**B. and others**
**A.-M. and others**
**A.-U. and others**
***v.***
**ILO**

**128th Session** **Judgment No. 4134**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr A. B. and 49 other complainants (listed in Annex 1) against the International Labour Organization (ILO) on 6 November 2018, the ILO's reply of 6 December 2018, the complainants' rejoinder of 28 January 2019 and the ILO's surrejoinder of 27 February 2019;

Considering the applications to intervene in those complaints by the seven officials whose names are also listed in Annex 1 and the ILO's comments thereon;

Considering the complaints filed by Mr E. A.-M. and 69 other complainants (listed in Annex 2) against the ILO on 13 December 2018, the ILO's reply of 14 January 2019, the complainants' rejoinder of 8 February and the ILO's surrejoinder of 12 March 2019;

Considering the complaints filed by Mr A. A.-U. and 160 other complainants (listed in Annex 3) against the ILO on 20 December 2018, the ILO's reply of 14 January 2019, the complainants' rejoinder of 14 February and the ILO's surrejoinder of 12 March 2019;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

Considering that the facts of the case may be summed up as follows:

The complainants are ILO officials in the Professional category and above. They challenge the decision of the Director-General of the International Labour Office to apply to their salaries as of April 2018 the post adjustment multiplier (PAM) determined by the International Civil Service Commission (ICSC) on the basis of its 2016 cost-of-living survey, with the result that their salaries were reduced.

Following its 2016 cost-of-living survey undertaken in relation to seven duty stations, the ICSC decided in March 2017 to approve the results of the survey in Geneva and determined that the new post adjustment index (PAI) applicable to Geneva should be implemented on 1 May 2017. It subsequently decided that the implementation date should be deferred until 1 August 2017.

After several discussions between executive heads of Geneva-based organizations and the ICSC, and within the Governing Body of the International Labour Office, the ILO decided on 22 March 2018 to implement the ICSC's decision to reduce the PAI and corresponding PAM for staff in the Professional category and above. This was implemented in two stages: on 26 April 2018, the ILO officials concerned received an e-mail Broadcast from the Human Resources Development Department (HRD) informing them of an initial reduction of the PAM reflected in their April payslip, and on 25 June 2018, another e-mail was received with regard to the further reduction reflected in their June payslip.

On 28 and 30 July 2018, 232 ILO officials, who are members of the ILO Staff Union and represented by the Staff Union's Legal Adviser, lodged a grievance with HRD contesting their April 2018 payslips to the extent that they applied the revised PAM. These officials filed corrected versions of their grievance on 4 September 2018. They then filed a second grievance contesting their June 2018 payslips, on 5 September 2018. The first and second grievances were joined by HRD at the request of the complainants.

In parallel, 59 other ILO officials lodged two grievances on 30 and 31 August 2018 contesting their April and June 2018 payslips, respectively.

In all of these grievances, the officials concerned requested that the decisions reflected in the April 2018 and subsequent payslips implementing the revised post adjustment for Geneva be set aside, that new revised payslips be provided and that material, moral and exemplary damages be awarded.

The Director of HRD rejected the grievances filed by the ILO Staff Union members through a letter dated 18 October 2018, and the other grievances through a letter dated 28 September 2018. These are the impugned decisions.

The letters of the Director of HRD stated that the Director-General exempted the officials who had lodged grievances with HRD from the obligation to follow further steps of the internal conflict resolution procedures. Consequently, the officials were authorised to impugn the decisions directly before this Tribunal, in accordance with Article 13.5(2) of the ILO Staff Regulations. Accordingly, three sets of complaints were filed before the Tribunal. The first was filed by Mr B. and 49 other complainants. The second was filed, in French, by Mr A.-M. and 69 other complainants represented by the Staff Union. The third was filed, in English, by Mr A.-U. and 160 other complainants, likewise represented by the Staff Union.

The complainants request that the impugned decisions as well as the contested decisions reflected in their April 2018 and subsequent payslips implementing the revised post adjustment for Geneva be set aside and that new revised payslips be provided. They claim material damages, with interest, as well as moral damages (6,000 Swiss francs per complainant) and exemplary damages (5,000 Swiss francs per complainant). The complainants represented by the ILO Staff Union also claim costs (100 Swiss francs per complainant).

The ILO requests that the complaints be dismissed by the Tribunal in their entirety.

## CONSIDERATIONS

1. This judgment concerns complaints filed by several staff members of the ILO based in Geneva, challenging a downward adjustment in their salaries as part of a general downward adjustment of salaries of staff in the Professional category and above. Similar challenges have been made by Geneva-based staff of four other organizations, namely the World Intellectual Property Organization, the World Health Organization (and an associated entity, the United Nations Joint Programme on HIV/AIDS), the International Organization for Migration and the International Telecommunication Union.

2. Separate judgments will be given in relation to each of these organizations. However, in virtually all respects, the events leading to the downward adjustment are the same and very many of the legal arguments are the same though, in some ways, differently expressed. Accordingly much of the analysis and the language used in this judgment will be repetitive of what is said in those other judgments. The fact that the language used does not adopt or repeat the language in the specific pleas of the parties in any given case does not, in the Tribunal's view, compromise the analysis or the conclusions.

3. In addition, the suite of documents or extracts from documents relied on by the parties in their pleas were not universally the same. In aggregate, the documents (excluding documents peculiar to a particular organization) were either public documents or documents (such as letters) which were semi-public in the sense that their contents were not confidential and were shared with others beyond the direct recipients. In these circumstances, the Tribunal is satisfied that no prejudice is occasioned to any party by referring to or relying on any document in the aggregate of documents, even if it was not specifically referred to or relied upon by the parties in any particular proceedings.

4. The complaints filed in the Tribunal concerning the ILO have resulted in three proceedings which are being considered by the Tribunal in this session. One proceeding involves complaints by 50 complainants. The second proceeding involves complaints by 70 complainants

represented by the ILO Staff Union. The third proceeding involves complaints by 161 complainants also represented by the ILO Staff Union. No issues are raised by the ILO about the standing of any of these complainants or the receivability of their complaints. On 28 September and 18 October 2018, the ILO agreed to the complainants filing a complaint with the Tribunal without pursuing internal appeals to finality.

5. The complaints raise substantially the same facts and questions of law and they are therefore joined to form the subject of a single judgment. There are seven applications to intervene that are not opposed by the Organization. Those applications are granted.

6. The legal foundation for the complaints is the individual decision, reflected in a payslip, to reduce the salary of each complainant and likewise affecting each intervener. In such circumstances the complainant can challenge the general decision on which the individual decision is based (see, for example, Judgment 1798, consideration 6). In the present case there is potentially a succession of several general decisions of the ICSC following a survey conducted in, amongst other places, Geneva in 2016 culminating in the Geneva-based officials in the Professional category and above being paid at a reduced amount. In addition there was the general decision of the administration of the ILO to give effect to these ICSC decisions. The last mentioned decision flowed from the ILO's membership of and adherence to the United Nations common system.

7. The following are potentially at least some of the relevant general decisions of the ICSC. One was a decision in March 2017 to approve the 2016 survey results. The next was that the implementation date be 1 August 2017 not 1 May 2017, as originally contemplated, and the next was a decision in July 2017 to augment by 3 per cent the PAI derived from the survey. The next was a decision to pay to existing staff members a personal transitional allowance (being the difference between the revised and prevailing PAMs) in full for the first six months after the implementation date though to be adjusted downwards every four months until it was phased out. The last decisions were Consolidated Post

Adjustment Circulars. One was ICSC/CIRC/PAC/518 dated 1 February 2018 and the other was ICSC/CIRC/PAC/522 dated 1 June 2018. Both specified the amount of the PAM for, relevantly, Switzerland and declared from when the amount took effect (1 February 2018 and 1 June 2018 respectively).

8. Some principles in the case law of the Tribunal should be noted immediately. The first is, as observed in Judgment 1266, consideration 24, 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 [the organization] 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."

9. The second is, as noted in Judgment 1160, consideration 11, that if the ICSC adopts a methodology, although not binding on an organization merely by virtue of the ICSC's approval of it, the organization's decision to apply it is one that it is not free afterwards to disclaim. Moreover, as the Tribunal observed in Judgment 1000, consideration 12:

> "Some principles there is ample precedent for will bear restating. One is 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 (cf. Judgments 382 [...], 622 [...] and 825 [...]). The present complainants may accordingly challenge the lawfulness of the general methodology and of the 1987 survey of Vienna, which, taken together, constitute the basis in law of the decisions under challenge."

10. It is desirable to summarise some of the factual background. In September and October 2016, cost-of-living surveys were undertaken by the ICSC in relation to seven duty stations, including Geneva. They were undertaken for the purpose of gathering price and expenditure data at each location to be used for determining the PAI at each of those locations. The PAI for any given duty station measures the cost of living

of staff in that duty station compared to that of the base city, presently New York.

11. The PAI affects the salaries actually paid, in the present case, to Professional category and above staff of the ILO in the following way. The salaries are essentially composed of two parts. One amount is the net salary, or base or floor salary as it is described in the United Nations common system, embodied in a prescribed salary scale. The other amount is the post adjustment established for each duty station arising from the application of Article 3.9 of the ILO's Staff Regulations. That provision operates to adjust the salaries for cost-of-living variations at different duty stations. The post adjustment is determined by multiplying 1 per cent of the net salary by a multiplier, the PAM. The PAI informs the amount of the PAM together with other elements including exchange rates. This process underpins a significant element of the Noblemaire principle applicable to the salaries of international civil servants, namely that "the pay of international civil servants [should be] equivalent by making its real value, or purchasing power, as uniform as possible from one duty station to another" (see Judgment 825, consideration 4).

12. The Advisory Committee on Post Adjustment Questions (ACPAQ) met at its 39th session in New York from 20 to 27 February 2017. A summary of the deliberations was set out in an ICSC note (ICSC/84/R.7) dated 3 March 2017 (the March 2017 note). The ACPAQ is an expert body providing the ICSC with technical advice on the operation of the post-adjustment system and it is comprised of six members and chaired by the ICSC's Vice-Chairman. The March 2017 note recorded recommendations of the ACPAQ. Those recommendations, as the ICSC later noted, would lead to a salary reduction of about 7.5 per cent (in United States dollar terms) or about 6.7 per cent (in Swiss franc terms), though the precise magnitude of the salary reduction could not then be determined until further steps were undertaken. The ICSC met at its 84th session later in March 2017 and considered the March 2017 note. It accepted the results of the 2016 survey in Geneva with the

ultimate consequence that the salaries of Geneva-based officials in the Professional category and above would be reduced.

13. Affected organizations had not been formally notified by the ICSC of its decision in March 2017, but information on its decision and implementation measures was published on the ICSC website and this "resulted in a swift reaction from the executive heads of Geneva-based organizations, as well as from the staff and staff associations" (this is a description in the 10 July 2017 paper referred to shortly). By letter dated 13 April 2017, the executive heads of ten Geneva-based organizations affiliated to the United Nations common system wrote to the Chairman of the ICSC requesting that they be provided with specified information. They proposed deferral of implementation until such information was available and validated. A meeting took place on 24 and 25 April 2017 between the Vice-Chairman of the ICSC and the executive heads, who wrote again on 28 April 2017 reaffirming their request for deferral and thanking the ICSC for its commitment to provide the requested and related information.

14. On 9 May 2017 the Chairman of the ICSC provided information specifically on the Geneva survey results and additional explanations of the results of the 2016 baseline cost-of-living surveys at headquarters duty stations. The Geneva-based organizations considered that the information provided was not sufficient and "mandated an informal team of three senior statisticians to review the application of the methodology and data processing work" (ICSC/85/CRP.9, paragraph 8). The review commenced with a desk review of available documentation during a mission by members of the team between 31 May and 2 June 2017. Later in June 2017, they produced a report of 60 pages including three appendices. The results, in summary, of the review were that there had been material errors in the survey methodology. In the opinion of the statisticians:

> "Correcting these errors has the combined impact of [...] increasing the PAI by approximately 4%. Incorporating these corrections alone in to the published PAI for May, decreases the reduction in the pay index for Geneva

> from 7.7% to less than 4%, well below the 5% threshold for any reduction in the pay index to be implemented."

The practical import of this conclusion, put simply, is that there would be no decrease in salaries arising directly from that survey. Of some significance is that this conclusion depended on the existence of the 5 per cent threshold, as discussed later.

15. On 10 July 2017 the ICSC published a note (ICSC/85/CRP.9) from the Geneva-based organizations, setting out their position for the purpose of consideration at the 85th session of the ICSC in Vienna between 10 and 21 July 2017 (the 10 July 2017 note). This note summarized many of the events between March and July 2017 referred to in the preceding considerations. After recounting this history and discussing a number of matters potentially relevant to what should occur thereafter, the 10 July 2017 note concluded with five steps the Geneva-based organizations believed should be taken by the ICSC. They were:

> "(a) Consider seriously the conclusions reached by the informal review team as developed in Annex I of the present document and take immediate appropriate actions to correct the identified errors;
>
> (b) Suspend its decision to implement the survey result for Geneva as of 1 May 2017 with a staggered approach over several months;
>
> (c) Review the survey methodology in the light of the conclusions and recommendations presented in this paper in close consultation with the organizations of the UN common system;
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> (d) Rescind its decision to modify the gap closure measure in determining the post adjustment multiplier applicable to a duty station by abolishing the 5 per cent augmentation of the post adjustment index derived from negative place-to-place survey results when the difference between the existing pay index and the new post adjustment index resulting from the survey is more than 5 per cent; and
>
> (e) Notwithstanding (d) above, review in consultation with the organizations the issue of transitional measures and other operational rules of the post adjustment system, as may be required."

16. On 12 July 2017 the ICSC published another document (ICSC/85/CRP.10) entitled "Response to the report of the review of the

cost-of-living survey in Geneva by a team of statisticians appointed by Geneva-based organizations" (the 12 July 2017 paper). Again, this paper was created for the purpose of its consideration at the 85th session of the ICSC in Vienna between 10 and 21 July 2017. It was highly critical of the methodology and conclusions of the team of statisticians retained by the Geneva-based organizations. In relation to the opinion referred to at the conclusion of consideration 14, the 12 July 2017 paper said in paragraph 41:

> "As discussed above, the secretariat disagrees with such an assessment, which is not based on an application of the approved methodology, but on an alternative scenario designed to increase the PAI for Geneva. It is regrettable that the review team's conclusions are based on selective data sources and a weight structure not approved by the [ICSC]; an erroneous calculation of the 'New Fisher Index', leading to an exaggeration of the results for Geneva. It is evident that this calculation is an *ad hoc* attempt to increase the PAI for Geneva, to within what the review team knew was required to achieve a *status quo* post adjustment classification for Geneva. It was done with no regard to the approved methodology, the need to use valid data, or its implications for the rest of the system."

17. The ICSC met in its 85th session in Vienna between 10 and 21 July 2017. It published a report of the work at that session on 22 September 2017 (ICSC/85/R.13) (the 22 September 2017 report). That report addressed a number of matters including a discussion of the survey results at the session by representatives of a number of Geneva-based organizations and representatives of staff. Without descending into detail at this point, it is clear from the report that there was considerable concern expressed by the Geneva-based organizations about the survey methodology, the results of the survey and the implementation of those results. The discussion also reflected a significant division of opinion between the ICSC secretariat and an independent expert in price statistics who was a member of the ACPAQ on the one hand and, on the other hand, the statisticians referred to in consideration 14 about the legitimacy of the survey results. It was clear that, in substance, neither the Geneva-based organizations nor the ICSC were resiling from their critiques and criticisms of the methodologies and conclusions of the other. However, as discussed in more detail

shortly, the ICSC indicated it was prepared to reintroduce an aspect of the gap closure measure it had abandoned in 2015, with a threshold percentage of 3 per cent. This and related measures would result in the attenuation of the effect of the salary reduction both in terms of the immediacy of the reduction and the period over which the reduction would incrementally impact on staff members.

18. At its 85th session, the ICSC decided that a review should be undertaken of the methodology for cost-of-living surveys and, to that end, engaged in due course an independent expert to carry out this task, though the terms of reference for the expert did not involve a consideration of the 2016 survey or the analysis of its results. The expert reported in February 2018 about survey methodology more generally, but in terms that cast real doubt on the ICSC's position maintained at its 85th session in relation to the 2016 survey results, and suggested, impliedly, that this position was not as irrefutably correct as contended by the ICSC at its session in July 2017.

19. In early 2018 each of the five Geneva-based organizations referred to in consideration 1, including the ILO, responded to the circumstances in which it found itself, leading, ultimately, to a decision reflected in pay slips to reduce the salaries of officials in the Professional category and above as determined by the ICSC.

20. The ILO Governing Body held its 331st session in October and November 2017. It noted that the ICSC had decided to undertake a review of the methodology and of the conclusions of the report of the team of Geneva statisticians before its 86th session to be held between 19 and 29 March 2018. It also decided that the ICSC's decision would be considered for final decision at its 332nd session, in March 2018.

21. It is convenient to record, at this point, that at a meeting of the General Assembly of the United Nations on 24 December 2017 the implementation of the ICSC's decisions was addressed and the following resolution (A/RES/72/255, distributed on 12 January 2018) adopted (relevant extracts):

> "The General Assembly,
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> [...]
>
> 6. Notes with serious concern that some organizations have decided not to implement the decisions of the [ICSC] regarding the results of the cost-of-living surveys for 2016 and the mandatory age of separation;
>
> 7. Calls upon the United Nations common system organizations and staff to fully cooperate with the [ICSC] in the application of the post adjustment system and implement its decisions regarding the results of the cost-of-living surveys and the mandatory age of separation without undue delay;
>
> 8. Reminds executive heads and governing bodies of the United Nations common system that failure to fully respect the decisions taken by the General Assembly on the [ICSC]'s recommendations could prejudice claims to enjoy the benefits of participation in the common system, including organizations' participation in the United Nations Joint Staff Pension Fund, as stated in article 3 (b) of the Fund's regulations;
>
> [...]"

22. ILO Financial Services introduced in January 2018 interim measures to ensure the ICSC decision would have no effect pending the ILO's final decision on its implementation. In an HRD Broadcast, circulated to ILO staff by e-mail on 5 February 2018, the staff were informed that the ILO would continue to maintain salary levels for Geneva-based staff in the Professional category and above at the current (January 2018) levels until the Governing Body took a decision on the matter at its March 2018 session.

23. A document dated 6 March 2018, GB.332/PFA/11, was prepared for the 332nd session of the Governing Body and entitled "Update on the decisions taken by the [ICSC] at its 85th Session regarding the post adjustment index for Geneva". The document was authored by HRD. It recounted the events leading to the decision of the ICSC at its 85th session and what followed. It noted, in relation to the consideration of the 2016 survey results, that:

> "[...] a team of statisticians was tasked by the Geneva-based organizations to review the application of the methodology and the factors that determined the results. A number of issues and errors were identified which called into question the reliability of the survey outcomes."

It stated later in the document, in relation to the independent expert's report referred to earlier in consideration 18:

> "7. [...] The report identifies many shortcomings in the ICSC methodology and includes 64 recommendations for consideration. The report generally concurs with the earlier findings of the Geneva-based team of experts. Similarly to the report of the team of experts, the consultant report raises concerns regarding index aggregation, the inclusion of public institutions in the education component, the inclusion of the pension component, the measurement of domestic services, the treatment of housing related expenditures and the estimation of housing index, the lack of proper documentation of decision-making in processing data, the identification of non-corrected errors and the lack of revision policy.
>
> 8. Further, and importantly, the consultant stopped short of responding positively to a question in the Terms of Reference as to whether the post adjustment system is 'fit for purpose'. He states only that it goes a 'long way towards' meeting the criteria for being fit for purpose but that there are 'clearly areas for improvement' as detailed in his 64 recommendations. The report acknowledges that the post adjustment is a statistical construct aiming at striking a reasonable balance between accurate and punctual measurement of parity of purchasing power, and stability of remuneration. It emphasizes that compensation policy requires reasonable stability in salary and avoidance of sudden major drops in its value.
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> 9. The review undertaken by the expert did not however extend to an examination of many of the specific issues and serious methodological, legal and managerial concerns raised by organizations and staff federations with regard to the results of the 2016 survey round. It therefore remains unresolved to date what specific, cumulative impact those issues had on the results of the 2016 survey round. Therefore, if implemented without further review and, as appropriate, revision, it appears probable that the ICSC decisions would be open to legal challenge by officials at concerned duty stations."

The paper proposed a draft decision of the Governing Body to, in effect, apply the ICSC decision.

24. On 22 March 2018 during the 332nd session of the Governing Body, the Director-General said:

> "[...] the ICSC process which has been ongoing and brought us to the decision point we have before us is flawed. There are shortcomings in that process which have been recognized by, I think, all sides of the house, and more importantly, are shortcomings which, within the processes of the common system, myself and my colleagues are striving to correct."

No decision of the type proposed by the HRD document was made by the Governing Body. Nonetheless, that evening, ILO staff were informed through an HRD e-mail Broadcast that "[i]n view of the discussion and decision of the Governing Body the revised post adjustment will be applied to Geneva-based Professional and higher category staff from 1 April 2018".

25. At the end of April 2018, payslips were disseminated for Geneva-based staff in the Professional category and above that reflected a salary reduction of approximately 3 per cent compared to the payslip for March 2018. On 26 April 2018, staff received by e-mail an HRD Broadcast entitled "Geneva post adjustment – April payslips". The Broadcast informed staff that the applicable PAM was in fact 77.8 for April 2018, but that three points had been added as a personal transitional allowance, bringing the total multiplier to 80.8. Similarly on 25 June 2018, staff received by e-mail an HRD Broadcast entitled "Geneva post adjustment – June payslips", which referred to the Broadcast of 26 April, informing staff that the PAM for the month of June was 72.8 and that the personal transitional allowance of 3.0 points was no longer applicable as of the end of May 2018. By the end of June 2018 the reduction in remuneration for staff in the Professional category and above was complete and was slightly more than 5 per cent.

26. It is desirable to refer to some of the principles that govern the Tribunal's consideration of cases such as the present. First, an international organization is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all the principles of international civil service law (see, for example, Judgments 1821, consideration 7, and 3324, consideration 16). Further, the Tribunal has noted that cases such as the present can raise issues of a highly specialised nature being "based on the technical judgment to be made by those whose training and experience equip them for that task" and that it will not substitute its own assessment for that of the organization (see, for example, Judgment 3360, considerations 4 and 5). While an international organization is free to choose a methodology, system or standard of reference for determining

salary adjustments it must be a methodology which ensures that the results are stable, foreseeable and clearly understood or transparent (see, for example, Judgments 1821, consideration 7, and 2095, consideration 13). The requirement that the results must be stable, foreseeable and clearly understood or transparent does not mean a salary regime is fixed once and for all and is incapable of change (see Judgment 1912, consideration 14), or that this requirement excludes reasonable variations in the results yielded (see Judgment 3676, consideration 6). Moreover "a methodology cannot be applied without a degree of flexibility and without leaving some room for interpretation by the competent authority, which [is] entitled to take into account the imbalances generated by past applications of the adopted methodology in order to try to attenuate the effects thereof and properly to implement the Noblemaire principle" (Judgment 2420, consideration 15).

27. The Tribunal has recognised that "[t]he whole subject of post adjustment is of great complexity and [...] the constant changes in the factors that are considered relevant, mean that the methodology will probably never attain perfection" (see Judgment 1459, consideration 10; see also Judgment 1603, consideration 6).

28. However, if the organization is relying on an external body for advice and assistance, it nonetheless needs to ensure these principles have been applied (see, for example, Judgment 1765, consideration 8, where the Tribunal said in relation to erroneous calculation by the ICSC):

> "[The organization] has the duty of checking the lawfulness of any decision by another body on which it bases its own decision. So too must it check the adequacy of action by that other body to correct any mistake it may have made, and make sure that such corrective action respects the rights of staff. Authority for that is in Judgment 826 [...] under 18. If the [ICSC]'s original reckoning was unlawful, so is a second one that fails to redress fully the wrong."

To the same effect was Judgment 1713, consideration 3, and later, Judgment 2303, consideration 7. In Judgment 1713 the Tribunal observed that a decision on local pay cannot "stand if, say, it overlooks or misconstrues some particular factor, or if some method is applied for the wilful contrivance of lower figures of local pay, or if corners are

cut for the sake of saving time, but to the detriment of staff interests" (consideration 8).

29. The Tribunal's mandate deriving from its Statute is, fundamentally, to resolve individual disputes between an organization and one or a number of members or former members of its staff. Over the life of the Tribunal a matrix of legal principles has been developed and applied by the Tribunal to ensure just and principled outcomes both from the perspective of members of staff and also the perspective of organizations as employers. In its judgments the Tribunal has recognised and accepted the existence of the United Nations common system and respected its objectives. However, the existence of the United Nations common system and a desire to maintain its integrity should not, in itself, compromise the Tribunal's adjudication of individual disputes in any particular case or series of cases involving the application of its principles. Indeed, in Judgment 2303, consideration 7, the Tribunal acknowledged the argument of the organization that considerable inconvenience arose from an earlier judgment (Judgment 1713) and it was virtually impossible for the organization to depart from the scale recommended by the ICSC. The Tribunal has to recognise that an organization's legal obligations arising from the operation of the common system could have legal ramifications for an organization that inform or even determine the resolution of any particular dispute. However notwithstanding these matters, the Tribunal must uphold a plea from a staff member or members if it is established that the organization has acted unlawfully.

30. One issue of fundamental importance raised by the complainants is whether the ICSC had the power to determine, by decision, the outcome of its conclusions about the PAI and its effect on the salaries of Geneva-based Professional and higher grade staff, or whether it only had a power to make a recommendation on this matter to the General Assembly. It can be seen in Resolution 72/255 of the General Assembly set out in consideration 21 above that the General Assembly proceeded on the assumption that there had been a decision on this matter by the ICSC. Moreover, much of the correspondence

and other documentation generated by the ICSC concerning the implementation of the 2016 cost-of-living survey in Geneva speaks in terms of that body having made a decision. Indeed, four of the Geneva-based organizations, but not including the ILO, which had challenged the methodology applied in the survey and the conclusions drawn by the ICSC at its 85th session, sought the ICSC's opinion (in a letter dated 15 November 2018) on, amongst other things, its powers. The ICSC provided a legal analysis in a letter dated 23 November 2018, supporting a conclusion that under Article 11(c) of its Statute it had power to determine, by decision, the applicable PAM for the relevant Geneva-based staff with its consequential application and effect on salaries.

31. Articles 10 and 11 of the ICSC's Statute provide:

> "Article 10
>
> The Commission shall make recommendations to the General Assembly on:
>
> (a) The broad principles for the determination of the conditions of service of the staff;
>
> (b) The scales of salaries and post adjustments for staff in the Professional and higher categories;
>
> (c) Allowances and benefits of staff which are determined by the General Assembly;
>
> (d) Staff assessment.
>
> Article 11
>
> The Commission shall establish:
>
> (a) The methods by which the principles for determining conditions of service should be applied;
>
> (b) Rates of allowances and benefits, other than pensions and those referred to in article 10 (c), the conditions of entitlement thereto and standards of travel;
>
> (c) The classification of duty stations for the purpose of applying post adjustments."

It can be seen that the power of the ICSC in relation to the matters enumerated in Article 10 is a power to recommend only. In contradistinction, the power of the ICSC in relation to the matters enumerated in Article 11 is a power to decide by "establishing".

32. This question of power does not arise in isolation and the answer has consequences. What was the source of the ICSC's power to do what it purportedly did may have ramifications in at least three respects. The first is that under Article 25(3) of the ICSC's Statute an organization is arguably bound to give effect to the ICSC's decisions, if that is the correct characterisation of the ICSC's actions. The second is that the answer concerning the source of power and what the ICSC did has a bearing on whether the ICSC was obliged to consult with affected organizations before acting. The third concerns potential limits on the power of the Director-General of the ILO to determine the remuneration of staff to whom a PAI applies under the ILO's Staff Regulations referred to earlier in consideration 11.

33. In ascertaining the ICSC's powers, the text of the Statute construed purposively is of paramount importance. The text of Articles 10 and 11 is comparatively clear, particularly having regard to the immediate context. The two Articles are clearly intended to demark different functions or powers. If the power to determine post adjustments in a quantitative sense is conferred by Article 10(b), then the power is not conferred by Article 11 and, specifically, by the expression "[establishing] the classification of duty stations for the purpose of applying post adjustments". Each provision is mutually exclusive of the other in the sense that the power to decide in relation to specified matters is conferred by one Article and the power to recommend only in relation to other specified matters is created by the other Article. It is inconceivable that each provision confers a power to address or deal with the same subject matter.

34. Even if the words "[t]he scales" are intended to qualify not only "salaries" but also "post adjustments", there is little room to doubt that Article 10(b) is concerned with the quantification of salaries and post adjustments that would be the subject of recommendation. Indeed, Article 12(2) creates an exception to the limitation that the ICSC is only to recommend salary scales. That paragraph confers power to determine salary scales at a particular duty station rather than make a recommendation if requested by the executive head after consultation with staff

representatives. The existence of this exception in relation to salary scales and its absence in relation to post adjustments, reinforces the construction of the Statute that the ICSC's power in relation to the quantification of post adjustments is limited to making recommendations. The Tribunal is satisfied, having regard only to the text of the Statute, that Article 11(c) is not a source of power to make a decision quantifying post adjustments.

35. However it is necessary to address historical matters and commentary concerning those powers relied on by the parties. The Statute of the ICSC was presented, in draft form, to the UN General Assembly in September 1973 as an annexure to a report (A/9147, dated 20 September 1973). That report contained, amongst other things, a commentary on the draft Statute. It included the following observations at paragraphs 14 and 15:

> "14. Under article 10, the [ICSC] is to make recommendations to the General Assembly on 'the broad principles for the determination of the conditions of service of the staff' **and on three elements of pay** which are of general application: Professional and higher-level salaries, **post adjustments, which are added to or deducted from such salaries in order to compensate for differences in cost-of-living at the various duty stations**, and the staff assessment to which all salaries are subject [...].
>
> 15. The functions assigned to the [ICSC] under article 11 differ from those enumerated under article 10 in two respects: (a) they cover methods of application of the broad principles for determining the conditions of service and particular allowances or benefits; and (b) they represent a uniform cession to the [ICSC] of powers now variously distributed between the legislative and executive organs of the organizations in the common system. It is the intent of this provision that the authority of the [ICSC] in regard to the technical or detailed aspects of the conditions of service should be the same in relation to all the organizations it is to serve." (Emphasis added.)

36. There is no material before the Tribunal that would suggest any amendments were made to the draft Statute impacting on the accuracy of this commentary, before the adoption of the Statute by the General Assembly on 18 December 1974 by Resolution 3357 (XXIX). This commentary plainly supports a conclusion that the ICSC was only being given a power to provide a recommendation concerning, and not

decide, post adjustments "added to or deducted from [...] salaries in order to compensate for differences in cost-of-living at the various duty stations".

37. The ILO says in its replies that the expression "scales" of post adjustments in Article 10(b) refers to an earlier method of calculating post adjustment based on schedules of post adjustments that had been submitted in the past to the General Assembly for approval, together with salary scales, as annexes to the Staff Regulations. This method of calculation was discontinued in 1989 when the General Assembly adopted Resolution 44/198 and decided that a revised PAM and a PAI would be established at each duty station. Moreover, in 1991, the General Assembly by Resolution 45/259 approved the deletion of post adjustment schedules and references to such schedules from the Staff Regulations. The ILO says that the current method of calculating post adjustment is based on the determination of a multiplier for each duty station and the establishment of the multiplier for a duty station is understood by the ICSC and the General Assembly as a means of classifying duty stations. This is within the power contemplated by Article 11(c). However, the obvious difficulty with this analysis is that these changes postdate the adoption of the ICSC's Statute, and whatever may have emerged systemically by actions of the General Assembly cannot, in the absence of an amendment to the Statute, found an interpretation of the Statute, adopted almost one and a half decades earlier, which is at odds with its terms. Article 30 of the Statute provides that amendments to it are to be made by the General Assembly and are subject to the same acceptance procedure "as the present statute". Article 1 provides that acceptance involves notification thereof in writing by the executive head of the organization.

38. The ILO contends that there is an established practice accepted by the General Assembly involving the ICSC determining, by decision, PAMs and thus their effect on salaries. It contends that practice impacts, as a matter of law, on the scope of the powers of the ICSC. It refers to instances where practice is, so it contends, as a matter of international law, accepted and recognised. However, even if this were so, it would be a large step for this Tribunal to conclude that the

Statute of a body such as the ICSC did not define and delimit its powers. The ILO has accepted the authority of the ICSC but necessarily on the basis of its role, as established by its Statute. The Statute recognises, in Article 1, an organization's participation in the United Nations common system is based on its acceptance of the Statute in the manner referred to earlier. The contention of the ILO would involve the adoption of a principle by this Tribunal that the conduct of the ICSC together with its acceptance by the General Assembly, even if agreed to or accepted without objection by some or all organizations participating in the United Nations common system, could or even would result in an alteration of the powers of the ICSC irrespective of how they might be defined or constrained by its Statute.

39. In relation to the relevance of practice, the complainants say practice is not legally binding if it contravenes a written rule that is already in force. This principle is well established in the Tribunal's case law (see, for example, Judgment 3883, consideration 20). However, the ILO argues this principle concerns only the relationship between written rules and practice in the confined context of the legal relationship between staff and an organization. While this latter point is correct, the principle is a manifestation of a more fundamental requirement, namely the creation of stability, predictability and certainty. This matter was recently discussed by the Tribunal in the context of the operation of the principle of *stare decisis* in Judgment 3450. The Tribunal observed in consideration 8, that it is important for the law to be stable, predictable and certain and the principle of *stare decisis* "[...] serves a much more fundamental and important purpose of creating consistency and predictability in a legal system". The Tribunal observed that principles and interpretations of the Tribunal in earlier judgments should be followed "in order to create a stable, predictable and certain legal system concerning the rights and obligations of both staff and organizations". To accept the contention of the ILO concerning the legal effect of practice is to invite instability, unpredictability and uncertainty and must be rejected.

40. The ICSC did not have power to decide, itself, the amounts of post adjustments with the ultimate consequence that the salaries of

Geneva-based officials in the Professional category and above be reduced. The ICSC could only make recommendations and not decide on amounts. That was the preserve of the General Assembly.

41. The scheme of the ICSC's Statute is relatively clear. On some matters the ICSC is authorised to make a decision. On some matters it is authorised to make a recommendation to the General Assembly. In the latter situation, the reservation of the power to decide to the General Assembly is intended to ensure that the actual decision is made at the highest level. The role of the General Assembly is not intended to be nominal or symbolic. Otherwise there would be no purpose served by conferring on it the power to decide rather than on the ICSC. The General Assembly, obviously aided by the recommendations of the ICSC and the reasons for those recommendations, must give genuine and realistic consideration to the matter on which a decision must be made. If there is information known to the General Assembly that, in a material way, bears upon whether it should accept and act on the recommendation of the ICSC or reject the recommendation, then it must have regard to the information or material. In the present case that now would include the report of the independent expert retained by the ICSC and the reasons advanced by the Geneva-based organizations, founded in particular on the report of the statisticians they had retained. It also must have regard to the purpose for which the whole scheme of post adjustments was established, namely to give effect to the Noblemaire principle discussed earlier. That purpose is not to create economies by reducing salary costs even if, in relation to any particular duty station, that is a consequence of the operation of the scheme for the purpose for which it was established.

42. The ICSC's decisions on this matter were without legal foundation. On any reasonable view, the General Assembly did not consider and act on a recommendation in adopting its Resolution 72/255 in December 2017. It is not apparent that the General Assembly exercised any discretionary decision-making power whether to act on a recommendation but assumed, as noted earlier, the decision had already been made. Accordingly, action of the ILO to reduce the salaries of the

complainants and interveners based on the ICSC's decisions was legally flawed and should be set aside.

43. The outcome involving no decrease in salaries referred to in consideration 14, above, depended on the maintenance of the 5 per cent threshold that was reaffirmed in 2015 and not its reduction to 3 per cent as occurred in July 2017. But that reduction was itself legally flawed. For some time before 2015, the ICSC had adopted a methodology that had, as an element, a gap closure measure. It provided, amongst other things, a 5 per cent buffer when salaries might be adjusted as a result of implementing the results of a new cost-of-living survey.

44. In 2015, this policy was revised by the ICSC. In a note prepared by the secretariat of the ICSC dated 1 June 2015 for its 81st session between 27 July and 7 August 2015, options were canvassed concerning the operation of the gap closure measure. The 1 June 2015 note explained that the 5 per cent augmentation of the updated PAI, part of the gap closure measure, "provides a margin for the error that may result from determining salaries exclusively on the basis of a single cost-of-living survey producing negative results".

45. In July 2017, at its 85th session, the ICSC reverted to the application of the gap closure measure as it had been applied before the changes in 2015. It also then adopted the threshold percentage as 3 per cent rather than 5 per cent. The change in the percentage is discussed shortly. However it is convenient to note a description given by the ICSC in a booklet published in April 2018 entitled "UNITED NATIONS POST ADJUSTMENT SYSTEM". The booklet said at page 40:

> "The gap closure measure (GCM) is designed to mitigate the impact of the implementation of negative survey results leading to a post adjustment index that is lower than the prevailing pay index by more than 3 per cent. It is applicable to all duty stations regardless of type (Group I or Group II). The GCM is applied as follows [...]:
>
> a. If the PAI resulting from the [cost-of-living] survey is lower than the existing pay index (multiplier +100) by 3 per cent or less, the existing PAM is maintained until the PAI catches up with the pay index;

b. If the PAI resulting from the [cost-of-living] survey is less than the existing pay index by more than 3 per cent, a revised PAM equal to the survey PAI plus 3 per cent is promulgated;

c. This revised PAM is applicable for all staff members in the duty station. Existing staff members, already at the duty station before the implementation date of the survey results, receive the revised PAM plus a personal transition allowance (PTA).

d. The PTA is the difference between the existing PAM and the new PAM. It is paid in full for the first six months, and adjusted downwards every four months until it is phased out.

e. During an adjustment month, the new PTA is calculated by taking the difference between the prevailing pay index and the pay index applicable to existing staff (that is, the prevailing pay index plus the existing personal transitional allowance), reduced by 3 per cent."

46. As noted earlier, the ICSC met in its 85th session in Vienna between 10 and 21 July 2017 and published a report of the workings of that session on 22 September 2017. The report addressed, in a summary way, the gap closure measure. The ICSC made, relevantly, several decisions. The first was expressed as follows:

> "76 (a) [...] Approve a margin of 3 per cent to be added to the results of all cost-of-living surveys conducted under the round for 2016 that are lower than the prevailing pay index by more than 3 per cent, in view of the recommendation of the Advisory Committee's at its resumed thirty-ninth session."

The second decision contained several elements under the general heading "Implementation of the results of the cost-of-living surveys conducted in the round for 2016". The ICSC decided as follows:

> "78. Taking into account the appeals by representatives of organizations and staff federations, the [ICSC] decided to approve the following modification of the gap closure measure, an operational rule designed to mitigate the negative impact on salaries of the results of cost-of-living surveys that are significantly lower than the prevailing pay indices:
>
> (a) In accordance with the Commission's decision in 76 (a), the post adjustment index derived from the survey (updated to the month of implementation) is augmented by 3 per cent to derive a revised post adjustment multiplier for the duty station;
>
> (b) The revised post adjustment multiplier is applicable to all Professional staff members in the duty station. Existing staff members already at the duty station before the implementation date of the survey results

receive the revised post adjustment multiplier, plus a personal transitional allowance;

(c) The personal transitional allowance is the difference between the revised and prevailing post adjustment multipliers. It is paid in full for the first six months after the implementation date; and adjusted downward every four months until it is phased out;

(d) During an adjustment month, the new personal transitional allowance is calculated by taking the difference between the prevailing pay index and the pay index applicable to the existing staff (that is, the prevailing pay index plus the existing personal transitional allowance), reduced by 3 per cent."

47. Several observations can be made about the way in which ICSC decided, in July 2017, to modify the gap closure measure. The first is that in its report on 22 September 2017 on its 85th session nothing is said which explains in statistical, mathematical, methodological or otherwise scientific terms why the reduction from 5 per cent to 3 per cent was necessary or desirable or justified. It is said that the modifications were based on a recommendation of ACPAQ at its resumed 39th session and involved "taking into account the appeals by representatives of organizations and staff federations". In the 22 September 2017 report, at paragraph 48, the following is also recorded:

> "No member of the [ICSC] questioned the results of the cost-of-living surveys or the faithful application of the approved methodology and the general consensus was that, since the results were expected to have a heavy impact on staff remunerations, not only in Geneva but potentially other duty stations, it was wise to seek a solution that would enhance existing mitigation measures and that there was still time to do so. In concrete terms, several members of the [ICSC] indicated that the parameters of the gap closure measure, including the mitigation provided by the augmentation of severely negative survey results, should be revisited."

48. The adoption of the threshold percentage at 3 per cent and the reversion to a model of the gap closure measure existing before 2015 attenuated some of the immediate negative effects of the salary reduction on some of the staff concerned. However the reduction of the percentage had the result that even if the criticisms of the Geneva statisticians were well founded and their conclusions about the quantum of the potential

decrease correct, downward adjustments to salaries would nonetheless take place whereas they would not had the prevailing 5 per cent threshold been retained.

49. As discussed earlier, while an international organization (or a body such as the ICSC) is free to choose a methodology, system or standard of reference for determining salary adjustments, it must be a methodology which ensures that the results are stable, foreseeable and clearly understood or transparent (see, for example, Judgments 1821, consideration 7(b), and 2095, consideration 13). The requirement that the results must be stable, foreseeable and clearly understood or transparent does not mean a salary regime is fixed once and for all and is incapable of change (see Judgment 1912, consideration 14). But in the documentary material before the Tribunal, the alteration of the operative percentage in the gap closure measure was without real explanation as to the rationale in statistical, mathematical, methodological or otherwise scientific terms. A change from 5 per cent to 3 per cent is at least in mathematical terms, a two-fifths reduction or, expressed differently, a reduction by 40 per cent. And, as stated by the ICSC itself, this was a measure to create a margin for error that may result from determining salaries exclusively on the basis of a single cost-of-living survey producing negative results. No explanation was proffered as to why 5 per cent was appropriate up to and including 2015 and yet no longer appropriate in 2016 and 2017. The reduction of the threshold percentage to 3 per cent was not substantiated nor transparent.

50. It is necessary to consider what is the appropriate relief. In a number of cases in which the complainants have established that a decision to adjust salaries was unlawful, the order of the Tribunal has been to set aside the impugned decision and to remit the matter to the organization to consider the matter afresh and make a new decision (see, for example, Judgments 1821, consideration 11, and 3324, considerations 22 and 23). However, in the present case, the unlawfulness of the administration’s decision flowed from the unlawfulness of the decision of the ICSC. The decisions to implement ICSC/CIRC/PAC/518

and ICSC/CIRC/PAC/522 are unlawful. The ILO cannot, by a new decision, render the ICSC's decisions lawful. Accordingly, the ILO should be ordered to reinstate the applicable PAM in place immediately before the decision to reduce salaries was taken and pay the complainants and interveners the salary lost between then and the time the PAM are reinstated, together with interest. However, the Tribunal considers that this is not a case in which moral damages, exemplary damages, or costs are warranted.

51. In this judgment, the Tribunal has not addressed a multiplicity of other arguments raised by the complainants in their pleas, though, it should be observed, a number of them raise issues of real substance. It has been unnecessary to address them.

## DECISION

For the above reasons,

1. The impugned decisions of 28 September 2018 and 18 October 2018 are set aside.

2. The complainants' and interveners' April 2018 payslips and all subsequent payslips implementing the ICSC's contested decisions regarding the revised post adjustment for the duty station of Geneva are set aside.

3. The ILO shall provide the complainants and interveners with new revised payslips as from the April 2018 payslip with a post adjustment multiplier not based on the revised post adjustment index resulting from the 2016 cost-of-living survey.

4. The ILO shall pay each complainant and each intervener an amount equivalent to the difference between the remuneration actually paid to them since April 2018 and the remuneration that would have been paid to them during the same period but for the

implementation of the ICSC decisions, with interest at the rate of 5 per cent per annum from due dates until the date of final payment.

5. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, Ms Dolores M. Hansen, Judge, Mr Michael F. Moore, Judge, Sir Hugh A. Rawlins, Judge, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Yusra Suedi, Legal Officer in the Registry.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

FATOUMATA DIAKITÉ

YVES KREINS

YUSRA SUEDI

Annex 1

*In re* B. and others

Mr A. B. and the following 49 complainants
(in alphabetical order):

*(names removed)*

Seven interveners (in alphabetical order):

*(names removed)*

Annex 2

*In re* A.-M. and others

Mr E. A.-M. and the following 69 complainants
(in alphabetical order):

*(names removed)*

Annex 3

*In re* A.-U. and others

Mr A. A.-U. and the following 160 complainants
(in alphabetical order):

*(names removed)*