

Judgement No. 109

(Original : English)

Case No. 112 :
Ashton (Validation of
non-pensionable
service.)

Against : The Secretary-General of
the International Civil
Aviation Organization

Request by a technical assistance official of ICAO for validation by the Joint Staff Pension Fund of a period of employment prior to his participation in the Fund. Intervention by the Joint Staff Pension Board.

Observation by the Tribunal that in his contested decision, the Respondent, while indicating that it was not for him to decide on the request for validation of prior service, nevertheless expressed his view on the legal question of the Applicant's right to such validation.—Lack of substance in an application directed against the said decision, since the ICAO Staff Pension Committee, the competent body, had taken a negative decision.—Possibility for the Applicant to refer the matter to the Joint Staff Pension Board.—Allegation by the Applicant that he sustained injury.—Observation by the Tribunal that the Applicant had not requested compensation from the Respondent for the alleged injury, and that the question had not been considered by the Advisory Joint Appeals Board.—Irreceivability of the application.

Aspects of the case on merits.—The Tribunal refuses to pass judgement on them. Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; Mr. R. Venkataraman, Vice-President ; Mr. Louis Ignacio-Pinto, alternate member ;

Whereas, on 21 January 1967, Robert Ashton, the Applicant in the present case and, at the time, a technical assistance official of the International Civil Aviation Organization, hereinafter called ICAO, requested an extension of the time-limit for the filing of an application to the Tribunal ;

Whereas, on 14 February 1967, the Applicant requested the President of the Tribunal to designate a counsel to assist him in drawing up and submitting the application ;

Whereas, on 15 February 1967, the President, with the agreement of the Respondent, extended to 29 April 1967 the time-limit for the filing of the application ;

Whereas, on 20 February 1967, the President, in pursuance of United Nations Administrative Instruction ST/AI/163, designated as counsel Mr. Hernando Florentin, a staff member of the United Nations ;

Whereas, on 27 April 1967, the Applicant filed an application to the Tribunal requesting :

“(a) A declaration that by refusing the Applicant's request for validation by the Joint Staff Pension Fund of his period of employment from 5 October 1951, the date of his entry on duty, to 1 January 1958, the date of his participation in the Fund, the Respondent and the ICAO Staff Pension

Committee infringed the Applicant's contract of employment and conditions of employment ;

"(b) An order against the Respondent to pay to the Joint Staff Pension Fund a sum equivalent to 14 per cent of the salary received by the Applicant from 5 October 1951 to 31 December 1957, with compound interest, to enable the Fund to pay to the Applicant the benefits due to him for the entire period of his employment with ICAO ;

"(c) An order for payment to him of the sum of \$17,725 if the Respondent decides to pay compensation for the injury sustained, by virtue of the option given to him under article 9, paragraph 1, of the Statute of the Tribunal. (The amount requested is based on a calculation of annuities which is attached as Annexes 17 and 18) ;

"(d) An order to pay to him costs in a sum that will be determined later according to actual legal expenses that the Applicant may have incurred." Whereas the Respondent filed his answer on 31 May 1967 ;

Whereas, on 29 June 1967, the Applicant filed written observations which he amended on 29 July 1967 ;

Whereas, in accordance with article 21 of the Rules of the Tribunal, the application was transmitted on 24 July 1967 to the United Nations Joint Staff Pension Board ;

Whereas, on 31 July 1967, the Secretary of the United Nations Joint Staff Pension Board requested communication of the Respondent's answer and any further pleadings or other documentation admitted to the dossier ;

Whereas, on 9 August 1967, the Executive Secretary of the Tribunal, on the instructions of the President, communicated the Respondent's answer and the Applicant's written observations ;

Whereas the Respondent, in reply to a question put by the President, submitted a written statement on 17 August 1967 ;

Whereas, on 13 September 1967, the Secretary of the United Nations Joint Staff Pension Board, under article 20 of the Rules of the Tribunal relating to intervention, submitted his observations on behalf of the Chairman of the Board ;

Whereas, on 3 October 1967, the Respondent submitted a request for withdrawal from record of certain documents ;

Whereas, on 10 October 1967, the Applicant informed the Tribunal that he had no objection to the request ;

Whereas the facts in the case are as follows :

The Applicant is a former technical assistance official of ICAO who was engaged as an expert and served in the organization under successive contracts from October 1951 until his retirement in 1967. On 1 January 1958, he became a full participant in the United Nations Joint Staff Pension Fund under article 248 (a) of the third edition of the Technical Assistance Board Manual of Personnel Policies and Procedures, which came into force on that date. Since several ICAO technical assistance experts admitted on 1 January 1958 to participation in the Pension Fund had requested retroactive participation from the beginning of their service with the organization, the question of validation of non-pensionable service, as has been explained in Judgement No. 89 of the Administrative Tribunal, was dealt with in a general circular of 26 February 1958 issued by the Director of the ICAO Technical Assistance Bureau and addressed to all staff members in the Applicant's category. In that document, the Director interpreted the texts that

had just become effective with a view to determining the rights of the staff members concerned, and ruled that validation was excluded in the case of technical assistance experts.

On 13 August 1959, the Applicant nevertheless made a request for validation in a memorandum addressed to the Chief of the Organization and Personnel Branch. In a reply dated 5 January 1960, the Secretary of the ICAO Staff Pension Committee informed him that the only article of the Pension Fund Regulations under which he could apply for additional benefits was article XVIII relating to voluntary deposits by participants. In 1965, the question of validation was studied within the ICAO Administration and on 21 February 1965, in a memorandum addressed to the Director of the Administration Bureau, the Applicant made another request on the grounds that his circumstances were exactly similar in context to those relative to Judgement No. 89 which the Administrative Tribunal had rendered in the meantime. On 26 March 1965, the Chief of the Personnel Branch sent him the following answer :

“ ...
“ I regret it is not possible to permit revalidation of previous service as requested by you, since you failed to make such request within the prescribed one year time-limit and your right thereto had, therefore, lapsed.

“ As regards Judgement No. 89, this merely settled the issue in litigation as between the parties involved. Incidentally, I may mention that the staff member involved had submitted a request for revalidation in good time, and upon denial of such request had lodged an appeal again within the required time-limits.”

On 17 April 1965, the Applicant addressed the following letter to the Chief of the Personnel Branch :

“ ...
“ Naturally, I do not carry around with me correspondence going back seven years but I remember very clearly checking in 1963 or 1964 that I had made a request for validation of my previous service from 1951 to 1957 inclusive and therefore my right of appeal has not lapsed.

“ In addition I draw attention to a memorandum from the Director, Technical Assistance Bureau to all technical assistance personnel affected and dated 26 February 1958 entitled ‘ Retroactive Participation in the United Nations Joint Staff Pension Fund of TA [Technical Assistance] Personnel who accrued five years’ service prior to 1 January 1958 ’. This memorandum told me in the penultimate paragraph that I was specifically excluded from validation of previous service. Because of the many queries about this point the memorandum was designed to discourage requests for validation of previous service. As is proved by Decision No. 89 of the UN Administrative Tribunal this was incorrect information.

“ I suggest that the proper line to follow is that the rules regarding appeals should apply from the date the Organization informs the staff interested of the decision taken as a result of Judgement No. 89 i.e., from 6 April 1965... Therefore in addition to and alternatively to my contention that I did ask for validation of my previous service I formally request that I am permitted to validate my previous service with ICAO for pension purposes from 4 October 1951 as my request is within one year of the date of the principle now established.”

The Chief of the Personnel Branch replied on 3 May 1965 by a letter which read as follows :

" ...

" I am afraid that the points you make in your letter do not in any way alter the advice I gave you in this matter in my letter of 26 March 1965. Our records show that your first inquiry as to the possibility of validation of your past service was made in a memorandum dated 13 August 1959, i.e., after the prescribed one-year time-limit. As for the memorandum from the Director of the Technical Assistance Bureau of 26 February 1958, this memorandum stated the Organization's view concerning validation rights of Technical Assistance Field Staff. If you considered this view invalid, you should have contested it by requesting validation of your past service within the prescribed time-limit and upon denial of your request which would have followed, you should have appealed the decision again within the prescribed time-limit. In this connection I must repeat my statement in the closing paragraph of my letter of 26 March 1965 to the effect that Judgement No. 89 merely settles the issue in litigation between the parties involved. It could in no way create a new right vested in a third party."

After a further exchange of correspondence between the Applicant and the Chief of the Personnel Branch, the latter conveyed to the Applicant, on 30 August 1965, the views of the Secretary General on the matter in the following letter :

" ...

" The Secretary General who is presently absent on home leave had, before leaving Montreal, stated his position on this matter in relation to all Technical Assistance staff members affected in the following terms :

" ' It is clear that it had been the intention of the Organization to exclude Technical Assistance Field Staff from pension fund participation for the period preceding 1 January 1958. This intention had not been given effective expression in terms of the letters of appointment issued to Technical Assistance Field Staff and the Organization sought to correct this shortcoming by issuing, on 26 February 1958, a circular to the staff concerned stating that the staff in question had been excluded from pension fund participation as intended. Staff members affected who did not agree with the statement in the circular of 26 February 1958 had open to them a course of action which one of them did in fact take, namely, to apply nevertheless for validation of their service for the period preceding 1 January 1958 and upon refusal to appeal the decision. Had others done so, as in the case of the appellant in Judgement No. 89, they would have been successful. However, not having done so has deprived them of the right to validate their service prior to 1 January 1958, and this right was not restored by the United Nations Administrative Tribunal Judgement No. 89 which merely settled matters as between the Organization and the appellant. Had this Judgement been rendered on the grounds that it was improper for the Organization to attempt to exclude such staff members from participation in the Pension Fund prior to 1 January 1958, there would have been a question whether the Organization was not morally bound to extend voluntarily the applicability of Judgement No. 89 to staff members who did not request validation in good time and who did not appeal. Since, however, Judgement No. 89 is not based on these grounds but on the technicality that the intended exclusion from participation

in the Pension Fund was ineffectively made, there does not appear to be any reason, even in the moral sphere, for the Organization to extend applicability of Judgement No. 89 to such staff members' "

"I trust that the above fully clarifies the position of the Secretary General in this regard and that you will find it directly relevant to your case." On 4 October 1965, the Applicant stated his own position as follows in a letter addressed to the Secretary General :

" ...
"I came to Montreal in 1957 on secondment to the Air Navigation Bureau and when it became known that Technical Assistance personnel would be admitted to the UN Pension Fund scheme with effect from 1 January 1958, I asked the Officer then in charge of UN Pension Fund affairs, Mrs. Masterman, if it was permissible for me to purchase my services prior to 1 January 1958 for pension purposes. She told me, at the time, that it was not permissible. Shortly afterwards, the Director, Technical Assistance Bureau, issued a memorandum, dated 26 February 1958, again specifically declaring that Technical Assistance personnel could not validate services prior to 1 January 1958 for pension purposes. I accepted this decision in the belief that it was a correct one and at that time knew very little about the attitude which could be adopted by a member of the Organization in disagreement with decisions made on personnel matters, detailed information of this nature is not readily available in the field and I had only recently come to Montreal from the field. Although I had discussed my pension position with Mrs. Masterman prior to the Director, Technical Assistance Bureau 26 February 1958 memorandum later, on 13 August 1959, I did make a claim in writing. It was not until some years later that I heard that another Technical Assistance expert, in the same position as myself, had tenaciously followed an appeal all the way through to the UN Administrative Tribunal. Obviously, a situation where every Technical Assistance expert followed the same procedure would be untenable.

"I believe that Judgement No. 89 of the UN Administrative Tribunal has established a precedent and that I am entitled to any benefits that might arise from this precedent. I have discussed this matter with my solicitor and he agrees with me and has advised me that under English law I would have a right to the same treatment as that given to the appellant by the UN Administrative Tribunal in their Judgement.

"This matter is of very great importance to me and since Part VII, paragraph 1 of the ICAO Service Code permits you, at your discretion, to consider claims made beyond the period of one year, I ask you to review the circumstances surrounding my claim and to permit it on the grounds that the first claim was made only six and a half months outside the twelve months time-limit i.e. eighteen and a half months after 26 February 1958 or alternatively, because my second claim on the same matter was made within twelve months of the date of the UN Administrative Tribunal Judgement No. 89."

The Secretary General confirmed on 8 October 1965 that he was unable to accede to the request for validation and, on 21 October 1965, the Applicant appealed from that decision to the Advisory Joint Appeals Board. In its Opinion No. 23 of 7 December 1965, the Board found *inter alia* that the action taken as a result of

the Applicant's letter of 13 August 1959 had been incomplete in that it had not been referred to the ICAO Staff Pension Committee, and that the advice and subsequent decisions conveyed to the Applicant had been given without the proper procedure for consideration of requests having been followed ; it recommended that the Secretary General refer the Applicant's request of 21 February 1965 to the ICAO Staff Pension Committee, together with all relevant correspondence, so that the Committee might be fully informed on the grounds for the request.

The Secretary General having accepted the above recommendation on 9 December 1965, the Applicant submitted to the Secretary of the ICAO Staff Pension Committee, on 20 December 1965, a request for validation of past non-pensionable service supported by an explanatory memorandum reading :

" ...
" "...When the ICAO Staff Pension Committee considers my case I would be glad if, as well as considering the relevant papers referred to it, it would take into account the three principal grounds on which I ask that I be allowed to validate my service for the period quoted, these are :

" (a) *Application for validation was made within the time-limit*

" My first application for validation of my service from 5 October 1951 to 31 December 1957 was made verbally on at least two occasions between the date when I was seconded to the Air Navigation Bureau in May 1957 to 26 February 1958 when the Organization's circular letter on this subject signed by the Director, Technical Assistance Bureau caused me to believe that the decision in that letter was a correct decision.

" When I was appointed to be the Inspector of Training in the Technical Assistance Bureau on 5 August 1959 and left Montreal on mission and home leave on 13 August 1959 having then doubts about the correctness of the circular letter mentioned, I made a further, and this time written, application.

" When I became aware of Decision No. 89 of the UN Administrative Tribunal, I made a second written application on 21 February 1965.

" The previous Secretary of the ICAO Staff Pension Committee, when asked by me on 12 December 1965, remembers that I did consult her in her office in 1957/1958 on several occasions about validation of my previous service. She cannot remember the exact dates but it is reasonable to accept that these consultations did take place, as I contend they did, between May 1957 and February 1958 when the memorandum of 26 February 1958 made further representations futile and were therefore made within twelve months of the date of my admission to the UN Pension Fund on 1 January 1958. It should be noted that there is nothing in Article III of the Regulations of the United Nations Joint Staff Pension Fund or Section B.19 of the Administrative Rules of the United Nations Joint Staff Pension Fund which requires that an application for validation of previous service should be in writing and it is reasonable for an applicant being based in the same building as the Secretary of the ICAO Staff Pension Committee, to make a primary application in person and ;

" (b) *Applicability of twelve months rule*

" Although Section B.19 requires that an application for validation of service must be made within twelve months of the applicant joining the

United Nations Joint Staff Pension Fund my first written application for revalidation of previous service was prejudiced and delayed by the action taken by the Organization in the letter dated 26 February 1958 previously mentioned and subsequently proved to be incorrect by Decision No. 89 of the United Nations Administrative Tribunal in the case of the appellant. The Secretary General has accepted that Decision No. 89 could be applied to other applicants having similar contractual conditions and has applied the decision in another case of an applicant who did not take his case to the United Nations Administrative Tribunal.

"The applicability of Decision No. 89 was left for the Organization to apply and the Secretary General on 4 February 1965 decided that he had no further obligation. However, in common law, because the United Nations Administrative Tribunal believed that there was general applicability of its Decision No. 89, which it left to the Organization to apply, the time limitation in cases having contractual similarity to that of the appellant in that decision can only be applicable for twelve months from 4 February 1965 or if not from that date on the date when the Secretary General made his final decision known to any other possible applicants. It should be noted that other possible applicants still employed by the Organization were known to him.

"My second written application was made within twelve months of 4 February 1965, and ;

(c) Undue influence and discrimination

"When Decision No. 89 of the United Nations Administrative Tribunal was handed down there was considerable internal correspondence within the Organization and correspondence with other bodies outside the Organization concerning the applicability of the decision to other persons having contractual conditions similar to that of the appellant in the case quoted. This correspondence seems to have come to an end on 4 February 1965 when the Secretary General decided that the Organization had no further obligation. But the Organization took no further steps to inform the relatively small number of persons affected (only myself and two others still employed by the Organization) that the memorandum of the Organization dated 26 February was incorrect in certain circumstances.

"Furthermore it would appear from Opinion No. 23 of the Advisory Joint Appeals Board on my application and the acceptance of the opinion by the Secretary General that the Organization was in error in conducting correspondence with me and that the Administrative Rules of the United Nations Joint Staff Pension Fund should have been followed. It follows that for the same reasons the memorandum of 26 February 1958 was also a mistake and should have been signed by the Secretary of the ICAO Pension Fund Committee or on behalf of that Committee. I was considerably influenced by the 26 February 1958 memorandum and consider that I was unduly influenced by it because it came to me signed by my Director whose apparent decision had considerable weight.

"The appellant and the one other person to whose case Decision No. 89 was applied were together in the same Technical Assistance Mission and were able to consult and be aware of each other's actions in the matter. I consider that in such a vital matter as validation of previous service the

Organization should have been more helpful to experts employed in technical assistance programmes who working alone or in small numbers in the field and often under pressure could not be expected to be fully aware of their rights in pension matters.

“ The memorandum of 26 February 1958 was an attempt to advise them but since in certain circumstances it was incorrect it follows that in those cases it has become discriminatory.”

On 30 December 1965, the Secretary of the ICAO Staff Pension Committee requested the Chief of the Personnel Branch to certify, in accordance with Administrative Rule B.20 of the Pension Fund, that the conditions stipulated under article III of the Regulations of the Pension Fund had been met. On 17 January 1966, the Chief of the Personnel Branch declined to provide the certificate for the reason that one of the conditions so stipulated was that the participant must “ elect within one year ” to validate his past non-pensionable service and this condition had not been met by the participant. The ICAO Staff Pension Committee considered the matter on 22 June 1966. On 25 July 1966, its Acting Secretary informed the Applicant that the Committee had not been able to accept his request for validation under Administrative Rule B.20 for the reason that the competent authority of the member organization had not certified that the conditions of article III of the Regulations had been met. On the same day, the Chief of the Staff Administration Section of the Personnel Branch informed the Applicant's representative that he was at his disposal should he wish to consult the Personnel Branch about the procedures open to the Applicant under the provisions of the ICAO Service Code or the Administrative Rules of the Pension Fund. On 10 August 1966, replying to a letter of 29 July 1966 from the Applicant's representative, the Secretary General advised the latter that, while reserving his right to contest whether the Applicant had any right to invoke the appeals procedure contemplated in GSI [General Secretariat Instruction] 1.4.7 [on the rules governing the constitution and procedure of the Advisory Joint Appeals Board], he found no ground to alter the decision of the competent authority not to certify that the conditions of article III of the Regulations of the Pension Fund had been met. Thereupon the Applicant's representative appealed to the Advisory Joint Appeals Board against that decision of 10 August 1966 by a letter dated 18 August 1966. The Board gave its Opinion (No. 28) on 28 November 1966. The sections of the Opinion entitled “ Findings and Conclusion ” and “ Recommendation ”, excluding the foot-notes, read as follows :

“ Findings and conclusion

“ 9. In considering this matter, the Board did not go into the question whether the terms of the contract of employment held by the Appellant gave him the right to validate his services with the Organization prior to becoming a participant in the Pension Fund. The principle underlying this question has already been decided by the United Nations Administrative Tribunal in a similar case (Judgement No. 89), and is binding on ICAO in accordance with the special agreement concluded between the United Nations and ICAO under Article 14 of the Statute of the United Nations Administrative Tribunal. The Board, therefore, has limited its consideration to the question of the applicability in the present case of the time-limits established by the Regulations and Administrative Rules of the UN Joint Staff Pension Fund with respect

to an application for validation of non-pensionable services. This, in the opinion of the Board is the only issue before it.

" 10. The Board is unable to accept the position taken by the then Director of Administrative Bureau, and communicated by the Chief of Personnel to the Appellant by letter dated 30 August 1965, on the question of the Appellant's request for validation of his previous services for pension purposes. According to this view, the Appellant should have taken the course of action as another staff member had done on receiving the memorandum of 26 February 1958 from D/TAB [Director, Technical Assistance Bureau], namely, to have applied for validation of his past non-pensionable service and to have appealed the decision when that request had been denied. The Representative of the Secretary General has not brought forward any new argument in support of the Administration's refusal to permit validation of such service, except to the extent of quoting Rule B.19 of the Administrative Rules and Article III of the Regulations of the United Nations Joint Staff Pension Fund which required that an application for validation should be filed within one year of the commencement of the applicant's participation in the Fund.

" 11. In 1956 a member of the Secretariat (Mr. D.P. Taylor), who had up to that time held successive contracts as a technical assistance expert to which the provisions of the Technical Assistance Board Manual of Personnel Policies and Procedures applied, and which included the so-called '*omnibus* clause', was allowed to revalidate his past non-pensionable service. However, in the memorandum of 26 February 1958 issued by the then D/TAB the Administration advised the staff members concerned as follows :

" 'May I draw your attention to paragraph 4 of this article, which specifically excludes you from validating your non-pensionable service by virtue of the fact that you were excluded by your contract, which was subject to the rules in the TAB Manual in which participation in the Pension Fund was not provided' "

" At a yet later stage the Administration claimed that it was the '*omnibus* clause' which constituted a specific exclusion of the right to such validation.

" 12. In Judgement No. 89, the United Nations Administrative Tribunal, giving its judgement in a similar case, considered that the '*omnibus* clause' did not specifically exclude the persons in whose contracts such a clause had been inserted from the right to validate their previous non-pensionable services for pension purposes.

" 13. The Board considers that, in the present case, the Appellant cannot be required to bear the consequences of not having made a written application within the period prescribed in the Regulations. In Judgement No. 89, the Tribunal said as follows (par. IV) :

" Each of the staff members in question was entitled to expect that his individual legal status would be determined on the basis of the interpretation given in that circular*, which had been issued by the competent authority and was binding on the latter until properly amended. "

* Memorandum dated 26 February 1958 mentioned in para. 11 above.

“ Therefore the staff member concerned was entitled to consider as valid an interpretation given by his competent authority ; such interpretation in this case being the circular letter dated 26 January [sic] 1958 issued by the Director of Technical Assistance Bureau. It is difficult to support the contention of the Administration on the one hand that the Appellant did not have the right to validate, and on the other, notwithstanding the fact that such a right had been recognized later on by the United Nations Administrative Tribunal, that the Appellant having been informed that he had no right should have exercised within a certain time his right to appeal against that interpretation.

“ 14. Following the above, the Board is of the opinion that when Judgement No. 89 of the United Nations Administrative Tribunal was given, in view of the fact that the Appellant had been misled by D/TAB's memorandum of 26 February 1958, the Administration should have accepted the Appellant's letter of 13 August 1959 as a proper election to have his past non-pensionable services validated, and instituted necessary action to have that request accepted.

“ Recommendation

“ 15. The Board recommends to the Secretary General that the application for validation of previous non-pensionable services made by the Applicant be clearly considered to have been made within time. ”

On 30 November 1966, the Secretary-General rejected the above recommendation on the grounds that the statement in paragraph 14 of the Opinion assumed that the Administration had the function of “ accepting ” applications for validation of non-pensionable services and assumed also that the Administration had the authority to dispense with the requirement as to the period of one year. In the Secretary General's view, neither assumption was correct since, as regards the first, the function of ICAO was only to certify whether or not “ the conditions of Article III ” had been met, and, as regards the second, the statutory requirement was binding on both the Applicant and the organization. On 27 April 1967, the Applicant filed the application referred to earlier.

While following the appeals procedure which led to the recommendation made by the Advisory Joint Appeals Board in Opinion No. 28 and its rejection by the Secretary General, the Applicant had on 29 July 1966 requested the ICAO Staff Pension Committee, under Administrative Rule G.9 of the Pension Fund, to review its decision of 22 June 1966 notified to him on 25 July 1966. That request, which had been submitted within the time-limit prescribed, was considered by the ICAO Staff Pension Committee on 6 October 1966. Since by that time more than two months from its submission had elapsed and since under Administrative Rule G.10 a decision on such a request should be taken within two months, the Committee referred the request to the Joint Staff Pension Board under Administrative Rule G.11. At its 110th meeting, the Standing Committee of the Board considered the request and decided that the matter be referred back to the ICAO Staff Pension Committee on the grounds that compliance with the time-limit of one year specified in article III of the Regulations of the Pension Fund was not one of the conditions on which Administrative Rule B.20 required the competent authority to certify. On 20 January 1967 the ICAO Staff Pension Committee accordingly reconsidered the application for validation, taking also into consideration a letter of 31 October

1966 in which the Applicant pointed out that the 1961 edition of the Administrative Rules did not contain the Rule (B.20 in the 1963 edition) requiring certification by the competent authority of the member organization. The Committee, however, refused to accept the application for validation on the grounds that it had no evidence that a valid application had been made within the prescribed time-limit. On 20 March 1967, the Applicant requested the ICAO Staff Pension Committee to review its decision of 20 January 1967. The Committee undertook the review on 19 May 1967 but confirmed its earlier decision on the same grounds. Regarding Opinion No. 28 the Committee considered that the recommendation of the Advisory Joint Appeals Board to the Secretary-General had no relevance in the ICAO Staff Pension Committee. The Committee noted that the rules required that applications for validation should be made to the Secretary of the Committee and it was for the Committee to decide whether any application had been made within the prescribed time-limit. In a letter of 24 May 1967, the Secretary of the Committee drew the Applicant's attention to his right to appeal that decision to the Joint Staff Pension Board under Administrative Rule G.7.

Whereas the Applicant's principal contentions are :

1. When applications were made for revalidation of non-pensionable service, twice verbally between May 1957 and February 1958, and in writing on 13 October 1959, Administrative Rule B.20 (1963 edition) did not exist. Therefore, no certification by the Administration was then necessary and the ICAO Staff Pension Committee should have processed the application.

2. Even if Administrative Rule B.20 were applicable, its applicability should only be admitted with the limitation proposed by the Standing Committee of the Joint Staff Pension Board, namely, that compliance with the time-limit of one year was not one of the conditions on which the competent authority was required to certify.

3. As a result of Judgement No. 89 of the Administrative Tribunal, the right of technical assistance experts to participate in the Pension Fund for the period preceding 1 January 1958 is no longer in question. That Judgement, far from having merely settled matters as between the parties, constituted in effect an authoritative rectification of a specific policy of ICAO, which is bound to have definitive legal consequences for ICAO and for all persons affected by that policy.

4. As a result of the circular letter of 26 February 1958 in which an official policy of the Administration was stated, the Applicant cannot be required to bear the consequences of not having made a written application within the prescribed period. Having misled the Applicant as to his rights, the circular had the legal effect of suspending the time-limit requirement. Therefore the Applicant sustains the statement of the Advisory Joint Appeals Board which appears in paragraph 14 of its Opinion No. 28.

5. The Respondent's argument that, as the Executive Head of a member organization, he does not have the competence to accept an application for validation of non-pensionable service is irrelevant and misleading since what the Advisory Joint Appeals Board intended was to prevent the Applicant from being penalized by the Administration's mistakes.

Whereas the Respondent's principal contentions are :

The appeal is not receivable for the following reasons :

1. The Executive Head of a member organization, such as ICAO, does not have the competence to accept an application for validation of non-pensionable service. If he purported to "accept" such an application, his action would be *ultra vires* and would not be binding on the Joint Staff Pension Fund. Under Administrative Rule B.12 (1967 edition), an application for validation of non-pensionable service must be addressed to the Secretary of the Committee of the organization to which the participant belongs.

2. Any declaration to the effect that the Respondent "refused the Applicant's request for validation" would be contrary to fact because the Respondent, in his decision of 30 November 1966, did not so refuse, but only stated that he did not have the function of accepting an application for validation ; and it would also be futile and meaningless because such a declaration would not be binding on the Joint Staff Pension Fund, or the Joint Staff Pension Board which administers the Fund, or the ICAO Staff Pension Committee which acts for the Board under delegated authority.

3. On 20 December 1965 the Applicant made an application to the ICAO Staff Pension Committee for validation of his previous service. On 19 May 1967 the Committee rejected that application. The Applicant, if he wishes to pursue his request for validation, can now only appeal to the Joint Staff Pension Board under Administrative Rule G.7.

4. In so far as concerns the refusal of the Respondent to accept the recommendation of the Advisory Joint Appeals Board, it is observed that :

(a) The Applicant himself says that it was not for the Respondent to judge the question of time-limit ;

(b) In any case, the Standing Committee of the Joint Staff Pension Board has decided that the ICAO Administration is not the competent authority to issue a certificate concerning the time-limit ;

(c) On the merits, the competent body, namely the ICAO Staff Pension Committee, has decided that an application for validation was not made by the Applicant within time ; and

(d) The decisions mentioned in (b) and (c) above are binding on the Applicant, subject only to review by the Joint Staff Pension Board.

The Tribunal, having deliberated from 9 to 18 October 1967, now pronounces the following judgement :

I. The contested decision dated 30 November 1966 rejected the Applicant's appeal on two grounds, namely, that the Respondent was not competent to "accept" applications for validation of prior non-pensionable service, and that the requirement as to the time-limit of one year specified in article III of the Regulations of the Pension Fund was binding on both the Applicant and the Organization. The Respondent further stated that if he had discretionary authority to dispense with the requirement as to the time-limit of one year, he would not be disposed to do so.

II. By his decision therefore the Respondent, while indicating that it was not for him to decide on the request for validation of prior service, nevertheless expressed his view on the legal question of the Applicant's right to such validation.

III. The Tribunal is informed that the request for validation has been denied by the competent authority, namely, the ICAO Staff Pension Committee, but that the Applicant may appeal to the Joint Staff Pension Board. Since the ICAO Staff Pension Committee, competent to decide the question of the Applicant's right to validation of his prior service, has taken a negative decision, there is no substance in an application directed against the Respondent's decision taken after consideration of the recommendation of the Advisory Joint Appeals Board.

IV. The Tribunal notes that in his written observations on the Respondent's answer the Applicant alleges that he sustained injury as a result of the Respondent's action relating to the validation of the prior service of technical assistance experts. As stated above, however, it is still open for the Applicant to refer the matter to the Staff Pension Board for final decision. Further, no compensation for the alleged injury has been requested from the Respondent ; nor has this point been considered by the Advisory Joint Appeals Board.

V. Moreover, an application directed against the decision of 30 November 1966, even if granted, would give the Applicant no relief and must therefore be declared infructuous and irreceivable.

VI. The Applicant contends, on merits, that he has suffered a legal injury in that he was prevented from making an application for validation of prior service within the prescribed time-limits on account of the circular dated 26 February 1958. According to him the effect of the circular had already been considered by the Tribunal in Judgement No. 89 which in paragraph IV decided as follows :

“ In form and content this document, which was addressed to all staff members in the Applicant's category, has the character of a general circular. Interpreting the texts that have just become effective, with a view to determining the rights of the staff members concerned, the Director rules that in the case of technical assistance experts validation is excluded on the basis of article III, paragraph 4 [of the Regulations of the Pension Fund].

“ Each of the staff members in question was entitled to expect that his individual legal status would be determined on the basis of the interpretation given in that circular, which had been issued by the competent authority and was binding on the latter until properly amended. ”

The Applicant argues that the circular was a ruling by a competent authority and was binding on a staff member until it was properly amended, and that when the Tribunal held in Judgement No. 89 that prior service with Technical Assistance could be validated for pension benefits, the right of the Applicant to claim the benefit of validation should have been deemed to be revived. The Respondent as a matter of fact did examine all the cases and, while admitting the claim of staff members who had filed applications for validation within the prescribed time-limit, however rejected the claim of the Applicant. It is observed that these applications were filed prior to the issue of the circular. The Applicant contends that the Respondent by his conduct had deterred the Applicant from filing his application for validation of prior service and that the Respondent therefore could not object on the ground that an application was not filed in time. Further, the Respondent was estopped from raising the objection regarding time-limits as the Respondent by his circular dated 26 February 1958 set out the legal position incorrectly, and

thereby misled the Applicant from filing his application for validation of prior service.

VII. The Tribunal, in view of its conclusion regarding the receivability of the present application, does not pass judgement on these aspects of the case. It is for the appropriate bodies to consider these points if and when a case is submitted to them for decision.

VIII. For the foregoing considerations the application is rejected and no order is made as to costs.

IX. In view of its decision on the question of receivability, the Tribunal has not considered it necessary to examine the contentions raised by the Joint Staff Pension Board in its intervention.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

R. VENKATARAMAN
Vice-President

L. IGNACIO-PINTO
Alternate Member

Jean HARDY
Executive Secretary

New York, 18 October 1967.

Judgement No. 110

(Original : English)

Case No. 108 :
Mankiewicz

**Against : The Secretary-General of
the International Civil
Aviation Organization**

Request by a former staff member of ICAO for recognition of his right to the salary and allowances to which he would have been entitled if the ICAO Council's decision amending the definition of dependents had not been applied to him or, alternatively, to a personal allowance.

Challenge by the Applicant to the legality of the ICAO Council decision of 17 June 1960 which amended the definition of dependents.—Barring of the Applicant by his failure to file an appeal with the Advisory Joint Appeals Board within fifteen days after receipt of the decision applying the amendment to his case.—Applicant's contention that he had a continually recurring right of appeal each time a payment was made to him.—Rejection of this contention, as the Applicant's alleged cause of action actually accrued on the date when the amendment was first applied to him.—On the merits, irrelevance of the Applicant's arguments challenging the legality of the Council's decision.—Exclusive competence of the Council in determining whether the facts presented to it form a sufficient foundation for its decisions.—Non-discriminatory character of the amendment.—The amendment as such did not have the effect of abolishing annual pay increments and future salary increases.—The Council's right to authorize the Secretary-General to specify the date on which the amendment would take effect and the manner of appli-