

Judgement No. 358

(Original: French)

Case No. 350:
SherifAgainst: The Secretary-General
of the United Nations

Request by a former staff member of UNEP for the rescission of the decision of summary dismissal, for payment of compensation under appendix D to the Staff Rules, for signature of the Separation Notification form for Pension Fund purposes, for a disability pension and for a request to the insurance company to pay compensation.

Direct submission of the application to the Tribunal under article 7.1 of its statute.

Applicant's request for compensation under appendix D to the Staff Rules.—Finding that the case is still before the Advisory Board for Compensation Claims.—Applicant's request for rescission of a decision of the Medical Director with regard to disability pension.—Finding that procedures under the Regulations of the Pension Fund should be used.—Applicant's plea for a request to the insurance company to pay compensation.—The Tribunal has no competence against an insurance company.—Applicant's plea for rescission of the decision of summary dismissal.—Consideration of the reasons therefor.—Conclusion that the Applicant was guilty of serious misconduct and that the Respondent could legitimately proceed with immediate and irrevocable dismissal.—Applicant's plea for an order to sign the Separation Notification form required by the Pension Fund.—Staff rule 103.18 (b) and articles 43 and 45 of Pension Fund Regulations.—Finding that the Administration has no grounds for refusing to issue the Notification, for which all other conditions have been met, in order to secure the payment of a debt.—Respondent's contention that the Tribunal should not exercise its statutory powers to help the Applicant advance his fraudulent schemes ("clean hands" doctrine and the maxim nemo auditur propriam turpitudinem allegans).—The Tribunal holds that it has an obligation to exercise its competence and that it is not a court of equity (Judgement No. 197: Osman).—The Tribunal notes that the Administration may withhold or deduct amounts owed by a staff member only from his emoluments.—Observation that the Administration may consider invoking the financial responsibility of staff members who, through negligence or complicity, enabled the Applicant to commit fraud.—The Tribunal notes that no deductions may be made from the benefits due from the Pension Fund, except for indebtedness to the Fund, and that rights under the Regulations of the Fund may not be assigned.

The Tribunal declares the appeal against the refusal to transmit to the Pension Fund the Separation Notification form well founded.—All other pleas rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Endre Ustor;
Mr. Roger Pinto;

Whereas, on 29 January 1985, Walid Sherif, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application which did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 April 1985, the Applicant filed a corrected application the pleas of which read as follows:

"1. Annulment of the decision concerning arbitrary separation taken by UNEP

"2. Payment of all the compensation and salary to which I am entitled from April 1984 to December 1984

“3. Payment of the compensation necessary in accordance with the rules of the United Nations [Appendix D to Staff Rules]; and annulment of the decisions of the Secretary-General in that respect, in accordance with the attached medical report.

“4. That UNEP should be requested to sign the Separation Notification Form (PF/4) and to send it immediately to the United Nations Joint Staff Pension Fund in New York in order to enable me to receive my pension

“5. Agreement to annul the decision of the Director of Medical Services in New York with respect to disability pension, since the medical report establishes the opposite of what he says.

“6. That the insurance company should be requested to pay compensation for the total loss of a member, in accordance with the attached medical report.”;

Whereas, on 17 June 1985, the Respondent filed his answer, in which he requested the Tribunal to dismiss the Applicant's pleas concerning transmission to the Pension Fund of a PF/4 Separation Notification form or, subsidiarily, to adjourn the case until the spring 1986 session; and to dismiss all the Applicant's other pleas;

Whereas, on 29 July 1985, the Applicant filed written observations;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNEP on 7 July 1979 as a Regional Adviser and was assigned to the Regional Office for West Asia in Beirut, Lebanon. He first received a fixed-term temporary appointment of five months and 25 days at the L-5, step III level. His appointment was extended retroactively for one year, from 1 October 1979 to 30 September 1980. From 13 December 1979 onwards he acted as UNEP Deputy Regional Representative at the Regional Office for West Asia and his appointment, which until that time had been under the 200 series of the Staff Rules, came under the 100 series. On 5 June 1980 he signed a new letter of appointment for a period of one year and three months ending on 31 December 1981.

On 20 August 1980, the Chief, UNEP Administrative Service, authorized the Deputy Resident Representative of UNDP [United Nations Development Programme] in Beirut to pay the Applicant an advance of \$6,000 on the education grant due to him for the period 1980-1981. In a reply dated 28 August 1980, the UNDP Resident Representative informed the Chief, UNEP Administrative Service, that the UNEP Regional Representative and Director of the Regional Office for West Asia had, at a confidential meeting, mentioned “serious reasons to withhold payment of \$6,000 education advance to Sherif”. In a telegram dated 11 September 1980, Mr. Saleh Osman, at that time Chef de cabinet of the Executive Director of UNEP, informed the UNEP Regional Representative and Director of the Regional Office for West Asia that he was requested to authorize payment of the education grant. At the request of the UNEP Regional Representative and Director of the Regional Office for West Asia, the UNDP Resident Representative subsequently paid the Applicant the advance of \$6,000 on his education grant.

On 27 March 1981, the Chef de cabinet of the Executive Director of UNEP recommended that the Applicant's appointment should be extended for two years and stated, in support of his recommendation, that both the Deputy Executive Director and he himself considered the Applicant's performance “fully satisfactory”.

In a telegram dated 31 March 1981 addressed to the Chief, UNEP Administrative Service, the UNEP Regional Representative and Director of the Regional Office for West Asia stated that his "definite and strong recommendation based on [the Applicant's] work performance is that no repeat no extension beyond his present contract period through end December 1981". In a reply dated 31 March 1981, the Chief, UNEP Administrative Service, informed the UNEP Regional Representative and Director of the Regional Office for West Asia that recommendations on the extension of appointments were not submitted directly to the Executive Director of UNEP but required the endorsement of the authority designated for that purpose "which, in the case of the Regional Office for West Asia, was the Deputy Executive Director" and that he should "comply soonest with this procedure". On 2 April 1981, the Executive Director of UNEP approved the extension of the Applicant's fixed-term appointment for another two-year period ending on 31 December 1983; the Applicant and the Deputy Executive Director were informed accordingly on 6 April 1981.

The applicant was transferred to Kuwait as of 1 May 1981.

On 11 May 1981, shortly after his arrival in Kuwait, the Applicant submitted an application for a rental subsidy under the terms of administrative instruction ST/AI/258. In support of his application, he submitted a copy of an "agreement for tenancy of a residential flat" between himself and the Aisha Al-Salem Centre. He certified that the rent was 650 Kuwaiti dinars (KD) per month (approximately \$US 2,300). UNEP approved a rental subsidy of KD 260 per month (approximately \$US 920), later reduced to KD 216 (approximately \$US 764). The Applicant stated that rent was payable three months in advance.

On 7 July 1981, the UNEP Regional Representative and Director of the Regional Office for West Asia refused, in connection with the granting to the Applicant of an annual salary increment, to certify that the services of the Applicant had been satisfactory during the previous 12 months. On the same day, he addressed a memorandum to the Chief, UNEP Personnel Section, in which he explained the reasons for his refusal.

On 17 December 1981, the UNEP Regional Representative and Director of the Regional Office for West Asia evaluated the Applicant's performance during the period 7 July 1979 to 31 December 1981. The Applicant's performance was rated as a "poor performance".

About two months later, in a memorandum dated 4 February 1982, the UNEP Regional Representative and Director of the Regional Office for West Asia informed the Deputy Executive Director that after discussing the Applicant's performance evaluation report with the Executive Director of UNEP and a number of senior officials, he was "withdrawing the . . . report and [would] let the matter rest with headquarters".

On 9 September 1982, the Applicant was informed that the Executive Director of UNEP had approved an extension of his appointment, as of 1 January 1984, up to 31 December 1984.

On 22 October 1982, the Applicant requested a salary advance of \$US 15,000 to pay "advance rental required by landlord, in view of extremely difficult housing conditions in Kuwait". The Applicant produced an "amendment of agreement dated 1/5/81, W. Sherif, apartment 101" on stationery with the letterhead of the Aisha Al-Salem Center, in which the manager of the building certified that, as of 1 August 1982, the Applicant would have to pay his rent one year in advance. The Applicant indicated that, having already paid

three months rent, he must pay for another nine months "to complete one year advance rent ending 30/4/83". His request was granted.

On 1 December 1982, the Office of Personnel Services drew up for the Applicant a letter of appointment for a fixed term of one year with effect from 1 January 1984. The Applicant signed this letter but did not record the date. On 16 December 1982, the Chef de cabinet of the Executive Director of UNEP and the Deputy Executive Director drew up a performance evaluation report for the Applicant covering the period from 7 July 1979 to 15 December 1982. The Applicant's performance was there rated as "very good". The Applicant was, moreover, given seven ratings of "outstanding".

In a memorandum dated 22 March 1983 addressed to the Officer-in-charge, UNEP Staff Services Unit, the Applicant requested a new "rental advance loan" of \$US 15,000, giving the following explanation:

"As you know, in October 1982, I took an advance for rent of my house in Kuwait to be repaid in 12 monthly instalments. At that time, the loan was half of the money needed due to the fact that the big sum of money will be a burden on my salary".

On 28 March 1983, the Applicant requested a salary advance of "\$US 33,575.04 less outstanding advance of \$US 8,750 = \$US 24,825.04". That amount represented the balance of two months rent still owed to the landlord, in addition to the amount for rent payable in advance for the 12-month period from 1 May 1983 to 30 April 1984. The Applicant undertook to provide a statement from his landlord certifying the amount of rent for the coming year.

In a memorandum dated 28 March 1983, the Officer-in-charge, UNEP Staff Services Unit, informed the Chief, UNEP Administrative Service, of the Applicant's request and stated "The staff member has a genuine problem and we are obliged to assist him given that he is based in Kuwait in our service".

The Chief, UNEP Administrative Service, noted the following at the bottom of the memorandum:

"After discussion with Mr. Denis, Chief, Internal Audit Unit, it is agreed to advance the s[taff] m[ember] the total amount required for the annual rent (\$33,575.04) less pending advance from last year (\$8,750), the balance to be repaid effective April 1983 and to be completed in April 1984".

The Applicant subsequently received the sum of \$US 24,825.04.

On 1 November 1983, Mr. Saleh Osman, who had formerly been Chef de cabinet of the Executive Director of UNEP and who had since acted as UNEP Regional Representative and Director of the Regional Office for West Asia in Beirut, informed the Executive Director of UNEP that, in the course of a conversation that he had had with the Director of the Department of Technical Co-operation of the Ministry of Planning of Kuwait, she had requested him to inform the Executive Director of UNEP of the Applicant's failure to pay the rent of the apartment that he had been renting from the Government since his arrival in Kuwait in May 1981. The apartment belonged to the Government Real Estate Administration and had been rented to the Applicant for a monthly rent of KD 156 in the period 24 June to 31 December 1981 and of KD 282 thereafter. According to the UNEP Regional Representative as of 10 October 1983, the Applicant still had not "paid a single cent". He added, moreover:

"According to the records in Mr. Sherif's file with Personnel he has been receiving housing subsidy on the basis of a *monthly rent of KD 650*. The amount of subsidy he received for the period 1 May 1981 to 30 April 1984 amounts to KD 8,568 (eight thousand five hundred and sixty-eight Kuwaiti dinars), which is approximately equivalent to \$US 30,000 (thirty thousand US dollars). The Personnel records also contain information provided by Mr. Sherif that he has paid the rent for his apartment until 30 April 1984 in advance.

"Recommendation

"It is clear from the above information that there is a very serious charge of serious misconduct for Mr. Sherif to answer. As his immediate supervisor I recommend that disciplinary measures under Staff Rules 110.3, 110.4 and 110.5 be applied to this case".

In the light of this information, the Executive Director of UNEP decided, in a handwritten note at the foot of the page, that an official investigation of the affair should be carried out. The Assistant Executive Director of the UNEP Office of the Environment Fund and Administration was entrusted with the task and proposed to the Executive Director of UNEP that the assistance of the Government of Kuwait should be sought since it was difficult to establish the truth in Nairobi. For that purpose, a UNEP official was sent to Kuwait.

In the course of the investigation the Executive Director of UNEP decided, on 1 March 1984, to change the Applicant's duty station from Kuwait to Bahrain. The Applicant was in fact transferred to Bahrain as of 3 March 1984.

On 10 April 1984, the Applicant, who had been invited to Nairobi to exonerate himself from the allegations made against him, admitted in the following letter that he had defrauded the Organization:

"Dear Dr. Tolba,

"I am very sorry about the circumstances which allowed myself to do wrong action concerning the rental subsidy of my house in Kuwait.

"I am here informing your Excellency that with my appologise allowed myself to submit false documents for rent of my house which I have never lived in on the basis of this receipt, I was paid rental subsidy by UNEP for 216 K.D. per month since May 1981 up to March 1984. (I was aiming to live in this house then I got the government house) In fact I am occupying a government house monthly rent is 282 K.D. since May 1981 up to now. I paid to the government up till now 5.950.00 K.D. and I am owing the government 2.600.00 K.D. I will endeavour to settle the money envolved for UNEP and for the government.

"Dear Dr. Tolba,

"Inspite the wrong action I did I am asking you kindly to forgive me for the sake of my family. and I am ready to accept any decision you will take against me even submitting my resignation or terminating my services, but I appeal to your mercy heart to forgive me and keeping in my post either in the Gulf or in Nairobi as I have not any source of income else my salary and I have a family to support and children in schools and universities. and it is very difficult to find a job in my age anywhere else.

"And I shall attend not to do anything which will deceive the organization any more.

"I am sorry for the disturbance I caused to you and I am still hope you will forgive me."

On 11 April 1984, the Chief, UNEP Administrative Service, recommended to the Executive Director of UNEP that the Applicant should be summarily dismissed. The Executive Director accepted that recommendation on 20 April 1984.

On 27 April 1984, the Deputy Executive Director, on behalf of the Executive Director of UNEP, informed the Applicant of his summary dismissal from UNEP effective 27 April 1984. He wrote, in part, the following:

“This decision has been reached, under Staff Regulation 10.2 of Article I of the United Nations Staff Regulations, on the basis of your fraudulent obtainment of funds from the Organization using falsified rental documentation which you have admitted and which constitutes serious and blatant misconduct.

“Please contact the Chief of Personnel as soon as possible in respect of your separation arrangements. Please also note that pending recovery of monies owing to the Organization as a result of your fraudulent action, all payments to you will be withheld”.

On 11 May 1984, the Assistant Executive Director, Office of the Environment Fund and Administration, confirmed to the Applicant the decision to dismiss him from UNEP with effect from 27 April 1984 in a letter in which he wrote, in part:

“Attached for your information and record is a copy of the Personnel Action (p. 35) by which your separation has been implemented. Please note that your sick leave entitlement has been honoured up to 27 April 1984, the date of your separation from service . . .”.

The contents of the letter were also included in a telegram addressed to the Applicant at the Inter-continental Hotel in Nairobi.

On 23 May 1984, the Chief, UNEP Finance Section, informed the Chief, UNEP Administrative Service, that the Applicant owed UNEP the sum of \$US 40,843.08. That sum represented a salary advance, education grant advances and the “disallowed rental subsidy”. It did not include the final assessment of the outstanding travel allowances.

In a telegram dated 24 May 1984 addressed to the Executive Director of UNEP, the Applicant requested payment of salary and per diem. In a reply dated 30 May 1984, the Assistant Executive Director, Office of the Environment Fund and Administration, confirmed to the Applicant his dismissal as of 27 April. He added:

“Your indebtedness to the Organization has now been calculated as approximately forty thousand dollars US. In your letter to Executive Director of TEN April 1984 you expressed your willingness make good this debt. EYE therefore request you authorize Pension Fund release funds due to you on separation in order offset sum owed by you TO Organization”.

On 5 July 1984, the Chief, UNEP Administrative Service, requested the advice of Mrs. Yolanda Auger, Chief, Rules and Personnel Manual Section, Office of Personnel Services at Headquarters in New York, on “any further procedure to be followed towards recovery of funds owed by former staff member in such a case as likelihood his voluntary repayment remote”. In a reply dated 6 July 1984, she stated:

“RECOVERY OF FUNDS OWED BY FORMER STAFF MEMBER MAY BE EFFECTED BY DEDUCTING FROM FINAL SEPARATION PAYMENTS SUM OR SUMS OWING TO ORGANIZATION”.

In the mean time, in a cable dated 20 May 1984 (No. CCY2908-05) the Secretary of the Joint Staff Pension Board, who had been consulted by the Chief, UNEP Administrative Service, had replied:

“INDEBTEDNESS MUST BE DEALT DIRECTLY WITH STAFF MEMBER AS NO DEDUCTION CAN BE MADE FROM ENTITLEMENT DUE AT SEPARATION. PAYMENTS MAY BE MADE CARE OF YOUR OFFICE UPON STAFF MEMBERS WRITTEN REQUEST. ARRANGEMENTS CAN THEN BE MADE AT YOUR END TO SETTLE OUTSTANDING DEBTS.”

On 10 July 1984, the Applicant requested the Assistant Executive Director, Office of the Environment Fund and Administration, to assist him in completing a series of forms relating to his separation from service, including the Separation Notification for the Pension Fund.

Then, on 26 July 1984, the Chief, Rules and Personnel Manual Section, advised UNEP officials to seek the advice of the Office of Legal Affairs and added: “In the meantime do not issue any certification which may result in payment of pension fund benefits to former staff member. If he agrees to release of such payments to Organization advise you consult pension fund on appropriate procedure”.

In a telegram dated 7 August 1984, the Assistant Executive Director, Office of the Environment Fund and Administration, again requested the Secretary of the Joint Staff Pension Board to give a formal ruling

“AS TO WHETHER AND UNDER WHAT MODALITIES UNEP MAY RECOVER ALL OR AT LEAST PART OF WALID SHERIF’S INDEBTEDNESS TO UNEP THROUGH DEDUCTION OR DEDUCTIONS FROM HIS PENSION FUND BENEFITS, ON WHICH QUESTION YOU EXPRESSED NEGATIVE OPINION IN CABLE CCY2908-05 [of 20 May 1984] TO TARBAH [Chief, UNEP Administrative Service]”.

In a reply dated 10 August 1984, the Secretary of the Joint Staff Pension Board stated:

“FUND’S REGULATIONS PROVIDE FOR DEDUCTIONS TO BE MADE FROM ANY BENEFIT PAYABLE ONLY IN THE CASES OF RECOVERY OF INDEBTEDNESS TO THE FUND. NO EXCEPTIONS CAN BE MADE. SUGGEST YOU HAVE WALID SHERIF COMPLETE PAYMENT INSTRUCTIONS FORM PENS. E/7 REQUESTING PAYMENTS BE SENT CARE OF YOUR OFFICE. RECOVERY ARRANGEMENTS MAY THEN BE MADE AT YOUR END”.

In a letter dated 16 August 1984 addressed to the UNEP Personnel Division, the Applicant requested UNEP “for the last time” to send “my official documents to New York—Medical Service and Pension Fund”. In a reply dated 26 September 1984, the Chief, UNEP Administrative Service, informed the Applicant that:

“The Finance Section has established that your indebtedness totals 40,843.08 US dollars (see attached statement).

“ . . .
“ . . . It would therefore be in all our interests if you would sign the attached statement authorizing recovery of the sum you owe to UNEP from your Pension Fund entitlement. In this way, the debt will be clear, the formalities will be completed and any moneys still due to you from the Pension Fund can be released”.

On 20 December 1984, the Assistant Executive Director, Office of the Environment Fund and Administration, addressed to the Applicant the following letter:

"I refer to your request of 10 July 1984, in which you asked us to complete the Separation Notification Form (PF/4) so that you could receive payments from the United Nations Joint Staff Pension Fund.

"We very much regret that, after careful consideration, we are of the view that you are not entitled to receive this form until all matters relating to your former employment are settled.

"You are, of course, aware that, in accordance with the attached statement, you owe UNEP a total of \$40,843.08, in addition, you have, through your position with UNEP, assumed an indebtedness of \$21,298.41 with the Credit Union and \$12,892 with the Government of Kuwait. Yet, without any undertaking on how you intend to settle these debts, you still request us to issue a Separation Notification (Form PF/4) to the United Nations Joint Staff Pension Fund, the effect of which would be to enable you to receive your withdrawal settlement from the Fund.

"In our view, issue of a Separation Notification requires that all matters relating to a former staff member's employment have been settled. Until the matter of your indebtedness to UNEP and to the others to whom you are indebted because of your UNEP connection are settled, the UN will not issue a Separation Notice".

He also added that, if the Applicant so desired, he could appeal the decision directly to the United Nations Administrative Tribunal.

On 17 June 1985 the Applicant filed the above-mentioned appeal with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Even if the Applicant conceded that he was indebted to UNEP, UNEP would not be entitled to refuse to transmit the Separation Notification form to the United Nations Joint Staff Pension Fund and to prevent the Applicant from receiving his pension.
2. The Regulations and Rules of the United Nations Joint Staff Pension Fund stipulate that a pension belongs to the staff member and not to the organization that employs him.
3. UNEP is punishing the Applicant for personal reasons arising out of a dispute between the Applicant and the Executive Director of UNEP relating to the election of the latter.

Whereas the Respondent's principal contentions are:

1. The Staff Regulations require that staff conduct themselves in a manner befitting their status as international civil servants and provide for their summary dismissal in cases of serious misconduct. The Applicant's summary dismissal for deliberately and continually defrauding the Organization of some \$40,000 over a three-year period was a valid exercise of administrative discretion on the part of the Respondent.
2. The Applicant is estopped from seeking to have the Tribunal compel the Respondent to send to the United Nations Joint Staff Pension Fund a Separation Notification form. By virtue of the principles of equity that the Tribunal has applied in its judgements, an Applicant may not request the judges to provide him with the means to engage in fraudulent schemes. The Respondent invokes both the "clean hands" doctrine applied by common law judges and the maxim *nemo auditur propriam turpitudinem allegans* applied by civil law judges.

The Tribunal, having deliberated from 15 October to 7 November 1985, now pronounces the following judgement:

I. (a) The Applicant requests the Tribunal (Plea No. 3) to order the Respondent to pay him the compensation provided for in Appendix D to the Staff Rules. This request is not ready for judgement. It was considered by a medical board convened by the Secretary-General on 12 February 1985 under article 17 of Appendix D. The findings of the medical board were submitted to the Advisory Board on Compensation Claims, which must make a recommendation to the Secretary-General. The Applicant's plea should be directed against the decision taken by the Secretary-General. This is not the case.

(b) The Applicant requests the Tribunal to annul the decision of the Director of Medical Services with regard to his disability pension. The Tribunal notes that the Applicant produces no document constituting a decision. Moreover, the procedures to be followed in applying for disability pensions and for the settlement of disputes arising therefrom are established in the Regulations and Rules of the United Nations Joint Staff Pension Fund. An appeal lies from a decision of the Pension Board. This is not the situation in the present case.

(c) Plea No. 6 of the Applicant is "that the Insurance Company should be requested to pay compensation for the total loss of a member". The Tribunal is not competent to pronounce judgement against a private company or even to address a request to it.

Those pleas are therefore rejected.

II. The facts that gave rise to the Applicant's summary dismissal were conceded by him in his letter of 10 April 1984. He committed fraudulent acts against the United Nations Environment Programme (UNEP) which enabled him to appropriate more than \$US 40,000 in advances to which he was not entitled. He had also made use of his official position to contract a debt of \$US 21,000 with the Credit Union and to avoid payment of almost \$US 13,000 owed to the Government of Kuwait in overdue rent, for a total of almost \$75,000. The Applicant's schemes had not gone unnoticed. Previously, in 1980, the Applicant had obtained an advance against the education grant in circumstances that were somewhat ambiguous. His contract had been extended several times before expiry and on 1 December 1982 was even extended without awaiting the Applicant's performance evaluation report. In a report of 17 December 1981, however, his immediate superior, the UNEP Regional Representative and Director of the Regional Office for West Asia, had rated his performance as "poor". Two months later, having been subjected to certain pressures, he withdrew his report without really giving any explanation.

III. Accordingly, the Tribunal notes that the Applicant was guilty of serious misconduct. After an investigation in the course of which the Applicant acknowledged the facts, the Respondent could legitimately consider that the interest of the service required the Applicant's immediate and irrevocable dismissal.

IV. By virtue of the letter dated 27 April 1984 from the Executive Director of UNEP, the Applicant was separated from service with UNEP as of that day. His status was that of "separation" in accordance with the definition given in article 1 (t) of the Regulations and Rules of the Pension Fund. The Fund should be notified of that situation by the organization to which the Applicant belonged by means of a document known as a "Separation Notification" (PF/4/Rev.1 (5-74)). Such notification enables the Fund to settle

such entitlements to benefits and/or retirement pensions as the Applicant might claim. The Respondent refused to submit the Separation Notification document. On 10 July 1984, the Applicant called upon the Respondent to make the notification. In a first cable, dated 20 May 1984, the Secretary of the United Nations Joint Staff Pension Board had informed the Chief, UNEP Administrative Service, that the Administration was obliged to give the notification required on separation from service. The Secretary confirmed that position in a cable dated 10 August 1984. However, the Respondent, in a letter of 14 December 1984, informed the Applicant that he would not transmit the Separation Notification form to the Pension Fund as long as the Applicant refused to give an undertaking as to how he intended to settle the debts exigible and acknowledged by him to the United Nations, the Credit Union and the Government of Kuwait. The Respondent bases this refusal on the fact that there are exigible and acknowledged debts and that the Applicant neither agrees to pay them nor to make arrangements for their payment by agreement with the Administration.

V. The Tribunal notes that the Respondent does not invoke any express provision of the Staff Rules or of the Regulations and Rules of the Pension Fund authorizing him to refrain from forwarding to the Pension Fund an administrative document attesting to a fact which determines the legal status of a United Nations staff member: in the case under consideration, the fact of the Applicant's separation from service.

VI. Staff Rule 103.18 (b) (ii) to (iv) provides that "deductions from salaries, wages and other emoluments may be made" in the following cases:

- "(i)
- "(ii) For indebtedness to the United Nations;
- "(iii) For indebtedness to third parties when any deduction for this purpose is authorized by the Secretary-General;
- "(iv) For lodging provided by the United Nations, by a Government or by a related institution".

VII. There is a parallel provision in article 43 of the Regulations and Rules of the United Nations Joint Staff Pension Fund covering the recovery of indebtedness to the Fund:

"The Board may deduct from any benefit payable under these Regulations to a participant, or on his account, the amount of any indebtedness to the Fund by the participant or by any beneficiary or third person to whom payment has been made otherwise than in accordance with these Regulations".

As matters stand, the Applicant has no indebtedness to the Fund. Because the Respondent refuses to issue the separation from service document, the Applicant has no valid claim against the Fund.

VIII. Lastly, the Regulations of the Fund prohibit a participant or beneficiary from assigning his rights conferred by the Regulations (art. 45).

In such circumstances, the procedure envisaged by the Respondent and suggested by the Secretary of the Pension Board—namely that the Applicant should instruct the Fund to pay his pension care of the United Nations Administration and that the United Nations Administration should, by arrangement with its debtor, recover its claim—might not have the desired result.

IX. However, the Tribunal considers that the Respondent does not have the authority to use the issue of an administrative document attesting to a

relevant and precise fact in order to bring pressure to bear to obtain from the person concerned with the issue of such a document an act or omission in a domain different from that for which that document is intended. In the case in question, the Administration has no grounds for refusing to issue the Separation Notification, for which all other conditions have been met, in order to secure the payment of a debt, even if it is exigible and acknowledged. Its competence is binding on it. Any refusal to exercise it constitutes a lack of due process.

X. The Respondent is seeking to avoid indirectly the fulfilment of his obligations by invoking two theories that the Tribunal is unable to accept as applying to the case in question.

XI. First, the Respondent maintains that the Tribunal should not exercise its statutory powers when approached by an applicant who uses his right of appeal to the Tribunal in order to advance his fraudulent schemes. The Tribunal is not a court of equity free to exercise its competence or not. The competence of the Tribunal is established by its Statute, and it has an obligation to exercise it. It is unable to grant the Respondent's request that it adjourn the case until its spring session. As the Tribunal stated in its Judgement No. 197 (*Osman*, 1973):

“. . . the Tribunal, as a judicial organ, is bound to apply existing law, including the provisions of its Statute. The Tribunal does not have the power to decide a case *ex aequo et bono*.”

Accordingly, the charge that the Applicant does not have clean hands or a clear conscience is not relevant.

XII. The Tribunal notes with regret that neither the Staff Rules nor the Regulations and Rules of the Pension Fund provide for measures enabling the Administration to withhold or deduct amounts owed by a staff member other than from salaries, wages and other emoluments. By virtue of Staff Rule 103.18 (b) (ii) (iii) and (iv), it rested with the Secretary-General to take the decision to hold the Applicant indebted for the sums he owed to the Administration, to third parties and to a Government that had provided him with lodging. This measure can still be taken if salaries, wages or other emoluments are still due to the Applicant.

XIII. If such a measure has not been taken, or if the deductions made did not completely settle the Applicant's indebtedness, the Administration may, *inter alia*, consider invoking the financial responsibility of those staff members still serving who, through their negligence or complicity, enabled the Applicant fraudulently to appropriate the amounts in question. It rests with the Secretary-General to decide, in accordance with Staff Rule 112.3, to require those staff members to reimburse the amounts owed by the Applicant and to deduct them, under the provisions of Staff Rule 103.18, from their salaries, wages and other emoluments.

XIV. On the other hand, no provision of the Staff Rules allows the Administration to deduct and recover debts still owed by a staff member from benefits due to him from the Pension Fund. The Secretary of the Pension Board informed the Administration on two occasions, on 20 May 1984 and on 10 August 1984, that the Regulations and Rules of the Fund provided for deductions to be made from any benefits due to a participant only for the purposes of the Fund itself. He indicated that no exception could be made.

XV. The Tribunal notes, indeed, that article 43 of the Regulations of the Fund provides only for deductions from benefits for the recovery of indebtedness to the Fund. Moreover, article 45, mentioned above, states:

“A participant or beneficiary may not assign his rights under these Regulations.”

The Secretary of the Pension Fund made the following suggestion:

“Suggest you have Walid Sherif complete payment instructions form Pens. E/7 requesting payments be sent care of your office. Recovery arrangements may then be made at your end”.

This procedure envisages an arrangement involving a payment from the benefits due from the Fund to the Applicant. The procedure was not, however, accepted by the Applicant.

XVI. The Tribunal considers that the Administration should not be left defenceless in such a case. The Respondent and the Fund should seek an appropriate solution to similar situations. The Respondent and the Fund should, for example, determine whether article 43 prohibits an organization which is a member of the Fund from opposing the payment of benefits due from the Fund to one of its former staff members.

XVII. The Tribunal considers that the Respondent may not exercise any right of lien over forms constituting instruments of notification or the like that it is required to provide to the Fund on the separation from service of a staff member. The right of lien is a kind of security interest by virtue of which a creditor who has in his holding or possession property belonging to his debtor can refuse to deliver it until he is paid. It is clear to the Tribunal that the PF/4 Separation Notification form does not constitute “property” belonging to the Applicant that the Respondent may withhold as security interest for his debt. It is a document intended to execute a formality required by statutory provisions, in the case in question provision J(i) of the Administrative Rules of the Fund. In refusing to apply this provision, the Respondent fails to observe a relevant provision of the Regulations and Rules of the Joint Staff Pension Fund. He is obliged to do so.

XVIII. For these reasons, the Tribunal

1. Can only declare the appeal against the refusal of the Administration to complete form PF/4 (Separation Notification) and to transmit it to the Secretary of the United Nations Joint Staff Pension Board to be well founded;

2. Declares unfounded all other requests and pleas of the Applicant, namely pleas No. 1, 2, 3, 5 and 6 concerning the annulment of his summary dismissal, the request for compensation for a service-related illness, the request for a disability pension; and consequently dismisses the Applicant’s claims with regard thereto.

(Signatures)

Samar SEN
Vice-President, presiding

Endre USTOR
Member

New York, 7 November 1985

Roger PINTO
Member

R. Maria VICIEN-MILBURN
Executive Secretary