



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1495

Case No. 1592

Against: United Nations Joint Staff
Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Sir Bob Hepple, First Vice-President, presiding; Mr. Goh Joon Seng, Second
Vice-President; Ms. Brigitte Stern;

Whereas at the request of a former participant of the United Nations Joint Staff Pension Fund
(hereinafter referred to as UNJSPF or the Fund), the President of the Tribunal granted an extension of the
time limit for filing an application with the Tribunal until 29 February 2008; and once thereafter until 30
April;

Whereas, on 25 April 2008, the Applicant filed an Application requesting the Tribunal, inter alia:

“II. PLEAS

6. [To]:

....

(b) ... consider the present [A]pplication receivable under [a]rticle 7 of its Statute
and [a]rticle 22 of its Rules.

7. [To]:

(a) ... rescind the decision of the United Nations Joint Staff Board’s Standing
Committee rejecting the Applicant’s request to review under Rule K of the UNJSPF’s
Administrative Rules of the decision of the UNJSPF refusing his claim for payment of
accumulated benefits he is entitled to for the period 1 January 1997 to 31 December
2006;

(b) ... order that the Applicant's accumulated benefits, payment of which was deferred during his term of office as Secretary-General, be paid with interest calculated at 8% from 1 January 2007[.]”

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 30 September 2008; and once thereafter until 31 October 2008;

Whereas the Respondent filed his Answer on 31 October;

Whereas the Applicant filed Written Observations on 14 May 2009;

Whereas the Respondent submitted additional documentation on 14 October 2009;

Whereas the Applicant submitted additional documentation on 30 October 2009;

Whereas the Tribunal received two additional communications from the Respondent dated 3 and 25 November 2009;

Whereas the facts of the case read as follows:

The Applicant first entered the service of the Organization in 1965. He participated in the UNJSPF from June 1966 through December 1996, with a break in service from 20 November 1974 to 19 November 1975. On 31 December 1996, his appointment as a staff member and his participation with the UNJSPF ended when he was elected as Secretary-General (SG). Thereafter, he did not resume any participation in the UNJSPF. He served as SG from January 1997 to January 2007.

On 9 January 1997, the UNJSPF created an “Aide Memoire” wherein it listed the possible courses of action with respect to pension benefits, taking into account the Applicant's unique situation - his participation in the UNJSPF as a staff member prior to being elected as SG. The Applicant claims that the Aide Memoire was not communicated to him, but nonetheless, the final course taken by the UNJSPF did not conform to any of the options cited in the document.

On 14 January 1997, the then Secretary of the United Nations Joint Staff Pension Board (UNJSPB) addressed an unsigned “draft” letter to the Special Assistant to the Secretary-General emphasizing that due to concerns as regards “perceived inconsistency” and with double-dipping, the best option for the Applicant would be to voluntarily suspend payment of any Pension Fund benefit during his term as SG, without “nullifying any part of his UNJSPF benefit entitlements and options”. The Applicant maintains that this document was not sent to or seen by him or his Special Assistant.

On 28 January 1997, the Applicant completed the UNJSPF's payment of benefits form covering the period of his prior participation in the UNJSPF as a staff member. He selected the option of “One-third lump sum, or \$ __, if less than one-third, OR your contributions with interest, if greater AND the balance as an early retirement benefit” under the heading of “Early Retirement Benefit For Participants Who Have Reached Age 55, But Have Not Reached The Normal Retirement Age (Article 29) ...” Furthermore, in the payment instructions section, he requested that “payment of [his] periodic benefit be suspended during the period of [his] service as UN Secretary General”.

On 3 February 1997, the then Secretary of the UNJSPB informed the Applicant that:

“[f]ollowing your separation, and in accordance with your benefit election, you have become entitled to an early retirement benefit under article 29 of the Pension Fund Regulations. As you have decided to commute a portion of your benefit into a lump sum, arrangements have been made to remit the lump sum in accordance with your payment instructions. Your reduced periodic benefit will be subject to cost-of-living adjustment under the Pension Adjustment System. However, in accordance with the request made in your payment instructions, payment of the periodic benefit will be suspended during the period of your service as Secretary-General of the United Nations”.

On 27 November 2001, the new CEO of the UNJSPF informed the Applicant that as per his payment instruction dated 28 January 1997, his monthly retirement benefit would be “suspended and not payable during the period of [his] service as Secretary-General...”. He was further informed that cost-of-living adjustments would be applied to his periodic benefits from January 1997 onwards.

On 21 December 2001, the new CEO of the UNJSPF notified the Applicant that the “suspension” of the payment of periodic Pension Fund benefits was suspended along the lines of article 40 (a) of the UNJSPF Regulations and that as such any benefits attributable to the timeframe he served as SG would not be payable.

On 27 June 2006, the Applicant wrote to the CEO of the UNJSPF regarding his prior voluntary request to defer payment of his accrued periodic benefits until after his tenure as SG and informed him of the banking instructions where the Fund may transfer the accrued payment as his tenure as SG would expire on 31 December.

On 30 June 2006, the CEO of the Fund informed the Applicant that a 3.4 per cent cost-of-living increase was applied to his UNJSPF early retirement benefit as of April 2006. He was also informed of the total amount of his monthly benefits payment.

On 7 July 2006, the Applicant informed the CEO of the UNJSPF that he disagreed with the Fund’s interpretation of their 1997 arrangement and requested that the Standing Committee review the matter.

On 31 August 2007, the CEO of the UNJSPF notified the Applicant that the Standing Committee of the UNJSPF held its 190th meeting on 11 July 2007 wherein they concluded that the arrangement entered into by the parties as regards the Applicant’s accrued benefit during the period he served as SG was “appropriate and legally valid”, that the SG had voluntarily selected the option that placed him in the same situation as retired staff members who returned to service pursuant to article 40 of the Fund, and therefore, the payment of his periodic benefits were correctly suspended during the timeframe he served as SG.

On 25 April 2008 (*extension previously approved*), the Applicant filed his Application with the Tribunal.

The Respondent claims that the present Application is irreceivable as the Applicant did not request review from the Standing Committee when the issue was actively being considered in 1997 or when he received the official benefit letter from the Fund dated 3 February 1997. Additionally, the suspension decision was further explained to the Applicant on 27 November and 21 December 2001, but he did not request review until June/July 2006. Therefore, the Respondent contends that the Applicant’s request for review to the Standing Committee and his current Application before the Tribunal should be considered as time-barred. The Applicant disagrees because his understanding of the issues was completely opposite of that of the Respondent’s and that was the reason why he did not raise the issue of the suspension while he was in office, until the summer of 2006, when he was informed that the Fund considered “suspension” to signify

forfeiture, and thereafter he timely requested review from the Standing Committee, who accepted to review his claims.

On 25 April 2008, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Application is receivable.
2. He suspended payment of his pension benefits during the period he served as Secretary-General, with the understanding that payment would resume after the completion of his term as Secretary-General, including the accumulated benefits.

Whereas the Respondent's principal contentions are:

1. The Application is not receivable.
2. The Applicant agreed to forfeit his pension benefits during the period he served as Secretary-General.

The Tribunal, having deliberated from 26 October to 25 November 2009, now pronounces the following Judgement:

Issues

I. The Applicant was an active participant in the UNJSPF from 1 June 1966 until 31 December 1996, when he ceased to be a UN staff member. From 1 January 1997, he took office as Secretary-General, having been elected by the General Assembly for an initial five-year term. He was re-elected for a second term which expired on 31 December 2006. He was the first UN staff member in the history of the Organisation to be elected to this high office, and this represented an unprecedented situation for the UNJSPF. The main issues in dispute are (1) whether the Applicant voluntarily gave instructions to the UNJSPF that his entitlement to periodic benefits which he had earned while a staff member should be suspended without any retroactivity during the period in which he held the office of Secretary-General, and, if so (2) whether such an instruction was lawful and valid.

Time limits

II. The Respondent has raised as a preliminary issue the question whether the application is time-barred. The Respondent claims that the Applicant should have challenged the Respondent's interpretation of their mutual agreement, reached in early 1997 and set out in the Respondent's letter to him dated 3 January 1997, at the latest when he received letters dated 27 November and 21 December 2001, from the new CEO of the UNJSPF. Those letters stated that the word "suspension" of benefits was intended to have the same meaning as the term "suspended" in Article 40(a) of the UNJSPF Regulations, i.e. with the result

that the UNJSPF benefits attributable to the time period concerned (during office as Secretary-General) were not payable to the Applicant. It was only after his request (by letter dated 27 June 2006) for payment of accumulated periodic payments for the period January 1997 to December 2006 had been rejected by the CEO of the UNJSPF (by letter dated 30 June 2006) that the Applicant (by letter dated 7 July 2006) availed himself of the provisions in Rule K.5 of the Administrative Rules of the UNJSPF in order to request a review of the CEO's decision by the Standing Committee. On 31 August 2007, the Applicant was informed that the Standing Committee had confirmed the CEO's decision to deny the Applicant periodical benefits for the period while he held the office of Secretary-General. The Application to the Tribunal was filed on 25 April 2008, an extension having been previously approved.

III. The Applicant states that his understanding of the "suspension" of payment of benefits was completely the opposite from that of the Respondent, but that it was not appropriate for him to seek a review until he had made a formal request for payment and this had been refused by the CEO. The Tribunal notes that no point was raised about time-limits during the course of the consideration of the review by the Standing Committee of the UNJSPB. Moreover, the Applicant was not contesting the withholding of payment of his benefits while he was in office. The new CEO's letters of 2001 expressed the Administration's interpretation of the agreement made in 1997, but they did not constitute a decision. Such a decision could not be validly reached until a formal request for payment of accumulated benefits was made in 2006. The Applicant promptly sought a review of the decision to deny him those benefits. Accordingly, the Tribunal finds that the Application is receivable.

The instruction about suspension of payments

IV. It is not in dispute that at the time the Applicant was separated from service as a staff member on 31 December 1996, having not yet reached the normal retirement age, he became entitled to receive an early retirement benefit under article 29 of the UNJSPF Regulations. It is also not in dispute that the Instructions for payment of benefits dated 28 January 1997, which he gave to the UNJSPF, were to elect for early retirement benefit, and specifically to elect for "one-third lump sum ... and the balance as early retirement benefit". The Payment Instructions attached to this form were for "remittance to my account as follows: I REQUEST THAT PAYMENT OF MY PERIODIC BENEFIT BE SUSPENDED DURING THE PERIOD OF MY SERVICE AS UN SECRETARY-GENERAL". It is the meaning and effect of these words (in capital letters in the original), that are contested.

V. The Applicant contends that he agreed only to "suspend" payment, in the sense of a deferment of payment of accumulated benefits, for the period he held office as Secretary-General. The Respondent, on the other hand, argues that the Applicant agreed to "suspension" in the sense of a forfeiture or waiver of periodical benefits during his period in office as Secretary-General. On their face, the words "that payment of my periodic benefit be suspended" are ambiguous. They are capable of being interpreted in either way.

Accordingly, it is necessary for the Tribunal to investigate the sense and meaning of the words used on the basis of the evidence of all the relevant surrounding facts available to the parties at the time the Payment Instruction was given by the Applicant, and accepted by the UNJSPF. The Tribunal has to put itself in the factual matrix in which the parties were at the time the Applicant gave his Instruction, and to determine what the words used in the Payment Instruction would convey to a reasonable person against the background of the Applicant's election as Secretary-General. Some of the evidence produced relates to facts subsequent to the undertaking being signed and accepted (e.g. the periodic cost-of-living notifications sent by the UNJSPF to the Applicant). In the Tribunal's judgement, this evidence of subsequent conduct is not relevant or admissible to show the meaning of the Payment Instruction, otherwise it could be argued that the Instruction meant one thing when it was signed and another thing at a later stage. The question is what the Applicant's words would convey to a reasonable person at the time the Instruction was given.

VI. A number of the surrounding facts support the Applicant's interpretation. Firstly, he was elected as Secretary-General by the General Assembly and all his terms and conditions of service fell to be set by the General Assembly. He was not a staff member of the UN Secretariat; on the contrary, all the staff of the Secretariat are appointed by the Secretary-General under Regulations established by the General Assembly (article 101, UN Charter). While staff regulation 6.1 provides for participation of staff members in the UNJSPF, this does not include the Secretary-General, and the terms on which the Applicant was appointed by the General Assembly did not specify that he would be a participant in the UNJSPF. The terms of employment of the Secretary-General included a separate non-contributory retirement allowance paid out of the regular budget of the Organisation. From time to time the General Assembly has modified the UNJSPF Regulations in order to accommodate new activities (see, e.g. Supplementary Article B), but it appears that the General Assembly has never considered the treatment to be accorded to a UNJSPF periodic benefit that a serving Secretary-General could receive while in office based on participation while a staff member.

VII. Secondly, the General Assembly and the Office of Human Resources Management at no time sought to apply to the Applicant any measure aimed at "double dipping". This refers to the receipt by a UNJSPF retiree, with respect to the same period, of both a UN salary and a UNJSPF pension benefit. The issue first arose in connection with the hiring of consultants. By its decision 51/408 of 4 November 1996, the General Assembly established "a ceiling across the board of 22,000 US dollars per calendar year ... for the employment of retired staff in respect of a pension benefit from the UNJSPF". The Tribunal considers that the General Assembly could have stipulated that the Applicant would forego his UNJSPF pension for the period he held office as Secretary-General, or it could have placed a cap on his earnings as Secretary-General having regard to his UNJSPF pension. However, the Office of Human Resource Management never discussed this with the Applicant, nor did they seek to impose such a condition on the Applicant's service as Secretary-General.

VIII. Thirdly, article 40 (a) of the UNJSPF Regulations (effect of re-entry into participation), deals solely with a former participant who is entitled to a benefit under the Regulations. Article 40 (a) provides that:

“[i]f a former participant who is entitled to a retirement, early retirement or deferred retirement benefit under these Regulations again becomes a participant, entitlement to such benefit or to a benefit derived therefrom shall be suspended and no benefit shall be payable until the participant dies or is again separated.”

Clearly, this did not apply to the Applicant who never re-entered into participation.

IX. Against these considerations, the Respondent contends that the Applicant, by signing the Payment Instruction, voluntarily forfeited his benefit for the period in question. The evidence in support of this is principally a statement of 2 October 2008 by the former CEO of the UNJSPF, wherein he states that in view of the concerns about “double dipping”, in January 1997, he met in person with the Applicant and his Special Assistant. He says that he stressed to them that “any UNJSPF benefit election on his part could not result in his receipt of a UNJSPF monthly pension with respect to all or part of the period he served as UN Secretary-General. To do otherwise would be in conflict with the UN General Assembly’s firm position against ‘double dipping’ ... Furthermore, it was made very clear that the concept of ‘double dipping’ could not be circumvented by the simple device of choosing to delay the payment of the UNJSPF pension until the UN salary was no longer payable, and then receiving the UNJSPF benefit for the period in question retroactively”. The former CEO claims that he provided an aide-memoire dated 9 January 1997, and a draft memorandum dated 14 January 1997, to the Secretary-General’s Special Assistant. The gist of these was that the Applicant should consider avoiding “double dipping” by accepting a voluntary “suspension” of periodic benefits, which would parallel article 40 (a) of the Fund’s Regulations.

X. The former CEO’s version of the discussion is contradicted by the Applicant in his statement of 22 April 2008. While he acknowledges that the former CEO “indicated that I might wish to consider avoiding the appearance of receiving an income from two sources during my term as Secretary-General by agreeing to suspend payment of my periodic benefits until I left office ... I was never advised that I would be required to forfeit those benefits and that was not my understanding”. The Applicant denies that he received the aide-memoire of 9 January 1997. In a supplementary statement of 24 March 2009, filed with his Written Observations, the Applicant states that he did not authorise his Special Assistant, or anyone else, to discuss his pension entitlements (a confidential matter) with the former CEO, and that he did not receive any written communication from the former CEO or from the UNJSPF at the time. In particular, he did not see the draft memorandum dated 14 January 1997 addressed to his Special Assistant. In her statement of 15 March 2009, the Secretary-General’s Special Assistant supports this and states that she has

“no recollection of any such discussions or having seen any written documents concerning his entitlements”.

XI. This conflict of evidence between the Applicant and his Special Assistant, on the one hand, and the former CEO of the UNJSPF, on the other hand, has placed the Tribunal in a very difficult situation. There has been no opportunity to cross-examine the witnesses in order to establish where the truth lies. The evidence is circumstantial and is finely balanced between the two versions. On the one hand, there is no corroborative evidence to support the former CEO of the UNJSPF’s statement that he “exchanged” the written communications with the Applicant and his Special Assistant. In any event, those allegedly contemporaneous documents do not expressly state that the Applicant was informed that he would be expected to forego his benefits for the period he held office as Secretary-General. The former CEO was clearly seriously concerned about the problem of “double dipping”, but the documents go no further than to suggest a number of options that the Applicant might consider in order to avoid the “perceived inconsistency” with General Assembly resolutions. They do not rule out the entirely credible possibility that the Applicant could avoid any appearance of conflict of interest by deferring payment until he left office. The most remarkable feature of the evidence is that no agreed note of the alleged discussions was minuted, and neither after the discussion nor after receipt of the Payment Instruction did the former CEO confirm in writing that the Instruction was being interpreted to mean that the Applicant was foregoing his benefits. His letter of 3 February 1997 to the Applicant states: “...[I]n accordance with the request made in your payment instructions, payment of the periodic benefit will be suspended during the period of your service as Secretary-General of the United Nations”. It was not until four years later, when the new CEO wrote to the Applicant on 21 December 2001, that it was expressly stated that the UNJSPF understood the word “suspension” in the sense used in article 40 (a) of the UNJSPF Regulations, i.e. “with the result that the UNJSPF benefits attributable to the time period concerned *are not payable to you*”.

XII. On the other hand, an inference could be drawn against the Applicant because of his failure to respond to the letter of 21 December 2001. He says that the reason was that it was well-known that his interpretation was the direct opposite of that set out in the letter, but prudence would have dictated a reply. Moreover, it can be said against the Applicant’s version that, as a participant in the Fund for over 30 years, he must have been well aware of the use of “suspension” in article 40 of the UNJSPF Regulations, and, had he intended a different meaning he could have made his Instruction in words such as “postponement” or “deferral” rather than “suspension”.

XIII. In resolving this conflict of evidence, the Tribunal is guided by the principle, well-established in its jurisprudence, that in complex matters relating to pensions, “the Administration has to be especially careful” (Judgement No. 1185, *Van Leeuwen* (2004)) and transparent (Judgement No. 1091, *Droesse* (2003)). Moreover, “[t]he Tribunal assumes that whenever possible or reasonable, in its negotiations the

Fund makes assumptions and decisions that are favourable to staff members”. (Judgement No. 1091, *Droesse*, para. VII). An example is to be found in Judgement No. 395, *Oummih et al.* (1987), in which the Tribunal had to decide on different meanings attached to the term “defer”. The Tribunal held that:

“[t]here is a very substantial difference between a temporary withholding (however prolonged) of a sum otherwise due and, in effect, the abolition of the entitlement to receive it. Given the ambiguity of the Secretary-General’s decision, it is open to the Tribunal to interpret its legal effect and in doing so the guiding principle to be observed, in the circumstances of this case, is that the decision should be construed as having a lesser rather than a greater adverse effect on the rights of the staff under the Staff Regulations and Rules.”

XIV. In the present case, the UNJSPF failed to act carefully and transparently in order to ensure that the consequences of the wording used by the Applicant in his Payment Instruction were made clear to him. In view of the ambiguity, the Instruction must be construed as having a lesser rather than a greater adverse effect on the Applicant’s vested pension entitlements. Not without hesitation, the Tribunal finds that the Respondent has failed to establish on the balance of probabilities, that the word “suspend” was used in the sense of a forfeiture of periodic benefits.

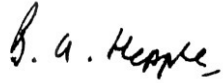
Is renunciation of pension entitlements legally possible?

XV. In view of this finding, it is not strictly necessary for the Tribunal to consider whether, had an Instruction been given to forego benefits to which the Applicant was entitled, this would have been lawful and valid. This is a matter of general importance. The legal systems of the Member States of the United Nations generally do not permit “contracting-out” of legal entitlements unless there are strict safeguards for individuals and necessary procedures have been observed. Article 40 of the UNJSPF Regulations makes such provision in relation to UN staff members who re-enter as participants in the Fund. If the General Assembly wishes to expand and clarify the circumstances in which renunciation is permitted, it should do so by express provision.

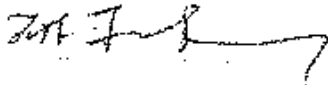
XVI. Accordingly, the Tribunal:

1. Rescinds the decision of the UNJSPB’s Standing Committee refusing the Applicant’s claim for payment of accumulated benefits to which he is entitled for the period from 1 January 1997 to 31 December 2006; and
2. Orders that the Applicant’s accumulated benefits be paid with interest calculated at eight per cent per annum from 1 January 2007.

Signatures)



Bob Hepple
First Vice-President



Goh Joon Seng
Second Vice-President



Brigitte Stern
Member

New York, 25 November 2009



Tamara Shockley
Executive Secretary