

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

Judgement No. 240

(Original: English)

Case No. 228:
Newton

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

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.

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

the United Nations who have full pension coverage for the period, UNRWA staff members find themselves without comparable pension coverage for those 11 years' (that is 1950 to 1960). The Secretary-General submitted a proposal for action of General Assembly aiming at validation, resorting to this means because of the financial difficulties of UNRWA. However, the proposal also put forward that 'only staff members still on the rolls as of 31 December 1975 would be eligible for coverage for the 1950 through 1960 period.' (paragraph 7).

"Applicant requests Tribunal to correct the inequity situation that still prevails, after approval of a proposal which is 'discriminatory', by recommending to the Secretary-General to take appropriate measures for the service of Mr. Newton with UNRWA for 1952 to 1957 be validated for pension purposes or alternatively to grant Mr. Newton a financial compensation equal to the additional pension fund benefits which would have accrued if the Secretary-General had not proposed the cut-off date of 31 December 1975."

Whereas the Respondent filed his answer on 18 September 1978;

Whereas the Applicant requested oral proceedings on 2 March 1979;

Whereas the President of the Tribunal denied that request on 26 March 1979;

Whereas the facts in the case are as follows:

The Applicant joined the international staff of UNRWA on 30 October 1952. As UNRWA was expected to be a temporary agency, there was initially no provision for participation of the international staff members in the United Nations Joint Staff Pension Fund. On 4 February 1957 the Applicant was transferred to UNICEF (United Nations Children's Fund) and as from 5 February 1957 he became a participant in the Pension Fund. On 28 January 1958 he submitted to the Pension Fund an application for validation of his service with UNRWA under article III of the Pension Fund Regulations. On 27 February 1958 the Pension Fund, after an exchange of memorandums with the Personnel Division of UNRWA concerning the contractual status of the Applicant during his service with UNRWA, advised the Applicant that article III of the Pension Fund Regulations as amended on 7 December 1956 did not permit validation of service with UNRWA since staff members of that organization were excluded from participation in the Pension Fund by the terms of their contract of employment. On 12 May 1958 the Applicant asked the Pension Fund to review his application for validation on the ground that his contract of employment with UNRWA did not specifically exclude participation in the Pension Fund. On 16 May 1958 the Pension Fund, having reviewed the application, confirmed that it could not be entertained. On 1 January 1961 the international staff members of UNRWA became associate participants in the Pension Fund. On 1 January 1967 they became full participants in the Pension Fund and provision was made for retroactive coverage of their period of service from 1 January 1961 to 31 December 1966; at the same time, in order to facilitate the possible future recognition of pre-1961 periods of service as contributory service, UNRWA established a Savings Account for Non-Pensionable Service into which UNRWA and the staff member were to pay the amount of contributions, plus interest, which each would have paid into the Pension Fund on 1 January 1967 had the staff member's continuous service immediately preceding 1 January 1961 been included on 1 January 1967 as contributory service for the purposes of the Pension Fund Regulations, it being understood that a staff member leaving UNRWA without having secured pension

coverage of his pre-1961 service would receive the balance standing to his credit in the Savings Account (including both his contribution and that of UNRWA, with interest). On 10 August 1968 the Applicant was transferred to UNIDO (United Nations Industrial Development Organization) where he served until his retirement on 31 December 1974. On 19 March 1974 the Applicant asserted in a letter to the Secretary of the United Nations Joint Staff Pension Board that the Pension Fund, UNRWA and UNICEF had erred in the interpretation of the December 1956 amendment to article III of the Pension Fund Regulations as it applied to his particular case: he contended that the right of validation did exist under the Pension Fund Regulations when his original application was submitted, that this right had not been altered by the amendment to article III, and consequently that his application for validation of UNRWA service was "viable and should be recognized". On 11 April 1974 the Secretary of the Pension Board replied that any claim by the Applicant that, prior to the commencement of his participation, he was wrongfully kept out of the Pension Fund at any time since the beginning of his contractual relationship with UNRWA on 30 October 1952 had to be pursued with UNRWA and the United Nations; with regard to the question of validation in the technical sense of the term under the Pension Fund Regulations, there was no way of reopening it since the Applicant had not, despite his view that the original decision was wrong, taken the necessary steps to challenge it within the appropriate time-limits and by the procedure stipulated in the Administrative Rules of the Fund. On 29 April 1974 the Applicant asked the UNIDO Legal Liaison Officer for a legal opinion as to whether his terms of employment as expressed in his original contract with UNRWA and its subsequent amendments did, or did not, exclude participation in the Fund under the stipulations of article III of the Pension Fund Regulations. On 7 May 1974 the Applicant requested an administrative decision on the same question in a letter to the Assistant Secretary-General for Personnel Services. On 22 May 1974 the Assistant Secretary-General replied that since that matter was so far in the past and nothing in the Applicant's letter suggested that there was any reason to review the matter after such a delay, he was not prepared to take any position on it. On 24 June 1974 the UNIDO Legal Liaison Officer conveyed to the Applicant the view of the Office of Legal Affairs in New York that his claim of entitlement to participation in the Pension Fund during his service with UNRWA was time-barred by reason of his omission to observe the time-limits prescribed by Staff Rule 111.3 and that it was therefore unnecessary to examine any substantive aspects of the matter. On 3 July 1974 the Applicant asked the Secretary-General to review the decision contained in the communication of 22 May 1974 from the Assistant Secretary-General for Personnel Services. On 18 July 1974 he was advised that it would be impossible to provide him with an administrative decision regarding his contractual status with UNRWA since UNRWA was not part of the United Nations Secretariat. On 21 August 1974 the Applicant lodged an appeal with the Joint Appeals Board against the refusal of the United Nations Secretariat to provide him with a legal interpretation on the application of article III of the Pension Fund Regulations to his contract of employment with UNRWA from 30 October 1952 to 4 February 1957. On 9 December 1974 the Applicant asserted in a cable to the Commissioner-General of UNRWA that, since his letter of appointment with UNRWA had not specifically excluded nor made reference to any document excluding participation in the Pension Fund, UNRWA had been obligated to include his name in the Pension Fund register and that its failure to do so involved non-observance of contract. On 12 December 1974 the Director of Personnel and Administration of UNRWA replied that Rule 150 of the International Staff Rules of UNRWA had clearly excluded the Applicant from par-

ticipation in the Pension Fund. During 1975 the Applicant concluded special service agreements with various agencies of the United Nations.

On 12 November 1975, in a report to the General Assembly (document A/C.5/1709), the Secretary-General proposed that certain staff members—a maximum of 45—of UNRWA be covered by the Pension Fund for service during the period 1950 through 1960; the proposal specified that only staff members “still on the rolls as of 31 December 1975” would be eligible for such coverage. On 2 December 1975 the Applicant addressed to the Commissioner-General of UNRWA and to the Under-Secretary-General for Administration and Management a cable reading in part:

“Astonished by document A/C.5/1709 November 12th Fifth Committee agenda item 96 proposing coverage certain UNRWA and UN system staff members but barring those as myself who meanwhile retired on UN pension without UNRWA service coverage. Consider present proposal unjust and discriminatory particularly as UNRWA records include cases pending since 1957 covering staff members meanwhile retired. Request new proposal on grounds on equity also include UNJSPF beneficiaries whose UNRWA pre-1961 service was not covered.”

On 6 December 1975 the Advisory Committee on Administrative and Budgetary Questions recommended acceptance of the Secretary-General's proposal in its seventeenth report to the General Assembly at its thirtieth session (document A/10008/Add.16). On 10 December 1975 the Fifth Committee of the General Assembly decided to recommend that the General Assembly should concur with the recommendation of the Advisory Committee. After the Fifth Committee had taken its decision, the representative of Canada suggested that the Secretariat should examine the implications of its proposal with regard to staff members who had formerly served with UNRWA and who had retired prior to 31 December 1975 and to report to the General Assembly at its thirty-first session on the implications of extending such coverage to those former staff members. The Chairman stated in conclusion that a decision by the Committee was not required, provided the Secretariat agreed to proceed along the lines of the suggestion of the representative of Canada. On 17 December 1975 the General Assembly concurred with the recommendation of the Advisory Committee. On 23 September 1976 the Applicant lodged with the Joint Appeals Board a second appeal in which, after referring to the Secretary-General's proposal that only staff members still on the rolls as of 31 December 1975 should be eligible for coverage for the 1950 through 1960 period, he contested the “administrative decision” of the Secretary-General “to restrict a benefit to certain staff members, consequently depriving other staff members of the same benefit, on the grounds of financial considerations and administrative convenience”. On 6 December 1976 the Secretary-General reported to the General Assembly at its thirty-first session (document A/C.5/31/71) that he was unable to submit a definitive report on the question raised by the delegation of Canada at the previous session, the principal reason being the difficulties surrounding UNRWA and its records; the Secretary-General believed that a reliable report could be prepared and presented to the General Assembly at its thirty-second session, assuming improved access by UNRWA to its records and that they were found to be intact. On 27 September 1977 the Secretary-General submitted his report to the General Assembly at its thirty-second session (document A/C.5/32/14) in which he reviewed various bases on which the Assembly might extend coverage to all or certain former staff members of UNRWA who had failed to benefit from the 1975 decision because they were no longer on the rolls as of the end of that year. On 26 October 1977 the Advisory Committee on

Administrative and Budgetary Questions, in its third report to the General Assembly at its thirty-second session (document A/32/8/Add.2), concluded that the report of the Secretary-General did not address itself to all the implications related to extending coverage to retired staff members for service with UNRWA and that, should the Fifth Committee decide to pursue that question, it might wish to request that the Secretary-General study the matter further. On 21 December 1977 the General Assembly, in its resolution 32/212 III, merely took note of the reports of the Secretary-General and of the Advisory Committee. On 3 May 1978 the Secretary-General agreed to the Applicant's second appeal being submitted directly to the Tribunal. On 30 June 1978 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The report of the Secretary-General to the Fifth Committee started with the premise that a situation of inequity existed and needed to be rectified. This situation is only partially rectified by the proposal of a cut-off date, i.e., 31 December 1975. The proposal in fact creates more inequities by being discriminatory.

2. The Secretary-General received authority to carry out validation for the entire 45 staff members; appropriation, however, was limited to 700,000 dollars "at the present time", i.e., for 1976-1977, therefore not ruling out the possibility of further appropriation.

3. It is clear from the record of the debate that UNRWA staff members were not to be deprived of pension coverage for any period of their service unless they decided of their own free choice not to participate.

Whereas the Respondent's principal contentions are:

1. Nothing in the Applicant's contract or terms of appointment can oblige the Secretary-General to make any particular recommendation to the General Assembly which would have the effect of improving such contractual terms and conditions.

2. Any decision of the General Assembly to limit the grant of a certain new (and expensive) benefit to staff still in service and the failure to offer it also to persons already retired, is not an arbitrary or capricious distinction.

3. The Respondent's authority under the 1975 decision of the General Assembly did not include the right to choose which of the 45 officials would receive the coverage or to provide coverage for differently situated officials or ex-officials.

The Tribunal, having deliberated from 7 to 15 May 1979, now pronounces the following judgement:

I. The Applicant alleges inequity and discrimination resulting from the proposal of the Secretary-General contained in his report to the General Assembly dated 12 November 1975. He requests the Tribunal to correct this "inequity situation" by recommending to the Secretary-General that he take appropriate measures for validation of the Applicant's service with UNRWA for pension purposes. Alternatively, the Applicant requests financial compensation equal to the additional pension benefits which would have accrued had he received coverage for his service with UNRWA.

II. Since the Applicant's pleas relate in essence to the service conditions of UNRWA, that Agency is according to the jurisprudence of the Tribunal (Judgement No. 63, *Hilpern*) a necessary party to the current dispute. As the Respondent undertook in his answer to act also on behalf of UNRWA, the procedural requirement has been met.

III. The Applicant does not assert in the present proceedings that he had a right to Pension Fund coverage under the terms of his appointment with UNRWA. He retired

from United Nations service on 31 December 1974 without coverage of his UNRWA service for the period 1952 to 1957. The Applicant bases his claim upon an event which occurred well after his retirement. Although he formally attacks an action by the Secretary-General, his real complaint is against the decision of the General Assembly which authorized retroactive coverage in the Pension Fund for service with UNRWA in the case of staff members who were in active service on 31 December 1975, thereby excluding those who had retired earlier.

IV. In another case previously dealt with by the Tribunal (Judgement No. 229, *Squadri*), the Administration of UNRWA found that the person concerned, notwithstanding his earlier retirement, was eligible to elect Pension Fund coverage of his pre-1961 service under the said decision of the General Assembly on the ground that on 31 December 1975 he was serving on the staff of an organ of the United Nations. In the present case, the Respondent has stated in his answer:

“During 1975 he [the Applicant] was briefly employed, in April-May for service with the Field Operations Service . . . and in June-July with UNDP (Office of Resident Representative in Iran), on Special Service Agreements (specifying that he was an ‘independent contractor’ not to ‘be considered in any respect as being a staff member of the United Nations’). Applicant was, consequently, no longer ‘on the rolls’ as of 31 December 1975, having retired exactly one year earlier.”

That statement has not been contested by the Applicant. As the Applicant was not in service with any organ of the United Nations on 31 December 1975, he cannot claim that he was covered by the precedent referred to above.

V. In the circumstances of the present case the Tribunal is unable to grant the relief requested by the Applicant. Although the General Assembly acted upon the proposal of the Secretary-General, it was evidently not bound by that proposal and therefore the responsibility for the decision lies solely with the Assembly and not with the Secretary-General. Moreover the Secretary-General’s action in this matter was not an administrative decision which could be rescinded by the Tribunal but a proposal for extending a benefit under the Pension Fund to a certain category of persons. Such a proposal falls outside the Tribunal’s competence.

The making of proposals to the General Assembly lies within the discretionary power of the Secretary-General. While the Tribunal is not precluded from making observations if it considers that legislative acts of the Organization appear contrary to the general principle of non-discrimination (Judgement No. 162, *Mullan*) and such observations can be considered by the competent authorities as recommendations, the present case does not seem to call for such action. The mere fact that a proposal by the Secretary-General and the General Assembly’s subsequent decision distinguish between active and retired staff members and do not extend to the latter category advantages granted to the former can normally not be deemed to constitute unlawful discrimination.

VI. A retired staff member cannot make claim before the Tribunal to benefits which the legislative organ of the Organization sees fit to grant subsequent to his separation from service to staff members still in service. Even if such action is felt by the retired staff member as regrettable or inequitable, he has no legal right to such benefits and in the absence of such right the Tribunal cannot espouse his claim.

VII. The application is therefore rejected.

(Signatures)

R. VENKATARAMAN

President

Suzanne BASTID

Vice-President

Endre USTOR

Member

Geneva, 15 May 1979

T. MUTUALE

Alternate Member

Jean HARDY

Executive Secretary

Judgement No. 241

(Original: English)

Case No. 224:
Fürst

Against: The Secretary-General
of the United Nations

Request for compensation for allegedly unlawful transfer and reassignment.

The Applicant contests the decision to appoint him to a post in Senegal in 1973.—Judgement No. 134.—The Applicant repeats the same arguments that were found unacceptable at that time.—Absence of any new and conclusive evidence.—The post classification system introduced by UNDP in 1973 is irrelevant, since it placed no obligation whatever on the Administration to promote automatically any staff member graded lower than the level of the post to which he is appointed.—The Tribunal concludes that the appointment of the Applicant at the P-3 level involved a valid exercise of authority by the Administration.—The Applicant contests the decision to transfer him to a post of area officer in New York in 1975.—Applicant's contention that the Administration exceeded its powers in assigning him to a post demonstrably to his detriment.—Staff members have an obligation to accept assignments to a specified duty station at a given time.—Judgement No. 165.—Judgement No. 92 is irrelevant.—The contention is rejected.—Applicant's contention that the transfer was to his detriment because it deprived him of the opportunity of promotion.—Contention rejected.—The Tribunal concludes that the two decisions contested by the Applicant represented a valid exercise of authority on the part of the Respondent.

Broader scope of the application.—Applicant's allegations that, in all his dealings with him, the Respondent was motivated throughout by prejudice.—Consideration of the allegations by the Tribunal.—The Tribunal concludes that there was no prejudice, improper motivation or abuse of power on the part of the Respondent.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. H. Venkataraman, President; Mr. Francisco A. Forteza; Sir Roger Stevens;

Whereas, on 17 April 1978, Ewald Viktor Fürst, a former staff member of the United