

**Judgement No. 247***(Original: English)***Case No. 240:  
Dhawan****Against: The Secretary-General  
of the United Nations**

*Request by the widow of a former local staff member seconded by the Government of India for compensation for loss suffered due to the fact that he was wrongfully deprived of the right to become a participant in the Joint Staff Pension Fund.*

*Letters of appointment excluding the decedent from participation in the Pension Fund.—Applicant's contention that the decedent was led to accept such terms of appointment by misrepresentations made through responsible officers.—Consideration of the relevant provisions regarding participation in the Pension Fund.—The Tribunal concludes that when the decedent was given an appointment for one year, associate participation in the Pension Fund was the normal condition of service.—Situation of Indian officers on deputation to international organizations.—When the decedent applied for appointment to the United Nations, there was no bar under Indian law to his joining the Pension Fund.—The Tribunal concludes that at the time of his appointment the decedent was entitled to become an associate participant in the Fund.—Respondent's right to exclude staff from Pension Fund participation in exceptional circumstances.—The issue for determination is not whether the Respondent had such a right but whether the decedent was excluded from participation by misrepresentation on the part of the authorized officers.—Need to examine the circumstances in which the decedent was excluded from participation in the Pension Fund.—Respondent's contention that the decedent had forgone his right to participation in the Pension Fund in order to obtain compensation for payments to his national pension scheme.—Contention rejected.—Misapprehension of the Respondent's officers at New Delhi that seconded Indian officers contributing to their national pension scheme were ineligible for participation in the Fund.—Respondent's contention that the decedent was provided a higher salary to compensate for his exclusion from the Fund.—Contention rejected.—Respondent's contention based on Judgement No. 151.—Contention rejected.—The decedent having entered into his terms of appointment on the basis of misrepresentation by the Respondent's officers at New Delhi, such terms of appointment did not conclude the decedent's rights.*

*Assessment of the compensation due to the Applicant at a lump sum equivalent to the capital value of the benefits which she and her children would have received had the decedent been an associate participant of the Pension Fund.—Award to the Applicant of compensation in the amount of Rs. 103,240.16.—The request for interest is denied.—Justification of the amount of compensation awarded under article 9, paragraph 1 in fine of the Statute of the Tribunal.*

**THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,**

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

Whereas, on 16 November 1978, Mrs. Bimla Dhawan, the Applicant herein and the widow of Mr. H. L. Dhawan, a former local staff member of a United Nations Special Fund Project at Dehra Dun, India, filed an application which did not fulfil all the formal requirements of article 7 of Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 28 May 1979;

Whereas, in the pleas of her application, the Applicant requests the Tribunal:

- “1. To overrule the decision of the Secretary-General rejecting:

“(a) the Joint Appeals Board’s conclusion contained in paragraph 142 . . . that erroneous advice was given to Mr. Dhawan which led to his disadvantageous acceptance of exclusion from participation in the United Nations Joint Staff Pension Fund . . . ,

“(b) the Joint Appeals Board’s conclusion contained in paragraphs 143, 144 and 145 . . . concerning a legal liability to compensate the Applicant for losses due to the staff member’s lack of participation in the Pension Fund . . . ,

“(c) the Joint Appeals Board’s alternative recommendation in paragraph 146 . . . of an *ex gratia* award. . . .

“2. To *uphold* the finding of the Joint Appeals Board contained in paragraph 142 of its report to the Secretary-General, that the senior officers in New Delhi Office were wrong in advising Mr. Dhawan that he was prohibited by United Nations policy from joining the Pension Fund so long as he continued to contribute to his Government’s pension scheme. As a result of which, the Board found, Mr. Dhawan was led to accept terms of appointment which, to his disadvantage, excluded his participation in the Pension Fund. . . .

“3. To *uphold* the finding of the Joint Appeals Board contained in paragraph 143 of its report to the Secretary-General . . . that there is a legal liability on the Secretary-General to compensate the Applicant for the losses she and her children have suffered because Mr. Dhawan did not become a participant in the Pension Fund.

“4. To *accept* the recommendations of the Joint Appeals Board contained in paragraphs 144, 145 and 146 . . . that:

“(a) the Secretary-General should pay to the Applicant as a lump sum an amount approximately equivalent to the capital value of the benefits that she and her children would have received had Mr. Dhawan been a full or an associate participant in the Pension Fund on the day of his death, less the amount of the *ex gratia* award made to her on 10 February 1970 . . . ,

“(b) since almost ten years have elapsed since the Applicant suffered the losses in question and since the lengthy delays in the case are attributable mainly to the conduct of the Respondent and to the Joint Appeals Board, the Secretary-General should pay to the Applicant interest at the rate of 6 per cent a year from the date that a pension would have been payable, had Mr. Dhawan become a participant in the Pension Fund . . . ,

“(c) alternatively, the Secretary-General should grant the Applicant an *ex gratia* award equal to the amount of the compensation and interest recommended above in recognition of his moral obligation to make good the losses suffered by the Appellant because of the misrepresentation made to Mr. Dhawan by his representatives . . . .

“5. To *order* the Secretary-General to pay the Applicant as a lump sum an amount approximately equivalent to the capital value of the benefits that she and her children would have received had Mr. Dhawan been a full or an associate participant in the Pension Fund on the day of his death, less the amount of the two *ex gratia* awards made to her on 10 February 1970 and on 31 July 1978 . . . , plus interest at 6 per cent.

“6. In the alternative to *order* the Secretary-General to grant the Applicant

an *ex gratia* award equal to the amount and interest recommended above in para. 5 in recognition of his moral obligation to make good the losses suffered by the Applicant because of the misrepresentation made to Mr. Dhawan by his representatives.”;

Whereas the Respondent filed his answer on 20 July 1979;

Whereas the Applicant filed written observations on 4 September 1979;

Whereas, on 27 September 1979, the Respondent submitted additional information at the request of the Tribunal;

Whereas the facts in the case are as follows:

On 17 November 1964 the Indian National Scientific Documentation Center (INSDOC) of the Council of Scientific and Industrial Research (CSIR), an agency of the Government of India, forwarded to Mr. J. McDiarmid, Resident Representative and Director of Special Fund Programmes in India, an application dated 5 November 1964 from one of its employees, Mr. H. L. Dhawan, for the post of Secretary/Stenographer in the Technical Assistance Board (TAB) and Special Fund office at New Delhi. On 6 April 1965 Mr. McDiarmid wrote to Mr. Dhawan that, while candidates had been selected to fill available vacancies in the New Delhi office, he was being offered, subject to his medical fitness, the post of a Secretary/Stenographer with the United Nations mission assigned to the Indian Institute for Petroleum Exploration, Oil and Natural Gas Commission (ONGC) at Dehra Dun, India, under the United Nations Special Fund Programme, and that the post would initially be for a period of one year; Mr. McDiarmid added:

“Under the United Nations salary for local staff at present in force, your appointment will be at ND-4 Step I which carries a net salary of Rs. 491.67 per mensem, free of Income Tax. In addition to this, you may be entitled to a children allowance of Rs. 15.00 per child up to the age of 18 for a maximum of 4 children. You may also be entitled to Associate Pension Fund participation in the UN Joint Staff Pension Fund.”

On the same day Mr. McDiarmid wrote to Mr. K. P. R. Menon, Chief of the Mineral Survey Section, Office for Special Fund Operations, Department of Economic and Social Affairs, that Mr. Dhawan had been selected as candidate for the post of Secretary/Stenographer of Mr. N. A. Eremenko, the Project Manager; he enclosed a copy of the offer of appointment and stated:

“As the appointment is being made on behalf of the United Nations, we believe the formal letter of appointment will be issued by ASTAO [Administrative Service, Technical Assistance Operations] and sent to Mr. Dhawan through this Office, with a copy to us for our record.”

On 7 April 1965 Mr. Dhawan informed Mr. McDiarmid that he was ready to accept the offer provided his “existing status” was “maintained by the United Nations”; he went on to state:

“You will kindly recall that at the time of my interview the worthy Board had agreed to compensate me suitably to enable me to maintain lien with the Government. According to the rules of Indian Government, I have to pay a sum of nearly Rs. 67/- on an average every month to my present employer for maintaining lien while working with the United Nations. The total emoluments presently being drawn by me amount to Rs. 527:25P per month as mentioned by me at the time of my interview and later

stated in the Personal History Form delivered to your office personally on April 5, 1965.

“In view of the above, I humbly request your goodself kindly to consider placing me at ND-4 Step IV so that my present status is maintained.”

On 14 April 1965 Mr. Menon cabled to Mr. McDiarmid that he agreed to the appointment of Mr. Dhawan and that the letter of appointment “should be issued by Eremenko as Project Manager in similar form to letter issued by you for local TAB personnel.” On 15 April 1965 the Acting Director of Special Fund Programmes in India acknowledged this cable and went on to state:

“2. In reply to our letter dated 8 April 1965 offering him the post, Mr. Dhawan has informed us that he will have to contribute about Rs. 67/- per mensem to the Government towards Pension Fund to enable him to retain his lien with the Government so that he could go back to his post on completion of his assignment with the UN at Dehra Dun. He has, therefore, requested that he be placed at ND-4 Step IV to make it worth his while. A copy of his letter is enclosed for your information.

“3. We have examined Mr. Dhawan’s request and in the circumstances explained by him, recommend that he be offered appointment at ND-4/Step IV. Kindly let us have your concurrence to this request preferably by cable so that we could arrange Mr. Dhawan’s release at an early date, after having him medically examined. Prof. Eremenko needs a Secretary rather urgently.”

On 21 April 1965 Mr. Menon cabled his agreement to ND-4, Step IV, for Mr. Dhawan and on 23 April 1965 Mr. McDiarmid sent the following letter to Mr. Dhawan:

“Please refer to your letter dated 7 April 1965 requesting an increase in the offer made to you for the post of a Secretary/Stenographer at Dehra Dun, in view of the fact that you are required to contribute a sum of nearly Rs. 67.00 per mensem to the Government to maintain your lien with them.

“We have considered your request and I am pleased to offer you the post at ND-4, Step IV, which carries a net tax-free salary of Rs. 587.92 per mensem.

“As you will be contributing to the Government of India towards your Pension, you will not be entitled to Associate Pension Fund participation in the UN Joint Staff Pension Fund.

“Please let us know if the offer is acceptable to you on the revised terms and conditions, and if so, let us know when you would be in a position to join duty at Dehra Dun. . . .”

On 10 May 1965 Mr. Eremenko and Mr. Dhawan signed the letter of appointment, which was for a period of one year from 4 May 1965 and included the following provision: “Pension Fund Participation: None”. Two copies of the letter of appointment were sent to the New Delhi office, which forwarded one to Mr. Menon “for [his] information and such action as may be deemed necessary”. On 29 May 1965 the Director of INSDOC forwarded to Mr. McDiarmid the foreign service terms in respect of Mr. Dhawan and requested Mr. McDiarmid to convey his acceptance of those terms. The terms of deputation for Mr. Dhawan provided that he would be on deputation for a period of two years with effect from 3 May 1965 and that the deputation would end on that date on which he assumed charge of a post under the CSIR; they included a paragraph 6 which read:

“LEAVE AND PENSION. During the period of deputation of temporary transfer, he will continue to be governed by the leave and pension rules of the C.S.I.R. applicable to him before such transfer.

“The allocation of leave salary and pensionary charges will be regulated under the rules of allocation contained in Appendix 3 to Account Code Volume I.”

On 8 June 1965 the New Delhi office referred the letter to Mr. Dhawan with the following comments:

“As you know, at the time we made the offer of your present post to you, we made it abundantly clear that we shall have nothing to do with your previous employers, with whom you were trying to retain your lien, and that you will yourself settle directly any terms that they may require you to accept before you joined the United Nations.

“In the circumstances, it would be appreciated if you would kindly take up the matter directly with INSDOC with regard to the terms of your foreign service without in any way involving the United Nations in this matter. The United Nations is bound by no conditions other than those explicitly stated in the letter of your appointment issued to you at the time of your appointment.”

On the same day the New Delhi office advised INSDOC that it was the responsibility of Mr. Dhawan to accept or reject the terms of his foreign service assignment and that the United Nations had nothing to do in the matter. On 17 June 1965 Mr. Dhawan assured the New Delhi office that he would advise his previous employers to write directly to him in the future. On 20 January 1966 the New Delhi office informed Mr. Eremenko that the salary scales payable to staff appointed locally had been revised effective 1 November 1965 and that Mr. Dhawan, being ND-4, Step IV, would receive a monthly salary of Rs. 623.23 and a monthly children's allowance of Rs. 46.23. On 24 March 1966 the New Delhi office asked Mr. Eremenko whether he wanted to have Mr. Dhawan's contract extended beyond 3 May 1966. On 11 April 1966 Mr. Eremenko wrote to Mr. McDiarmid requesting that Mr. Dhawan's contract be renewed “up to the end of the second phase of the Project” and enclosing a letter dated 12 April 1966 in which Mr. Dhawan asked for the upgrading of his post to level ND-5 on the ground that he had to maintain two establishments, one at Delhi and the other at Dehra Dun. On 18 April 1966 the Acting Resident Representative asked for Mr. Menon's approval of the renewal of Mr. Dhawan's contract through the end of the second phase of the Project and for his views of Mr. Dhawan's request for an upgrading of his post, indicating that the New Delhi office saw no ground for such action since the nature of Mr. Dhawan's duties had remained essentially the same. By a cable and a letter of 27 April 1966, Mr. Menon agreed to an interim six-month extension of Mr. Dhawan's contract. On 29 April 1966 the New Delhi office informed Mr. Eremenko of Headquarters' agreement to an interim extension of Mr. Dhawan's contract for a period of six months and included a letter of appointment reflecting the extension of his contract through 31 October 1966; the letter of appointment again contained the provision: “Pension Fund Participation: None”. On 24 May 1966 Mr. Y. Y. Kim, Assistant Resident Representative, transmitted to Mr. Menon a copy of the letter of appointment signed by Mr. Eremenko and by Mr. Dhawan; he also attached a copy of a letter to Mr. Eremenko asking him to confirm that he was agreeable to the extension of Mr. Dhawan's services until the end of the second phase of the Project (August 1968) but was not inclined to recommend the upgrading of Mr.

Dhawan's post. On 1 June 1966 Mr. Menon conveyed to Mr. McDiarmid Headquarters agreement to the proposed installation allowance for Mr. Dhawan and to such extension of his appointment as Mr. Eremenko considered necessary. On 13 June 1966 Mr. Eremenko confirmed to Mr. Kim his agreement to extend Mr. Dhawan's services until the end of the second phase of the Project without, however, upgrading the post to ND-5. On 30 June 1966 Mr. Kim advised Mr. Dhawan that, while his request for upgrading of his post had been denied, it had been decided to pay him installation grant provided his family established their residence at Dehra Dun, and to extend his contract through the end of the second phase of the Project. On 8 November 1966 the Deputy Resident Representative sent to Mr. Eremenko a letter of appointment reflecting the extension of Mr. Dhawan's contract for a period of one year (1 November 1966 through 31 October 1967); the letter of appointment again contained the provision: "Pension Fund Participation: None". On 19 November 1966 Mr. Dhawan sent to Mr. Eremenko the following letter:

"In UN letter dated 30.6.1966, Mr. Y. Y. Kim was kind enough to inform me that it had been decided to extend my service contract through the end of the second phase of the Project. In the letter of appointment dated 8.11.1966 I find that my service contract has been extended up to the end of October 1967 only with no expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations Development Programme thereafter even though the Project is expected to continue after October 1967.

"I wish to take this opportunity to request you please to be good enough to advise me on the circumstances which led to a sudden change in the earlier decision of the United Nations.

"I further find from the letter of appointment that the pension fund participation is shown as NIL in my case whereas it is learnt that the Field Manual provides for all employees to become associate participants necessarily wherever service contracts are for a period of not less than one year in each case. I shall be grateful for your advice on this point also."

On 21 November 1966 Mr. Eremenko transmitted this letter, as well as copies of the letter of appointment signed by himself and Mr. Dhawan, to the Deputy Resident Representative, requesting that the questions raised by Mr. Dhawan be answered and noting that so far as he remembered "there was agreement that Mr. Dhawan must work up to the end of the Project". On 25 November 1966 Mr. Kim wrote to Mr. Dhawan that, while in principle agreement had been given to the extension of his contract through the end of the second phase, according to the established procedures he had been given a one-year extension which would be further extended provided he continued to do satisfactory work; Mr. Kim added:

"Regarding Pension Fund participation, I would like to inform you that since you are already contributing to the Government of India Pension Scheme, in consideration of which we gave you some additional steps in your salary grade, at the time you were appointed to this post, you cannot be an associate participant in the UN Joint Staff Pension Fund. This was made clear to you in our letter dated 23 April 1965."

On 25 April 1967 an Administrative Officer of INSDOC reminded Mr. Dhawan that the lien period on his permanent post of Senior Stenographer in INSDOC was due to expire

on 2 May 1967 and asked him to indicate whether he wished to return to that post or to resign from it. On 29 April 1967 Mr. Dhawan asked Mr. Kim to advise him if he might be considered for employment abroad by the United Nations. On 3 May 1967 he requested permission from INSDOC to continue in United Nations service for further periods on the terms agreed to earlier, indicating that he would like to rejoin his substantive post in INSDOC if he was not permitted to continue further with the United Nations. On 8 May 1967 the New Delhi office advised him that his request for a field service assignment would be kept in view should an opportunity arise in the future. On 17 July 1967 Mr. Eremenko suggested in a letter to Mr. Kim that Mr. Dhawan should receive a salary at the ND-5 level since secretaries in other projects at Dehra Dun handling similar duties were paid at that rate. On 1 August 1967 Mr. Kim advised Mr. Eremenko that consideration would be given to his proposal for Mr. Dhawan's upgrading after he had observed Mr. Dhawan's performance for a further period and was satisfied beyond any doubt that Mr. Dhawan merited the promotion. On 16 October 1967 Mr. Eremenko requested that Mr. Dhawan's contract be extended for one more year. On 26 October 1967 Mr. Kim accordingly sent to Mr. Eremenko a letter of appointment and a Personnel Action form reflecting the extension of Mr. Dhawan's contract from 1 November 1967 to 31 October 1968. On 30 October 1967 Mr. Eremenko returned signed copies of the letter of appointment and of the Personnel Action form to Mr. Kim; both documents indicated that there would be no Pension Fund participation. On 7 November 1967 the New Delhi office forwarded copies of the two documents to Headquarters with the following comment:

"As Mr. Dhawan is contributing to the Government of India Pension Scheme, he is not entitled to Pension Fund participation in the UN Joint Staff Pension Fund."

On 23 April 1968 Mr. Dhawan conveyed to Mr. Kim his willingness, after the Project had come to an end, "to join any other Project or Office of the United Nations Development Programme." On 30 April 1968 Mr. F. Frerker, Chief of the Administrative Section of the Office of Technical Co-operation, addressed to Mr. McDiarmid the following letter:

"The Accounts Division, upon examination of the accounts for the India Institute for Petroleum Exploration Project at Dehra Dun, have called to my attention the fact that two local employees of that project (Messrs. Dhawan and Sat Pal) hold U.N. Letters of Appointment for two and one year respectively with a stipulation that since both staff members are Government employees contributing to the Government's Pension Fund, they are ineligible for participation in the U.N. Pension Fund.

"It is our understanding that such staff members must participate in the U.N. Pension scheme. Before we approach the Secretary of the Joint Staff Pension Fund for a ruling, we wonder if perhaps some special arrangements (of which we are not aware) have been approved for seconded Indian Government personnel. Any information concerning the local arrangements would be helpful to assist us in presenting the case to the appropriate Headquarters offices.

"It would also be helpful to know the local policy which permits the granting of an extra step to cover the cost of the contribution to the India Pension Fund as was done for Mr. Sat Pal . . .

"We hope soon to issue a general instruction concerning local personnel hired for Special Fund projects and the information requested would permit us to incorporate pertinent information on this subject . . ."

On 16 May 1968 Mr. Kim replied:

“ . . .

“2. It has been our understanding all along that local employees who are contributing to the Government's Pension Fund will not be eligible to participate in the UN Pension Fund. We have a UNDP staff member with us, namely, Mr. H. N. Tandon, our Programme Officer, who had been on secondment from the Government to this office from 1952 through August 1967. We were informed by UNDP Headquarters that since he was contributing to the Government Pension Fund, for which the UNDP was reimbursing him, he was not eligible to become a participant in the UN Pension Fund. He was not even allowed to be an Associate Participant in the UN Pension Fund. In August 1967 he resigned the Government job and was given an indefinite appointment by UNDP. Only then was he allowed to become a full participant in the UN Pension Fund.

“3. On the basis of the UNDP policy as outlined above, when Messrs. Dhawan and Sat Pal were given appointments at the project, on secondment from the Government, we assumed that the same policy would apply to them as regards Pension Fund participation. This fact was fully known to UN Headquarters from the very beginning in as much as copies of the letters of appointment were forwarded to them for their information and record and we had received no objection from your side.

“4. Regarding our action in granting both these staff members extra steps in their salary to cover the cost of contribution to the Government Pension Fund, I would like to inform you that this was done with a view to compensating them for the amount which they were required to pay to the Government Pension Fund from their own pockets.

“Mr. Dhawan was appointed at ND-4/Step IV with Headquarters permission, as per copies of correspondence enclosed. Higher start was given to him as he was already drawing a higher salary and was besides required to pay Rs. 67/- every month towards contribution to the Government Pension Fund. Similarly Mr. Sat Pal was given one additional step and appointed at ND-4/Step II as he made out that he was required to pay 8% of his salary to the Government towards Pension Fund contribution. A copy of note submitted to us by our Administrative Officer in Dehra Dun in this connection and our decision thereon is enclosed for your information. Had these staff members continued to work with the Government, they would not have been required to contribute to the Pension Fund as the Government Pension Scheme is non-contributory. Such a contribution is only required when Government employees are seconded to other organisations and the contribution ceases as soon as they revert to their original posts in the Government.

“5. We are glad to learn from the last para. of your letter that you hope soon to issue a general instruction concerning the local personnel hired for SF projects; we shall await it with interest.”

On 7 June 1968 Mr. Frerker advised Mr. Kim that his reply of 16 May 1968 had been “referred to the competent Office for action” and that he would be informed of the decision reached at Headquarters as soon as it was received. On 30 July 1968 Mr. Dhawan requested an interview with the President of India and indicated that at the interview he would bring to the President's attention in the public interest the difficulties he had come



across while working for the United Nations; the interview was set up for 10 August 1968. On 13 August 1968 the New Delhi office received two letters addressed by Mr. Dhawan to Mr. Kim. The first, dated 26 July 1968 at Dehra Dun, read:

“I shall be obliged if you will enrol me as full participant to the United Nations Joint Staff Pension Fund. I make this request because it may not be possible for me to maintain lien with the Council of Scientific and Industrial Research for an indefinite period. I was appointed with effect from 3 May 1965.”

In the second letter, dated 11 August 1968 at Dehra Dun, Mr. Dhawan submitted a revised personnel history form and a photocopy of his associate membership in the British Institute of Management. On 20 August 1968 Mr. Dhawan died in the Project office at Dehra Dun and the New Delhi office was immediately informed of his death. A draft reply to his letters of 26 July and 11 August 1968, which had been prepared by Mr. Kim, was placed, unsent, on file; it read in part:

“Regarding your request for participation in the UN Joint Staff Pension Fund, I have to inform you that your present assignment, as you know, is through 31 October 1968. The Project too is likely to terminate by December 1968 at the latest. We may therefore require your services only until your present assignment or through the end of the Project, that is December 1968, which however will be decided in due course in consultation with the Project Manager. After the completion of your assignment at the Project, unless we have another post available for which you could be considered suitable, we do not foresee any chances of your continuing with the United Nations, and you will therefore have to revert to your post in the Government. In the circumstances, it is no use taking up the matter with the U.N. Pension Fund with a view to enrolling you as a participant.”

On 22 August 1968 the Applicant sent to the Project office a letter containing the following request:

“My husband opted for becoming a full participant to the U.N. Joint Staff Pension Fund. He died while on duty (in office premises). Kindly cable to the Secretary, U.N. Joint Staff Pension Fund and find out my entitlements and those of my children.”

The Applicant's request was immediately transmitted to the New Delhi office. On 29 August 1968 Mr. Kim forwarded the Applicant's letter to the Chief of the Section for Asia and the Far East of the Office of Technical Co-operation, adding:

“You will observe that Mrs. Dhawan has raised a question regarding her entitlements including those of her children under the United Nations Joint Staff Pension Fund. In this connection, may I invite your kind attention to Mr. Frans Frerker's letter No. FI 100 (2-2-1) SF/UN dated 30 April 1968 concerning the question of UN Pension Fund participation by Messrs. H. L. Dhawan and Sat Pal, members of the staff at the above Project, in which he had stated that it was his understanding that these staff members must participate in the United Nations Pension Scheme. Our reasons for their not being allowed to participate in the Fund were explained to him at length in our letter dated 16 May 1968 . . .

“Before his death, Mr. Dhawan also wrote to us a letter dated 26 July 1968 (which however was received by us on 13 August 1968) requesting that he be permitted to enrol as a full participant in the UN Joint Staff Pension Fund as it might

not be possible for him to maintain lien with the Council of Scientific and Industrial Research, his parent office in the Government, for an indefinite period. This letter remained unreplyed until Mr. Dhawan's death. For your information, Mr. Dhawan leaves behind a wife and three children, two daughters aged 15 and 10 years and one son about eight years old.

"In addition to the payment in cash in lieu of the annual leave credit due to him and his salary, we wish to bring to your attention the following aspects of the possible compensation by the Organization for Mr. H. L. Dhawan:

*"(1) Compensation by the UN Joint Staff Pension Fund:*

"Technically Mr. Dhawan is not a member of the Fund but in view of the Headquarters' earlier suggestion that he become a full member of the Fund and in view of the fact that the matter is still awaiting a final decision by Headquarters, I should be grateful if you would keep his interest in this regard in mind when finally deciding a possible compensation from the Pension Fund.

" . . . "

On 2 October 1968 Mr. D. T. Holland, who had succeeded Mr. Frerker as Chief of the Administrative Section of the Office of Technical Co-operation, addressed the following memorandum to the Director of the General Legal Division of the Office of Legal Affairs:

"1. Mr. H. L. Dhawan was a locally recruited secretary at the Special Fund Institute for Petroleum Exploration, Dehra Dun, India, who died on 20 August 1968. The Office of the Resident Representative in India is questioning his entitlement to participation in the UN Joint Staff Pension Fund.

"2. Mr. Dhawan was appointed on 1 November 1967 for a period of one year. His letter of appointment, copy attached, excludes him from participation in the United Nations Joint Staff Pension scheme.

"3. An examination of the accounts for the project revealed that, although Dhawan had a contract for one year and was being paid out of the Special Fund contribution to the project, he did not participate in the UN Joint Staff Pension Fund. Since normally locally employed staff paid out of the Special Fund contribution who have contracts for one year or longer do participate in the UN pension, this office questioned the Resident Representative on 30 April 1968 to determine if, in accordance with local regulations, some other arrangements were being applied. A copy of our letter is attached.

"4. On 16 May 1968 we received the attached reply, indicating that a precedent had been established to permit some employees to participate in the Indian Government Pension Fund and that Mr. Dhawan had, in fact, been hired at a step above the normal to effect his cost of participating in that fund. It was felt that since this entitlement had been approved for UNDP staff we could raise no objection to the arrangements for Mr. Dhawan.

"5. The attached correspondence from the field now requests the Organization to consider a petition for participation in the UN pension scheme dated 26 July 1968 but which was never acted upon. Had the request been forwarded to this office we would have denied the request since Mr. Dhawan's letter of appointment excluded him from participation and since he was receiving an additional step increment to pay for his participation in the government scheme.

“6. May we please have your official opinion as to Mr. Dhawan’s entitlements at the time of his death.”

On the same day Mr. Holland, in reply to Mr. Kim’s letter of 29 August 1968, informed Mr. McDiarmid as follows:

“ . . .

“The question of Mr. Dhawan’s participation in the UN Joint Staff Pension Fund is being referred to our Legal Office for a ruling. It should be noted, however, that Mr. Dhawan’s letter of appointment specifically excluded him from participation. He was also granted an extra step in his salary to cover the cost of his contribution to the Government Pension Fund. It would seem that his participation in that pension scheme was fully paid for by the United Nations as Mr. Kim indicated in his memorandum of 16 May 1968 to Mr. Frerker that ‘this was done with a view to compensating them for the amount which they were required to pay to the Government Pension Fund from their own pockets’.

“We assume that Mrs. Dhawan is receiving a pension from the Government Pension Fund. It would be helpful if you would inform us of the benefits she derives from this fund.”

On 19 February 1969, in a letter addressed to the United Nations through the New Delhi office, the Applicant submitted an estimate of her entitlements from the Government Pension Fund, asking that the payments due to her be released expeditiously so as to avoid further hardship to her and her children. On 21 April 1969 Mr. McDiarmid cabled Mr. Holland urging that the decision on participation in the Pension Fund be expedited. On 19 May 1969 Mr. Holland sent him the following reply:

“ . . .

“I should now like to turn to the question of Pension Fund participation. As you will remember from the circular which you issued in 1958, exclusion from the Pension Fund should normally be very restricted and only in hardship cases. However, once the exclusion has been arranged, I am informed by the Pension Fund Secretariat that there has been no case where Pension Fund coverage has been permitted retroactively. The matter has to go before the Standing Committee, but my advice is that it is normally necessary for a fresh contract to be established for the future which lifts the exclusion. The case of Major General Rikhye was quoted to me as an example. This officer continued as a member of the Indian Government scheme and contributed to it accordingly just as did Mr. Dhawan. General Rikhye was excluded from the Pension Fund in the same manner, but on consideration later he himself decided that he would benefit to become a member of the Fund. My information is that this was not permitted notwithstanding several applications until such time as a fresh contract was offered to General Rikhye in which the previous exclusion was omitted. In this case coverage was for the future only.

“In the circumstances of this case, my feeling is that Mr. Dhawan’s exclusion will now have to stand as it is not possible to negotiate a fresh contract with him after his death. The only possible alternative so far as I can see would be to attack the validity of the actions taken in your own office in employing Mr. Dhawan so as to show that the exclusion from the Fund was improper or invalid. If you would like to put forward such a point of view, I should be grateful if someone like Mr.

Kim could prepare the necessary file and forward it to us, bearing in mind that all of the original correspondence has been lost. In making up such a file, it would be useful to include suitable information concerning other Indian local staff members and the manner in which their cases have been treated. In this connection, I feel the case of Mr. Sat Pal will be a question of a fresh contract and will not apply to Mr. Dhawan.

“Once again, I should like to express regrets that there has been so much delay in this case, but I do not think the Section can be held responsible for the total loss of memoranda and files addressed last Fall to . . . the General Legal Division.”

On 30 May 1969 Mr. McDiarmid wrote to the Applicant as follows:

“I feel extremely sorry for the extensive delay in receiving United Nations Headquarters’ decision on your request for the grant of pension under the United Nations Joint Staff Pension Fund, and regret to inform you that it is in the negative.

“UN Headquarters have advised us that since Mr. Dhawan was receiving additional steps in his level to permit his participation in the Indian Government Pension Fund, he was not eligible to participate in the United Nations Joint Staff Pension Fund. However, a case for future participation could have been considered if an extension of his contract was established, but in no case could pension fund coverage be permitted retroactively as had been requested by your late husband in his letter of 26 July 1968 received in this office on 13 August 1968.

“Notwithstanding the negative stand taken by UN Headquarters, I am taking up the matter with them with a view to impressing upon them once again the circumstances of your case and urging its reconsideration. I shall keep you advised of anything we hear further from them.”

On 3 June 1969 he sent the following letter to Mr. Holland:

“. . . I am unable to resist the temptation to point out that the comparison made between the case of late Mr. Dhawan and that of Major General Rikhye with reference to question of participation in the UNJS Pension Fund may be quite relevant technically speaking, but Mr. Dhawan’s case deserves special and sympathetic consideration because of his sudden and untimely demise.

“There is no denying the fact that the late Mr. Dhawan was not a member of the Pension Fund: but in his letter of 26 July 1968 received in this office on 13 August 1968 he expressed his willingness to join the Pension Fund. As Mr. Frerker in his letter No. FI 100 (2-2-1) SF/UN INDIA dated 30 April 1968 had indicated that . . . ‘such members must participate in the UN Pension Fund scheme’ and had promised in his letter of 7 June 1968 to let us know the Headquarters’ decision if Mr. Dhawan could join the Pension Fund, we detained his application in this office and did not forward it to Headquarters for consideration.

“Since the contract of the late Mr. Dhawan was expected to have been extended up to the end of December 1968, as the minimum, in view of what you have stated in your letter of 19 May, he would have had the benefit of future coverage under the Pension Fund at the time of his next contract extension.

“As you know, the demise of Mr. Dhawan has left his wife all alone to shoulder the responsibility of bringing up their three children—two daughters and one son, ages 15, 10 and 8 years respectively. She does not have any other source of income

to count upon except the meagre family pension of approximately Rs. 126 per month from the Government, determination of which too is likely to take a long time. Convinced with the pathetic nature of the case, I strongly recommend that if no compensation is possible on an annual basis under the Joint Staff Pension Fund, an *ex gratia* grant of Rs. 10,000 may be considered as a very special case in order to enable the poor lady to tide over the predicament in which she has been placed by circumstances."

After a further exchange of correspondence between the New Delhi office and Mr. Holland, on 10 February 1970 the Office of the Controller instructed Mr. McDiarmid to effect an *ex gratia* payment of Rs. 10,000 to the Applicant. On 26 February 1970 the Applicant wrote to Mr. McDiarmid asking him to convey to her his final decision in the matter of her pension entitlements, protesting that the *ex gratia* grant of Rs. 10,000 was not a fair sum and requesting an additional grant "as applicable to all dependants of international civil servants". On 30 March 1970 Mr. McDiarmid replied in part:

"As regards the question of your entitlements under the United Nations Joint Staff Pension Fund, the position unfortunately, remains the same as was conveyed to you in my letter of 30 May 1969. Your late husband was not a participant in this Fund and could not, therefore, benefit from it.

"I fully understand the predicament in which the death of your husband has left you and your children and you have my full sympathy. In fact, it was on this account that I did again take up the question of obtaining some financial assistance in your hour of need. As a result of this and after a thorough study of your case, the United Nations Headquarters decided to make an *ex gratia* payment of Rs. 10,000.00 which has already been paid to you."

On 22 April 1970 the Applicant addressed to the Secretary-General a letter in which she stated:

"...  
"Much prior to his death, my late husband Mr. H. L. Dhawan had opted for becoming a full participant to the United Nations Joint Staff Pension Fund. If he was not declared as an Associate or full participant until his death due to unwarranted negligence and inordinate delay on the part of responsible UNDP officials, it was because of their personal prejudice towards my late husband Mr. H. L. Dhawan. My husband was therefore a participant to the UNJSPF and as such he is entitled to all benefits accruing thereunder. . . ."

On 22 May 1970, in another letter addressed to the Secretary-General and to the Secretary of the Joint Appeals Board, the Applicant requested "redress of [her] grievances" and described the circumstances in which Mr. Dhawan had been granted his various letters of appointment and had requested his participation in the Pension Fund. On 12 June 1970, in reply to the Applicant's letter of 22 April 1970, Mr. Holland wrote as follows:

"... Your husband was not a participant in that fund as he was excluded by the terms of his contract of service. As I understand it, your husband preferred to remain a participant in his own Government scheme and in order to help him to make the contributions which he would have to pay in this respect, your husband was advanced in the UN salary scale so as to give him the necessary increase in remuneration. It was only at a later date on the initiative of this Headquarters that

it was suggested that your husband should perhaps be a full participant in the Pension Fund and that arrangements be made so that the exclusion could be lifted. This however was a contractual matter and so long as the contract of service which your husband accepted continued in effect, the exclusion from the Pension Fund also continued. In the event, it did not prove possible to make a contractual amendment before the date of his death. You will of course realize that contractual change after the date of death was impossible. Your husband was not therefore a participant and had no entitlements to benefits under the Fund's regulations.

"If you wish to appeal against this ruling, you should write directly to the Secretary of the Joint Appeals Board at United Nations Headquarters presenting a claim under Staff Rule 111.3. I am sure Mr. McDiarmid's Office will assist you in setting out your claim for this purpose.

" . . . "

The Applicant having claimed compensation on the ground that her husband's death was attributable to the performance of his official duties on behalf of the United Nations, the Advisory Board on Compensation Claims (ABCC) on 27 January 1972, recommended to the Secretary-General that her claim be denied. To its recommendation, however, the ABCC added the following consideration:

*"Consideration*

"In making this recommendation, the Advisory Board on Compensation Claims wished to draw attention to the fact that the difficult circumstances in which the decedent's family finds itself are in no small measure due to the fact that the decedent, at the time of his employment, had been excluded from participation in the United Nations Joint Staff Pension Fund for reasons which are not now considered sufficient to warrant such exclusion, and that certain administrative delays had subsequently prevented him from becoming a member of the Joint Staff Pension Fund.

"The Advisory Board on Compensation Claims would suggest that, in the same manner that has been followed in similar cases, the widow and children be granted a continuing *ex gratia* award, equivalent to the benefits which they would have received had the decedent been a member of the Joint Staff Pension Fund, such benefit to be reduced by the amount of any pension being paid by the Indian Government."

On 8 August 1972 the Secretary-General concurred in the ABCC's recommendation that the Applicant's claim for compensation be denied and on 10 August 1972 the Applicant was advised accordingly. As to the ABCC's suggestion that a continuing *ex gratia* award be made, it was referred for decision, under Financial Rule 110.13, to the Under-Secretary-General for Administration and Management who, on 15 August 1972, advised the Acting Controller that he saw no justification for granting a further *ex gratia* award. On 30 August, 4 September and 25 October 1972 the Applicant requested the Secretary-General to review his decision. On 23 October 1972 the Assistant Secretary-General for Personnel Services advised her that he had found no legal grounds to recommend to the Secretary-General that he modify his decision and that she might, if she wished, submit an application directly to the Tribunal. On 11 May 1973 the Applicant notified the Chief of Staff Services that she wished to refer the matter to the Joint Appeals Board. On 18 July 1973 she lodged an appeal with the Board, which submitted its report on 15 February 1978. The Board's conclusions and recommendations read as follows:

*“Conclusions and recommendations*

*“As to compensation under Appendix D to the Staff Rules*

“140. The Board, having carefully examined the statements and the information given to it, finds that the appellant has not established the fact that Mr. Dhawan’s death was attributable to his service with the Project.

“141. Accordingly, the Board makes no recommendation in support of the appellant’s claim for compensation made under Appendix D to the Staff Rules.

*“As to participation in the Pension Fund*

“142. The Board finds that the senior officers in the New Delhi office were wrong in advising Mr. Dhawan that he was prohibited by United Nations policy from joining the Pension Fund so long as he continued to contribute to his Government’s pension scheme. The Board finds that as a result of this advice Mr. Dhawan was led to accept terms of appointment which, to his disadvantage, excluded his participation in the Pension Fund.

“143. The Board is therefore of the opinion that there is a legal liability on the Secretary-General to compensate the appellant for the losses she and her children have suffered because Mr. Dhawan did not become a participant in the Pension Fund.

“144. The Board accordingly recommends that the Secretary-General should pay to the appellant as a lump sum an amount approximately equivalent to the capital value of the benefits that she and her children would have received had Mr. Dhawan been a full or an associate participant in the Pension Fund on the day of his death, less the amount of the *ex gratia* award made to her on 10 February 1970.

“145. The Board recommends further that, since almost 10 years have elapsed since the appellant suffered the losses in question and since the lengthy delays in the case are attributable mainly to the conduct of the respondent and to the Joint Appeals Board, the Secretary-General should pay to the appellant interest at the rate of 6 per cent per year from the date that a pension would have been payable, had Mr. Dhawan become a participant in the Pension Fund.

“146. Alternatively, the Board recommends that the Secretary-General should grant the appellant an *ex gratia* award equal to the amount of the compensation and interest recommended above in recognition of his moral obligation to make good the losses suffered by the appellant because of the misrepresentation made to Mr. Dhawan by his representatives.”

On 31 July 1978 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General, having considered the report of the Joint Appeals Board, had taken the following decisions:

“(a) to accept the Board’s conclusion and recommendation in paragraphs 140 and 141 rejecting your claim for compensation under Appendix D to the Staff Rules,

“(b) to reject the Board’s conclusion contained in paragraph 142 that erroneous advice was given Mr. Dhawan which led to his disadvantageous acceptance of exclusion from participation in the UNJSPF. This decision was based on the consideration that the Board’s conclusion ignored the extensive record cited in the Report itself (paragraphs 2, 4 and 5) which indicates that a specific contractual arrangement had been reached at the staff member’s request and presumably to his

advantage under the circumstances at the time. It was also based on the consideration that under Personnel Directive PD/2/61, which the Board failed to mention, the agreement to make additional payments to the staff member in return for exclusion from associate participation in the UNJSPF was, under the circumstances at the time, a reasonable exercise of administrative discretion.

“(c) to reject the Board’s conclusions contained in paragraphs 143, 144 and 145 concerning a legal liability to compensate you for losses due to the staff member’s lack of participation in the Pension Fund; to wit, the payment of the equivalent of the capital value of the pension benefits, (less the *ex gratia* award) plus interest at 6%. This decision was based on the consideration that the Board’s finding of a legal liability cannot be sustained on the basis of the facts or on the basis of Administrative Tribunal rulings,

“(d) to reject the Board’s alternative recommendation in paragraph 146 of an *ex gratia* payment in the amount of the capital value of the pension benefits plus interest.

“Considering your hardship situation, however, the Secretary-General had decided to authorize an additional *ex gratia* payment to you in the amount of 16,000 Rs. as a fair and final settlement of your claim. It is to be observed that with this second *ex gratia* payment you will be in receipt of a total of 26,000 Rs., an amount which is not very much less than your late husband’s total UN earnings over three years and four months (31,000 Rs.).”

On 16 November 1978 the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. Paragraph 10 of Personnel Directive 2/61 provides that in the case of staff members who have been seconded from national Governments under a contract which excludes them from associate participation in the Pension Fund, the United Nations will pay to such staff members the employer’s contribution to the national pension schemes up to the amount specified in the letter of appointment. Since no such amount was specified in Mr. Dhawan’s letter of appointment, paragraph 10 was inapplicable to him. Paragraph 11 provides that so far as future secondment cases are concerned, the United Nations will provide such staff members coverage as associate participants in the Pension Fund and will pay them service benefit upon separation from service, leaving it to such staff members to make their own arrangements with regard to coverage in their national insurance scheme. Since Mr. Dhawan joined the Organization on 4 May 1965, paragraph 11 was the relevant one. As to the extra steps which Mr. Dhawan managed to successfully negotiate for, they must be viewed, not as a payment to him of the employer’s contribution to the national pension scheme under paragraph 10, but as his own arrangement with regard to coverage in his national insurance scheme under paragraph 11.

2. In the Iyengar case the Applicant’s exclusion from Pension Fund participation as a result of a Government ban on seconded Indian officials joining the Pension Fund had been mutually understood and accepted, and as soon as the removal of such ban by the Indian Government was brought to the Respondent’s notice he took action to remedy the situation. In the present case, however, there was no such mutual acceptance and, even after it had been brought to the attention of the Respondent’s representatives that the United Nations regulations required that all staff holding a contract of one year or more should become associate participants of the Pension Fund, they continued to maintain



that Mr. Dhawan was ineligible for participation in the Pension Fund. In the Dias case the advice given to the Applicant had been correct under the circumstances in which it was given and it was the Applicant's failure to follow up on the correct advice that led to the non-validation. In the present case, however, the Applicant was most vigilant and he continued to raise the issue of his participation with the appropriate representatives of the Respondent, who erroneously advised him that because he had been excluded before, he could never become a participant in the Pension Fund.

Whereas the Respondent's principal contentions are:

1. At no time did United Nations officials give reason to Mr. Dhawan to believe that the mere fact of his continued participation in his national pension scheme prohibited him from participation in the Pension Fund. Mr. Dhawan was advised that he was prohibited by United Nations policy from joining the Pension Fund so long as he continued to contribute to his Government's pension scheme *at the expense of the United Nations*. The senior officers at New Delhi were not wrong in advising him this way and he was therefore not wrongly led into accepting terms of appointment, which at the time of his appointment appeared to be to his advantage.

2. Mr. Dhawan could have been employed under terms of appointment that included his participation in the Pension Fund. On the other hand, the terms of his contract of employment established in his appointment letter which excluded him from pension participation were a legally valid alternative. Arrangements whereby the United Nations agreed to contribute towards payments to national pension schemes of certain staff members who, in turn, did not participate in the United Nations pension system, constituted departures from a general system of obligatory participation of all staff members in the Pension Fund, which was favoured by the Organization as the ideal policy. They were necessitated, however, by certain conditions prevailing in several Member States such as India. The basic guideline, as contained in paragraph 7 of Personnel Directive 2/61, was that such cases were to be limited to "very exceptional circumstances" such as where—as in Mr. Dhawan's case—United Nations employment was likely to comprise a small part of the person's working life.

3. The terms of appointment offered to Mr. Dhawan were therefore legally valid; they were presented to him in clear and unambiguous language and accepted by him duly and knowledgeably. Initially Mr. Dhawan was not interested in participating in the Pension Fund; when he finally made a formal request to become a participant, he took this step because he envisaged the possibility of terminating his link with the national system and obtaining continued employment with the United Nations. As in the Iyengar case, the exclusion from Pension Fund participation and the correlative compensation by the United Nations for payments to a national pension scheme were the subject of a clearly understood agreement.

The Tribunal, having deliberated from 24 September to 4 October 1979, now pronounces the following judgement:

I. The point for decision in the case is whether the decedent was wrongfully deprived of the right to become an associate participant in the United Nations Joint Staff Pension Fund and what compensation, if any, should be paid to the Applicant for the loss suffered.

II. That the decedent received four letters of appointment each excluding him from participation in the Pension Fund and that despite the decedent's representations his exclusion remained operative is not in dispute. Thus the decedent never became a par-

ticipant in the Pension Fund and the Applicant does not claim benefits against the Pension Fund.

III. The Applicant contends that the decedent was led to accept terms of appointment excluding him from participation in the Pension Fund by misrepresentations made through responsible officers authorized by the Organization to negotiate and reach agreement with him on his terms of appointment.

IV. The provisions regarding participation in the Pension Fund of a staff member in the decedent's category at the relevant time were as follows.

Staff Regulation 6.1 stated:

"Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund."

Article II *bis*, paragraph 1 of the Pension Fund Regulations read as follows:

"Every full-time member of the staff of each member organization who is not eligible to become a participant under article II [which restricted eligibility for full participation to staff members who had received an appointment of five years or more] shall become an associate participant in the United Nations Joint Staff Pension Fund if

"(a) His appointment is for one year or more; . . .

"(b) . . .

provided that he is under sixty years of age and that his associate participation is not excluded by the terms of his appointment."

Personnel Directive No. 6/58 of 10 March 1958 provided in its paragraph 2 that the status of associate participation was "a compulsory condition of service for staff who enter employment on a fixed-term basis for a period of at least one year but less than five years". This Personnel Directive further stated in its paragraph 7:

"A special situation exists in the case of fixed-term staff who have been excluded from the United Nations Joint Staff Pension Fund because of continued participation in a national retirement scheme, and in respect of whom United Nations has undertaken to pay the Government's contribution to the national retirement scheme. *No new contracts will be written with this arrangement*; appropriate arrangements will be made for such present staff on an individual basis in the light of contractual commitments." [Emphasis added.]

Paragraph 7 of Personnel Directive No. 2/61 of 15 March 1961 provided that "only *very exceptional circumstances* may justify exclusion of a staff member from participation in the Pension Fund" [emphasis added] and paragraph 11 of this Personnel Directive read:

"So far as future secondment cases are concerned, the United Nations will provide such staff members coverage as associate participants in the Joint Staff Pension Fund and will pay them service benefit upon separation from service, leaving it to such staff members to make their own arrangements with regard to coverage in their national insurance scheme."

V. Thus when in 1965 the decedent was given an appointment for one year, associate participation in the Pension Fund was the normal condition of service.

VI. The Tribunal notes that when the decedent applied for appointment to the United Nations he was an employee of an agency of the Government of India, and that he wished to retain the lien on his Government post. Prior to 1960 the Government of India had, by an order, directed that officers of the All India and Central Services on deputation to international organizations "would not be allowed to join the Pension Schemes of those organizations". That situation was, however, modified in 1960 by Office Memorandum No. F.1 (47)-E.IV (A)/60 of the Ministry of Finance which provided *inter alia*:

"The President has been pleased to decide that such Officers deputed on Foreign Service on or after 1st January 1958 under the U.N. Bodies may be allowed to join the U.N. Joint Staff Pension Fund as Associate Members subject to the following conditions: . . ."

Thus, when the decedent applied for appointment to the United Nations, there was no bar under Indian law to his joining the United Nations Pension Fund on account of the lien on his Government post.

VII. According to paragraph 7 of Personnel Directive No. 6/58, no new contracts excluding fixed-term staff from the United Nations Joint Staff Pension Fund because of continued participation in a national retirement scheme were to be written. The net result of the foregoing provisions is that at the time of his appointment the decedent was entitled to become an associate participant in the Pension Fund.

VIII. The Respondent contends that, according to article II *bis*, paragraph 1 of the Pension Fund Regulations, associate participation could be excluded by the terms of appointment, and that the decedent was excluded from such participation by a valid agreement free from any irregularity. The Tribunal recognizes that, under both the Pension Fund Regulations and the Personnel Directives, fixed-term staff could be excluded from Pension Fund participation in "very exceptional circumstances". The issue for determination in this case, however, is not whether the Respondent had the right to exclude the decedent from participation in the Pension Fund but whether the decedent was so excluded by misrepresentation of his eligibility for such participation on the part of the authorized officers of the Respondent. It is therefore necessary for the Tribunal to examine the circumstances in which the decedent was excluded from participation in the Pension Fund.

IX. The decedent, who was employed by an agency of the Government of India, was offered the post of Secretary/Stenographer at ND-4, Step I with a salary of Rs. 491.67 a month, free of income tax. The decedent represented that he was actually drawing at the time of his application a monthly salary of Rs. 527.25 and that in order to maintain his lien on his Government post he would have to make a contribution of nearly Rs. 67 a month. He therefore requested that he be placed at ND-4, Step IV. In a reply dated 23 April 1965 the Resident Representative, after consultation with the appropriate authorities, acceded to the decedent's request and added:

"As you will be contributing to the Government of India towards your Pension, you will not be entitled to Associate Pension Fund participation in the UN Joint Staff Pension Fund."

The Respondent argues from the foregoing facts that the decedent was excluded from participation in the United Nations Pension Fund because the United Nations was compensating him for payments he had to make to his national pension scheme and that in

view of such compensation the decedent had voluntarily agreed to forego his right to participation in the United Nations Pension Fund. The Tribunal observes that this argument implies that the Respondent recognized the right of the decedent to become an associate participant in the Pension Fund but that the decedent, in return for an increase in salary to meet the pension contribution to his Government, waived the benefit.

X. The Tribunal notes that the tenor of the correspondence in the file does not bear out the Respondent's contention. The text of the letter quoted above shows that the Resident Representative was of the view that the decedent's associate participation in the United Nations Pension Fund was barred because of his contribution to his Government pension scheme, which indeed was the legal situation prior to 1960. When on 19 November 1966 the decedent raised the question of his participation in the United Nations Pension Fund, the Assistant Resident Representative replied:

"... since you are already contributing to the Government of India Pension Scheme, in consideration of which we gave you some additional steps in your salary grade, at the time you were appointed to this post, you cannot be an associate participant in the UN Joint Staff Pension Fund. . . ."

Here again the emphasis was on the ineligibility of the decedent to become an associate participant rather than on a waiver of his right to participation. The Tribunal's inference is further fortified by a memorandum dated 16 May 1968 from the Assistant Resident Representative to the Office of Technical Co-operation in which it is stated:

"It has been our understanding all along that local employees who are contributing to the Government's Pension Fund will not be eligible to participate in the UN Pension Fund."

This memorandum refers to a staff member seconded from the Government of India to the New Delhi office in 1952, that is, at a time when the Government of India barred its officers seconded to international organizations from participating in the United Nations Pension Fund. Thus the facts clearly indicate that the New Delhi office was under a misapprehension that the seconded officers of the Government of India contributing to their national pension scheme were ineligible for participation in the United Nations Pension Fund.

XI. The Tribunal further notes that the Respondent's officers at New Delhi showed little awareness of the relevant personnel directives. For instance, paragraph 11 of Personnel Directive No. 2/61 provides:

"11. *So far as future secondment cases are concerned, the United Nations will provide such staff members coverage as associate participants in the Joint Staff Pension Fund and will pay them service benefit upon separation from service, leaving it to such staff members to make their own arrangements with regard to coverage in their national insurance scheme.*" [Emphasis added.]

The above provision was applicable to the decedent when he applied to a post in 1965 and he should have been provided coverage as an associate participant in the United Nations Pension Fund regardless of his obligations to his national pension scheme. Instead the Respondent insisted on excluding the decedent from participation in the United Nations Pension Fund, apparently under the erroneous view that he was ineligible.

XII. The Respondent's assertion that the decedent was provided a higher salary to

compensate for his exclusion from the Pension Fund is also not borne out. In his memorandum dated 16 May 1968 the Assistant Resident Representative stated:

“Mr. Dhawan was appointed at ND-4/Step IV with Headquarters permission, as per copies of correspondence enclosed. Higher start was given to him *as he was already drawing a higher salary* and was besides required to pay Rs. 67/- every month towards contribution to the Government Pension Fund.” [Emphasis added.]

It is clear from this passage that the decedent was appointed at ND-4, Step IV to be provided with a net salary equivalent to the salary he was drawing from his Government and not as compensation or consideration for waiving his United Nations pension rights. In the view of the Tribunal, the argument that the decedent bartered away his right to United Nations pension benefits for an increase in salary is an afterthought.

XIII. The Respondent argues that the decedent had signed the letters of appointment containing the exclusion clause with full knowledge, freely and voluntarily and that the exclusion was therefore binding on him. In support of this argument, the Respondent relies on Judgement No. 151 (*Iyengar*) where the Tribunal upheld the validity of the exclusion of a staff member from participation in the United Nations Pension Fund on the basis of correspondence and conduct of the parties. The Tribunal notes, however, that this staff member was appointed at a time when his Government prohibited its seconded officers from joining the United Nations Pension Fund and that he clearly admitted that

“the Government of India have prohibited me from joining any Pension Fund under the Organization . . .”

In the present case, however, the decedent was under no such disability nor did he concede that he was ineligible for joining the United Nations Pension Fund. On the contrary, at the earliest opportunity he questioned his exclusion from the Pension Fund by making pointed reference to his rights under the UNDP Field Manual and he was keen on his pension rights until his very last days. It was therefore on the representation by the Respondent's officers at New Delhi that the decedent was ineligible for participation in the Pension Fund that he agreed to his terms of appointment.

XIV. The Tribunal therefore holds that the Respondent's officers at New Delhi misrepresented to the decedent that he was ineligible for participation in the United Nations Joint Staff Pension Fund and that, as the terms of appointment were entered into on the basis of his misrepresentation, such terms of appointment did not conclude the decedent's rights.

XV. Having reached the conclusion that the decedent was wrongfully deprived of his Pension Fund rights, the Tribunal now proceeds to assess the compensation due to the Applicant. As a consequence of the Respondent's action, the Applicant, who is the widow of the decedent, and her children have been deprived of pension benefits under the Pension Fund Regulations. The Respondent is therefore liable to compensate the Applicant. The Tribunal considers that a lump sum approximately equivalent to the capital value of the benefits which the Applicant and her children would have received had the decedent been an associate participant of the Pension Fund on the date of his death is a proper measure of compensation.

The Tribunal notes that since the date of the death of the decedent, certain *ex gratia*

payments have been made to the Applicant. At the request of the Tribunal, the Respondent on 27 September 1979 submitted the following information:

“I was advised by the Secretary of the Joint Staff Pension Fund that the capital value, expressed in Indian rupees as of the day of Mr. Dhawan's death (20 August 1968), of the benefits that the Applicant and her children would have received had Mr. Dhawan been a full or an associate participant in the Pension Fund at the day of his death would be Rs. 121,162.65 (\$16,155.02). Accordingly, this capital value less the amount of *ex gratia* awards made to her so far (Rs. 26,200) would be Rs. 95,162.65 according to the 1968 rate of exchange (Rs. 7.5 = \$1); if calculated according to the present rate of exchange (Rs. 8 = \$1) it would be Rs. 103,240.16.”

The Tribunal considers that, as the action is not for enforcement of obligations under the Pension Fund Regulations but for compensation for administrative failures on the part of the Respondent, the amount to be awarded becomes due and payable on the date of the judgement.

XVI. The Tribunal accordingly awards compensation in the amount of Rs. 103,240.16 to the Applicant. Since the compensation has been fixed as of the date of judgement, the request for interest from the date of the death of the decedent is denied.

XVII. Under article 9, paragraph 1 of its Statute, the Tribunal is called upon to

“... fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.”

The Tribunal observes that the amount of compensation fixed in this case represents the loss which the Applicant has suffered on account of misrepresentations made by the Respondent to the decedent about his entitlement to pension benefits. The rule that the compensation shall not normally exceed the equivalent of two years' net base salary would not ensure adequate compensation for the loss suffered by the Applicant in this case. The Tribunal has therefore fixed the amount of compensation at a figure in excess of two years' net base salary in order to compensate adequately the Applicant and her children for the loss sustained.

*(Signatures)*

R. VENKATARAMAN  
*President*

Francisco A. FORTEZA  
*Member*

Suzanne BASTID  
*Vice-President*

Jean HARDY  
*Executive Secretary*

New York, 4 October 1979

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