United Nations AT/DEC/1253

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1253

Case No. 1325 Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas at the request of a participant of the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF or the Fund), the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 2003 the time limit for the filing of an application with the Tribunal;

Whereas, on 18 December 2003, the Applicant filed an Application requesting the Tribunal, inter alia:

"9. … to find …:

(a) that the Applicant's acquired rights to a life-long non-assignable pension were violated.

(b) that, even if [the] Applicant had not had rights to a non-assignable life-time pension, the decision by the … Fund to remit an amount equal to 50 per cent of the Applicant's pension to his ex-spouse was arbitrary and capricious, and was not a reasonable exercise of the discretion conferred upon the [Chief Executive Officer (CEO)] by article 45.

10. ... [and] to order:

(a) that the … Fund stop any deduction from the Applicant's pension;

(b) that the … Fund reimburse to [the] Applicant all the amounts previously deducted, with interest;

(c) that the … Fund award to [the] Applicant an appropriate additional monetary compensation for the wrong done to him."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2004 and once thereafter until 30 September;

Whereas the Respondent filed his Answer on 28 September 2004;

Whereas the Applicant filed Written Observations on 5 October 2004 and the Respondent commented thereon on 30 October;

Whereas the Applicant commented on the Respondent's comments on 10 December and the Respondent submitted further comments on 17 January 2005;

Whereas the facts in the case are as follows:

On 10 September 1999, the Applicant separated from the service of the International Civil Aviation Organization (ICAO) due to early retirement. As an ICAO staff member, the Applicant was a participant in the Fund.

Upon his retirement, the Applicant chose to receive a partial lump-sum commutation of his pension, which sum amounted to US$ 85,879.35. As a result, as of 11 September 1999, he received a reduced pension benefit from UNJSPF, which amount was initially US$ 1,062.21 per month.

On 9 March 2001, the Fund was notified that the Applicant had not paid support to his ex-wife, whom he had married on 7 November 1982 and divorced on 7 January 1987, or their son, who was born on 24 May 1984, since the parties' divorce in 1987. The Fund was asked as to the possibility of all or part of the Applicant's UNJSPF pension benefit being paid to his ex-wife. Four judgements against the Applicant from the Québec Superior Court were attached to this request: a permanent order of support dated 4 April 1997 in the amount of CAD$ 1,750 per month, retroactive to August 1996; two interim Orders dated 23 and 29 August 1997; and, a judgement holding the Applicant in contempt of court for non-payment of support, dated 31 May 1999.

The Fund notified the Applicant on 4 May 2001 that a request had been made on behalf of his ex-wife and son, pursuant to article 45 of the UNJSPF Regulations. He was provided with copies of the court judgements in question, and given 30 days to submit his comments, in writing, "as to why the Chief Executive Officer of the Fund ought not to exercise his discretion pursuant to the amended Article 45 in assisting in

the implementation of the aforementioned court orders". The Applicant responded that, because the current article 45 was not in existence at the time he retired, he had an "acquired right" that protected him from changes in the Regulations which would adversely impact upon his pension rights. On 8 August, the Fund advised him that his assertion regarding his "acquired rights" lacked any legal basis or merit and again gave him 30 days in which to respond.

On 7 September 2001, the Applicant reiterated his position and also added that if he had been aware that future monthly pension payments could be in jeopardy, he would have opted for a withdrawal settlement upon his retirement. On 19 October, the Fund offered him the opportunity to change his benefit election, indicating that it would, exceptionally, permit him to opt for a withdrawal settlement, minus the amounts he had already received.

On 19 March 2002, the CEO of the Fund notified the Applicant that, with effect from 1 May 2002, 50 per cent of his monthly UNJSPF benefit would be remitted to his ex-wife, in order to satisfy his legal obligation to pay alimony and child support. The Applicant's monthly pension amounted to US$ 1,111.08 by this time, 50 per cent of which was US$ 555.54. On 1 April, the Deputy CEO of the Fund reiterated that the new arrangements would go into effect on 1 May, but also informed the Applicant that

> "the Pension Fund secretariat is still prepared to consider sympathetically a formal, written request that you might wish to make to change your UNJSPF benefit election from an early retirement benefit, with partial lump-sum commutation, into a one-time withdrawal settlement (that would sever your links to the UNJSPF and eliminate all other possible UNJSPF benefit entitlements)."

On 22 August 2002, the Applicant appealed the decision to remit 50 per cent of his monthly pension to his ex-wife to the Standing Committee of the United Nations Joint Staff Pension Board. The Standing Committee considered the case at its 186th meeting and, in its report of 11 July, upheld the CEO's decision, which it found to represent reasonable exercise of his discretion under article 45. On 24 July, the Applicant was advised accordingly.

On 18 December 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's acquired rights were violated by the impugned decision.

2. The decision was arbitrary and capricious, and had covert retroactive effect.

3. The judgement of the Québec Superior Court is no longer relevant, as the child has reached the age of majority.

4. The Fund withheld an inappropriately large amount of the Applicant's pension.

Whereas the Respondent's principal contentions are:

1. The decision made by the Standing Committee should be confirmed.

2. In applying article 45, the CEO of the Fund did not in any way violate the Applicant's "acquired rights".

3. If the Applicant has objections to the payment of child support for his son, it is open to him to apply for a breakdown of the support order or for a variance or rectification of the latest judgement; any such action by a Canadian court would automatically lead to a review of the case by the Fund.

The Tribunal, having deliberated from 22 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant, a Canadian national born on 21 January 1944, became a staff member of ICAO and, concomitantly, a participant in the UNJSPF, on 1 November 1972. On 7 November 1982, the Applicant married another Canadian national. Arising from this marriage was a son born on 24 May 1984. On 7 January 1987, the said marriage was dissolved by a decree of the Québec Superior Court. The Applicant opted for early retirement from ICAO, separating from service on 10 September 1999. He then elected to receive the maximum available lump-sum payment from the Fund, which amounted to US$ 85,879.35. As a result, his monthly pension initially amounted to US$ 1062.21.

In 1998, article 45 of the UNJSPF Regulations, entitled "Non-assignability of rights", had been amended to enable a portion of a participant's pension benefit to be paid directly to a former spouse or otherwise satisfy court-ordered or court-approved family obligations, where the participant requested that such action be taken. On 23 December 2000, article 45 was again amended. The relevant provisions of article 45 now read as follows:

> "a. A participant or beneficiary may not assign his or her rights under these Regulations. Notwithstanding the foregoing, the Fund may, to satisfy a legal obligation on the part of a participant or former participant, arising from a marital or parental relationship and evidenced by an order of a court or by a settlement agreement incorporated into a divorce or other court order, remit a portion of a benefit payable by the Fund to such participant for life to one or more former spouses …
>
> b. To be acted upon, the requirement under the court order must be consistent with the Regulations of the Fund, as determined by the Chief Executive Officer of the Fund to be beyond any reasonable doubt, and on the basis of the available evidence."

On 9 March 2001, legal counsel for the Applicant's ex-spouse wrote to the Fund enquiring as to the possibility of obtaining all or part of the Applicant's pension benefit for his client, on the basis that the Applicant had not complied with a series of maintenance orders made by the Québec Superior Court awarding the Applicant's ex-spouse both alimony and child support. On 4 May, the Fund's secretariat wrote to the Applicant informing him of the request and giving him 30 days to respond. The Applicant replied that, as he had retired in 1999 and article 45 did not exist in its present form at the time of his retirement, he had an "acquired right" that could not be taken away. Following further exchanges in which each party maintained its respective position, on 1 April 2002, the Deputy CEO of the Fund wrote to the Applicant as follows:

> "The question of the possible application in your case of article 45 of the UNJSPF Regulations … has been pending since May 2001. Therefore, and as communicated to you in our letter of 19 March 2002, the Chief Executive Officer of the [Fund] has exercised his discretionary authority under article 45 to remit, as from 1 May 2002, 50 percent of your UNJSPF periodic retirement benefit … to your former spouse …
>
> … At the same time, we would confirm that the Pension Fund secretariat is still prepared to consider sympathetically a formal, written request that you might wish to make to change your UNJSPF benefit election from an early retirement benefit, with partial lump-sum commutation, into a one-time

> withdrawal settlement (that would sever your links to the UNJSPF and eliminate all other possible UNJSPF benefit entitlements)."

On 22 August 2002, the Applicant appealed this decision to the Standing Committee. The Standing Committee upheld the decision of the CEO to remit 50 percent of the monthly pension benefit directly to the Applicant's ex-spouse, holding that the decision represented a reasonable exercise of the discretion conferred on the CEO by article 45. The Standing Committee's decision was conveyed to the Applicant on 24 July 2003. It is this decision which the Applicant now appeals to the Tribunal.

II. In his Application, the Applicant contends that his acquired rights to a life-long non-assignable pension were violated or, in the alternative, that the decision of the Fund to remit an amount equal to 50 percent of his pension to his ex-spouse was arbitrary and capricious, and not a reasonable exercise of the discretion conferred upon the CEO by article 45.

III. It is not disputed that the Applicant acquired his right to a pension under the Rules of the Fund upon his retirement from ICAO and elected for partial lump-sum commutation amounting to US$ 85,879.35 to be followed by monthly pension benefit at the initial rate of US$ 1062.21. Article 45 did not take, or purport to take, away the Applicant's pension rights that accrued to him on his retirement.

Article 45 came into force on 23 December 2000, operating, with prospective effect, to authorize the CEO of the Fund

> "to satisfy a legal obligation on the part of a participant or former participant arising from a marital or parental relationship and evidenced by an order of the Court … to remit a portion of a benefit payable by the Fund to such participant for life to one or more former spouses and or current spouse".

In general, the pension systems of public international organizations operate under statutory rules, to which the beneficiaries are subjected and by which their pension rights are ruled. The employees adhere to such schemes because the pension system is so organized and not by exercising any freedom of contract. The statutory part of the scheme may change at the discretion of the Administration in order, for example, to accommodate legally enforceable rights of third persons against pension recipients or for any other important reason decided upon by the appropriate organs.

Insofar as the right to the pension obtained by the retired staff member is not touched, the acquired right of the participant is not infringed, especially when the measures taken are in order to accommodate outstanding family obligations of the retired staff member and they constitute a fair portion of the pension which does not overly deplete his monthly pension.

The remission of the sum of 50 per cent of the Applicant's monthly pension to his ex-spouse is intended to discharge, in part, his liability for the maintenance of his ex-spouse and son under order of the Québec court which remains in force and is still binding on the Applicant. The Applicant is liable to pay this support, even if the Fund does not remit any sums to his ex-spouse in respect thereof. The Tribunal is therefore of the view that the Fund's action does not violate the Applicant's acquired right to a monthly pension payment.

IV. Insofar as the alternative ground put forward by the Applicant that, in any case, a deduction of 50 percent of his pension was arbitrary and capricious and not a reasonable exercise of the discretion conferred upon the CEO of the Fund by article 45, the Tribunal notes that the Applicant had consistently flouted several court orders, including contempt orders. His actions demonstrate a contumacious disregard for the court orders regarding his obligation to pay maintenance going back to 1987. In light of this, and bearing in mind that the Applicant had already commuted one third of his pension entitlement on retirement, the Tribunal is not persuaded that the decision of the CEO to remit 50 percent of his monthly pension entitlement was vitiated by arbitrariness, caprice or abuse of discretion.

V. The Applicant also contends that, whilst the composite sum ordered by the Québec court is for the maintenance of his ex-spouse and his son, as the latter has attained the age of majority which under Canadian law is 18 years, the support obligation of the Applicant ought to be adjusted down. The amount awarded by the Québec court is not apportioned, and the Tribunal finds that it is not proper for either the Tribunal or the Fund to determine whether, or how, that amount was ever intended to be broken down. Should the Applicant wish for the support order to be clarified or reduced based on his son's age, the correct course of action is for him to apply to the Québec court for revision of the order. In this regard, however, the Tribunal takes judicial notice of the fact that the actual amount ordered by the Québec court is CAD

$1,750 per month, and the amount paid directly to the Applicant's ex-wife by the Fund is approximately half of that sum.

VI. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Spyridon **Flogaitis**
Vice-President, presiding

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary

CONCURRING OPINION OF BRIGITTE STERN

I. The length of this "separate opinion" warrants an explanation. The text below was prepared as a draft judgement after discussion in the Tribunal which led to the unanimous conclusion that there was no acquired right at stake. Since the question of acquired rights is not a simple matter, I felt that in order to provide a solid legal foundation for the decision taken, the general issues surrounding the question of acquired rights should be presented. My colleagues, although in agreement on the ruling, felt that they could not support the idea of a general presentation of the question of acquired rights, and devoted only one paragraph to this fundamental question. In the absence of disagreement on the ruling, it seems quite unusual that the draft judgement should be rejected in favour of a less elaborate version. The judgement in this case seems to me to be both simplistic and purely declaratory. It is simplistic, because it affirms that there is no violation of pension rights, in stating that "Article 45 did not take, or purport to take, away the Applicant's pension rights" which is effectively a finding, but does not respond to the question raised, which is not whether

there was a violation of the right to a pension, which the Applicant never claimed, but whether there was a violation of a right to a non-assignable pension which, in my view, is a question which is very difficult to resolve, for other reasons. It is purely declaratory, because it seems that without even raising the question, the judgement merely affirms that "the acquired right of the participant is not infringed" because "the pension systems of public international organizations operate under statutory rules" and "the statutory part of the scheme may change at the discretion of the Administration". Yet it is not clear why this very general rule — which, incidentally, I do not think gives an adequate response to the complex question of acquired rights — does not apply to all the statutory aspects, which obviously include the right to a pension. In other words, it is not clear from a reading of the judgement what the justification is for a different approach to the right to a pension and the right to a non-assignable pension, that is to say why, in the view of the majority, the right to a pension, which is also governed by statutory rules, is an acquired right, while the right to a non-assignable pension is not. It was a legal response to this delicate and important question that I tried to provide in the draft judgement which was rejected by my colleagues. I therefore felt that it was important to publish it in the form of a concurring opinion, as a contribution to the coherence of the Tribunal's future jurisprudence.

II. This case concerns an appeal by the Applicant against a decision by the Administration to pay part of his pension to his ex-wife and his son, pursuant to a judgement handed down by a Canadian court, such decision being discretionary taken by virtue of its powers under article 45 of the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund (hereinafter UNJSPF).

III. The Applicant took early retirement on 10 September 1999 and at that time decided to take a lump sum of US$ 85,879.35, the rest of his pension consisting of a monthly periodic benefit in the amount of US$ 1,062.21 each month at the outset and US$ 1,111.08 each month at the time of the events giving rise to the present case. The Applicant married in 1982 and divorced in 1987 the person who is referred to in this judgement as his ex-wife, who in the divorce decree issued in 1987 obtained alimony for herself and child support for her young son. The Applicant has never made these or

any other payments, despite further judicial decisions in 1996, 1997 and, most recently, on 31 May 1999, on the ground that his pension could not be garnished.

IV. That point — whether or not a pension can be garnished — is at the heart of this case. Some rules affecting the pensions of former staff members have been modified over time, including the rule in article 45 concerning the non-assignability of a participant's pension: at first absolute, this rule was changed to enable the participant to waive non-assignability; it then became relative, since today, in certain well-defined circumstances, it can be waived by the Administration. I should like to review briefly the history of this change.

V. Prior to 1998, article 45, entitled "Non-assignability of rights", provided that "[a] participant or beneficiary may not assign his or her rights under these Regulations".

This article was amended a first time, as is apparent from the annual letter which the Pension Fund sent in 2001 to the staff members of the Organization:

> "The General Assembly had approved in 1998 an amendment to article 45 of the Regulations which provided a 'payment facility' designed to enable the payment of a portion of the pension benefit due to a former participant to a former spouse, to meet family obligations that had been incorporated in court decrees or court-approved divorce settlements, but only at the request of the participant or former participant concerned. After a review in 2000, the Board recommended and the General Assembly approved that the application of the payment facility be modified so as to no longer require a request from the participant or former participant concerned."

Subsequently, article 45 was amended a second time by resolution 55/224 of the United Nations General Assembly. This amendment resulted from a proposal of the Joint Staff Pension Board, which discussed its appropriateness at length, as is evident from its report to the General Assembly:

> "Most members expressed support for modifying the application of the payment facility to eliminate the requirement that a request for implementation should be made by the participant or former participant; at the same time, they agreed that it would be necessary to delegate to the CEO/Secretary the discretion to arrive at a determination, should he/she be presented with non-final, ambiguous or conflicting court orders. Several members expressed their strong opposition to any changes in the current arrangements.

> … **After extensive discussion, the Board decided, by consensus, to recommend to the General Assembly the following amendment to article 45 …"** (General Assembly documents, Supplement No. 9, A/55/9, paras. 172 and 173, emphasis in the original).

The amendment is as follows:

> "(a) A participant or beneficiary may not assign his or her rights under these Regulations. Notwithstanding the foregoing, the Fund may, to satisfy a legal obligation on the part of a participant or former participant arising from a marital or parental relationship and evidenced by an order of a court or by a settlement agreement incorporated into a divorce or other court order, remit a portion of a benefit payable by the Fund to such participant for life to one or more former spouses and/or a current spouse from whom the participant or former participant is living apart. Such payment shall not convey to any person a benefit entitlement from the Fund or (except as provided herein) provide any rights under the Regulations of the Fund to such person or increase the total benefits otherwise payable by the Fund.
>
> (b) To be acted upon, the requirement under the court order must be consistent with the Regulations of the Fund, as determined by the Chief Executive Officer of the Fund to be beyond any reasonable doubt, and on the basis of the available evidence. Once implemented, the assignment shall normally be irrevocable; however, a participant or former participant may request, upon satisfactory evidence based on a court order or a provision of a settlement agreement incorporated into a court decree, a new decision by the Chief Executive Officer that would alter or discontinue the payment or payments."

VI. It was pursuant to this article that the Chief Executive Officer of the Pension Fund notified the Applicant, by a letter of 19 March 2002, that, beginning on 1 May 2002, 50 per cent of his pension benefit would be paid to his ex-wife to satisfy his obligation to pay alimony and child support, as provided in a series of Canadian judgements. The Applicant submitted an appeal against this decision to the Standing Committee, acting on behalf of the United Nations Joint Staff Pension Board. The latter issued its report on 11 July 2003, in which it stated "[a]fter considering all the available documentation and information, the Standing Committee decided to uphold the Secretary/Chief Executive Officer's discretionary decision under article 45 to remit, prospectively as from May 2002, 50 per cent of the former ICAO participant's UNJSPF pension directly to his ex-spouse, since it represented reasonable exercise of the discretion conferred upon the Chief Executive Officer by article 45". The Administration informed the Applicant of the rejection of his request for modification of the earlier decision, whereby, from 1 May 2002, it paid half of his monthly benefit

to his ex-spouse and son. This is the decision which the Applicant is contesting before the Tribunal.

VII. This case is the first in which the question of timing in the application of article 45 has been at issue, and it raises some challenges for the theory of acquired rights and the principle of non-retroactivity.

The Applicant retired after the first amendment of article 45 but before the second amendment, whose relevance to his situation he contests, invoking his acquired rights and the impossibility of applying the new article 45 to his situation. The Administration maintains that there is retroactive application of the new provision and emphasizes that the Applicant had no acquired right in this instance.

VIII. There is no denying that international organizations have the authority to regulate vis-à-vis their staff. This authority is recognized in the preamble to the Staff Regulations of the United Nations:

> "The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat … The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary".

This authority to regulate, and to amend regulations, was clearly recognized in the first decision of the World Bank Administrative Tribunal, in the *de Merode et al* case:

> "… The Bank possesses, in common with other international organizations, an inherent power to change — subject to conditions which the Tribunal will examine later — the general and impersonal rules establishing the rights and duties of the staff. It is a well-established legal principle that the power to make rules implies in principle the right to amend them" (WBAT Decision No. 1 (1981), para. 31).

Clearly, if one has the authority to establish general rules, one also has the authority to modify them, as was recognized by this Tribunal in the *Puvrez* case, in which it stated that the "power to adopt general provisions implies in principle the right to amend the rules established" (Judgement No. 82 (1961), para. V).

IX. The freedom to modify established rules is not, however, unlimited and must in particular take into account what are called “acquired rights”. There is no disputing that respect for acquired rights is a general principle of law, even in the absence of a provision to that effect. This approach is seen, for example, in one of the judgements of principle on respect for acquired rights of the ILO Administrative Tribunal, in the *Ayoub* case, in which it emphasizes the pointlessness of an explicit reference to such rights, “since the doctrine of acquired rights is a general principle” (ILOAT Judgment No. 832 (1987), para. 11), adding that the ILO Staff Regulations incorporated that general principle: “Thus ILO staff have their acquired rights protected by the Organisation’s own Staff Regulations. Actually the doctrine would afford them protection anyway even if there were no such provision in the Regulations” (Ibid., para. 12). The general principle has been incorporated in regulation 12.1 of the Staff Regulations, which states:

> “The present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members”.

X. The question of respect for acquired rights brings into play the complex balancing act involved in adapting rules to inevitable changes and protecting the security of those subject to the rules, who in this instance are the staff members of international organizations. Various criteria have been proposed for tracing the demarcation line between changes which are possible and those which are not because they would adversely affect acquired rights.

XI. An acquired right can be said to be a right which the beneficiary insists must be respected, regardless of any changes in the regulations. What, then, are these rights that are so deserving of respect?

XII. An initial approach distinguishes between rights attaching to *prior services*, that is, services provided prior to the adoption of the new rule, and rights attaching to *subsequent services*. This approach was taken by the Tribunal some forty years ago in the *Puvrez* case:

> "... no amendment of the regulations may effect 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." (para. VII).

The jurisprudence of the Tribunal has been consistent on this point (Judgements Nos. 202, *Quéguiner* (1975) and 266, *Capio* (1980)). This approach, which fully embraces the principles of non-retroactivity and of respect for acquired rights, is of little use in difficult cases, however. It appears to be without dispute that a right which has finally become due cannot be challenged by a subsequent rule that modifies the conditions giving rise to it. If a staff member has taken retirement and, at the time of doing so, received a pension equal to a certain percentage of his or her salary, that calculation may not be retroactively modified if a new rule is adopted that sets a lower percentage, for example.

XIII. The problem is more delicate when dealing with "continuing rights", i.e. rights established at a given time for which it is necessary to know whether a new rule applies to them and, if so, starting from when; in other words, what is acquired under the old rule and what may become subject to the new one? It has been said that acquired rights are those having to do with the *substance*, or the actual principle, of the rights being invoked, whereas the *arrangements for giving effect* thereto are not acquired rights. This distinction is more or less in line with the distinction between substantive rules and procedural rules: the former are not to be implemented retroactively, while the latter are immediately applied and can have retroactive effect for that reason. This idea was expressed in the *Schurz* case, in which the Tribunal decided that the Applicant was "not entitled to the benefit of acquired rights in respect of the procedure to be followed for the purpose of her possible promotion to the Professional category" (Judgement No. 311 (1983), para. VIII). Another idea that has been advanced is that the *contractual rights* conferred on an employee by his or her contract are acquired rights, while the *statutory rights* he or she enjoys under the Staff Regulations and Rules are not.

Thus, in the *Kaplan* case, the Tribunal found:

> "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 member." (Judgement No. 19 (1953)).

In the *Kaplan* case, however, the Tribunal did not narrowly restrict contractual arrangements to those contained in the contract, but viewed them as including everything having to do with the *specific rights* of the staff member, as opposed to *general rights*. The Tribunal made a similar analysis in the *Mortished* case:

> "The Tribunal has been required to consider on a number of occasions whether a modification in the pertinent rules could affect an acquired right. It has held that respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract. The Tribunal pointed out, in paragraph VI above, that entitlement to the repatriation grant had been explicitly recognized at the time of the Applicant's appointment, together with the relationship between the amount of the grant and the length of service." (Judgement No. 273 (1981), para. XV; see also ILOAT Judgment No. 29, *Sherif* (1957), for the use of this type of distinction by the ILO Tribunal).

A similar analysis was made by the ILOAT in the *Lindsey* case:

> "The terms of appointment of international civil servants and, in particular, those of the officials of the Union, derive both from the stipulations of a strictly individual character in their contract of appointment and from Staff Regulations and Rules, which the contract of employment by reference incorporates. Owing, inter alia, to their increasing complexity, the conditions of service mainly appear not amongst the stipulations specifically set out in the contract of appointment but in the provisions of the above-mentioned Staff Regulations and Rules. The Staff Regulations and Rules contain in effect two types of provisions, the nature of which differs according to the object, to which they are directed. It is necessary to distinguish, on the one hand provisions which appertain to the structure and functioning of the international civil service and the benefits of an impersonal nature and subject to variation, and, on the other hand, provisions which appertain to the individual terms and conditions of an official, in consideration of which he accepted appointment. Provisions of the first type are statutory in character and may be modified at

> any time in the interest of the service, subject, nevertheless, to the principle of non-retroactivity and to such limitations as the competent authority itself may place upon its powers to modify them. Conversely, provisions of the second type should to a large extent be assimilated to contractual stipulations. Hence, if the efficient functioning of the organization in the general interest of the international community requires that the latter type of provisions not be frozen at the date of appointment and continue so for its entire duration, such provisions may be modified in respect of a serving official and without his content but only insofar as modification does not adversely affect the balance of contractual obligations or infringe the essential terms in consideration of which the official accepted appointment." (ILOAT Judgment No. 61 (1962)).

XIV. Finally, certain decisions have drawn a distinction between *fundamental conditions of employment* and *non-essential conditions*, the latter being modifiable and the former not so. This was the approach taken by the World Bank Tribunal in the *de Merode et al* case cited earlier:

> "Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to the limits and conditions which will be examined later" (ibid., para. 42).

XV. I shall not retain the distinction *stricto sensu* between the actual principle of the existence of a right and the arrangements for giving effect thereto, following on this point the analysis presented by ILOAT in the case of *Ayoub et al.*, according to which "in some instances only the existence of a particular term of appointment may form the subject of an acquired right. But there are other contingencies in which the arrangements for giving effect to the term may also give rise to such a right." (Ibid., para. 13). Nor shall I retain the distinction, *stricto sensu* between statutory and contractual rights, insofar as such a distinction appears completely random since contractual rights also include statutory rights of an individual nature; the indeterminate character of this distinction means that it is of little help in the task of ensuring a measure of legal security for international civil servants.

XVI. I believe that following the course taken by the Administrative Tribunal of the World Bank, the fairest approach would be to distinguish the essential conditions of service from the non-essential, while indicating a number of objective factors to back up this distinction and viewing it against the general background. The distinction

between those rights that must be respected because they are essential and those that can be modified because they are less essential is not easy to make, as the Administrative Tribunal of the World Bank has already pointed out:

> "The Tribunal recognizes that it is not possible to describe in abstract terms the line between essential and non-essential elements any more than it is in abstract terms possible to discern the line between what is reasonable and unreasonable, fair and unfair, equitable and inequitable ...
>
> Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely — both principle and implementation — to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion, in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential" (*de Merode et al* (ibid.), para. 43).

In this case, the Tribunal, applying the above-mentioned principles to the case of the Bank's reimbursement of taxes owed by staff members, noted that the right to reimbursement of national income tax was a fundamental and essential element of the conditions of service but that the calculation of the reimbursable amount did not have this fundamental and essential character.

XVII. The mere fact that it is difficult, as has just been shown, to distinguish essential from non-essential conditions should not prevent the Tribunal from specifying their nature. The essential feature of a condition of service giving it the character of an acquired right results, in my view, from a cluster of indicators, whose respective weight should be evaluated by the Tribunal in each case; I now propose to list these indicators.

XVIII. *The nature of the right*, of course, is not immaterial to the determination of the existence of acquired rights, for the breach of a contractual or individual right is more likely to be a breach of an acquired right than is the breach of a right stemming from a general statutory regulation. Likewise, the *distinction between a principle and the application of that principle* cannot be totally ignored: the breach of the essence of a right rather than of the ways it is enforced is what must be taken into account, because the breach of an acquired right is more likely to have occurred if the essence or very

existence of the right has been adversely affected than if it has been incorrectly enforced; in other words, if the new rule may be analysed as a procedural rule, there is no reason to prevent it from being immediately enforced, as is generally accepted in the case of rules of procedure. The essential character of a condition of service will also depend on *the importance of this condition of service in the decision to join the Organization*, it being understood that what is at issue is not strictly subjective importance, with some exceptions, but rather objective importance. Of course, a condition is also essential if its modification entails *extremely grave consequences* for the staff member, more serious than mere prejudice to his or her financial interests. On this point, I shall adopt the analysis of ILOAT, in the *Ayoub* case mentioned above, according to which the financial injury to the complainants, even if severe, is not enough in itself to establish it as a breach of acquired rights, although this evaluation is one of the elements that may affect the assessment of the overall situation: "The decisions impugned do mar the [staff retirement] outlook, in some cases seriously. But that is not enough to establish breach of an acquired right" (Ibid., para. 15). Lastly, the essential character should not be examined solely *in abstracto*, in an isolated manner and only from the point of view of the interested party, but should be evaluated in a comparative fashion, looking at it from the standpoint of the *interests pursued by the new regulations*.

XIX. Although it is not necessary for all the criteria mentioned to determine whether an acquired right exists should be present, in this case they are all present. The application of all these criteria to the case submitted to the Tribunal indicates that the non-garnishability of the pension should not be considered as an essential condition that must be protected by the principle of acquired rights against any modification. The facts of the case show that the rules concerning pensions, in particular article 45 of the Regulations of the Joint Staff Pension Fund, are *general statutory rules*, adopted and modified by the General Assembly. It should also be underlined that no breach occurred of the actual right to the pension, since the amount of the pension owed by the Administration to the Applicant did not change in application of the new rule; all that was modified was the *modalities of distribution* of the pension, since 50 per cent of the pension benefit is being remitted to his former wife and son. As for the third criterion specified by the Tribunal, namely, *the importance of the condition of service adversely affected by the new legislation as it pertains to the decision to join the Organization*, it would be difficult to argue that the fact that the pension cannot be

garnished, in execution of a judgement recognizing a debt owed that a staff member refuses to pay, would even cross an honest man or woman's mind when joining the Organization; it should be recalled that article 4.2 of the Staff Regulations clearly states that "(t)he paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and *integrity*" (emphasis added). It would be unthinkable to accept that a staff member could invoke an acquired right in order to evade obligations that have been duly contracted and recognized by law. Of course, this new regulation entails *financial consequences* for the Applicant, but a closer look at the financial prejudice suffered by him reveals that it is more the result of judgements recognizing his obligation to pay alimony and child support to his ex-wife and son than of any decision taken by the Administration, which is only ensuring the enforcement of the right. The *reasons of general interest* that led the General Assembly to terminate a privilege that was being used by staff members abusively and immorally to evade their obligations fully justify the new rule and do not conflict with the invocation of acquired rights. As ILOAT declared in another context, concerning new provisions — but the statement is perfectly applicable to this case — "although they do cause financial injury the reasons are objective and, all things considered, the degree of it admissible" (in re *Ayoub et al*., ibid., para. 16).

XX. I can only conclude, therefore, in view of the corroborating evidence, that the Administration has not violated any acquired right of the Applicant by applying to him the new rule contained in article 45.

XXI. The last point raised by the Applicant, accusing the Administration of an abuse of power in giving effect to the new article 45, remains to be examined. In particular, the Applicant calls into question the percentage represented by the amount retained, and the fact that the Administration has continued to remit the total amount due as maintenance, even though his son is now 18 years old. The Administration, on the contrary, believes that it has examined the case as carefully as possible, as may be seen in its submissions:

> "The CEO of the Fund decided in this case to remit each month 50 per cent of the former participant's reduced early retirement benefit to his ex-spouse. The CEO took into account that the former participant had decided to commute one third of his UNJSPF pension into a lump sum, thus reducing by one-third the

> size of the periodic benefit he is receiving. On 1 May 2002, the former participant was entitled to receive US$ 1,111.08 per month as his periodic benefit. 50 per cent of that amount (US$ 555.54) was then equivalent to Can$ 866.64. The former participant's legal obligations were quantified in the Judgement dated 4 April 1997 ... and in the contempt of court judgement dated 31 May 1999 ... The judgement dated 4 April 1997, which is still in effect, granted a permanent order of support in the amount of Can$ 1,750 per month, retroactively as from August 1996".

XXII. While 50 per cent of the benefit may seem *in abstracto* very high, this first impression is tempered by various considerations. First, it should be noted that the Applicant had chosen, at the time of his retirement, to receive a large lump sum, thereby proportionately lowering his future monthly benefits and hence the amount that could be garnished for the purposes of alimony. Also relevant is the fact that the last judgement, dated 4 April 1997, sentenced him to pay Can$ 1,750, whereas 50 per cent of his pension benefit amounted to only US$ 555.54, or approximately Can$ 820, which also puts into perspective his pleas concerning an arbitrary and disproportionate action. I feel that the facts of the case, as a whole, fully justify the decision to withhold 50 per cent of the Applicant's pension benefit and that, in its use of this formula to give effect to the Canadian judgement, the Administration has remained within its discretionary powers.

XXIII. The last criticism of the Administration voiced by the Applicant is that it has continued to remit the entire amount due, although his son is now 18 years old. The Respondent's reply is twofold: first, that it is up to the Applicant to request an amendment to the judgement and that, if a Canadian court effectively amended it, "any such action by a Canadian court would automatically lead to a review of the case by the Fund"; secondly, that child support payments may be paid by the United Nations until the child has reached the age of 25. On this latter point, I cannot agree with the Respondent, who unjustifiably confuses benefits under United Nations regulations with benefits accorded by a Canadian judgement enforced by a United Nations proceeding but not substantially determined by United Nations substantive rules. On the first point, it would appear that, if a judgement indicates that a payment must be made until the child comes of age, this judgement in principle ceases to have effect when the child reaches his majority, as defined not by international rules but by its national law — in this case Canadian law — which effectively sets the age of majority at 18 years of age. Therefore, if the judgement had provided for a breakdown of the amount between the

ex-wife and the son, the fact that the latter came of age could have been taken into account in order to reduce the amount of the pension benefit remitted. Nevertheless, in the absence of such a breakdown, and in view of the fact that the amount remitted as alimony is equivalent to only half of the amount due, I do not consider it unreasonable that the Administration has maintained the originally determined percentage; the Applicant is free to seek a more precise judgement and to request the Administration to amend its decision.

XXIV. It follows from this exhaustive analysis of his situation that the Applicant could not claim an acquired right to a non-assignable pension.

(*Signatures*)

Brigitte **Stern**
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary