

been higher than that of his successor, the Pension Board would have calculated his ceiling on the basis of the Applicant's actual remuneration and not on the basis of the lower remuneration which the Deputy Secretary-General of WMO would have received, in that case, as from 1 January 1972, for example.

9. To sum up, I consider that the Applicant cannot base his case on the literal interpretation of a General Assembly text designed, not to eliminate inequalities which might result from an increase or decrease in the pensionable remuneration of the Deputy Secretary-General of WMO, but to prevent any staff member who retired on a given date from receiving less than a staff member with the same average final remuneration who retired some years previously.

10. With regard to the inequality resulting from the level established for the salary of the Deputy Secretary-General of WMO as from 1 January 1972, I consider that it is for the WMO Congress rather than the United Nations General Assembly to decide whether that situation should be corrected.

11. For the foregoing reasons, I consider that the application should be rejected.

(Signature)

New York, 13 October 1977

Francisco A. FORTEZA

Judgement No. 229

(Original: English)

Case No. 218:

**Squadrilli (Retroactive participation
in the United Nations
Joint Staff Pension Fund
for service with UNRWA
prior to 1961)**

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

Request by a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East for pension coverage of a period of service prior to 1961.

Shifts in the basis and the nature of the Applicant's claim.—Withdrawal by the Applicant of certain pleas in the application.

Recognition of the Applicant's eligibility for coverage of his service prior to 1961. —Dispute as to the effective date of recalculation of the Applicant's pension benefits.—Competence of the Tribunal to hear and pass judgement.—Objection as to receivability based on the fact that the dispute arose after the filing of the application.—Relationship between the issue in dispute and the issue which the Respondent agreed should be submitted directly to the Tribunal.—Objection overruled.—Objection based on the fact that UNRWA is the proper Respondent to the dispute.—UNRWA arranged for its answer to the claim to be filed through the Secretary-General of the United Nations.—The Tribunal decides that UNRWA is represented in the proceedings before the Tribunal through the Secretary-General of the United Nations and that its decision is equally binding on UNRWA.—Question of the Applicant's alleged rejection of UNRWA's "offer" of coverage for his pre-1961 service.—In fact, UNRWA took a decision and did not make an "offer" subject to withdrawal.—The fact that the Applicant sought clarification cannot be regarded as rejection.—The Applicant's failure to make the requisite payments by the date prescribed by UNRWA cannot lead to forfeiture of his rights.—The Tribunal decides that UNRWA's decision must

be deemed to be subsisting.—Question of the additional cost resulting from the delay in implementing the pension coverage.—The Tribunal decides that the additional cost shall be borne by the Applicant and the Respondent in the same proportion as their respective contributions to the Pension Fund.—Question of the effective date from which the enhanced pension benefits should be calculated.—Contention of the Applicant that his retirement benefits should be calculated on the basis of article 29 (b)(i) of the Pension Fund Regulations.—Non-applicability of this article to a staff member who is not a participant in the Pension Fund.—Contention of the Respondent that the enhanced benefits become payable only from 1 January 1976, the effective date of operation of the General Assembly resolution.—Article 50 (b) of the Pension Fund Regulations.—Decision of the Tribunal that the Applicant's entitlement to enhanced pension benefits shall be calculated as from 1 January 1976.—Even in equity the Applicant's claim does not commend itself.—Should the General Assembly decide to extend any larger benefit of retroactive coverage, the Applicant will be eligible for such benefit.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Endre Ustor;

Whereas, on 1 June 1977, Alexander E. Squadrilli, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), filed an application in which he requested:

“(a) that in the event of alleged non-competence, and to ensure due process for the Applicant, the Tribunal decide affirmatively as to its competence, in accordance with article 2, paragraphs 2 (a) and 3 of its Statute;

“(b) that the Tribunal order the rescinding of the decision of the Secretary-General which limited to 45 designated officials, not including the Applicant, the application of the amended rule allowing for retroactive coverage in the Pension Fund for service with UNRWA during the years 1950 through 1960;

“(c) that the extent to which the action of the General Assembly in amending the rule may be interpreted as having sanctioned the limitation imposed by the Secretary-General, such sanction be declared null and void;

“(d) that the Tribunal affirm the obligation of the Secretary-General to administer the staff regulations and rules, and amendments thereto, equitably and without discrimination;

“(e) that the Tribunal order relief for the Applicant by

“1. the immediate adjustment of his status in the Pension Fund, and of his past as well as future benefits, based upon the inclusion of coverage of the period of his service with UNRWA from 29 April 1955 through 31 December 1960, which is not presently covered, and taking into account all changes in pension rates which have occurred since his initial retirement on 13 July 1967, and

“2. payment to the Pension Fund by the United Nations of the actuarial costs of such coverage, in the same manner as the Secretary-General has undertaken on behalf of the 45 beneficiaries designated by him, towards which costs the Applicant is prepared to pay his own relevant share.”

Whereas, on 19 August 1977, the Respondent filed his answer in which he requested that the Tribunal:

“(a) Determine that it lacks jurisdiction over the plea formulated in the Application: that the Respondent was under any obligation to recommend to the General Assembly, or that the latter was obliged to take a decision that would permit the recognition as pensionable of Applicant's periods of service that had

not been pensionable for UNJSPF [United Nations Joint Staff Pension Fund] purposes under the terms of his appointment with UNRWA;

“(b) If it considers that it has jurisdiction, reject, as unfounded, Applicant’s assertion that the General Assembly’s decision of 17 December 1975, and the proposal of the Respondent on which it was based, improperly discriminated against Applicant, or that the Respondent or the Assembly were under any obligation to improve the terms of Applicant’s original appointment with UNRWA so as to permit him to have recognized as pensionable his originally non-pensionable service;

“(c) Determine that any challenge to the administrative decision whereby UNRWA offered the Applicant an opportunity to secure recognition of his non-pensionable service, should be addressed to UNRWA and not to the Respondent herein (the Secretary-General of the United Nations);

“(d) Reject, as unfounded, any claim by Applicant that UNRWA be required to re-open the offer of recognition it had made until the General Assembly decides that persons in Applicant’s category are entitled to do so;

“(e) Determine, if it considers that UNRWA’s offer to Applicant should be re-opened, that any additional cost resulting from the establishment of a later date for acceptance of the offer and making the consequent payment, be borne by the Applicant;

“(f) Determine that, even if Applicant’s originally non-pensionable service is to be recognized as pensionable, he will not be entitled to any retroactive increase in his UNJSPF benefits before 1 January 1976, or that any such retroactive increase be limited in accordance with any decision that the General Assembly might take if it should allow any former UNRWA staff members who retired before 1 January 1976 to secure recognition of their previously non-pensionable service.”

Whereas the Respondent submitted additional documents on 1, 13 and 30 September 1977;

Whereas, on 7 September 1977, the Applicant filed written observations in which he withdrew pleas (b) and (c) of his application;

Whereas the Respondent submitted an additional written statement on 27 September 1977;

Whereas the Applicant submitted observations thereon on 3 October 1977;

Whereas the facts in the case are as follows:

The Applicant joined the international staff of UNRWA on 29 April 1955. As UNRWA was expected to be a temporary agency, there was initially no provision for participation of the international staff members in the United Nations Joint Staff Pension Fund; instead, a service benefit was paid upon separation at the rate of 4 p. 100 of base salary for each year of service in the staff member’s home country and at the rate of 8 p. 100 of base salary for each year of service outside his home country. On 1 January 1961, however, those staff members became associate participants in the Pension Fund. On 1 January 1967 they became full participants in the Pension Fund and provision was made for retroactive coverage of their period of service from 1 January 1961 to 31 December 1966, and they ceased to be entitled to the service benefit; at the same time, in order to facilitate the possible future recognition of pre-1961 periods of service as contributory service, UNRWA established a Savings Account for Non-Pensionable Service into which UNRWA and the staff member were to pay the amount of contributions, plus interest, which each would have paid into the Pension Fund on 1 January 1967 had the staff member’s continuous service immediately preceded-

ing 1 January 1961 been included on 1 January 1967 as contributory service for the purposes of the Pension Fund Regulations, it being understood that a staff member leaving UNRWA without having secured pension coverage of his pre-1961 service would receive the balance standing to his credit in the Savings Account (including both his contribution and that of UNRWA, with interest). On 11 July 1967 the Applicant retired, received the balance standing to his credit in the Savings Account for Non-Pensionable Service and became entitled to a regular retirement benefit. From 19 July 1971 to 30 June 1976 the Applicant held a series of fixed-term appointments with UNICEF (United Nations Children's Fund), the last two of which covered the periods from 1 July 1975 to 31 December 1975 and from 1 January 1976 to 30 June 1976 respectively.

On 23 September 1975 the Applicant, having learned that the General Assembly would soon consider the question of retroactive coverage by the Pension Fund for service with UNRWA, wrote to the Commissioner-General of UNRWA to record his intention of requesting retroactive coverage of his uncovered service. On 12 November 1975, in a report to the General Assembly (document A/C.5/1709), the Secretary-General proposed that certain staff members—a maximum of 45—of UNRWA be covered by the Pension Fund for service during the period 1950 through 1960; the proposal specified that only staff members “still on the rolls as of 31 December 1975” would be eligible for such coverage. On 6 December 1975 the Advisory Committee on Administrative and Budgetary Questions recommended acceptance of the Secretary-General's proposal in its seventeenth report to the General Assembly at its thirtieth session (document A/10008/Add.16). On 10 December 1975 the Fifth Committee of the General Assembly decided to recommend that the General Assembly should concur with the recommendation of the Advisory Committee. After the Fifth Committee had taken its decision, the representative of Canada suggested that the Secretariat should examine the implications of its proposal with regard to staff members who had formerly served with UNRWA and who had retired prior to 31 December 1975 and to report to the General Assembly at its thirty-first session on the implications of extending such coverage to those former staff members. The Chairman stated in conclusion that a decision by the Committee was not required, provided the Secretariat agreed to proceed along the lines of the suggestion of the representative of Canada. On 17 December 1975 the General Assembly concurred with the recommendation of the Advisory Committee. On 8 January 1976, in a further letter to the Commissioner-General of UNRWA, the Applicant requested the recalculation and adjustment of his pension benefits based upon the total period of his service with UNRWA. On 20 February 1976, in a reply to the Applicant's letters of 23 September 1975 and 8 January 1976, the Director of Personnel and Administration of UNRWA informed him that UNRWA had contacted New York in order to be able to give him an authoritative answer on the question of retroactive coverage for previous staff members already in receipt of pension. On 16 March 1976 the Applicant wrote to the Director of Personnel and Administration of UNRWA asking to whom or to what department the matter had been referred in New York so that he could follow it up there. On 24 May 1976 the Applicant stated his case in a letter to the Secretary-General. This letter led to a discussion of the case at a meeting between the Applicant and the Office of Personnel Services and on 15 June 1976 the Assistant Secretary-General for Personnel Services referred the matter to the Controller of the United Nations in a memorandum reading in part:

“Mr. Squadrilli was a staff member of the United Nations in December 1975 but since he had retired from UNRWA and was re-employed after the age of sixty, he was not a participant in the Pension Fund at that date. Consequently, even though technically he was serving with the United Nations on 31 December 1975,

this service could not place him in a more advantageous position than his colleagues who had retired and were not re-employed by the United Nations. On the other hand, Mr. Squadrilli considers that the application of this coverage to those staff members who were actually employed in December 1975 as distinct from those who were not so employed was discriminatory and devoid of any sense of equity. He realizes that the basic consideration in this exclusion was the availability of funds but nevertheless he strongly disagrees with the basis for the application.

"This Office has explained to Mr. Squadrilli that on the technical aspect of his having been employed by the United Nations on 31 December 1975 his claim did not carry much merit since he was not at that date a participant in the Pension Fund. On the question of equity, he was told that the matter would be referred to you for such consideration as you may deem appropriate."

On 15 July 1976 the Deputy Controller confirmed to the Applicant that a report would be made to the thirty-first session of the General Assembly in response to the request of the Fifth Committee initiated by the representative of Canada, but that the nature of the report was being left, in the first instance, to the Commissioner-General of UNRWA. On 27 July 1976 the Applicant wrote to the Commissioner-General of UNRWA inquiring as to the nature of the action being contemplated. In a reply dated 6 August 1976 the Commissioner-General expressed doubt that anything more than a preliminary report seeking further guidance from the General Assembly would be submitted. On 13 August 1976 the Applicant wrote to the Deputy Controller pointing out the inadequacy of the contemplated action as described by the Commissioner-General of UNRWA. On 27 August 1976 the Deputy Controller assured the Applicant that his views would again be conveyed to those responsible for deciding upon the response to be made to the Fifth Committee. On 12 October and 10 November 1976 respectively the Applicant wrote to the Deputy Controller and to the Commissioner-General of UNRWA expressing his concern that the matter might be allowed to lapse. On 6 December 1976 the Secretary-General reported to the General Assembly at its thirty-first session (document A/C.5/31/71) that he was unable to submit a definitive report on the question raised by the delegation of Canada at the previous session, the principal reason being the difficulties surrounding UNRWA and its records; the Secretary-General believed that a reliable report could be prepared and presented to the General Assembly at its thirty-second session, assuming improved access by UNRWA to its records and that they were found to be intact. On 10 December 1976 the Applicant was informed accordingly. On 30 December 1976 he requested the Secretary-General's agreement to submit an application directly to the Tribunal. On 8 February 1977 the Assistant Secretary-General for Personnel Services advised the Applicant that he should as a first step address to the Secretary-General a letter formulated in the terms of Staff Rule 111.3. On 17 February 1977 the Applicant accordingly addressed a letter to the Secretary-General requesting a review of his decision to exclude the Applicant from the benefits of the proposal made to the General Assembly at its thirtieth session failing which the Applicant requested the Secretary-General's agreement to the submission of an application directly to the Tribunal. On 15 March 1977 the Assistant Secretary-General for Personnel Services replied as follows:

"...

"It is clear from your letter that you are not challenging an administrative decision alleged to have violated any of your terms of appointment. You are in disagreement with a certain proposal made by the Secretary-General to the Fifth Committee of the General Assembly in the course of legislative deliberations aiming at a possible amendment of the current rules governing the matter. Your characterization of the said proposal as an administrative decision is not correct.

What you are contesting is not an administrative decision taken under the current rules in your individual case but a legislative proposal for the amendment of the said rules. It is therefore a matter of legislation and not of administration.

"The appeals machinery of the Organization, both before the Joint Appeals Board and before the Tribunal, is concerned only with the application to individual cases of the current regulations and rules but has no jurisdiction in respect of proposed amendments to the regulations and rules. Your request, therefore, does not fall within the purview of the appeals system. For this reason, the Secretary-General has decided to take no action on the matter.

"If, despite the above explanation you wish to pursue the matter further, the Secretary-General has no objection to your filing a direct application to the Administrative Tribunal as you requested. This does not imply any recognition that your application would be receivable and does not preclude the Administration from raising the question of lack of jurisdiction before the Tribunal."

On 25 April 1977 the Director of Personnel of UNRWA informed the Applicant that it was possible that he was eligible to elect Pension Fund coverage for the period from his entry on duty date with UNRWA to 31 December 1960, in which case he would be required as a condition to pay to UNRWA, with interest, the amount he had received on separation as his share of the Savings Account for Non-Pensionable Service. On 2 May 1977 the Applicant replied that, in the presence of continuing uncertainty as to his eligibility for the retroactive coverage in question, he would feel obliged to file his application with the Tribunal no later than around the end of May 1977 since an extended delay in filing his application might cause it to lose the opportunity of being considered by the Tribunal at its next session and, if delayed beyond 13 June 1977, would cause his current entitlement to recourse with the Tribunal to expire altogether. By a letter dated 27 May 1977 the Director of Personnel of UNRWA informed the Applicant that it had been determined that he was eligible to elect Pension Fund coverage for the period from his entry on duty date with UNRWA to 31 December 1960; if he wished to apply for such recognition of non-contributory service, the Applicant had to complete a form attached to the letter and return it to UNRWA by 30 June 1977 together with a cheque of \$21,225.02 as reimbursement of the amount received by him from the Savings Account for Non-Pensionable Service plus interest. On 1 June 1977 the Applicant filed with the Tribunal the application referred to earlier.

On 3 June 1977 the Director of Personnel of UNRWA confirmed his offer by cable to the Applicant. On 9 June 1977 the Applicant wrote to the Director of Personnel expressing his intention to apply for the coverage in question and to pay the requested amount; before making this payment, however, he wished to have a calculation of the adjustments which would be made in respect of his past and future pension benefits. On the same day the Applicant accordingly requested such a calculation from the Secretary of the Pension Board. This request having been denied, the Applicant requested the information on 16 June 1977 from UNRWA which, on 23 June 1977, cabled him that if he accepted the offer made to him the effective date of his increased periodic benefit, under the 1975 General Assembly decision, was 1 January 1976 and that no retroactive benefits were payable before that date. On 28 June 1977 the Applicant cabled UNRWA that the conditions of pension adjustments indicated to him did not conform with his views of entitlements and that, in the circumstances, he would defer payment of his contribution, reserving all rights to eligibility as already established by the United Nations, and pursue the application previously filed with the Tribunal. After a further exchange of cables between UNRWA and the Applicant, UNRWA informed the Applicant on 5 July 1977 that it would arrange for an answer to be filed with the Tribunal on behalf of the Secretary-General on the outstanding issues.

Whereas the Applicant's principal contentions are:

1. Prior to the amendment by the General Assembly of the rule which excluded coverage for any period of service prior to 1961, the Secretary-General decided to limit its application to 45 designated current and former UNRWA officials, among whom the Applicant was not included.
2. The Secretary-General's decision to exclude the Applicant was discriminatory, in contravention of the Applicant's conditions of service, a non-observance of equitable administration of the staff regulations and rules and amendments thereto, a violation of article 23 (2) of the Universal Declaration of Human Rights and a violation of equitable application of Staff Regulation 6.1.
3. The Secretary-General has refused to adjust the Applicant's status in the Pension Fund in accordance with the amended rule, and has denied him a review of his case.
4. The Applicant is subject to such regulations and rules of the United Nations and amendments thereto as are relevant after retirement, a principle which is enunciated in Staff Regulation 1.5, and in particular to those which may affect his status as a beneficiary in the Pension Fund, including the current rule, as amended, governing the participation of UNRWA staff members therein.
5. The Applicant is entitled to the immediate adjustment of his status in the Pension Fund in accordance with the amended rule, the records for the implementation of which are available in the Pension Fund and from himself.
6. The Applicant's eligibility under the amended rule is a matter for determination by the Tribunal and is not dependent upon or otherwise subject to legislation by the General Assembly.
7. In consequence of the Applicant's eligibility for pension coverage of his pre-1961 service with UNRWA, towards the validation of which he is prepared to pay and reimburse with interest the full amount of his required contributions, his pension entitlements should be recalculated in accordance with the prescribed standard formula effective as of the date of his retirement, and he should be paid the arrears with interest resulting from that recalculation.

Whereas the Respondent's principal contentions are:

1. As to the Applicant's principal plea:

(a) The Applicant is not asserting a right within the meaning of article 2, paragraph 1 of the Tribunal's Statute since nothing in his contract or terms of appointment can oblige the Secretary-General to make any particular recommendation to the General Assembly which would have the effect of improving such contractual terms and conditions;

(b) Any decision of the General Assembly to limit the grant of a certain new benefit to staff still in service and the failure to offer it also to persons already retired, is not an arbitrary or capricious distinction.

2. As to the Applicant's status under the 1975 General Assembly decision:

(a) Any plea relating to the contract of employment or the terms of appointment of a staff member of UNRWA should be addressed to that Agency;

(b) On 31 December 1975 the Applicant was serving on the staff of an organ of the United Nations but he was not in pensionable service—indeed he was regularly receiving a pension on the basis of his retirement from UNRWA. Most significantly, his new employment occurred after a break of four years, and it could well be argued that he was therefore not "still" on the rolls but "again" on the rolls. Nevertheless, the

Commissioner-General of UNRWA, after consulting with the Secretary-General, considered that this doubtful interpretation should be resolved in favour of the Applicant, and consequently the offer of 27 May 1977 was made to the Applicant;

(c) If the Applicant should conclude that UNRWA's offer, which was based on the uniform application of the General Assembly's 1975 decision, is not sufficiently attractive to him, he need not accept it—but he has no right to require it to be modified.

3. As to the issue of retroactive benefits:

(a) This issue arose almost a month after the application was filed. It is thus not an issue as to which the Respondent's agreement for direct submission to the Tribunal extends. Furthermore, this is an issue that the General Assembly is likely to decide at its thirty-second session. Thus any decision of the Tribunal on this issue at this time might either be construed as exerting pressure on the Assembly to adopt a solution along the lines sanctioned by the Tribunal, or it would result in a special régime applicable solely to the Applicant;

(b) It is a general principle of any insurance arrangement that the insured should not be in a position to make a current decision that would give him an assured benefit based on past events. Whenever the General Assembly has increased any Pension Fund benefits, it has explicitly or implicitly provided that no increase should become payable in respect of any period before the effective date of the change and that no increase in periodic benefits should increase the portion of a pension previously commuted to a lump-sum. Nor is the Applicant's claim to retroactive benefits sustainable in equity.

The Tribunal, having deliberated from 26 September to 14 October 1977, now pronounces the following judgement:

I. The consideration of this case has been rendered complex by the shifts in the basis and the nature of the Applicant's claim. In his letter dated 8 January 1976 to the Commissioner-General of UNRWA, the Applicant claimed that he was entitled to recalculation and adjustment of his pension benefits on the basis that he was "actively employed" in the United Nations on 31 December 1975, as required by the General Assembly resolution for retroactive coverage of UNRWA staff members by the Pension Fund. After it was explained to the Applicant, as mentioned in the interoffice memorandum dated 15 June 1976, that his having been employed by the United Nations on 31 December 1975 "did not carry much merit since he was not at that date a participant in the Pension Fund", the Applicant, by his letter dated 27 July 1976 to the Commissioner-General of UNRWA, expressed his hope that the latter would support a recommendation to the General Assembly for coverage of the retired staff members of UNRWA. When, towards the end of 1976, it became clear that the General Assembly had deferred decision on coverage of the retired staff members of UNRWA, the Applicant sought the concurrence of the Secretary-General to submit an application directly to the Tribunal. The administrative decision which he challenged at that time was the limitation of the benefit of retroactive coverage to 45 staff members only and the denial of the same privilege to the Applicant. In his application to the Tribunal, the Applicant asked for rescission of the decision of the Secretary-General excluding him from retroactive coverage and for a declaration as null and void of the General Assembly resolution to the extent it was interpreted so as to exclude him from retroactive pension coverage. By its letter dated 27 May 1977, received by the Applicant after the filing of his application, UNRWA determined that the Applicant was eligible for retroactive coverage of his pre-1961 service with UNRWA and detailed the requisite contributions payable by him. Thereupon differences arose between the Applicant and UNRWA as to the effective date from which the enhanced pension benefits should be calculated and paid to the Applicant. In view of the foregoing, some issues regarding the receivability of the

application and the competence of the Tribunal have become redundant. Nevertheless, the Tribunal has thought fit to deal briefly with them as they arise out of the pleadings in the case.

II. The Tribunal recalls that in his application to the Tribunal the Applicant sought rescission of the decision of the Secretary-General which limited to 45 designated officials, not including the Applicant, the entitlement to retroactive coverage in the Pension Fund for service with UNRWA from 1950 to 1960. The Applicant also pleaded that to the extent that the action of the General Assembly may be interpreted as having sanctioned the exclusion of the Applicant from retroactive coverage in the Pension Fund, such sanction be declared null and void.

The Respondent contests the receivability of the said pleas on the ground that the Respondent was under no obligation to recommend to the General Assembly, nor was the latter obliged to take, a decision that would extend pension benefits to the Applicant for an earlier period of non-pensionable service and that the request did not fall within the scope of article 2, paragraph 1 of the Statute of the Tribunal.

The Tribunal does not consider it necessary to rule on this objection since, subsequent to the filing of the application, UNRWA by its letter dated 27 May 1977 informed the Applicant that he was "eligible . . . to elect UNJSPF coverage for the period from [29 April 1955] to 31 December 1960" and as a consequence the Applicant, in his written observations, withdrew his pleas (b) and (c) mentioned earlier.

III. Arising out of the eligibility of the Applicant for coverage of his prior non-pensionable service, the Applicant contends that upon his payment of the required contribution, his pension entitlements should be recalculated and paid to him with retrospective effect from the date of his retirement on 13 July 1967. UNRWA replied on 23 June 1977 that:

"The effective date of your increased periodic benefit, under the 1975 GA [General Assembly] decision, is one January 1976 and that no retroactive benefits are payable before that date."

The Tribunal has therefore to determine the effective date of accrual of increased pension benefits in the case. The Tribunal notes that the Applicant relies on the provisions of article 29 (b) (i) of the Pension Fund Regulations. Hence an examination of those provisions becomes relevant for the determination of the matter in issue between the parties. Under article 2, paragraph 1 of its Statute, the Tribunal is competent to hear and pass judgement upon applications alleging non-observance of, among others, all pertinent regulations and rules, including the staff pension regulations, and under paragraph 2 of the same article, the Tribunal is open to any staff member, even after his employment has ceased. The Tribunal therefore finds that the determination of the dispute relating to the effective date of recalculation of the pension benefits of the Applicant *prima facie* falls within its competence.

IV. The Respondent, however, contends that the dispute relating to the quantum of pension benefits arose almost a month after the application to the Tribunal was filed and that it was not an issue as to which the Respondent's agreement for direct submission of the application extends. Thus the dispute regarding the quantum of benefits would not be receivable under article 7, paragraph 1 of the Statute of the Tribunal. The Tribunal considers that, though the question of the quantum of pension benefits is not covered by the Respondent's agreement for direct submission of the application, the question nevertheless arises as a consequence of the acceptance by the Respondent of the Applicant's claim for pension coverage of his pre-1961 service and that the matter is therefore properly before the Tribunal for its decision.

V. The Respondent further contends that any plea relating to the contract of employment or terms of appointment of a staff member of UNRWA should be ad-

dressed to that Agency and that UNRWA is therefore the proper Respondent to the dispute. In order to appreciate the legal situation, it is necessary to recount some of the salient facts. After an exchange of correspondence between the Applicant and UNRWA, the Applicant complained to the Secretary-General of the United Nations on 30 December 1976 that no conclusive action had been taken on his request concerning retroactive coverage in the Pension Fund of his prior uncovered service with UNRWA and requested the agreement of the Secretary-General to direct submission of an application to the Tribunal. In a reply dated 8 February 1977, the Assistant Secretary-General for Personnel Services wanted to "know precisely the nature of your appeal and against what administrative decision it is directed". Thereupon the Applicant, in his letter dated 17 February 1977, formulated his appeal in terms of Staff Rule 111.3, stating *inter alia* as follows:

"In your Report to the thirtieth session in which you proposed a change in the rule, you also proposed a limitation in the application of the benefits of that change to a select group of 45 current and former staff members of UNRWA, an action which had the effect of denying these benefits to other former staff members of UNRWA who had been equally deprived of full pension coverage under the original arrangements. The grounds of 'equity' which you advanced were limited in your considerations to that privileged group.

"Since it was not based on any existing legislation when it was made, your proposal to limit the application of the amended rule and thereby exclude certain former staff members of UNRWA from its benefits would seem clearly to qualify as an administrative decision. To the extent that, wittingly or unwittingly, the General Assembly by its ultimate action may seem to have associated itself with your prior decision, I would regard the General Assembly and yourself as one for the purposes of this Appeal."

It appears from the foregoing narration of facts that the administrative decision sought to be rescinded is the one excluding the Applicant from retroactive coverage of his pre-1961 service with UNRWA. The Tribunal, however, observes that this earlier decision of exclusion of the Applicant had been modified and the Applicant's eligibility for pension coverage of his uncovered service had been accepted by UNRWA and therefore the matter is no longer in dispute.

The matter at issue now is the effective date for calculation of the enhanced pension benefits payable to the Applicant upon his contributing to the Pension Fund the requisite amount—an issue which calls for examination of the pertinent Staff Regulations and Rules of UNRWA and of the Joint Staff Pension Fund. The Tribunal notes that it was UNRWA which determined both the eligibility and the requisite payments to be made for the coverage in the Pension Fund of the Applicant's pre-1961 service. Again it was UNRWA which decided that the effective date for the recalculation of the Applicant's periodic benefits was 1 January 1976 and that no retroactive benefits were payable before that date. In the circumstances, the Tribunal considers, on the basis of its Judgement No. 63 (*Hilpern*) that pleas relating to service conditions should be addressed to the employing agency, that UNRWA is a necessary party to the dispute.

The Tribunal, however, notes that when the Applicant, in his cable dated 28 June 1977, questioned the correctness of the recalculation of his pension benefits and indicated his intention to pursue the application already filed with the Tribunal, UNRWA by its cable dated 5 July 1977 stated as follows:

"With respect pension coverage, we note . . . that you intend to pursue previously filed application with United Nations Administrative Tribunal. *Consequently we will arrange for an answer to be filed on behalf of Secretary-General on the outstanding issues*". (Emphasis added.)

It appears from the above cable that UNRWA arranged for its answer to the Applicant's claim to be filed through the Secretary-General of the United Nations and that the Secretary-General was acting not only on his own but also on behalf of UNRWA before the Tribunal. The Tribunal considers that when the Respondent in his answer requested a determination that an action "to secure recognition of [the Applicant's] non-pensionable service, should be addressed to UNRWA and not to the Respondent herein", he had overlooked the cable from UNRWA quoted above.

The Tribunal therefore holds that UNRWA is represented in the proceedings before the Tribunal through the Secretary-General of the United Nations and that the decision of the Tribunal is equally binding on UNRWA.

VI. The Respondent contends that the Applicant had rejected UNRWA's "offer" of coverage of his pre-1961 service and had allowed the time for acceptance to expire. An examination of the text of the letter dated 27 May 1977, communicating UNRWA's action on the Applicant's request, shows that the letter was not an "offer" but a communication of a definite decision by UNRWA determining the eligibility of the Applicant for retroactive coverage. The letter further gives the Applicant the option to apply for recognition of his non-contributory service by making the requisite payments detailed therein. The Tribunal cannot therefore regard the determination of eligibility of the Applicant as an "offer" subject to withdrawal. Moreover, the exchange of correspondence between the Applicant and UNRWA shows that, on receipt of the letter mentioned above, the Applicant conveyed his intention to apply for the coverage and to pay the requested amount. He also sought clarification of the benefit he would derive as a result of such retroactive coverage. The Tribunal cannot regard the attitude of the Applicant seeking elucidation of the benefit he would derive as rejection. Again, the Applicant's failure to comply with the terms by 30 June 1977, the date prescribed by UNRWA, cannot lead to a forfeiture of the Applicant's rights, especially when there was a genuine difference regarding the ascertainment of the benefits accruing from such acceptance and the matter was under discussion. The Tribunal is not convinced that, having determined the Applicant's eligibility to retroactive coverage, the Respondent was entitled unilaterally to withdraw it when the matter was pending before the Tribunal.

For all these reasons, the Tribunal holds that the determination of the Applicant's eligibility to retroactive pension coverage made in the letter dated 27 May 1977 must be deemed to be subsisting.

VII. The Respondent has requested that, in such an event, the additional cost resulting from the establishment of a later date for acceptance of the "offer" should be borne by the Applicant. The Tribunal observes from the review of the events and circumstances mentioned in paragraph VI above that the non-payment of the requested amount was not due to wilful neglect or default on the part of the Applicant. It would therefore be unfair to charge the entire additional cost to the Applicant. Since the Tribunal considers that neither party deserves the blame for the delay, it decides that the additional cost, if any, arising out of the later implementation of the pension coverage shall be borne by the Applicant and the Respondent in the same proportion as their respective contributions to the Pension Fund.

VIII. The principal issue for determination in this case is the effective date from which the enhanced pension benefits should be calculated as a consequence of the retroactive coverage of the Applicant's non-contributory service. The Applicant claims that, upon his paying the requisite contribution, his entitlements should be calculated on the basis of his increased contributory service of 146 months and that the enhanced benefit should be paid with effect from 13 July 1967, the date of his retirement. In his observations dated 3 October 1977, he has made elaborate calculations of the difference between the increased pension benefits due to him from

1967 to 1977, the amount paid to him, the difference and the interest thereon, and reaches the figure that on payment of his contribution of \$21,514.15, the total amount due to him as arrears is \$39,708.18.

IX. In support of his claim, the Applicant argues that his retirement benefits should be calculated at the standard rate in accordance with article 29, paragraph (b) (i) of the Pension Fund Regulations, as is usually done in the case of staff members who become entitled to retirement benefits on separation. Article 29, paragraphs (a) and (b) (i) reads as follows:

“(a) A retirement benefit shall be payable to a participant whose age on separation is sixty years or more and whose contributory service was five years or longer.

“(b) The benefit shall, subject to (c) below, be payable either:

“(i) At the standard annual rate which is obtained by multiplying the years of the participant's contributory service, not exceeding thirty, by 1/50 of his final average remuneration . . .”

The Tribunal observes that the text quoted above deals with the calculation of a retirement benefit payable to a participant. The Applicant was paid his retirement benefit according to that article on his separation from service in July 1967. The article quoted above is not applicable *per se* to a staff member who is not a participant in the Pension Fund. The Tribunal considers that in this context a former participant cannot be treated as a participant.

X. It also appears from the interoffice memorandum dated 15 June 1976 that the Office of Personnel Services explained to the Applicant that “on the technical aspect of his having been employed by the United Nations on 31 December 1975 his claim did not carry much merit since he was not at that date a participant in the Pension Fund”. The Applicant without contesting that interpretation preferred to await the result of General Assembly action on extension of retroactive coverage to UNRWA staff members who had retired prior to 1 January 1976. That the Applicant was not a participant on 1 January 1976 when the retroactive coverage came into force is not in dispute as the Applicant himself stated in his letter dated 8 January 1976 that “I have not been a participant in the Pension Fund during this period of re-employment.” Therefore the Applicant cannot claim to be treated on a par with the staff members who were participants in the Pension Fund as on 1 January 1976.

XI. The Respondent concedes that the Applicant's period of contributory service shall be increased by his pre-1961 service and thus there is no dispute about the total period of contributory service. But the Respondent contends that the enhanced benefits become payable only from 1 January 1976, the effective date of operation of the General Assembly resolution. The Respondent has calculated and set out in his additional written statement the benefits to which the Applicant is entitled on that basis. The Respondent argues that the General Assembly, whenever it has increased Pension Fund benefits, has explicitly or implicitly provided that no increase should become payable in respect of any period prior to the effective date of change, and he cites in his answer instances of General Assembly resolutions on enhanced benefits in respect of cost-of-living changes. None of these instances relates to the retroactive coverage of service which stands on a different footing from the grant of enhanced benefits on the basis of cost of living.

XII. The Tribunal, however, notes that article 50 (b) of the Pension Fund Regulations provides that an amended regulation shall enter into force as from the date specified by the General Assembly but without prejudice to rights to benefits acquired

through contributory service prior to that date. On the analogy of that principle, the Tribunal considers that the benefits accruing from the General Assembly resolution should become operative from its effective date, namely 1 January 1976. It is clear that the Applicant derived his right to retroactive coverage of his prior non-pensionable service only from the General Assembly resolution and therefore should be governed by the same. It is also observed that the General Assembly resolution only confers additional benefits and does not prejudice the Applicant's rights to benefits acquired prior to 1 January 1976. The Tribunal therefore holds that the enhanced pension benefits should be recalculated and paid as from 1 January 1976.

XIII. The Tribunal also notes that, if the Applicant's contention were accepted, he would draw the enhanced pension benefits for a period prior to 1976 while the staff members in service similarly situated will draw their enhanced pension benefits only on separation after 1 January 1976. Even in equity the claim of the Applicant does not commend itself to the Tribunal.

XIV. The Tribunal further notes that the study by the Fifth Committee of the implications of extending the benefit of retroactive coverage to UNRWA staff who had retired from service prior to 1 January 1976, proposed by the representative of Canada, has not been concluded. The Tribunal rules that, should the General Assembly decide to extend to UNRWA staff members who retired prior to 1 January 1976 any benefit of retroactive coverage larger than that afforded to the Applicant, the eligibility of the Applicant for such benefit remains open.

XV. The Tribunal therefore decides:

- (a) That it is competent to hear and pass judgement on the present application;
- (b) That UNRWA is represented in these proceedings through the Secretary-General of the United Nations and that the judgement of the Tribunal is equally binding on UNRWA;
- (c) That the determination of the Applicant's eligibility for retroactive pension coverage made in the letter dated 27 May 1977 must be deemed to be subsisting;
- (d) That the additional cost, if any, arising out of the delayed implementation of the pension coverage shall be borne by the Applicant and the Respondent in the same proportion as their respective contributions to the Pension Fund;
- (e) That the Applicant's entitlement to enhanced pension benefits shall be calculated as from 1 January 1976; and
- (f) That, should the General Assembly decide to extend to UNRWA staff members who retired prior to 1 January 1976 any benefit of retroactive coverage larger than that afforded to the Applicant, the eligibility of the Applicant for such benefit remains open.

(Signatures)

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

New York, 14 October 1977

Endre USTOR
Member

Jean HARDY
Executive Secretary