

"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.

The claims are not receivable and are rejected.—The related requests also fail.—Award to the Applicant of travel and subsistence costs for his counsel.—The remainder of 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, on 9 February 1971, Robert Ashton, a former technical assistance official of the International Civil Aviation Organization, hereinafter called ICAO, filed an application the pleas of which read:

"1. Request for a preliminary order

"In view of Respondent's continued reluctance to enter his pleas on the merits of Applicant's claims, and also in view of the inevitable connection between the questions raised by the time-limit invoked by Respondent and the substance of Applicant's claims, Applicant respectfully requests the Tribunal to order Respondent as a preliminary measure to show cause why he should not submit his substantive contentions concomitantly with his procedural arguments.

"2. Substantive pleas

"(a) On the basis of the application of Article III of United Nations Pension Regulations (as they stood on 1 January 1958) and in compensation of the injury caused by Respondent to Applicant for having purposely and decisively deterred Applicant by his own action (issuance of the Circular of 26 February 1958) from requesting within one year from 1 January 1958 the validation of Applicant's prior non-pensionable services, thus causing the UN Joint Staff Pension Board to refuse such validation,

"Applicant respectfully requests the Tribunal to order Respondent to pay Applicant a sum of money to be determined as follows:

"the additional retirement benefits which Applicant would have received from the date of his retirement in 1967 for the whole duration of his life expectancy, had his prior services from 5 October 1951 until 31 December 1957 been validated, to be capitalized as of 1 January 1958, such capitalization then to be reduced by an amount equivalent to the contributions which Applicant should have paid to the Pension Fund at the time of validation, i.e. on 1 January 1958; plus interests at 5% on the net amount due Applicant from 1 January 1958 up to the date of payment of the compensation.

"(b) Alternatively, on the basis of Article II of the United Nations Pension Regulations (as they stood on 5 October 1952),

"Applicant respectfully requests the Tribunal:

"(i) To order Respondent to pay to the UN Joint Staff Pension Fund the amounts found by the latter's Consulting Actuary to be sufficient to meet Respondent's obligations vis-à-vis the Pension Fund as a result of inclusion of Applicant's additional contributory service (i.e. from 5 October 1952 until 31 December 1957) in addition to the contributions to be paid by Applicant which, in such circumstances, remain at 7% of the remuneration concerned;

"(ii) To declare that Applicant was entitled as of 5 October 1952 to validate his prior services from 4 October 1951 up to 4 October 1952, and consequently to order Respondent to pay to the UN Joint Staff Pension Fund the amount found by the latter's Consulting Actuary to be sufficient to meet Respondent's obligations as a result of the validation of Applicant's such service, in addition to the contributions to be paid by Applicant which, in such circumstances, remain at 7% of the remuneration concerned;

"(iii) Or, in the case where Respondent would indicate that he chooses not to fulfil the obligations as stated under (b)(i) and (ii), to order Respondent to pay to Applicant a compensation for the injury which the latter would sustain as a result, namely the actuarial value of the benefits to which Applicant was entitled on the date of his retirement, had he been made a participant in the Pension Fund as of 4 October 1951, taking into account past and prospective improvements in the UN Pension system, minus the actuarial value of the benefits Applicant received at the time of his retirement, such actuarial value to be determined by the Consulting Actuary of the UN Joint Staff Pension Fund;

"(c) To order Respondent to pay Applicant a sum of \$3,000 as compensation for the prejudice he has suffered as a result of the errors, procrastinations and procedural evasive actions of Respondent.

"(d) 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 3 May 1971;

Whereas, on 1 June 1971, the Applicant requested that oral proceedings be held in the case;

Whereas, on 4 June 1971, the Applicant filed written observations in which he requested the President of the Tribunal, under article 10, paragraph 1 of the Rules of the Tribunal, to call upon the Respondent to submit additional written statements with the object of answering the Applicant's substantive pleas and arguments;

Whereas, on 26 August 1971, counsel for the Applicant requested the President of the Tribunal to order the Respondent to pay counsel's travel and subsistence expenses so that he might take part in the oral proceedings;

Whereas, on 8 September 1971, the Executive Secretary of the Tribunal informed counsel for the Applicant, on the instructions of the President, that the Tribunal lacked competence to make such an order at that stage, but that any claim for reimbursement of counsel's travel and subsistence expenses would be decided by the tribunal in its judgement;

Whereas, on 15 September 1971, the application was transmitted to the United Nations Joint Staff Pension Board in accordance with article 21 of the Rules of the Tribunal;

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

"Applicant . . . requests the Administrative Tribunal not only to order the reimbursement of expenses incurred with respect to Applicant's counsel's travel and subsistence, but to determine that in refusing to pay these ex-

penses in advance of the hearing Respondent has used his discretionary power arbitrarily and unreasonably.

“Respondent should reimburse Applicant

“(a) The amount spent by him in Thai baht for the transfer of his counsel’s travel expenses, that is, Baht 13,255.00.

“(b) Cost of two telegrams sent by Applicant to his counsel with respect to the transfer, respectively, on 25 August and 14 September 1971. (Approximately \$15)

“(c) Cost of telegram sent by Applicant’s counsel in connection with his representing Applicant. (\$3.30)

“(d) Subsistence of Applicant’s counsel from and including 30 September up to and including 5 October 1971.”

Whereas the Tribunal heard the parties at a public session held on 4 October 1971;

Whereas, on 14 October 1971, the Respondent submitted additional information at the request of the Tribunal;

Whereas the facts in the case, subsequent to Judgement No. 109, are as follows:

The Applicant appealed to the United Nations Joint Staff Pension Board against the ICAO Staff Pension Committee’s decision to reject his application for validation on the ground that no valid application had been made within the prescribed time-limit. On 28 April 1969 the Secretary of the Joint Staff Pension Board informed the Applicant of the outcome of his appeal by the following letter:

“The Standing Committee [of the Joint Staff Pension Board] noted that the decision against which you had appealed had been based on the finding that your application for validation of prior service under article III of the Pension Fund Regulations had not been made within the time-limit stipulated in paragraph 1 of that article and in Administrative Rule B.19, (see the letter to you dated 24 May 1967 from the Secretary of the ICAO Staff Pension Committee).

“The Standing Committee, on the basis of the information available to it, found that there was no evidence before it to show that you had in fact submitted an application in accordance with article III of the Pension Fund Regulations within one year of the commencement of your participation, that is to say, between 1 January 1958 and 31 December 1958 inclusive. (The text of article III here referred to is that in force at the material time, namely the text introduced by General Assembly resolution 1073 (XI) of 7 December 1956, which remained in force until 1 January 1963.)

“The Standing Committee finds it advisable, however, to point out the nature of this decision and of the procedural question to which it refers.

“The Standing Committee’s responsibility in this appeal is limited to the question of whether or not a particular time-limit was met, and it has no jurisdiction to assess the liabilities of an employing organization vis-à-vis its staff, which flow from any alleged action or inaction by that organization which may have caused the failure to observe the time-limit.

"Moreover, the time-limit here referred to (under article III of the Pension Fund Regulations and Administrative Rule B.19) has no relevance to any issue other than the validation of prior non-pensionable service in the very precisely circumscribed situations defined in article III of the Pension Fund Regulations; that is to say, where a participant seeks to validate a prior period of service during which the staff member had not been entitled to participate in the pension system either because his appointment was for less than one year or because he had completed less than one year of service (see paragraph 1 of article III).

"It follows therefore that article III can be of no assistance to a participant who seeks to validate a prior period of service during which he had not been in the Pension Fund for any reason other than those specified in paragraph 1 of article III of the Pension Fund Regulations.

"In the circumstances of your case, it did not appear to the Standing Committee that article III would be relevant to your situation even if you had submitted an application within the prescribed time-limit, the reason being that your previous non-participation in the Pension Fund clearly was not due to either of the reasons specified in paragraph 1 of article III.

"The Pension Board, for its part, is entitled to rely on the determination by your employing organization as to any exclusion from participation in the Pension Fund of which it (your employing organization), was the author, and any disagreement concerning such exclusion would require to be settled between you and the latter organization. Similarly, the Pension Board is entitled to accept the determination by ICAO, as your employing organization, that the terms of your appointment entitled you to become a participant in the Pension Fund only from 1 January 1958, and not before.

"A claim to convert a prior period of non-contributory service into contributory service on the ground that during the prior employment the staff member should have been entered in the Fund under article II of the Pension Fund Regulations, and that participation had been wrongfully denied by his employer would not be a claim for validation under article III, but would involve the interpretation of the contractual relationship between the staff member and his employing organization, to which the Pension Fund is not a party, and which it has no competence to adjudicate. Moreover, even if, in such a case, it were to be established that a staff member had been wrongfully excluded from participation in the Pension Fund, this would not establish any obligation on the part of the Pension Fund, but only on the part of the organization responsible for the exclusion.

"In conclusion, therefore, I am instructed to inform you that, in the general context outlined above, the Standing Committee rejected your contention that you had submitted an application for validation under article III of the Pension Fund Regulations within the time-limit prescribed in that article, and considered that this was the only issue raised in your appeal which could properly be decided on by the Standing Committee.

In a letter dated 29 October 1969, the Applicant requested the Secretary General to take an administrative decision on "the various aspects of my case on which the Administrative Tribunal did not yet pass judgement in view of its conclusion regarding the receivability of my former application", as well as on the Applicant's alternative course of action, namely, his right to become a participant

in the Pension Fund as of 5 October 1952 under article II of the Pension Fund Regulations in force on that date; the letter concluded:

"In the light of the foregoing, I am requesting you under article XII of the ICAO Service Code and article II of the Pension Regulations in force on 4 October 1952 to decide that I became participant in the Pension Fund on that date with all the legal consequences flowing from my status of participant ...".

On 16 December 1969 the Secretary General declined "to entertain [the Applicant's] claims" on the ground that the Applicant had "failed to make them within the time-limits prescribed for the submission of claims". On 12 January 1970 the Applicant requested the Secretary General to review that decision and, should his decision on review be unfavourable to the Applicant, to agree to the direct submission of the dispute to the Tribunal. On 23 January 1970 the Secretary General confirmed his decision and refused to give his agreement to the direct submission of the dispute to the Tribunal. On 3 February 1970 the Applicant lodged an appeal with the Advisory Joint Appeals Board, which handed down its Opinion (Opinion No. 40) on 7 December 1970. The Board's recommendations read as follows:

"...

"12. A memorandum dated 11 November 1970 from the Secretary General advised the Board that the sole question before the Board 'at present is whether or not the claims made by the Appellant in the present Appeal are governed by either or both of those provisions* or not. My predecessor held they were so governed. It would be appreciated if the Board would advise me on that question'.

"13. Although the Board believes it to be in the best interest of everyone if the entire appeal were to be disposed of at one time, it defers to the wish of the Secretary General, and *recommends* to him to consider the claim of the Appellant as not barred by time under either paragraph 1, Part VII, of the ICAO Service Code, or Rule 10.5, Part X, of the ICAO Field Service Staff Rules for the following reasons:

"(1) When the entitlement to the claim arose in 1952 in respect of the Appellant, neither of the two regulations cited were in force and, therefore, were inapplicable to him.

"(2) The failure of the Appellant to press his claim earlier than he did was not due to any lack of initiative on his part, but was occasioned by (i) an uncertainty of interpretation, which was not of his making, of the pertinent regulations which resulted in even the United Nations Administrative Tribunal having been misled and having to revise its earlier opinion, and (ii) the stand taken by the Administration of ICAO and its failure to apply the United Nations Joint Staff Pension Fund Regulations correctly or consistently.

"(3) The issuing of the circular letter dated 26 February 1958 by the Director of Technical Assistance Bureau which misled the Appellant as to his rights.

"(4) The addressing of the letter dated 13 August 1959 by the Appellant to the Chief, P[ersonnel] and O[rganization] Section (now Chief Personnel Branch), requesting:

* Namely, Rule 10.5, Part X, of the ICAO Field Service Staff Rules and paragraph 1, Part VII, of the ICAO Service Code.

'I would like to take advantage of any conditions under the ICAO Service Code or otherwise which would permit me to pay such sums as would entitle me to full pension rights as if my service counted from the date of my first contract dated 5 October 1951.'

"14. Even if the Board were to accept the validity of the argument of the Representative of the Secretary General mentioned in paragraph 9 above, namely that time began to run against the Appellant from 5 August 1959 [date when the Applicant, who had been serving under the Technical Assistance Programme, joined the regular staff of ICAO], the Board considers the above-mentioned letter of 13 August 1959 of particular significance because it regards that letter as amounting to a proper claim made by the Appellant within time in respect of his rights under the United Nations Joint Staff Pension Fund. This opinion of the Board is in conformity with its earlier view expressed in Opinion No. 28, Appeal No. 25 (Mr. Robert Ashton), in paragraph 14 thereof, namely:

'... in view of the fact that the Appellant had been misled by D/TAB [Director of the Technical Assistance Bureau]'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'.

"15. The Board is aware of the fact that the opinion in Appeal No. 25 was expressed in connection with the application of Article III of the United Nations Joint Staff Pension Fund Regulations, but believes that the same argument applies, *mutatis mutandis*, to the requirements of Article II in force at the time in question, the failure of observing the same by the administration having led to the present impasse.

"16. If the Secretary General finds the above recommendation unacceptable, the Board further *recommends* that in view of the particular difficulty and complexity of the task of determining, at the pertinent times in question, the rights and entitlements of the Appellant under the United Nations Joint Staff Pension Fund Regulations—which fact has been amply demonstrated by the record of the applications and appeals that Mr. Ashton has had to make over the past many years and the conflicting and inconsistent opinions expressed in the past by ICAO, the United Nations Administrative Tribunal, etc.—the Secretary General exercise his discretion, as permitted under paragraph 1, Part VII, of the ICAO Service Code and Rule 10.5, Part X, of the ICAO Field Service Staff Rules and agree to consider the merits of the claim made by the Appellant."

On 21 January 1971 the Secretary General's final decision was communicated to the Applicant, as follows:

"I have studied the report (Opinion No. 40) of the Advisory Joint Appeals Board in Appeal No. 35 of Mr. R. Ashton. Having retired from the service of ICAO in 1967, Mr. Ashton first brought his present claim in October 1969. His contracts of service prior to 1 January 1958 did not provide for membership of the United Nations Staff Pension Fund. That was a decision not to enrol him as a member of the Fund. He did not appeal against that decision. When his last contract was made it was stated that with effect from 1 January 1958: 'you will become a full participant in the United Nations Joint Staff Pension Fund'. Here again was a decision exclud-

ing him from the Fund for any period before 1 January 1958 and he failed to appeal, with the consequence that pursuant to paragraph 4 of the rules governing appeals contained in GSI [General Secretariat Instruction]-1.4.7, he lost any right which he had to appeal.

"In addition, paragraph 1 of Part VII of the ICAO Service Code states that 'a claim arising from the employment of a staff member shall not be considered if not made in writing within one year of the date of accrual of the entitlement claimed'. There is a corresponding provision in Rule 10.1 [*sic*], Part X, of the ICAO Field Service Staff Rules. Those provisions which, respectively, entered into force on 1 October 1958 and 1 August 1963, govern any claim brought after those dates. Even if a pre-existing claim were to be considered as a proper way of applying those provisions, that claim should have been made within one year of the applicable date mentioned.

"The Board, in paragraph 14 of its report (Opinion No. 40) thinks that a letter of 13 August 1959 written by the appellant (the relevant part of the text of that letter being quoted in paragraph 13 (4) of the Board's Opinion), amounts to a proper claim made by the appellant. I do not consider that a claim was thereby made. If it had been made on 13 August 1959, then it lapsed in accordance with paragraph 4 of GSI-1.4.7, considering that such a claim was not accepted (clause (b) of paragraph 3 of the GSI).

"Alternatively, the Board recommends that the Secretary General exercise his discretion, as permitted under paragraph 1, Part VII, of the ICAO Service Code and rule 10.1 [*sic*], Part X, of the ICAO Field Service Staff Rules. I have given careful consideration to this matter. The present claim is brought eighteen years after 5 October 1951, the date on which the appellant was first appointed and from which he claims participation in the Pension Fund. The appellant was not suffering from disability. He had knowledge that he was excluded from the Pension Fund and he had opportunities on several occasions to make the present claim, as mentioned above, but he did not do so, although he has been bringing other claims. I cannot agree to exercise my discretion in the manner suggested.

"The claim made in the present case by the appellant being barred by time, and having lapsed, is not to be considered."

On 9 February 1971 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. As to the merits of the case:

(a) The Respondent's contractual liability is engaged vis-à-vis the Applicant on account of the injury suffered by the latter as a result of his inability to obtain validation of his service from 4 October 1951 to 31 December 1957 on the basis of article III, paragraph 4 of the Pension Fund Regulations (1958 edition) because of the Respondent's own action: The Applicant's legal position vis-à-vis the Respondent is identical with that of the Applicant in Judgement No. 89 except that the latter made his request for validation within the prescribed time-limit; since the present Applicant's failure to observe such time-limit is directly attributable to the erroneous representations made by the Respondent in its circular of 26 February 1958, the Respondent is estopped from invoking such failure and the legal findings of the Tribunal in Judgement No. 89 also apply to the Applicant;

(b) The Respondent's contractual liability is engaged vis-à-vis the Applicant on account of the injury suffered by the latter as a result of the Respondent's failure to implement the Applicant's right of participation in the Pension Fund as of 5 October 1952 on the basis of article II of the Pension Fund Regulations (1952 edition): On 5 October 1952 the Applicant met the three requirements laid down in that article and the Respondent should have taken the necessary steps under the Administrative Rules of the Pension Fund to notify the ICAO Staff Pension Committee that the Applicant had become entitled to be participant in the Pension Fund; on the same date the Applicant became *ipso jure* entitled to automatic validation of his prior service from 4 October 1951 to 4 October 1952.

2. As to the Respondent's procedural objections:

(a) The present appeal is the continuation of the claim instituted by the Applicant on 13 August 1959; practically all the prior proceedings were the result of the Respondent's errors; throughout these years the Respondent never invoked the time-limit of 15 days mentioned in GSI-1.4.7;

(b) The Applicant's claim as based on article III of the Pension Fund Regulations is not a new claim and is not barred by any of the time-limits invoked by the Respondent;

(c) The Applicant's claim as based on article II of the Pension Fund Regulations is not barred by the time-limits invoked by the Respondent.

3. The Tribunal is competent to adjudicate simultaneously the merits of the case and the Respondent's procedural objections.

4. The Applicant is entitled to compensation for the prejudice suffered as a result of the Respondent's errors and dilatory procedures.

Whereas the Respondent's principal contentions are:

1. The Respondent had the right to restrict the scope of the proceedings before the Advisory Joint Appeals Board to recommendations on the preliminary issue of time-limits.

2. The claim relating to article II of the Pension Fund Regulations is barred by time under paragraph 1, part VII of the ICAO Service Code and Rule 10.5, part X of the ICAO Field Service Staff Rules.

3. The claim relating to article III of the Pension Fund Regulations is a new claim which was not before the Advisory Joint Appeals Board in the proceedings leading to Opinion No. 40; this new claim is being attempted in disregard of the requirements of paragraph 3 of GSI-1.4.7, both in regard to procedure and as to specified time-limits, and is not receivable under article 7 of the Statute of the Tribunal.

4. Claims similar to the Applicant's claim based on article II of the Pension Fund Regulations were rejected by the Administrative Tribunal of the International Labour Organisation on the grounds of non-observance of time-limits.

The Tribunal, having deliberated until 16 October 1971, now pronounces the following judgement:

I. The Respondent has confined his pleadings to the preliminary issue that the Applicant's main claims are barred by time. He limited his presentation before the Advisory Joint Appeals Board to arguments concerning the receivability of the claims, without defence on the merits of the case.

The Advisory Joint Appeals Board had "expressed its willingness, and even stressed the advisability, to hear oral arguments on the entire appeal at the earliest possible time in order to be enabled to render its final opinion expeditiously to the Secretary General" on a matter that went back to 1951 and which had been before the Board in the form of the present appeal since February 1970, as further delay in dealing with the case could only lead to additional expenses to every one concerned.

In its Opinion, however, the Board stated:

"A memorandum dated 11 November 1970 from the Secretary General advised the Board that the sole question before the Board 'at present is whether or not the claims made by the Appellant in the present Appeal are governed by either or both of those provisions* or not. My predecessor held they were so governed. It would be appreciated if the Board would advise me on that question'".

The Board recommended:

"Although the Board believes it to be in the best interest of everyone if the entire appeal were to be disposed of at one time, it defers to the wish of the Secretary General, and *recommends* to him to consider the claim of the Appellant as not barred by time under either paragraph 1, Part VII, of the ICAO Service Code, or Rule 10.5, Part X, of the ICAO Field Service Staff Rules . . .".

Thus the recommendation of the Advisory Joint Appeals Board deals only with the question of time-limits.

Under article 7 of the Statute of the Tribunal, an application is not receivable unless the Applicant has previously submitted the dispute to the Joint Appeals Board and the latter had communicated its opinion to the Secretary-General, except where the Secretary-General and the Applicant have agreed to submit the application directly to the Tribunal.

By objecting to an examination of the merits of the dispute by the Advisory Joint Appeals Board, the Respondent has limited the scope of an appeal to the Tribunal.

The broad discretion given to the Secretary General to waive the time-limits for the filing of an appeal may be judiciously exercised in consideration of the merits of a case, and it is only after a full examination of all aspects that the Board can make useful recommendations to the Secretary General. Consequently, it was unwarranted for the Respondent to restrict the scope of the Board's recommendations by pleading time-limits as a preliminary issue.

The Tribunal is not convinced by the Respondent's arguments based on the practice regarding preliminary objections before the International Court of Justice, whose jurisdiction is based on the consent of States.

II. The Applicant held successive contracts under the ICAO Technical Assistance Programme from October 1951 to 1 October 1959. On 2 May 1957, however, he was seconded to the Air Navigation Bureau at Headquarters. On 5 August 1959, his last contract as a technical assistance expert was superseded by a two-year appointment in the regular staff of ICAO. On 1 January 1961 he was granted a permanent appointment in the regular staff. On 1 June 1966 the Applicant

* Namely, Rule 10.5, Part X, of the ICAO Field Service Staff Rules and paragraph 1, Part VII, of the ICAO Service Code.

reverted to the ICAO Technical Assistance Programme under a programme appointment as Senior Training Adviser, a post which he held until his retirement in 1967.

III. The Respondent's first contention is that the Applicant's right to appeal has lapsed as stated by the Secretary General in his final decision, dated 21 January 1971, which reads in part:

"... When his [the Applicant's] last contract was made it was stated that with effect from 1 January 1958: 'you will become a full participant in the United Nations Joint Staff Pension Fund'. Here again was a decision excluding him from the Fund for any period before 1 January 1958 and he failed to appeal, with the consequence that pursuant to paragraph 4 of the rules governing appeals contained in GSI-1.4.7, he lost any right which he had to appeal."

That contention is unacceptable since the Applicant was not a regular staff member of ICAO on 1 January 1958, and GSI-1.4.7 did not apply to him at that time.

IV. The Respondent argues that when the Applicant became a regular staff member of ICAO on 5 August 1959, it was open to him to appeal under GSI-1.4.7 against his implied exclusion from the Pension Fund for the period prior to 1 January 1958, and that, as the Applicant failed to take appeals procedure, his claim became barred by time.

The Tribunal is not satisfied that the letter of appointment dated 20 January 1958 stating that from 1 January 1958 the Applicant "will become a full participant in the United Nations Joint Staff Pension Fund" constitutes a decision excluding him from participation in the Pension Fund for the prior period. Assuming, however, that it was a decision in terms of GSI-1.4.7, the Tribunal proceeds to examine the applicability of these rules to the present case.

Paragraphs 3 and 4 of GSI-1.4.7 read as follows:

"3. (a) A staff member who wishes to appeal against

"...

"(iii) any administrative decision, taken after 30 June 1952, which it is alleged constitutes non-observance of a contract of employment, or of the terms of the ICAO Service Code, or non-observance of established administrative practices in such a way as to adversely affect the individual;

"shall as a first step, address a letter to the Secretary General requesting that the decision be reviewed. Such a letter shall be sent within one month of the time the staff member received notification of the decision in writing.

"(b) If the staff member wishes to make an appeal against the answer received from the Secretary General, he shall submit his appeal in writing to the Secretary of the Board within two weeks from the date of receipt of the answer. If no reply has been received from the Secretary General within two weeks of the date the letter was received by him, the staff member shall, within the two following weeks, submit his appeal in writing to the Secretary of the Board. A copy of the letter of appeal shall be sent by the appellant to the Secretary General.

"4. A staff member who fails to observe the time-limits indicated above shall lose his right to appeal, unless the delay is waived under paragraph 5 hereof."

It appears from paragraph 3 of GSI-1.4.7 that a staff member who wishes to appeal against an administrative decision adversely affecting him should, as a first step, address to the Secretary General a letter requesting the review of the decision; such a letter must be sent within one month of the time the staff member received notification of the decision in writing. Those provisions, therefore, apply to any decision notified after they became applicable to a staff member. In the present case, the alleged decision goes back to about 20 months before the relevant rules became applicable to the Applicant. Since the decision relied on by the Respondent was not one notified after the Applicant had come under the provisions of GSI-1.4.7, the Tribunal rejects the plea of time bar under GSI-1.4.7 with regard to that decision.

V. The Respondent further contends that the claim is also barred by time under paragraph 1, part VII of the ICAO Service Code which was in effect from 1 October 1958. That paragraph reads as follows:

"A claim arising from the employment of a staff member shall not be considered if not made in writing within one year of the date of accrual of the entitlement claimed. However, the Secretary General may, at his discretion, consider claims made beyond that period."

Rule 10.5, part X, of the ICAO Field Service Staff Rules, which became effective on 1 August 1963, is stated in identical terms.

Neither of these rules were in force on or before 1 January 1958. However, when the Applicant became a regular staff member of ICAO on 5 August 1959, the ICAO Service Code applied to him, and when he reverted to the technical assistance programme on 1 June 1966 the ICAO Field Service Staff Rules became applicable to him.

The text quoted above does not specifically provide for cases where the entitlement claimed accrued before the text came into force or became applicable to a particular staff member. The Tribunal considers that the aim of such a rule is to prevent belated claims and that the rule is therefore applicable to entitlements which accrued earlier. The staff member concerned is allowed one year, reckoned from the date on which the text came into force with respect to him, within which to submit a claim concerning an entitlement which accrued before the text became applicable to him. Consequently, the time-limit of one year must, with respect to the Applicant, be reckoned from 5 August 1959 as regards entitlements which accrued prior to that date.

VI. While the Respondent argues that no claim was made by the Applicant within one year of his becoming a regular staff member of ICAO and that the Applicant's memorandum dated 13 August 1959 was nothing more than an enquiry into his rights, the Applicant asserts that this memorandum constituted a valid and proper claim. The memorandum dated 13 August 1959 reads as follows:

"Although I have been entitled to full pension rights since 1 January 1958 under my previous Technical Assistance contract, I would like to take advantage of any conditions under the ICAO Service Code or otherwise which would permit me to pay such sums as would entitle me to full pension rights as if my service counted from the date of my first contract dated 5 October 1951.

"Would you please treat this memorandum as my proper request, with the details to be settled after my return from home leave in November."

It is observed that the Applicant stated in his memorandum that it should be treated as a "proper request".

VII. The Respondent argues that even if the Applicant's memorandum of 13 August 1959 addressed to the Chief of the Organization and Personnel Branch was assumed to be a valid request, it lapsed under paragraphs 3 (b) and 4 of GSI-1.4.7 as no reply was received from the Secretary-General within the prescribed time-limits.

The Tribunal observes that the memorandum dated 13 August 1959 was not an appeal against an administrative decision but a communication submitting a claim to the Administration. Therefore, the provisions of GSI-1.4.7 relied on by the Respondent are not applicable.

VIII. But the Tribunal notes that the Applicant's memorandum dated 13 August 1959 was acknowledged and replied to by the Secretary of the ICAO Staff Pension Committee in a letter dated 5 January 1960 which read in part:

"I refer to your memorandum dated 13 August 1959 regarding your interest in establishing your contributory service in the United Nations Joint Staff Pension Fund with effect from 5 October 1951.

"...

"The rules and regulations of the Pension Fund have been reviewed in relation to your contracts and according to my understanding it appears that the only article of the Pension Fund Regulations under which you would be eligible to apply for additional benefits, is Article XVIII ..."

From the statement in the above letter that the "only" article applicable to the Applicant was article XVIII the Tribunal concludes that the Applicant was clearly notified that other articles of the Pension Fund Regulations, particularly articles II and III, did not apply to his case. As the Applicant did not take appeal proceedings against that decision under GSI-1.4.7, paragraph 3, the Tribunal rules that the Applicant's right of appeal is barred by time.

IX. According to article III of the Pension Fund Regulations, the Applicant's request for validation of his prior service had to be made within one year beginning on 1 January 1958. The Applicant contends that he was misled by the general circular of 26 February 1958 informing him that he was not entitled to validation under article III.

In issuing that circular, the Respondent took a position the normal effect of which was to dissuade the Applicant from taking any action in the matter. The Respondent then refused to certify before the ICAO Staff Pension Committee that the Applicant had acted within the prescribed time-limit. In the absence of such certification, the Committee denied the request for validation on the ground that one of the conditions required by the Pension Fund Regulations had not been fulfilled.

The question is whether the Respondent failed in his obligations towards the Applicant in addressing to him a general circular the effect of which was to prevent him from applying for validation within the prescribed time-limit. There can be no doubt that for the purposes of article III of the Pension Fund Regulations, the time-limit expired on 31 December 1958. But the injury, if any, sustained by the Applicant as a result of the Respondent's action raises a different issue.

As the Advisory Joint Appeals Board made no recommendation on this point, the claim is not receivable by the Tribunal under article 7 of its Statute.

X. It appears from the file that on 2 April 1957, before the Applicant's secondment to ICAO Headquarters, the Respondent sent him the following cable:

"Secretary General has now formally approved your assignment maximum two years chief PEL training [Personnel Licensing and Training Section] on your present basic salary Stop Present cost of living allowance headquarters dollars five hundred subject Staff Assessment but substantial upward revision likely shortly Stop Dependency allowances dollars two hundred wife and three hundred each child Stop *No Pension Fund* or other allowances Stop Please cable whether you accept and ETA Stop Branch will visit you shortly Israel or nearby—Rolian ICAO" [Emphasis added].

The Applicant accepted those terms by a cable dated 4 April 1957 confirmed by a letter dated 5 April 1957.

The Tribunal notes further that in a notice of personnel action (No. 1/1898) dated 21 May 1957, it was stated *inter alia*:

"Not eligible for participation in the United Nations Joint Staff Pension Fund."

It is clear from the document that a copy was marked to the staff member in the usual course.

Thus, in the cables exchanged between ICAO and the Applicant and in the notice of personnel action dated 21 May 1957, it was specified that the Applicant was not eligible for participation in the Pension Fund in 1957. However, as the Tribunal has not concerned itself with the substance of the case, the Tribunal does not rule on this point.

XI. For the reasons stated in paragraph VIII above, the Applicant's claims are rejected.

In the light of this decision, the Applicant's requests for a sum of \$3,000 as compensation for prejudice suffered and for a sum of \$1,000 towards costs of legal representation and counsel also fail.

XII. The Applicant has requested the Tribunal to order payment of travel and subsistence allowance for his counsel in the case. ICAO GSI-1.4.14, paragraph 9, reads as follows:

"The Organization will normally, whether or not the Tribunal finds that the application is well founded, provide travel and subsistence for the applicant, his counsel and necessary witnesses to the place where the Tribunal meets to consider the case, if the Tribunal decides to hold oral proceedings."

The Respondent has argued that, since the case was being heard in New York, it was not "normal" for the Organization to bear the travel and subsistence expenses of counsel from Europe.

In view of the multiplicity of earlier proceedings and the complexity of the issues involved in the case, the Tribunal decided to hold oral proceedings under article 15 of its Rules. The Applicant, who is entitled to present oral arguments in such proceedings, may also designate a counsel to represent him. The Tribunal considers that, in view of the special circumstances mentioned above, this is a fit

and proper case for the payment by the Respondent of the travel and subsistence costs for four days of the Applicant's counsel and so orders.

XIII. Except as said in paragraph XII above, 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, 16 October 1971

Judgement No. 153

(Original: English)

Case No. 146:
Jayaram

**Against: The United Nations Joint
Staff Pension Board**

Request for the commutation into a lump sum of the Applicant's pension benefit at the minimum annual rate.

Article 29 of the Pension Fund Regulations.—In order to be entitled to a commutation of a benefit payable at the minimum annual rate, the participant must elect to receive the benefit at the standard annual rate.—Corresponding provisions of the previous edition of the Pension Fund Regulations.—The application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Zenon Rossides; Sir Roger Stevens;

Whereas, on 17 March 1971, Thodur Madapusi Jayaram, a former staff member of the United Nations Development Programme, hereinafter called UNDP, filed an application the pleas of which read as follows:

“ . . .

“I request the Tribunal to give a decision as regards the applicability of article 29 (*d*) [of the Pension Fund Regulations] with respect to article 29 (*c*), i.e. commutation of pension benefit into a lump sum and annual pension, if the participant elects to receive it at the minimum annual rate.

“I also request the Tribunal to recommend to the United Nations Joint Staff Pension Board, if necessary, alterations of the text of the provisions