

officials of UNDP. He suffered the injury of termination through lack of due process and this resulted in a change of his position to his detriment in that he was excluded from consideration for a probationary appointment. Considering these circumstances the Tribunal awards as compensation one year net base salary to the Applicant.

X. As regards the Applicant's request for renewal of appointment, the Tribunal holds that since the renewal of a fixed-term appointment or its conversion to another type of appointment is a matter within the discretion of the Respondent, the Tribunal cannot order renewal of the Applicant's appointment. The request is therefore rejected.

XI. For the foregoing reasons the Tribunal:

(1) Orders the Respondent to pay to the Applicant the compensation awarded under paragraph IX above;

(2) Rejects the Applicant's other pleas.

(Signatures):

R. VENKATARAMAN
President

Zenon ROSSIDES
Member

New York, 18 April 1975

Roger STEVENS
Member

Jean HARDY
Executive Secretary

Judgement No. 196

(Original: French)

Case No. 193:
Back

**Against: The Secretary-General
of the United Nations
and the United Nations
Joint Staff Pension
Board**

Request by a retired staff member of the United Nations for compensation for the damage suffered by him as a result of an unjustified delay in the payment of his pension lump-sum benefit.

The Tribunal notes that the application is directed against both the Secretary-General and the Joint Staff Pension Board and that the two Respondents have submitted a joint answer.—Decision of the Tribunal to consider the facts in the case without pronouncing on their imputability to one or other of the Respondents.

Subject of the application.—Importance which the date of payment may have at a time of monetary instability and in the light of article 48 (b) of the Pension Fund Regulations.—Previous judgments of the Tribunal and the ILO Administrative Tribunal relating to currency devaluations.—Question whether any statutory provision required payment on a specific date.—Applicant's argument that that date would normally be the date on which the periodic benefit is payable.—This argument rejected in view of the requirement relating to certification by the Secretary of the Board.—Applicant's argument that if payment is made after the due date, the rate of exchange to be applied to the transfer of funds should be that which was in effect on the due date.—This argument rejected in the light of article 48 (b) of the Pension Fund Regulations.—Question whether the date of payment was unduly delayed by reason of the conduct of the Respondents.—Separation notification sent to the Pension Fund.—Unusual

notation therein.—Negligence on the part of the Fund in failing to ascertain the meaning of that notation with a view to taking appropriate action.—The Applicant's case was settled only as a result of steps initiated by the Applicant.—Calculation of the portion of the delay in payment attributable to the conduct of the Respondents.—Conclusion of the Tribunal that if the Respondents had shown normal diligence, the Applicant would have been paid at the earliest on 21 January 1973 and at the latest on 4 February 1973.—Obligation of the Respondents to make good the damages suffered by the Applicant as a result of negligence in the operation of administrative services.—No responsibility for any negligence can be ascribed to the Applicant.—The injury suffered must be calculated by taking the average of the two sums that would have been paid to the Applicant if the payment order had been executed on 21 January 1973 and on 4 February 1973 respectively.—The injury must be assessed as being the difference between the average thus obtained and the sum credited to the Applicant's account.—Award to the Applicant of the sum thus determined.

Request for the payment of interest.—Article 45 of the Pension Fund Regulations, invoked by the Respondents, not applicable.—Precedents of Judgements Nos. 143 and 164.—Award to the Applicant of interest at the rate of 6 per cent per annum from 6 December 1973 to the date of payment.

Award to the Applicant of \$800 in lieu of costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Sir Roger Stevens;

Whereas, on 25 October 1974, Jean Back, a former staff member of the United Nations, submitted an application to the Tribunal against the Secretary-General of the United Nations, the first Respondent, and the United Nations Joint Staff Pension Board, the second Respondent;

Whereas, in the pleas of his application as he amended them following the oral proceedings, the Applicant requests the Tribunal:

“(1) To grant him a sum in United States dollars which will be the equivalent of 33,206.20 Swiss francs at the rate of exchange obtaining on the day of effective payment, such sum representing the damage suffered by the Applicant as a result of the unjustified delay in the payment of his pension lump sum benefit, the amount of such damage being calculated as the difference between the lump sum benefit which the Applicant should have received on 29 January 1973 at the commercial rate of exchange of 3.6625 Swiss francs per dollar (i.e. $\$56,706.81 \times 3.6625 = 207,688.69$ Swiss francs and the sum which he actually received on 6 March 1973, i.e. 174,482.49 Swiss francs;

“(2) To grant to the Applicant interest on the amount stated in paragraph (1) at the rate of 6.5 per cent per annum from 2 May 1973 to the date of payment;

“(3) To grant to the Applicant the reimbursement of his postal (registered and special delivery mail) and telephone expenses between Geneva and Brussels as well as all postal expenses between Brussels and New York; such expenses being in the amount of \$100;

“(4) To grant to the Applicant the reimbursement of his counsel's fees in the amount of \$1,500; and, in addition, the reimbursement of a cancellation fee of \$86 for a trip contracted for by the Applicant's counsel after he had been informed that oral proceedings were not granted and which he had to cancel when he was advised that oral proceedings would be held;

“(5) To sentence jointly the two Respondents to pay the Applicant the sums above stated under paragraphs (1) to (4).”;

Whereas, on 20 February 1975, the two Respondents filed a joint answer, the first

Respondent agreeing, under article 7, paragraph 1, of the Statute, that the application be submitted directly to the Tribunal;

Whereas the Applicant submitted a request for oral proceedings on 29 January 1975;

Whereas the Applicant filed written observations on the answer of the Respondents on 24 March 1975;

Whereas the Applicant filed an addendum to his written observations on 26 March 1975 and an addendum to his pleas on 31 March 1975;

Whereas the Respondents submitted an additional document and observations on 1 April 1975;

Whereas, on 4 April 1975, the Tribunal heard the parties in oral proceedings, following which the Applicant filed additional documents and final pleas;

Whereas, on 7 April 1975, the Respondents submitted additional information on which the Applicant submitted observations on 8 April 1975;

Whereas the facts in the case are as follows:

On 21 October 1972, the Applicant, a staff member of the United Nations stationed in Cyprus, advised the Secretary of the United Nations Joint Staff Pension Board that he had decided to retire as of 16 December 1972 and that he wished to receive the reduced pension together with the lump sum referred to in article 29 of the Regulations of the Fund. On 10 November 1972, the Secretary sent the Applicant the form to be completed by participants for payment of their pension benefits, asking him to complete it and return it to him before he retired, and informing him that payment of his benefit would commence three or four weeks after all the required separation documents had been received. The Applicant completed the form on 18 November 1972 and returned it to the Secretary, who received it on 21 November 1972; in the form, the Applicant specified that his benefit should be paid in Swiss francs to a bank in Geneva which he named. The Applicant separated from the service of the United Nations on 16 December 1972. This fact was recorded in two personnel action forms (P.5) drawn up by the United Nations Office at Geneva: form 72-5060 (which erroneously gave 15 December 1972 as his separation date), dated 13 December 1972 and received by the Pension Fund in New York on 5 January 1973, and form 72-5077 (which corrected the preceding form), dated 15 December 1972 and received by the Pension Fund on 8 January 1973. The Applicant's separation was also the subject of a separation notification drawn up by the Personnel Office on 1 January 1973 and by the Finance Officer on 22 December 1972, addressed to the Pension Fund and received by it on 5 January 1973; in this notification, which mentioned 16 December 1972 as the separation date, the following words are printed "A review of the official record (indicates/does not indicate) that the staff member should be reviewed by the Joint Staff Pension Fund under Article 34 of the Pension Fund Regulations"; the words in parentheses had been crossed out and replaced by the words "not received". On 21 February 1973, after the Applicant had made inquiries of the Director of Administrative and Financial Services in Geneva, the Liaison Officer of the Pension Fund in Geneva cabled the Secretary of the Joint Staff Pension Board communicating the Applicant's request for information regarding the payment of his retirement benefit. On 27 February 1973, the Director of Administrative and Financial Services transmitted to the Applicant the message cabled by the Pension Fund advising him that his pension payment would be processed during the course of the week. On the same day, the Secretary of the Joint Staff Pension Board authorized a New York bank to remit by cable to the Geneva bank specified by the Applicant the equivalent of \$US 56,706.81, the lump sum due to the Applicant under article 29 (d) (i) of the Pension Fund Regulations. On 6 March 1973, the Applicant's account at his Geneva bank was

credited in the amount of 174,482.49 Swiss francs, corresponding to a rate of exchange of about 3.07 Swiss francs per \$US 1. On 27 March 1973, in a letter addressed to the Secretary of the Joint Staff Pension Board, the Applicant reserved his position as to the payment and the date on which it was effected and requested that the entire matter be investigated. On 24 April 1973, the Secretary replied that the last of the required separation documentation had been received on 8 January 1973, but that, as the Applicant's medical clearance had not been received from Geneva, it had been necessary to obtain further clarifications, that the documentation of his retirement was not completed until 26 February 1973, and that the necessary action was taken on the following day for payment of the lump sum and on 2 March 1973 for the first payment of the periodic benefit; the Secretary concluded that the Fund had discharged its obligations to the Applicant, since his benefit had been paid to him in the currency he had selected at the rate of exchange for dollars obtained by the Fund on the date of payment, in accordance with article 48 (b) and rule J.2 (c) of the Fund's Regulations and Rules. In a further letter dated 5 May 1973 addressed to the Secretary of the Joint Staff Pension Board, the Applicant pointed out that he did not question the actions taken by the Pension Fund but only the date on which they were taken, due maybe to some fault of the administrative services; he added that all the documentation requested had been sent immediately and that he had never been told that a medical clearance was necessary. On 14 June 1973, the Applicant wrote to the Secretary-General requesting him to order an investigation into the whole matter, including the delay between the date of his retirement and the date when the separation documents were received by the Fund. The Applicant sent a copy of his letter to the Secretary of the Joint Staff Pension Board, who pointed out in a letter dated 22 June 1973 that, in applying to the Secretary-General, the Applicant was seeking relief from a source not competent to deal with questions concerning the Pension Fund, and asked him whether he wished the Secretary of the Pension Board to review the case and whether he might subsequently wish to proceed under section K of the Pension Fund Rules. On 5 July 1973, the Applicant replied that, since the Secretary had stated that the Fund had acted 24 hours after having received the required documentation, he had concluded that the means of recourse left to him were not to be found in section K of the Pension Fund Rules, but in his request to the Secretary-General for an investigation. Meanwhile, the Under-Secretary-General for Administration and Management had, on 25 June 1973, informed the Applicant, on behalf of the Secretary-General, that the Assistant Secretary-General for Personnel Services had been asked to look into the question, in consultation with the Secretary of the Joint Staff Pension Board. On 6 December 1973, the Under-Secretary-General for Administration and Management informed the Applicant that his letter of 14 June 1973 had been transmitted to the Secretary of the Pension Board and suggested that the Applicant should deal directly with the Secretary, as all matters relating to pensions and payments by the Fund were reserved exclusively to be dealt with by the Fund through its secretariat. In his reply dated 28 December 1973, the Applicant disagreed with that suggestion pointing out that, according to the Secretary of the Pension Board, the Fund was not responsible for the delay, and requesting the Under-Secretary-General for Administration and Management to take an early decision and, if he maintained his interpretation, to authorize the Applicant to appeal directly to the Tribunal, since over one year had elapsed since the date of his retirement. On 25 January 1974, the Assistant Secretary-General for Personnel Services sent the Applicant a letter worded as follows:

“ . . .

“The separation notification [received by the Pension Fund in New York on 5 January 1973] indicated that a medical examination, which is customary in Geneva in all cases of separation, had not been carried out. The Office of Personnel

Services in Geneva was not requested by the Fund to clarify the documentation submitted or to provide further documents at any time after dispatch of the separation papers to New York. It appears that the decision of the Fund on 27 February 1973 to authorize payment of your pension benefits did not, in fact, result from the receipt of new documentation, but rather from their determination, in the light of your inquiry and upon review of the case, that what they already had was sufficient for their purposes. We are advised by the Administrative and Financial Services, Geneva, that from their experience of other cases, it is not unusual for a period of several weeks to elapse between the retirement date and the payment of pension benefits.

"It is, of course, regrettable that you incurred losses as a result of the devaluation of the dollar at the beginning of February 1973. However, this is not the first time nor, I am afraid, will be the last in which currency fluctuations increase or decrease the amount of pension payments when these are converted into currencies other than US dollars. As you realize, such fluctuations are the result of complex economic and political forces, which are far beyond the power and control of the administration and the Pension Fund. In the face of these inescapable realities, it has been the consistent policy of both not to entertain any claims for losses suffered by retirees under circumstances similar to those obtaining in your case. Conversely, no attempt of recovery from retirees is ever made when the value of the dollar goes up instead of down. In fact, as you know, a dollar revaluation is now taking place, which may very well benefit those staff members who retire while the trend continues. Under the circumstances, the experience for somebody retiring now in Switzerland may conceivably be the opposite of yours. . . ."

On 15 February 1974, the Applicant addressed the following reply to the Assistant Secretary-General for Personnel Services:

" . . .

"Firstly, I should like to thank you for having kindly made inquiries of Personnel Services in Geneva, which have shed new light on this regrettable case.

"During my lengthy correspondence with various offices in New York, Mr. Liveran [Secretary of the Joint Staff Pension Board] wrote to me on 24 April 1973 that the last of the documentation was received by the Fund on 8 January 1973. He went on to say: 'However, as your medical clearance was not received from Geneva/FOS, further clarifications were necessary. It was not until 26 February 1973 that the documentation of your retirement was complete, and we could process your benefit. The necessary action was taken by this office on the following day, 27 February . . . '.

"I concluded from this letter that between 8 January and 26 February 1973 something had been done, either by the Fund or by Geneva, to obtain the information and that on 26 February, once the clarification had been obtained, the Fund had acted immediately. I therefore wrote to Mr. Liveran on 5 July 1973 stating that I certainly did not wish to question his statement that the Fund had acted 24 hours after having received the required documentation.

"However, it seems from your letter that nothing happened between 8 January and 26 February 1973 . . . except that Mr. Liveran received telegram No. 1043 from Geneva dated 21 February in which Mr. Godin [Liaison Officer of the Pension Fund in Geneva] notified him that I was requesting information on payment of my retirement benefit. This telegram was sent after I had approached Mr. Kirkbride [Director of Administrative and Financial Services] personally.

"On 27 February 1973 Mr. Kirkbride sent a cable to me in Helsinki informing

me of the reply from New York which stated that my pension payment would be processed during that week (it was processed on that very day).

"Moreover, your letter of 25 January 1974 clearly indicates that the decision of the Fund on 27 February 1973 to authorize payment of the sum in question did not result from the receipt of new documentation, but rather from the Fund's determination, following my inquiry and a review of the case, that the documents it already had were sufficient to establish my entitlement.

"I am sure you would agree with me that, from the administrative point of view, such inaction is as inexplicable as it is inexcusable. The outcome was that my case was left pending for almost two months, the necessary action being taken only at my request, because I was worried—and justifiably so—about the daily decline of the dollar which was seriously affecting my interests.

"With regard to your statement that I must have incurred losses as a result of the devaluation of the dollar, I would venture to point out that the responsibility for those losses lies, to a large extent, either with the Administration or with the Fund. I cannot conceive that their lack of diligence should be allowed to cause me to lose some 40,000 Swiss francs.

"This is all the more evident because I already informed Mr. Liveran on 21 October 1972 of my decision to retire as of 16 December 1972. Mr. Liveran replied on 10 November 1972 that payment of my benefit would commence three or four weeks after all the required separation documents were received.

"I, for my part, had sent the documentation required by Mr. Liveran on 18 November 1972 and had therefore done all that had been asked of me.

"In view of the foregoing facts, which show that an error has been committed that has certainly been detrimental to my interests, I should be grateful if, as I asked Mr. Davidson [Under-Secretary-General for Administration and Management] in my letter of 28 December 1973, you could authorize me to refer this case directly to the Administrative Tribunal, without having recourse to the Joint Appeals Board, since over a year has elapsed since the date of my retirement.

" . . . "

On 6 March 1974, the Director of the Division of Personnel Administration advised the Applicant that, since the alleged delay in the payment of his pension benefits did not derive from any action of the administration of the United Nations involving non-observance of the terms of his appointment, it would not be appropriate for the Joint Appeals Board to consider his case, and, therefore, the question of the Secretary-General's agreement to submit the case directly to the Tribunal did not arise; he drew the Applicant's attention to the procedures for review and appeal provided for in article 49 of the Pension Fund Regulations and in section K of the Rules. On 28 March 1974, the Applicant asked the Secretary of the Joint Staff Pension Board to reconsider his decision of 24 April 1973. On 3 April 1974, the Secretary replied as follows:

" . . . "

"In accordance with your request and in the light of the correspondence to which you refer in your letter, I wish to confirm that the decision was indeed in accordance with the Regulations and Rules of the Pension Fund, because as was pointed out to you in my letter of 24 April 1973, the amount paid was the one due in accordance with Article 48 (b) and Rule J.2 (c) of the Regulations and Rules of the Pension Fund, and the date on which payment was effected was the one on which, in accordance with the established practice, it became possible for the Pension Fund to do so.

"In this connection and in the light of the correspondence referred to, I should perhaps elaborate and explain that, in order for the Fund to establish

whether you had become entitled to a benefit under Article 29 of the Regulations, it was necessary to determine under that Article, whether or not your separation had taken place, separation being defined in Article 1 of the Regulations as 'ceasing to be in the service of a member organization otherwise than by death'.

"As neither employment by, nor separation from its member organizations are functions carried out by the Pension Fund, it is self-evident that the Fund cannot know whether or not such a separation has taken place unless it is so informed by the Organization that employed the participant. What requirements the Organization deems necessary and what procedures it follows in order to effect a separation is a matter entirely for that organization and is beyond the control and jurisdiction of the Pension Fund.

"Finally, as to the possibility that an administrative error was committed in your case, I wish to reconfirm that if any such error was committed, it was not committed by any of the organs of the Pension Fund and hence there is no basis for a claim against the Pension Fund on such grounds. . . ."

On 1 May 1974, the Applicant requested the Secretary to put the matter before the competent body of the Pension Fund. Following a further exchange of correspondence with the Applicant, the Secretary submitted the Applicant's case to the Standing Committee of the Joint Staff Pension Board, which considered the case on 6 August 1974. On 11 August 1974, the Secretary informed the Applicant of the Standing Committee's decision as follows:

" . . .

"After careful consideration the Standing Committee concluded that without prejudice to the question of whether the loss you claim to have suffered is one which engages legal liability on the part of anyone, it clearly is not a loss for which the United Nations Joint Staff Pension Fund bears responsibility.

"In rejecting your claim, the Committee recognized that the procedures followed by a member organization of the Fund in separating a staff member from its service may be challenged. In your case it must therefore be pursued against the United Nations as it is the United Nations and not the United Nations Joint Staff Pension Fund which establishes these procedures.

" . . ."

On 25 October 1974, the Applicant filed the above-mentioned application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Both Respondents acknowledge the existence of an abnormal delay in the payment of the Applicant's pension benefits but explain the reason for this delay in different ways and decline all responsibility for it, each appearing to shift such liability to the other.

2. If the payment had been effected within a normal period of time, the Applicant would have received about 40,000 Swiss francs more than he received on 6 March 1973.

3. The Pension Fund Regulations and Rules do not provide for a medical examination in the case of the Applicant. He fulfilled all administrative formalities requested of him at the time of separation by the two Respondents. The question whether the second Respondent could legitimately consider the separation file transmitted to it by the first Respondent as incomplete is a matter of exclusive concern to the two Respondents and cannot affect the Applicant's rights.

4. Entitlement to a retirement benefit shall vest in a participant on the day succeeding the last day of his contributory service, subject to certification by the Secretary of the Pension Board that the conditions for payment have been fulfilled. It is obvious that

the Secretary cannot lawfully delay such certification beyond a short time after the participant has fulfilled all the requirements laid down or has supplied the further information or documentation requested from him. It is also obvious that such certification does not affect the date on which entitlement to the benefit takes effect. In the present case, the second Respondent was fully aware, since 18 November 1972, that the Applicant would retire in Switzerland and that he had asked that his benefits be paid in Switzerland in Swiss francs. The second Respondent was therefore under a legal obligation to pay the Applicant's benefits in Swiss francs at the rate of exchange in effect on the date when payment was to be made.

5. In private law, as in public law, when a claim is expressed in currency A but must be paid by the debtor in currency B, the amount to be received by the creditor in currency B is determined by the rate of exchange obtaining on the date when the payment should have been made. If the debtor postpones the payment of his debt without any valid reasons opposable to the creditor and meanwhile the rate of exchange of currency A has decreased as against currency B, the debtor will have to pay the creditor the difference between the amount he would have received in currency B, had the claim been satisfied when it should, and the amount received by him at the time of the actual payment.

6. Neither of the two Respondents can therefore invoke article 48 of the Pension Fund Regulations. That article does not mean that the Fund may lawfully satisfy its debts at any time it pleases.

Whereas the Respondents' principal contentions are:

1. Since the Secretary of the Board can certify the payment of a benefit as required under section I.2 of the Administrative Rules of the Pension Fund only after a participant has actually been separated, and then only when all relevant information has been made available to him, it is evident that in the normal course of events, payment cannot be made immediately on the date that entitlement begins. Consequently, the Regulations and Rules of the Fund make no provision for such instant payment.

2. From article 45 of the Regulations of the Fund, which stipulates that the Fund shall not be liable for interest on any due but unpaid benefit, it may be deduced *a fortiori* that the General Assembly did not intend the Second Respondent to be liable for any incidental detriment due to a delay in payment.

3. It is clear from article 48 (b) of the Fund Regulations that the Applicant is not entitled to conversion of his benefit into the currency selected by him at the rate of exchange prevailing on the date when his entitlement begins.

4. It is clear from Administrative Rule J.2 (c) that the Applicant was not entitled to conversion of his benefit at the United Nations operational rate of exchange.

5. The interval of 73 days (from 17 December 1972 to 27 February 1973) which elapsed between separation and the issue of the payment authorization cannot be considered excessive in view of the complexity of the factors that must be taken into account before a benefit can be calculated and paid. The Applicant has failed to establish that any delay in payment was due to the negligence or fault of either of the Respondents. The second Respondent, in particular, was not negligent in failing to note that processing had not been completed sooner. On the other hand, the Applicant is not entirely free of fault. If he was concerned that delay in payment would prejudice him, it would have been prudent on his part to inquire whether the delay was attributable to any circumstances, such as a misunderstanding (as was actually the case), susceptible of prompt correction as soon as an initiative was taken.

6. In calculating his damages, the Applicant fails to take into account that, even if the payment to him had been made more promptly, substantial portions of the total

period required to make payment could not reasonably have been eliminated or significantly reduced.

The Tribunal, having deliberated from 4 to 18 April 1975, now pronounces the following judgement:

I. The Tribunal notes that the application is directed against both the Secretary-General of the United Nations and the United Nations Joint Staff Pension Board. The two Respondents have submitted a joint answer, the pleas of which are as follows:

"The Tribunal is respectfully requested to find that Applicant has failed to establish any obligation, based on any provision of his contract of employment or terms of appointment (including the Staff and Pension Fund Regulations and Rules), on the part of either Respondent to assure him of payment on or at the rate of exchange prevailing on the date his pension entitlement vested; nor has Applicant proved fault on the part of either Respondent, not outweighed by his own lack of diligence, causing him to be paid only after an allegedly unreasonable delay from the date of such vesting."

Consequently, the Tribunal will consider the facts in the case without pronouncing on their imputability to one or other of the Respondents and, in particular, without determining the share of responsibility, if any, which might be apportioned to each of them.

II. The application concerns the circumstances in which payment was made to the Applicant of the lump sum representing the commutation of a portion of his pension, such commutation having been requested by the Applicant under article 29 of the Fund Regulations. There is no dispute between the parties concerning the evaluation of this lump sum, calculated in dollars in accordance with article 48 of the Fund Regulations (\$56,706.81). The Applicant, availing himself of the option provided by article 48 (b), selected Swiss francs as currency of payment. However, although the Applicant's date of separation was 16 December 1972, payment was not made until 6 March 1973. According to the Applicant, the rate obtained by the Fund to exchange dollars for Swiss francs on the date of payment was 3.07 Swiss francs to the dollar whereas, if the exchange had taken place on the day following retirement, the rate would have been 3.7720 Swiss francs and, on 29 January 1973 (the date on which, in his view, payment should have been made) the rate was still 3.6625 Swiss francs. Consequently, the final sum received in Swiss francs by the Applicant was 174,482.49 Swiss francs, whereas, if the sum had been paid on 17 December 1972, the Applicant would have received 213,898 Swiss francs and, if payment had been made on 29 January 1973, he would have received 207,688.69 Swiss francs.

It is incontestable that, at a time of monetary instability and in the light of the provisions of article 48 (b) of the Fund Regulations, under which benefits are payable at the rate of exchange for dollars obtained by the Fund on the date of payment, that date can have a considerable effect on the sum received by the recipient in the currency selected by him.

III. In judgement No. 182 (*Harpignies*), the Tribunal considered the problem of the effects of the devaluation of the dollar on the situation of retired staff members of the United Nations. It concluded that it does not seem that "the resulting inequality of treatment, which is not attributable to the Organization, imposes any specific duty on its part towards a retired staff member" (para. XVII). The Administrative Tribunal of the International Labour Organisation, in its judgement No. 234 of 6 May 1974 (*in re Chawla*, No. 2), stated that "Upon well-established principles there can be no claim in respect of currency devaluation as such".

Consequently, the Tribunal must consider only:

(2) If such is not the case, whether the date of payment must be considered as having been unduly delayed by reason of the conduct of the Respondents.

IV. The Applicant, while recognizing that no provision specifically stipulates the date on which a lump sum benefit is payable, considers that it would normally be the date on which the periodic benefit is payable, since the lump sum benefit is based on the periodic benefit. He also maintains that, if payment is made after the due date, the rate of exchange to be applied to the transfer of funds should be that which was in effect on the due date, and not the rate in effect on the date on which payment is actually made.

However, the Applicant himself concedes that a certain time may be needed to compute the benefit and he adds that that time should be "much shorter than 3 weeks".

Without considering this last point, and without dwelling on the apparent contradiction in the Applicant's argument, the Tribunal notes that section I.2 of the Administrative Rules of the Fund distinguishes between the date of entitlement and the date of payment: payment is subject to certification by the Secretary of the Board "that the conditions for payment of the benefit have been fulfilled". This provision of section I.2 of the Administrative Rules of the Fund invalidates the argument submitted by the Applicant. It is clear that the requirement of certification by the Secretary of the Board implies that payment cannot be made on the day on which entitlement to a benefit takes effect. With regard to the rate of exchange, article 48 (b) of the Fund Regulations clearly stipulates that it is the rate of exchange for dollars obtained by the Fund on the date of payment, and not an earlier rate such as that in effect on the date of commencement of entitlement, which must be applied.

V. The real issue is whether the date on which payment was made was unduly delayed by reason of the conduct of the Respondents and whether they are obligated to make good the damages suffered by the Applicant as a result.

The Tribunal notes that the discussion between the parties mainly concerns three points: the wording of the separation notification received by the Secretary of the Board on 5 January 1973; the circumstances in which the Secretary of the Board notified the Applicant that payment would be made; and the interval which elapsed before payment was made.

VI. The separation notification sent to the Secretary of the Board by the United Nations Office at Geneva, in part "A. Separation notification", signed on 1 January 1973 by the Personnel Officer, did not state, in item 2 which reads as follows: "A review of the official record (indicates/does not indicate) that the staff member should be reviewed by the Joint Staff Pension Fund under article 34 of the Pension Fund Regulations", any choice between "indicates" and "does not indicate"; both alternatives had been crossed out and the words "not received" had been typed above them.

The presentation of this notification was therefore unusual since it signified for practical purposes (although it did not state as much explicitly) that, at the time of signing, the Personnel Officer did not have a medical certificate enabling him to determine whether or not it was necessary to apply the provisions of article 34 concerning disability benefits.

The parties discussed at length the practice of requiring a medical certificate upon retirement and the reasons for such a requirement. However, they agree that the submission of such a certificate is not a statutory requirement.

The Tribunal notes that the notification received on 5 January 1973 by the Pension Fund was unusual, or at least peculiar. At first glance, it appears that the words "not received" were intended to inform the recipient of the notification that an additional document was to follow. Normally, such a notation would provoke a request for explanations, if not immediately, at least after a few days.

The Tribunal was not informed of the reasons for the decision to send to the Fund the notification containing this unusual notation. It is possible that the Geneva services considered that, as the Applicant was under the authority of the Field Operations Service administered from New York, he was not subject to a requirement which existed in Geneva, or they might have intended to provide the information subsequently. In any case, the wording used was ambiguous.

VII. There is nothing in the file to show that, on receipt of this document, the Pension Fund took any steps to clarify the situation, and the Respondents have provided no justification or information in this connexion.

The effect of this inaction was to block certification of the lump sum. This situation continued from 5 January to 26 February 1973, i.e. for one month and three weeks, indicating negligence which it is difficult to excuse when information could have been obtained either from the Field Operations Service in New York or from the Pension Fund Liaison Officer in Geneva. Regardless of whether medical clearance was required or not, depending on whether or not the Applicant was considered to be subject to the regulations governing Geneva staff, there was negligence in failing to ascertain the meaning of the unusual notation on the notification, with a view to taking appropriate action, i.e., requesting additional documentation or proceeding with certification.

VIII. This state of affairs was terminated only when the Applicant himself approached the Director of Administrative and Financial Services in Geneva; as a result, a telegram was sent on 21 February 1973 to the Secretary of the Joint Staff Pension Board by the Fund's Liaison Officer in Geneva. Five days later, the Fund informed Geneva that the payment would be processed within the week. The telegram of 21 February 1973 stated only that the Applicant was requesting information on payment of his retirement benefit. No further explanation was provided concerning the content of the separation notification, and no additional document was produced. However, on 27 February 1973, the Pension Fund made arrangements for payment of the lump sum.

In a communication dated 24 April 1973 addressed to the Applicant, the Secretary of the Board stated: "It was not until 26 February 1973 that the documentation of your retirement was complete, and we could process your benefit."

The Respondents have not claimed that other documents were received before Monday, 26 February 1973 or that further steps were taken. In these circumstances, the Tribunal considers that it was as a result of the receipt of the telegram sent from Geneva on Wednesday, 21 February 1973 that the Fund, having examined the documents already in its possession, decided to certify payment.

It appears therefore that the Applicant's case was settled by the competent service only as a result of steps initiated by the Applicant.

IX. The transfer to the Applicant's account was finally made on Tuesday, 6 March 1973, although the relevant documents had been received by the Pension Fund on Friday, 5 January 1973. In order to determine what portion of the delay in payment is attributable to the conduct of the Respondents, the Tribunal notes that the transfer to Geneva took 13 days from the receipt of the telegram of 21 February 1973. It notes that the New York bank received the order to cable to the Geneva bank the sum due to the Applicant. It is therefore reasonable to assume that the 13-day period represents the minimum required.

The Tribunal also recognizes that the wording of the notification received on Friday, 5 January 1973 could lead to certain steps being taken. However, in view of the fact that, according to the notification, the Applicant was under the authority of the Field Operations Service, it could have been easily established that a medical certificate—not required by the statutory texts—was not compulsory in order to pro-

ceed with certification. Taking into account the time needed for any exchange of correspondence with Geneva, the Tribunal considers that an interval of two weeks from the first working day following receipt of the notification—i.e. Monday, 8 January 1973—would correspond to reasonable administrative diligence.

In conclusion, the Tribunal considers that, if the Respondents had shown normal diligence, the Applicant would have been paid at the earliest within a period of 13 days from 8 January 1973—i.e. on 21 January 1973—and at the latest within 27 days from that date, i.e. on 4 February 1973.

The Tribunal notes further that, in his correspondence with the Applicant, the Secretary of the Board stated that he was anxious to avoid unnecessary delays in the settlement of benefits and that he had even indicated that payment would commence three or four weeks after the required documents were received.

X. In the light of the circumstances noted above, the delay in paying the sum due to the Applicant demonstrates negligence in the operation of administrative services such that the resulting damages to the Applicant must be made good by the Respondents.

The Respondents have maintained that the time taken by the Applicant to inquire into the reasons for the delay in settlement should lead to a sharing of responsibility. The Tribunal considers that, having completed all the formalities required under the Fund Regulations, no responsibility for any negligence can be ascribed to the Applicant.

XI. The Tribunal considers that no precise date can be fixed as being that on which payment should have been made, but that the prejudice suffered should be calculated by taking the average of the two sums in Swiss francs that would have been paid to the Applicant if the payment order had been executed in Geneva on 21 January 1973 and on 4 February 1973 respectively.

The prejudice must be assessed as being the difference between the average thus obtained and the sum of 174,482.49 Swiss francs credited to the Applicant's account on 6 March 1973. The Respondents shall pay to the Applicant the sum in dollars corresponding to the sum in Swiss francs thus determined.

XII. The Applicant requests the payment of interest at the rate of 6.5 per cent per annum from 2 May 1973 to the date of payment. The Respondents contest the principle of this request, basing their argument on article 45 of the Pension Fund Regulations. The Tribunal notes that this text relates to the case of a benefit due but unpaid. In this case, the Applicant is claiming not a benefit under the pension scheme, but compensation for damages incurred as a result of the abnormal delay in payment of the benefit.

The Tribunal notes that, as at 2 May 1973, the Applicant had not initiated any appeals procedure and that, consequently, as at that date the settlement of the claim was not unduly delayed. Subsequently, however, this settlement was delayed because of the actions of the Respondents and, in particular, because of the divergent views expressed by them on responsibility for the prejudice. Consequently, the Tribunal recalls the precedents of its judgements Nos. 143 and 164 and decides to grant interest at the rate of 6 per cent per annum. That interest will run from 6 December 1973—the date on which the Under-Secretary-General for Administration and Management referred the Applicant to the Secretary of the Joint Staff Pension Board although the Applicant had, on 14 June 1973, already requested the Secretary-General to order an investigation into the whole matter—until the date of payment by the Respondents of the sum due to the Applicant under paragraph XI above.

XIII. As expenses, the Applicant claims \$100 to meet the cost of correspondence and telephone calls and \$1,500 for counsel's fees.

The Tribunal notes that the Applicant had the option of availing himself of the services of one of the persons named in the Panel of Counsel.

Consequently, in view of its resolution of 14 December 1950 and of the circumstances of the case, the Tribunal decides to award to the Applicant a total sum of \$800 in lieu of costs.

With regard to the claim for reimbursement of a cancellation fee for a journey contracted for by the Applicant's counsel, the Tribunal notes that, in the addendum to his written observations which was dated 19 March 1975 and was received in New York on 26 March 1975, the Applicant's counsel was still pressing his request for oral proceedings and that the Respondents cannot be required to reimburse the cancellation fee in question because the counsel's request was finally satisfied by a decision of which he was informed on 24 March 1975. The claim is therefore rejected.

XIV. For these reasons, the Tribunal decides that the Respondents shall pay to the Applicant:

- (1) The sum determined in accordance with paragraph XI above, plus interest at the rate of 6 per cent per annum from 6 December 1973 to the date of payment;
- (2) The sum of \$800 in lieu of costs;
- (3) All other pleas are rejected.

(Signatures)

Suzanne BASTID
Vice-President, presiding

Francisco A. FORTEZA
Member

New York, 18 April 1975

Roger STEVENS
Member

Jean HARDY
Executive Secretary

Judgement No. 197

(Original: English)

Case No. 173:
Osman

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

Request for revision of Judgement No. 180.

Request that copy of the application be transmitted to the Staff Council, to the Joint Appeals Board and to the Administrator of UNDP under article 21 of the Rules of the Tribunal.—Request rejected.

Request for the hearing of three witnesses.—Request rejected.

Alleged error made in Judgement No. 180 in calculating the length of time by which the Applicant's period of employment fell short of that required for him to become a participant in the Pension Fund.—Justification of the calculation used in Judgement No. 180.—Calculation more favourable to the Applicant used by the Secretary of the Joint Staff Pension Board.—Correction of Judgement No. 180 under article 12 in fine of the Statute of the Tribunal.

Application for revision.—Discovery by the Applicant of the fact that the Administration had not provided him with a copy of the Pension Fund Regulations which came into force on 1 January 1967.—Applicant's consequential deduction that there could be no lapse on his part in not bringing the matter