

Judgement No. 232*(Original: English)***Case No. 223:
Dias****Against: The Secretary-General
of the United Nations**

Request by a former technical assistance expert for validation for pension purposes of a period of service during which he was not a participant in the Joint Staff Pension Fund.

Alleged administrative error committed by the UNDP Resident Representative in Somalia, who allegedly gave the Applicant misleading advice concerning the validation of past service.—Question whether the Applicant failed to validate his prior service because he followed the allegedly misleading advice.—Different modalities for payments required to validate past service.—Advice given to the Applicant by the Resident Representative.—Finding of the Tribunal that there is no evidence to establish an administrative error which misled the Applicant.—Lack of due diligence on the part of the Applicant.—Rejection of the Respondent's plea that the application be rejected on the ground that it is time-barred.—Application rejected on the merits of the case.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Sir Roger Stevens; Mr. Endre Ustor;

Whereas, on 11 April 1978, Chandrasekera Dias, a technical assistance officer of the United Nations, filed an application the pleas of which read as follows:

“ . . . I wish to appeal the decision of the Secretary-General and request the Tribunal to order the Secretary-General to inform the Secretary of the United Nations Joint Staff Pension Committee that the United Nations committed an administrative error, and that, because of it, the United Nations should bear the financial consequence and pay the actuarial cost of validation of my first five years of service with the United Nations. In this connexion, may I bring to your attention the fact that the United Nations would have had to bear these costs, with some minor adjustments, if at the time I was not prevented from participating in the Fund. Accordingly, what the United Nations is being asked to pay corresponds roughly to what it would have otherwise paid if not for the administrative error of Mr. Harding.”;

Whereas the Respondent filed his answer on 5 June 1978;

Whereas the Applicant filed written observations on 21 July 1978;

Whereas the Applicant submitted an additional document on 7 September 1978;

Whereas the facts in the case are as follows:

The Applicant served as a technical assistance expert of the United Nations in Somalia under a succession of fixed-term appointments from 27 February 1964 to 31 December 1968. Effective 1 January 1969 his appointment was extended for three months and he became entitled to participation in the United Nations Joint Staff Pension Fund; the relevant Personnel Action forms were dated 13 and 17 January 1969 and the letter of appointment was signed on 27 January 1969 for the Director of Personnel and on 2 February 1969

by the Applicant. In January 1969 the Applicant accordingly received from the Secretary of the United Nations Staff Pension Committee a "Note to Participants" transmitting a copy of the Pension Fund Regulations and Administrative Rules and two copies of a declaration form to be completed and returned; the second paragraph of the Note read:

"Your attention is drawn in particular to article III and to Administrative Rule B.12 which provide for the possibility of validating a prior period of service in certain circumstances if a participant elects to do so *within one year of the commencement of his participation*. The necessary application form may be obtained from this office on request. It is the responsibility of the participant to ensure that the election is made and communicated to this office within that time limit."

The Applicant sought the advice of the Resident Representative of the United Nations Development Programme (UNDP), Mr. W. M. Harding, as to whether he could pay in instalments the sum that was payable to the Pension Fund for the purpose of validating his services prior to January 1969. The Resident Representative advised him that in view of his contractual status he could only make payment in a lump sum. The Applicant decided not to validate his prior services. On 1 April 1969 his appointment was extended until the end of the year and on 1 January 1970 it was further extended for three months. On 1 April 1970 the Applicant was reassigned to the Development Planning Advisory Services, Centre for Development Planning, Projections and Policies, Department of Economic and Social Affairs, as Special Technical Adviser and his appointment was extended for one year. Thereafter, except for an assignment to the Philippines as Senior Planning Adviser from 25 January to 12 November 1971, he continued to serve in that capacity under successive fixed-term appointments. In April 1976 the Applicant sought the guidance of the Assistant Director-in-Charge of the Development Planning Advisory Services (DPAS) in making a tentative assessment of his retirement entitlements. On 2 November 1976 the Assistant Director-in-Charge addressed to Mr. Harding, who had retired from United Nations service, a letter reading in part:

"I am writing to you to seek clarification regarding the circumstances surrounding the non-validation of the first five years of service of Chandra Dias, Special Technical Adviser attached to DPAS, who has been in continuous employment in the UN since 1964.

"His fixed-term contract, valid up to 24 January 1977, was further extended in March this year to enable him to proceed on home leave in June. With this extension, he will be reaching the minimum retirement age during the currency of his present contract.

"In April 1976 he sought my guidance in making a tentative assessment of his retirement entitlements. During the ensuing discussion, at my request, he recapitulated his recollection of the circumstances leading up to his decision not to validate the first five years of his service. The summary of his version is briefly as follows: that he was in Somalia where you were the Resident Representative, when he became entitled to full participation in the Pension Fund; that due to extreme pressure of work and non-familiarity with the Fund's Rules and Regulations, he sought your advice on how he should proceed; that at the relevant time he only had a three-month fixed contract with the prospect of any further extension very much in doubt, due to the Five Year rule; that you advised him that he could only make payment

in a lump sum; and that as he did not have the financial capability to do so, he decided not to validate.

“I have advised him that provided you could confirm his statement there appeared to be a prima facie case for requesting a redress on the grounds of administrative error.

“ . . . ”;

Various supporting documents were attached to the letter. On 30 December 1976 Mr. Harding replied:

“ . . . ”

“Let me say first that eight years is a very long time, particularly in a fast-moving and many-faceted life such as that of a UNDP Resident Representative, and that I am not noted for detailed memory recall. My memory is much more the type which recalls broad sweeps of events rather than the details. In this instance, however, even without the chronology and supporting documents you provided, it is not difficult to recall and confirm the meeting in question with Mr. Dias, the discussion of his pension validation and the advice I then gave him.

“What I should explain is, perhaps, first the reason for the advice I did give, particularly in view of the fact that at the relevant time I was myself in the process of validating my own past service; and second, my regrettable oversight in not following up on that advice, due to preoccupation with other pressing matters.

“In spite of my efforts to obtain the appropriate action from OTC [Office of Technical Co-operation], Mr. Dias was actually without a contract from 1 January to 1 February 1969. He received and signed a contract (dated 2 February) on 12 February which extended his service up to the end of March 1969. A further extension was very much in doubt due to the Five Year rule.

“At the time of our discussion (which I now place at sometime in the second week of February 1969, on the basis of the date of his Pension Fund Declaration) he had only some six weeks left on his firm contract. I think it will be obvious that in such circumstances the question of validating past service by monthly payments was not highly relevant.

“Government had requested an extension up to the end of 1969 and I was in the process of discussing with Government a further proposal to have his contract extended up to the end of 1972. His services were of critical importance to the entire UNDP Programme and one of my major concerns at that time was to obtain the longer extension and thus provide the adviser with the security and continuity required so that he could devote himself fully to the longer-term tasks.

“These longer-term arrangements were not, of course, a subject of discussion with Mr. Dias at the time under review. It would have been improper and may have merely raised false hopes.

“Under the circumstances described my advice to Mr. Dias was to complete and forward his declaration to Headquarters and to pay his arrears in a lump sum.

“I had intended, once the extension had been approved, to follow up on my initial advice and, provided the expert had not in the meantime paid up his arrears, to suggest that he initiate the procedure for instalment payments as I had myself done.

“The Government accepted my proposal for the extension of the expert’s con-

tract up to the end of 1972 and I conveyed the request to OTC by letter dated 31 March 1969, the day on which Mr. Dias' three-month contract was due to terminate. Before this had reached New York, acting on the Government's original request, OTC cabled me on 1 April 1969 approving the extension of the experts' contract through 1969 exceptionally. The cable also indicated that if the post continued beyond 1969 a replacement would be required as the expert would have then served more than five years. In retrospect, I now feel that it was at this stage that I should have followed up on my initial advice. The chronology shows, however, that my preoccupation was still the full extension of the adviser's contract. On 6 April 1969 I reiterated to OTC the Government's request for extension up to the end of 1972. This dialogue with Headquarters continued for almost five months and it was only on 29 August 1969 that OTC informed me by cable that the extension of the expert's contract up to 28 February 1971 was in process.

"Although it was not until the first week of October 1969 that the contract was offered to the adviser, there was still the whole month of September 1969 during which I could have followed up on my initial advice.

". . .

"This was the background and context in which I unfortunately overlooked, before his validation period had expired, to follow up on the initial advice I had given Mr. Dias.

"I am grateful to you for your letter and detailed chronology without which I would never have been able to reconstruct this sequence of events nor realize that I had indeed failed to follow up on this case. I am, however, pleased to have been consulted now and to have had an opportunity to state the facts as I recall them. I am also happy to note that this unfortunate administrative error stands a chance of correction and I am gratified to have been able to assist in that process.

". . ."

On 17 January 1977 the Assistant Director-in-Charge requested the Senior Administrative Officer for Personnel Matters of the Department of Economic and Social Affairs to take up the matter with the Secretary of the United Nations Joint Staff Pension Board in order to validate the Applicant's first five years of non-contributory service. On 28 July 1977 the Applicant addressed to the Administrator of UNDP a memorandum in which he recited the facts summarized above and continued:

". . .

"On 31 March 1977, the Secretary of the [Pension] Board addressed a memorandum to me (Annex 1) rejecting the request to validate my prior service on the basis that the advice given to me by Mr. Harding was correct. The Secretary specifically stated in this memorandum that the 'statement that you have to liquidate in a lump sum all arrears outstanding before separation which you were given, was correct'.

"On 26 April 1977 I submitted an application (Annex 6) under rule K-1 of the rules of the United Nations Joint Staff Pension Fund to the United Nations Staff Pension Committee, requesting a review of the decision taken by its Secretary in his memorandum of 31 March 1977.

"On 1 July 1977, the Secretary, in a telephone conversation to Mr. Dan Hart-

stein of this office, stated that my suit 'requires an acknowledgement by UNDP that their representative made an error in communicating to Mr. Dias what his rights were'. Copy of note by Mr. Hartstein, on the gist of this conversation is at Annex 7.

"In response to my application of 26 April 1977 (Annex 6), the Secretary of the Joint Staff Pension Fund addressed a memorandum to me dated 6 July 1977 (Annex 8), indicating the procedural steps necessary to pursue my claim.

"Accordingly, I now request the UNDP to inform the Secretary of the United Nations Joint Staff Pension Board that Mr. William Harding, the UNDP Resident Representative in Somalia at the relevant time, committed an administrative error in advising me that I had to pay in a lump sum the arrears due for validating for pension purposes my first five years of service with the United Nations; and that because of it, UNDP is prepared to bear the financial consequences, i.e. to pay the actuarial cost of validation."

By a letter dated 19 October 1977 the Assistant Administrator, Bureau for Administration of UNDP, replied:

" . . .

"With regard to your request that UNDP assume the financial consequences of Mr. Harding's alleged error, we can see no basis for the UNDP to do so. You were not a UNDP staff member to which UNDP has some general or specific responsibility, whether for information on employment benefits or those benefits themselves. Moreover, nowhere in the resolutions of the General Assembly concerning UNDP and the Joint Staff Pension Fund, or in the Regulations and Rules of the latter, or in any other administrative enactments relating to UNDP or yourself, are UNDP and its Resident Representatives entrusted with the function or responsibility of giving official advice or responses to UN/OTC experts on Pension Fund questions. On the contrary, Rule A.1 of the Administrative Rules of the United Nations Joint Staff Pension Fund stipulates that 'The Secretary of the Board shall be responsible, under the authority of the Board, for ensuring the observance of the regulations and these rules by the member organizations and the participants.' Only the Secretary of the Board or his authorized delegates, which do *not* include UNDP Resident Representatives, can give authoritative advice to participants in the Pension Fund. That which Mr. Harding extended to you bore no more authority and entailed no more responsibility for UNDP than advice which any staff member expresses to a colleague on a personal basis.

" . . . "

On 28 October 1977 the Applicant requested the Secretary-General to review the administrative decision contained in that letter. On 12 December 1977 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to maintain the decision. On 14 February 1978 the Chief of Staff Services advised the Applicant that the Secretary-General had agreed to direct submission of an application to the Tribunal. On 11 April 1978 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The jurisprudence of the Tribunal, as well as all legal systems, have firmly

accepted the principle that an employee should not be victimized by an administrative error.

2. The Resident Representative's responsibility in the matter cannot be frustrated by the application of the time-limit for validation of prior service.

3. The statement by UNDP and the Secretary-General that the Resident Representatives are not entrusted with authority to give advice on pension matters is immaterial as the Resident Representative in fact assumed that responsibility in the present case and gave advice upon which the Applicant acted in good faith.

4. In view of the administrative authority the Resident Representative exercised over the Applicant it was natural, as a reasonable person, for the Applicant to have sought official advice and clarification from the Resident Representative on all official communications made to him.

5. The advice given by the Resident Representative was not personal but official.

6. Having admitted to an "administrative error", the Organization is now estopped from denying it and, as the Applicant has suffered injury due to the acknowledged error, the Organization should make amends.

Whereas the Respondent's principal contentions are:

1. The subject-matter of the application is time-barred. The real issue in dispute is the appropriateness and implications of the advice on pension matters received by the Applicant from the Resident Representative. This advice was received in February 1969, but its correctness was neither contested nor even questioned by the Applicant until many years after the expiry of the applicable time-limits. The fact that the Secretary-General and the Applicant have agreed to bypass the Joint Appeals Board cannot be taken to show agreement on the part of the Secretary-General to waive the normally applicable period of limitation.

2. The Applicant knew or should have known that the Resident Representative was not the appropriate authority to give advice on questions pertaining to conditions of employment and entitlements in general, and pension matters in particular.

3. The advice by the Resident Representative that the Applicant must pay in a lump sum was correct since the right to pay in instalments was not possessed by non-participants and since, at the time the advice was given, the Applicant was employed on a three-months' contract due to expire in less than two months.

The Tribunal, having deliberated from 2 to 12 October 1978, now pronounces the following judgement:

I. The Applicant bases his claim on an alleged administrative error committed by his former chief, the then Resident Representative of UNDP in Somalia, Mr. W. M. Harding. This error consisted in giving allegedly misleading advice to the Applicant concerning the validation of his non-pensionable service. The fact that the Applicant believed this advice to be correct caused him the loss of an opportunity to validate some five years of service for pension purposes. The Applicant contends that the act of the Resident Representative is imputable to the United Nations and that the latter has to bear the responsibility and the financial consequences of the material loss he suffered.

II. It is true that the Applicant suffered a financial loss by not availing himself of the opportunity to validate his prior period of non-pensionable service. The first question arising in this connexion is whether the omission of the Applicant to validate his previous service was caused by following the allegedly misleading advice. If the answer to this

question is in the affirmative then a second question arises, namely, whether the United Nations is liable for the alleged administrative error committed by the Applicant's superior.

III. In January 1969 the Applicant received, together with the "Note to Participants", the Regulations and Administrative Rules of the United Nations Joint Staff Pension Fund as they were in force at that time. Upon receiving these papers he must be presumed to have read at least those parts of them to which his attention was particularly drawn. These are article III of the Regulations entitled: "Validation of non-pensionable service" and Administrative Rule B.12. This rule is the first of six rules (B.12-B.17) contained in a sub-section of the Administrative Rules under the heading "Validation by a participant of non-pensionable service".

It must be assumed that the Applicant read all six rules appearing under this heading, including Rule B.14. This rule enumerates three methods of payment which a participant is entitled to select when requesting validation of non-pensionable service. The three methods are the following:

(a) In a lump sum, payable upon notification of the amount due;

(b) In equal monthly instalments, payable within a period no longer than that of the previously non-pensionable service which the participant is validating and in any case prior to age 60, such period commencing at the date when the participant is notified of the amount payable; and

(c) Partially in a lump sum as in (a) above, with the balance payable in equal monthly instalments, as in (b) above.

IV. The fact that the Applicant must have been aware that different methods of payment were open to him does not by itself preclude—it makes it indeed probable—that he wished to seek advice concerning the choice to be made by him. On the other hand the fact that he asked for advice shows that he must have known at the time that—at least in principle—different modalities existed for the payments required for the validation of past service.

On the advice received the Applicant states: "The Resident Representative advised me that *I could only make payment in a lump sum*". (Emphasis added)

It can be assumed that had the Applicant intended to choose another method of payment he would have asked for an explanation as to why he was precluded from utilizing it. But the application is silent on this point.

V. The allegation of the Applicant concerning the advice received does not seem to be supported by evidence.

In his letter of 30 December 1976, Mr. Harding states:

"At the time of our discussion . . . he [the Applicant] had only some six weeks left on his firm contract. I think it will be obvious that in such circumstances the question of validating past service by monthly payments was not highly relevant.

". . .

"Under the circumstances described my advice to Mr. Dias was to complete and forward his declaration to Headquarters and to pay his arrears in a lump sum.

"I had intended, once the extension [of Applicant's contract] had been approved, to follow up on my initial advice and, provided the expert had not in the meantime paid up his arrears, to suggest that he initiate the procedure for instalment payments

. . .

“ . . . I unfortunately overlooked, before his validation period had expired, to follow up on the initial advice I had given Mr. Dias.

“ . . .

“I am . . . happy to note that this unfortunate administrative error stands a chance of correction . . .”

VI. This letter does not substantiate the Applicant's contention that the Resident Representative advised him that he “could only make” payment in a lump sum. The evidence adduced by the Applicant shows rather that under the circumstances prevailing at the time of the giving of the advice (when the Applicant's firm contract was about to expire and a “further extension was very much in doubt due to the Five Year rule”), “the question of validating past service by monthly payments was not highly relevant”.

Mr. Harding, the person whose “administrative error” allegedly misled the Applicant, does not think that his advice was wrong at the time it was given. What he considers to be his fault is that he did not follow up on his initial advice.

VII. The Tribunal finds that there is no evidence to establish an administrative error which misled the Applicant and which caused him pecuniary loss.

The advice given by the Resident Representative under the then prevailing circumstances was reasonable. These circumstances changed with the renewal of the Applicant's contract and it was for the Applicant—a highly qualified and competent man—to take this change into consideration, to look after his own interests and to take the necessary steps, for which he had ample time. Hence it was not negligence on the part of the then Resident Representative but a lack of due diligence on the part of the Applicant which cost him the loss of an opportunity. No extreme pressure of work on the shoulders of the Applicant can shift his responsibilities concerning his own and his family's interests to his superior. Nor can the superior be held to be under a permanent obligation to draw the attention of his subordinates to this or that possibility given by the Staff Rules or the rules pertaining to their pension rights.

VIII. No administrative error having been committed by the Resident Representative, the answer to the first question put under paragraph II above is in the negative and the second question does not therefore arise.

IX. The Tribunal considered the plea of the Respondent to reject the application on the ground that it is time-barred. The application attacks an administrative decision dated 12 December 1977 and was lodged in due time. The time-limits for appeals set by the Staff Rules (Rule 111.3 (a) and (b)) and referred to by the Respondent are irrelevant in the present case and therefore the Respondent's objection based on those limits is not valid.

X. On the merits of the case, the Tribunal reaches the conclusion that the Applicant's claim requesting “the Tribunal to order the Secretary-General to inform the Secretary of the United Nations Joint Staff Pension Committee that the United Nations committed an administrative error, and that, because of it, the United Nations should bear the financial consequence and pay the actuarial cost of validation of my first five years of service with the United Nations” cannot be sustained.

XI. For the foregoing reasons, the application is rejected.

(Signatures)

R. VENKATARAMAN
President

Endre USTOR
Member

Roger STEVENS
Member

Jean HARDY
Executive Secretary

New York, 12 October 1978

Judgement No. 233

(Original: French)

Case No. 214:
Teixeira

Against: The Secretary-General
of the United Nations

Request by a person who has concluded a series of special service agreements to be recognized as having the status of staff member.

Request that the Tribunal rule that the link established between the Applicant and the Economic Commission for Latin America (ECLA) gave him in fact the status of a regular employee.—Applicant agreed to the conclusion of special service agreements giving him the legal status of an independent contractor.—The Tribunal is not called upon to take into account personal considerations which may have led the Applicant to act in such a manner.—Conclusion of the Tribunal that the Applicant cannot use his factual situation as an argument to claim a legal status different from his contractual status.—Charge that the Respondent abusively used the special service agreement procedure.—Although improper, this practice was favourable to the Applicant.—Conclusion of the Tribunal that the Applicant is not entitled to claim that he sustained any injury because of the renewal of his special service agreements.—The Applicant's claims concerning the inequality between his remuneration and that of his colleagues are rejected.—Right of the Applicant to a termination indemnity.—The amount of the indemnity is fixed at \$3,000.—All other requests are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. T. Mutuale; Mr. Francis T. P. Plimpton, Vice-President, alternate member;

Whereas, on 3 September 1976, Ib Teixeira filed an application in which, *inter alia*, he requested the Tribunal:

“To rule that he had in fact become a staff member of ECLA [Economic Commission for Latin America] and that as such his appeal on the merits of the case should be receivable either by the Joint Appeals Board or directly, but subsequently, by the Tribunal itself”;