UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2018/084
UNDT/NBI/2018/085
UNDT/NBI/2018/086
Judgment No.: UNDT/2021/087
Date: 26 July 2021
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CHAOUI

RICHARDS

KALOTY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Me. Jean-Didier Sicault, Avocat à la Cour de Paris

Counsel for the Respondent:
Jérôme Blanchard**,** Human Resources Legal Unit, UNOG

INTRODUCTION

1. By applications filed on 24 July 2018, the Applicants challenge the decision of the Secretary-General to apply the new post adjustment multiplier for Geneva as decided by the International Civil Service Commission ("ICSC") in July 2017 in relation to the salary of each of them ("the impugned decision'), as of February 2018.[1]

2. The Respondent filed a reply to the applications on 24 September 2018 in which it was argued that their claim is not receivable and, if found receivable, the contested decision was lawful.[2]

PROCEDURAL HISTORY

3. By Order No. 170 (NB1/2018), the three applications were consolidated for the purposes of adjudication.

4. On 26 September 2018, the Counsel for the Applicants filed a motion for leave to reply to the Respondent's reply. By Order No. 152 (NBI/2018), the motion was granted. The Applicants filed the rejoinder on 17 October 2018. On 3 December 2018, the Respondent also filed submissions on the Applicants' comments and an erratum to his reply on 4 December 2018.

5. On 4 September 2019, the Applicants filed another motion for leave to submit an additional concise brief. On 23 January 2020, the Respondent also filed a motion for leave to file additional documents. These briefs were incorporated in the parties' submissions.

6. On 19 March 2021, the United Nations Appeals Tribunal issued Judgment No. 2021-UNAT-1107 dismissing applications in the *Abd Al-Shakour et al* and *Aksioutine*

[1] Application, section V.
[2] Reply, section I, para 3 and 4.

et al cases, which were based on the same set of facts and involved the same legal issues.[3]

7. In light of the UNAT judgment, the Tribunal, by its Order No. 099 (NBI/2021), invited the parties to amend their pleadings and distinguish their cases from the *Abd Al-Shakour et al.* and *Aksioutine et al.* cases, if they wished, by 27 May 2021. The Tribunal informed the parties that absent a response, it would proceed to judgment based on the pleadings before it.

8. The Respondent filed a response to Order No. 099 on 27 May 2021. There was no response to Order No. 099 from the Applicants. The Tribunal, by its Order No. 122 (NBI/2021) extended the deadline to 24 June 2021 for the Applicants to file a response to Order No. 099, if they wished. The Applicants did not make any submissions as per Order No. 122 (NBI/2021). Absent a response or a motion for extension of time from the Applicants, the Tribunal proceeds to judgment based on the pleadings such as put presently before it.

FACTS

9. At its 38th session in February 2016, the Advisory Committee on Post Adjustment Questions ("ACPAQ")[4] 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 recommendations in March 2016.[5]

[3] *Abd Al-Shakour et al* and *Aksioutine et al* 2021-UNAT-1107.
[4] 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.
[5] Reply, annex 1, page 3 (ICSC/ACPAQ/39/R.2 – Report on the implementation of the methodology approved by the Commission for cost-of-living surveys at headquarters duty stations).

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[6] index at these locations. Geneva was one of the duty stations included in the survey.[7] After confirming that the surveys had been conducted in accordance with the approved methodology, the ACPAQ recommended the ICSC's approval of the survey results for duty stations not covered by the ECP in February 2017. This recommendation included the Geneva duty station.[8]

11. At its 84th session held in New York on 20-31 March 2017, the ICSC approved the results of the cost-of-living surveys conducted in Geneva in 2016, as recommended by ACPAQ at its 39th session.[9] On the basis of these surveys, the ICSC, consequently established new post adjustment multipliers, including for Geneva.[10]

12. The Executive Heads of the Geneva-based organizations expressed their concerns with the ACPAQ report and the subsequent decision of ICSC arising from the 2016 baseline cost-of-living surveys.[11]

13. On 9 May 2017, the ICSC chairman provided a reply to the concerns raised.[12] Not convinced by the answer provided, the Executive Heads decided to mandate a team of three senior statisticians to review the application of the methodology and the data processing process. The team of statisticians produced a report[13] which was annexed

[6] Post adjustment is an amount paid to staff members serving in the Professional and higher categories and in the Field Service category, in accordance with annex I, paragraph 8, of the Staff Regulations, to ensure equity in purchasing power of staff members across duty stations. ST/SGB/2017/1, rule 3.7(a).
[7] Application, annex 6 (ICSC/85/CRP.1 – Considerations regarding cost-of-living surveys and post adjustment matters – note by Geneva-based organizations).
[8] ICSC/84/R.7 – Post adjustment issues: results of the 2016 round of surveys; report of the Advisory Committee on Post Adjustment Questions on its thirty-ninth session and agenda for the fortieth session.
[9] Application, Annex 3.
[10] Ibid.
[11] Application, annex 14 and 15.
[12] Application, annex 16.
[13] Application, annex 17.

to a note dated 10 July 2017 filed with the ICSC by Geneva-based organizations.[14]

14. On 11 May 2017, through a Broadcast-UNHQ, the Department of Management, informed the staff members of the United Nations Secretariat and other Organizations, that the ICSC had approved the post adjustment index variance for Geneva translating into a decrease in the net remuneration of staff in the professional and higher categories of 7.7%. By the same Broadcast, the staff members were also informed that the new post adjustment would initially be applicable to new staff joining the duty station on or after 1 May 2017 and currently serving staff members would not be impacted until August 2017.[15]

15. Pursuant to a decision made at the ICSC's 85th session in July 2017, the ICSC engaged an independent consultant to review the methodology underlying the post adjustment system and assess, *inter alia*, whether it was "fit for purpose". In a report dated 6 February 2018, the consultant noted that the purpose of the post adjustment system "is to adjust salaries of UN Common System professional staff in all duty stations in a way that is fair, equitable and meets standards of compensation policies. To this extent it can be said that these procedures and the approved methodology go a long way to meet the criterion of 'fit for purpose'. There are however clearly areas for improvement […]".[16] The consultant made 64 recommendations, including but not limited to the methodology for the post adjustment system, policies and specific issues.[17] The Applicants assert that neither the Geneva-based organizations nor the staff were consulted regarding the terms of reference for the review or the appointment of the consultant as expected.[18]

16. On 18 July 2017, at its 85th Session, the ICSC determined that its earlier

[14] Application, annex 18.
[15] Application, annex 4.
[16] ICSC/ACPAQ/40/R.2 - Review of the post adjustment index methodology – report of the consultant).
[17] Ibid., pp. 47-54.
[18] Application, para. 66.

measures would not be implemented as originally proposed. Instead, the decrease would commence from February 2018 and it would be significantly less than originally expected.[19]

17. The reduction in post adjustment for professional and higher categories, including the Applicants, was reflected in the February 2018 pay slips, leading to a decrease of net take-home pay of approximately 3.5%; hence the contested decision.[20]

18. On 10 April 2018, separately, the Applicants requested management evaluation of the contested decision.[21] On 10 July 2018, the Under-Secretary-General for Management responded declining the requests on the ground that, in its resolution 67/241, the General Assembly held that resolutions and decisions of the ICSC, are binding on the Secretary-General and the Organization. Consequently, the payment of post adjustment in accordance with the multiplier established by ICSC is not an administrative decision subject to appeal.[22]

RECEIVABILITY

19. The Tribunal finds that the application is timely, having been filed within the applicable deadline following a properly requested management evaluation.

20. 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 reiterates its holding in the previous related cases, the details of which are incorporated here by reference[23] that, after *Andronov*, applications originating from implementation of acts of general order are receivable when an act of general order has resulted in norm crystallization in

[19] Application, annex 8.
[20] Ibid.
[21] Application, annex 9.
[22] Application, annex 10.
[23] See e.g., Judgment No. *Abd Al-Shakour et al* UNDT/2020/106.

relation to individual staff members by way of a concrete decision, such as through a pay slip or personnel action form. Accordingly, every pay slip 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.

21. In the present case, just as it was held by this Tribunal in *Abd Al-Shakour et al*[24], an individual decision, namely, to apply the new post adjustment in relation to each of the Applicants, had been issued and implemented, as demonstrated by their salary slip for the month of February 2018[25].

22. In similar cases[26], 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 pay slip and the actual financial detriment was incurred by the Applicants at the same time as it was reflected in their pay slips.[27]

23. The Respondent initially questioned receivability of the applications in submitting 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 decision subject to judicial review" [emphasis added].

24. This Tribunal held previously, and reiterates here, that, under the UNDT Statute, the exercise of administrative discretion does not function as criterion for determining receivability of an application. In the present discourse, there is no room for a relativist "*may not* constitute administrative decision subject to judicial review", a statement that would further undermine legal certainty in the area of access to United

[24] *Abd Al-Shakour et al* UNDT/2020/106 para. 42.
[25] Application, annex 11 (the Applicants' pay slips).
[26] Respondent's reply in *Steinbach* UNDT/2020/114; *Bozic* UNDT/2020/115; *Andres et al* UNDT/2020/117; *Angelova et al* UNDT/2020/118; *Andreeva et al* UNDT/2020/122, para. 48.
[27] Application, para. 14.

Nations administrative tribunals, already marred by inconsistent and *ad hoc* pronouncements. The Tribunal recalls that the doctrine of administrative law distinguishes discretionary decisions and constrained decisions, the latter denoting situations where an administrative organ only subsumes facts concerning an individual addressee under the standard expressed by a rule of a general order. Constrained decisions, as a rule, are reviewable for legality, i.e., their compliance with the elements of the controlling legal norm. Whereas state systems may conventionally determine that constrained decisions are to be challenged not before an administrative, but rather before a civil or labour court, the applicants challenging decisions of the Secretary-General have no such option available. To exclude *a limine* judicial review of constrained decisions would unjustly restrain the staff members' right to a recourse to court.

25. The most recent position of the Respondent seems to yield to the holding by the majority of UNAT in *Lloret-Alcañiz et al*, which, in response to similar arguments, held:

> The majority of the 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 nature of a duty. However, such exercises of duty 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 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.[28]

26. It is noted that the most recent and substantively more pertinent UNAT judgment in *Abd Al-Shakour et al* and *Aksioutine et al*[29] addressed the issue by noting that "the parties did not contest the receivability of the applications". Given, however, that non receivable applications cannot be adjudged on the merits, which is what *Abd Al-Shakour et al* and *Aksioutine et al* ultimately did, receivability of the applications seems to have been confirmed.

27. The Respondent concedes that the present case concerns a "mechanical and quasi-automatic implementation of a post adjustment multiplier, issued on a monthly basis by the ICSC through a post adjustment classification memo.[30] The Tribunal holds that applications directed against such decisions are receivable. So are the present applications.

Merits

Submissions

28. The Applicants contest the legality of the impugned decision on the basis that it implemented an illegal decision of the ICSC. Fundamentally, they submit, after ILOAT Judgment 4134, that the competence norm has been breached because under the ICSC statute, the ICSC did not have the authority to decide on the post adjustment multiplier for Geneva.[31]

29. Moreover, the Applicants seek to demonstrate numerous procedural and substantive flaws regarding the ICSC decision, *i.e.*, that it: a) lacks adequate reasoning as to the applied methodology and the choices made with respect to the gap closing measure; b) results from errors of fact, most of which had been pointed out by the

[28] *Lloret-Alcañiz* 2018-UNAT-840, para.65.
[29] *Abd Al-Shakour et al* and *Aksioutine et al* 2021-UNAT-1107.
[30] Reply, para. 18.
[31] Applicants' rejoinder filed on 17 October 2018.

Geneva statisticians and, since, largely confirmed by the independent expert engaged by the ICSC; c) infringes the acquired rights of staff members; d) inflicts excessive harm on the staff members affected; e) violates the requirements of stability, predictability and transparency by its arbitrary and *ad hoc* nature; f) results from the application of operational rules which are themselves unlawful; g) results from a procedural irregularity on the interface of the ICSC and its Advisory Committee on Post Adjustment Questions and (h) causes unjustified difference in pay for staff in Geneva.

30. Implementation of the ICSC decision, therefore, violated minimum standards of lawfulness and good administration.[32]

31. As a remedy, the Applicants request the Tribunal to annul the contested decision.

32. The Respondent submits that the Applicants only identify alleged flaws relating to the ICSC decision, rather than any flaws relating to the decision of the Secretary-General. ICSC decisions are binding on the Secretary-General. The Respondent cannot, therefore, fully address all and each unsubstantiated claim, which relate to the ICSC internal decision-making process, the methodology, or the data used, and may only rely on the data derived from public documents.

33. To the extent the Applicants argue that the Secretary-General, by implementing the allegedly unlawful PA multiplier set by the ICSC, violated his implied duties to act according to the minimum standards of lawfulness and good administration, the Respondent concedes that, arguably, in the exercise of a mechanical power, more of a nature of a duty, a *manifestly* unlawful decision would not be implemented on the basis of these minimum standards of lawfulness and good administration. Yet, the Applicants did not demonstrate how, and why, the ICSC decision should have been

[32] Application, para. 62.

considered *manifestly* unlawful, requiring the decision-maker to suspend the implementation of the decision and seek direction from the legislative authority. The Secretary-General implemented ICSC's decision as it was not manifestly unlawful or based on a manifest error of law or fact.

34. The Respondent demonstrates that, after the General Assembly approved certain changes concerning methodology of the PA calculation by the Commission, the establishment of a PA multiplier is a proper exercise of the ICSC authority under Article 11 of its Statute and that the Secretary-General was bound by law to implement it. The Respondent, furthermore, develops argument about a lack of any bias or manifest error of fact in the modification of the PA multiplier, the methodology, or the data used.

35. In conclusion, the Respondent asks the Tribunal to dismiss the applications.

Considerations

36. It is not contested that the impugned decision of the Secretary-General complies with the ICSC-calculated post adjustment for Geneva. It is also not disputed that the Secretary-General is bound to implement the ICSC decisions. Contrary to the Respondent's argument, however, in addition to having no bearing on receivability, as discussed *supra,* the matter has a limited bearing on the scope of substantive review of the impugned decision. The Respondent's proposition that the Secretary-General might refrain from implementing an ICSC decision only where it would be manifestly unlawful is doctrinally sound, but not relevant for the issue at bar. The claim before the UNDT concerns annulment of the impugned decision because of its unlawfulness, and not compensation because of a faulty conduct of the Secretary-General. The claim, therefore, is to be decided based on the examination of the question of objective unlawfulness alone. The issue is whether the alleged unlawfulness of the ICSC decision occurred and whether because of it the individual decision implementing it would also be unlawful.

37. As concerns difficulties in access to facts and evidence, such as may be attendant to the fact that the Secretary-General did not author the controlling decision himself, they may be pertinent; there is, however, no basis to treat them as insurmountable. While the Counsel for the Respondent indeed represents the Secretary-General and not any other organs of the United Nations, they however represent the Secretary-General in his function as guardian of the rule of law for the Secretariat and not in the area of personal or corporate interests. As such, the Tribunal assumes that the Respondent may count on cooperation from the ICSC and the General Assembly for the provision of data where necessary, and that it is his role to establish avenues for such cooperation in the event they do not exist. In the present case, however, the need for information concerning the internal functioning of the ICSC does not arise as the Tribunal does not deem it relevant for the question of legality of the impugned decision.

38. Moving on to discussing unlawfulness, the Tribunal will first address the claim that the ICSC decision on post adjustment was ultra vires for the lack of statutory competence.

39. In the argument on ICSC's statutory competences, the central issue appears to lie in the fact that art. 10 of the ICSC statute *prima facie* confirms the competence of the General Assembly to decide post adjustment akin to the way it decides salaries. That the General Assembly has a role in post adjustment results from the plain language. What the ICSC ultimately decide upon, however, is conditioned by the meaning ascribed to the terms "scales" in art 10 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. The Statute itself does not stipulate what is meant by "scales" in art. 10 and "classification" in art. 11. In explaining the relevant competencies, therefore, it is necessary to examine the meaning of these terms as intended and accepted by the parties, as evidenced by practice.

40. As demonstrated by the documents submitted by the Respondent[33] 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, however, 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.[34] 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 post adjustment 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.[35]

41. Moreover, until 1989 the General Assembly determined regressivity scales. The latter involved a "precise financial calculation" in terms of United States dollars per index point for each grade and step; the calculations, however, were related to the salary scales only and not to post adjustment. 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.

42. While the General Assembly gradually relinquished determining scales and

[33] Reply, annexes 12 and 14.

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

[35] It would seem that the General Assembly in its resolution 40/244 conferred on the Commission the power to "take steps to prevent the rules relating to a post adjustment increase" from adversely affecting the margin defined by the same resolution and thus, effectively authorised it to depart from schedules in case where post adjustment calculation indicated that it could be decreased.

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;
>
> 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 […].

43. It is clear, nevertheless, that the ICSC statute had been crafted with a specific method of determining post adjustment in mind, which, at the time, was considered fundamental enough to be enshrined in the Statute. Resignation of post adjustment scales eliminates an express category of the methodology, i.e., modifies the conduct norm of ICSC as well as effectively eliminates a discrete regular function of the General Assembly in determining the post adjustment, i.e., annuls a norm of competence. It is deontic logic and plain juridical fact that these changes amount to a change to the Statute. As rightly pointed out by the Respondent, the ICSC was established by General Assembly resolution 3357(XXIX) of 18 December 1974. The ICSC Statute is a General Assembly Resolution, and is thus to be read in conjunction with subsequent General Assembly Resolutions of equal normative value, susceptible to modify, alter, or amend resolution 3357 (XXIX) approving the ICSC Statute. [36] The situation contemplated here falls snuggly under the holding of UNAT in *Lloret-Alcañiz*:

[36] Reply-corrected version page 7 last para.

> 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.[37]

44. The Tribunal, accordingly, maintains its position expressed in *Abd Al-Shakour*, with respect to the Applicant's allegation of a violation of the procedure in amending the ICSC statute, which under its art. 30 requires express written approval of amendments. It holds that the alleged procedural defect may produce claims only to relative ineffectiveness, rather than absolute invalidity, of the changes. In this regard, the Applicant's argument cannot be upheld under Article 1 of the ICSC statute: As results from Article 1 section 2, the United Nations has been juxtaposed with "specialized agencies and other international organizations …which accept the present statute"[38]. As results from section 3, it is only "specialized agencies and other international organizations" who have the option of accepting, or not, the ICSC statute and, in accordance with art.30, any ensuing amendments. The United Nations, which, in this context, denotes the Secretariat and funds and programmes, are directly bound by the General Assembly's decisions on the matter of ICSC competencies. This conclusion distinguishes the present case from the case subject to ILOAT Judgment 4134. Thus, the Applicant's argument based on the lack of ICSC competence to decide the PA multiplier fails.

45. This said, retaining in the ICSC statute references to elements of methodology

[37] At para 81.
[38] This delineation is also recalled in the annual reports of the ICSC which distinguish organizations who have accepted the statute of the Commission and the United Nations itself, see e.g., Report for 2017, Chapter I para 2.

that have been abolished is confusing and non-transparent, and is partially responsible for the present disputes.

46. Further on the authority behind the ICSC decision, and before discussing the substance, 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, the ultimate regulatory decision emanates from the General Assembly. Such a decision is binding on the Tribunals and may only be reviewed incidentally and narrowly for the conflict of norms between the acts of the General Assembly.[39] On the other hand, where the ICSC exercises a delegated regulatory power under art. 11, its decision, while undisputedly binding on the Secretary-General, may be subject to incidental examination for legality, including that where the contested matter belongs in the field of discretion, the applicable test will be that pertinent to discretionary decisions i.e., the *Sanwidi* test. This is confirmed by the Appeals Tribunal in *Pedicelli*, where, following a remand for consideration of the merits, an individual decision, based on the conversion of a salary scale then applied to General Service staff in Montreal promulgated by the ICSC under art. 11, entailed an examination of the ICSC decision for reasonableness.[40]

47. Notwithstanding the aforesaid, also where the ICSC exercises its delegated regulatory powers, it remains subordinated to the United Nations General Assembly who may intervene, and indeed does so, mainly in the policy stage but also after the ICSC decision has been taken. Thus, the General Assembly interfered in 2012 in the system of post adjustment, requesting the ICSC to maintain the existing level of post adjustment in New York.[41] Also, in August 1984, the ICSC decided that the post adjustment in New York would be increased by 9.6%. However, the General

[39] *Lloret-Alcañiz* 2018-UNAT-840, para.79-83.
[40] *Pedicelli* 2017-UNAT-758 para 26 "We find no error in [UNDT's finding] that the renumbering exercise "had a legitimate organizational objective of introducing the GCS for GS positions."
[41] General Assembly Resolution 67/551 of 24 December 2012.

Assembly, in paragraph 1(c) of its resolution 39/27 of 30 November 1984[42], requested the ICSC to maintain the level of the post adjustment and not to introduce the new one. The power of the General Assembly to intervene in the implementation of the post adjustment was confirmed by the former United Nations Administrative Tribunal.[43] The ICSC recalled this precedent in its report of 2012.[44]

48. Intervention of the General Assembly largely removes the matter from the purview of the Tribunals. This is confirmed in *Ovcharenko*, where the Appeals Tribunal confirmed legality of the implementation of the post adjustment freeze because the ICSC decision, subject to implementation by the Secretary-General, had been based on the General Assembly's resolution recommending the freeze.[45] In such cases, the regulatory decision is attributed directly to the General Assembly. Thus, in accordance with *Lloret-Alcañiz*, the Tribunals review becomes limited to the question of a normative conflict between the acts of the General Assembly-such as in *Lloret-Alcañiz* where the question was whether the impugned decision (one of a general order and, consequently, the individual decision taken by the Secretary-General) violated staff members' acquired rights.

49. The Tribunal notes that, with respect to the present dispute, the General Assembly observed in its resolution A-RES-72-255:

Preamble

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

> 6. *Notes with serious concern* that some organizations have decided not to implement the decisions of the Commission regarding the results of the cost-of-living surveys for 2016 and the mandatory age of separation;
>
> 7. *Calls upon* the United Nations common system organizations and staff to fully cooperate with the Commission in the application of the post adjustment system and implement its decisions regarding the results of the cost-of-living surveys and the mandatory age of separation without undue delay; […].

50. In reference to this Resolution, the Appeals Tribunal stated in *Abd Al-Shakour et al* and *Aksioutine et al*:

> In the present case, however, *there is no need to investigate whether or not the ICSC acted on its own behalf or on delegation by the General Assembly* [emphasis added].
>
> [..] As there is a direct order of the General Assembly to the Secretary-General to apply the ICSC decision, the United Nations Tribunals do not have the authority to review the lawfulness of such a general determination."[46]

The Tribunal further notes that the General Assembly stated in resolution A-RES-74-255[47]

> Expressing its concern over the inconsistencies in the application of the 2016 post adjustment
>
> results at the Geneva duty station of the United Nations common system,
>
> 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;
>
> 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

[46] *Abd Al-Shakour et al* and *Aksioutine et al*, paras. 48-49.
[47] A/RES/74/255, para. 7.

> to take decisions on the number of post adjustment multiplier points per duty station, under article 11 (c) of its statute;
>
> 3. Urges the member organizations of the United Nations common system to cooperate fully with the Commission in line with its statute to restore consistency and unity of the post adjustment system as a matter of priority and as early as practicable;
>
> 4. Recalls its resolution 41/207 of 11 December 1986, and reaffirms the importance of ensuring that the governing organs of the specialized agencies do not take, on matters of concern to the common system, positions conflicting with those taken by the General Assembly;
>
> 5. Also recalls its resolution 48/224, reiterates its request that the executive heads of organizations of the common system consult with the Commission in cases involving recommendations and decisions of the Commission before the tribunals in the United Nations system, and once again urges the governing bodies of the organizations to ensure that the executive heads comply with that request.

51. In reference to this Resolution, the Appeals Tribunal found in *Abd Al-Shakour et al* and *Aksioutine et al*:

> Therefore, by means of General Assembly resolution 74/255, issued a few months after a similar case had been delt [sic] with by the ILOAT, the General Assembly, even though well aware of the arguments put forward against it, approved of the methodology for calculating the post adjustment, as well as its financial impact on staff remuneration in Geneva. This alone would be sufficient grounds for dismissing the appeal, in light of the restricted scope of competence of the United Nations Tribunals to review legislative texts originating from the General Assembly. […][48]

52. The Appeals Tribunal proceeded to disown its earlier approval to *Tintukasiri* Judgment [49], in favour of *Ovcharenko,* to ultimately conclude:

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[48] *Abd Al-Shakour et al* and *Aksioutine et al* 2021-UNAT-1107, Para. 60.

[49] *Tintukasiri* 2015-UNAT-526, paras. 38-39, the Appeals Tribunal cited the UNDT: '>[…] In explaining the reasons for this conclusion, the UNDT further stated: It is only at the occasion of individual applications against the monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it. As such,the Tribunal confirms its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.<

> Indeed, ordinarily, there is little or no margin for the Tribunals to apply the reasonableness test to legislative texts issued by the General Assembly, particularly when it comes to decisions related to human resources management and administrative and budgetary matters [..] Hence the UNDT was wrong to have delved into an examination of the reasonableness of the ICSC decision in its considerations.[50]

53. This Tribunal takes it that it is however firmly established that the ICSC had acted in the exercise of its delegated regulatory powers under art. 11 of the Statute. It also recalls that a "direct order to implement" from the General Assembly would not have a normative import to the issue at hand, given that, as copiously cited throughout the case, the Secretary-General is obliged to implement ICSC decisions as a matter of law without a "direct order" (save, possibly, manifestly unlawful decisions, as proposed by the Respondent). Rather, the Tribunal understands that the Appeals Tribunal interpreted A-RES-74-255 – or both A-RES-74-255 and A-RES-72-255 – to mean that the General Assembly implicitly approved the disputed methodology and/or its results for the Geneva post adjustment by way of an *ad hoc* intervention.

54. The above interpretation is not obvious, given that: a) the said Resolution was mainly about confirming the powers of the ICSC and not diminishing them ; b) a review of the previous interventions by the General Assembly post adjustment matters discloses that they have always been explicit, which the present ones are not; c) these past interventions operated to withhold, and not to confirm, the ICSC's decisions[51]; d) at the time of the Resolutions 72-255 and 74-255 the impugned methodology was under review, entailing, as it is understood, a considerable investment of time and funds; approving it would belie the purpose of the review; and e) the fact of the pendency of the dispute would all the more require an explicit approval of the post adjustment in

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The Appeals Tribunal agrees with the Dispute Tribunal's reasoning […].'In *Abd Al-Shakour et al* and *Aksioutine et al.* 2021-UNAT-1107, at para.60 the Appeals Tribunal held: 'UNDT's reliance on a passage from the Judgment in *Tintukasiri* is not applicable here. This is because the extract quoted in the impugned Judgmentis a quotation from the earlier UNDT *Tintukasiri* judgment, not a conclusion from the Appeals Tribunal's Judgment in that case.'

[50] *Abd Al-Shakour et al* and *Aksioutine et al* 2021-UNAT-1107, Para. 61.

[51] See para 47 above and references cited therein.

Geneva, had it been intended. However, accepting, after the Appeals Tribunal, that the General Assembly stepped in to confirm the disputed post adjustment in Geneva, thus endorsing the ICSC decision as its own, there still remains the question of the alleged normative conflict.

55. The Tribunal feels compelled to clarify certain elements of terminology involved: a normative conflict contemplated in *Lloret-Alcañiz* and one relevant for the issue at bar, concerns a putative conflict of an impugned regulatory decision originating from, or confirmed by, the General Assembly with other acts emanating from the General Assembly.[52] The normative conflict relevant for the present discourse has not been about the compliance of the constellation of individual decisions issued by the Secretary-General with the controlling act of the General Assembly. The latter, albeit arguably possible to be subsumed under the problem area of conflict of norms, boils down to the propriety of the calculation of the post adjustment in an individual case in accordance with the superior normative act. That issue has not arisen in the relevant disputes, neither does in the present case.

56. As regards the normative conflict *proprio sensu,* one question raised is whether the impugned decision violated acquired rights as per staff regulation 12.1. In this area, the Appeals Tribunal responded in *Lloret-Alcañiz* by pronouncing that the question of acquired rights does not arise where modification to emoluments has no retroactive effect[53] and that, in principle, norms established by the General Assembly should be reconciled in accordance with the established conflict principle of *lex posterior*.[54] *Lloret-Alcañiz* did not pronounce whether, apart from non-retroactivity, there would be any fetter on legislative power in introducing downward modification to United Nations staff remuneration.

57. Whereas the Former Administrative Tribunal had accepted that such fetter lies

[52] Theoretically, also *ius cogens;* this area, however, is not relevant for the dispute.
[53] *Lloret-Alcañiz* 2018-UNAT-840, para.91
[54] Ibid. para. 81.

in the principles laid down in the Charter of the United Nations art. 101 para. 3; *i.e.*, that economic measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service, which is verified through the test of reasonability[55], the Appeals Tribunal in *Abd Al-Shakour et al* and *Aksioutine et al* dismissed this approach[56], without providing an alternative one. The Appeals Tribunal stated "ordinarily, there is little or no margin for the Tribunals to apply the reasonableness test to legislative texts issued by the General Assembly".[57] It, however, offers no guidance as to a) what the extra-ordinary circumstances would be, and b) where the said little margin lies. It also stated that normative conflict does not arise[58], but did not state with what norm, or norms, it was comparing the disputed post adjustment, except that it did not act retroactively[59] and that the very existence of the right to post adjustment was not at stake, presumably referring to staff rule 3.7(a) which defines post adjustment as amount paid to ensure equity in purchasing power of staff members across duty stations.[60]

58. Applying thus these two criteria to the case at hand, this Tribunal finds that the disputed modification of the post adjustment is not retroactive – as such it does not infringe on acquired rights as defined by *Lloret-Alcañiz*, and, further, that it does not undermine the very existence of the right to post adjustment as decided by the Appeals Tribunal in *Abd Al-Shakour et al* and *Aksioutine et al*. Accordingly, the applications fail.

[55] See *Abd Al-Shakour et al* UNDT/2020/106, para. 118 and references cited therein.
[56] *Abd Al-Shakour et al* and *Aksioutine et al* 2021-UNAT-1107, Para. 61.
[57] *Abd Al-Shakour et al* and *Aksioutine et al* 2021-UNAT-1107, Para. 61.
[58] Ibid, para. 52
[59] Ibid, para. 65.
[60] Ibid. para 58 "Indeed, the very existence of the right to the post-adjustment allowance is not at take." In para. 66 post adjustment is compared to a bonus or allowance, which seems to be at variance with the established paradigm that, given global operation of the Organization, post adjustment is an element of salary and is not determined based on circumstances individual to the staff member.

JUDGMENT

59. The applications are dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 26th day of July 2021

Entered in the Register on this 26th day of July 2021

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi