

VI. The Tribunal notes that if the Applicant's appointment had in fact been extended for one year, as the Government of Trinidad and Tobago had originally requested, and if the Applicant had been terminated at the end of one month, he would have been entitled, in accordance with annex III to the Staff Regulations, to an indemnity equivalent to five days' salary for each of the 11 months remaining before the expiration of his contract—a total of 55 days. The Tribunal considers that compensation equivalent to that provided for by annex III should be granted to the Applicant because of the behaviour of the Respondent mentioned above.

VII. For the foregoing reasons, the Tribunal decides that the Respondent shall pay to the Applicant an indemnity equal to his net base salary for a total of 55 days.

(Signatures)

Suzanne BASTID
Vice-President, presiding

Zenon ROSSIDES
Member

New York, 16 October 1973

Roger STEVENS
Member

Jean HARDY
Executive Secretary

Judgement No. 179

(Original: English)

Case No. 174:
Ashton (Compensation for being prevented from requesting validation of non-pensionable service)

Against: **The Secretary-General of the International Civil Aviation Organization**

Claim by a former technical assistance official of ICAO for compensation for the injury caused him as a result of having been deterred from requesting in due time the validation by the Joint Staff Pension Fund of service completed before his participation in the Fund.

Claim for compensation based on the pleas that, as a result of the issue of the circular dated 26 February 1958, the Respondent dissuaded the Applicant from requesting validation within the prescribed time-limit.—Need to examine first of all whether the Applicant's failure to comply with the time-limit prescribed for requesting validation resulted directly from the circular.—The circular construed by the Tribunal in its Judgements Nos. 89 and 152.—Conclusion of the Tribunal that the circular would normally have dissuaded a staff member from applying for validation.—Circumstances related to his own contractual status may have caused the Applicant not to seek validation.—In order that the question of the Respondent's liability may arise, it must be established that the circular was the only reason which motivated the Applicant's abstention.—Impossibility of considering the circular as the only reason for the Applicant's abstention.—Conclusion of the Tribunal that the damage, if any, suffered by the Applicant, is not directly attributable to the Respondent's actions.

Argument of the Applicant that the "omnibus clause" contained in his contracts of employment did not exclude him from participation in the Pension Fund.—Irrelevance of the argument, the question before the Tribunal being whether the Applicant suffered injury as a consequence of the issue of the circular.

Argument of the Applicant based on the fact that the Respondent agreed to validate in the case of

another staff member similarly placed.—Irrelevance of the argument, for the reason given in the preceding paragraph and because the facts in the two cases are dissimilar.

The Respondent contests the receivability of the application on the ground that the claim is barred by time.—In view of its decision on the substance of the case, the Tribunal does not need to pronounce on the plea of time-limits.

Rejection of the claim for compensation for loss of pension benefits, the claim for compensation for prejudice suffered as a result of evasive procedural action of the Respondent, and the request for costs.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President;
Mr. Francisco A. Forteza;

Whereas on 6 March 1973, at the request of Robert Ashton, a former technical assistance official of the International Civil Aviation Organization, hereinafter called ICAO, the President of the Tribunal, with the agreement of the Respondent, extended to 4 May 1973 the time-limit for the filing of an application to the Tribunal;

Whereas on 9 April 1973 the Tribunal further extended to 4 June 1973 the time-limit for the filing of the application;

Whereas, on 25 May 1973, the Applicant filed an application, the pleas of which read as follows:

"1. Applicant respectfully requests the Tribunal to declare that his contracts of employment from 4 October 1951 until 1 May 1957 did not exclude him from participation in the Pension Fund and that, consequently, the reservation contained in Article III, paragraph 4 (as it stood on 1 January 1958), did not apply to him, in the same manner as it did not apply to the Applicant concerned in Judgement No. 89, since Applicants in those two instances find themselves in an identical substantive legal position.

"2. Applicant further requests the Tribunal to declare that Respondent, by allowing the issuing of the Circular of 26 February 1958 . . . , purposely dissuaded Applicant from requesting validation of his previous non-contributory service within the prescribed time-limit of one year which expired on 31 December 1958; that, consequently, Respondent caused an injury to Applicant for which he is legally responsible and which he must repair by paying to Applicant appropriate compensation.

"3. Applicant therefore requests the Tribunal to rescind Respondent's contested decision of 22 December 1972 and to order Respondent to pay to Applicant:

"(a) an amount equal to the net financial advantage which the Applicant would have derived under the Regulations of the Pension Fund from the validation of Applicant's prior non-contributory service extending from 4 October 1951 until 1 May 1957, the net financial advantage in question consisting of the capitalization as of 1 January 1958 of the additional retirement benefits which Applicant would have received from the date of his retirement in 1967 for the whole duration of his life expectancy, had his prior service (as determined above) been validated; such capitalization to be reduced by an amount equivalent to the contributions which Applicant should have had to pay in the Pension Fund at the time of validation; plus interest at 6 per cent on the net amount due to Applicant from 1 January 1958 up to the date of payment of said compensation;

"(b) a sum of \$3,000 as compensation for the prejudice suffered by Applicant

as a result of the evasive procedural actions of Respondent for the last eight years;

“(c) a sum of \$1,500 towards the cost of preparation of the present legal proceedings and of legal representation and counsel.”;

Whereas the Respondent filed his answer on 5 July 1973;

Whereas, on 17 August 1973, the application was transmitted to the United Nations Joint Staff Pension Board in accordance with article 21 of the Rules of the Tribunal;

Whereas, on 18 September 1973, the Applicant filed written observations in which he amended his pleas by adding to paragraph 3 a subparagraph *d* reading:

“(d) a sum of \$50 towards the reimbursement of mailing expenses and of \$100 for the cost of typing the Application (\$75) and the written observations of Applicant on Respondent’s Answer (\$25).”;

Whereas the facts in the case, subsequent to Judgements Nos. 109 and 152, are as follows:

In a letter of 17 December 1971 addressed to the Secretary-General, the Applicant, referring to paragraphs IX and X of Judgement No. 152, requested compensation for injury suffered as a result of having been deterred from filing in time a request for validation of his prior non-contributory service because of the issuance of the general circular of 26 February 1958, such compensation being the equivalent of the contributions which ICAO would have had to pay into the Pension Fund to validate such prior service according to the actuarial evaluation calculated by the latter, plus the interest accrued since the time such payment should have been made; he pointed out that the period of prior service to be taken into account extended from his entry on duty up to 31 December 1957, with the exception of the period from 2 May 1957 up to the end of December 1957, during which his participation in the Pension Fund seemed to have been specifically excluded as noted by the Tribunal in its Judgement. On 22 December 1971 the Secretary-General advised the Applicant that his request for compensation was ill-founded and, in any event, out of time. On 5 January 1972 the Applicant lodged an appeal with the Advisory Joint Appeals Board. On the same day, referring to paragraph I of Judgement No. 152, he asked the Secretary-General to instruct his representative to address himself to the merits of the case as presented, besides invoking time-limits. The Advisory Joint Appeals Board handed down its Opinion (Opinion No. 45) on 12 December 1972. By a majority of two to one, the Board found that the appeal for compensation of injury sustained was not receivable. In a dissenting opinion, a member of the Board recommended:

“. . . that the Secretary-General accept the appeal—condoning, if necessary, any delay by the Appellant in filing the appeal—and grant the Appellant compensation ‘at an amount equal to the net financial advantage which the Appellant would have derived, under the Regulations of the Pension Fund, from the validation of his prior service’ from 4 October 1951 until 1 May 1957, (the period of 2 May 1957 to 31 December 1957 being disregarded because the Appellant had accepted to be excluded from pension benefits for that period), or its equivalent, in the same manner as was done in respect of [two other staff members].”

On 22 December 1972 the Secretary-General’s final decision was communicated to the Applicant, as follows:

“I have perused Opinion No. 45 of the Advisory Joint Appeals Board. In that Opinion the majority has stated, in paragraph 37, that the Appellant’s claim for compensation because of the alleged dissuasive effect of the Circular of 26 February 1958 could be relevant only in the context of validation of previous service under Article III of the Pension Fund Regulations; and has held that the Appellant had no right to validation under Article III in question.

“In a dissenting opinion, another member of the Board has recommended, in paragraph 13, that I accept the Appeal—condoning, if necessary, any delay in the filing of the Appeal.

“On the issues on the merits I accept the conclusions and the recommendation of the majority of the Board. On the question of waiving time-limit I do not consider this to be a fit case.

“The Appeal is rejected.”

On 25 May 1973 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant has suffered an injury for which the Respondent is answerable:

(a) By causing the 26 February 1958 circular to be issued, the Respondent failed in his obligations towards the Applicant:

- (i) As a party to a contract of employment, the Respondent was bound not only to respect its written provisions but also all the consequences attached to the contract by equity, custom and the law itself, and it is not in conformity with equity and custom for an employer to cause his employees to lose the enforceability of a contractual right;
- (ii) The Respondent was bound to fulfil his contractual obligations in good faith. He had not only a general duty of care vis-à-vis the Applicant but the latter was entitled to expect that the former would not take advantage of his position as chief executive officer to induce the Applicant to adopt a course of inaction harmful to his rights and interests;
- (b) The only reason why the Applicant did not submit a validation request in time was the dissuasive effect of the circular; had he filed his validation request in time, he would have received compensation in lieu of validation as others did;
- (c) There is a direct causal link between the Respondent's action and the Applicant's injury;
- (d) It is therefore incumbent on the Respondent to pay to the Applicant damages for the injury suffered by the latter so that the consequences of the Respondent's action be removed.

2. The Applicant's claim for injury is receivable on procedural grounds:

(a) The Applicant's loss of his right of validation under article III, paragraph 4 of the Pension Fund Regulations does not entail the loss of his right to impute such loss to the Respondent and to sue him for damages on that ground;

(b) The Applicant's cause of action based on injury is not the same as that underlying a claim for validation of prior service;

(c) The Applicant's present action is not barred by time either under part VII, paragraph 1 of the ICAO Service Code or under GSI [General Secretariat Instruction] 1.4.7.

Whereas the Respondent's principal contentions are:

1. The Applicant's claims are barred by time:

(a) It is clear from paragraph VIII of Judgement No. 152 that the Applicant's claim to the effect that his contracts of employment from 4 October 1951 to 1 May 1957 did not exclude him from participation in the Pension Fund is barred by time;

(b) The Applicant did not bring in time a claim for compensation on the ground that he had been dissuaded by the circular of 26 February 1958 although he brought a number of proceedings and appeals and made various pleas to obtain pension in

respect of his service prior to 1 January 1958; nor did he institute, in time, any review or appeal proceedings in relation to such a claim.

2. The Applicant's claims are unfounded. Prior to 1 January 1958, the ICAO technical assistance personnel had been excluded from participation in the Pension Fund on account of their unstable conditions of employment. The Applicant himself was under no illusion about such exclusion and, on 4 April 1957, he accepted a transfer to ICAO Headquarters under an arrangement which specifically provided for "no Pension Fund" as the Administration did not wish him to think that merely because he was being transferred, he would be permitted to participate in the Fund. The staff member in Judgement No. 89 invoked a particular regulation of the Pension Fund and under that regulation, and within the time-limit specified therein, had brought his claim for validation of previous service. The remedy provided by that regulation is the exclusive remedy and the right of validation is lost if the time-limit is disregarded.

3. The Applicant cannot bring successive litigations on what is essentially the same cause of action.

The Tribunal, having deliberated from 1 to 18 October 1973, now pronounces the following judgement:

I. The Applicant claims compensation from the Respondent on the pleas that, as a result of the issuance of the circular dated 26 February 1958, the Applicant was dissuaded from requesting validation of his prior non-contributory service within the prescribed time-limit and thereby suffered loss of the pension benefits he would have derived from such validation.

II. In order to decide on the Applicant's plea for compensation, the Tribunal must examine first of all whether the Applicant's failure to comply with the time-limit prescribed for requesting validation of prior service resulted directly from the circular dated 26 February 1958, in other words, whether the Applicant's failure to act was caused by his reliance on the terms of the circular.

III. The circular dated 26 February 1958 was construed by the Tribunal in its Judgement No. 89, where it held in paragraph IV:

"In form and content this document, which was addressed to all staff members in the Applicant's category, has the character of a general circular. Interpreting the texts that have just become effective, with a view to determining the rights of the staff members concerned, the Director [of the ICAO Technical Assistance Bureau] rules that in the case of technical assistance experts validation is excluded on the basis of article III, paragraph 4 [of the Pension Fund Regulations].

"Each of the staff members in question was entitled to expect that his individual legal status would be determined on the basis of the interpretation given in that circular, which had been issued by the competent authority and was binding on the latter until properly amended."

Again in its Judgement No. 152 the Tribunal held in paragraph IX that:

"In issuing that circular, the Respondent took a position the normal effect of which was to dissuade the Applicant from taking any action in the matter."

The Respondent does not contest the legal nature of the circular. In his answer he states that "the circular letter dated 26 February 1958 was an administrative decision which affected the Applicant in relation to a matter arising from his employment, namely, his participation in the Pension Fund".

IV. The Tribunal concludes that the circular dated 26 February 1958 would normally have had a dissuasive effect on a staff member from making an application for validation of prior service.

V. The Tribunal observes, however, that in the present case the Applicant's failure to act may have resulted from circumstances related to his own contractual status since, as stated in paragraph X of Judgement No. 152, the Applicant accepted on 4 April 1957 his secondment to ICAO Headquarters subject to a specific provision that he was not eligible for participation in the Pension Fund. Indeed, the Applicant concedes in his application that his participation in the Pension Fund was specifically excluded from 2 May 1957 to 31 December 1957. Thus, when the Applicant became a participant on 1 January 1958, the fact that his appointment in 1957 excluded specifically the benefit of pension rights could also have been a factor in dissuading him from requesting validation.

VI. In order that the question of the Respondent's liability for any loss or damage suffered by the Applicant consequent upon the issuance of the circular may arise, it must be established that the circular was the only reason which motivated the Applicant's abstention: The Tribunal must be satisfied that, as claimed in the application, "the only reason why he [the Applicant] did not submit a validation request in time was precisely the dissuasive effect of that circular".

VII. Since the Tribunal considers that the fact that the Applicant agreed to his non-participation in the Pension Fund a few months before he became a participant may have caused him not to seek validation, the circular cannot be considered as a factor which by itself alone determined the Applicant's decision not to request validation. The Tribunal therefore holds that the causal link between the Respondent's circular and the Applicant's failure to request validation has not been established and consequently that the damage, if any, suffered by the Applicant is not directly attributable to the Respondent's action.

VIII. The Applicant contends on the basis of Judgement No. 89 that the so-called "omnibus clause" contained in his contracts of employment from 4 October 1951 up to 30 April 1957 did not exclude him from participation in the Pension Fund and that, notwithstanding his exclusion from the Fund during the period from 2 May 1957 to 31 December 1957, his rights to pension benefits remained unaffected from 4 October 1951 until 1 May 1957. But the Tribunal observes that the question now before it is not whether the Applicant had a valid claim for pension benefits under the Pension Fund Regulations but whether he suffered injury as a consequence of the Respondent's action in issuing the circular dated 26 February 1958.

IX. The Applicant argues that in the case of Mr. D. P. Taylor, another staff member similarly placed, the Respondent agreed to the validation of prior non-pensionable service and that the Respondent discriminated against the Applicant by refusing validation in his case. But since, as stated in the preceding paragraph, the Tribunal is not concerned in the present case with the right of a staff member to validation of prior non-pensionable service, the Tribunal is of the view that the case of Mr. Taylor does not serve as a precedent to establish the Applicant's claim. The Tribunal further observes that the facts in the two cases are dissimilar and in particular that Mr. Taylor became a participant before the 1956 amendment to the Pension Fund Regulations came into effect and that he applied for validation of his prior service within the prescribed time-limit.

X. The Respondent contests the receivability of the application on the ground that the claim is barred by time. He contends that under part VII of the ICAO Service Code, GSI 1.4.7 and the corresponding provisions of the ICAO Field Service Staff Rules, the Applicant should have appealed against the administrative decision contained in the circular dated 26 February 1958.

The Applicant argues that the cause of action in this case is not the same as in the prior proceedings, that the claim before the Tribunal relates to compensation for

injury caused to him by the circular dated 26 February 1958, and that his right to claim damages arose "only when it was definitively adjudicated that he had lost his right to validate his prior service".

In view of its decision on the substance of the case, the Tribunal does not deem it necessary to pronounce on the plea of time-limits.

XI. For the reasons stated earlier, the Tribunal rejects the Applicant's claim for compensation for loss of pension benefits, his claim for compensation for prejudice suffered as a result of evasive procedural action of the Respondent, and his request for costs.

XII. The application is rejected.

(Signatures)

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

New York, 18 October 1973

F. A. FORTEZA
Member

Jean HARDY
Executive Secretary

Judgement No. 180

(Original: English)

Case No. 173:
Osman

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

Request by a technical assistance expert of the United Nations Industrial Development Organization that he be recognized as a full participant in the Joint Staff Pension Fund.

The Tribunal need not rule on the procedural pleas of the application, as the facts were fully set out by the parties in their respective pleadings.

Objection by the Respondent that the application is time-barred because the Applicant did not appeal against an administrative decision refusing him admission to the Pension Fund as a full participant.—Objection rejected, since the Respondent, in his final decision, did not decline to entertain the Applicant's request on the plea of time-limits but reviewed it on merits and rejected it.

Contention of the Applicant that under the Pension Fund Regulations which came into force on 1 January 1967 he became entitled to full participation, since on that date he fulfilled the requirements of article II, paragraph 1, of those Regulations.—Article II of the Regulations.—Respective scope of paragraphs 1 and 2.—Clause in paragraph 1 containing a qualifying proviso with regard to the provisions of paragraph 2 dealing with the category of associate participants to which the Applicant belonged.—Argument based on Circular TARS/INF.1/Rev.4.—Limited purpose of the circular.—As the Applicant was an associate participant when the 1967 Regulations came into force, the Applicant could not claim to become a full participant under article II, paragraph 1.—Argument of the Applicant based on the alleged absurdity which would result from that construction.—Justification of associate participation and competence of the General Assembly to determine the related régime.—Conclusion of the Tribunal that there was no administrative error or oversight on the part of the Respondent in not enrolling the Applicant as a participant in the Pension Fund on 1 January 1967 under article II, paragraph 1, of the Regulations.

Contention of the Applicant that the Respondent should not have fixed the date of expiration of his