Judgement No. 360

(Original: English/French)

Case No. 338: Taylor *Against:* **The United Nations Joint Staff Pension Board**

Request by a staff member of FAO for the rescission of the decision denying him the restoration of his prior contributory service; request for a ruling on the manner in which the Applicant's benefits ought to be calculated.

Definition of the issues involved in the case.—Question of the legality of amendments to the Regulations of the Fund adopted by the General Assembly in its resolutions 37/131 and 38/233.—Applicant's contention that the amendment to the Regulations of the Pension Fund depriving him of his right to restore previous contributory service, which was adopted by the General Assembly in order to remedy the actuarial imbalance of the Fund, was not within the power of the General Assembly as article 26 of the Regulations provides the sole legitimate method of remedying an actuarial deficiency.—The Tribunal holds that article 26 does not prohibit amendments to the Regulations for the purpose of putting the Fund on a sounder actuarial basis for the future.—Applicant's contention that the contested amendment was discriminatory and contrary to his acquired rights.—The Tribunal does not find it necessary to rule on these allegations in view of the fact that, in accordance with the General Assembly resolutions, the amendments were to be "without retroactive effect".—Finding that the Applicant, when he was separated from service with FAO on 31 March 1982, had a legal right to the restoration of his contributory service, such right being incorporated in the contracts under which he was working.—That right was conditional upon resuming contributory service and it was not eliminated by the amendments under consideration.—Finding that the express desire of the General Assembly was to make the change pro futuro *and not* pro praeterito.

The decision denying the Applicant's request for restoration of his prior contributory service is rescinded.—All other pleas rejected, without prejudice to the Applicant's right to renew them in the future if need be.

*Separate opinion of Mr. Roger Pinto.—Discussion of the concept of acquired rights and of retroactivity, as defined in Judgements No. 108 (*Khamis*), No. 19 (*Kaplan*) and No. 82 (*Puvrez*) and in the advisory opinion of the International Court of Justice in the* Mortished *case.—A new legislative provision is retroactively applied only if it deprives the person concerned of an acquired right and not of a conditional, virtual or dormant right.—The Applicant, when he left the service of FAO, did not have any right which would have been impaired by the new provisions.—When he was reappointed, the new provisions were applicable to him.—However, he was entitled to the application of article 21 (b) of the Pension Fund Regulations as modified with effect from 1 January 1984, i.e., after the Applicant's reappointment.—The Applicant has the right to restore his prior contributory service under that article.*

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Endre Ustor; Mr. Roger Pinto;

Whereas, on 15 August 1984, Martin Seymour Taylor, a staff member of the Food and Agriculture Organization of the United Nations, hereinafter referred to as FAO, filed an application in which he requested the Tribunal

"1. To order the rescission of the decision of the Standing Committee of the Respondent denying the Applicant's requests for adjustment of his

deferred retirement benefit and restoration of his prior contributory service.

"2. To rule that articles 49 (*b*) and 50 (*b*) of the Regulations of the Fund protect the Applicant's right to restore contributions for periods of service prior to the entry into force of any amendments to the Regulations purporting to revoke the right to restore.

"3. To order the Respondent to restore the Applicant's contributory service in the Pension Fund in accordance with former article 24 of the Regulations of the Fund as in force on 31 December 1982.

"4. In the alternative, to order that the benefits eventually paid in respect of Applicant's pre-1983 service be calculated on the basis of final average remuneration at the time of payment.

"5. To order the Respondent to treat the Applicant's current contributory service as entitling him to a retirement, early retirement or deferred retirement benefit notwithstanding that the length of his current contributory service may be for less than five years.

"6. To order the Respondent to apply the standard rate of accumulation of benefits to Applicant's current service as provided in Article 28 (*c*) of the Regulations.

"7. In the alternative to any of the above, to order the Respondent to give effect to any retroactive alteration of Applicant's contractual status during his break in service in order to render his participation continuous under Article 21 of the Regulations.

"8. To order the Respondent to allow the Applicant, within a reasonable time following the judgement of the Tribunal, to exercise or to alter any choice regarding pension matters that he has been entitled or required to make since his separation in 1982.";

Whereas, on 28 December 1984, the Respondent filed his answer;

Whereas, on 13 February 1985, the Applicant filed written observations dated 28 January 1985;

Whereas the Tribunal considered the case at its spring session held in Geneva from 20 May to 14 June 1985;

Whereas the Tribunal decided on 14 June 1985 to remand the case to its following session;

Whereas on 14 June 1985 the presiding member of the panel decided, under Article 15 of the Rules of the Tribunal, that oral proceedings be held, with an invitation to the FAO to send a representative to answer questions;

Whereas the Tribunal resumed consideration of the case at its autumn session held in New York from 14 October to 8 November 1985;

Whereas, on 22 October 1985, the Tribunal heard the parties and the representative of the FAO at a public session;

Whereas, at the request of the Tribunal, the Respondent, by a letter dated 23 October 1985, submitted further information;

Whereas the Applicant, by a letter received on 31 October 1985, commented on the Respondent's letter of 23 October;

Whereas the facts in the case are as follows:

The Applicant entered the service of the FAO on 15 April 1975 under a two-year fixed-term appointment and thereby became a participant in the United Nations Joint Staff Pension Fund. On 26 March 1977, the Applicant's

assignment to Somalia was terminated and he was granted leave without pay to bridge a gap until 22 May 1977, when he began a new one-year fixed-term appointment and thereby continued participation in the Fund. His fixed-term appointment was successively extended for further fixed terms, until 31 March 1982, when his appointment expired and he separated from the service of the FAO, having accumulated almost seven years of contributory service under the Regulations and Rules of the United Nations Joint Staff Pension Fund, hereinafter referred to as the Pension Fund Regulations.

Thereafter, the Applicant received four separate contracts from FAO as a Consultant. The first was from 16 June to 20 August 1982. The second contract, which was on a "when actually employed" basis [WAE], was from 21 August to 23 September 1982 (the Applicant actually worked from 26 August to 16 September and from 19 to 23 September 1982). The third contract, also WAE, was from 24 September to 31 December 1982 (the Applicant worked from 23 November to 8 December 1982). The fourth contract, likewise WAE, was from 1 January to 31 March 1983 (the Applicant worked from 9 January to 22 February 1983).

In the meantime, in its Report to the Thirty-seventh Session of the General Assembly (Supplement No. 9 (A/37/9)), the UN Joint Staff Pension Board informed the General Assembly that it had undertaken an analysis of possible measures to improve the actuarial balance of the Fund, and recommended to the General Assembly, among other measures to improve the actuarial balance of the Fund,

> "that appropriate changes should be made in the Regulations to limit the right to restore prior contributory service on re-entry into participation to those who, as a result of their prior service, were not entitled to elect a benefit other than the return of their own contributions, because they had less than five years of contributory service."

It also proposed that

> "after 1 January 1983 deferred pensions, irrespective of the date of their election, would no longer be adjusted until such time as the former participant reached age 50. At that time the basic dollar pension entitlement would be adjusted by the United States CPI [Consumer Price Index] until payment of the pension commenced . . . . Thereafter, the pension in payment would be adjusted in the same manner as all other pensions in payment."

The General Assembly, in resolution 37/131 adopted on 17 December 1982, approved the above measures recommended by the UN Joint Staff Pension Board and amended,

> "with effect from 1 January 1983, the Regulations of the United Nations Joint Staff Pension Fund, without retroactive effect, as set forth in Annex XII of the report of the Board, and the pension adjustment system in accordance with annexes IX and X thereof."

On 11 May 1983, the Applicant inquired from the competent authorities at the FAO how the "recent changes made in Pension Fund conditions" would affect his pension entitlements. In a reply dated 25 May 1983 the Secretary of the FAO Staff Pension Committee informed him that if he again became a participant in the Fund, he could not "continue [his] prior period of participation" by restoration of his prior contributory service, since Article 24 of the Pension Fund Regulations had been amended so as to exclude restoration of prior periods of contributory service of five years or more. The Secretary also

stated that the Applicant was required to elect a benefit on the basis of the options which had been communicated to him on 10 March 1982.

On 10 July 1983, the Applicant was given a new fixed-term appointment with the FAO and thereby became a participant in the Fund as of that date.

In a memorandum dated 15 July 1983 addressed to the Secretary of the FAO Pension Committee, the Applicant requested an assurance that his deferred reduced pension would be adjusted for cost-of-living changes as from the date of his election for the reduced deferred pension and a decision as to his rights to restore his prior contributory service in the Fund. He declared that if the decision were positive he would wish to revise his election to withdraw his contributions, which had not yet led to the payment of any money.

On 18 July 1983 the Applicant was paid, in accordance with his election, a lump sum corresponding to a portion of his deferred retirement benefit.

In a letter dated 29 July 1983, the Secretary of the FAO Pension Committee informed the Applicant that the General Assembly had decided that in future only those staff members who, on separation, had less than five years of contributory service would be able to restore it and that irrespective of the date when they were elected, deferred pensions would, after 1 January 1983, not be adjusted until the prospective beneficiary reached age 50.

On 29 August 1983 the Applicant requested that the decision by the Secretary of the FAO Staff Pension Committee be reviewed by the FAO Staff Pension Committee under Section K of the Administrative Rules of the UN Joint Staff Pension Fund.

On 23 November 1983 the Applicant was informed by the Deputy Secretary of the FAO Staff Pension Committee that the Committee had rejected his request for review. In a letter dated 5 January 1984 addressed to the Deputy Secretary of the FAO Staff Pension Committee, the Applicant requested a review of the decision by the FAO Staff Pension Committee by the Standing Committee of the UN Joint Staff Pension Board. The Applicant asserted that as he had separated from the service of FAO on 31 March 1982 and had been rehired on 10 July 1983 he "would appear to be precluded from restoring [his] prior contributory service despite the modified regulations". He explained that in his case recruitment procedures for his present post had been "particularly lengthy" due to administrative procedures and stated that "staff, such as myself, whose period between assignments exceeds one year, through no fault of the staff member, should be permitted restoration of previous pensionable service".

On 27 January 1984, the Secretary of the FAO Staff Pension Committee informed the Applicant of the new Regulation 21 (*b*) of the Pension Fund Regulations which had been amended by the General Assembly, effective 1 January 1984. The new regulation gave participants the right to restore prior contributory service, if the break in contributory service was less than 12 months, provided no benefit had been paid. The Applicant, it was said, did not meet either condition. The letter regretted that the Applicant's break in service was more than 15 months and remarked that the General Assembly had considered that allowing for a 12-month break would be sufficient to cover most cases.

On 17 May 1984 the Secretary of the UN Joint Staff Pension Board informed the Applicant that the Standing Committee of the Pension Board had decided to uphold the decision of the FAO Staff Pension Committee, denying the Applicant's requests.

On 15 August 1984 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. After his separation in 1982, the Applicant had an acquired right to restore prior service under the UN Pension Fund Regulations in force at the time of separation. This right is protected against subsequent deprivation by amendments to the Regulations.

2. At the time of his separation in 1982, the Applicant had an acquired right to benefits based on his eventual final average remuneration at the end of all future contributory service.

3. The relevant amendments to the Pension Fund Regulations deprive the Applicant of his vested right, thereby causing a substantial reduction in his pension.

4. The amended Pension Fund Regulations impermissibly discriminate against a particular class of United Nations employees.

5. It is impermissibly arbitrary to apply the amended Pension Fund Regulations retroactively without giving the Applicant the opportunity to change his participatory status.

6. The amendments at issue are invalid because they improperly shift the burden of an actuarial deficit in the Fund from member organizations on which they are imposed by Article 26 of the Pension Fund Regulations, to the individuals who are participants in the Fund.

Whereas the Respondent's principal contentions are:

1. The Applicant had no acquired right to restore his prior contributory service in accordance with the Pension Fund Regulations in force when that service ended with his separation from FAO on 31 March 1982.

2. Under Article 40 of the Pension Fund Regulations, the Applicant has no right to a retirement, early retirement or deferred retirement benefit based on less than five years of contributory service after re-entry into participation.

3. For his contributory service commencing 10 July 1983 the Applicant is not entitled to a benefit calculated on the basis of the standard annual rate in Article 28 (*c*).

4. The Pension Fund Regulations as amended, dealing with restoration of prior contributory service, are not discriminatory or retroactive.

5. Article 26 of the Pension Fund Regulations, dealing with deficiency payments, has no relationship whatsoever to the amendment of the Regulations on restoration of prior contributory service.

The Tribunal, having deliberated from 21 October to 8 November 1985, now pronounces the following judgement:

I. The facts of this case are not in dispute.

II. The Applicant held two fixed-term contracts with FAO, for the periods from 15 April 1975 to 21 May 1977 and from 22 May 1977 to 31 March 1982.

III. He then held contracts as a consultant for the following periods:

from 16 June 1982 to 20 August 1982,
from 21 August 1982 to 23 September 1982,
from 24 September 1982 to 31 December 1982, and
from 1 January 1983 to 31 March 1983.

IV. From 10 July 1983 he has again held a fixed-term contract, under which he is serving in Botswana at the present time.

V. The period between the expiry of his fixed-term contract on 31 March 1982 to the commencement of his present fixed-term contract on 10 July 1983 exceeds 12 months.

VI. During that period, in the course of which he held four consultancies, he was not a contributory to the Pension Fund.

VII. During that same period, the Regulations of the Fund were amended by resolution A/RES/37/131 adopted on 17 December 1982 of the General Assembly of the United Nations.

VIII. This amendment of the Regulations was to the disadvantage of the Applicant, in depriving him of his right to restore his previous contributory service should he subsequently become a contributory to the Fund under a new contract of employment.

IX. The amendment came into effect on 1 January 1983.

X. A subsequent amendment, made by resolution A/RES/38/233 of the UN General Assembly, adopted on 20 December 1983, modified the Regulations with effect from 1 January 1984 so as to allow restoration if the gap between periods of contributory service did not exceed 12 months and a benefit had not been paid to him. This did not assist the Applicant, because in his case the gap exceeded 12 months and a benefit had been paid to him.

XI. The Applicant's claim is, in effect, an appeal against the refusal of the Joint Staff Pension Board to allow him to restore his earlier period of contributory service upon his resumption of a subsequent period of contributory service from 10 July 1983, despite the lapse of more than 12 months between the two periods, and despite his having received a benefit.

XII. It is not disputed that the Regulations and Rules of the UN Joint Staff Pension Fund apply to the Applicant.

XIII. The Applicant does not contest the formal validity of either of the amendments referred to above, but asserts that, in view of Article 26 of the Regulations, it was not within the power of the General Assembly to adopt those amendments, inasmuch as their purpose was to remedy a prospective deficiency in the assets of the Fund.

XIV. The purpose of the amendment of 17 December 1982 was expressed in the General Assembly's resolution to be "to improve the actuarial balance of the [Fund]", and similar language was used in the amending resolution of 20 December 1983.

XV. The resolutions were drafted by the Pension Board on the basis of recommendations made by the Fund's actuaries. Article 12 (*a*) of the Fund's Regulations expressly requires the Board to have an actuarial valuation made by the Fund's consulting actuary at least once every three years, and Article 12 (*b*) requires the actuarial report, *inter alia*, to make "recommendations, if any, for appropriate action". Article 12 (*c*) requires the Board to recommend action to the member organizations and to furnish a copy of the report to the UN Advisory Committee on Administrative and Budgetary Questions. This Committee may, in the normal course, be expected to draw the recommendations to the attention of the General Assembly.

XVI. The Applicant argues, however, that Article 26 of the Regulations provides the sole legitimate method of remedying an actuarial deficiency. If so, it eliminates the power of the General Assembly to amend the Regulations in consequence of a recommendation under Article 12, and requires the potential

deficiency to be remedied only by contributions to be made by each member organization.

In the Tribunal's view, Article 26 does not prohibit the amendment of the Regulations for the purpose of putting the Fund on a sounder actuarial basis for the future. This view is supported by the legislative history of the Article cited by the Respondent.

XVII. The Applicant further asserts that the relevant amendments of the Regulations were discriminatory, because they particularly affected members of the field service, who were more likely to have intervals between their fixed-term contracts than their colleagues at Headquarters.

XVIII. The Applicant also claims that his right to restoration acquired by virtue of Article 24 in respect of his contributory service from 1975 to 1982 (i.e. before the amendments of 1983 and 1984 were made) cannot be prejudiced by those amendments. He relies on Article 49 (*b*) of the Regulations, which provides that amendments of the Regulations are to be:

> "without prejudice to rights to benefits acquired through contributory service prior to that date."

XIX. The Tribunal does not think it necessary to consider these questions of alleged discrimination or a possible acquired right enjoyed by the Applicant, inasmuch as the General Assembly, in its resolutions enacting the amendments of 1983 and 1984 (referred to in paragraphs VII and X above), specifically provided that the amendments were to be "without retroactive effect".

In the course of the oral proceedings, the Respondent has argued that, up to 31 December 1982, the Applicant enjoyed nothing more than a hope of further contributory service which, under the Regulations as they then stood, would have entitled him to restoration of his previous period of contributory service.

The Tribunal considers, however, that this hope, referred to by the Respondent, was based on particularly solid grounds in view of his excellent record in the service of FAO and his outstanding expertise in his field. Moreover, in the Tribunal's view, his period of contributory service had earned him a legal right to restoration of that period. This right was incorporated in the two fixed-term contracts under which he was employed up to 31 March 1982, being a provision, then in force, of the Pension Fund Regulations. Admittedly, this right was conditional upon his resuming contributory service with a member organization. Nevertheless, it was a right, and an important one at that.

XX. The conditional right, referred to in the preceding paragraph, has not been eliminated by the amendments under consideration. In the present case this is all the more evident because the General Assembly made specific provision for non-retroactivity in the two relevant resolutions.

XXI. In a letter dated 23 October 1985 addressed to the President of the Tribunal, the Secretary of the United Nations Joint Staff Pension Board explained the Respondent's position *inter alia* as follows:

> "If Mr. Taylor is permitted to link his various periods of contributory service without the appropriate actuarial payment being made by FAO, there will be a corresponding increase in the Fund's overall liabilities. Prior to 1 January 1983, the Pension Fund Regulations allowed the acceptance by the Fund of such additional liability. However, the emergence of an actuarial imbalance had led to the conclusion both by the United Nations Joint Staff Pension Board and the United Nations General Assembly that the Fund could no longer afford to be so generous and that steps had to be taken to reduce the Fund's overall liabilities. With that end in view the United Nations General Assembly sought to reduce the Fund's liabilities by

approving several amendments to the Fund's Regulations, including the amendment the applicability of which is contested by Mr. Taylor. A solution in the case under review which would lead to an increase in the Fund's liabilities would be contrary to the express desire of the United Nations General Assembly."

The Tribunal appreciates this explanation but finds that the "express desire" of the General Assembly—as stated above—was to make the change in the relevant rules *pro futuro* only and not *pro praeterito.*

XXII. The Tribunal, for these reasons, concludes that the Applicant's conditional right to restoration of his prior contributions, as it existed on 31 March 1982, was preserved by the terms of the relevant amending resolutions of the General Assembly.

XXIII. The Tribunal accordingly orders the Respondent to rescind the decision denying the Applicant's requests for restoration of his prior contributory service and, at the appropriate time, to calculate his benefits accordingly.

XXIV. The Applicant's pleas requesting adjustment of his benefits and the calculation of his benefits in a specific manner have not been fully argued before the Tribunal and can only be considered at the appropriate time in the future. In consequence, all other pleas are denied, without prejudice to the right of the Applicant to renew them in the future if need be.

(Signatures)

Arnold KEAN
Vice-President, presiding

Curdon WATTLES
Acting Executive Secretary

Endre USTOR
Member

New York, 8 November 1985

SEPARATE OPINION OF MR. ROGER PINTO

I. Unfortunately, I cannot concur with the reasons given for the judgement rendered today by the Tribunal.

I consider that the application to the Applicant of General Assembly resolutions A/RES/37/131 and A/RES/38/233, adopted respectively on 17 December 1982 and 20 December 1983, in no way constitutes retroactive implementation of the amendments adopted at that time. Such application is therefore not contrary to the texts of the aforementioned resolutions of 1982 and 1983, which provide that the amendments would not have retroactive effect.

II. In fact, when Mr. Taylor's contract expired on 31 March 1982, he was entitled to the immediate and deferred benefits and allowances deriving from his participation in the Joint Staff Pension Fund. These benefits cannot be taken away.

On the other hand, he had no right to the maintenance in the future of the provisions of the regulations and rules of the United Nations Joint Staff Pension Fund. In particular, he has no "right" to the maintenance of article 24 (*a*) of the regulations (version of 1 August 1980) which allowed former participants who had received a new contract to restore their prior contributory service. That provision can be applied to Mr. Taylor only at the time when he concludes a new contract and in the form in which it exists at that time. However, at the time when Mr. Taylor concluded a new contract, that provision had been abrogated. Only the provision in force applies to Mr. Taylor. It is not a question

of retroactive application. Retroactive application would deprive Mr. Taylor of an acquired right to restoration. But he has no acquired right to such restoration. In order to prevent the immediate application of the new provision, it is not sufficient for him to invoke a conditional, virtual or dormant right.

III. The General Assembly resolution stating that amendments to the Pension Fund regulations shall not have "retroactive effect" means that these amendments cannot impair a right existing at the time of their adoption. They do not apply to a conditional, virtual or dormant right.

IV. Mr. Taylor does not even have a hope or expectation. The judicial practice of the Tribunal on this point concerns the expectation of renewal of an individual contract—and not the maintenance in force of regulations which by their nature are subject to amendment and abrogation.

V. In the *Khamis* case (Judgement No. 108) the Tribunal expressed itself clearly concerning the scope of the non-retroactivity of amendments to the Pension Fund regulations. The text applicable at that time (art. XXXVII) is identical with that of article 49 of the regulations currently in force. The Tribunal expressed itself as follows (para. IX of the Judgement):

> "This text sets out a general principle and an exception. The general principle is that the amendments apply to all participants. Thus, as and from the effective date fixed by the General Assembly, a single legal system is applicable. The exception is that the amendment shall be without prejudice to 'rights to benefits acquired through contributory service accumulated prior to that date'.
>
> "The exception contained in article XXXVII is in conformity with the accepted principle of jurisprudence that retroactive legislation shall be without prejudice to vested or acquired rights."

The Tribunal further defined its thinking by citing Maxwell (para. X of the Judgement):

> "X. The principles regarding retroactive construction of statutes as set out on page 206 of *Maxwell on the Interpretation of Statutes* (11th Edition) read as follows:
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> "'It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation.'
>
> "It is clear from the above text that the principle of law against 'retroactive' construction relates mainly to cases when certain acquired rights are disturbed or denied."

VI. By its judgement, the Tribunal dangerously extends the notion of acquired rights to purely virtual or conditional rights. This extension runs counter to the established judicial practice.

VII. According to the analysis of the International Court of Justice, the "fundamental principle of respect for acquired rights" invoked by the Tribunal in the *Mortished* case applies only if an acquired right actually exists and if the new provisions are "retroactive to destroy" an "acquired right" (Application for review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ, Dec. 1982, pp. 325-362, para. 73).

VIII. In the judicial practice of the Tribunal, it has never been considered that a merely "conditional" right could be included in the category of acquired rights.

IX. Moreover, the statutory elements of the legal status of staff members never have the legal nature of acquired rights, let alone "conditional" rights. In the *Kaplan* case (Judgement No. 19), the Tribunal expressed itself as follows:

> "In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements:
>
> "All matters being contractual which affect the personal status of each member—e.g., nature of his contract, salary, grade;
>
> "All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning—e.g. general rules that have no personal reference.
>
> "While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members." (para. III)

X. More precisely, the Tribunal considers that respect for acquired rights means nothing can

> "affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member, but nothing prohibits an amendment of the regulations where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment." (Judgement No. 82, *Puvrez*)

In the present case, the benefits and advantages claimed by the Applicant are linked to service after the entry into force of the new provision on 1 January 1983—namely, the conclusion of a contract on 10 July 1983.

XI. In order to determine the Applicant's right to restoration of a period of prior contributory service, I do not think it is necessary to consider that he has an acquired right to such restoration. It will suffice to apply to him article 21 (*b*) of the Pension Fund regulations as amended by General Assembly resolution 38/233 with effect from 1 January 1984.

XII. The Respondent, without providing any justification, has called in question the application to the Applicant of a provision which entered into force on 1 January 1984, after he resumed his contributory service on 10 July 1983.

XIII. Such was not, however, the view of the Secretary of the FAO Staff Pension Committee. In his letter to the Applicant dated 27 January 1984, the Secretary indicates that new article 21 (*b*) would apply to the Applicant if he fulfilled the conditions set forth therein.

XIV. Above all, the Respondent's position is contrary to the judicial practice of the Tribunal in the *Khamis* case (Judgement No. 108). In that case, the Respondent contended that an amendment whose date of entry into force had been fixed at 1 January 1963 applied exclusively to staff members who rejoined the Pension Fund on or after 1 January 1963.

The Tribunal interpreted the amendment as applying to *all* staff members.

XV. Moreover, the Tribunal emphasized that the Respondent's argument led to an absurdity:

"XVII. Furthermore, the Respondent's argument leads to an absurdity. For example, if a staff member rejoined the Pension Fund in 1958 he would not be entitled to restore his prior service but if rejoined in 1963 he could claim such a right. Thus between two staff members who both left the service in 1953, the one who rejoined after an interruption of five years would be ineligible for restoration of prior service but the one who rejoined after an interruption of ten years or more would be entitled to the benefit.

"The rule against absurd construction of statutes and regulations applies in this case."

XVI. Moreover, the Tribunal noted that a restrictive interpretation would lead to inequities:

"VIII. . . . restricted application of the article only to staff members who rejoined on or after the effective date of the amendment would lead to inequities."

XVII. I consider that amended article 21 (*b*) therefore applies to the Applicant. But the Respondent contends that the Applicant does not fulfil the two conditions set by that article because

"(*a*) He resumed his contributory service over 15 months [and not 12 months] after his separation; and

"(*b*) A benefit had been paid to him."

XVIII. In order to determine whether the Applicant fulfils the first condition set by article 21 (*b*)—as I believe he does—it will suffice to recall the recent turbulent history of article 21 of the Pension Fund regulations and of the right to restoration.

XIX. On 31 March 1982, when the Applicant left FAO, the right to restoration, without any limit on its duration, was incorporated in the Pension Fund regulations. From 1 January 1983 to 1 January 1984, the right to restoration ceased to exist, without exception. On 1 January 1984, the right to restoration was re-established subject to the two conditions mentioned above.

XX. The latest amendment was introduced on the initiative of the Joint Staff Pension Board, which explained the reasons therefor in its report to the General Assembly (*Supplement No. 9* (A/38/9), Addendum, 19 October 1983). In the relevant part of this report, the Joint Staff Pension Board states the following:

"9. The attention of the Standing Committee was drawn to the fact that where a participant's career with a member organization (or organizations) consisted of a series of unconnected fixed-term appointments—as was the case with technical co-operation experts—the reduction in the retirement benefit would be so drastic as to be socially undesirable.

"10. The Standing Committee saw merit in that argument. It recalled that the Board's objective at its thirtieth session, at which the package of economy measures had been formulated, was to address situations such as that of a participant who, after, say, 10 years of contributory service as a junior professional, and a subsequent break in service of 10, 15 or 20 years, rejoined a member organization in a senior post; and that the Board did not intend to penalize those who—because of the nature of the skills they could offer to the member organizations—could not be employed on a continuous basis.

"11. The Standing Committee noted that in the case of technical co-operation experts most of the interruptions of service were of less than 12 months. In some instances, member organizations could link periods of

contributory service by administrative expedients, such as the granting of special leave without pay. The Standing Committee felt that recourse to such expedients would be undesirable. It also noted that short interruptions in contributory service (unlike the case referred to in the preceding paragraph) would have a lesser impact on the size of the final total benefit.

"12. Accordingly, the Standing Committee has concluded that where a participant resumes his contributory service with a member organization within 12 months of separation, without a benefit having been paid to him, his participation in the Fund (as distinct from his contributory service) should not be deemed to have been interrupted. Should this recommendation be approved, a consequential amendment would be required in article 32 (*a*) on the deferment of payment or choice of benefit, in which the period of deferment would have to be increased from 6 to 12 months."

XXI. The purpose of this proposal was thus to prevent former participants in the Pension Fund from restoring their period of prior contributory service after an interruption of 10, 15 or 20 years. It was not to penalize staff members who, because of the nature of their work, cannot be employed on a permanent basis.

XXII. I would note that the 12-month time-limit was chosen somewhat arbitrarily. There is a substantial difference between 12 months and 10 or 20 years. The Joint Staff Pension Board explains its choice by noting that "in the case of technical co-operation experts *most* of the interruptions of service were of less than 12 months" (emphasis added). No effort was made to find out what in fact the actual situation was.

XXIII. No special provision was adopted to take into account the special situation of experts who, during their interruption of service, are not participants in the Pension Fund but continue to be employed by a member organization as consultants.

XXIV. On the other hand, the Respondent acknowledges that this special situation can be taken care of by placing the staff member on "special leave without pay". In this position, the staff member remains in service although he is not actually employed and he is not even obliged to pay contributions until he once more becomes a participant in the Fund. Special leave without pay thus makes it possible to "bridge" two periods of participation in the Fund. Such leave can be granted for an unlimited period of time.

XXV. As counsel for the Respondent explained during the oral proceedings:

"If the pay status period was followed immediately, without interruption, by a leave without pay period, no separation would have taken place; and since there was no separation, the leave without pay period itself could go on, theoretically, for years. But that is only because Article 21 (*b*) would not yet be invoked at all."

XXVI. During the oral proceedings, counsel for the Respondent contended that the 12-month time-limit provided for in article 21 (*b*) could not be suspended during the periods when the person concerned was effectively employed by a member organization as a consultant, without participation in the Fund.

XXVII. Counsel for the Respondent has recognized that if the difference in the treatment accorded to a staff member on special leave without pay and a consultant was legally grounded, it might lead to possibly anomalous situations.

This anomalous situation clearly arose in the case of the Applicant, who during the interruption in his contributory service was in fact employed by FAO as a consultant for more than 9 months.

If this situation is compared with that of staff members on special leave without pay it is not only anomalous but completely unfair and moreover absurd.

XXVIII. In conformity with the Tribunal's judicial practice in the *Khamis* case, I could not interpret article 21 (*b*) in a way that would lead to such unjust and absurd results.

XXIX. I consider that article 21 (*b*) should be interpreted as meaning that the 12-month time-limit is suspended during the periods in which a former participant in the Pension Fund is "in fact employed" by a member organization.

XXX. In those circumstances, the Applicant certainly fulfils the first condition posed in article 21. He was in fact employed by FAO for nine months and was reappointed after only six months.

XXXI. There is a second reason for considering that this condition has been fulfilled. It is not denied that from 31 March 1982 to 1 January 1983 the Applicant would have been entitled to the restoration of his prior period of contributory service if he had been reappointed during that period. The 12-month time-limit cannot begin to run until the day (1 January 1983) on which participants in the Fund lost their right to restoration. It would be absurd to take into consideration the period of time during which a participant, if he had been reappointed, would have had the right to restoration. That is, in my view, the interpretation which should be given to article 21 (*b*) as amended as of 1 January 1984.

XXXII. In these circumstances, the 12-month time-limit began to run, in the Applicant's case, on 1 January 1983, the date on which the right to restoration ceased to exist. The Applicant resumed his contributory service with FAO on 10 July 1983, after a period of only seven months.

XXXIII. In any event, the Applicant resumed his contributory service less than 12 months after his separation from service.

XXXIV. I consider that the second condition set in article 21 (*b*) has also been fulfilled. The Applicant received a benefit on 18 July 1983, long after his separation from service on 30 March 1982. At that time, the right to restoration had been abolished. The Applicant's freedom of choice was limited, as can be seen from his correspondence with FAO (from May 1983 to January 1984).

XXXV. Pursuant to the amendment to article 21 (*b*) which entered into force on 1 January 1984, the Applicant once again had a limited right to restoration. He had been unable to make his earlier choice under the new provisions which completely changed his situation. He therefore requested the Tribunal

> "8. To order the Respondent to allow the Applicant, within a reasonable time following the judgement of the Tribunal, to exercise or to alter any choice regarding pension matters that he has been entitled or required to make since his separation in 1982."

XXXVI. Without prejudice to any arrangement that may be made between the Applicant and the Pension Fund, I consider that the application of the condition set in article 21 (*b*) concerning the payment of benefits runs

counter to article 49 of the Pension Fund regulations. That article sets forth the rules for amendments to the regulations. Paragraph (*b*) states:

> "The Regulations so amended 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*" (emphasis added).

When the Applicant made his choice in 1983, that choice could not have a negative effect on his right to restoration, which no longer existed. To apply to the Applicant today the condition of non-payment of a benefit established as from 1 January 1984 would unquestionably prejudice a right to benefits acquired during a period of contributory service prior to that date. The fact that a benefit was paid to the Applicant cannot deprive him of the advantages conferred by article 21 (*b*).

XXXVII. I note, moreover, that the benefit was paid to him when he had already resumed his contributory service. The second condition is fulfilled since the Applicant resumed his service on 10 July 1983 "without a benefit having been paid to him" That benefit was paid to him on 18 July 1983.

XXXVIII. I consider that article 21 (*b*) is applicable. In accordance with the provisions of that article, the Applicant's participation in the Pension Fund did not end when he resumed his contributory service with FAO on 10 July 1983. I therefore consider that the decision of 17 May 1984 rejecting the Applicant's plea concerning the restoration of his prior contributory service should be rescinded.

(Signed)

Roger PINTO
Member

Curdon WATTLES
Acting Executive Secretary

New York, 8 November 1985

Judgement No. 361

(Original: English)

Case No. 367: Minter *Against:* **The Secretary-General of the United Nations**

Request by a former staff member of UNIDO for compensation for loss incurred through the denial of the conversion of his savings on the cessation of service.

Conclusion of the Joint Appeals Board that the Applicant relied on a certain practice, withdrawn suddenly, which implied the possibility of the conversion of his savings at the official rate of exchange.—Recommendation to pay the Applicant compensation of $US 3,981, plus interest.—Recommendation rejected.

The Tribunal recalls that its jurisdiction under article 2.1 of its statute can only be invoked in the case of violation of the relevant contract of employment, terms of appointment or pertinent rules or regulations.—Applicant's assertion that the Respondent is financially responsible for the loss suffered by the Applicant by the denial of the host Government of the facilities for conversion of savings at the official rate of exchange.—Consideration of the circumstances of the case.—Finding that the savings in question resulted from the accumulation of unspent portions of daily subsistence allowance and that the normal expectation is that this allowance would not result in