UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/GVA/2017/032 and 036
Judgment No.: UNDT/2017/098
Date: 29 December 2017
Original: English

Before: Judge Rowan Downing (Presiding)
Judge Teresa Bravo
Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

QUIJANO-EVANS
DEDEYNE-AMANN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Daniel Trup, OSLA
Natalie Dyjakon, OSLA

Counsel for Respondent:
Bettina Gerber, HRLU/UNOG
Cornelius Fischer, HRLU/UNOG

Introduction

1. By applications filed between 19 April and 7 June 2017, the Applicants challenge the decisions "to reduce [their] contracted salary and the manner of the implementation of [a] Unified Salary Scale" effective 1 January 2017. The nature of the contested decisions is more fully discussed at paragraphs 32 to 35 below.

Facts

Introduction of the new Unified Salary Scale

2. Prior to the introduction of a Unified Salary Scale on 1 January 2017, staff members 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, defined in ST/AI/2011/5 (Dependency status and dependency benefits).

3. In 2012, at its seventy-fifth session, the International Civil Service Commission ("ICSC") decided to initiate 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".

4. The General Assembly endorsed this initiative in its Resolution 67/257 of 13 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.

5. 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 ICSC's sessions.

6. 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, acts as Counsel for the Respondent in cases before the Appeals Tribunal and, thus, is an interested party— on possible infringement of acquired rights of existing staff members. A summary of this advice is reproduced in the ICSC annual report for the year 2015, dated 31 August 2015 ("ICSC 2015 Report") (A/70/30), as well as in paras. 119 to 128 below.

7. In its 2015 Report, the ICSC made its 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. The ICSC also recommended some changes to the eligibility criteria for this support. Amongst others, staff members with a non-dependent spouse at the time and in receipt of a salary at the dependency rate by virtue of a first dependent child would instead receive the child allowance for said child. Acknowledging that "[s]ome of those staff members would therefore experience significant reductions in salary under the proposed system", the ICSC proposed the introduction of a transitional allowance.

8. These recommendations were adopted by the General Assembly in its Resolution 70/244 of 23 December 2015.

9. In its report A/71/258 of 29 July 2016, the Secretary-General proposed amendments to the Staff Regulations required to implement the changes to the compensation package for internationally recruited staff members. He also requested the General Assembly to note his amendments to the Staff Rules. 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 ST/SGB/2017/1, which amended both the Staff Regulations and the Staff Rules.

10. The new salary scale as of 1 January 2017 ("Unified Salary Scale") no longer provides different net base salaries for staff members who are single and for those who have dependent(s). The gross and net base salaries of staff members previously paid at the dependency rate were recalculated (reduced) to *inter alia* exclude the dependency component from the salary, and two new distinct dependency allowances were introduced: a spouse allowance (for dependent spouses), and a single parent allowance (on account of the first dependent child when the staff member is recognized by the organization as a single parent). The two other existing allowances, namely a child allowance (which stays as a fix amount payable for each dependent child), and a special dependency allowance (for disabled children) remained unchanged under the Unified Salary Scale.

11. Staff members like the Applicants, who were previously paid at the dependency rate on account of their first child (because they had a non-dependent spouse), are now eligible for a child allowance, which is currently a fixed amount of USD2,929 per annum.[1] These staff members are eligible for a transitional allowance for a six-year period, but this allowance does not fully compensate for the reduction of their net base salary. This transitional allowance and its payment modalities are described 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.
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> (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).

[1] If a staff member became eligible for the allowance prior to January 2007, or on or after 1 January 2007, or on or after 1 January 2009, the child allowance amount is slightly different and is calculated in local currency (see ST/IC/2011/6 of 8 March 2011 on Dependency allowances for staff in the Professional and higher categories and in the Field Service category).

> (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.
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> (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.

12. Pursuant to a document entitled "Overview of Changes to the Compensation Package as of 1 January 2017" ("Overview of compensation changes") updated and circulated by the Office of Human Resources Management on 18 January 2017, the allowances (i.e., spouse, single parent and transitional)—calculated at 6% 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.

13. However, the Secretary-General acknowledged that "the progressive elimination of the transitional allowance during the first five years of implementation of the Unified Salary Scale will result in a significant loss of net take-home pay for working parents whose spouse is not recognized as a dependent".

14. Through the Overview of compensation changes, staff members were informed that they will receive interim advanced payments identified on their payslips as "ICSC Interim 6% Depend (Adj)", equivalent to 6% of their net salary plus post adjustment, until "the new dependency solution is fully implemented in Umoja in September 2017" and a reconciliation exercise is undertaken.

Applicant Quijano-Evans

15. The Applicant Mrs. Quijano-Evans is a Crime Prevention Expert (P-4) working at the United Nations Office on Drugs and Crime ("UNODC") in Vienna. She has a non-dependent spouse and one dependent child.

16. On or about 31 December 2016, the Applicant received her payslip indicating a monthly gross salary of USD8,183.75. The deduction for her staff assessment was in the amount of USD1,468.58.

17. On or about 31 January 2017, the Applicant received a payslip indicating a monthly gross salary of USD8,036.75 and a transitional allowance in the amount of USD502.24 described on her payslip as "ICSC Interim 6% Depend (Adj)". The deduction for her staff assessment was in the amount of USD1,637.17. It is noted that the post adjustment for Vienna went down from 33.90 to 30.80 from December 2016 to January 2017.

18. On 31 March 2017, the Applicant submitted a request for management evaluation challenging "the decision of the Administration to alter a fundamental and essential condition of her employment relating to her salary" and on 9 May 2017, she received a response from the Management Evaluation Unit informing her that the Secretary-General had decided to uphold the contested decision.

19. On 30 May 2017, the Applicant filed her application with the Tribunal and on 3 July, the Respondent submitted his reply.

Applicant Dedeyne-Amann

20. The Applicant Mrs. Dedeyne-Amann works as Chief (D-1), Secretariat to the Governing Bodies, Division of Treaty Affairs, at UNODC Vienna. She has a non-dependent spouse and one dependent child.

21. On or about 31 December 2016, the Applicant received her payslip indicating a monthly gross salary of USD11,024.17. The deduction for her staff assessment was in the amount of USD2,226.50.

22. On or about 31 January 2017, the Applicant received her payslip indicating a monthly gross salary of USD10,846.67, and a transitional allowance in the amount of USD658 described on her payslip as "ICSC Interim 6% Depend (Adj)". The deduction for her staff assessment was in the amount of USD2,452.33.

23. On 31 March 2017, the Applicant submitted a request for management evaluation challenging "the decision of the Administration to alter a fundamental and essential condition of her employment relating to her salary" and on 9 May 2017, she received a response from the Management Evaluation Unit informing her that the Secretary-General had decided to uphold the contested decision.

24. On 2 June 2017, the Applicant filed her application to the Tribunal and on 7 July 2017, the Respondent submitted his reply.

Procedural background

25. Following communication with the President of the Appeals Tribunal pursuant to art. 10. 9 of the United Nations Dispute Tribunal Statute, by Orders No. 132 and 149 (GVA/2017) of 28 June and 7 August 2017, Judge Rowan Downing referred all the present cases, together with nine other cases, to a panel of three judges of the Dispute Tribunal as all of them raise similar issues.

26. By Order No. 155 (GVA/2017) of 25 August 2017, all three judges decided to remain seized of the cases despite having a conflict of interest. They applied the doctrine of necessity. The parties expressly did not object to this course being followed. The Tribunal also decided to hear the two present cases together with nine other similar cases, which also concern the introduction of the Unified Salary Scale but involve staff members with different family situations, namely *Lloret Alcaniz* UNDT/GVA/2017/020, *Zhao* UNDT/GVA/2017/029, *Mirella* UNDT/GVA/2017/030, *Xie* UNDT/GVA/2017/031, *Ben Said* UNDT/GVA/2017/033, *Kutner* UNDT/GVA/2017/037, *Santini* UNDT/GVA/2017/039. *Krings* UNDT/GVA/2017/040 and *Keating* UNDT/GVA/2017/046.

27. On 12 July 2017 and 7 September 2017, the Applicants responded to the Respondent's reply on receivability and they clarified the family situation of a number of Applicants. On 7 September 2017, the Respondent also filed additional documents pursuant to the Tribunal's direction.

28. From 20 to 22 September 2017, the Tribunal held a hearing on the merits on the 11 above-mentioned cases, where it heard two witnesses proposed by the Respondent, namely:

a. The Chief, Payments and Payroll Unit, UNOG, to explain the financial implications of the Unified Salary Scale, the details of the payslips and the reconciliation exercise; and

b. A Human Resources Officer, OHRM, to explain the background of the adoption of the Unified Salary Scale, and the manner in which it was implemented.

29. On 29 September 2017, the parties filed additional submissions pursuant to the Tribunal's directions and the Applicants sought leave to amend their applications. On 4 October 2017, each party responded to the submissions of the other party.

Parties' submissions

30. The Applicant's principal contentions are:

Receivability

a. The Applicants are negatively affected by the contested decisions. They incur a reduction of their gross and net base salaries, which do not now include a dependency component. This loss is further aggravated by the reduction of the transitional allowance by one percentage point each year as of 1 January 2018;

b. The contested decisions are reviewable administrative decisions as they breach the Applicants' specific terms and conditions of employment;

c. The Applicants do not challenge the validity of the resolutions adopted by the General Assembly but the Secretary-General's failure to exercise his discretion in the manner he implemented these resolutions, ignoring his legal obligation to protect the Applicants' acquired rights. In particular, they argue that staff regulation 12.1 required the Secretary-General to safeguard their acquired rights when implementing the resolutions adopted by the General Assembly;

Merits

d. The conversion of part of the Applicants' salary into an allowance is unlawful. Since the Applicants' salary is set out in their letters of appointment, it is an essential element of their contracts and thus constitutes an acquired right. In converting a portion of the Applicants' salaries into an allowance, the Administration changed its meaning from an acquired right to a non-essential term and condition of employment. Such a change in meaning permits the Administration to amend its value without the Applicants' consent and, therefore, violates their acquired rights;

e. The reduction of the transitional allowance every year is discriminatory as it makes an unlawful distinction between the Applicants and other categories of staff members, namely, those who receive spouse or single parent allowances which will not be reduced over time;

f. The Applicants also submit that they are discriminated against on the basis of their gender as, being women, they are more likely than men to have a non-dependent spouse. Hence, the discontinuation of payment at the dependency rate to a staff member with a non-dependent spouse on account of dependent child disproportionally affects them;

g. The Applicants request:

i. Rescission of the decision to reduce their salary and payment of the outstanding backdated pay;

ii. Specific performance, *inter alia*, in the form of an order: 1) to change the classification of the transitional allowance so that it is reintroduced as a salary component and not subject to depreciation; 2) to increase the Applicants' step in grade by three steps; or 3) to calculate the Applicants' salaries based on the 2016 scale while paying them the transitional allowance;

iii. In the alternative, compensation for harm in the amount of USD50,000 for each Applicant; and

iv. Moral damages in the amount of USD1,000 for discrimination.

31. The Respondent's principal contentions are:

Receivability

a. The Tribunal is not competent to review the contested decisions as they were taken by the General Assembly and the Secretary-General was obliged to implement them, which he did in calculating the Applicants' remuneration in accordance with General Assembly Resolutions 70/244 and 71/263, ST/SGB/2017/1 (Staff Regulations and Rules) and ST/AI/2016/8 (Dependency status and dependency benefits);

b. The contested decisions do not meet the definition of an administrative decision set out by the former United Nations Administrative Tribunal in Judgment No. 1157 *Andronov* (2003) as the Applicants challenge regulatory decisions taken by the General Assembly which are of general application and do not affect them alone;

c. The Applicants did not suffer any adverse consequence as a result of the introduction of the Unified Salary Scale. In this respect, the Respondent argues that one Applicant actually benefited from a net gain between December 2016 and January 2017 (Mrs. Quijano-Evans) while the other suffered a minor loss due to other factors such as variation of the post adjustment (e.g. Mrs. Dedeyne-Amann). Furthermore, any potential loss that

may occur in the future is outside the scope of the applications and hypothetical at this stage;

Merits

d. The implementation of the Unified Salary Scale did not breach the Applicants' acquired rights. The Applicants did not have a right to be paid a specific amount of salary nor to have their salary calculated by a particular methodology. They were entitled to receive "a salary", at the level decided by the General Assembly;

e. Moreover, the Applicants did not establish a breach of a fundamental or essential element of their conditions of employment, as defined by the Dispute Tribunal in *Candusso* UNDT/2013/090. In this respect, there is no evidence that any of the Applicants would not have joined the Organization under the conditions of the Unified Salary Scale. The Unified Salary Scale did not entail any grave consequence for the Applicants more serious than the mere prejudice to their financial interests;

f. The Applicants were not discriminated against. They were treated as other staff members in the same situation, namely staff members whose spouse's annual gross earnings exceed the earnings limit required for the spouse to be recognized as a dependent, a situation that is different from those who receive a single parent allowance or a spouse allowance. On the contrary, the Unified Salary Scale ensures that all staff members are paid equally for the same work regardless of their family status;

g. The transitional allowance was adopted and implemented fairly. The General Assembly duly considered the impact on staff members and mandated the Secretary-General to remove the transitional allowance from the Applicants' pay as soon as their first dependent child turned 21;

h. The transitional allowance does not expose the Applicants to undue hardship as the mathematical possibility of a negative financial impact on them is for a limited time and represents only a minor percentage of their overall salary;

i. The Unified Salary Scale does not treat female staff members differently than their male colleagues. The Applicants' assertion that more female staff members are likely to have a non-dependent spouse is purely speculative; and

j. As to remedies, there is no decision of the Secretary-General to rescind and any award of compensation would effectively overturn the decision of the General Assembly, which the Tribunal has no power to do. Furthermore, specific performance cannot be ordered to alter the staff members' conditions of employment, which are set out in the Staff Regulations and Rules.

Consideration

Receivability

Contested decisions

32. At the outset, the Tribunal notes that there is some confusion as to the exact nature of the contested decisions that the Applicants seek to challenge. As recalled by the Appeals Tribunal, it falls under the Tribunal's role "to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review, which could lead to grant or not to grant, the requested judgment" (*Massabni* 2012-UNAT-238).

33. In their applications, the Applicants identified the contested decisions as being "[t]he decision of the Administration to reduce [their] contracted salary and the manner of the implementation of the Unified Salary Scale". In their response to the Respondent's reply dated 12 June 2017, the Applicants clarified that they seek to challenge "the failure of the Secretary-General to carry out fully his mandated obligations regarding the manner of the implementation of the Unified Salary Scale

and not the Resolution of the General Assembly". They further state that it is the failure of the Secretary-General to account for the Applicants' acquired rights that is an appealable administrative decision. In their amended applications, the Applicants further clarified that they "seek to challenge the implied decision of the Secretary-General in failing to exercise his inherent discretion in the matter of the implementation of the Unified Salary Scale".

34. From the Applicants' submissions taken as a whole, the Tribunal understands that in essence, they base their complaints on the fact that in implementing the Unified Salary Scale, the Secretary-General reduced their salary as of 1 January 2017 by removing the portion which was previously calculated and paid on the basis that they have dependent(s). Whilst the Applicants also raise a number of challenges concerning the newly established transitional allowance, they essentially take issue with the fact that this allowance, which was established to mitigate their loss, does not fully compensate for the reduction of their salary. It is noted that the Applicants do not challenge the General Assembly's resolution adopting the Unified Salary Scale as a measure of general application but solely its implementation by the Secretary General in their particular cases, on the basis that it allegedly violates their individual contractual and acquired rights.

35. In this context, the contested decisions are to be identified as the Secretary-General's decisions, in implementing the Unified Salary Scale, to pay the Applicants a salary reduced of the portion which was previously paid on the basis that they have dependent(s).

Whether the contested decisions constitute administrative decisions

36. The jurisdiction of the Dispute Tribunal is defined in art. 2 of its Statute, which provides in its relevant part:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

> (*a*) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance[.]

37. As a preliminary matter, the Tribunal stresses that in interpreting its jurisdiction, it must take into account the Organization's duty to provide access to justice to its staff members.

38. The right to access to justice, and its subsidiary right of access to a court, are fundamental rights recognized by human rights instruments adopted by the General Assembly. Article 10 of the Universal Declaration of Human Rights, adopted by the General Assembly in its Resolution 217(A)(III) of 10 December 1948, provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

39. Likewise, art. 14(1) of the International Covenant on Civil and Political Rights ("ICCPR"), adopted by the General Assembly in its Resolution 2200A(XXI) of 16 December 1966, provides that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Appeals Tribunal recently recalled in *Al Abani* 2016-UNAT-663, that "the Charter, the Universal Declaration of Human Rights, and the General Assembly's resolutions and decisions take precedence over the Organization's regulations, rules and administrative issuances [footnote omitted]".

40. It is recalled that staff members are barred from bringing any cause of action against the Organization before national courts, since the United Nations Charter and the Convention on the Privileges and Immunities of the United Nations grant the Organization immunity from jurisdiction. Consequently, the Convention demands that "the United Nations shall make provisions for appropriate modes of

settlement of … [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party".

41. The Organization's immunity from jurisdiction may impair the staff members' right to access to court if the Organization does not provide them with a reasonable alternative dispute resolution mechanism. In this respect, the European Court of Human Rights ("ECtHR") held in *Waite and Kennedy v. Germany* (Application no. 26083/94, Judgment of 18 February 1999):

> 63. Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.
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> …
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> 67. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, as a recent authority, the Aït-Mouhoub v. France judgment of 28 October 1998, *Reports* 1998-VIII, p. 3227, § 52, referring to the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24).

42. The International Court of Justice ("ICJ") explicitly recognised the role played by the former United Nations Administrative Tribunal in fulfilling the Organization's obligation to provide access to justice to its staff members in its *Advisory Opinion on Effects of Awards of Compensation made by the United Nations Administrative Tribunal* of 13 July 1954 (I.C.J. Reports 1954, p. 47, at p. 57), where it held:

> When the Secretariat was organized, a situation arose in which the relations between the staff members and the Organization were governed by a complex code of law. This code consisted of the Staff Regulations established by the General Assembly, defining the fundamental rights and obligations of the staff, and the Staff Rules, made by the Secretary-General in order to implement the Staff Regulations. It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.
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> In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.

43. Similarly, the former United Nations Administrative Tribunal took into account on several occasions the staff members' right to access to justice in interpreting its jurisdiction (see, e.g., Judgment No. 378, *Bonh et al.* (1986); Judgment No. 461, *Zafari* (1990); Judgment No. 469, *Salaymeh* (1990)).

44. Most significantly, when the former United Nations Administrative Tribunal set the definition of what constitutes an administrative decision in its seminal Judgment *Andronov*, it was cautious to state the following:

> The Tribunal believes that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without *lacunae* and failures, so that the final objective, which is the protection of staff members against alleged non-observance of their contracts of employment, is guaranteed. The Tribunal furthermore finds that the Administration has to act fairly vis-à-vis its employees, their procedural rights and legal protection, and to do everything in its power to make sure that every employee gets full legal and judicial protection.

45. Likewise, the Administrative Tribunal of the International Labour Organization ("ILOAT") relied upon "the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure" in its leading case *Chadsey* (Judgment No. 122 (1968)). In *Rubio* (Judgment No. 1644 (1997)), the ILOAT spoke more broadly of the principle that "an employee of an international organization is entitled to the safeguard of an impartial ruling by an international tribunal on any dispute with the employer".

46. In view of the foregoing, the Tribunal finds that whilst it would be outside the scope of its jurisdiction to create avenues of recourse where they are not foreseen in the law, it shall, however, take into consideration the Organization's duty to provide access to justice to its staff members in interpreting the jurisdiction that is vested in it by virtue of its Statute.

47. That being observed, by art. 2 of its Statute the Tribunal is clearly only competent to hear applications against "administrative decisions". In this respect, the Appeals Tribunal has adopted the definition of an administrative decision set forth by the former United Nations Administrative Tribunal in *Andronov*, which reads:

> There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

48. The Appeals Tribunal insisted that in determining whether a decision constitutes an administrative decision, the Tribunal must consider "the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision" (*Andati-Amwayi* 2010-UNAT-058, quoted in *Lee* 2014-UNAT-481). In *Lee*, the Appeals Tribunal also stated that:

> 49. [UNAT has] consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must "produce [] direct legal consequences" [footnote omitted] affecting a staff member's terms and conditions of appointment; the administrative decision must "have a direct impact on the terms of appointment or contract of employment of the individual staff member" [footnote omitted].

49. In line with these principles, the Appeals Tribunal adopted a broad interpretation of the requirement that the administrative decision be of "individual application", distinguishing regulatory decisions from their execution where appropriate. Contrary to the Respondent's submissions, the Appeals Tribunal did not rule out the possibility that decisions of general application may constitute administrative decisions within the meaning of art. 2 of the Dispute Tribunal's Statute. In *Ovcharenko et al.* 2015-UNAT-530 and *Pedicelli* 2015-UNAT-555, the Appeals Tribunal found that decisions which negatively affect the terms of appointment or contract of employment of a staff member are reviewable administrative decisions, despite their general application. In this respect, it explicitly held in *Pedicelli* (see para. 29) that:

> [I]t is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an "administrative decision" falling within the scope of article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.

50. The Appeals Tribunal adopted a pragmatic approach in reviewing various types of challenges which involved decisions of general application, seeking to identify the exact nature of the challenge being brought. It evaluated, on a case by case basis, whether staff members were effectively challenging the legality of a decision taken by a regulatory body such as the General Assembly or the ICSC (see, e.g., *Tintukasiri et al.* 2015-UNAT-526; *Kagizi et al.* 2017-UNAT-750 and *Reid* 2015-UNAT-563), or whether the staff members asserted a different cause of action stemming from a violation of their individual terms and conditions of employment as a result of the implementation of the regulatory measure in their individual cases (see, e.g., *Ovcharenko et al.* and *Pedicelli*). For instance, in *Pedicelli*, the Appeals Tribunal stressed that the substantive argument put forward by the Applicant was that the implementation of the new seven-level salary scale promulgated by the ICSC "affected her contractual rights under her permanent appointment" (see para. 30). By contrast, it emphasised in *Reid* that "Mr. Reid entered into his contract of employment against the background of the changed landscape for employees on temporary contracts brought about by the General Assembly resolutions in 2008, 2009 and 2010" (see para. 36).

51. The distinction between regulatory decisions and their implementation is perhaps best illustrated in *Tintukasiri et al.*. In this judgment, the Appeals Tribunal found that applications against the Secretary-General's decisions to adopt revised salary scales for the General Service and National Officer categories of staff in Bangkok, based on the results of a salary survey, were not reviewable administrative decisions as they were not of individual application. However, the Appeals Tribunal opened the possibility for the concerned staff members to challenge these decisions when implemented in their individual cases through their

payslips. In this respect, the Appeals Tribunal endorsed the following conclusion of the Dispute Tribunal (see para. 38):

> 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. [footnote omitted]

52. It follows that the implementation by the Secretary-General of a decision of general application taken by the General Assembly constitutes an administrative decision within the meaning of art. 2 of the Tribunal's Statute if it has "a direct impact on the terms of appointment or contract of employment of the individual staff member". Thus, the Tribunal must carefully examine what is being challenged.

53. In the present cases, the Applicants direct their challenges against the implementation of the Unified Salary Scale in their individual situations. The crux of their arguments is that in implementing the new salary scale, the Secretary-General breached their contracts of employment and their acquired rights, irrespective of the legality of the General Assembly decision to adopt this new scale.

54. As a result of the contested decisions, the Applicants' gross and net base salaries were reduced by their loss of their entitlement to be paid at the dependency rate as part of the computation of their salary. In other words, an extra payment was previously made to the Applicants as a component of their salaries on the basis that they had dependents, but this component was removed under the Unified Salary Scale. The Applicants are currently in receipt of a transitional allowance to mitigate their financial loss which, at the time of filing their applications, compensates for the reduction of their gross salary, as will be discussed below. However, the newly adopted rules clearly express that this transitional allowance will reduce over time.

55. The reduction of the Applicants' salary and the loss of their entitlement to be paid at the dependency rate negatively impact their terms and conditions of appointment. Whether they can claim compensation at this point for a financial loss that has not yet materialised is not a receivability issue but rather a matter to be addressed when examining the Applicants' claims for remedies.

56. Therefore, the Tribunal finds that the contested decisions constitute administrative decisions within the meaning of art. 2 of its Statute.

Whether the Tribunal has the power to review the contested decisions

57. Irrespective of the receivability of the application *stricto sensu*, the jurisprudence of the Appeals Tribunal seems to limit *de facto* the Tribunal's power to review decisions of the Secretary-General which stem from the implementation of a decision of the General Assembly, although the case law on point is not entirely clear.

58. In *Tintukasiri et al.,* the Appeals Tribunal held that the Tribunal "can incidentally examine the legality of decisions with regulatory power, [but] it does not have the authority to rescind such decisions". In *Pedicelli*, where the Applicant challenged the decision to reclassify her post from the G-7 to the G-6 level following the conversion from a nine-level scale then applied to a seven-level salary scale promulgated by the ICSC, the Appeals Tribunal remanded the case to the Dispute Tribunal for consideration on the merits. By so doing, the Appeals Tribunal recognised that the contested decision, even if it found its source in a decision of the ICSC, was subject to review by the Tribunal.

59. However, in *Ovcharenko et al.* the Appeals Tribunal held that decisions taken by the Secretary-General based on regulatory decisions of the General Assembly "must be considered lawful" as the Secretary-General is duty bound to comply with General Assembly resolutions. In this respect, the Appeals Tribunal more specifically stated:

> 34. Having analysed the merits of the contested post adjustment freeze or non-payment of the increased multiplier, the Appeals Tribunal concurs that the Secretary-General had to comply with General Assembly decision 67/551 of 24 December 2012 and the ensuing enactment of that decision by the ICSC. These decisions constituted the grounds for the freeze and non-application of the 68.0 multiplier from August 2012 until February 2013, when the payment of the increased multiplier returned to its normal schedule, albeit with no retroactive payments.
>
> 35. 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-General in accordance with the content of higher norms.
>
> 36. Although the Appellants expressly stated in paragraph 38 of their brief that their claim "does not call for a review [of] the actions of the ICSC or the General Assembly", the Appeals Tribunal finds this argument to be contradictory and self-defeating: if the Secretary-General had no discretion to depart from the determinations of the General Assembly and the ICSC, and given that the decisions of those bodies were not under review, it becomes impossible to hold the Secretary-General responsible for having rightly executed the General Assembly's decision. Asking the Secretary-General to behave otherwise, as the appeal does, would result in the unlawful imputation of the powers of the General Assembly to the Secretary-General.

60. The Tribunal acknowledges that decisions taken by the General Assembly are binding upon the Secretary-General. However, it stresses that *Ovcharenko et al.* is distinguishable from the present cases. While it appears that in *Ovcharenko et al.* the issue of acquired rights was argued, the Appeals Tribunal did not address the situation, such as the one in the present matters, where it is alleged that the Secretary-General was bound by conflicting obligations, namely the General Assembly resolutions adopting the Unified Salary Scale on the one hand, and the Organization's contractual obligations towards the Applicants and a previous resolution adopted by the General Assembly which enshrined the Applicant's acquired rights on the other hand.

61. There can be no doubt that the Secretary-General was bound by Resolutions 70/244 and 71/263, where the General Assembly adopted the Unified Salary Scale and the consequent modifications to the Staff Regulations and Rules. However, the

Secretary-General was equally bound by the contractual obligations stemming from the contracts he signed with staff members on behalf of the Organization. The binding nature of contracts between the Organization and its staff members was explicitly recognised by the ICJ in its *Advisory Opinion on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (at p. 53):

> Such a contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of that Organization as its representative. When the Secretary-General concludes such contract of service with a staff member, he engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts.

62. Finally, the Secretary-General is also bound by preceding resolutions adopted by the General Assembly that are still in force and may conflict with earlier extant ones, as it is alleged to be the case in the present cases. In this respect, the Applicants claim that the reduction of their gross salary is in breach of staff regulation 12.1, initially adopted by the General Assembly on 24 January 1946 through its Resolution 13(I) "Organization of the Secretariat" and reiterated throughout time and most recently in the new edition of the Staff Regulations and Rules, which protects their acquired rights.

63. The Tribunal is of the view that the alleged conflict between these norms or obligations cannot be ignored by the Secretary-General nor by this Tribunal, notably in light of the Applicants' right to access to justice. Since the Applicants' cases are that the implementation of the Unified Salary Scale adopted by the General Assembly triggered issues related to their acquired rights, it does not involve a simple matter of implementation in the ordinary manner, as described in *Ovcharenko et al.*. It follows that the general principle held in *Ovcharenko et al.* has to be interpreted in such a way so as to accommodate alleged violations of acquired rights and the particular circumstances of the present cases.

64. Actions taken in the implementation of decisions of the General Assembly may be lawful insofar as they comply with a regulatory measure. However, this does not mean that they are not in breach of the staff members' terms and conditions

of employment. In this connection, it is noted that the role of the Tribunal, as defined in its Statute, is not to control the legality of the actions taken by the Secretary-General but rather to determine whether they are in breach of the staff members' terms and conditions of employment. In reviewing administrative decisions, the Tribunal must take into account all relevant rules and regulations applicable to the situation at hand, in line with art. 2.1(a) of its Statute, which states that "[t]he terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non[-]compliance". What the Respondent is in fact asking the Tribunal to do is to take into account only the General Assembly resolutions that enacted the Unified Salary Scale and to disregard any other rule that may be relevant to the cases. This cannot be done.

65. The ICJ specifically addressed this situation in its *Advisory Opinion on the Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (I.C.J. Reports 1982, p. 325, para. 76), where it stated:

> Certainly the 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 Tribunal possessing any "powers of judicial review or appeal in respect of the decisions" taken by the General Assembly, powers which the Court itself does not possess (I.C.J. Reports 1971, p. 45, para. 89). Nor did the 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 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 Court can pass – is whether the 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 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.

66. The ICJ expressly rejected the argument that the former United Nations Administrative Tribunal may have exceeded its jurisdiction in reviewing a decision of the Secretary-General that implemented a decision adopted by the General Assembly and examining whether it violated the Applicant's acquired rights:

> 78. However that may be, the Tribunal's competence is defined in Article 2 of its Statute, and the pertinent paragraph reads as follows:
>
> > "1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations."
>
> Thus, it is clear that the Tribunal's jurisdiction included not only the terms of Mr. Mortished's contract of employment and terms of appointment, but also the meaning and effect of Staff Regulations and Staff Rules, in force at the material time. It can hardly be denied that Mr. Mortished's appeal to the Tribunal, based as it was upon the various provisions of the Staff Regulations and on Rules established by the Secretary-General in pursuance of those Staff Regulations, corresponds directly with both the words and spirit of Article 2. It is difficult to see any possible ground on which the Tribunal could be said to have exceeded the terms of its jurisdiction or competence thus defined. It sought to interpret and apply the terms of Mr. Mortished's appointment, and the relevant Staff Regulations and Rules and General Assembly resolutions. Even its application of the notion of acquired rights it derived from the Staff Regulations which had been established by the General Assembly. It is impossible to say that the Tribunal anywhere strayed into an area lying beyond the limits of its jurisdiction as defined in Article 2 of its Statute. Whether or not it was right in its decision is not pertinent to the question of jurisdiction.

67. The Tribunal finds this advisory opinion persuasive given that it addresses a situation similar to that raised in the present cases, and that the solution proposed therein is in line with the Tribunal's Statute, as discussed above. It also ensures that staff members have access to justice when they claim that the administrative decisions concerning the implementation of a General Assembly resolution by the Secretary-General infringes upon their contractual or acquired rights and causes

them a prejudice for which they may be entitled to claim compensation, and where the Organization's immunity of jurisdiction bars any other legal avenue.

68. Indeed, the former United Nations Administrative Tribunal relied upon this ICJ opinion in *Bonh et al.* to find that it was competent to review a decision by the Secretary-General to reduce the pension paid to retired staff members in local currency, which implemented a decision by the General Assembly, holding that:

> XII. The Tribunal also took into account the fact that, if it accepted the Respondent's argument concerning its competence, the Applicants would be deprived of the possibility of submitting their claims to a jurisdictional procedure.
>
> …
>
> XVII. The Respondent also maintained that the decision impugned was in reality a decision of the General Assembly, which the Respondent had merely implemented. The Tribunal deems this objection is unfounded. Were it to be accepted, it would deprive staff members and pensioners of any possibility of recourse.

69. Likewise, the Tribunal notes that the ILOAT similarly allows for a review of decisions taken by the Head of Offices when implementing decisions adopted by the General Assembly or the ICSC for the common system. In examining applications by staff members of the World Intellectual Property Organization ("WIPO") challenging the new salary scale for General Service staff members established by the ICSC, and implemented by the Executive Director of WIPO (see ILOAT Judgment No. 1265, *In re Berlioz*, *Hansson*, *Heitz*, *Pary (No. 2) and Slater* (1993)), the ILOAT found the following:

> 21. The Organization has thus fully complied with the obligations it derives from its membership of the common system. But it may not in that way decline or limit its own responsibility towards the members of its staff or lessen the degree of judicial protection it owes them. The Tribunal has already had occasion to speak of that responsibility and to stress the duty of any organisation that introduces elements of the common system or any other outside system into its own rules to make sure that the texts it thereby imports are lawful: see Judgment 825 (*in re Beattie and Sheeran* v. *ILO*), under 18, which in turn refers to Judgment 382 (*Hatt and Leuba*), under 6.

> 22. In Judgment 1000, mentioned above, the Tribunal held, under 12, that "when impugning an individual decision that touches him directly the employee of an international organisation may challenge the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for the individual one". The complainants may therefore challenge in their present suit the lawfulness of any measure taken by the Commission that serves as the basis for the decisions affecting them, whatever method may have been adopted to import it into the Organization's own rules.
>
> …
>
> 24. The conclusion is that by incorporating the standards of the common system in its own rules the Organization has assumed responsibility towards its staff for any unlawful elements that those standards may contain or entail. Insofar as such standards are found to be flawed they may not be imposed on the staff and WIPO must if need be replace them with provisions that comply with the law of the international civil service. That is an essential feature of the principles governing the international legal system the Tribunal is called upon to safeguard. It is therefore plain that the complainants' rights to judicial process are safeguarded by the defendant Organization's recognition of the Tribunal's jurisdiction. Such jurisdiction may not be restricted by the introduction into the Organization's Staff Regulations of rules adopted by bodies outside the Tribunal's competence.

70. The ILOAT recently took the same approach in its Judgment No. 3883, *B and others* (2017), where it found receivable applications from ILO staff members challenging the new salary scale in Bangkok for General Service Staff, holding that:

> 11. The question of whether a complaint, based on a payslip, challenging a general decision to freeze salaries is receivable was recently addressed by the Tribunal in Judgment 3740. The Tribunal concluded in consideration 11 that:
>
> > "Although the [paysheets immediately following the freeze] did not reflect any change in [the complainants'] salaries, nor would any change be reflected in subsequent paysheets while the freeze was in effect, at that point in time it was evident that the salary freeze was liable to cause [the complainants] financial injury. As the Tribunal explained in Judgment 3168, under 9, for there to be a cause of action a complainant must demonstrate that the contested administrative action caused injury to the complainant's

> health, finances or otherwise or that it is liable to cause injury. Accordingly the complaints are receivable."
>
> 12. The general circumstances of the present case are indistinguishable. Accordingly, the complaints are receivable.

71. The Tribunal is of the view that although judgments from ILOAT are not binding upon it, they have a persuasive value and warrant consideration, especially when they touch upon issues that affect the common system as a whole. A convergent and uniform interpretation of rules or legal principles applying all across the common system when the factual situations at hand raise similar legal issues is desirable and proper. In this respect, the Redesign Panel on the United Nations system of administration of justice stated in its report of 28 July 2006 (A/61/205, at para. 96) that "there should be harmonization [of the UNAT and the ILOAT] jurisprudence … so as to ensure, so far as is practicable, equal treatment of the staff members of specialized agencies and those of the United Nations itself".

72. Finally, it is noted that the Secretary-General had an opportunity to raise any issue he may have had in respect of the implementation of the Unified Salary Scale before it was adopted by the General Assembly. In line with art. 28 of the ICSC Statute, the Secretary-General had a consultative role in the process and the evidence shows that he exercised it in participating in consultative meetings organized by the ICSC. However, he did not raise any issue concerning possible violations of contractual rights or acquired rights nor of any other applicable norm. The Secretary-General possibly had another opportunity to raise concerns he may have had regarding the implementation of the Unified Salary Scale when he was requested to propose amendments to the Staff Regulations and to make the required modifications to the Staff Rules. There is no evidence that he raised any concern.

73. The system allows the Secretary-General to play an important role in ensuring that proposed modifications to staff members' conditions of service are in line with the Organization's existing obligations. This role cannot be underestimated and constitutes an important safeguard of the respect of the rule of law in the Organization. The Tribunal can certainly not review the role played by the Secretary-General in the process that led to the adoption of the Unified Salary Scale,

but it would be equally unfair to staff members if the Tribunal were to conclude that alleged violations of their contractual or acquired rights are exempt from any judicial review because the Secretary-General is duty bound to apply decisions of the General Assembly.

74. In view of the foregoing, the Tribunal concludes that the presumption of legality set out in *Ovcharenko et al.* may be rebutted when an applicant alleges that the implementation of a regulatory measure adopted by the General Assembly conflicts with other norms or contractual obligations equally applicable. Hence, the Tribunal shall fully exercise its jurisdiction to review the contested decisions and the issues raised insofar as they effectively seek to impugn these decisions. In conducting this type of review in the present cases, the Tribunal is not engaging in a review of the legality of the General Assembly resolutions. It is only reviewing the administrative decisions taken by the Administration to implement these resolutions in the Applicants' individual cases given the contractual matrix and the broader legal context.

75. The Tribunal therefore finds that the applications are receivable.

Merits

76. The Tribunal shall now examine whether the contested decisions violate the Applicants' contractual or acquired rights.

77. Pursuant to art. 101(1) of the Charter of the United Nations, "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly". Article 101(3) further provides that "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity".

78. In turn, staff regulation 12.1, initially adopted in 1946 and consistently reiterated in the Staff Regulations afterwards, provides that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members". This means that notwithstanding

that which is purported to be done, it shall not prejudice the existing rights which have been acquired.

79. Pursuant to staff rule 4.1:

> The letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.

80. Sections (a) and (b) of Annex II to the Staff Regulations and Rules also provide that:

> (a) The letter of appointment shall state:
>
> (i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;
>
> (ii) The nature of the appointment;
>
> (iii) The date at which the staff member is required to enter upon his or her duties;
>
> (iv) The period of appointment, the notice required to terminate it and the period of probation, if any;
>
> (v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;
>
> (vi) Any special conditions which may be applicable;
>
> (vii) That a temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment;
>
> (viii) That a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;

> (b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules[.]

81. In line with these provisions, each of the Applicants' individual initial letter of appointment indicated the following:

Assessable Salary: xxx	Gross per annum, which after United Nations staff assessment gives an approximate net salary per annum of [USD]…, which may rise, where applicable and subject to satisfactory service, in accordance with the schedule of increments for this category and level set out in the Staff Regulations and Staff Rules.

82. The amount of gross and net salary varied of course in respect of each individual Applicant.

83. It is noted that the Applicants' letters of appointment refer to the "net salary" as being the gross salary minus staff assessment. This is in line with the terminology used on the salary scale, which is an annex to the Staff Regulations and Rules. The expression "net base salary" is more generally used in the Staff Regulations and Rules, notably for the calculation of the dependency and transitional allowances. It is understood, however, that the two expressions bear the same meaning. The Tribunal will therefore use the terminology commonly used in the current edition of the Staff Regulations and Rules, and refer to "net base salary" as being the gross salary minus staff assessment.

84. Throughout time, the Applicants' gross and net base salaries increased, as announced in their letter of appointment, either by acceding to promotions, reaching step increments, or by an increase of the salary scale itself. Therefore, their actual salaries (gross and net) as of 31 December 2016 no longer reflected the ones set out in their initial letters of appointment.

85. With the implementation of the Unified Salary Scale, the Applicants' gross and net base salaries suddenly decreased, as evidenced by a comparison of their respective December 2016 and January 2017 payslips. Setting aside the impact of the fluctuation of the post adjustment, the Applicant Mrs. Quijano-Evans suffered a reduction of her monthly gross salary of USD147 and an increase of her staff assessment of USD225.83, resulting in a reduction of her net base salary of USD372.83.

86. Likewise, the Applicant Mrs. Dedeyne-Amann suffered a reduction of her monthly gross salary of USD177.50 and an increase of her staff assessment of 168,59, resulting in a reduction of her net base salary of USD346.09.

87. It is noted that the reduction of the Applicants' gross and net base salaries was compensated in January 2017 by the introduction of a transitional allowance. Adding this allowance to the net base salary of the Applicant Mrs. Quijano-Evans, while removing from the equation the variation due to the fluctuation of the post adjustment, to calculate the variation of her net take home pay, shows that she received USD186.65 more in January 2017 than in December 2016. Likewise, the Applicant Mrs. Dedeyne-Amann received USD244.67 more.

88. However, it should be noted that this increase in the Applicants' take home pay is not due to the introduction of the new remuneration scheme, but to inflation and to the application of the Noblemaire principle, which led to an overall increase of the salary scale in January 2017 as it is regularly done at the beginning of each year.

89. Further, it is clear from staff rule 13.11(c) that the transitional allowance currently paid to the Applicants will be reduced by one percentage point every year, starting from 1 January 2018, until it reaches the equivalent of the child allowance. From that time, the Applicants will receive only the child allowance. According to an estimation tool made available to staff members by the

Administration, which factors the impact of the Unified Salary Scale, the Applicants will suffer losses as follows.[2]

90. The transitional allowance of the Applicant Mrs. Quijano-Evans will go down from USD519.90 to USD441.92 per month as of 1 January 2018, then to USD360.48 as of 1 January 2019 and to USD275.56 as of 1 January 2020. From 1 January 2021, she will receive instead the child allowance amounting to USD244.08. Taking into account that her younger child will reach 21 on 26 February 2037, the progressive reduction and subsequent discontinuation of the transitional allowance entail that she will receive approximately USD65,120.76 less than what she would have been entitled to under the previous regime.

91. The transitional allowance of the Applicant Mrs. Dedeyne-Amann will go down from USD681.14 to USD567.62 per month as of 1 January 2018, then to USD462.55 as of 1 January 2019 and to USD346.92 as of 1 January 2020. From 1 January 2021, she will receive the child allowance amounting to USD244.08. Taking into account that her younger child will reach 21 on 3 June 2023, the progressive reduction and subsequent discontinuation of the transitional allowance entail that she will receive approximately USD22,228.74 less than what she would have been entitled to under the previous regime.

92. The Applicants claim that they have a contractual right and/or an acquired right to receive the amount of gross salary they received before the introduction of the Unified Salary Scale, which the Organization violated by unilaterally changing their mode of remuneration. In turn, the Respondent submits that whilst the Applicants have an acquired right to receive "a salary", they do not have a right to receive a specific amount. He further asserts that the amount of gross salary is of no relevance for the staff members as it is never paid to them and it is not

[2] Estimations are based on the post adjustment index in force at the time the tool was made available and on a child allowance amount of USD244.08, which is the flat rate in USD applicable since 1 January 2011, as discussed in para. 11 and footnote 1. This child allowance may vary slightly for each Applicant, who may be entitled to a different amount calculated in local currency if they became eligible to it prior to January 2007, or on or after 1 January 2007 or on or after 1 January 2009. For ease of calculation and as per the estimation tool, a fix amount of USD244.08 for the child allowance was taken into consideration.

determinative of the net salary. In this respect, the Respondent states that "[u]nlike in the outside world, where the gross salary is reduced by income tax, staff assessment is an add-on to the net salary, which is the starting point of the pay-setting process. In other words, the gross salaries are established by grossing up the net salaries by reverse application of the scale of staff assessment". The Respondent argues that all that matters is the staff members' "net take home pay". This notion is not referred to in the Organization's rules but the Respondent appears to assimilate it to the net base salary plus the transitional allowance in the context of these proceedings.

93. The Tribunal notes that irrespective of the methodology actually employed by the Organization for establishing the gross and net base salaries of its staff members, the staff assessment is formally presented to staff members as a deduction from their gross salary in their letters of appointment, as recalled above, and in the Staff Regulations. Staff regulation 3.3(a) provides in this respect that:

> An assessment at the rates and under the conditions specified below shall be applied to the salaries and such other emoluments of staff members as are computed on the basis of salary, excluding post adjustments, provided that the Secretary-General may, where he or she deems it advisable, exempt from the assessment the salaries and emoluments of staff members engaged at locality rates.

94. It also bears mentioning that specific staff assessment rates are set forth in staff regulation 3.3(b). Thus any variation of the gross salary directly impacts on the net base salary following a set rate, or vice-versa.

95. It follows that any fluctuation of the Applicants' gross salary does actually affect them. Even if the Respondent's position were to be adopted and that the net base salary was to be the reference point rather than the gross one, this would mean that the Applicants' right to salary should be examined in light of their net base salary, which was also specified in their letter of appointment. Irrespective of the mode of calculation of the salary, the issue at stake remains essentially the same, namely whether the Applicants had a contractual right or an acquired right to be paid the same amount of salary, gross or net, they received as of 31 December 2016, or more.

96. When issuing letters of appointment to the Applicants, the Organization entered into a contractual relationship with them, as explicitly recognised, *inter alia*, in staff rule 4.1 and by the Appeals Tribunal in *El-Khatib* 2010-UNAT-029 (see also the ICJ's *Advisory Opinion on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, quoted in para. 61 above). Pursuant to art. 101 of the UN Charter and staff regulation 12.1, the contracts between the Organization and the Applicants are composed of the terms explicitly set out in the letters of appointment and are also governed by the internal laws of the Organization, which the latter has the power to unilaterally modify, subject to the Applicants' acquired rights.

97. Staff regulation 12.1, which was adopted from the inception of the Staff Regulations and reiterated thereafter in all their amended versions, poses some limits to the Organization's power to amend the Staff Regulations and Rules. It thus has a quasi-constitutional value within the Organization. As the ILOAT held in *In re Poulain d'Andecy* (Judgment No. 51 (1960), at para. 3), "[a]ny authority is bound by its own rules for so long as such rules have not been amended or abrogated".

98. Staff regulation 12.1 is also an intrinsic part of the contractual relationship between the Organization and its staff members as it is integrated by reference in the staff members' letter of appointment. In accepting their letter of appointment, staff members agree that their conditions of service may be subject to unilateral change by the Organization but only insofar as they do not touch upon their acquired rights.

99. Further, the obligation of an International Organization to respect its staff members' acquired rights is a general principle of international civil service law, as acknowledged by the ILOAT in *Ayoub* (Judgment No. 832 (1987)) (see also the former United Nations Administrative Tribunal Judgment No. 273, *Mortished* (1981) and the separate opinion of Judge Stern in the former United Nations Administrative Tribunal Judgment No. 1253, *Ittah* (2005)). Indeed, this principle has generally been recognised by the principal international administrative tribunals, whether explicitly using this term or not, including by the former United Nations Administrative Tribunal (see, e.g., Judgments No. 19, *Kaplan* (1953),

No. 82, *Puvrez* (1961), No. 273, *Mortished* (1981), confirmed by the ICJ's *Advisory Opinion on* the *Application for review of Judgment No. 273 of the United Nations Administrative Tribunal*; by the ILOAT (see, e.g., Judgments No. 61, *Lindsey* (1962), para. 12; No. 365, *Lamadie (No. 2) and Kraanen* (1978); No. 391, *Mertens n° 2* (1979); No. 391, *Los Cobos and Wenger* (1980) and by the World Bank Administrative Tribunal (Judgment No. 1, *de Merode et al.* (1981), at para. 44). It would thus apply even if it was not formally enacted in staff regulation 12.1 (see *Ayoub*). As the Appeals Tribunal held in *De Aguirre* 2016-UNAT-705, "in interpreting the terms of a staff member's appointment, we may draw upon general principles of law insofar as they apply to the international civil service [footnote omitted]".

100. It follows that, by its nature and content, staff regulation 12.1 and the acquired rights guaranteed therein take precedence over other staff regulations and rules governing the staff members' conditions of employment. 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. It is the thread which has been consistent and runs through the contracts of each of the Applicants. 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. In this connection, Judge Mosler stated in his Separate Opinion to the ICJ's *Advisory Opinion in the Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* that:

> 8. This regulation [Staff Regulation 12.1 on Acquired Rights] is the higher norm in the hierarchy of the legal provisions applicable to the present case. Resolution 34/165 [the General Assembly's Resolution subject to the ICJ's case] could not have the effect of changing the law since it did not either amend Regulation 12.1 or clearly state that the General Assembly decided either to disregard this regulation or to state that the right to the repatriation grant … could not be considered as acquired in the meaning of Regulation 12.1.

101. In any event, no derogation from staff regulation 12.1 was made, or can be implied, in adopting the Unified Salary Scale and for the reasons outlined above, the said provision fully applies and takes precedence. In fact, the Respondent does not argue generally that acquired rights are not protected. The point of contention is whether or not the decisions to pay the Applicants a salary reduced of the portion which was previously paid on the basis that they have a dependent child entitling them to be paid at the dependency rate infringe upon their acquired rights.

102. The notion of acquired rights has not yet been closely examined by the Appeals Tribunal. Therefore, and since the former United Nations Administrative Tribunal and other international administrative tribunals have developed an important corpus of jurisprudence in this matter, this Tribunal finds it appropriate to seek guidance therein to ensure coherence of the common system.

103. At the outset, it is noted that to some extent, the contractual rights of staff members were assimilated into their acquired rights by the former United Nations Administrative Tribunal and the ILOAT. The notion of acquired rights is used in a broad sense to examine staff members' alleged violations of their contracts of employment through amendments to rules of general application given the limits posed by staff regulation 12.1 in respect of acquired rights, which are also to be found in the constitutive documents of several other international organizations.

104. From early on, the terms and conditions of employment explicitly set out in the staff members' letters of appointment were considered to be acquired rights by the former United Nations Administrative Tribunal (Judgment No. 19, *Kaplan* (1953)) and the ILOAT (Judgment No. 29, *Sherif* (1957)). These were described as "contractual elements", as opposed to statutory elements comprised in the Staff Regulations and Rules, which may be subject to change. Initially, the former United Nations Administrative Tribunal and the ILOAT found that only the terms set out in the staff members' letters of appointment were protected against unilateral changes. Then, the protection was extended to prevent retroactive amendments to statutory elements, namely those which would deprive staff members of accrued rights for services already rendered (see, e.g., ILOAT Judgment No. 360, *In re Poulain d'Andecy* (1960); former United Nations

Administrative Tribunal Judgments No. 360, *Taylor* (1985), No. 370, *Molinier et al.* (1986); and World Bank Administrative Tribunal Judgment No. 1, *de Merode et al. (1980)*).

105. Throughout time, this strict distinction between contractual and statutory elements was tempered as the jurisprudence of international administrative law moved towards a more substantive approach to the notion of acquired rights, to extend the protection to terms of appointment set out in the internal rules of the Organizations in certain circumstances.

106. An acquired right is understood to be "one the staff member may expect to survive any amendment of the staff rules" (*Ayoub*, para. 12). The test for determining whether a modification to a term or condition of service violates an acquired right, as it derives from jurisprudence of international administrative tribunals including the leading cases *de Merode et al.* of the World Bank Administrative Tribunal and *Ayoub* from the ILOAT, may be summarised as follows.

107. Firstly, the Tribunal must determine if the modification to the rules alters a term of employment that is "fundamental and essential in the balance of rights and duties of the staff member" (*de Merode et al.*, para. 42; see also *Ayoub*, para. 13). The notion of "fundamental term", which is derived from the common law of contracts, is particularly well captured by Lord Upjohn of the House of Lords in the case *Suisse Atlantique Société d'Armement Maritime v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361:

> A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that *any* breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach.

108. A fundamental and essential term of employment may be expressed in the staff members' letters of appointment or in the internal laws of the Organization. As the World Bank Administrative Tribunal held in *de Merode et al.*, "[i]n some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations". However, a term of employment which is explicitly set out in a letter of appointment is presumed to be fundamental and essential (*Ayoub*, at paras 14-15, *Mertens*, *de Merode et al.*, at para. 44).

109. In this connection, the Tribunal notes that the terms of appointment currently set out by the Organization in the letters of appointment of its staff members are very limited, as per the provisions of sec. (a) of Annex II to the Staff Regulations and Rules. They relate essentially to the identification of the post, the commencing date of the appointment, its duration and the ways to terminate it, the salary and the applicable legal regime. These are the basic and fundamental elements of any contract of employment. Given that they are explicitly set out in the letters of employment, by contrast to other more general terms which are to be found in the Staff Regulations and Rules, it is reasonable to presume that they create a legitimate expectation for staff members that they will not be changed without their consent.

110. If a term of appointment is considered to be a fundamental and essential one, it is not open to any change without the consent of the affected staff member (*de Merode et al.*, at para. 42) and, as such, it is considered to be an acquired right (*Ayoub*, at para. 14, first prong of the test, and at para. 15). In other words, a change to a fundamental and essential term of appointment would violate the staff members' acquired rights irrespective of the reason for the change or the actual impact on the concerned staff members.

111. However, if the altered term of appointment is found to be less fundamental and essential, the Tribunal must then examine, *inter alia,* the reasons for the change and its consequences for the staff members (see *Ayoub*, at para. 14, second and third prong of the test; *de Merode et al.*, at paras. 45-48). Non-fundamental and essential terms of employment may be unilaterally changed by the Organization in the exercise of its power, subject to some limits and conditions.

112. Applying this test to the present cases, the Tribunal finds that the salary is a fundamental and essential term of employment of the Applicants. It is explicitly set out in their letters of appointment and there can be no doubt that it goes to the root of the Applicants' contract of employment. Indeed, the right to payment of salary has long been considered an acquired right (see, e.g., *Kaplan*) and this is not disputed by the Respondent. The disagreement between the parties lays on the content and extent of this right.

113. In this connection, the Tribunal finds that the right to salary necessarily extends to its quantum. The salary is, by definition, the consideration paid for the staff member to perform his or her duties. It is part of any contract of employment and the agreement between the parties lays in the determination of its actual level. The balance between the rights and obligations of the parties would be broken if the Organization was allowed to unilaterally modify the level of salary, as suggested by the Respondent. In line with these general principles, the Organization indeed committed not to reduce the Applicants' salaries in specifying the initial amount in their letters of appointment and explicitly stating that this amount is "subject to increase", making this term of employment inviolable (see, e.g., *In re De Los Cobos and Wegner*). The protection of salary must therefore be distinguished from allowances for which the quantum is not specified and which are not directly linked to the services performed. Absent any jurisprudence on point from the international administrative tribunals, the Tribunal notes that national jurisdictions readily recognise that the agreed remuneration of an employee constitutes an essential element of the contract of employment which cannot be modified unilaterally by the employer (see, e.g., House of Lords, United Kingdom, *Rigby v. Ferodo Ltd*, [1988] ICR 29; French Court of Cassation, Chambre sociale, 3 March 1998, Bull. 1998, No. 109, p. 81).

114. The Tribunal further finds that as their salaries increased over time as per their letter of appointment, the Applicants accrued a right to be paid the newly determined salaries. The new quantum being substituted for the initial ones set out in the letters of appointment and forming part of the contractual relationship between each Applicant and the Organization as it evolved throughout time. The

quantum of the Applicants' new salaries thus enjoys the same protection as their initial ones. In this connection, the ILOAT acknowledged in *Ayoub* that the doctrine of acquired right "cover[s] not just terms of appointment that were in effect at recruitment but also terms that were brought in later and were calculated to induce the staff member to stay on" (see also *de Merode et al.*, at para. 41). In any event, a potential increase of salaries was already foreseen in the Applicants' letters of appointment, hence the increased amount has become an inviolable part of their terms of appointment.

115. As discussed above, the implementation of the Unified Salary Scale to the Applicants led to a reduction of their gross salaries. The Applicants' net base salaries were also reduced by about 6%, due to the reduction of their gross salaries as well as an increase of their staff assessment, for which the rate is no longer based on the dependency status of staff members. Concretely, the Applicants lost 6% of their net base salaries which they previously received based upon them having dependents. Because this additional payment made to the Applicants on account of their dependents was initially embedded in their salaries, which is a fundamental and essential term of employment, it could not be unilaterally reduced by the Organization or discontinued for that matter, irrespective of the reason for the change or its impact. By removing a component of the Applicants' salary, the Organization unilaterally altered the composition and methodology for the calculation of the Applicants' gross and net base salaries to their detriment, without their consent or agreement in any manner first obtained.

116. The introduction of a transitional allowance to mitigate the Applicants' losses is insufficient in the circumstances of the present cases to safeguard their acquired rights. This allowance does not compensate for the financial loss that the Applicants will incur over time, starting from 1 January 2018, as discussed above. Likewise, the child allowance, which will be paid to the Applicants instead of receiving their salary at the dependency rate, is significantly lower. Furthermore, these two allowances are not part of the Applicants' salary, so they may be subject to further changes in the future. They will also not be taken into account in the determination of other allowances in case of separation, such as the termination indemnity

pursuant to staff rule 9.8, the repatriation grant pursuant to Annex IV of the Staff Regulations and sec. 5.2 of ST/AI/2016/2 (Repatriation grant), the indemnity in case of death pursuant to staff rule 9.11 and the commutation of accrued annual leave pursuant to staff rule 9.9(a), which are all based on the Applicants' net base salary.

117. In view of the foregoing, the Tribunal finds that in reducing the Applicants' salaries of the portion which was previously paid on the basis that they have a dependent child entitling them to be paid at the dependency rate, the Secretary-General violated their right to receive the gross and net salaries set out in their letters of appointment with increases thereafter, which is a fundamental and essential term of their contract of employment and, as such, constitutes an acquired right.

118. The Secretary-General had an obligation to act lawfully in implementing the Unified Salary Scale for the Applicants and to respect their acquired rights, which took precedence over the new conditions of employment set out in the amendments to the Staff Regulations and Rules. It is not for this Tribunal to decide how the Secretary-General could concretely proceed to resolve his conflicting obligations at this stage of the process where he was left to administratively implement the changes brought upon by the Unified Salary Scale. The Tribunal has already commented upon the opportunities he had beforehand to raise the issue for proper consideration (see paras. 72 and 73 above). It suffices to say, for the purpose of the present proceedings, that the Secretary-General's implementation of the Unified Salary Scale for the Applicants, which triggered their payment of reduced gross and net base salaries from 1 January 2017, is unlawful insofar as it breaches their acquired rights protected under staff regulation 12.1.

Observation on the lack of independence of the ICSC

119. As a final observation on this matter and to fully account for the role played by the Secretary-General in this process, the Tribunal stresses that he was in fact indirectly consulted by the ICSC on possible issues of violation of acquired rights stemming from the adoption of the Unified Salary Scale, as the ICSC sought legal

advice from OLA, which is under the govern of the Secretary-General. However, as discussed below, this consultation was done in a most inappropriate manner which compromised the independence of the ICSC.

120. Article 6.1 of the Statute of the ICSC ("ICSC Statute") provides:

> The Commission shall be responsible as a body to the General Assembly. Its members shall perform their functions in full independence and with impartiality; they shall not seek or receive instructions from any Government, or from any secretariat or staff association of an organization in the United Nations common system.

121. Independence of the ICSC from the Secretariat of the United Nations, and thus its Executive, is further made clear through art. 20 of the ICSC Statute providing for the selection and status of its staff. The Chairman of the ICSC is central to the selection process, and importantly, the staff of the ICSC are taken out of the Secretariat's administrative reporting lines by being regarded for administrative purposes "as officials of the United Nations". The ICSC was further empowered by art. 20.4 of its Statute to "employ such experts and auxiliary staff as it may deem necessary". It goes without saying that these experts shall similarly be independent. This advisory role is different from the consultative one that is afforded to the executive heads of the organizations, in this case the Secretary-General and staff representatives. In this respect, art. 28.2 of the ICSC Statute provides that:

> Executive heads of the organizations and staff representatives shall have the right, collectively or separately, to present facts and views on any matter within the competence of the Commission. The manner in which this right shall be exercised shall be set out, after consultations with executive heads and staff representatives in the rules of procedure established under article 29.

122. Art. 36.1 of the ICSC Rules of Procedure further provides that:

> The Administrative Committee on Co-ordination, the executive heads, the Federation of International Civil Servants' Associations, the Co-ordinating Committee of Independent Staff Unions and Associations of the United Nations System, the staff representatives and the United Nations Joint Staff Pension Board may submit

> written statements to the Commission on matters of concern to them, either at the request of the Commission or on their own initiative.

123. Taking into consideration the above mentioned ICSC's legal framework and the nature of its functions, the Tribunal is of the view that a clear distinction was supposed to be maintained between the UN secretariat and the advisory body during the consultation stage for the revision of the remuneration scheme. Significantly, the ICSC was directed by its Statute to independently assess potential issues of acquired rights stemming from the new remuneration scheme it envisaged to adopt in making its recommendations to the General Assembly. Art. 26 of the ICSC Statute provides in this respect that:

> The Commission, in making its decisions and recommendations, and the executive heads, in applying them, shall do so without prejudice to the acquired rights of the staff under the staff regulations of the organizations concerned.

124. However, during the consideration of this matter by the Tribunal, and following the submissions and the evidence provided to it, the Tribunal noted that the independence and impartiality of the ICSC in the consideration of implications of the Unified Salary Scale on the acquired rights of serving staff members would appear to have been compromised, both by the actions of the ICSC and the Respondent.

125. It is apparent from oral evidence heard and from the ICSC 2015 Report that the Commission sought "legal definition and guidance from [OLA]" of the United Nations Secretariat, in respect of possible issues of acquired rights in the implementation of the new compensation package and the introduction of transitional measures for the purpose of the recommendations it proposed to make to the General Assembly. It was provided with such advice by OLA. The ICSC noted that OLA provided "summary information", however the advice given was substantive in nature. Also, it is noted that the ICSC reproduced only a summary of the advice and it remains unclear whether the full advice provided went further and actually provided an opinion as to possible violations of acquired rights in implementing the Unified Salary Scale. This raises a number of specific issues of

concern, as the ICSC by so seeking advice from OLA was seeking such advice from one of the very organs from which it is expressly established to be independent. Equally, in providing the advice requested, OLA compromised the respect by the Executive of the independence and impartiality of the Commission.

126. The ICSC did not seek submissions from the Secretariat under art. 36 of its Rules of Procedure, rather it was legal advice that is specifically recorded as being sought by the Commission in respect of a matter which it is directed to consider by virtue of art. 26 of its Statute. The ICSC did not give the staff representatives the opportunity to provide written statements on the issue, thereby hearing only the voice of the Organization. Further, there is no indication in the ICSC 2015 Report that the Commission made its own assessment of the issue of acquired rights in making its recommendations to the General Assembly, as it was directed to do. Rather, the report can only be read as being such that the advice provided by OLA was to be considered the state of the law and there is no analysis by the ICSC as to how the legal principles set forth by OLA applied in the circumstances.

127. The appropriate course of action was for the ICSC to either seek the respective views of all parties involved, as part of its consultative process, and/or to seek legal advice from an independent expert on possible issues of acquired rights. For the sake of completeness, the Tribunal sets out below the relevant part of the ICSC 2015 Report in respect of the legal advice requested and the advice given:

> **D. Acquired rights and transitional measures**
>
> **1. Acquired rights: legal definition and guidance from the Office of Legal Affairs**
>
> 142. In considering the implementation of the new compensation package, the question of the "acquired rights" of existing staff and the potential need for transitional measures to smooth the implementation process was apparent. With that in mind, the Commission sought the advice of the Office of Legal Affairs, which provided summary information of relevant judgements by the administrative tribunals of the United Nations common system, namely, the former United Nations Administrative Tribunal, the United Nations Appeals Tribunal and the International Labour Organization (ILO) Administrative Tribunal.

143. In its summary, the Office of Legal Affairs stated that the legal framework relating to acquired rights contained broad principles that could only be applied on a case-by-case basis. More general principles were as follows:

(a) The prohibition on retroactive application;

(b) The distinction between contractual and statutory conditions of employment;

(c) The distinction between fundamental or essential, and non-fundamental or non-essential conditions of employment.

144. In the light of the principle of non-retroactive application, any amendment to the Staff Regulations of the United Nations and Staff Rules could be applied only prospectively. The Office of Legal Affairs also pointed out that although staff might have a contractual benefit or entitlement, the methodology for the computation of such an allowance or entitlement was generally considered a statutory element of employment that could be lawfully amended by the administration of an organization under certain circumstances. As a general rule, while an amendment to a statutory element of employment might lawfully reduce a benefit, the change should not result in the total evisceration of the benefit.

145. According to the Office of Legal Affairs, the tribunals had been clear that, irrespective of the question of acquired rights, any proposed changes to the Staff Regulations and Rules must not be "arbitrary" and must promote implementation of the principles in Article 101 of the Charter of the United Nations, that is, the requirement that the paramount consideration in the employment of the staff and in the determination of the conditions of service should be the necessity of securing the highest standards of efficiency, competence and integrity. The ILO Administrative Tribunal had similarly held that an international organization should refrain from any measure that was not warranted by its normal functioning or the need for competent staff. The rationale for the requirement appeared to be to ensure that the effect of an amendment to the Staff Regulations and Rules (individually or cumulatively) should not be so draconian as to undermine the very functioning and health of the international civil service system.

146. The Office of Legal Affairs found that although the United Nations Appeals Tribunal had discussed substantively the concept of acquired rights in some 60 cases, only in approximately 12 of those did the Tribunal find a breach of an acquired right. The ILO Administrative Tribunal had likewise interpreted the concept of "acquired rights" conservatively. Of around 80 cases relating to acquired rights, it had found a breach of an acquired right in only two cases, one of which related to the discontinuance of the reimbursement of travel expenses, while the other concerned an amendment to a pension scheme.

147. According to the Office of Legal Affairs, acquired rights could be seen as rights that derived from the staff member's contract of employment and accrued through service. Pursuant to the applicable legal principles, amendments to the rules that breached acquired rights would not withstand a challenge before the tribunals successfully. However, even in cases in which an amendment to the rules might not affect an acquired right, the administration of an organization had on occasion opted to implement the amendment in such a way as to permit staff to continue to take advantage of a benefit to which they were entitled prior to the amendment, for a limited period of time. This was commonly referred to as a "transitional measure". Transitional measures could also include, for instance, deferral of the implementation of the amendment for a number of years, progressive alteration of the modalities for a reduction of allowances, payment to each affected staff member of an amount to counter act any negative effect of the amendments on allowances they might receive in future.

148. The decision to implement transitional measures was not necessarily relevant to situations concerning acquired rights. In other situations in which it is not clear that acquired rights are involved in a regulatory change to the terms and conditions of employment, the employing organization has the option to consider providing for transitional measures as a matter of administrative policy with regard to the best manner in which to implement an amendment to the rules.

2. Proposed transitional measures

149. Bearing in mind the legal considerations outlined above and the general principle of good employer practice in transitioning from one system of remuneration to another, the proposed transitional measures for existing staff in relation to each proposed change are outlined below.

128. The ICSC sought and received legal advice from part of the organization it was supposed to independently advise. It abrogated the nature of the mission it was supposed to perform and compromised the independence and impartiality expected from it.

Remedies

129. The Tribunal shall consider the remedies sought by the Applicants, listed in para. 30.g above, in light of art. 10.5 of its Statute, which delineates its powers regarding the award of remedies.

130. Art. 10.5 of the Tribunal's Statute provides that:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (*a*) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (*b*) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

131. Having found that the Secretary-General's decisions to pay the Applicants a salary reduced of the portion which was previously paid on the basis that they have dependent(s) were unlawful, the Tribunal rescinds them.

132. The Tribunal is aware that rescinding the contested decisions may raise some questions as to how the Applicants will be paid since the salary scale from 1 January 2017 onward is based on the reduced salaries. The previous scale is no longer in force and it would not be adapted to the increased cost of living.

133. Consequently, the Tribunal clarifies that the effect of the rescission entails that the 6% reduction of the Applicants' net salary plus post adjustment should be reintegrated as part of their salary from 1 January 2017 onwards. This amount will not be subject to any reduction as long as the Applicants continue to meet the eligibility criteria for payment at the dependency rate, as defined under former staff regulation 3.4, staff rule 3.6 and ST/AI/2011/5 (Dependency status and dependency benefits).

134. Also, this amount, being part of their salary, shall be taken into account in the calculation of any other allowance or benefit that is based on the net base salary. Staff rule 13.11 concerning the transitional allowance will not apply to the Applicants because otherwise they would receive the 6% twice.

135. By the rescission of the contested decisions, the Applicants are fully compensated for their prejudice. The Applicants suffered no financial loss for 2017 as they received the transitional allowance, which was then equivalent to the reduction of their salary. Their situation for the future is fully remedied by the rescission.

136. The Applicants are thus not entitled to any compensation for harm under art. 10(5)(b) of the Tribunal's Statute.

137. The Tribunal further clarifies that since the Applicants were paid the full transitional allowance for the year 2017, no retroactive payment is due to them and rescission of the contested decisions will, for all practical purposes, only have a prospective effect.

Conclusion

138. In view of the foregoing, the Tribunal DECIDES:

a. To rescind the Secretary-General's decisions to pay the Applicants a salary reduced of the portion which was previously paid on the basis that they have dependent(s) in implementing the Unified Salary Scale; and

b. To reject all other claims.

(Signed)	*(Signed)*	*(Signed)*
Judge Rowan Downing	Judge Teresa Bravo	Judge Alexander W. Hunter, Jr.

Dated this 29th day of December 2017

Entered in the Register on this 29th day of December 2017
(*Signed*)
René M. Vargas M., Registrar, Geneva