

ADMINISTRATIVE TRIBUNAL

Judgement No. 493

Case No. 479 : Mr. Z

Against: The United Nations  
Joint Staff Pension  
Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Roger Pinto, President; M. Ahmed Osman,  
Vice-President; M. Samar Sen;

Whereas, on 17 October 1988, Mr. Z, a former staff member  
specifically recruited by the United Nations Children's Fund,  
hereinafter referred to as UNICEF, filed an application containing  
the following pleas:

"II. Pleas

In accordance with article 48 of the Regulations of the  
United Nations Joint Staff Pension Fund (...),

In view of articles 7, 9 and 14 of the Statute of the  
Administrative Tribunal,

The Applicant requests the Tribunal:

1. To annul the decision of the Standing Committee of the United Nations Joint Staff Pension Board of 20 to 24 June 1988 (...) confirming the decision of the Staff Pension Committee of 29 June 1987 (...) and upheld by that body on 24 November 1987 (...) following a request for review made by the Applicant, who was requesting that he should be granted a disability benefit under article 33 of the Regulations of the United Nations Joint Staff Pension Fund and in accordance with the provisions of section H of the Fund's administrative rule (...);
2. To declare and to rule:

- (a) That, when he separated from service, the Applicant was incapacitated for further service at UNICEF reasonably compatible with his abilities, within the meaning of article 33(a) of the Regulations of the United Nations Joint Staff Pension Fund (...);
  - (b) That the Applicant is therefore entitled to a disability benefit under article 33 of the Regulations of the United Nations Joint Staff Pension Fund, as from 31 March 1987, the date of his separation from service;
- 3. Incidentally, to declare and to rule that neither the Secretary of the Pension Fund nor the Pension Board have any justification for refusing a participant the right to representation by counsel in requests for review and appeals to organs of the Fund.
- 4. In addition, to order:
  - (a) That payment of the monthly benefit payable to the Applicant should start, at the latest, on the last working day of the second full month following the date of the communications of the judgement of the Tribunal to the Respondent;
  - (b) That the United Nations Joint Staff Pension Fund should pay to the Applicant a sum corresponding to the total compensation payable to the Applicant as from 31 March 1987, the date of his separation from service, in the following manner: the entire sum as soon as it can reasonably be paid; failing that, 50 per cent of a reasonable estimate of the outstanding amounts, payable at the latest on the last day of the first full month following the date of the communication of the judgement of the Tribunal to the Respondent, the balance being payable at the latest and in full on the last day of the second full month following the date of the communication of the judgement of the Tribunal to the Respondent;
  - (c) That, in the event of failure to execute the judgement of the Tribunal duly with respect to the method of payment specified, the Respondent should pay to the Applicant, on the full amounts outstanding not paid as disability benefit and for the duration of the failure to pay the outstanding amounts, interest in an amount equal to the prime rate applicable in New York on the day of payment,

as published in The Wall Street Journal, increased by one point;

5. As a secondary consideration, to order the Respondent to pay to the Applicant the symbolic sum of one (1) United States dollar as damages, in compensation for the moral and material injury to him resulting from abnormal tensions and difficulties - particularly in view of the Applicant's poor health and the fact that the Applicant is unable to obtain gainful employment in keeping with his level of skills - caused by the summary, inconsistent decisions, not accompanied by a statement of reasons, reached by the Respondent following the request for disability benefit filed by the Applicant with the United Nations Joint Staff Pension Fund in accordance with the Fund's Regulations;
6. Lastly, to decide that the Applicant's name shall not be mentioned in the copies and extracts of the text of its judgement."

Whereas the Respondent filed his answer on 30 June 1989;

Whereas the Applicant filed written observations on 3 August 1989;

Whereas, under article 10 of the Rules of the Tribunal, the President of the Tribunal put questions to the Respondent on 26 September 1989, and the Respondent answered the questions on 4 October 1989;

Whereas, on 5 October 1989, the Applicant submitted written comments on the Respondent's answers to the questions put by the Tribunal;

Whereas, on 5 October 1989, the Respondent submitted an additional document;

Whereas, on 9 October 1989, the Applicant submitted an additional document;

Whereas, on 11 October 1989, the Applicant submitted additional written comments on the document submitted by the Respondent on 5 October 1989;

Whereas, on 20 October 1989, the Respondent submitted additional observations on the preceding communications from the Applicant;

Whereas, on 24 October 1989, the Tribunal put further

questions to the Respondent and the Respondent answered the questions on 30 October 1989, also submitting an additional document;

Whereas, on 2 November 1989, the Applicant submitted additional observations;

Whereas, on 29 November 1989, the Tribunal decided to defer consideration of the case to its following session, in spring 1990, and under article 17 of its rules put questions to the Respondent;

Whereas, on 9 January 1990, the Respondent answers the questions put by the Tribunal and submitted additional documents;

Whereas, on 29 January 1990, the Applicant filed and additional communication and submitted further documents;

Whereas, on 1 May 1990, the Tribunal put further questions to the Respondent;

Whereas, on 7 May 1990, the Applicant filed an additional communication and submitted further documents;

Whereas, on 11 May 1990, the Respondent answered the questions put by the Tribunal;

Whereas, on 31 May 1990, the Tribunal once again decided to defer consideration of the case to its following session, in autumn 1990;

Whereas, on 7 August 1990, under article 10 of the Rules of the Tribunal, the President of the Tribunal put questions to the parties, simultaneously requesting the Applicant's consent to the production of additional documents that were confidential, which consent the Applicant gave on 19 August 1990;

Whereas, on 29 August 1990, the Applicant filed additional written comments and submitted further documents;

Whereas, on 18 September 1990, the Director of the United Nations Medical and Employee Assistance Division (Medical Service) submitted a number of documents that the Tribunal had requested;

Whereas, on 23 October 1990, the Applicant filed an additional communication and submitted a further document;

Whereas, on 30 October 1990, the Respondent filed an

additional communication;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 26 June 1984, on a fixed-term contract for two years and five days at the P-4 level, as a Finance Officer. In March 1986, as a result of a recommendation by the Comptroller stating detailed reasons, the Applicant's contract was renewed for a two-year period, until 30 June 1988. Immediately thereafter, the Applicant's health started to deteriorate owing to an acute psychotic illness that had a negative effect on his work.

In May 1986, the UN Medical Director examined the Applicant and advised him to take "immediate leave in order to protect UNICEF and not to harm the Organization any further". In accordance with personnel directive PD/2/80/Rev.1, entitled "Medical Standards and Clearances" (Administrative rules applicable to medical clearance for employment), the Applicant was classified as "2A", that is to say, he was given the classification of "candidates who have a correctible medical impairment and are only eligible for employment after this has been corrected or candidates who have had a serious medical problem and who cannot be cleared yet for employment". At the request of the UN Medical Director, on 15 August 1986, the Applicant, the Comptroller and a staff officer met to discuss the Applicant's health and work. According to a note drawn up for the record by the staff officer, the UN Medical Director indicated that the Applicant could "perform normally in his present functions" but "also made it clear that based on [Mr. Z's] recent illness, it [was] up to Management, within its discretion, to decide on the type of work which [could] be assigned to him." The staff officer indicated that if the Applicant had been given a "2A" classification before the signing of his contract, UNICEF would not have renewed his contract.

On 19 December 1986, the Comptroller informed the Applicant

that his post was being abolished as of 31 December 1986 and that he would be separated from the Organization on 31 March 1987. The three-month period running from 1 January 1987 to 31 March 1987 would be regarded as a notice period during which he would be temporarily assigned to the Greeting Card Operation.

In the course of the procedure started by the Applicant, concerning the establishment of a medical board to determine whether his health justified payment of a disability benefit, which will be described below, the notes drawn up by the Medical Service indicated that the Deputy Director of Personnel, who was the Applicant's former superior, had notified the Medical Service that the Applicant had been given a very simple assignment in March 1987, to pass the time (pending his separation from service, which was to take place on 31 March 1987) which did not require his daily presence in the office. The Applicant had, therefore, not been subjected to any tension due to his work. However, on 12 March 1987, the Director, Greeting Card Operation, made the following assessment of the Applicant's work on the assignment in question:

"During his assignment to GCO [the Greeting Card Operation] [from 1 January to 31 March 1987] [the Applicant] carried out an assessment of the use of commercial media (TV, radio and print) as practised by five international humanitarian agencies working in the area of child development.

Through skillful negotiations and discussions with these organizations [the Applicant] was able to obtain some valuable information to guide our future activities in this area."

However, a medical certificate made out by Dr. Francis Mas, the Applicant's attending physician in New York, on 29 May 1987, shows that the Applicant "remained euthymic under close medical supervision until March 1987, when he suffered an abrupt relapse into a very severe manic episode which included auditory hallucinations, as well as paranoid and grandiose delusions".

On 12 February 1987, the Applicant requested the Director of

Personnel to submit his case to the Appointment and Promotion Committee so that the Committee might find him a suitable post in the Organization. He also asked whether he qualified for a disability benefit under article 33 of the Regulations of the United Nations Joint Staff Pension Fund (the Pension Fund). In a letter dated 24 February 1987, the Director of Personnel informed the Applicant that he would submit his case to the Appointment and Promotion Committee, and indicated that, as far as his entitlement to a disability benefit was concerned, "unless the Medical Director [was] prepared, based on medical evidence, to recommend [him] to the Pension Board for disability benefit ...", UNICEF had "no grounds" for requesting such a benefit.

In a letter dated 11 March 1987, the Applicant requested the Director of Personnel to discharge him "on medical grounds" and to help him "claim from any available source the maximum compensation benefits available for a staff member being incapacitated in the course of duty." In another letter dated 12 March 1987, the Applicant confirmed that he accepted the "[Administration's] proposal of a termination indemnity equivalent to five and one half months of salary without prejudice to [his] normal entitlements", and that he accepted "not to have [his] case reviewed by the APC [Appointment and Promotion Committee]", since that would be a "futile exercise considering the lack of employment opportunity for [him] in UNICEF at the time."

In a letter dated 25 March 1987 addressed to the Secretary of the United Nations Joint Staff Pension Board (the Pension Board)) in accordance with the Pension Fund administrative rule H.4(a), the Applicant requested the Pension Fund to award him a disability benefit. In a note dated 14 April 1987, the UN Medical Director informed the Secretary of the Pension Board as follows:

"Because of an acute psychotic illness last year, [Mr. Z] is medically classified as 2A - however, he has been at work for several months. In my view, he would not qualify for a pension disability benefit."

On 31 March 1987, the Applicant was separated from service with UNICEF on the date on which his last fixed-term contract expired.

On 14 May 1987, the Secretary of the Pension Board transmitted the UN Medical Director's opinion to the Applicant, and on 3 June 1987, the Applicant submitted further documents in support of his application.

In a memorandum dated 22 June 1987, the UN Medical Director communicated to the Secretary of the Pension Board his evaluation of the Applicant's health, stating the following:

"...

Because of his 2A medical classification (which should continue for at least five years), [Mr. Z] is not medically cleared for a position in other UN organizations. Also, many non-UN organizations are unlikely to recruit him, at the present time, because of his recent medical history.

However, if [Mr. Z's] post had not been abolished earlier this year, he could have continued working in UNICEF (like other staff members, in the 'UN system', who have the same psychiatric condition). Thus, the possibility of [Mr. Z] receiving a pension disability benefit, which is his expectation, cannot be decided on medical considerations alone."

In a letter dated 2 July 1987, the Secretary of the Pension Board informed the Applicant that the United Nations Staff Pension Committee (the Pension Committee) had considered his application for a disability benefit and decided unanimously that he was not entitled to a disability benefit since he was not "incapacitated for further service in a member organization", within the meaning of article 33(a) of the Pension Fund's Regulations when he separated from the service of UNICEF on 31 March 1987. In support of its decision, the Pension Committee also noted that:

"a) You separated on 'agreed termination', although your fixed-term contract would not have expired until 30 June 1988;



b) You were not terminated on medical grounds; and

c) At the time of your separation UNICEF had apparently taken steps aimed at abolishing your post."

On 21 July 1987, the Applicant requested the Pension Committee to review its decision. In a letter dated 29 July 1987, the Applicant was informed that his case would be reviewed at the next meeting of the Committee and that, if he wished, a medical board could be established to assist the Committee in the reconsideration of his case, in accordance with the Pension Fund's administrative rule K.7. In a letter dated 16 August 1987, the Applicant requested that a medical board should be set up and named Dr. Francis Mas as his designated physician to sit on the board, on which Dr. Michael Irwin, Medical Director, representing the Organization, and Dr. Nathaniel Kwit, the third member of the board, selected by Drs. Mas and Irwin would also serve.

On 21 August 1987, the Medical Service discussed the membership of the Medical Board with a Senior Legal Officer in the Pension Fund's Secretariat, who recorded the Pension Fund's consent to the appointment of Drs. Mas and Kwit as members of the Board. In its answer of 18 September 1990, to the questions put by the President of the Tribunal on 5 September 1990, the Respondent indicated that Drs. Mas and Kurt had served as consulting physicians to the Medical Service for a long time.

The Medical Board met on 10 September 1987, and unanimously adopted the following conclusion:

"Based on the evidence available to it, the Board believes that [Mr. Z] was apparently able to work, while under medical supervision, on 31 March 1987, and could have continued working beyond that date if his UNICEF P-4 post had still existed on 1 April 1987.

...

Because [Mr. Z] was able to work, while receiving regular medical care from his personal physician, on 31 March 1987, the Board does not believe that there were sufficient medical reasons to terminate his appointment on that date.

The Board has also noted that [Mr. Z] is in a paradoxical situation as his UN medical classification is now 2A. However, he is presently fit to return to UNICEF - his 'parent organization'. But, he will find it very difficult to obtain further employment with other UN and non-UN organizations, during the next few years (UN system - five years), because of his recent medical history and classification."

On 24 November 1987, at its 234th meeting, the Pension Committee decided unanimously to uphold its earlier decision to deny the Applicant's request for the award of a disability benefit. The Applicant was informed thereof in a letter dated 30 November 1987, from the Secretary of the Pension Board.

On 12 February 1988, the Applicant lodged an appeal against that decision with the Standing Committee of the Joint Staff Pension Board (the Standing Committee).

At its 168th meeting, held from 20 to 24 June 1988, the Standing Committee considered Mr. Z's appeal against the Pension Committee's decision to deny his application for a disability benefit and decided unanimously to uphold the Pension Committee's decision. The Applicant was so informed in a letter from the Secretary of the Pension Board dated 18 July 1988.

On 17 October 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant is suffering from an illness, which became apparent in March/April 1986. His disease was immediately detected and recognized by the competent administrative and medical authorities of the employer organization as soon as it became apparent.

2. The Applicant's illness is disabling and was recognized as such by the medical and administrative authorities of the employer organization.

3. The disabling nature of the illness has affected and

continues to affect the Applicant's current and potential employment relationship with the organizations in the United Nations system.

4. The illness and hence its disabling effects are of long duration, if not permanent, and existed at the time of the Applicant's separation from service and continued to exist as of the date on which the application was filed.

5. The Applicant meets the requirements of article 33(a) of the Pension Fund's Regulations.

Whereas the Respondent's principal contentions are:

1. The Applicant was not "incapacitated for further service in a member organization" on the date of separation from service.

2. The Applicant was not terminated "on medical grounds".

3. The Applicant has not become disabled within the meaning of article 33 of the Pension Fund's Regulations since 31 March 1987.

4. The Applicant has been accorded due process.

The Tribunal, having deliberated from 24 October to 8 November 1989 in New York, from 1 to 21 May 1990 in Geneva, and from 18 October to 2 November 1990 in New York, now pronounces the following judgement:

I. The Applicant maintains that he is entitled to the award of a disability benefit under article 33 of the Regulations of the Pension Fund. The Tribunal notes that the composition of the Medical Board that examined the Applicant was not such as to prevent the Board's independence from being challenged. Dr. Francis Mas, the doctor selected by the Applicant to represent him on the Medical Board had been recommended to him by the United Nations Medical and Employee Assistance Division (Medical Service) as an attending physician; according to the Respondent, Dr. Mas has been "a consultant physician for the Medical Service for a long time". He could and, in accordance with the judicial practice of the Tribunal, no doubt should have declined to give an opinion and should not have

agreed to become a member of the Medical Board and to assist the Applicant in his capacity as attending physician before the Board. What is even more serious, Dr. Nathaniel Kwit, who was selected jointly by Dr. Mas and the Medical Director, has been a regular consultant to the Medical Service since 1969. In the Tribunal's view, the appointment of this third member does not meet the requirement that the Board should be independent. (Cf. Judgements No. 91, Miss Y (1964) and No. 114, Kherderian (1968)).

II. The Respondent cannot properly argue that the Applicant did not raise any objection to the membership of the Board. In the Tribunal's view, the Applicant, who was suffering from a very serious chronic mental disease cannot be regarded as having been fully capable of freely taking a decision. Moreover, the procedural irregularity resulting from the fact that the three members of the Board had close links with the Medical Service cannot be covered up, even if the individual concerned, sound in body and mind, gave his consent.

III. In these circumstances, the Tribunal believes that the decision of the Standing Committee of 18 July 1988, upholding the decision of the Pension Committee of 24 November 1987, is invalid owing to a substantial procedural irregularity.

IV. The Respondent must therefore set up a new medical board, made up of a representative of the Applicant and a third member appointed by the first two members who is not a consultant to the United Nations or a member organization of the Pension Fund, under administrative rule K.7(b) of the Pension Fund. The board in question must determine the Applicant's state of health on the date of his separation from service (31 March 1987) and try to ascertain, in accordance with the actual provisions of article 33 of the Pension Fund's Regulations; (i) whether, on the date of his separation from service, 31 March 1987, the Applicant was

"incapacitated for further service in a member organization [of the Pension Fund] reasonably compatible with his abilities ..."; and (ii) whether such incapacitation was "due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration".

It will be for the Pension Committee, on the basis of the medical board's opinion, to take a reasoned decision on the Applicant's request that he should be awarded a disability benefit.

V. In his pleas, as a subsidiary matter, the Applicant requested the Tribunal to order the Respondent to pay the symbolic sum of one (1) United States dollar as compensation for the moral and material injury to him. The Tribunal believes that it is appropriate to accept this request for compensation for the injury to the Applicant resulting from the violation of his right to due process.

VI. On these grounds, the Tribunal, without determining the merits of the case, decides that:

1. The decision of the Standing Committee of 18 July 1988 is annulled.

2. Unless the Respondent decides, after reviewing the case, to grant the Applicant's request for a disability benefit, the procedure must be repeated and the Applicant's application must be submitted, for an opinion, to a medical board made up, in accordance with administrative rule K.7(b) of the Pension Fund, of a representative of the United Nations Medical Service, a representative of the Applicant who has no link with the United Nations Medical Service, and a third member, also having no link with the United Nations Medical Service, selected by the first two members, within two months of notification of the present judgement.

The medical board shall submit its conclusions within two months of its establishment, and the Respondent shall take a new decision within two months of the date on which the medical board's conclusions are transmitted to it and to the Applicant. The cost of

the review shall be borne by the Pension Fund.

3. The Respondent shall pay to the Applicant, by way of compensation, the sum of one (1) United States dollar and shall reimburse the Applicant for the expenses incurred by him in connection with the preceding medical board.

VII. The Tribunal determines that the Applicant's name shall not be mentioned in any of the versions of the present judgement that are to be published.

(Signatures)

Roger PINTO  
President

Ahmed OSMAN  
Vice-President

Samar SEN  
Member

New York, 2 November 1990

R. Maria VICIEN-MILBURN  
Executive Secretary

DECLARATION BY SAMAR SEN

I have signed the judgement as the legal arguments advanced are completely acceptable to me and the conclusions drawn from them are logical; however, for similar reasons, I would have preferred an award of adequate monetary compensation for the lack of due process and to eliminate the need to convene another medical board for examining what might have occurred several years ago.

(Signature)

Samar SEN  
Member

New York, 2 November 1990