

## Judgement No. 151

(Original: English)

Case No. 148:  
Iyengar

Against: The Secretary General of the  
International Civil Aviation  
Organization

*Request by a staff member of ICAO on secondment from the Government of India for the recognition of his right to have been enrolled as a participant in the Joint Staff Pension Fund at an earlier date than he was.*

*Principal request.—The Applicant's contention that he was not excluded by the terms of his appointment from participating in the Pension Fund and that the prohibition stipulated by the Indian authorities was not binding on the Respondent.—Letters from the Applicant informing ICAO of this prohibition.—Reimbursement to the Applicant of his contributions to the national pension scheme.—Conclusion that, at the time of his entering the service of ICAO, the Applicant was excluded from participation in the Pension Fund.—Argument based on letters of appointment which stipulated that the Applicant's salary would be subject to a deduction.—The Applicant raised no objection or protest when the deductions were not made.—Conclusion of the Tribunal that the Applicant's exclusion from the Pension Fund was mutually understood and accepted.*

*First subsidiary request that the Applicant should have been enrolled as an associate participant on the introduction of the scheme.—Supplementary article B of the Pension Fund Regulations.—The Applicant contends that the prohibition of his Government did not extend to his enrolment as an associate participant.—As a matter of policy, the United Nations favoured the enrolment as associate participants of those not eligible for the status of full participant.—The relevant Personnel Directive was not applicable to ICAO.—Since the prohibition was stated in general terms, it equally applied to the Applicant becoming an associate participant.—Argument that the scheme of associate participation was only an insurance scheme.—Consideration of the scheme and rejection of the argument.*

*Memoranda from the Indian Ministry of Finance authorizing seconded Indian officials to become participants in the Pension Fund.—The Respondent cannot keep himself abreast of every change in the national regulations and rules.—The Respondent took action to remedy the situation as soon as the Applicant informed him that the ban had been removed.*

*The principal request and the first subsidiary request are rejected.*

*Second subsidiary request that the Applicant should pay into the Pension Fund only his contribution plus interest, the difference between that amount and the actuarial capitalization of the unpaid contributions being borne by the Respondent.—The request is rejected, as the obligation to enrol the Applicant in the Fund arose on the date on which he advised the Respondent of the rescission of the ban.*

*Request for costs.—The request is rejected, as no oral proceedings were held and the claims have been rejected on the merits.*

*Statement by the Tribunal taking note of a decision by which the Respondent agreed to exercise his discretion in the Applicant's case, in the same way as was done in the case of another Indian official in an analogous situation.*

*The application is rejected.*

## THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Francisco A. Forteza; Mr. Zenon Rossides, alternate member;

Whereas, at the request of N. V. S. Iyengar, a staff member of the International Civil Aviation Organization, hereinafter called ICAO, the President of the Tribunal, with the agreement of the Respondent, extended to 27 May 1971 the time-limit for the filing of an application to the Tribunal;

Whereas, on 7 May 1971, the Applicant filed an application the pleas of which read:

"1. Applicant prays the United Nations Administrative Tribunal to rescind Respondent's decision dated 25 November 1970 insofar as it accepted the finding of the ICAO Advisory Joint Appeals Board of 12 January 1970, which rejected Applicant's request that he should be considered as having been a participant in the United Nations Joint Staff Pension Fund since 30 May 1955 and that, consequently, Respondent should pay into the Pension Fund the amounts sufficient to meet Respondent's obligation vis-à-vis the Pension Fund, while Applicant would pay his own contribution (namely, 7 per cent of his successive salaries from 30 May 1955 until the date of his participation) augmented by interest on that contribution, as determined by the Pension Fund and would reimburse Respondent the \$1,000 paid to him in December 1957;

"2. Applicant therefore requests the Administrative Tribunal to order Respondent to perform specifically vis-à-vis Applicant and the UN Pension Fund the obligation imposed upon him by Article II, paragraph 1 of the UN Pension Fund Regulations (JSPB/G.4/Rev.1) and consequently to pay into said Pension Fund the amount found by the latter's Consulting Actuary to be sufficient to meet Respondent's obligation vis-à-vis the Pension Fund so that Applicant's period of service from 30 May 1955 until 1969 be taken into account for the calculation of his retirement benefits at age 60;

*"Alternatively.*

"3. Applicant requests the Administrative Tribunal to order Respondent to bear the legal consequences of his failing to observe the obligation imposed upon him by Supplementary Article B of the UN Pension Fund Regulations (JSPB/G.4/Rev.2) and of Applicant's consequent inability to validate his prior service up to 1 January 1958 under Article III, paragraph 1 of the UN Pension Fund Regulations JSPB/G.4/Rev.5; therefore to order Respondent to perform specifically said obligations by paying into the UN Pension Fund the amount found to the latter's Consulting Actuary to be sufficient to include Applicant's service from 1 January 1958 up to 1969 into his contributory service for pension purposes;

*"Alternatively.*

"4. Applicant requests the Administrative Tribunal, in case Respondent would refuse specific performance of his obligations, to pay directly to Applicant for the injury thus sustained by him an amount equivalent to that stated in paragraph 2 or paragraph 3;

"5. Applicant requests the Tribunal to rule that whatever period of his service prior to 1969 is included in his contributory service for pension purposes, Applicant should pay into the Pension Fund only his 7 per cent contribution plus interest, the difference between that amount and the

actuarial capitalization of the unpaid 7 per cent contributions being borne by Respondent, as being the consequence of his non-observance of his obligations;

"6. Applicant further requests the Tribunal to order Respondent to pay to Applicant a sum of \$1,000 towards the costs of legal representation and counsel.";

Whereas the Respondent filed his answer on 9 June 1971;

Whereas, on 14 June 1971, the Applicant requested that oral proceedings be held in the case;

Whereas the Applicant filed written observations on 15 June 1971;

Whereas, on 26 July 1971, the Executive Secretary of the Tribunal informed the parties that the President had decided that no oral proceedings would be held in the case;

Whereas the Applicant filed additional statements on 16 September and 4 October 1971;

Whereas, on 4 October 1971, the Applicant filed additional pleas reading as follows:

"1. Applicant respectfully requests the Administrative Tribunal to order Respondent to compensate him for the necessary expenses incurred in connexion with the examination of his personal file by his counsel and the preparation of an additional statement.

"2. These expenses consist of

"(a) The normal *per diem* of \$29, for two days' time required for the study of the file and preparation of the statement, that is, a total of \$58.

"(b) The cost of labor for the typing in New York of the additional statement, of \$30.

"3. Compensation for or reimbursement of these expenses is requested without prejudice to the other requests for damages and payment of legal fees stated in the original Application.";

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 30 May 1955 as Communications Officer in the Far East and Pacific Office at Bangkok, on secondment from the Government of India, under a temporary appointment which was due to expire on 31 December 1955 but was subsequently extended to 30 June 1956; the appointment specified that apart from the deductions for the Staff Assessment Plan, the Applicant would not contribute to any fund of the Organization. On 1 July 1956 the Applicant was granted a two-year appointment. In a communication of 16 August 1956 transmitting the letter of appointment to the Applicant, the Secretary General informed him that under part III, article XII.1 of the ICAO Service Code he would be expected to participate in the United Nations Joint Staff Pension Fund and that if he wished not to join the Fund, he should send a formal letter requesting that he might be excluded. On 12 November 1956 the Applicant confirmed that he wanted to join the Pension Fund and requested that the necessary deductions be made from his salary commencing 1 November 1956. On 28 December 1956 the Acting Secretary General wrote to the Applicant as follows:

"In your letter . . . dated 12 November 1956 addressed to the Secretary General you intimated that you wished to join the United Nations Joint Staff

Pension Fund and that the necessary deductions from your salary may be made from 1 November 1956 on account of your contribution to the Fund. Normally there would be no occasion for the Organization doing anything else than treating you as having joined the Fund but it happens that the Secretary General is personally aware that the policy of the Government of India is to prohibit its officials serving in the United Nations or in any specialized agency from joining the Fund. In fact, the Secretary General has been in correspondence with the Minister in the Ministry of Communications on this subject. The Secretary General desires strongly that Indian Government officials serving in ICAO should be able to join the Fund. In my own case there is a specific clause in the authorization which was given me by the Indian Government to serve in ICAO whilst still retaining my status as a member of the service in India that I was not to join the United Nations Joint Staff Pension Fund. During my recent visit to New Delhi I ascertained that the Government had not yet taken a decision in regard to altering the clause in question; and last week the Secretary General received a cable from the Indian Minister concerned that the question was under active consideration by the Government. In these circumstances, I would advise you first to check the terms contained in the authorization given by the Government of India to you for joining ICAO so as to make sure that nothing in that authorization prohibits you from joining the United Nations Joint Staff Pension Fund. In case there is such a condition, would you please write to ICAO so that the Secretary General's desire to take up your case in addition to mine with the Indian authorities may be carried out."

On 23 January 1957 the Applicant replied as follows:

"Further to my letter of 12 November 1956, I wish to advise you that in the terms of my release for service in the Organization the Government of India have prohibited me from joining any Pension Fund under the Organization. As I am desirous of joining the U.N. Pension Fund, I shall be grateful if you will take up the question of my participation in the pension fund with the Indian authorities."

On 30 April 1957 the Secretary General addressed to the Minister of Communications of the Government of India the following letter:

"I would refer to your cable . . . in which you indicated that the question of Mr. P. K. Roy's joining the United Nations Joint Staff Pension Fund was under active consideration. We have not yet received information on the decision of the Government of India in this case.

"There is another staff member of Indian nationality and servant of the Government of India, Mr. N. V. S. Iyengar, who has become eligible to join the United Nations Pension Fund but who is unable to do so under the terms of his release by your Government.

"It is very important to have uniformity in regard not only to salary but also other conditions of service for all members of the staff of the Organization. This policy is rendered incapable of practical application in the case of two staff members, namely the above mentioned nationals of your country.

"Similarly, the Organization attaches importance to ensuring social security in respect of its staff members and their dependants."

On 19 December 1957 the Secretary General informed the Applicant that the matter had been further represented to the Government of India, but without success, and that he had consequently decided, in line with the practice of the United Nations in similar cases, to reimburse to the Applicant the amount of the contributions which he was required to make for his continued participation in the Pension Scheme of the Indian Government. Arrangements were made accordingly. On 1 July 1958, 1 July 1959 and 1 July 1961, the Applicant was granted appointments for one year, two years and one year respectively. These appointments contained a clause providing that the Applicant's salary would be subject to a deduction of 7 per cent as his contribution towards participation in the United Nations Joint Staff Pension Fund. In connexion with the second of those appointments, the Chief of the Organization and Personnel Branch addressed to the Applicant a letter dated 13 June 1960 which read in part:

“ . . .

“It would appear that you have not produced to the Finance Branch receipts for any payments to the Accountant General, India, for the period from 1 January 1958 onwards in respect of your contributions to the Indian Government's pension fund and that, therefore, no payments have been made into your banking account in respect of that period. You are, therefore, advised that if you desire to claim reimbursement you should communicate with the Finance Branch making your claim, supported by the necessary receipts.

“Another point noted in connection with pension matters is that your present letter of term appointment dated 3 April 1959, which was prefaced with the phrase ‘subject to the approval of the Government of India’ contained a clause providing for your participation in the United Nations Joint Staff Pension Fund. It is understood that you are still on deputation terms from the Government of India and that, therefore, you are not permitted under those terms to participate in the United Nations Joint Staff Pension Fund. If this is so, Clause 7 of your letter of appointment of 3 April 1959 would need to be deleted and it is thought that the best method of doing so would be in the form of a letter from you to the Secretary General indicating your agreement to the deletion of this particular clause from your letter of appointment.”

The Applicant's reply to that letter does not appear in the file. During the negotiation of the third of the above-mentioned appointments, ICAO expressed its willingness to offer a permanent appointment to the Applicant. It appeared, however, that the Government of India was unable to agree to the Applicant's permanent absorption in ICAO unless he resigned his post in India. As the Government was willing, on the other hand, to consent to three-year terms of deputation, the Applicant inquired, in a letter of 20 November 1961 addressed to the Chief of the Organization and Personnel Branch, whether ICAO would have objection to the adoption of such a procedure in order that he might complete 30 years of service with the Government of India and thereby become eligible for full pension benefits from the Government; the Applicant added: “No doubt the Government will, in accordance with past precedents, also permit me to join the U.N. Pension Fund”. On 8 December 1961 the Chief of the Organization and Personnel Branch replied that there would be no objection to the Applicant being placed on three-year periods of deputation by the Government of India, but mentioned that the Government of India had not permitted any of its employees serving on deputa-

tion with the United Nations organizations to participate in the United Nations Pension Fund. On 1 July 1962 the Applicant received a three-year appointment which was superseded on 1 January 1965 by another three-year appointment, and on 1 January 1968 he was granted a one-year appointment. On 7 March 1968 the Applicant informed the Chief of the Personnel Branch that the Government of India had amended its rules by an office memorandum dated 5 November 1966 in order to permit its officers seconded for service in international organizations to join the Pension Funds as full participants, and requested him to make the necessary arrangements for enabling the Applicant to join the Pension Fund with retrospective effect from 30 May 1955. On 21 March 1968, the Chief of the Personnel Branch asked the Applicant to obtain clarification as to whether the decision of the Government of India took effect from the date of the office memorandum or whether the officers concerned might be permitted to apply for validation of periods of service prior to 5 November 1966; he noted in that respect that during periods of full participation in the United Nations Pension Fund the Government would not make payments to the Indian Pension Fund on behalf of its seconded officers, according to the office memorandum, and that the periods of participation in the United Nations Pension Fund would not be counted for purposes of calculation of Government pension. On 28 March 1968 the Applicant replied that the Government of India should have no objection to the validation of the period of service prior to 5 November 1966 for, once it permitted him to join the United Nations Pension Fund, validation of past service was a matter between him and the Fund, governed only by article III of the Pension Fund Regulations; he added that such was in fact the practice followed in the Economic Commission for Asia and the Far East (ECAFE). As from 1 January 1969 the Applicant's appointment was extended on a month-to-month basis. On 17 January 1969 the Chief of the Personnel Branch communicated to the Applicant the decisions taken with regard to his participation in the United Nations Pension Fund, as follows:

“... ”

“As you know, since you are a member of the Indian Government service seconded at our request for service in this Organization, you were excluded from participation in the United Nations Joint Staff Pension Fund (see, *inter alia*, our letter of 28 December 1956 and your letter of 23 January 1957) in view of the injunction placed upon such participation by the Indian Government in connexion with your secondment. In view of the lifting by the Indian Government of the above-mentioned injunction, of which you advised us in your letter of 7 March 1968, we are prepared to remove now the exclusion of your participation in the United Nations Joint Staff Pension Fund and to enrol you as a full participant in the Fund. However, the period of your past exclusion from participation cannot be made pensionable since, under the Regulations of the Fund, Article III.1, in fine, such periods cannot be validated for pension purposes. (The point which you make in one of your communications, namely, that Indian Government servants of ECAFE who now join the United Nations Joint Staff Pension Fund as full participants can validate their service for pension purposes, does not constitute an analogy with your case inasmuch as these ECAFE staff members were associate participants in the United Nations Joint Staff Pension Fund during the period of their service preceding full participation, and Article III.1 of the Regulations of the Fund provides for validation of associate participants' service while it precludes specifically validation of past service during which participation in the Fund in any form was excluded.)

"As regards the date from which you will become a full participant in the Fund, this should be the date on which the motive for your exclusion from participation had ceased to exist, namely, 5 November 1966, the date of the rescission by the Indian Government of the injunction placed upon such participation. This would involve on our part the retroactive lifting of your exclusion from participation in the Fund with a consequent payment to the Fund of the actuarially calculated cost of such retroactive participation over the last two years. This actuarially calculated cost will be in excess of the normal contribution of 21 per cent plus interest which applies in cases where validation of past non-pensionable service is possible. Since, however, it was not until 7 March 1968 that you advised us of the rescission by the Indian Government of the injunction upon your participation in the Fund, we would be prepared to absorb the excess only for the period from 7 March 1968 so that in respect of that period you would be required to pay into the Fund only 7 per cent of your pensionable remuneration plus interest, with the Organization paying the required balance. As regards the period from 5 November 1966 to 6 March 1968, we would pay to the Fund 14 per cent of your pensionable remuneration plus interest, with you contributing the required balance. Upon receipt of your confirmation that the above cost sharing formula is acceptable to you, you will be advised of the amount of your share of the cost.

"As regards the question of reimbursing you for the payment of contributions which, during the period of your exclusion from participation in the United Nations Joint Staff Pension Fund, you were making to the Indian Government's pension plan, we were, as you know, always prepared to make such a reimbursement subject to presentation of a claim on your part supported by appropriate vouchers . . . Subject to the receipt of such vouchers we are prepared to arrange for the reimbursement for the period from 1 January 1958 until the effective date of your full participation in the United Nations Joint Staff Pension Fund set forth in the preceding paragraph. With respect to the period of your service from 30 May 1955 to 31 December 1957, you have already received reimbursement of your contributions to the Indian Government's pension plan."

The above decisions were confirmed on 13 May 1969 after a lengthy exchange of correspondence with the Applicant, who was enrolled retroactively in the Pension Fund as full participant with effect from 5 November 1966. On 15 July 1969 the Applicant lodged an appeal with the Advisory Joint Appeals Board, which handed down its Opinion (Opinion No. 35) on 12 January 1970. The Board's conclusion and recommendation read as follows:

*"Conclusion"*

"21. Taking all the above into consideration, the Board concludes that the Appellant was excluded from participation in the United Nations Joint Staff Pension Fund by virtue of the terms of his appointment from the date he joined the service of ICAO until 5 November 1966. The Board finds unacceptable the suggestion of the Representative of the Appellant that Judgement No. 89 (Case No. 84: Young against the Secretary General of the International Civil Aviation Organization) helped the case of the Appellant. Apart from other factors, the wording of the parallel regulation on which that Judgement was based was different. The regulation in force on the pertinent date, namely 1 January 1958, said that ' . . . a participant may

not make pensionable a period during which he was employed under a contract of employment which specifically excluded his participation in the Pension Fund' (para. 4 of Article III of the Regulations of the United Nations Joint Staff Pension Fund established on 7 December 1956). The current regulation—either Article III, para. 5, of GENERAL JSPB/G.4/Rev. 4 (Regulations in force from 1 January 1963) or Article III, para. 1, of GENERAL JSPB/G.4/Rev. 5 (Regulations in force from 1 January 1967)—does not use the term 'contract of employment', but 'terms of his appointment'. Clearly the Regulations of the United Nations Joint Staff Pension Fund have evolved during the course of the years and emphasis has shifted, making the particular dictum established in Young's case inapplicable to the present one.

*"Recommendation*

"22. Strictly applying the requirements of the Regulations and Administrative Rules of the United Nations Joint Staff Pension Fund, in so far as the Appellant seeks validation, for purposes of pension under the said Fund, of the period of service before 5 November 1966, the appeal must fail and the Board so recommends.

"However, in view of the Appellant's long service with the Organization for which he is not entitled to a reasonable pension, and considering the finding recorded in paragraph 19 (ii) and (iii) above\*, the Board also recommends, on grounds of equity, that the Secretary General exercise his discretion as provided for in the last sentence of Article XII, Part III of the ICAO Service Code."

On 25 November 1970 the Secretary General communicated his decision to the Applicant, as follows:

"The Advisory Joint Appeals Board, in its Opinion No. 35, has stated in paragraph 22 that in so far as the Appellant seeks validation, for purposes of pension under the United Nations Joint Staff Pension Fund, of the period of service before 5 November 1966, the Appeal must fail, and the Board has so recommended. I accept this finding and the Appeal is rejected.

"The Board, however, in view of the Appellant's long service and other considerations has recommended, on grounds of equity, that the Secretary General exercise his discretion under the last sentence of Article XII, Part III, of the ICAO Service Code. I accept this recommendation in the sense that I am prepared to exercise my discretion with a view to making other suitable pension arrangements within the limits of expenditure specified in that Article. I authorize the Chief, Personnel Branch, to explore the feasibility of such other arrangements, consulting, as far as practicable, the wishes of the Appellant. The Chief, Personnel Branch, is requested to submit his report in the matter at an early date for my decision.

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\* "19. . . . From the evidence on record, the Board finds the following facts relevant and established:

- "(ii) The Appellant had expressed the desire to join the United Nations Joint Staff Pension Fund by his memoranda dated 12 November 1956 (Exhibit 5) and 23 January 1957 (Exhibit 7).
- "(iii) One staff member, in circumstances similar to the Appellant's, had been given the benefit of an arrangement that was provided for in the last sentence of Article XII, Part III of the ICAO Service Code."



"I wish it to be noted that my willingness to exercise discretion, pursuant to Article XII of the ICAO Service Code, does not affect my decision in the first paragraph above that the Appeal stands rejected in so far as concerns the question of the Appellant's participation in the United Nations Joint Staff Pension Fund before 5 November 1966."

On 7 May 1971 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The so-called "injunction" or "prohibition" stipulated by the Indian authorities in their relations with the Applicant was an extraneous factor as regards the Respondent, did not constitute the "exclusion" referred to in the Pension Fund Regulations, and was in no way one of the terms of the Applicant's appointment.

2. The Applicant should have become participant in the United Nations Pension Fund on 15 September 1956 at the latest.

3. The Applicant could have been made associate participant on or about 1 January 1958.

4. Had the Applicant been an associate participant on 1 January 1967, he could have validated then his prior service as associate participant.

Whereas the Respondent's principal contentions are:

1. The Applicant being on secondment from his Government, ICAO was bound to respect the Government's policy prohibiting the Applicant "from joining any Pension Fund under the Organization".

2. There was an express agreement between ICAO and the Applicant that, while he was excluded from joining the Pension Fund, he would receive reimbursement of his pension contributions to his Government. That agreement excluded the Applicant's participation in the Pension Fund; it remained unaltered until the date on which the Applicant was allowed to join the Pension Fund and could not be altered except by the consent of both parties.

The Tribunal, having deliberated from 5 to 14 October 1971, now pronounces the following judgement:

- I. The Applicant's first contention is that he was not excluded by the terms of his appointment from participating in the United Nations Joint Staff Pension Fund and that the prohibition stipulated by the Indian authorities was not binding on the Respondent nor constituted a term of the Applicant's appointment. The Applicant also relies on his letters of appointment covering the period from 1 July 1959 to 30 June 1962, which provided that his salary would be subject to a deduction of 7 per cent as his contribution towards participation in the Pension Fund.

The Tribunal notes, however, that in his letter dated 23 January 1957 the Applicant stated:

"... I wish to advise you that in the terms of my release for service in the Organization the Government of India have prohibited me from joining any Pension Fund under the Organization ...".

It appears from the correspondence that the Respondent was keen on the enrolment of the Applicant in the Pension Fund and that the Applicant was excluded on the basis of the letter quoted above.

The Tribunal notes further that the Respondent, by his reply dated 19 December 1957, conveyed his decision to reimburse to the Applicant "the amount of the contributions which [he was] required to make for [his] continued participation in the Pension Scheme of the Indian Government". Pursuant to that decision the Applicant obtained the reimbursement of his contributions to the national pension scheme till 31 December 1957.

Even as late as 7 March 1968 the Applicant reiterated the fact that he was prohibited from joining the Pension Fund in a letter to the Chief of the Personnel Branch, as follows:

"It will be recalled that I have not been able to join the Pension Fund until now because my Government rules did not permit such action."

It is therefore clear that at the time of his entering the service of ICAO, the Applicant was excluded from participation in the Pension Fund.

II. As regards the letters of appointment relied on by the Applicant, the Tribunal notes that the Chief of the Organization and Personnel Branch, in his letter dated 13 June 1960, pointed out the mistake of inserting the clause relating to a deduction of 7 per cent from the Applicant's salary as his contribution towards participation in the Pension Fund; he wrote:

"It is understood that you are still on deputation terms from the Government of India and that, therefore, you are not permitted under those terms to participate in the United Nations Joint Staff Pension Fund. If this is so, Clause 7 of your letter of appointment of 3 April 1959 would need to be deleted and it is thought that the best method of doing so would be in the form of a letter from you to the Secretary General indicating your agreement to the deletion of this particular clause from your letter of appointment."

Although the Applicant sent no reply to that letter, the Tribunal observes that deductions were not made for the Applicant's contribution to the Pension Fund during the fixed-term appointment under this or the subsequent letter of appointment. The Applicant raised no objection or protest, even though the letters of appointment contained the standard clause regarding deductions from salary towards Pension Fund participation.

From the correspondence and the conduct of the parties, the Tribunal therefore concludes that the Applicant's exclusion from the United Nations Joint Staff Pension Fund was mutually understood, accepted, and acted upon.

III. The Applicant's next contention is that on the introduction of the scheme for associate participation in the Pension Fund on 1 January 1958, the Applicant should have been enrolled as an associate participant and that the Respondent, by his failure and neglect to enrol him as an associate participant, deprived him of his subsequent right to validation of his prior non-pensionable service. Effective 1 January 1958, the Pension Fund Regulations were amended by the General Assembly to provide for associate participation. Supplementary article B of the said Regulations read as follows:

#### "SUPPLEMENTARY ARTICLE B

##### *"Associate participation*

"1. Every full-time member of the staff of each member organization shall become an associate participant in the United Nations Joint Staff Pension Fund:

“(a) If he enters employment under a fixed-term contract for at least one year but less than five years; or

“(b) If he has completed one year of continuous employment, provided that he is not eligible under article II,1 to become a participant, provided that he is under sixty years of age, and provided further that his associate participation is not excluded by his contract of employment. For the purposes of this article, intervals of not more than thirty calendar days in the period of employment shall not be considered as breaking the continuity of employment.

“2. The participation of an associate participant shall cease when he reaches the age of sixty.

“3. An associate participant shall be eligible for a disability benefit under article V and his survivors to a death benefit under article VII,1, 2, 3, 4, 6 and 7, and to a child's benefit under article VIII. He shall not be entitled to a retirement benefit under article IV nor to a withdrawal benefit under article X, and his survivors shall not be entitled to a death benefit under article VII,5.

“4. Each member organization shall pay monthly into the Pension Fund, in respect of each associate participant, a contribution equal to 4½ per cent of his pensionable remuneration, or such percentage contribution, not to exceed 6 per cent, as shall be determined from time to time by the Joint Staff Pension Board on the basis of actuarial valuations of the Fund.

“5. Whenever an associate participant is entitled under article II to become a participant, he may elect during the first year of his participation to have the period performed as an associate participant included in his contributory service to the extent to which he pays into the Pension Fund a sum or sums equal to the contributions he would have paid as a participant, plus interest, at the rate designated in article XXIX. Payment into the Pension Fund of amounts sufficient to meet the Fund's obligations, resulting from the inclusion of such additional contributory service, which are not met by payments made by the participants shall be made by the member organization designated for that purpose in accordance with arrangements concluded by the member organizations, provided that payment has not already been made by a member organization for the period concerned.

“6. All other provisions of these regulations consistent with the present article shall be applicable to associate participants, *mutatis mutandis*, in the same manner as to a participant. Such administrative rules as shall be considered necessary for the implementation of this article shall be established by the Joint Staff Pension Board.”

The Applicant contends that it was obligatory on the part of the Respondent to enrol him in the Pension Fund as an associate participant and that the prohibition of his national Government did not extend to his enrolment as an associate participant. From Personnel Directive No. 6/58 of 10 March 1958, issued by the Acting Director of Personnel of the United Nations to all Administrative Officers in the Office of Personnel and all Executive Officers, it appears that:

“Both associate participation and full participation may be excluded by the contract of employment, but such exclusion will be limited to truly exceptional cases and may be accomplished only after submission to the Office of the Director of Personnel.”

Paragraph 7 of the said Directive reads:

“A special situation exists in the case of fixed-term staff who have been excluded from the United Nations Joint Staff Pension Fund because of con-

tinued participation in a national retirement scheme, and in respect of whom United Nations has undertaken to pay the Government's contribution to the national retirement scheme. No new contracts will be written with this arrangement; appropriate arrangements will be made for such present staff on an individual basis in the light of contractual commitments."

It is therefore clear that, as a matter of policy, the United Nations favoured the enrolment in the Pension Fund, as associate participants, of those not eligible for the status of full participant.

IV. The Personnel Directive quoted above was not applicable to ICAO and no decision or other action along the lines suggested in the Directive appears to have been taken by the Respondent. The question whether the Applicant should have been enrolled as an associate participant in 1958 again depends on whether he was excluded from participation by the terms of his employment.

The Tribunal observes from the Applicant's letter dated 23 January 1957 that in the terms of his release for service in the Organization the Government of India had prohibited him "from joining *any* Pension Fund under the Organization" [Emphasis supplied]. Since the associate participation scheme was a part of the Pension Fund under the Organization, it must be concluded that the prohibition equally applied to the Applicant becoming an associate participant in the Pension Fund.

V. The Applicant argues that the associate participation scheme was not a pension fund scheme and that, therefore, he was not excluded from becoming an associate participant. This argument must be examined with reference to the nature of the scheme of associate participation.

Under this scheme, associate participants pay no contribution and are not entitled to retirement or withdrawal benefits. They are, however, covered for disability benefits in the same way as full participants and, if they die leaving a widow or children, the latter are entitled to widow's or children's benefits in the same way as those of full participants.

The Tribunal is therefore unable to accept the argument that the scheme of associate participation was only an insurance scheme and not a pension fund scheme.

VI. It is contended that, as a consequence of memorandum OM. No. F.1 (47)-E.IV (A)/60 dated 18 October 1960 of the Indian Ministry of Finance stating that seconded Indian officials were eligible to become associate participants in the United Nations Pension Fund and of memorandum OM. No. F.1 (16)-E.III (B)/66 dated 5 November 1966 of the Indian Ministry of Finance stating that Indian officials deputed to international organizations were eligible to become full participants in the United Nations Pension Fund with retrospective effect, the Applicant should have been a full participant as from 1956 or an associate participant as from 1958.

The Tribunal observes, however, that after the Respondent's decision on 19 December 1957 to reimburse to the Applicant the amount of his contributions to his national pension scheme, the Applicant did not raise the matter with the Respondent until 7 March 1968; nor did he seek to revise the earlier exclusion. In a case like this, the Respondent cannot keep himself abreast of every change in the national regulations and rules and act *suo moto*. Since there was an exclusion at the time of the initial appointment, the exclusion continued in subsequent renewals of the same unless modified by mutual agreement.

The Tribunal also observes that as soon as the removal of the ban on seconded Indian officials joining the Pension Fund was brought to the Respondent's notice, he took action to remedy the situation.

VII. Under the applicable provisions of Supplementary article B (Associate participation), of article II (Full participation) and of article III (Validation of non-pensionable service) of the Pension Fund Regulations, a staff member was not eligible for participation or validation if his participation in the Pension Fund had been excluded by his terms of employment. Since the Tribunal reaches the conclusion that the Applicant's participation in the Pension Fund was excluded by his terms of employment, the Applicant's claims based on those articles fail.

VIII. The Applicant also requests the Tribunal to rule that whatever period of his service prior to 1969 is included in his contributory service for pension purposes, he should pay into the Pension Fund only his 7 per cent contribution plus interest, the difference between that amount and the actuarial capitalization of the unpaid 7 per cent contributions being borne by the Respondent, as being the consequence of his non-observance of his obligations.

The Tribunal observes that the Applicant advised the Respondent of the rescission of the ban on his becoming a participant in the Pension Fund only on 7 March 1968 and that the obligation to enrol the Applicant as a participant arose on that date. During the period from 5 November 1966 to 6 March 1968, there was no question of non-observance by the Respondent of any obligation towards the Applicant.

The Tribunal concludes that for the period from 5 November 1966 to 6 March 1968, the Respondent was right in paying to the Pension Fund 14 per cent of the Applicant's pensionable remuneration plus interest, with the Applicant contributing the required balance.

The Tribunal notes that for the relevant period subsequent to 6 March 1968 the Respondent has agreed that the Applicant would pay into the Pension Fund only 7 per cent of his pensionable remuneration plus interest, with the Organization paying the required balance.

IX. The Applicant further requests the Tribunal to order the Respondent to pay to the Applicant a sum of \$1,000 towards the costs of legal representation and counsel, as well as a sum of \$88 for expenses incurred in connexion with the examination of the Applicant's personal file by his counsel.

The Tribunal points out that the Applicant could have availed himself of the services of a member of the United Nations panel of counsel. In view of the fact that no oral proceedings were held and that the Applicant's claims have been rejected, the Tribunal rejects the request for costs.

X. The Tribunal recognizes that this is a hard case and that even though the Applicant and the Organization were keen on the Applicant's participation in the Pension Fund, the Applicant was unable to join the Fund by extraneous circumstances. The Tribunal also notes that another Indian staff member in a similar situation received a more favourable treatment from the Respondent. The Tribunal understands further that the Respondent's contribution to the Pension Fund would have been greater than his obligation to reimburse the Applicant's contribution to his national pension scheme and that, to that extent, the Applicant can be said to have been deprived of benefits normally available to staff members. In these circumstances, the Tribunal takes note of the Respondent's statement that:

"The Secretary General by his decision dated 25 November 1970 . . . agreed to exercise [his] discretion in the Applicant's case, in the same way and from the same date as was done in October 1960 in the case of another official of the Indian Government employed in ICAO."

XI. The application is rejected.

*(Signatures)*

R. VENKATARAMAN

*President*

Suzanne BASTID

*Vice-President*

Francisco A. FORTEZA

*Member*

Zenon ROSSIDES

*Alternate member*

Jean HARDY

*Executive Secretary*

New York, 14 October 1971.

## Judgement No. 152

*(Original: English)*

**Case No. 145:**

**Ashton (Participation in  
the United Nations  
Joint Staff Pension  
Fund)**

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

*Request by a former technical assistance official of ICAO for compensation of the injury caused him as a result of having been deterred from requesting in due time the validation by the Joint Staff Pension Fund of service completed before his participation in the Fund and subsidiary request for the recognition of his right to have been enrolled as a participant in the Fund at an earlier date than he was.*

*Preliminary pleading that the Applicant's claims are barred by time.—By objecting to an examination of the merits by the Advisory Joint Appeals Board, the Respondent has limited the scope of an appeal to the Tribunal.—It was unwarranted for the Respondent to act in that manner.*

*Contention that the right to appeal has lapsed, based on GSI-1.4.7—GSI-1.4.7 did not apply to the Applicant at the time the contested decision was taken.—The Applicant was not notified of this decision after he had come under the provisions of GSI-1.4.7.—The contention relating to this decision is rejected.—Contention that the claim is barred by time under part VII, paragraph 1, of the ICAO Service Code.—Time-limit of one year, reckoned from the date on which the text came into force with respect to the official, within which to submit a claim concerning an entitlement which accrued before this date.—The contention is rejected, as the Applicant had submitted a claim within the stipulated time-limit.—The provisions of GSI-1.4.7 are not applicable.—Decision of the Respondent implicitly rejecting the Applicant's claim.—As the Applicant did not take appeal proceedings against that decision under GSI-1.4.7, his right of appeal is barred by time.*