally alter the terms of the employment contract is the countervailing power of the right to strike. Just as employees are permitted to resort to a power play in support of a demand for salary increases, so too is the employer allowed to resort to unilateral action to decrease salaries once bargaining has reached an impasse. While strictly speaking both actions may be in breach of contract, in a statutory context strikes and unilateral reductions are regarded as legitimate resorts to power in collective bargaining. Such arrangements may not apply within the United Nations system and thus are not relevant. The practice does nonetheless give the lie to the notion that unilateral amendment is wholly proscribed in law.

The cross-appeal

96. With regard to the cross-appeal, we considered it in the interest of justice to admit the response to the answer to the cross-appeal in light of the importance of the matter. On the merits, we hold that the UNDT did not err in finding that it lacked jurisdiction to examine whether the decision of the General Assembly to provide for the transitional allowance was illegal, discriminatory and in violation of Article 8 of the Charter of the United Nations. The brief rationale of the UNDT, namely, that the Respondents had gone beyond impugning the implementation of resolutions 70/244 and 71/263 and sought to challenge the legislative decision of the General Assembly establishing the transitional allowance, is an adequate and correct explication of the legal basis for declining jurisdiction.

97. There is a fundamental difference between reviewing the Secretary-General's exercise of a mechanical power to implement a General Assembly resolution (to test if his application of the resolution is in accordance with the intrinsic legal pre-conditions defining its scope and area of application) as compared to testing the substantive content of a resolution against the higher normative values of the Charter, in particular Article 8 which requires the Organization not to place restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs. The former judicial exercise consists of an essentially interpretative process aimed at determining if the implementation of the resolution is legally in accordance with its scope of application and conditions precedent. By contrast, the latter judicial exercise is akin to a bill of rights review or a constitutional adjudication, where the content of the resolution is evaluated against a norm of higher constitutional value to assess its compliance with the fundamental instrument.

98. Although the UNDT drifted into the realm of constitutional adjudication with its incorrect assertions regarding the "quasi-constitutional" nature of Staff Regulation 12.1, its acceptance of jurisdiction to review the implementation of the resolutions was correct in the face of a necessity to interpret, apply and reconcile resolutions 70/244 and 71/263 with resolution 13(I) of 1946 in order to establish their scope of application. By contrast, in the cross-appeal the Respondents essentially seek an order declaring the resolutions constitutionally inconsistent with the Charter and thus invalid. However, neither the UNDT nor this Tribunal is a constitutional court. The establishment of the terms and content of the transitional allowance is a matter for the General Assembly and the allegations of discrimination are directed at the nature and content of the legislative or regulatory choices of the General Assembly. The challenge goes

beyond clarification of the resolutions' scope of application; it is directed rather at a policy decision, which the Respondents hope to re-define in accordance with their interpretation of the requirements of Article 8 of the Charter. As such, they indisputably attack the substantive validity of the resolutions or the legislative decisions of the General Assembly. The UNDT was accordingly correct to decline jurisdiction on the basis that only appeals in relation to administrative decisions are receivable by it.

99. In the result, the cross-appeal must be dismissed.

The UNDT's observations on the role of the ICSC and OLA

100. In light of our vacating the erroneous Judgment of the UNDT entirely, there is strictly no need to rule on the request of the Secretary-General to strike out the UNDT's observations impugning the independence and impartiality of the ICSC and OLA in carrying out their mandates. In fairness though, it must be said, the UNDT erred in making these observations. The request by the ICSC, which is a subsidiary body of the General Assembly, for legal advice from OLA, whose role is, *inter alia* to provide legal advice to United Nations organs, was not improper. We agree with the Secretary-General that a request for non-binding legal advice did not violate the prohibition on seeking instructions as contained in Article 6(1) of the ICSC Statute. There is a difference between receiving instructions and obtaining non-binding legal advice.

Judgment

101. The appeal is upheld, the cross-appeal is dismissed and Judgment No. UNDT/2017/097 is hereby vacated.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

(Signed)

Judge Lussick

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar