

(1) orders the Respondent to pay compensation to the Applicant in the amount of \$US 1,500;

(2) rejects all other pleas.

(Signatures)

Samar SEN  
Vice-President, presiding

Herbert REIS  
Member

New York, 28 October 1983

L. de POSADAS MONTERO  
Member

Jean HARDY  
Executive Secretary

## Judgement No. 320

(Original: English)

Case No. 308:  
Mills

Against: The Secretary-General  
of the United Nations

*Request by a former staff member of the United Nations to rescind the decision rejecting the Applicant's request for reimbursement of the United States income tax on a partial lump-sum withdrawal benefit from the Staff Pension Fund.*

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

*Consideration of the entitlement to reimbursement of income tax levied by the United States on a lump-sum payment from the Staff Pension Fund.—Applicant's legitimate expectation to receive such reimbursement in accordance with staff regulation 3.3 (f), information circular ST/ADM/SER.A/1828, Judgement No. 237 (Powell) and information circular ST/IC/77/90.—Question whether by transferring to FAO shortly before reaching the mandatory retirement age in the United Nations the applicant lost the entitlement to tax reimbursement by the United Nations.—Respondent's contention that a staff member's terminal and pension entitlements are established under the rules of the organization from which he retires.—Applicant's contention that the application of this principle would lead to serious anomalies in that a staff member transferring from the United Nations to another organization would lose an important entitlement while in the reverse situation the staff member would benefit from a windfall.—The Tribunal reiterates its finding in Judgement No. 237 that the tax reimbursement on the lump-sum commutation is a terminal benefit, though it may not be payable at the time of separation.—Interpretation of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff.—The view of the Tribunal that the organizations would not normally affect adversely legitimate expectations of staff members, seek to avoid inequities and not act in a way to prejudice certain categories of staff.—Finding of the Tribunal that the Guide to National Taxation of UNJSPB Benefits with Special Reference to United States Taxes cannot serve as vehicle for promulgating official United Nations policy.—Finding of the Tribunal that refusing to reimburse the tax paid by the Applicant would be inequitable and contrary to the principle of equality of treatment.*

*Rescission of the decision rejecting the Applicant's request for tax reimbursement.—Order to the Secretary-General to reimburse the tax the Applicant would have paid if he had retired on the day of his transfer to FAO, with interest.—In case of disagreement on the actual amount, the parties may turn directly to the Tribunal for settlement.*

*Dissenting opinion of Mr. Luis de Posadas Montero.—Having retired as a staff member of FAO, the Applicant is only entitled to rights and benefits due at the time of retirement to staff members of that Organization and not to entitlements due only to those who retire as staff members of the United Nations.*

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Endre Ustor, President; Mr. Luis de Posadas Montero;  
Mr. Roger Pinto;

Whereas at the request of Victor Moore Mills, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 28 December 1982 and 28 February 1983 the time-limit for the filing of an application to the Tribunal;

Whereas, on 22 February 1983, the Applicant filed an application in which he requested the Tribunal to grant the following relief:

“1. Order rescission of the decision of the Secretary-General rejecting the Applicant’s request for tax reimbursement on a partial lump-sum withdrawal benefit from the United Nations Joint Staff Pension Fund, conveyed to the Applicant by the Assistant Secretary-General for Personnel Services in her letter of 14 September 1982;

“2. Order the Secretary-General to reimburse the Applicant forthwith by payment of the smaller of the following two amounts:

“(a) The tax the Applicant would have paid on the lump-sum, as calculated by the Secretary of the Joint Staff Pension Fund, to which the Applicant would have been entitled had he retired on 26 April 1979 on separation from service in the United Nations, or

(b) The tax which the Applicant actually paid on the lump-sum which he received in 1981 upon withdrawal from the Pension Fund;

“3. Order the Secretary-General to pay interest at the prevailing rate, to be added to the tax reimbursement; such interest to be computed as from 14 September 1982, the date of rejection of the Applicant’s request for reimbursement.”;

Whereas the Respondent filed his answer on 22 June 1983;

Whereas the Applicant filed written observations on 16 August 1983;

Whereas the facts in the case are as follows:

The Applicant, who was born on 27 October 1919, entered the service of the United Nations on 10 April 1946 and would have been due for retirement on 31 October 1979. On 18 December 1978, when the Applicant was serving as Chief of the Economic, Social and Human Rights Section of the Budget Division, Office of Financial Services, the Director of the Personnel Division of FAO cabled the Director of Personnel Administration of the United Nations to request United Nations agreement to the inter-agency transfer of the Applicant to FAO as of 30 April 1979 with an initial assignment until 31 October 1981. On 24 January 1979 the Director of the Personnel Division of FAO was informed of the United Nations’ approval of the Applicant’s transfer. On 1 March 1979 a Personnel Officer of FAO formally offered the Applicant a fixed-term appointment not to exceed 31 October 1981 on “Inter-Agency transfer from the United Nations”. By a letter of 26 March 1979 addressed to the Personnel Officer of FAO and copied to the Office of Personnel Services of the United Nations, the Applicant accepted the offer with the following reservation:

“Regarding the formal offer of appointment, I have signed the ‘Terms of Employment’ as requested but I would like to explicitly state that my acceptance is on the understanding that any acquired rights which I have had under my permanent appointment with UN would not be jeopardized or otherwise affected by my acceptance of a fixed term appointment with FAO. Since it is my understanding that under the interagency agreement

regarding transfers, secondment and loans of staff, acquired rights are maintained on transfer, I assume that the reservation expressed above will raise no difficulties, and would appreciate your confirmation on this point.”

On 4 April 1979 the Personnel Officer of FAO stated in a letter to the Applicant:

“I wish to confirm that you will maintain any acquired rights which you have had with UN, when transferring to FAO, Rome, provided they are not in conflict with FAO Rules and Regulations.”

On 27 April 1979 the Applicant began his service with FAO. On 3 May 1979 he addressed the following letter to the Controller of the United Nations:

“This letter is to request a statement on behalf of the Secretary-General regarding my entitlement to reimbursement of taxes on any partial lump sum withdrawal from the Joint Staff Pension Fund.

“As you know, I transferred from the United Nations to the Food and Agriculture Organization of the United Nations effective 27 April 1979.

“Furthermore, I would have been due for retirement on 31 October 1979, and I did not receive any indication that the Secretary-General would offer me an extension of my service beyond that date.

“It is thus clear that my separation from the United Nations is permanent and final.

“Under the terms of ST/SGB/171 dated 14 February 1979, pursuant to a decision of the Administrative Tribunal, members of staff were informed that the suspension of reimbursements of national taxes paid on partially commuted retirement benefits received from the United Nations Joint Staff Pension Fund, which has been in effect since 16 July 1978, is hereby lifted.

“It follows from the above that on separation from the United Nations had I been in a position to withdraw from the Joint Staff Pension Fund I could have claimed reimbursement of any tax on a partial lump sum withdrawal.

“Under the Rules and Regulations of the Joint Staff Pension Fund, however, I am not permitted to withdraw from the Fund as long as I remain in continuous service with a member organization of the Fund. Therefore, no immediate claim for tax reimbursement arises.

“Nevertheless, at such time as I do withdraw from the Joint Staff Pension Fund, provided that no change is made by the General Assembly in the present entitlement to tax reimbursement, I consider that the United Nations will be liable to reimburse such proportion of any tax on a partial lump sum withdrawal as relates to my 33 years of service with the United Nations.

“Since the FAO does not reimburse such taxes and is not bound by the decisions of the Administrative Tribunal on this matter (judgements 237, 238 and 239) which apply only to the United Nations, I would have no claim against FAO for such reimbursement, and it follows that my transfer to the FAO cannot divest the United Nations of a potential liability it had at the time of my transfer.

“I would therefore appreciate your confirmation of the assumption I have made in the second preceding paragraph above regarding the United Nations’ responsibility for reimbursement of tax on a partial lump sum withdrawal.”

On 29 June 1979 the Controller of the United Nations replied:

“This is in response to your letter of 3 May 1979 which I had referred to the Legal Counsel for advice. Having now been provided with his opinion, I would wish to respond to you as follows:

“The issue raised by you is one that was considered explicitly in 1974, at the time that the reimbursement of national income taxes imposed on partially commuted retirement benefits from the Pension Fund was first undertaken. At that time it was realized that since it was likely that other common system organizations would not follow the lead of the United Nations, or in any event might not do so immediately, the following situations were likely to arise: (i) staff members, who, as yourself, had served the United Nations for a long time might, before their retirement, transfer to another organization participating in the Pension Fund that did not reimburse taxes imposed on partial lump sum payments; (ii) staff members who have served for a long time in such an organization might, before retirement, transfer to the United Nations and retire from this Organization. It was concluded at that time that in neither case could any account be taken of the fact that the staff member had also served in an organization other than the one from which he retired, i.e., that in situation (i) the staff member could receive no reimbursement payment either from the United Nations or from his new employer, while in situation (ii) the United Nations would reimburse taxes in respect of the entire lump sum and not only in respect of the portion that could, on some basis of proration, be attributed to the UN service.

“This is a consequence of the principle that a staff member moving from organization to organization within the UN common system can only retire once, at which time his terminal and pension entitlements are established under the Regulations and Rules of the Organization from which he separates. There cannot be a series of partial retirements, resulting in a series of possibly inconsistent termination benefits.

“This conclusion is also in accord with the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances (CO-ORDINATION/R.931/Add.1), sub-paras. 8 (a) and (b) of which provide as follows:

‘(a) A staff member who is transferred will cease as from the date of transfer to have any contractual relationship with the releasing organization, which will therefore be under no obligation to re-employ him should he leave the receiving organization.

‘(b) As from the date of transfer, the entitlements of the staff member will be governed by his contractual relationship with the receiving organization.’

“Since on the date of your transfer from the United Nations you were not, as indicated in your own letter, entitled to a reimbursement in respect of taxes that might be imposed on a lump sum that you were not at that time entitled to receive, no such right *vis-à-vis* the UN could be created later since your contractual rights with that Organization ceased from the date of the transfer. After the transfer, your rights are governed entirely by the rules of FAO.”

On 5 July 1979 the Personnel Officer of FAO informed the Applicant that there was no Rule or Regulation under which FAO might undertake to reimburse any claim for tax which he might pay in the future on the lump sum portion of his

retirement benefits. On 19 July 1979 the Applicant requested the Controller of the United Nations to reconsider the decision that the United Nations would not at any time reimburse the Applicant for any taxes imposed on a lump sum withdrawal from the Pension Fund. On 9 August 1979 the Controller of the United Nations confirmed the conclusion conveyed to the Applicant on 29 June 1979. On 10 August 1981 the Assistant Secretary-General for Personnel Services reaffirmed the position of the United Nations in a letter to the Applicant. On 31 October 1981, having completed his fixed-term appointment and attained the FAO retirement age of 62, the Applicant left the service of FAO. He exercised the option under article 29 (d) (i) of the Pension Fund Regulations to commute into a lump sum one third of the actuarial equivalent of his retirement benefit and subsequently received a lump sum payment of \$201,534.50 upon which he was assessed and paid United States income taxes. On 15 April 1982, in a letter to the Assistant Secretary-General for Personnel Services of the United Nations, the Applicant requested reimbursement of that part of the tax attributable to his lump sum withdrawal benefit which related to his service with the United Nations; he also asked that, if his request was not accepted, the United Nations agree to direct submission of an application to the Tribunal. In a reply dated 14 September 1982 the Assistant Secretary-General for Personnel Services rejected the Applicant's request and stated that the Secretary-General would not object to direct submission of an application to the Tribunal. On 22 February 1983 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's entitlement to refund of tax on a partial lump-sum withdrawal is based on his letter of appointment, Staff Regulation 3.3 (f), Information Circular ST/ADM/SER.A/1828, Judgement No. 237, Secretary-General's Bulletin ST/SGB/171 and General Assembly resolution 34/165.

2. It is clear from subparagraphs 1 (b) and 1 (c) of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff that the agreement was not drafted with the intent that the risk of loss of entitlements or accrued rights should fall upon the staff members of the organizations. On the contrary, the releasing organization is required to eliminate the element of risk and to ensure that staff members concerned are fully informed of and agree to all of the consequences of applying the agreement to them. If it fails to do so, it cannot invoke subparagraph 8 (a) or 8 (b) of the agreement or, for that matter, any of its provisions against them.

3. The Respondent has not shown why the fact that an FAO fixed-term appointment followed the Applicant's separation from United Nations service before he retired under the Pension Fund Regulations should disqualify him from a terminal benefit which would have been payable had retirement occurred directly after separation from the United Nations. The Respondent has also failed to show why the calculation of a terminal benefit, tax reimbursement, which is based on a benefit under the Pension Fund Regulations, the lump-sum benefit, cannot be pro-rated to service attributable to the United Nations without involving some concept of "partial retirement". Furthermore, the Respondent has not demonstrated any legal difficulty which would preclude attribution of part of a lump-sum withdrawal or part of any tax imposed upon it to a particular organization.

Whereas the Respondent's principal contentions are:

1. The United Nations is not liable to reimburse tax levied on salaries and emoluments paid to a former United Nations official at the time of his separation from the service of another organization.

2. The Applicant's entitlements to tax reimbursement on salaries and emoluments paid to him upon his separation from FAO in 1981 are determined by his contract with FAO, pursuant to which he was not eligible for reimbursement of taxes paid on his partial lump sum withdrawal from the Pension Fund.

The Tribunal, having deliberated from 6 to 28 October 1983, now pronounces the following judgement:

I. It is common ground between the parties that the Applicant, who entered the service of the United Nations on 10 April 1946, could have expected to receive on his retirement from the United Nations reimbursement of the income taxes levied by the United States on any lump sum pension payment received from the United Nations Joint Staff Pension Fund. The financial burden of such reimbursement is, through the Tax Equalization Fund, borne by the United States Government as a substitute for the tax exemption generally granted by other Member States.

The Applicant's legitimate expectation was founded on Staff Regulation 3.3 (f) and on Information Circular ST/ADM/SER.A/1828 of 16 December 1974, the validity of which was expressly recognized by the Tribunal in Judgement No. 237 (*Powell*), as well as on circulars of later date such as Information Circular ST/IC/77/90 of 30 December 1977. It was also implicitly recognized in section III of General Assembly resolution 34/165 of 17 December 1979, which cancelled the right to tax reimbursement on lump sum pension payments but only in respect of staff members joining the United Nations Secretariat on or after 1 January 1980.

II. The question at issue between the parties is whether the Applicant has lost his entitlement to tax reimbursement by the fact that on 27 April 1979, shortly before the date he would have attained the mandatory United Nations retirement age (31 October 1979), he transferred to FAO, where he worked under a fixed-term appointment until his retirement on 31 October 1981.

III. The Respondent first stated his position in the letter of the Controller dated 29 June 1979 and quoted above *in extenso*. In this letter, the Controller made no reference to any Staff Regulation or Rule but to the

"principle that a staff member moving from organization to organization within the UN common system can only retire once, at which time his terminal and pension entitlements are established under the Regulations and Rules of the Organization from which he separates. There cannot be a series of partial retirements, resulting in a series of possibly inconsistent termination benefits."

According to the Controller, it follows from that principle "that in situation (i) [namely in the case of a staff member transferring from the United Nations to FAO] the staff member could receive no reimbursement payment either from the United Nations or from his new employer, while in situation (ii) [namely in the case of a transfer from FAO to the United Nations] the United Nations would reimburse taxes in respect of the entire lump sum and not only in respect of the portion that could, on some basis of proration, be attributed to the UN service."

IV. The Applicant considers this position of the Respondent an anomaly. "Under this policy", he states in his application, "the Applicant would lose a very large sum of money as a United Nations staff member transferring to FAO

just before retirement; had the Applicant been an FAO staff member transferring to the United Nations after the same length of service, he would have received a windfall.”

While the Respondent maintains that the existence of “anomalies” does not create rights for the Applicant, the Tribunal has to examine whether the solution of the “situations”—as the Controller described them—must necessarily lead to anomalies or inequities.

V. According to the “principle” invoked by the Controller as quoted in paragraph III above, the “terminal and pension entitlements are established”, in the case of a transfer, “under the Regulations and Rules of the Organization from which [the staff member] separates. There cannot be a series of partial retirements, resulting in a series of possibly inconsistent termination benefits.”

This statement must obviously be qualified insofar as the pension entitlements are not established by the individual organizations but by the United Nations Joint Staff Pension Fund in a uniform way irrespective of the member organization of the Fund in which the staff member concerned was employed. This applies also to the right to commute retirement benefits. The systems of the United Nations and FAO differ, however, in that FAO does not reimburse taxes assessed on lump sum pension benefits.

VI. The Controller in his letter of 29 June 1979 and the Respondent in the proceedings before the Tribunal refer to the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances. The Controller quotes sub-paragraphs 8 (a) and (b) which are, according to him, in accord with the “principle” in question.

VII. The Agreement just mentioned also contains, however, the following provision:

“1 (b) The agreement . . . does not of itself give the staff member rights which are enforceable against an organization. It merely sets out what the organizations will normally do. The agreement can only be enforced to the extent that either the organizations have included appropriate provisions in their administrative rules or the parties have accepted to apply it in the individual case.”

It is evident from this provision that the Agreement is generally not *per se* a source of rights or obligations for staff members.

The Respondent argues that, in the present case, the Agreement does bind the Applicant because it is reflected in the terms and conditions of the FAO appointment. The Tribunal is unable to accept this argument because the FAO appointment merely mentions that the case is an “inter-agency transfer” and says nothing about the Agreement.

VIII. The Tribunal stated in its Judgement No. 237 (*Powell*), paragraph XXII, that the one-third lump sum payment may be regarded as a terminal payment. It is obvious that the reimbursement of the taxes imposed upon the lump sum payment is also a terminal payment, as the Controller seems to recognize in the letter of 9 August 1979 in which he states:

“The only legal basis for any tax reimbursement on Pension Fund lump sum payments is that these might in a sense be considered to constitute terminal payments made by the United Nations itself on the separation of one of its staff members.”

The letter of the Assistant Secretary-General for Personnel Services dated 10 August 1981 also states that:

“the tax reimbursement on the lump sum payment was arranged by the United Nations as a kind of ‘terminal benefit’ for staff members who are separated from service with the Organization.”

The Tribunal notes that the specific feature of the tax reimbursement is that it is not due on the date of separation—as are other terminal benefits—but later, namely, after the individual concerned has paid his taxes which are subject to reimbursement.

IX. As to the question raised in paragraph IV above whether the “situations” resulting from transfers from and to the United Nations must necessarily be solved in a way creating anomalies, the Tribunal finds that this is not the case. The organizations applying the United Nations common system of salaries and allowances have concluded the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff. This Agreement “merely sets out what the organizations will [in case of transfer] *normally* do.” (paragraph 1 (b)) (emphasis added)

Normally the organizations would not, in the view of the Tribunal, adversely affect legitimate expectations of staff members, particularly of those with long years of service like the Applicant; they would seek to avoid inequities and would not act in a way which would prejudice certain categories of staff and give undeserved advantages to others (i.e. to those transferring to the United Nations). In the “situations” mentioned above, inequities can be avoided by pro-rating for the purpose of tax reimbursement the lump sums received both by those leaving and by those joining the United Nations.

X. The Tribunal is not convinced by the argument of the Respondent suggesting a measure of illegitimacy in the Applicant’s effort to have the benefit of extended service in FAO and at the same time maintain his claim for reimbursement of taxes on the lump sum payment he expected from the Pension Fund on the basis of his years with the United Nations. As tax reimbursement is regarded as a terminal payment due to the Applicant by the United Nations for work done for that organization during the period of his service, the fact that the Applicant continued working for a different employer cannot be considered as either reprehensible or legally depriving him of the fruit of his former work.

XI. In the proceedings before the Tribunal, the Respondent referred to Information Circular ST/IC/79/86 on payment of income taxes promulgating the conditions of tax reimbursement for 1979 and specifically drawing the attention of staff to the *Guide to National Taxation of UNJSPF Benefits with Special Reference to United States Taxes* (JSPB/G.11/Rev.2).

To this the Applicant pointed out (1) that the Circular was issued on 29 December 1979, more than 8 months after his transfer, and is therefore irrelevant, (2) that the previous tax circulars did not contain the reference to the Guide in question and (3) that the Guide cannot be considered as an official vehicle for the promulgation of United Nations administrative policy.

The Respondent particularly referred to paragraph 6 of the Guide which states:

“It should be noted that the United Nations only refunds taxes imposed on its own staff members—that is, on officials who at the time of the separation on the basis of which the benefit is paid are covered by the UN Staff Regulations”.

The Tribunal finds that by its very nature the Guide is not a proper means for promulgating staff rules, particularly rules intended to deprive some staff

members of certain rights. It is significant that the Administration never referred to the Guide in the course of its correspondence with the Applicant. Besides, the text of paragraph 6 is, in the view of the Tribunal, ambiguous and therefore should not be interpreted in a way which leads to inequities.

XII. To deny the Applicant reimbursement of the national income taxes levied on that portion of the lump sum pension payment which is the fruit of his service to the United Nations would also run counter to the overriding principle of equality of treatment among the staff members of the United Nations.

XIII. On the basis of those considerations, the Tribunal orders the rescission of the Secretary-General's decision rejecting the Applicant's request for tax reimbursement on his lump sum pension benefit and orders the Secretary-General to reimburse to the Applicant a sum equivalent to the taxes he would have paid on the lump sum pension benefit to which he would have been entitled had he retired from the United Nations on 26 April 1979, and to pay to the Applicant interest on that sum. At the request of the Respondent, to which the Applicant essentially agreed, the Tribunal leaves it to the parties to agree on the amount of tax reimbursement and on the interest, with the proviso that in the event that such agreement cannot be reached, each party shall be entitled to turn directly to the Tribunal for the settlement of the dispute.

*(Signatures)*

Endre USTOR  
*President*

Roger PINTO  
*Member*

Not being in agreement with the conclusions of the Judgement, I set forth my dissenting opinion below.

L. de POSADAS MONTERO  
*Member*

Jean HARDY  
*Executive Secretary*

*New York, 28 October 1983*

I have participated in the Tribunal's deliberations on this case but do not concur with its conclusions for the following reasons:

I. Having retired as a staff member of FAO, the Applicant was only entitled at the time of his retirement to the rights and benefits due to the staff members of that Organization and cannot claim a benefit which is only due to those who retire as staff members of the United Nations.

II. The Applicant was never eligible for the benefit he claims, not being eligible when he left the service of the United Nations because he did not retire then, and not being eligible at the time of retirement because at that time he was a staff member of an organization that did not grant tax reimbursement.

It is also my view that the Tribunal could have based its judgement on the fact of the existence of an undeniable responsibility on the part of the United Nations for not having duly and timely informed the Applicant as to what his entitlements in his new post would be, thus failing to comply with paragraph 1 (c) of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances.

*(Signature)*

L. de POSADAS MONTERO  
*Member*

*New York, 28 October 1983*