

injury caused to him by the circular dated 26 February 1958, and that his right to claim damages arose "only when it was definitively adjudicated that he had lost his right to validate his prior service".

In view of its decision on the substance of the case, the Tribunal does not deem it necessary to pronounce on the plea of time-limits.

XI. For the reasons stated earlier, the Tribunal rejects the Applicant's claim for compensation for loss of pension benefits, his claim for compensation for prejudice suffered as a result of evasive procedural action of the Respondent, and his request for costs.

XII. The application is rejected.

(Signatures)

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

New York, 18 October 1973

F. A. FORTEZA
Member

Jean HARDY
Executive Secretary

Judgement No. 180

(Original: English)

Case No. 173:
Osman

Against: **The Secretary-General
of the United Nations**

Request by a technical assistance expert of the United Nations Industrial Development Organization that he be recognized as a full participant in the Joint Staff Pension Fund.

The Tribunal need not rule on the procedural pleas of the application, as the facts were fully set out by the parties in their respective pleadings.

Objection by the Respondent that the application is time-barred because the Applicant did not appeal against an administrative decision refusing him admission to the Pension Fund as a full participant.—Objection rejected, since the Respondent, in his final decision, did not decline to entertain the Applicant's request on the plea of time-limits but reviewed it on merits and rejected it.

Contention of the Applicant that under the Pension Fund Regulations which came into force on 1 January 1967 he became entitled to full participation, since on that date he fulfilled the requirements of article II, paragraph 1, of those Regulations.—Article II of the Regulations.—Respective scope of paragraphs 1 and 2.—Clause in paragraph 1 containing a qualifying proviso with regard to the provisions of paragraph 2 dealing with the category of associate participants to which the Applicant belonged.—Argument based on Circular TARS/INF.1/Rev.4.—Limited purpose of the circular.—As the Applicant was an associate participant when the 1967 Regulations came into force, the Applicant could not claim to become a full participant under article II, paragraph 1.—Argument of the Applicant based on the alleged absurdity which would result from that construction.—Justification of associate participation and competence of the General Assembly to determine the related régime.—Conclusion of the Tribunal that there was no administrative error or oversight on the part of the Respondent in not enrolling the Applicant as a participant in the Pension Fund on 1 January 1967 under article II, paragraph 1, of the Regulations.

Contention of the Applicant that the Respondent should not have fixed the date of expiration of his

appointment in the light of the date originally foreseen for the completion of the project but in the light of the date to which it became probable that the completion of the project would be shifted, which would have enabled the Applicant to become a full participant in the Pension Fund under article II, paragraph 2, of the Regulations.—Question of the propriety of the Respondent's action.—Letter showing that it had become obvious to the Administration that, subject to the agreement of the recipient Government, the date of completion of the project would have to be shifted to 31 October 1969.—Argument of the Applicant that according to the relevant provisions of the Project Managers' Manual, his letter of appointment should have covered the period up to 31 October 1969.—Procedures prescribed for the execution of Special Fund projects.—The plan of operation necessarily emerges from a tripartite agreement between the Special Fund, the recipient Government and the executing agency.—Examination by the Tribunal of the question whether there was agreement among the parties for an extension of the project until 31 October 1969 when the Applicant's letter of appointment was issued.—Absence of evidence to show that at that time the Administration had been notified of the existence of an agreement that would justify a change in the plan of operation.—Objection of the Applicant that formal consent of the recipient Government was not necessary.—Objection rejected.—Objection of the Applicant based on the practice followed by the Administration in granting letters of appointment.—Objection rejected.—The duration of a fixed-term appointment is a matter within the discretion of the Secretary-General and it is for the Applicant to establish his entitlement to an appointment for a specified term of service.—Conclusion of the Tribunal that in this case the Applicant has failed to prove entitlement to an appointment beyond the termination date originally foreseen for the completion of the project.

The Tribunal notes that the Applicant has no pension benefits, solely because his appointment fell short of the qualifying period by a few months.—Considerations based on equity.—Possible oversight on the part of the Respondent in not providing the Applicant with a type of contract which would have placed him, in respect of pension benefits, on a par with other staff members of comparable length of service.—Lapse on the part of the Applicant in not bringing the matter to the attention of the Administration at the relevant time.

Claim and requests for consequential relief rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Francisco A. Forteza;

Whereas, on 2 May 1973, Abdelsalam Ahmad Osman, a technical assistance expert of the United Nations Industrial Development Organization, hereinafter called UNIDO, filed an application the pleas of which read as follows:

“ . . .

“2. The Applicant requests that if the statement made by him as to the long range nature of the type of project of which he was and still is Project Manager is disputed by the Respondent, then Mr. P. M. Henry, Assistant Managing Director and Associate Director of the Bureau of Operations and Programming of the Special Fund at the time the Applicant joined the United Nations and now President, Development Centre, O.E.C.D., be asked to testify on the matter.

“3. The Applicant is citing in para. 42 of the Explanatory Statement instances of UN employment which would have given him undisputed right to full participation in the United Nations Joint Staff Pension Fund and which are obviously less justifiable than his actual case. Before proceeding to consider the merits he would request the Tribunal to obtain a ‘yes’ or ‘no’ answer from the Respondent as to the entitlement of the cases cited to full participation in the Pension Fund.

“4. In Annex 2 the Applicant is tabulating 21 letters of appointment given to him by the employing organisation, the term of each letter of appointment and its dates of issue and of signature by the Applicant. Rather than submit his copies of these letters of appointment for confirmation of the information given in the

Annex, the Applicant requests that the employing organisation (UNIDO) be asked to testify as to whether this information is correct.

"5. In Annexes 14 and 15 the Applicant is reproducing correspondence exchanged between UNIDO and Mr. Liveran, Secretary of the UN Joint Staff Pension Board, regarding the Applicant's claim to full participation in the Pension Fund. The Applicant is requesting that Mr. Liveran be asked to testify as to the correctness of these two documents.

"6. The Applicant is contesting and requesting rescission of the decision of the Secretary-General of the United Nations that there was no oversight or administrative error by the employing organisation

"(i) in not entering him as a full participant in the Pension Fund as of 1 January 1967, and

"(ii) having incorrectly left him as an Associate Participant in the Pension Fund after 1 January 1967, in not entering him as a full participant in the Fund in June 1967 when he was still under 60 and when it became evident that his service would extend beyond the date at which he would complete five years of continuous service.

"7. The Applicant is requesting that the Tribunal shall (i) confirm that under the Regulations of the United Nations Joint Staff Pension Fund effective 1 January 1967 he had the right to be entered as a full participant in the United Nations Joint Staff Pension Fund on 1 January 1967, or alternatively in June 1967, (ii) order that his rights be restored to him retroactively and that he be considered a full participant in the Fund from 1967, and (iii) order that his previous service be validated.

"8. The Applicant is requesting that the Tribunal shall fix the amount of compensation to be paid to him should the Secretary-General decide that the Applicant be compensated without further action being taken in his case, at US \$50,000 (fifty thousand).";

Whereas the Respondent filed his answer on 27 July 1973;

Whereas, on 21 August 1973, 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 23 August 1973, the Applicant requested that oral proceedings be held in the case;

Whereas, on 29 August 1973, the Applicant filed written observations in which he reformulated his pleas as follows:

**"ALTERATION OF PENSIONABLE REMUNERATION AS OF 1 JULY 1973 AND
RESULTING CHANGE IN APPLICANT'S PLEAS**

"Following submission of his Application to the Administrative Tribunal the Applicant was informed, by Information Circular No. SAU/IC-31 dated 26 June 1973 from the UNDP Regional Representative in Riyadh, and by UNIDO's circular UNIDO/Adm/PP/INF.35 dated 31 July 1973, that the Pensionable Remunerations of staff in the Professional and higher categories have been increased by 15% effective 1 July 1973. Since the Applicant had based his calculation of the amount of compensation to be paid to him should the Secretary-General decide that the Applicant be compensated without further action being taken in his case on the pensionable remuneration then in effect, and in view of the increase of pensionable remuneration of 15% from 1 July 1973, the amount of compensation should be increased accordingly, from US \$50,000 to US \$57,500.

"CONCLUSIONS

"In view of the considerations given in his Application to the Administrative Tribunal and of his Observations on the Answer for the Respondent, the Applicant respectfully requests:

"1. That the Administrative Tribunal (i) reject the Respondent's submission that the complaint of the Applicant is time-barred and rule that the case is receivable by the Tribunal and (ii) reject Respondent's other submissions.

"2. rescission by the Administrative Tribunal of the decision of the Secretary-General of the United Nations that there was no oversight or administrative error by the employing organisation:

"(i) in not entering him as a full participant in the Pension Fund as of 1 January 1967, and

"(ii) having incorrectly left the Applicant as an Associate Participant in the Pension Fund after 1 January 1967, in not entering him as a full participant in the Fund in June 1967, when he was still under 60 years of age and when it became evident that his services were to extend beyond the date at which he was to complete five years of continuous service.

"3. that the Tribunal rule that the Applicant had the right to be entered as a Full Participant in the United Nations Joint Staff Pension Fund on 1 January 1967, or alternatively in June 1967.

"4. that the Tribunal order that Applicant's rights be restored to him retroactively and that he be considered a Full Participant in the Fund from 1 January 1967 or alternatively from June 1967.

"5. that the Tribunal order that the Applicant's previous service be validated. and

"6. that the Tribunal fix the amount of compensation to be paid to the Applicant should the Secretary-General decide that the Applicant be compensated without further action being taken in his case at US \$57,500 (Fifty seven thousand five hundred).";

Whereas, on 10 September 1973, the Executive Secretary of the Tribunal informed the parties that the President had decided that the circumstances of the case did not justify oral proceedings;

Whereas, on 5 and 9 October 1973 respectively, the Respondent and the Applicant submitted additional information in reply to a question put to them by the Tribunal on 5 October 1973;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations as a technical assistance expert on 5 February 1964 under an appointment for two months. He rejoined the Organization on 16 June 1964 and served thereafter under a succession of appointments as indicated hereunder:

No.	From		To	Date of issue	Date of signature by appointee
1	5 Feb. 1964	-	4 Apr. 1964	9 Mar. 1964	18 Mar. 1964
2	16 Jun. 1964	-	25 Aug. 1964	26 Jun. 1964	26 Jun. 1964
3	26 Aug. 1964	-	27 Sep. 1964	17 Sep. 1964	18 Sep. 1964
4	28 Sep. 1964	-	11 Oct. 1964	20 Jan. 1965	21 Jan. 1965
5	12 Oct. 1964	-	31 Dec. 1964	23 Oct. 1964	21 Jan. 1965
6	1 Jan. 1965	-	22 Jan. 1965	5 Feb. 1965	8 Feb. 1965
7	23 Jan. 1965	-	19 Feb. 1965	17 Feb. 1965	17 Feb. 1965
8	20 Feb. 1965	-	26 Feb. 1965	24 Feb. 1965	5 Apr. 1965
9	27 Feb. 1965	-	26 Jun. 1965	15 Mar. 1965	5 Apr. 1965

<i>No.</i>	<i>From</i>		<i>To</i>	<i>Date of issue</i>	<i>Date of signature by appointee</i>
10	27 Jun. 1965	-	15 Aug. 1965	21 Sep. 1972	17 Oct. 1972
11	16 Aug. 1965	-	9 Sep. 1965	21 Sep. 1972	17 Oct. 1972
12	10 Sep. 1965	-	9 Sep. 1966	9 Nov. 1965	30 Nov. 1965
13	10 Sep. 1966	-	9 Sep. 1967	13 Sep. 1966	29 Sep. 1966
14-a	10 Sep. 1967	-	9 Mar. 1969	5 Oct. 1967	10 Oct. 1967*
14-b	10 Sep. 1967	-	9 Mar. 1969	31 May 1968	9 Jun. 1968*
15	10 Mar. 1969	-	31 Dec. 1969	31 Mar. 1969	8 Apr. 1969
16	1 Jan. 1970	-	31 Dec. 1970	11 Mar. 1970	17 Mar. 1970
17	1 Jan. 1971	-	31 Mar. 1971	10 Dec. 1970	23 Dec. 1970
18	1 Apr. 1971	-	30 Apr. 1971	18 Mar. 1971	30 Mar. 1971
19	1 May 1971	-	31 Oct. 1971	20 Apr. 1971	27 Apr. 1971
20	1 Nov. 1971	-	30 Apr. 1972	13 Oct. 1971	19 Oct. 1971
21	1 May 1972	-	31 Dec. 1973	10 Feb. 1972	17 Feb. 1972

*Letter of appointment No. 14-a dated October 1967 gave the salary at level 7, step IV. By a letter dated 31 May 1968 the Applicant was informed that the salary had been erroneously indicated but subsequently corrected to show the exact equivalent of salary as level 7, step III, since increments occur every two years for salaries above level 6, step IV. The Applicant was requested to sign letter of appointment No. 14-b cancelling and superseding letter No. 14-a, which he did.

Upon completing one year of uninterrupted employment on 16 June 1965, the Applicant became an associate participant in the United Nations Joint Staff Pension Fund. On 10 September 1965 he was assigned to the Industrial Studies and Development Centre in Riyadh, Saudi Arabia, as Project Manager Designate. On 10 September 1966 he became Project Manager. On 8 November 1967 the Applicant, having reached the age of 60, ceased to be an associate participant in the Pension Fund.

On 15 May 1971, in a letter addressed to the Chief of the Technical Programme Financial Management Section of the Administrative Division of UNIDO, the Applicant claimed to be entitled to participate in the Pension Fund on the following grounds:

“ . . .

“The new regulations of the Fund, dated 1 January 1970 provide under paragraph 3 ‘Note on the position of associate participants (page 24)’ that associate participants who were in service on 31 December 1966 and have since completed five years of continuous service, will be eligible for full participation in the Pension Fund under Article 52 and have the right to validation under articles 23 and 25 (c) of these new regulations. Article 52 states that an associate participant in the Fund on 31 December 1966 shall, if he remains in continuous service, continue to be an associate participant in accordance with article II *bis* of the Regulations in force on that date and shall become a participant if during such participation he receives . . . (b) an appointment which will extend the total continuous period of his service to or beyond five years.

“By virtue of these provisions, I hereby request (i) that I be considered as continuing to be an associate participant in the Fund uptill 16 June 1969, the date of completion of five years’ continuous service, (ii) that from 16 June 1969 I become a Participant, and (iii) that my whole period of service, including the two months’ service in the first quarter of 1964, be validated as contributory service towards pension. I shall of course pay to the Fund the contributions required.”

In a reply dated 28 May 1971, the Chief of the Technical Programme Financial Management Section referred to the fact that the Applicant’s associate participation in the Pension Fund had been discontinued upon his reaching his 60th birthday and asserted that he was not eligible for participation since he was over 60 years of age at the time the new Regulations came into force. On 13 June 1971 the Appli-

cant sent to the Chief of the Technical Programme Financial Management Section a further letter, stating in part:

"I am sure that you will be good enough to reconsider the matter . . . and that the necessary steps be taken so that (i) I be considered a participant in the Fund and (ii) my whole period of service, including the two months of service in the first quarter of 1964, be validated as contributory service towards pension. I shall of course pay to the Fund the contributions required for my validated service."

On 6 September 1971, in a letter addressed to the Technical Assistance Recruitment Service of the Office of Personnel at the United Nations, the Applicant, referring to the fact that his contractual status in 1967 was considered a decisive factor in his entitlement to participation in the Pension Fund, asked why he had been given a contract covering the period 10 September 1967 to 9 March 1969 followed by a second one for the period 10 March 1969 to 31 December 1969, instead of one contract covering the period 10 September 1967 to 31 December 1969. On 11 October 1971 the following reply was sent to him:

" . . .

"The extension of your contract was on the basis of the Plan of Operation which was the only authorizing document. According to this plan the project was to terminate on 9 March 1969 and your contract was extended only to that date. However, when the adjustment advice No. 1, which extended the project until the end of 1969 was issued (this happened only on 25 June 1968), your assignment was therefore extended accordingly."

The questions raised by the Applicant in his letter of 13 June 1971 had been referred in the meantime to the Secretary of the Joint Staff Pension Board, who replied as follows in a memorandum dated 17 September 1971:

" . . .

"A review of the file indicates that Mr. Osman was correctly separated on 8 November 1967 when he reached age 60, as the extension of his appointment effective 10 November 1967 (Personnel Action R7-1681 dated 29 September 1967) did not extend the total continuous period of his service to or beyond five years. In determining this we have taken into account his periods of employment from 5 February to 4 April 1964 and from 16 June 1964 to 9 March 1969, less the period from 5 April to 15 June 1964 which was a break between his two assignments."

On 24 June 1972, after an exchange of correspondence with UNIDO, the Applicant, at the suggestion of UNIDO, submitted to the Secretary of the Joint Staff Pension Board a "request for review by the United Nations Joint Staff Pension Committee of [his] claim to full participation in the United Nations Joint Staff Pension Fund". On 28 August 1972, the Secretary of the Board advised him that any claim that he might have against the United Nations because of its alleged failure to take appropriate steps in connexion with his admission into the Fund had to be pursued in accordance with the procedures laid down in the Staff Regulations and Rules of the United Nations for claims by staff members alleging an infringement of the terms of their employment. On 28 October 1972 the Applicant requested the Secretary-General to review his claim to full participation in the Pension Fund. On 22 November 1972 the Assistant Secretary-General, Office of Personnel Services, sent him the following answer:

"This refers to your letter dated 28 October 1972 addressed to the Secretary-General, in which you complain of what you consider as an administrative error in not entering you into the Pension Fund as a full participant upon the entry into force of the Joint Pension Fund Regulations of 1 January 1967. Your complaint

was thoroughly examined and your case was reviewed in the light of your employment record and of the relevant statutory provisions.

"At the date of the entry into force of the Regulations of 1 January 1967 you were an associate participant in the Pension Fund with a period of service of two years and 6½ months. Your current contract at that time was due to expire on 9 September 1967. This last date would have brought your entire period of service to 3 years, two months and three weeks. Under Article II paragraph 2 of the said Regulations every associate participant on 31 December 1966 would continue to be an associate participant in accordance with the previous provisions of Article II *bis* of the Regulations of 1 January 1963. As an exception to the rule, the above-mentioned Article of the Regulations of 1967 provides for a possible conversion to full participation in two well-defined cases:

"(a) If the associate participant receives a permanent appointment or an appointment certified by his Organization to lead normally to a permanent appointment and,

"(b) If the associate participant receives an appointment which extends the total continuous period of his employment to or beyond 5 years. In January 1967 you were in neither of these categories. In fact you had not received a permanent appointment or an appointment certified as leading to a permanent appointment. You were at the time serving under an extension of appointment for 10 months through 9 September 1967, which would not have extended the total period of your employment to 5 years, as explained above.

"I would like to point out that what matters in the application of the Regulations of the Pension Fund is the actual period of service and not the possible length of potential service. Therefore, the fact that a possible continuation of the project which you were managing could have given you an anticipation of a continuous service to or beyond five (5) years did not create a right for you to become a full participant in the Pension Fund. This is the manner in which the Regulations of the Fund are interpreted by its Board inasmuch as the length of service is concerned. The Board has constantly maintained that only the actual length of service can be taken into consideration and that mere anticipation of continuous service is irrelevant to the application of the Fund's Regulations. As you may know it is the Board of the JPF which, under Article 2 of its current Regulations, interprets those Regulations to the extent required to give effect thereto.

"There was, therefore, no oversight or administrative error in not entering you as a full participant in the Pension Fund in January 1967. When you reached the age of 60 on 8 November 1967 you were still an associate participant governed by the provisions of Article II *bis* of the Regulations of 1963. Paragraph 3 of this Article stipulates that participation shall cease when an associate participant reached the age of 60. Therefore, the administrative action taken on 20 November 1967 discontinuing your associate participation in the Fund was perfectly in conformity with the applicable regulations. There is no way at this point in time of reconsidering your position vis-à-vis the JPF, since when you completed 5 years of service on 15 June 1969 you were no longer an associate participant."

On 20 December 1972 the Applicant lodged an appeal with the Joint Appeals Board. On 24 January 1973 the Assistant Secretary-General informed him that the Secretary-General would be inclined to agree to direct submission of the case to the Tribunal. On 18 February 1973 the Applicant expressed his agreement with that suggestion. On 28 February 1973 the Director of the Division of Personnel Administration, in charge of Personnel Services, advised him that the Secretary-General had agreed to his submitting the application concerning his participation in the Pension Fund directly to the Tribunal. On 2 May 1973 the Applicant filed his application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The fact that the Secretary-General did review the case clearly indicates that he had waived any right to consider the request for review irreceivable on account of lapse of time. Furthermore, the case was brought to the Tribunal as suggested and agreed by the Secretary-General.

2. With the issue of the Pension Fund Regulations effective 1 January 1967 the Applicant, being then under 60 years of age, having completed more than one year of continuous service and having an appointment of one year, satisfied the requirements of paragraph 1 of article II of the new Regulations and was entitled to full participation in the Pension Fund as of 1 January 1967 notwithstanding paragraph 2 of that article, which concerns associate participants who do not satisfy the requirements of paragraph 1 for full participation.

3. The Respondent's interpretation of article II leads to absurd results. It means that if the General Assembly had not given those who were associate participants on 31 December 1966 any privileges, then the Applicant's right to full participation in the Pension Fund on 1 January 1967 would not have been disputed. It again means that whereas if the Applicant had left the service of the United Nations for some time in 1967 and rejoined the service before he reached the age of 60 he should have become a full participant in the Fund; because he remained in continuous service he was denied this right.

4. The Applicant should have been given, in the third quarter of 1967 (before he reached 60) a letter of appointment extending his services to 31 October 1969. This would have extended his appointment beyond the date of completion of five years of continuous service and should have resulted in his being entered as a full participant in the Pension Fund. Even with his letter of appointment effective 10 September 1967, if this had been the Applicant's very first letter of appointment, he would have been entitled to full participation in the Pension Fund. Finally, since it had become evident to the employing organization in June 1967 that the project was, of necessity, to be extended beyond mid-1969, the employing organization should have, at least, certified in mid-1967 that the Applicant's services were to continue beyond 16 June 1969, the date on which he was to complete five years of continuous service, and entered him in the Pension Fund as a full participant under article II 2 (b).

5. It is the Applicant's real status of employment and the letters of appointment that he should have been given that should be the basis of consideration of his case. As Project Manager of a project which was, of necessity, to continue beyond 16 June 1969, the Applicant was holding a post extending his total anticipated service beyond five years. It was the duty of the employing organization to have given him the type of contract which would have enabled entering him as full participant in the Pension Fund when he became entitled to such participation before reaching the age of 60.

Whereas the Respondent's principal contentions are:

1. The omission of the Applicant to observe the time-limits prescribed by Staff Rule 111.3 (a) has resulted in the lapse of his right to appeal.

2. The entitlement of an associate participant on 31 December 1966 to become thereafter a full participant in the Pension Fund is governed by paragraph 2, article II of the Pension Fund Regulations which went into effect on 1 January 1967. Since the Applicant was admittedly an associate participant on 31 December 1966, he could thereafter become a full participant only on fulfilling the conditions set out in that paragraph, which conditions he never fulfilled. The 1967 Regulations did not abolish associate participation. They merely provided that one who was not already an associate participant on 31 December 1966 could not thereafter become one, whilst those who were associate participants on that date would continue as

such in accordance with the unchanged régime applicable before and after 1966 to associate participants. The hypothetical cases envisaged by the Applicant are misleading. The fact is that he did not resign from the service and he continued to receive until the age of 60 the benefits accorded to associate participants. If the Applicant had in fact left the service of the Organization in 1967, there is no assurance that he would have been re-employed by it. Even if he were re-employed, he could have been excluded by the terms of his appointment from participation in the Pension Fund. As still another possible arrangement, he could have received a short-term appointment for less than one year, which would not have entitled him to participation prior to 8 November 1967; because of his age, he could not have become a participant thereafter.

3. The extension of the Applicant's appointment from 10 September 1967 to 9 March 1969 was a valid exercise by the Secretary-General of his discretionary authority. An examination of the applicable Staff Rules and the terms of the Applicant's letter of appointment clearly indicates that he had no right or legitimate expectancy to any extension of his appointment subsequent to 9 September 1967. Nor did the Applicant at any time acquire in the circumstances surrounding his employment a contractual right or legitimate expectancy to an extension of his appointment from 10 September 1967 to 31 October 1969. Moreover, UNIDO lacked the authority in 1967 to appoint the Applicant for a period extending substantially beyond the project termination date (28 February 1969) stipulated in the Plan of Operation.

The Tribunal, having deliberated from 1 to 19 October 1973, now pronounces the following judgement:

I. The Tribunal decides that it is not necessary to rule on the procedural pleas 2 to 5 of the application as the facts have been fully set out by the parties in their respective pleadings.

II. The Respondent raises the plea that letter of appointment No. 14-a issued on 5 October 1967 did not provide for the Applicant's full participation in the Pension Fund and that, since the Applicant did not appeal against that administrative decision "not to enrol him as a full participant" within the time-limit prescribed in Staff Rule 111.3 (a), he has lost his right of appeal.

III. The Tribunal observes that it is unnecessary to enter into the question whether the letter of appointment constituted an administrative decision on the question of pension rights. Suffice it to say that in his letter dated 22 November 1972 the Assistant Secretary-General, Office of Personnel Services, did not decline to entertain the Applicant's request for review on the plea of time-limits but reviewed the Applicant's claim on merits and rejected it. It is that decision taken on behalf of the Secretary-General which is properly before the Tribunal and therefore the Respondent's objection based on time-limits is not valid.

IV. The Applicant contends that under the Pension Fund Regulations which came into force on 1 January 1967 he became entitled to full participation in the Pension Fund since prior to that date he had completed more than one year of continuous service and had received an appointment for one year, as required by paragraph 1 of article II of the said Regulations, and that the Administration by oversight or administrative error failed to apply correctly the Regulations in his case.

Article II of the Pension Fund Regulations effective on 1 January 1967 reads as follows:

"Participation

"1. Every full-time member of the staff of each member organization shall, subject to paragraph 2 below, become a participant in the Fund

"(a) Upon receiving an appointment for one year or longer, or

“(b) Upon completing, in the same or more than one member organization, one year of service without an interruption of more than thirty days, whichever is earlier, provided that he is then under sixty years of age and that participation is not excluded by the terms of his employment.

“2. Every associate participant in the Fund on 31 December 1966 shall, if he remains in continuous employment by a member organization, continue to be an associate participant in accordance with the provisions of article II *bis* in force on that date; he shall, nevertheless, become a participant if during such associate participation he receives:

“(a) A permanent appointment or an appointment certified by a member organization to lead normally to a permanent appointment, or

“(b) An appointment which will extend the total continuous period of his employment to or beyond five years.

“3. Participation shall cease when the payment of a benefit becomes due to a participant or on his account.”

V. It appears from the above text that the right to become a participant in the Pension Fund under paragraph 1 is available to every full-time member of the staff who is not an associate participant under paragraph 2. Paragraph 1 expressly provides that the eligibility for participation in the Pension Fund is “subject to paragraph 2 below”, which paragraph deals with associate participants and the conditions under which they may become full participants.

The Applicant’s contention that, since he fulfilled the conditions prescribed under paragraph 1, he became entitled to participation in the Pension Fund ignores the qualifying proviso that such participation is “subject to paragraph 2”, dealing with the category of associate participants, to which the Applicant belonged.

VI. In support of his contention the Applicant relies on Information Circular TARS/Inf.1/Rev.4 dated 4 August 1967, which states: “If you are under the age of 60 with an appointment of one year or longer or have completed one year of service under shorter appointments without an interruption of more than 30 days, you will participate in the UNJSPF provided such participation is not excluded in the letter of appointment”. The Tribunal observes that the circular only paraphrases paragraph 1 of article II of the Pension Fund Regulations and does not purport to cover associate participants, who are specifically excluded from the application of that paragraph. In any event the circular cannot override the clear text of article II.

VII. The Tribunal therefore holds that, as the Applicant was an associate participant in the Pension Fund when the 1967 Pension Fund Regulations came into force, he could not claim to become a full participant under paragraph 1 of article II, and that he was governed by the provisions of paragraph 2 of article II of the said Regulations.

VIII. The Applicant argues that the construction of paragraph 1 of article II as aforesaid leads to an absurdity, namely, that while a staff member under 60 years of age with one year of service or an appointment for one year could become a participant in the Pension Fund, a staff member who was an associate participant with longer service could not become a participant, and that paragraph 1 of article II should be so construed as to avoid such an anomaly. Applying the provisions to his own case, the Applicant states that if he had joined the service as a fresh entrant, or if after having resigned he had re-entered the service before he reached the age of 60, he would have been entitled to full participation in the Pension Fund, but that because he remained in continuous service he was denied that right. In effect the Applicant argues that the phrase “subject to paragraph 2 below” should be ignored and that paragraph 1 of article II should be so construed as to avoid an absurdity.

IX. The Tribunal does not agree that its interpretation of paragraph 1 of article II leads to an absurdity. Articles II and III of the 1967 Pension Fund Regulations read together provide that an associate participant under paragraph 2 of article II is entitled to validate the entire period of his non-pensionable service. Thus, while an associate participant was excluded from automatic participation in the Pension Fund, he was none the less provided with certain benefits in respect of validation of his prior non-pensionable service. The Tribunal considers that it was for the General Assembly to determine what benefits should be provided to associate participants and under what conditions. Those were defined in articles II and III of the Pension Fund Regulations, which have to be interpreted according to their tenor regardless of the hypothetical situations put forward by the Applicant.

X. The Tribunal therefore concludes that there was no administrative error or oversight on the part of the Respondent in not enrolling the Applicant as a participant in the Pension Fund on 1 January 1967 under paragraph 1 of article II of the Pension Fund Regulations.

XI. The Applicant alternatively pleads that he was entitled on the expiry of his appointment No. 13 on 9 September 1967 to an appointment from 10 September 1967 to 31 October 1969 or later and that, had he been given such an appointment, he would have become a participant under paragraph 2 of article II. The Applicant, who was holding the post of Project Manager of the Industrial Studies and Development Centre in Riyadh, Saudi Arabia, was offered by a letter dated 31 July 1967 from UNIDO "an extension of your contract, which would carry through to the end of the project, i.e. February 1969". Thereafter the Applicant was issued on 5 October 1967 a letter of appointment (No. 14-a) from 10 September 1967 to 9 March 1969.

XII. The Tribunal notes that if the Applicant's appointment had been extended to 16 June 1969, he would have had an appointment extending his total continuous period of employment to five years, as required by paragraph 2 (b) of article II. In fact the appointment granted to him on 5 October 1967 covered the period up to 9 March 1969, a period shorter by three months and one week than was required for the Applicant to become a participant in the Pension Fund. Since the Applicant reached the age of 60 on 8 November 1967, he ceased on that date to be an associate participant and the appointments granted to him after 9 March 1969, which have in fact extended his total period of service to more than nine years, could not entitle him to become a participant in the Pension Fund.

The Applicant maintains that as a consequence of fixing the date of expiration of his appointment No. 14-a as 9 March 1969, he suffered an injury in that he was deprived of his pension benefits. He argues that, by granting him such an appointment at a time when it had become likely that the project would be further extended and that his services as Project Manager would be required accordingly, the Respondent acted improperly and caused loss which he was under an obligation to compensate.

XIII. The Tribunal must therefore consider whether, by fixing 9 March 1969 as the date of expiration of appointment No. 14-a, the Respondent has acted improperly.

XIV. The Tribunal observes that even before the issuance of letter of appointment No. 14-a, the Acting Chief of the Technology and Research Projects Section informed the Applicant on 19 June 1967 that:

"The time has come now to process an Adjustment Advice to the Plan of Operation for your project to indicate its revised phasing due to the delay in the implementation of the field operations.

"Kindly review, with the assistance of Mr. Hassan [Resident Representative of UNDP], the attached draft of revised Appendix I, and let us know if you and the Government of Saudi Arabia agree to the revised tables. In essence, the

estimated date of the completion of the project's operations has been shifted from 28 February 1969 to 31 October 1969."

The letter specified that "as a result", the post of Project Manager "also would continue through 31 October 1969".

Thus, when letter of appointment No. 14-a was issued to the Applicant on 5 October 1967, it had become obvious to the Administration that, subject to the agreement of the Government, the date of completion of the project would have to be shifted to 31 October 1969.

XV. The Applicant argues that according to paragraph 16 of Section H2/Rev.1 of the Project Manager's Manual concerning experts, the Project Manager should request the extension of the expert's contract "for the full duration of the project" and that, as it had become evident that the project was of necessity to be extended to 31 October 1969, letter of appointment No. 14-a should have covered the period up to 31 October 1969.

XVI. The Respondent points out that in respect of Special Fund projects the plan of operation emerges from tripartite agreement between the Special Fund, the recipient government and the executing agency. He refers to the procedures prescribed for the execution of Special Fund projects by the United Nations, which are contained in a memorandum dated 4 September 1959 from the Special Fund to the United Nations, paragraph 10 of which reads:

"The Managing Director of the Special Fund would notify to the United Nations Secretariat earmarking within the budgetary authorizations included in the Plan of Operation. Such earmarkings would constitute a basis for the United Nations Secretariat to incur obligations and expenditure in respect of a project in accordance with the Plan of Operation and the budgetary provisions contained therein."

The Respondent contends that the extension of the project beyond February 1969 did not become effective until 25 June 1968, when Adjustment Advice No. 1 was issued, and that he thus lacked the authority in mid-1967 to extend the Applicant's appointment beyond the date stipulated in the plan of operation.

XVII. The Tribunal must therefore examine whether there was agreement among the parties for an extension of the project until 31 October 1969 when letter of appointment No. 14-a was issued.

XVIII. In reply to the question put to both parties by the Tribunal on 5 October 1973, namely, "whether, between 19 June 1967 and 5 October 1967, the recipient government expressed its agreement to the extension of the project from 28 February 1969 to 31 October 1969", the Respondent stated that the files did not indicate that the Government of Saudi Arabia had done so. The Applicant for his part stated that minor changes in the plan of operation did not require formal government agreement, that verbal consultations with the government resulted in an immediate agreement, and that at a meeting of the Board of Directors of the Centre held on 3 September 1967, the Board decided that the Special Fund should be requested for extension of the project for five years.

XIX. The Tribunal observes that, even if verbal consultations with the Government of Saudi Arabia resulted in an immediate agreement for the extension of the project in principle, there is no evidence to show that, when letter of appointment No. 14-a was issued, the Administration had been notified of any such agreement to warrant a change in the plan of operation.

XX. The Tribunal observes that in a letter dated 19 June 1967 on the question of the extension of the project termination date, the Acting Chief of the Technology and Research Projects Section asked the Applicant to "let us know if you and the Govern-

ment of Saudi Arabia agree to the revised tables". It appears from that document that the Administration regarded the agreement of the Government of Saudi Arabia as necessary for such an extension.

XXI. The Tribunal also notes that UNDP considered the practical problems arising out of the delays experienced in obtaining formal signatures on behalf of recipient governments on relatively minor adjustments and decided to make certain changes set forth in an administrative circular (SP/CM/76) dated 10 December 1963. In paragraph 3 the circular stated as follows:

"Whenever a significant change in the scope of a project is involved, or where the Government's counterpart obligations are subject to formal revision, the procedure of tripartite approval of the change, whether through signature of an amendment or through a three-way exchange of letters, will be retained."

It would seem from the letter dated 19 June 1967 that there was an element of the government counterpart contribution in kind to this project and that the matter had to be discussed with the Government of Saudi Arabia. The letter stated *inter alia*:

"It will not be necessary to prepare a revision of Appendix II unless the Government so desires; we, therefore, leave it up to yourself and Mr. Hassan to take this matter up with the Government. It may very well be that you and the Government would prefer to include a revision of Appendix II in the Adjustment Advice, to show the increased estimated amounts of the Government counterpart contribution in kind."

XXII. The Tribunal is therefore unable to agree with the Applicant's contention that formal consent of the recipient government was not necessary in this case.

XXIII. The Tribunal regards the decision, referred to by the Applicant, of the Board of Directors of the Centre, at a meeting held on 3 September 1967, that "the Special Fund should be requested for extension of the project for five years" as a proposal for a greater extension of the project, not directly related to the issue of shifting the project termination date from 28 February 1969 to 31 October 1969.

XXIV. The Applicant states that in practice the Administration granted letters of appointment even before approval of the plan of operation by the Governing Council of UNDP and he relies on his letter of appointment No. 17, which was issued on 10 December 1970, before the extension of the project was approved by the Governing Council in January 1971. The Applicant also states that his letter of appointment No. 21, issued on 10 February 1972, was prior to the signatures of the amendment to the plan of operation on 16 May 1972.

The Tribunal notes, however, that appointments Nos. 17 to 21 did not extend beyond the agreed termination date of the project.

XXV. The Tribunal therefore considers that instances of extensions of appointment given under different circumstances do not constitute a precedent nor create an obligation to provide a contract covering the estimated duration of a project prior to its approval by the parties concerned.

XXVI. The Tribunal is of the view that the duration of a fixed-term appointment is a matter within the discretion of the Secretary-General and that it is for the Applicant to establish his entitlement to an appointment for a specified term or length of service.

In this case the Applicant has failed to prove entitlement to an appointment beyond the termination date mentioned in the plan of operation in force during 1967.

XXVII. The Tribunal nevertheless observes that the Applicant joined the service of the United Nations in 1964 and that, in spite of successive contracts extending his employment without break until 31 December 1973, he has no pension benefits only

because his appointment from 10 September 1967 to 9 March 1969 fell short by a few months of the qualifying period of five years' service as associate participant.

In fact, in a letter dated 15 December 1971, the Chief of the Special Services Section of UNIDO stated "We sincerely regret that action was not taken to provide you with the type of contract which would have permitted participation prior to your reaching age 60".

It could be argued that in equity the Applicant should have been enabled to earn the benefits of participation in the Pension Fund. But the Tribunal notes that the Applicant did not raise any question regarding the duration of his appointment and its extension to 31 October 1969, which was the contemplated date of project termination, either when an offer was made to him on 31 July 1967 or when letter of appointment No. 14-a was issued to him on 5 October 1967, even though he had been informed on 19 June 1967 that the date of completion of the project would have to be shifted to 31 October 1969.

XXVIII. If there was any oversight on the part of the Respondent in not providing the Applicant with a type of contract which would have placed him, in respect of pension benefits, on a par with other staff members of comparable length of service, there was equally a lapse on the part of the Applicant in not bringing the matter at the relevant time to the attention of the Administration.

XXIX. For the reasons stated earlier, the Tribunal rejects the Applicant's claim and his requests for consequential relief.

(Signatures)

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

New York, 19 October 1973

F. A. FORTEZA
Member

Jean HARDY
Executive Secretary

Judgement No. 181

(Original: English)

Case No. 171:
Nath

*Against: The Secretary-General
of the United Nations*

Non-renewal of the fixed-term appointment of a staff member of the United Nations Children's Fund (UNICEF).

Assertion of the Applicant that he had a verbal commitment of continued employment.—Contradiction of that affirmation by the officials concerned.—Applicant's admission that as a civil servant of the Government of India he could not negotiate with UNICEF for a period of employment beyond that agreed to by the Government in its secondment.—Irrelevance of a letter addressed to the Administrative Division of UNICEF by the Regional Director, which does not constitute an agreement with the Applicant.—Conduct of the Applicant belies his claim based on assurances of continued employment with UNICEF.—The Bhattacharyya case not in point.—The employment commitments given the Applicant were for