

Judgement No. 238

(Original: English)

Case No. 233:
Carlson

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

Request for tax reimbursement on a partial lump sum commutation of pension benefits.

Contractual status of the Applicant.—The Applicant continues to be a full-time member of the staff of the United Nations.—Question as to when a Pension Fund participant becomes entitled to a retirement benefit.—Rules 1.1, J.1 and J.2 of the Administrative Rules of the Pension Fund.—Since the Applicant cannot claim any vested right to a retirement benefit, the question of tax reimbursement does not arise in her case.

The Applicant's plea that the Tribunal order the rescission of the bulletin suspending reimbursement of the taxes in question is rejected.—The Tribunal recalls its Judgement No. 237 upholding the validity of Information Circular ST/ADM/SER.A/1828.—Premature nature of the request for tax reimbursement in the case.—Request for costs rejected.—Application rejected.

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, Helen Carlson, a staff member of the United Nations, filed an application in which she 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 14 September 1917, entered the service of the United Nations on 26 January 1950 as a Secretary and was granted a permanent appointment on 17 May 1954. She reached the mandatory age of retirement on 14 September 1977. However, because of the needs of her Department, of which she had become the Administrative Officer, her appointment was successively extended for one year and for a further period of six months due to expire on 31 March 1979.

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.”

On 14 August 1978 the Applicant requested in a letter to the Secretary-General that the administrative decision set out in the Bulletin quoted above be reviewed; her letter read in part:

“Had I known of the possibility of such an administrative decision I might not have accepted my Department’s offer of a one year extension of my contract since I had reached sixty years of age in September 1977.

“My Department has requested that I consider the possibility of an additional extension for six months. My decision in this regard is contingent on your rescission of the decision to suspend the tax reimbursement.

“If your response is in the negative, I would request your agreement to bypass the Joint Appeals Board so that my case may be taken directly to the Administrative Tribunal.”

By a blanket reply dated 31 August 1978 from the Assistant Secretary-General for Personnel Services, the Applicant and all other staff members concerned were advised 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 insure 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".

7. The Applicant presents no evidence that would support an assertion that she was given any specific undertaking, by Respondent or any authorized representative, that the Staff Regulations and Rules or administrative practices in general, or the tax reimbursement régime in particular, applicable to her on the date she would normally have retired (30 September 1977), would not be changed to her disadvantage during the period of extended service.

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

I. The Tribunal notes that the Applicant, upon reaching the normal retirement age of 60, was scheduled to retire on 30 September 1977. Had she done so and had she taken the option granted by article 29 (d) (i) of the Pension Fund Regulations, she would have received tax reimbursement for national income taxes paid on the taxable portion of her partially commuted retirement benefit in accordance with the practice followed by the United Nations since 1974.

II. The Tribunal further notes that the Secretary-General, as an exception under Staff Regulation 9.5, extended—an extension which the Applicant accepted—her active service on two consecutive occasions, for a total period of eighteen months. She is therefore scheduled to retire on 31 March 1979. Thus at the present time the Applicant continues to be a full-time member of the staff of the United Nations.

III. The Tribunal now proceeds to deal with the question as to *when* a Pension Fund participant becomes entitled to a retirement benefit under the United Nations pension scheme. Administrative Rule 1.1 of the Pension Fund reads in part: "Entitlement to a benefit shall . . . vest in a participant . . . on the day succeeding the last day of his contributory service . . ." and the established procedure regarding computation and payment of benefits requires the member organization concerned, upon separation of the staff member, to inform the Pension Fund of his last day of service (Administrative Rule

J.1). In accordance with Administrative Rule J.2, the participant, on his part, "shall specify in writing . . . the benefit and any commutation thereof which he elects in accordance with the Regulations . . .".

IV. In the light of the Administrative Rules mentioned in paragraph III above, it clearly follows that, since the Applicant continues to be, at the date of the present Judgement, "in pay status" with the United Nations within the meaning of article 1(k) of the Pension Fund Regulations, she cannot claim any vested right to her retirement benefit. Consequently the question of tax reimbursement does not arise in her case. In other words, as the Applicant has not yet retired, she is not entitled to exercise her option for the so-called one-third lump sum; that being so, it is obvious that no grounds exist for tax reimbursement.

V. (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

F. A. FORTEZA
Member

Suzanne BASTID
Vice-President

Jean HARDY
Executive Secretary

New York, 13 February 1979

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