

Counsel for Appellants:

Robbie Leighton, OSLA

Counsel for

Judgment No.	2021-UNAT-1113

JUDGE SABINE KNIERIM, PRESIDING.

- 1. In 2017 and 2018, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva received what it referred to as "5 waves" of applications, challenging the Administration's implementation of the Post-Adjustment Multiplier (PAM),<sup>2</sup> which Appellants assert had resulted in a pay cut for United Nations staff members based in Geneva. These cases have also been referred to as the "salary scale" cases. The applications, all filed by individual staff, were consolidated and then transferred from the UNDT in Geneva to the UNDT in Nairobi on account of recusal by the Geneva-based Judges.<sup>3</sup>
- 2. Throughout the summer of 2020, the UNDT in Nairobi issued 19 Judgments on these applications, all upholding the Secretary-General's decision to implement the PAM, following the decision of the International Civil Service Commission (ICSC).
- 3. The Appeals Tribunal received several consolidated appeals to these Judgments. One of the appeals, in the matter our t rtry nr o t nt tons was decided by the Appeals Tribunal sitting as a full bench. In that case, we issued Judgment No. 2021-UNAT-1107, wherein we affirmed the UNDT's Judgment and dismissed the appeals.
- 4. The present Judgment addresses an appeal against Judgment No. UNDT/2020/153, in the matter u t r t ry n r o t n t t ons, registered with the Appeals Tribunal as Case No. 2020-1471. This appeal was filed by 32 staff members serving at the United Nations Children's Fund (UNICEF). This panel, having reviewed the record before the Dispute Tribunal and the parties' briefs on appeal, find that the Appellants have raised neither factual differences nor legal issues different from those canvassed in companion cases and disposed of by our full bench in Judgment No. 2021-UNAT-1107 ( our t .
- 5. Accordingly, we adopt the facts, parties' submissions and reasoning set forth in that Judgment, reproduced below, and dismiss the instant appeals. For clarity, the reproduction below when citing to the "Impugned Judgment" refers to the impugned Judgment No. UNDT/2020/106 ( our t .).

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Facts and Procedure

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e) In March 2017, t

- 10. On 19 August 2020, the UNDT issued the impugned Judgement ( u t The UNDT held that the applications were receivable.<sup>8</sup> In particular, the UNDT found there had been an individual decision made to apply the new PAM, which was implemented by the staff members' pay-slips and had adverse impact on the terms of their appointment.<sup>9</sup> The UNDT also held that the applications were receivable in line with the holdings of the Appeals Tribunal's Judgments in or t ñ z t <sup>10</sup> and u no ns<sup>11</sup> namely, that even if the Secretary-General had little discretion to implement the PAM the Secretary-General's "mechanical power" was administrative in nature and therefore, reviewable on grounds of legality.
- 11. On the merits, the UNDT dismissed the applications finding that the Secretary-General had correctly implemented the PAM and that the ICSC had not acted u tr r s its statutory authority, as it always had the authority under Article 11(c) of its Statute to decide on the PAM without the General Assembly 's further approval or action.
- 12. On 16 October 2020, through the Office of Staff Legal Assistance (OSLA), Appellants filed their appeal.
- 13. On 23 October 2020, the Appeals Tribunal issued Order No. 382 (2020) rejecting the Secretary-General's motion of 7 October 2020. In his motion, submitted in the previously pending companion salary scale cases, the Secretary-General requested approval to file one answer in response to all of the salary scale appeals filed at that time and in the near future. The Appeals Tribunal rejecting this request ordered the Secretary-General to file individual answers to each appeal filed.
- 14. Accordingly, the Secretary-

## Submissions

## Appellants' Appeals

- 15. The Appellants argue that the UNDT erred in law in not finding that the ICSC's decision had been taken u tr r s its Statute. The ICSC's power derives from its Statute, namely Articles 10(b) and 11(c), which grant it recommendatory authority on "scales of salaries and post adjustments" and decisory authority on classification of duty stations for the purpose of applying the post adjustment. Since the PAM decision did not involve the General Assembly, the ICSC acted outside its statutory authority. The ICSC Statute reflected a process that had ceased to be used after 1989, when the General Assembly discontinued the practice of approving the post adjustment. This migrated the decisory power from that of both ICSC and the General Assembly to the ICSC alone. The UNDT erred in finding that the alteration of this procedure in turn altered the meaning of the Statute. Since the practice no longer matched the Statute, the ICSC had acted u tr r s
- 16. The Appellants also argue that the UNDT erred in interpreting the ICSC Statute. The UNDT had accepted, that on its face, the Statute did not give the ICSC decisory authority, 12 yet the UNDT analyzed the technical assumption underpinning the Statute based on a review of General Assembly resolutions that were adopted 45 years after the Statute. In contrast, ILOAT refused to base their interpretation of the Statute on General Assembly resolutions that post-dated the Statute. To consider the meaning of a Statute based on subsequent practice or subsequent resolutions would render the Statute fluid and risk legal uncertainty.
- 17. The UNDT applied two wrong standards when reviewing the decision: 1-whether the ICSC's action contravened a written rule; and 2-whether the ICSC's action usurped power. Rather, the issue was whether or not the ICSC had statutory authority. Further, the UNDT erred in fact and law in determining that the ICSC's responsibility for measuring the cost of living amounted to a quantitative determination of post adjustment. This conflicts with the UNDT's own finding that the General Assembly, up until 1985, had determined that the two prerequisites for transitioning from one class to another, are the required percentage variation in the cost-of-living index and the required period for which it had to be maintained. Determining such prerequisites is a decision on the quantitative determination of post adjustment. Thus, prior

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<sup>&</sup>lt;sup>12</sup> Impugned Judgment, paras. 70-73.

<sup>&</sup>lt;sup>13</sup> *Id.*, para. 71.

to 1985, the calculation was a function of both ICSC and General Assembly decisions. It follows that since the decision is only in the domain of the ICSC, there has been a usurpation of power. Regardless, the ICSC action was u tr r s the Statute.

- 18. The UNDT erroneously indicated that the absence of prior challenges to the ICSC's competence had precluded their ability to raise their current challenge; however, the UNDT acknowledged that there was a 75-year practice refraining from downward revision of salary, meaning that staff have never encountered this issue before. Also the challenges in the o n r<sup>14</sup> and r n o<sup>15</sup> cases, cited by the UNDT, pertained to the General Assembly, not the ICSC. Thus, they do not reflect an acquiescence in the UNDT's interpretation of the ICSC Statute. The Statute itself has a mechanism for authorizing the new post adjustment practice but this process was not utilized.
- 19. The UNDT erred in law in finding that the UNDT's scope of review of an ICSC decision implemented by the Secretary-General could not be reviewed for legality under the nw 16

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correct and in-line with that of the General Assembly. The position of the General Assembly is expressed in its recent resolution 74/255 A-B, which stated in part that it:<sup>23</sup>

Reaffirms

determinations of the General Assembly and the ICSC. <sup>25</sup> Thus, in implementing the ICSC's decision regarding the common system, the Secretary-General is bound by the authority of the General Assembly over the level of salaries and post-adjustment.

31. In this situation, the Secretary-General had exercised "mechanical" powers, which entail little choice, and per the or t ñ z t standard, such mechanical powers support implied duties to act lawfully and in accordance with good administrative practice. Mechanical powers are thus reviewable on grounds of legality. The UNDT erroneously suggested that it had authority to review the ICSC decision on grounds of reasonableness per the nw

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34. The UNDT correctly held that the Secretary-General's decision did not infringe the Appellants' acquired rights. The UNDT's consideration in the instant case is similar to that dealt with by the Appeals Tribunal in or t ñ z t . The UNDT concluded that doctrinal protection of acquired rights is an aspect of the principal of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory instruments.<sup>27</sup> The UNDT in this case, however, suggests that when there is a prospective application, the issue of infringed acquired rights does not arise but instead a test of reasonableness applies, similar to the nw test.<sup>28!</sup> The Secretary-General argues, however, that there is no reasonableness test applicable to decisions emanating from legislative power.

## Considerations

35. As indicated at the start, we reproduce the reasoning of our t ., supr , as set forth below.

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- 36. This is one of a series of cases dealing with a sensitive issue deriving from a reduction in the remuneration of staff in Geneva as a result of a downward revision in the Post Adjustment Index (PAI) originated from an ICSC decision.
- 37. There are two features of the remuneration packages of affected United Nations staff members that underpin the decision in these cases. First, unlike in labour law, remuneration is not the subject of negotiation or bargaining between the employer and the employee directly, or with the employee's staff association or union. Rather, remuneration is determined by the General Assembly resolutions, as well as the terms of the appointment. Second, the post allowance element of the remuneration is a feature separate to the other components that go to make up a salary that reflect such considerations as qualifications, experience, seniority, responsibility, and the like. The post adjustment allowance reflects the cost of living at a particular duty station at which a staff member is based. It takes account of and reflects the very different costs of living borne by other staff in equivalent roles at different locations around the world and who are otherwise equally remunerated. So, not only may a

<sup>&</sup>lt;sup>27</sup> Lloret Alcañiz et al. v. Secretary-General of the United Nations, Judgment No. 2018-UNAT-840, paras, 90-91.

<sup>&</sup>lt;sup>28</sup> Impugned Judgment, paras. 118-119.

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exercise discretion, the Secretary-General's decision to execute such regulatory decisions, depending on the circumstances, do not constitute administrative decisions subject to judicial review.<sup>42</sup>

51. Therefore, judicial review is limited to the question of possible normative conflict between acts of the General Assembly or their implementation, and their execution by the Secretary-General.<sup>43</sup> In the present case, as correctly found by the UNDT, there is no dispute that the Secretary

- 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 unque delay;

74/255 -

- 8. Notes with concern that the organizations of the United Nations common system face the challenge of having two independent administrative tribunals with concurrent jurisdiction among the organizations of the common system, as highlighted in the report of the Commission, and requests the Secretary-General, in his capacity as Chair of the United Nations System Chief Executives Board for Coordination, to conduct a review of the jurisdictional setup of the common system and submit the findings of the review and recommendations to the General Assembly as soon as practicable;!
- 59. Therefore, by means of General Assembly resolution 74/255 issued a few months after a similar case had been delt 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. As the Appeals Tribunal has stated in r n o, "Decisions of the General Assembly are binding on the Secretary-General and therefore, the administrative decision under challenge must be considered lawful, having been taken by the Secretary-

69/203 (18 2014):

37. Also reaffirms that recourse to general principles of law and the Charter of the United Nations by the Tribunals is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances;"

71/266 (23 2016):

29. Recalls its decision, contained in paragraph 5 of its resolution 68/254, and reiterates that decisions taken by the Dispute Tribunal and the United Nations Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management;

73/276 (22 2018):

