

Accordingly the Tribunal rejects the request.

V. In view of the above conclusions, no question of compensation under article 9 of the Statute of the Tribunal arises in the case.

VI. For the foregoing reasons the Tribunal rejects the application.

VII. At the request of the Applicant, the Tribunal orders that the name of the Applicant shall be omitted from the published versions of the Judgement.

*(Signatures)*

Suzanne BASTID  
President

CROOK  
Vice-President

R. VENKATARAMAN  
Vice-President

L. IGNACIO-PINTO  
Alternate Member

Jean HARDY  
Acting Executive Secretary

Geneva, 21 April 1967.

## Judgement No. 108

*(Original : English)*

**Case No. 109 :**  
**Khamis**

**Against : The United Nations Joint  
Staff Pension Board**

*Request by a Staff member of FAO that his prior period of employment be restored as pensionable service.*

*Rejection by the FAO Staff Pension Committee, under article XII of the regulations of the Pension Fund in force at the time, of a request by the Applicant for the restoration of his prior period of employment, on the ground that his participation in the Pension Fund had been interrupted for a period longer than three years.—Deletion, by a 1963 amendment to the said article XII, of the provision relating to length of interruption of service.—Question of the Applicant's entitlement to restoration of his prior service by virtue of article XII as amended.*

*Interpretation of the words "If a former participant again becomes a participant".—No restrictive wording excluding persons who had been participants before the amendment.—Legal effects of the General Assembly's decision fixing the effective date of the amendment.—Unacceptability of the contention based on the fact that the General Assembly did not specifically state that the amendment was to be retroactive.—Absurdity and inequities to which the Respondent's interpretation would lead.—Purport of article XXXVII of the regulations of the Pension Fund, relating to amendments.—Scope of the principle of law against "retroactive" construction of texts.—Conclusion that neither the text of article XXXVII nor the principles governing non-retroactivity contradict the application of the amended article XII to the Applicant.*

*Rescission of the decision of the Joint Staff Pension Board and of the decision of the FAO Staff Pension Committee denying the Applicant's request for restoration of prior pensionable service.—Restoration of the prior service of the Applicant for the period 30 July 1949 to 29 September 1953.*

## THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; Mr. R. Venkataraman, Vice-President ; Mr. Zenon Rossides, alternate member ;

Whereas, on 25 November 1966, Salem Hanna Khamis, a staff member of the Food and Agriculture Organization of the United Nations, hereinafter called FAO, filed an application whose pleas he amended in written observations filed on 14 April 1967 ;

Whereas the pleas as amended request the Tribunal to :

“ (i) Order the rescission of the relevant decision of the United Nations Joint Staff Pension Board taken at its Thirteenth Session, and to order the same to enable the Applicant to restore his prior pensionable service for the period 30 July 1949-29 September 1953.

“ (ii) In line with ... (i) above, order the rescission of the decision of the FAO Staff Pension Committee taken on 16 July 1965, denying the Applicant's request to restore prior pensionable service.

“ (iii) Request the Applicant's presence during any oral proceedings of the Tribunal relating to his Appeal, if necessary, particularly as he was not given such an opportunity at all stages of prior considerations of his previous appeals by the joint appeal bodies ; ”

Whereas, on 19 December 1966, the Applicant informed the Executive Secretary of the Tribunal, with regard to paragraph (iii) of the pleas, that he was not making any request for oral proceedings ;

Whereas the Respondent filed his answer on 25 March 1967 ;

Whereas, on 14 April 1967, the Applicant filed the written observations referred to above ;

Whereas, on 18 July 1967, the Respondent filed a reply to the Applicant's written observations ;

Whereas the facts in the case are as follows :

The Applicant was employed by the United Nations from 30 July to 29 September 1953 and was during that period a participant in the Joint Staff Pension Fund. Since he had less than five years of contributory service when he left the Organization, he became at that time entitled under article X.1 (a) of the Regulations of the Joint Staff Pension Fund to a withdrawal benefit limited to his own contributions to the Pension Fund with compound interest. He also became entitled to the option provided for in article X.2 of the Regulations and, in the exercise of that option, he requested that the payment of the withdrawal benefit be postponed for a period not exceeding three years during which compound interest would be added to the amount of such benefit. On 9 February 1955, however, he requested payment of the sum due to him.

On 29 November 1958 the Applicant joined FAO and re-entered into participation in the Pension Fund ; since that time he has been employed by that organization. On 19 July 1959, in a letter addressed to the Secretary of the FAO Pension Fund Committee, he requested that consideration be given to reinstating as pensionable service his previous period of employment with the United Nations on the grounds that during the period of interruption of his pensionable services he had carried out work related to the United Nations and its specialized agencies and undertaken non-pensionable assignments for some of those

organizations. That request was denied under article XII.1 (a) of the regulations of the Joint Staff Pension Fund for the reason that the Applicant's participation in the Pension Fund had been interrupted by a period of more than three calendar years, and the Applicant was informed that the only provisions of the regulations under which his previous contributory service could be restored were those of article XII.1 (b). Article XII, as in force from 1 January 1953 to 31 March 1961, read as follows :

*“ Article XII*

“RE-EMPLOYMENT

“ If a person who has ceased to be a participant becomes a participant again by virtue of a new appointment, the following provisions shall apply, subject to article IX [on eligibility for disability and death benefits] :

“ 1. If the participant received a lump-sum withdrawal benefit, he may pay into the Pension Fund in a manner acceptable to the Joint Staff Pension Board a sum or sums equivalent to the withdrawal benefit received, with compound interest at 2 ½ per cent per annum. If such repayments are made :

“ (a) If participation has been interrupted for a period of three calendar years or less, the participant's contributory service credit prior to separation shall be restored.

“ (b) If the participation has been interrupted for a period exceeding three calendar years, the repayments so made shall be credited as additional contributions in accordance with the provision of article XVIII, 2 and 3 [on voluntary deposits by participants].

“ ... ”

As from 1 April 1961, the above text of article XII was replaced by a new text, which remained in force until 31 December 1962. With effect from 1 January 1963, that text was in turn replaced by the following, which remained in force until 31 December 1966 :

*“ Article XII*

“RE-EMPLOYMENT

“ 1. If a former participant again becomes a participant under article II [on participation], payments to him shall cease.

“ 2. The prior contributory service credit of such a participant shall be restored provided that all amounts received under article X [on withdrawal settlements] are repaid with compound interest at the rate designated in article XXIX [on adoption of basic tables] in a manner acceptable to the Joint Staff Pension Board.

“ ... ”

On the basis of that amended text, the Applicant made another request for restoration of previous service in a memorandum of 28 January 1963 addressed to the Alternate Secretary of the FAO Staff Pension Committee which read in part :

“ I understand that there have been changes in the conditions of revalidating previous pensionable services by cancelling the period of three years, at most, between the end of the first period and the beginning of the

second period of service with the United Nations and its Specialized Agencies. I believe that proper interpretation of such a change would be applicable to all staff members joining before or after the effective date of the changes in Article 12 of the Regulations of the Pension Fund.

“ ... ”

“ I understand that the new regulations as communicated to FAO apply only to those joining after 1 January 1963. I believe such a limitation is unfair. A simple example could serve to show that the 1 January 1963 cut-off date is not logical. A person may have been a participant in 1950, withdrew from the service of the United Nations in 1953 and joined again in 1959. In this case he cannot revalidate his previous participation in the Pension Fund. However, the new rule would entitle him for revalidating his previous participation period by resigning in 1963 and joining again afterwards and thus revalidating all his previous periods of service. I hope that this example will assist you in bringing to the notice of the Pension Fund Committee the need to apply the new rules effective to all previous participation periods regardless of the date of re-employment. For this reason I would very much appreciate your informing me on whether the new regulations may be interpreted to cover re-employment before 1 January 1963. I am personally interested in revalidating my previous period of service and I am ready to repay the funds withdrawn by me from the Pension Fund in respect of my previous period of service with the U.N. and in accordance with the conditions governing this procedure. ”

On 28 February 1963, the Alternate Secretary replied that the question of whether the new text of article XII could be applied to former participants re-employed prior to 1 January 1963 had been raised with the Secretary of the Joint Staff Pension Board, who had referred it to the Board's Standing Committee for consideration at its next meeting on 22 March 1963. On 15 January 1965, the Applicant reiterated his request in a letter to the Secretary of the FAO Staff Pension Committee in which he stressed, in particular, his continued interest and co-operation in the work of the United Nations family after leaving the United Nations and before joining FAO. The Secretary informed him, on 25 January 1965, that the request could not be granted because the Joint Staff Pension Board, at its last meeting in July 1964, had upheld the Board's Secretary's interpretation to the effect that the new article XII of the regulations could not be applied retroactively. That interpretation was confirmed by the Board's Secretary himself, to whom the request had been communicated together with a memorandum from the Director of the Statistics Division of FAO describing the Applicant's active interest in the United Nations during the period 1953-1958. The Applicant thereupon asked the Secretary of the FAO Staff Pension Committee to submit his request to the Standing Committee of the Staff Pension Board for further consideration. Since in the Secretary's view, however, the matter had first to be considered by the FAO Staff Pension Committee, the Applicant's request for restoration of previous service was submitted to that Committee, which decided on 3 May 1965 that the Applicant had no right to restoration in view of the decision of the Staff Pension Board that the new article XII of the regulations could not be applied retroactively. On 24 May 1965 the Applicant appealed against the decision of the FAO Staff Pension Committee to the Standing Committee of the Board. However, since in the view of the Board's Secretary that decision had not yet been reviewed by the

FAO Staf Pension Committee under Administrative Rule G.9 of the Staff Pension Fund, the matter was referred back to that Committee which on 16 July 1965 upheld its previous decision. On 20 July 1965, the Applicant lodged an appeal to the Standing Committee of the Staff Pension Board. The Standing Committee, however, referred the Applicant's case as well as the principle of retroactivity of article XII to the Board which decided, at its thirteenth session, to deny the appeal. The relevant item in the report of that session, dated 18 August 1966, read as follows :

*“ Restoration of prior contributory service under article XII (item 20)*

“ The Board confirmed the interim decision of the Standing Committee not to allow the appeal... As regards the question of whether the Board should reverse its own decision taken at the twelfth session in regard to the non-retroactivity of article XII, the Board decided to confirm that decision. In so doing the Board recognized that while a reversal would provide a solution to a number of cases where restoration was not now possible, the implications of doing so by means of reversing itself on this point would be far-reaching and dangerous. Doubt would be cast on the finality of any of the Board's decisions even in cases when no new elements had entered into their reconsideration. Furthermore, as all cases of hardship had already been dealt with separately, the Board held that there was no justification to sacrifice, for the sake of offering relief in the remaining cases, an important general principle whose retention was essential in order to provide certainty in regard to the regulations. ”

The Board's decision was notified to the Applicant by a memorandum dated 20 August 1966 and, on 25 November 1966, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are :

1. The provision in article XXXVII of the Regulations of the Staff Pension Fund stating that “ the Regulations so amended [by the General Assembly of the United Nations] shall take effect in regard to the participants in the Fund, including those who were participants before the regulations were amended, as from the date specified by the General Assembly but without prejudice to rights to benefits acquired through contributory service accumulated prior to that date ” asserts the applicability of amendments in the case of participants prior to the date when the amendments were made. Therefore, the interpretation of article XII as being not retroactive in the Applicant's case is in contravention to article XXXVII and the denial of the Applicant's appeal in this regard was not justified. The interpretation of the amended text of article XII in respect to retroactivity, as far as participants in the Fund at the time the amended text becomes effective are concerned, should be subject to the more general provisions of article XXXVII. Should article XII not apply to those participants, the phrase “ including those who were participants before the Regulations were amended ” would be without any significance.

2. If the Applicant resigns and then rejoins the United Nations family, he would be entitled to revalidate all his prior pensionable service, including the one denied him by the contested decision of the Staff Pension Board.

3. The current interpretation of article XII as to retroactivity discriminates between different categories of participants. A person who participates in the

Pension Fund for a non-continuous period of five years, but interrupted many times (say over twenty years) will be able to restore all the five years of his prior pensionable service, while the Applicant who is now a participant already for a period of about eight years is denied the restoration of a prior pensionable period of service even though he continues in the service of the United Nations family.

4. In the contested decision of the Board it is stated that hardship cases had been dealt with. The Applicant's case is also a hardship case in view of the surrounding circumstances.

5. The decision of the Board is not self-consistent nor accurate for the following reasons :

(a) Retroactivity of article XII in the case of participants before the amendment came into effect is a logical corollary of article XXXVII. The Board's decision on retroactivity of article XII can be legal only if the text of article XII itself excluded explicitly its retroactivity ;

(b) The Board's assertion that reversing its decision on retroactivity of article XII would be far-reaching and dangerous cannot be justified. Firstly, there are only a few cases similar to the Applicant who are members of the United Nations regular staff and were participants when the amended text came into effect. Secondly, even if the Board's reversal of its position might be far-reaching or dangerous, the main issue is whether the reversal itself would be just or not, regardless of the consequences ;

(c) The Board should have considered the Applicant's appeal on its own merits and not on the basis of prestige considerations if they have to reverse an earlier decision ;

(d) The Applicant's appeal should be judged not only by the letter of the Regulations but also by the spirit and intent of article XII. The Applicant is much more entitled to restoration of the contested period of prior service than many of the new participants who will be re-employed after 1 January 1963 ;

(e) The Applicant's case would have been considered as a hardship case had the FAO Staff Pension Committee considered his request promptly, early in 1963.

Whereas the Respondent's principal contentions are :

1. The matter is governed by the text of article XII of the regulations in force on the date of the Applicant's re-employment, 29 November 1958. The date on which each of the successive versions of this article took effect was in each case expressly stipulated in the General Assembly resolution by which they were adopted. Thus, the 1963 text of article XII, which is specially cited by the Applicant, was introduced by General Assembly resolution 1799 (XVII) which provided *inter alia* that the Assembly "adopts the texts annexed to the present resolution as amendments to the Regulations..., with effect from 1 January 1963". The text of the amended article XII adopted by that resolution deals with the situation which arises "if a former participant again becomes a participant", and not "if a former participant again becomes—or has again become—a participant". Thus, it would only have been possible to apply to the Applicant's re-employment the amended article XII introduced some years later if the Assembly had expressly so authorized.

2. There is no basis for the Applicant's claim that in application of the provisions contained in article XXXVII, the amended text of article XII which entered into force on 1 January 1963 should nevertheless be interpreted as governing and redefining the Applicant's rights when he had again become a participant

more than four years previously. It follows from article XXXVII that the amended text of article XII takes effect in regard to all participants from the date specified by the General Assembly, namely 1 January 1963. It is therefore clear that the terms of article XXXVII do not permit that any Pension Fund Regulation amended by the Assembly should be applied to a situation which existed prior to "the date specified by the General Assembly", even in the case of "those who were participants before the Regulations were amended". The purpose of the words just quoted is to make it clear that the effective date of an amended regulation shall apply not only to new participants and new situations arising after that date, but that "those who were participants before the regulations were amended" shall equally become subject to the amended regulation from the same effective date, and not before. Finally, the position of the Respondent in this case is entirely consistent with the past practice of both the Pension Fund and of the General Assembly.

3. The question as to whether or not the case of the Applicant might reasonably be considered a "hardship case" is not and was never relevant to the contested decision, and in no case has an amendment of article XII been applied retroactively whether on "hardship" or any other ground. The decision on "hardship cases" was taken as an interpretation of, and in application of, the defective article XII in force from 1 April 1961 until 31 December 1962, and did not involve any retroactivity. Furthermore, the cases affected by that decision were necessarily limited to those who, unlike the Applicant, had been re-employed during the period while the defective article had been in force.

4. Some of the matters referred to by the Applicant are policy matters relating to the lawful exercise by the Respondent of his discretionary or administrative authority, and not to the application or observance of the Pension Fund Regulations. As such these matters are not subject to the jurisdiction of the Tribunal.

5. Since the only issue before the Tribunal is whether or not there was any non-observance of the regulations of the Staff Pension Fund, the Respondent considers inadmissible, irrelevant or untrue all allegations made by the Applicant which purport to show that the application by the Respondent of the relevant regulations was unjust, unfair, illogical or discriminatory.

The Tribunal, having deliberated from 6 to 18 October 1967, now pronounces the following judgement :

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

The Applicant was a staff member of the United Nations from 30 July 1949 to 29 September 1953. He was during that period a participant in the Joint Staff Pension Fund. At the time he left the service, he became entitled under article X.1 (a) of the regulations of the Joint Staff Pension Fund to a withdrawal benefit, which he duly received. On 29 November 1958, the Applicant entered the service of FAO and again became a participant in the Pension Fund.

On 19 July 1959, the Applicant applied to the FAO Pension Fund Committee requesting that his prior period of employment be restored as pensionable service. His request was rejected under article XII.1 (a) of the regulations at the time in force, on the ground that his participation in the Pension Fund had been interrupted for a period longer than three calendar years. The following is the text of the relevant part of the article :

*“ Article XII**“RE-EMPLOYMENT**“ ...**“ 1. ...**“ (a) If participation has been interrupted for a period of three calendar years or less, the participant’s contributory service credit prior to separation shall be restored.”*

II. Subsequently article XII of the regulations was amended so that the disability to the restoration of prior service based on interruption of service was removed. The amended article XII, as on 1 January 1963, read as follows :

*“ Article XII**“ RE-EMPLOYMENT**“ 1. If a former participant again becomes a participant under article II, payments to him shall cease.**“ 2. The prior contributory service credit of such a participant shall be restored... ”**“ ... ”*

III. The issue before the Tribunal is whether, by virtue of the 1963 amendment of article XII, the Applicant was entitled to restoration of his prior service as pensionable.

IV. The Respondent interprets the words “ If a former participant again becomes a participant ” in the above text to mean that the benefit of the amendment should apply only to those who become participants after the effective date of the amendment and could not apply to those who had become participants earlier. The Respondent contends that since the General Assembly had specified the effective date 1 January 1963, the amendment could not apply retroactively to participants who had joined earlier. Emphasis has also been laid by the Respondent on the words “ again becomes ” as distinct from the words “ has again become ” to reinforce the argument that the article has no application to those who had become participants earlier.

The Tribunal is unable to read from the words “ again becomes a participant ” any exclusion of those who were currently participants. No words of exclusion such as “ if a former participant hereafter becomes a participant ” have been used in the text. On the contrary, the entire text of the article is in the present tense and the word “ becomes ” in the context may apply equally to those who become participants—either before or after the amendment.

V. By fixing 1 January 1963 as the effective date of the amendment, the General Assembly followed the normal practice of fixing a date on which legislation, including retroactive legislation, would come into force. If, in the case before the Tribunal, the Applicant had ceased to be a participant before 1 January 1963, he could not have claimed restoration of his prior service since the amendment became effective only on 1 January 1963. The Tribunal is unable to accept the contention that because the General Assembly had fixed an effective date, the amendment applied only to those who became participants on or after that date.



VI. The Respondent pleads that the amendment in question should not be treated as retroactive as it has not been specifically stated to be so. But the question whether the amendment applies to all staff members, or only to those who became participants on or after 1 January 1963, is a question of interpretation of the text before the Tribunal.

The Tribunal is unable to interpret the words "if a former participant again becomes a participant" to mean that the amendment applies only to those who become participants on or after 1 January 1963.

VII. 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 he 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.

VIII. The Tribunal therefore considers that the construction to be placed on the amended article XII is that the rule applies to participants generally, whether they joined the Pension Fund before or after the effective date of the amendment. Otherwise, restricted application of the article only to staff members who rejoined on or after the effective date of the amendment would lead to inequities.

IX. The meaning and purport of article XII, as given above, is further borne out and supported by article XXXVII of the regulations, which expressly provides as follows :

*" Article XXXVII*

*"AMENDMENTS*

" The Joint Staff Pension Board may recommend to the General Assembly of the United Nations amendments to these Regulations. The General Assembly may, after the Joint Staff Pension Board has been consulted, amend these Regulations ; and the Regulations so amended shall take effect in regard to the participants in the Fund, including those who were participants before the Regulations were amended, as from the date specified by the General Assembly but without prejudice to rights to benefits acquired through contributory service accumulated prior to that date. "

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.

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 :

“ 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.

XI. The result of the amendment before the Tribunal is that a period of service which could not be restored for pension benefit becomes eligible for restoration. The amendment does not affect or take away any vested or accrued right but on the other hand recognizes as eligible for restoration a prior period of service not hitherto taken into account for such benefit.

XII. The Tribunal finds that neither the text of article XXXVII nor the principles governing non-retroactivity contradict the application of the amended article XII to the Applicant.

XIII. The Respondent argues that the Tribunal has no jurisdiction to pass on the lawful exercise of the discretionary or administrative authority of the Staff Pension Board regarding matters of policy. But the Tribunal finds that the issue involved in the present case is not one regarding the policy of the Board, but one of the legal interpretation and application of the regulations on which the Tribunal clearly has jurisdiction.

XIV. The Tribunal therefore orders :

1. The rescission of the decision of the United Nations Joint Staff Pension Board and of the decision of the FAO Staff Pension Committee denying the Applicant's request of restoration of prior pensionable service ;

2. The restoration of the prior service of the Applicant for the period 30 July 1949 to 29 September 1953 for pension benefit in accordance with the relevant regulations and rules.

*(Signatures)*

Suzanne BASTID

*President*

CROOK

*Vice-President*

R. VENKATARAMAN

*Vice-President*

Z. ROSSIDES

*Alternate Member*

Jean HARDY

*Executive Secretary*

*New York, 18 October 1967.*