



ADMINISTRATIVE TRIBUNAL

Judgement No. 1091

Case No. 1113: DROESSE

Against: The United Nations
Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha Echols; Mr. Omer Yousif
Bireedo;

Whereas, on 23 November 1999, Mr. Gerd Droesse a former participant in the United Nations Joint Staff Pension Fund (UNJSPF) filed an Application requesting the Tribunal:

"...

4. ... to order the UNJSPF to provide:

(a) Copies of all tables of actuarial values which have been established for the determination of benefits of (former) UNJSPF participants electing to transfer their entitlements to the [Asian Development Bank (ADB)] or other organizations with outer circle agreements, and for staff from other organizations (including ADB) with outer circle agreements who are eligible to transfer their pension rights to the UNJSPF ...

(b) The exact amount of the transfer value of the Applicant's pension rights if the [Applicant] had joined [an inner circle organization] effective 11 June 1998 ...

(c) Information on the actuarial values which were applied by the UNJSPF in determining service credits in the last 20 cases where persons from organizations with outer circle agreements transferred, or requested to transfer, their pension rights to the UNJSPF. ...

(d) Clarification as to whether the specific actuarial values applied by the UNJSPF in connection with the Transfer Agreement have been approved by the General Assembly ...

(e) Copies of all correspondence exchanged between ADB and the UNJSPF in connection with the negotiation/conclusion of the Transfer Agreement.

...

5. The Applicant respectfully requests the Administrative Tribunal to be given the opportunity to submit, following submission of all relevant documents by the Respondent, detailed pleadings on the substance of the matter.

...

9. The Applicant seeks the following relief:

(a) Increase of the actuarial value of his pension rights [to reflect] the full value of his pension rights ...

(b) Actuarial damages in line with the tables of actuarial values established by ADB on the difference between the amount to be determined as the real transfer value of his pension rights and the amount transferred to ADB.

(c) Actuarial damages on the amount transferred to ADB because UNJSPF failed to provide the information requested by the Applicant and thus made it impossible for him to take a considered decision on the transfer of his pension rights at an earlier date.

(d) Actuarial damages as of 11 December 1998 on the amount transferred to ADB because UNJSPF did not effect the transfer to ADB by the date mentioned above ...

(e) Damages for ... injury and moral damages for the fact that the UNJSPF consistently withheld information.

(f) Legal costs."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 May 2000 and periodically thereafter until 30 April 2001;

Whereas the Respondent filed his Answer on 24 April 2001;

Whereas the Applicant filed a "Request for a Preliminary Decision" on 29 May 2001;

Whereas, on 28 November 2001, the Tribunal decided to postpone consideration of this case until its summer session and to hold oral proceedings;

Whereas the Applicant filed additional Observations on 18 March 2002 and, on 22 April 2002, the Respondent commented thereon;

Whereas, at the request of the Respondent, on 23 April 2002, the Tribunal decided to postpone consideration of the case until its autumn session;

Whereas, on 3 and 10 May and on 11 June 2002, the Applicant requested production of documents; the Respondent submitted comments thereon on 28 June 2002; and, the Applicant responded to the Respondent's comments on 16 September 2002;

Whereas, on 7 October 2002, the Respondent submitted an additional communication;

Whereas, on 14 and 28 October 2002, the Applicant submitted additional communications;

Whereas, on 31 October 2002, the Tribunal held oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Food and Agriculture Organization of the United Nations (FAO) on 17 July 1983. On 1 September 1996, the Applicant was placed on special leave without pay (SLWOP) from FAO to take up a position with the ADB. Effective 11 June 1998, the Applicant resigned from FAO and joined the ADB on a regular appointment.

The Applicant participated in the UNJSPF from 17 July 1983 until 11 June 1998. During his period of SLWOP, however, he was a participant in the ADB pension scheme and did not remit the necessary contributions to UNJSPF to make the period part of his pensionable service with UNJSPF.

On 1 January 1995, the "Agreement on the transfer of pension rights of participants in the United Nations Joint Staff Pension Fund and of participants in the Asian Development Bank Staff Retirement Plan" (Transfer Agreement), went into effect, as approved by the ADB Pension Committee on 19 August 1994 and by the General Assembly in its resolution A/49/224, on 23 December 1994. This Agreement provides for the transfer of pension rights for staff members

who move from one organization to the other but does not make provision for periods of SLWOP.

On 13 March 1995 and 7 August 1998, the Respondent provided the Applicant with estimates of the transfer value of his pension rights. Also on 7 August 1998, the UNJSPF informed the Applicant that this transfer value would comprise the withdrawal settlement he could take from the UNJSPF as such amount was "substantially higher" than the current actuarial value of his accrued pension rights. Accordingly, the UNJSPF was prepared to transmit the withdrawal benefit to the Applicant or the ADB Plan. On 14 October, the Respondent advised the Applicant of the administrative steps involved in transferring his pension rights, and that the UNJSPF Consulting Actuary would calculate an official determination of the applicable actuarial transfer value. On 2 December, the Respondent transmitted the calculation to the Applicant. On 4 December, the Applicant formally requested a transfer of his pension to the ADB Plan. On 11 January 1999, the sum of \$130,948.63, the transfer value of the Applicant's pension rights, was transmitted to the ADB Plan.

On 5 July 1999, the Applicant appealed the transfer value of his pension rights to the Standing Committee of the UNJSPF. The Standing Committee considered the case at its session held from 13 to 16 July. On 3 August, the Chief Executive Officer, UNJSPF, informed the Applicant that the Standing Committee had noted that a number of his claims were based on the fact that there were no provisions covering staff members on SLWOP in the Transfer Agreement, but concluded that the absence of such provisions had not adversely affected the Applicant, as the transfer had been completed at his request. The Chief Executive Officer further informed the Applicant that

"various other claims [he] had advanced essentially constituted challenges to the substantive provisions of the ... Transfer Agreement ... The Committee also noted that during the entire process, [he was] informed of major developments and received a number of explanations and clarifications from the Fund secretariat, as well as from the Fund's Consulting Actuary.

The Standing Committee therefore decided to deny all [his] claims ... on the grounds that (a) the UNJSPF-ADB Transfer Agreement had been applied correctly in [his] case; and (b) there had been no administrative errors or mistakes on the part of the Fund secretariat while processing [his] case that would entitle [him] to any additional compensation".

On 23 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The UNJSPF failed to act in good faith, having refused to provide the Applicant or the ADB with the criteria applied for the determination of transfer value of pension rights.
2. The UNJSPF discriminated against the Applicant in determining the transfer value of his pension rights.
3. The UNJSPF applies substantially different criteria to determine the transfer value of pension rights of staff who join inner circle organizations and staff who join organizations that have concluded outer circle agreements with the UNJSPF.

Whereas the Respondent's principal contentions are:

1. The various other claims of the Applicant are essentially challenges to the substantive provisions of the Transfer Agreement, as approved by the Pension Board and concurred with by the General Assembly.
2. The terms of the Transfer Agreement were applied to the Applicant without any errors, mistakes or undue delay.

The Tribunal, having deliberated from 24 October to 28 November 2001 and from 29 October to 25 November 2002, now pronounces the following Judgement:

I. In this case the Applicant asks the Tribunal to redress what he considers to be a financial wrong with regard to the transfer of his pension rights from UNJSPF (the Fund). The transfer occurred when he separated from FAO - a member organization of the Fund - to join the staff of the ADB on a permanent basis. He had worked for FAO since 1983 but in 1996 took special leave without pay to work for the ADB, where he remained until his separation from FAO in 1998.

II. Within two weeks of his separation from FAO and his employment at the ADB, the Applicant notified the Fund of his separation and requested a calculation of the transfer value of

his pension rights. Eventually the Fund transferred \$130,948.63 (the withdrawal value of the Applicant's pension benefits) to the ADB Staff Retirement Plan under an agreement between the Fund and ADB – a so-called outer circle transfer agreement. This amount, it said, was higher than the \$83,360 estimated, current actuarial value of the Applicant's accrued pension rights. The Applicant argues, among other things, that this was a less favourable result than applies when a staff member transfers benefits under one of the two inner circle agreements, but that he cannot determine the extent of the discrimination because the Respondent failed to provide him with actuarial tables and other documents.

III. A more specific complaint of the Applicant is that the Fund refused to provide him with adequate documentation (e.g., tables of actuarial values and information on actuarial values) to explain how it calculated the benefits of other persons – including non-United Nations staff members – as well as the transfer value of his pension rights in a hypothetical situation. The documentation is necessary to determine whether there is discrimination between transfer agreements, which affected his own pension rights, according to the Applicant. He asserts that there was discrimination in determining the transfer value of his accrued pension rights in the Fund. The Respondent replies that it applied its rules properly.

IV. The Fund's Regulations and Rules explain that the Fund was "established by the General Assembly of the United Nations to provide retirement ... and related benefits for the staff of the United Nations and other organizations admitted to membership in the Fund". The general rule of Article 21 of the Regulations and Rules of the Fund is that staff members must participate in the Fund until separation from service. Contributions are made by the staff member and the Organization in percentages spelled out in the Regulations and Rules. According to a report from the Fund to the General Assembly, "the United Nations pension scheme is essentially a civil service pension scheme in which the benefits should be more or less proportional to the period of contributory service which a participant has spent in the Organization".

At the oral hearing in this case, counsel for the Respondent explained that the United Nations maintains a "defined benefits" pension scheme, not a "defined contributions" pension scheme. The pension benefit is not based on the actual contributions by the Organization and the

staff member but on the "totality of benefits", although under the Regulations there is a clear breakdown of the contributions made by the staff member (1/3) and the Organization (2/3).

Under the United Nations' system the contributions of the Fund and the staff member to the latter's pension provide only a theoretical total dollar value for the pension. The actuarial assumptions are general and do not take into account sex, age or personal lifestyle (e.g., smoking). It is a system that may provide benefits without full regard to the contributions made by the Organization and the staff member. A staff member does not have a defined monetary amount that is hers or his. For example, if the staff member separates from the Organization after a very short period of service, the total amount of the Organization's contributions to his pension might not be available. However, the system provides a protected pension. The value of the pension does not fluctuate with the market. On the other hand, the staff member owns none of the contributions and so cannot borrow against the pension. The real meaning of this explanation is that the United Nations pension system is unlike a section 401(k) retirement plan in the United States or perhaps even like a military pension in most jurisdictions.

The pension system administered by the Fund rewards those who make their career with the Organization. The theoretical calculations described above reflect this policy. For the first five years of employment both the staff member and the Organization contribute to the individual's pension. However, for example, if the staff member separates after three years of service, the theoretical contributions from the Organization in effect disappear and are not available as part of the pension. The staff member would have available only his or her own contributions plus interest. The longer the individual remains with the Organization, the greater the benefits available on separation. This feature is challenged by the Applicant. The Tribunal finds no basis for finding against this bias in favour of staff who remain with the Organization for a longer period.

V. The Regulations and Rules provide formulae for calculating particular benefits - retirement benefit, withdrawal settlement and disability benefit. For example, a retirement benefit is paid at a standard rate that is the product of the years of contributory service multiplied by a percentage of final average remuneration, with certain limits placed on the benefit. Article 27 of the Regulations and Rules on entitlement to benefits offers either an early retirement benefit, a deferred retirement benefit or a withdrawal settlement to those who separate and are

not yet entitled to a retirement benefit. Article 39, which relates to limitation of entitlement during special leave without pay, does not appear to limit those three choices. In contrast there is no definition of, or special formula for calculating, transfer benefits.

The Regulations of the Fund address the transfer of pension rights in article 13. That article states that

"[the] Board may, subject to the concurrence of the General Assembly, approve agreements with member Governments of a member organization and with intergovernmental organizations, with a view to securing continuity of pension rights between such Governments or organizations and the Fund".

When asked to do so at the oral hearing, neither party provided a clear explanation of the language "continuity of pension *rights*". Their statements focused on pension *benefits*. The Fund appears to interpret these *rights* as the full panoply of retirement related benefits offered under the plan, a general matter without regard to an individual's pension *benefits*. Thus, in negotiating a transfer agreement, the object of the Fund appears to be to find whether the other organization has an equivalent system for determining service credits and, if it does not exist, to negotiate a more complex arrangement for calculating the value of the service credits to be recognized by the new employer. Apparently, the Fund believes that only two organizations – the International Monetary Fund and the Inter-American Development Bank – have equivalent systems. They are the two inner circle organizations.

VI. In its negotiations, the Fund classifies those agencies with benefit systems like those of the Organization within an inner circle and enters into a particular type of agreement regarding the transfer of pension benefits. As explained at the oral hearing, the Fund reviews three factors in deciding whether it should have an inner or an outer circle arrangement. Those three factors are the comparative level of pension remuneration, contributions and benefits provided. When these factors are comparable for the Fund and the other organization, then the period of contributory service is considered equal. For example, an FAO staff member with fifteen years of contributory service in the UNJSPF who leaves FAO and joins an inner circle organization would be taken into that inner circle pension scheme with fifteen years of contributory service. No calculation is needed beyond a determination of the amount the UNJSPF must transfer to the

receiving organization in order for the staff member to maintain his/her years of service credits upon entering into service with the new employer.

Other organizations like the ADB are considered part of an outer circle because their pension schemes are not equivalent to that of the Fund. The UNJSPF pension benefits accumulated by the staff member will buy more or less service credits with the new employer than the person had with the Organization. In this situation, the staff member has the usual three choices: carry two partial pension plans (i.e., leave the pension benefits with the Fund and enroll in a plan with the new employer), withdraw the benefits and invest them privately, or transfer the benefits. In any case, the dollar amount of the benefits is categorized as either a withdrawal settlement or an actuarial value. When a staff member transfers under an outer circle agreement as the Applicant did, apparently, the larger of the withdrawal settlement or the actuarial value is transferred.

The Fund and the ADB entered into a transfer agreement in 1995, entitled "Agreement on the transfer of pension rights of participants in the United Nations Joint Staff Pension Fund and of participants in the Asian Development Bank Staff Retirement Plan". The Respondent included the text of the Transfer Agreement as an annex to its report to the forty-ninth session of the General Assembly (A/49/9). The General Assembly approved the Agreement in resolution A/49/224 of 1 March 1995, thereby acknowledging and concurring with the actions of the Fund. It did nothing to alter its previous delegation of authority to the Fund. The Tribunal finds that the Fund has properly carried out this delegation, including its determination of actuarial values.

VII. Section L of the Fund's Regulations and Rules ("Transfer Agreement") gives certain rights to staff members:

"A participant in the Fund may avail himself or herself of the provisions of any agreement entered into by the Fund for the purpose of securing continuity of pension rights under article 13 of the Regulations of the Fund, in accordance with the terms of the relevant agreement".

Clearly the emphasis is on the continuity of pension rights, i.e., the continuity of the rights acquired as a participant in the Fund as opposed to individual benefits.

According to article II(c) of the Transfer Agreement between the Fund and the ADB, a former participant in the Fund may elect to have transferred an amount equal to the greater of

"(i) The equivalent actuarial value ... of the pension rights which the former UN participant had accrued in the Pension Fund based on his contributory service and final average remuneration up to the date his participation in the Pension Fund ceased; or

(ii) The withdrawal settlement to which he would have been entitled ... upon his separation from the service of a member organization of the Pension Fund."

Also according to article II, the "equivalent actuarial value" is calculated under article 1(a) and 11 of the Fund Regulations and Rules. Under those articles, the equivalent actuarial value is determined according to the predictions evidenced by actuarial tables, including service tables, adopted by the Pension Board. Those predictions are not made public.

According to the Applicant, the Respondent "discriminated" against him because the transfer occurred on terms less favourable than the terms applied to those transferring into the United Nations and less favourable than those applying under inner circle agreements. The Respondent admits that it "differentiates" between inner and outer circle agencies in calculating the transfer value of accrued pension rights. This difference is in part a consequence of dissimilar systems that create different rights as described above. The Fund properly exercises its discretion in maintaining inner and outer circle agreements and in attempting to protect the rights of staff members. The Applicant's pension rights are not affected by the fact that there are two sets of agreements. His pension benefits are not prejudiced either. The Tribunal assumes that whenever possible or reasonable, in its negotiations the Fund makes assumptions and decisions that are favourable to staff members.

VIII. The Applicant claims that his full rights were not continued when he transferred to the ADB Plan. The Applicant asked the Fund to transfer the amount described in Article II(c)(i) - the actuarial value of all service, including the years when he was on SLWOP. Instead, the Fund transferred the Article II(c)(ii) amount - the withdrawal settlement. The Applicant believes that the actuarial value, including the period of his SLWOP, should exceed the value of the withdrawal settlement. The inner circle agreements address the eligibility and treatment of participants with periods of leave without pay but outer circle agreements do not.

Under the Regulations of the Fund, contributory service accrues until the date of cessation of participation including, according to article 25, during a period of SLWOP provided the staff member continues to contribute to the Fund. In this case the Applicant was on SLWOP from FAO to the ADB from 1 September 1996 through 10 June 1998. During that period he did not contribute to the Fund but instead contributed to the ADB Plan.

IX. The Applicant's contentions regarding the calculation of his accrued pension rights are related to his request for the disclosure of certain documents, including actuarial tables and values. The Respondent eventually supplied the Applicant with an explanation of the transfer value calculations made by the Fund's Consulting Actuary but refused to compare that calculation with the calculations that would have been made under transfer agreements with inner circle organizations. The Principal and Consulting Actuary to the Fund wrote to the Applicant in March 1999 describing the actuarial value of the Applicant's accrued pension, saying that it was \$88,756.59 in contrast to a possible withdrawal settlement of \$130,948.63. An actuarial table was not included. The Actuary explained that

"the actuarial value is determined as the lump sum commuted value of the individual's accrued pension, which is assumed to be deferred until normal retirement age. The lump sum factors are a weighted average of factors based on various interest rates and mortality tables, as adopted by UNJSPF. These factors do not take cost of living adjustments into account.

Our calculations indicated a factor of 4.688 ..., which is to say that each \$1 of accrued pension payable at age 60 has a present value of \$4.688. Since [the Applicant's] accrued pension was \$18,932.72 per annum, we determined the present value to be \$88,756.59.

...

In summary, the calculations were performed fully in accordance with the methodology adopted for outer circle transfers. The results are consistent with the results obtained for others of a similar age i.e., that the amount to be transferred equals the withdrawal settlement."

A 1995 letter from the Secretary of the Fund to the Manager of the Compensation and Benefits Division of the ADB contained another explanation of transfer values. One attachment contained a textual explanation of the calculation of transfer value and the other gave an example of the calculation factor used by the UNJSPF to determine the transfer value of a participant at

age 60. In contrast, the Applicant claims that most organizations, including the ADB, provide staff members with actuarial tables. The Tribunal notes that there are wide variations in the information provided to enrollees under different pension and retirement plans.

X. The Tribunal recently addressed the question of transparency and the provision of information to staff members, although neither case involved the Fund. In both cases, the Tribunal said that it is "sympathetic to this legitimate interest in obtaining information" about the review of a staff member's own promotion exercise. (See Judgements No. 1056 *Katz* (2002); and No. 1067, *Ou* (2002).) At the same time, the Tribunal recognized the importance of maintaining some confidentiality in the proceedings. (See *Ou, ibid.*) Thus, the Tribunal is particularly concerned that staff members should have access to information that affects their personal rights. This type of data contrasts with the general information provided in the Annual Letter from the CEO of the Fund.

The Tribunal believes that all of the personal information needed by the Applicant to understand his actual situation and the decisions made about his transfer benefits was provided. The transfer value that would have applied if he had changed to an inner circle organization is not the actual situation of the Applicant and could not have affected the benefits he had in reality. The information provided was a proper response to an individual participant in the Fund. The letters explained how the value of the Applicant's benefits was calculated, although they did not explain the financial assumptions made by the actuary. Those are reported to the Fund's Board. The tables of actuarial values and information about actuarial values requested by the Applicant are unrelated to his case and the Respondent was justified in denying them. The same is true with regard to the correspondence requested.

XI. For the reasons stated above, the Tribunal:

1. Rejects the request for the consideration of this matter by the Tribunal in plenary session; and,
2. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Omer Yousif BIREEDO
Member

New York, 25 November 2002

Maritza STRUYVENBERG
Executive Secretary