

**Judgement No. 239***(Original: English)***Case No. 232:  
Masiello****Against: The Secretary-General  
of the United Nations**

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[See summary of Judgement No. 238 above.]

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## THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 7 December 1978, Anthony Masiello, a staff member of the United Nations, filed an application in which he requested the Tribunal to:

“1. Order the rescission of ST/SGB/167 dated 16 July 1978 pursuant to article 9(1) of the Statute of the Administrative Tribunal.

“2. Order the payment of tax reimbursement on partial lump sum commutation of benefits from the United Nations Joint Staff Pension Fund.

“3. Order that interest at the prevailing rate be added to tax reimbursement, paid pursuant to paragraph 2 of this section, such interest to be computed from the date that the recipient would have been reimbursed but for the issuance of ST/SGB/167.

“4. Order the Secretary-General to reimburse the Applicant for all fees, costs and disbursements incurred in the preparation and presentation of this case, including reasonable attorney’s fees, such amount to be computed and fixed by the Tribunal on the basis of documentary evidence to be submitted upon the completion of these proceedings.

“5. Order the payment to the Applicant of an indemnity pursuant to article 9(1) of the Statute of the Administrative Tribunal for incidental and consequential damages incurred by the Applicant as a result of the issuance of ST/SGB/167, such amount to be computed and fixed by the Tribunal on the basis of documentary evidence to be submitted upon the completion of these proceedings.”;

Whereas the Respondent filed his answer on 2 January 1979;

Whereas the Applicant requested oral proceedings on 5 January 1979;

Whereas the United States Government submitted an *amicus curiae* brief on 8 January 1979;

Whereas the Applicant filed written observations on 29 January 1979;

Whereas, on 30 January 1979, the Tribunal, having recognized that the United States Government might be affected by any decision in the present case, decided under article

27 of its Rules that the *amicus curiae* brief referred to above was receivable and that the United States Government might, if it so wished, make a brief statement at the public hearing;

Whereas, on 31 January 1979, the Tribunal decided at the request of the Respondent that, since annexes 130 and 131 of the Applicant's written observations were not signed or authenticated, they could not be regarded as forming part of the record;

Whereas the Applicant submitted an additional document on 1 February 1979;

Whereas the Tribunal heard the parties and a representative of the United States at a public hearing held on 2 February 1979;

Whereas additional information was submitted at the request of the Tribunal by the Applicant on 2 February 1979 and by the Respondent on 2 and 6 February 1979;

Whereas the Applicant submitted a statement on costs on 6 February 1979;

Whereas the facts in the case are as follows:

The Applicant, a United States national born on 2 February 1925, entered the service of the United Nations on 2 September 1947 as an Office Labourer and was granted a permanent appointment on 1 September 1954. Because of a work-related disability permitting only light duty assignments, he plans to retire after 33 years of service at age 55 in February 1980. He estimates that, based upon his current gross salary of approximately 21,000 dollars annually, the approximate value of his one-third lump sum pension withdrawal is 60,000 dollars on which there will be a tax due of approximately 18,000.

On 13 June 1978, in an Aide-Mémoire presented to the Legal Counsel, the United States Mission to the United Nations stated that the United States had been reviewing the question of the propriety of tax reimbursements on one-third lump sum pension payments and had reached the preliminary conclusion that the Tax Equalization Fund should not be used to reimburse taxes on one-third lump sum pension payments because such taxation (a) did not constitute a "double taxation" and (b) one-third lump sum pension payments should not be considered "salaries and emoluments" for purposes of article 18(b) of the Convention on the Privileges and Immunities of the United Nations or General Assembly resolution 973 C (X). Upon the request of the Secretary-General, the Aide-Mémoire was examined by the Under-Secretary-General for Administration and Management, the Legal Counsel and the Controller, who jointly advised the Secretary-General that they had come to the conclusion that the views of the Government of the United States on the law of the matter were sound and recommended that the decision be taken to discontinue forthwith the practice of reimbursement of taxes on pension benefit withdrawals. On 30 June 1978 the United States Mission confirmed to the Secretary-General that the legal views concerning non-reimbursement of national taxes on one-third lump sum pension payments set forth in the Aide-Mémoire constituted the definitive conclusions of the Government of the United States on the law of the matter. On 12 July 1978 the United States Mission confirmed to the Secretary-General that the United States Government shared the view of the Legal Counsel that there was no legal basis for reimbursing national taxes on lump sum pension payments from the Tax Equalization Fund, and that, as a consequence, the practice of reimbursement of such taxes should stop immediately as of that date. On 16 July 1978 the Secretary-General issued the following Bulletin (ST/SGB/167):

"1. Questions have been raised recently as to the legality of reimbursing, out of the Tax Equalization Fund, the national taxes paid by retired or retiring staff

members on the one-third lump sum payment which they are entitled to opt to receive out of the Joint Staff Pension Fund.

“2. Consequently, legal opinions on this question were obtained. These opinions confirm that there are serious grounds for questioning the legality of the practice referred to, which has been in effect for a number of years.

“3. It has, therefore, been decided that in order to clear up any doubts as to the legality of the practice, the question should be referred immediately for an advisory opinion to the United Nations Administrative Tribunal. The Tribunal is therefore being asked to examine and advise on the question as a matter of urgency.

“4. Until such time as the Tribunal has rendered its opinion, it will be necessary to suspend immediately, as from 16 July 1978, further reimbursements out of the Tax Equalization Fund with respect to national taxes paid by retired or retiring staff members on one-third lump sum payments received out of the Joint Staff Pension Fund.

“5. The foregoing decision does not affect the right of staff members to exercise the option of withdrawal from the Pension Fund of the one-third lump sum payment. It applies exclusively to the question of reimbursement of taxes paid on these amounts from the Tax Equalization Fund.”

Having written to the Secretary-General to request review of the suspension decision, the Applicant and all other staff members concerned were advised by a blanket reply dated 31 August 1978 from the Assistant Secretary-General for Personnel Services that the Secretary-General was not in a position to change his decision and that he agreed to waive the requirement to proceed first through the Joint Appeals Board in order to permit the staff members concerned to submit their cases directly to the Tribunal. On 29 September 1978 the Tribunal decided that it had no competence to entertain the Secretary-General's request for an advisory opinion. On 29 November 1978 the Secretary-General issued the following Bulletin (ST/SGB/169):

“1. By a bulletin of 16 July 1978 (ST/SGB/167), the staff was informed of the serious question that had been raised concerning the legality of reimbursing national taxes paid by retired and retiring staff members on commuted retirement benefits from the United Nations Joint Staff Pension Fund, and that, pending the receipt of an advisory opinion that was to be requested from the Administrative Tribunal, such reimbursement payments would be suspended.

“2. The Administrative Tribunal has decided that it has, under its statute, no competence to entertain a request for an advisory opinion. It will thus be necessary that the matter be resolved in the course of appeals regularly submitted to the Tribunal.

“3. Consequently, it has been decided to continue the suspension of reimbursements of national taxes paid on any commuted retirement benefit received from the United Nations Joint Staff Pension Fund which has been in effect since 16 July 1978. . . .”

On 7 December 1978 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The fundamental principles of the independence of international civil servants and the equality of treatment of staff members mandate tax reimbursement. An analysis of the historical development of the tax reimbursement system demonstrates, conclusively,

the consistent intent of the General Assembly to ensure that all United Nations staff members be free to exercise their duties as international civil servants independently and be treated equally regardless of the tax policies of the Member States.

2. Tax reimbursement on lump sum withdrawals from the Pension Fund is consistent with the governing principle of equal pay for equal work.

3. One-third lump sum retirement benefits qualify for reimbursement under Staff Regulation 3.3 (f):

- (i) One-third lump sum retirement benefits constitute "salaries and emoluments";
- (ii) The one-third lump sum pension distribution is paid by the United Nations;
- (iii) One-third lump sum distributions are payable to staff members or officials subject to both staff assessment and national income taxation.

4. The principle of past practice requires continuation of tax reimbursement on one-third lump sum withdrawals from the Pension Fund.

5. The Secretary-General has improperly interfered with the acquired rights of the staff by discontinuing tax reimbursement on one-third lump sum withdrawals.

6. Although the one-third lump sum Pension Fund distribution is not subject to double taxation, it is nevertheless properly subject to tax reimbursement.

7. The failure of the Secretary-General to consult with the Staff Council and/or the Joint Advisory Committee prior to the issuance of the 16 July 1978 Bulletin requires the reinstatement of tax reimbursement payments.

8. Discontinuance of tax reimbursement on one-third lump sum distributions violates fundamental notions of equity and justice.

Whereas the Respondent's principal contentions are:

1. The *travaux préparatoires* of the Convention on the Privileges and Immunities of the United Nations establish that pensions paid to former officials were not intended to be covered by section 18(b) of the Convention.

2. The conclusion that pensions are not exempt from national income taxation under the Convention is borne out by subsequent practice.

3. No sufficient legal basis exists for drawing a distinction between periodic pension payments, and a part of those payments taken, at the pensioner's option, as a lump sum (i.e. partially commuted retirement benefits), which would warrant the conclusion that the former benefits are taxable and the latter are not.

4. The conclusion that there is no sufficient basis for a distinction of the nature just mentioned is borne out by practice, as exemption from taxation for such commuted benefits has not been asserted and reimbursements have not been paid, except for a brief period between the end of 1974 and the middle of 1978, and then only within the United Nations and not, for the most part, within the other organizations that form part of the "common system".

5. The evidence now available shows that the liability of commuted retirement benefits to income tax is not confined to the United States, but is established also in certain other countries, some of which are host States to specialized agencies and are parties, without reservation on matters of taxation, to the Convention on the Privileges and Immunities of the United Nations and the corresponding instruments relating to other common system organizations.

6. Even if the Convention had provided for immunity from taxation of pension benefits, which is not the case, an automatic right to reimbursement of taxes on commuted lump sum payments does not arise in the United Nations, as Staff Regulation 3.3(f) only authorizes reimbursement, with specified exceptions, when the sums concerned are "subject both to staff assessment and to national income taxation".

The Tribunal, having deliberated from 29 January 1979 to 13 February 1979, now pronounces the following judgement:

I. The Tribunal notes that the Applicant plans to retire in February 1980. At the present time, he continues to be a full-time member of the staff of the United Nations.

II. In paragraph III of its Judgement No. 238 (*Carlson*), the Tribunal dealt with the question as to when a Pension Fund participant becomes entitled to a retirement benefit under the United Nations pension scheme.

Furthermore, in paragraph IV of the above-mentioned Judgement, the Tribunal established that, as far as a Pension Fund participant continues to be "in pay status" with his organization within the meaning of article 1(k) of the Pension Fund Regulations, he cannot claim any vested right to his retirement benefit and that consequently the question of tax reimbursement does not arise.

III. (a) The Applicant's first plea that the Tribunal order the rescission of Bulletin ST/SGB/167 of 16 July 1978 must be denied for the reasons stated in Judgement No. 237 (*Powell*).

(b) (i) As regards the Applicant's second plea that the Tribunal order the payment of tax reimbursement on partial lump sum commutation of benefits from the Pension Fund, the Tribunal recalls its Judgement No. 237 (*Powell*) upholding the validity of Information Circular ST/ADM/SER.A/1828 of 16 December 1974;

(ii) As regards the request for payment of tax reimbursement in the present case, the Tribunal holds that, since the cause of action has not yet arisen, no decision is called for.

(c) As regards costs, the Tribunal points out that the three applications dealt with in Judgements Nos. 237 (*Powell*), 238 (*Carlson*) and 239 (*Masiello*) were treated as a single application with the same presentation, documentation and oral hearing. As costs have been awarded in Judgement No. 237, the request for separate costs in the other two cases is denied.

Except as stated in paragraph (b) (i) above, the application is rejected.

(Signatures)

R. VENKATARAMAN  
President

Suzanne BASTID  
Vice-President

New York, 13 February 1979

F. A. FORTEZA  
Member

Jean HARDY  
Executive Secretary

## STATEMENT BY MR. PLIMPTON

I have participated in the consideration of the above case and have concurred as to the substance of the Tribunal's judgement.

(Signature)

Francis T. P. PLIMPTON

New York, 8 February 1979

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**Judgement No. 240**

(Original: English)

**Case No. 228:**  
**Newton**

**Against: The Secretary-General  
of the United Nations**

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*Request by a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East for pension coverage of a period of service prior to 1961.*

*Participation of UNRWA in the proceedings. Applicant's complaint is against the decision of the General Assembly excluding from retroactive coverage staff members who had retired before 31 December 1975.—Judgement No. 229.—The aforementioned precedent is not applicable to the case of the Applicant.—Responsibility for the decision at issue lies exclusively with the General Assembly.—Discretionary power of the Secretary-General with regard to the making of proposals to the General Assembly.—Lawful nature of the distinction between active and retired staff members.—Application rejected.*

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**THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,**

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Endre Ustor; Mr. T. Mutuale, alternate member;

Whereas, on 30 June 1978, Donald C. Newton, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), filed an application the pleas of which read as follows:

“The case rests on a claim for the validation of Mr. Newton's service, for pension purposes, for the period 1952 to 1957 with United Nations Relief and Works Agency (UNRWA).

“The question of coverage by the United Nations Joint Staff Pension Fund of certain staff members of UNRWA for services during the period 1950-1960 received the attention of the Fifth Committee at the Thirtieth General Assembly session. The Secretary-General in his report to the Fifth Committee . . . clearly put forward that ‘on grounds of equity that this situation be rectified’ (paragraph 1). The situation being referred to is the anomaly of ‘. . . unlike staff members of other organs of