

Judgement No. 283*(Original: English)***Case No. 270:
Rajan****Against: The Secretary-General
of the United Nations**

Request for the validation by the Joint Staff Pension Fund of a period of service as an OPAS expert.

Article 23 and article 1 (u) of the Pension Fund Regulations.—Article VII, paragraph 3, of the OPAS contract.—The Applicant was not a staff member of the United Nations but an employee of the recipient Government.—Arguments of the Applicant based on conduct subsequent to the conclusion of the contract.—Rejected.—Argument of the Applicant based on communications addressed to another person.—Rejected.—The claim to validation and the related claims are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,**Composed of Mr. Endre Ustor, President; Mr. Arnold Kean; Mr. Herbert Reis;**

Whereas, on 17 August 1981, Thiruvengadatha Rajan, a former expert recruited under the OPAS (Provision of Operational, Executive and Administrative Personnel) Programme, filed an application, directed against the Secretary-General of the United Nations and the United Nations Joint Staff Pension Board, the pleas of which read as follows:

“(a) Preliminary measures requested

“1. The Tribunal may kindly request the United Nations Organisation to produce adequate copies of the following documents/evidences that are relevant to consideration of the issues involved:

“(i) Published copy of the UN document on the Convention on the Privileges and Immunities of the United Nations.

“(ii) The list of officials of the United Nations, 1975 prepared for submission to the Governments of Members of the United Nations in pursuance of article V, section 17, of the Convention on the Privileges and Immunities of the United Nations, together with ‘Preface’ thereto. (On page 325 my name RAJAN THIRUVENGADATHA appears listed.)

Similar or any other list prepared for the year 1976 for the same purpose mentioned in the ‘Preface’ and in which my name will obviously have continued to appear until separation at end of 1976.

“(iii) The advice given by the Resident Representative of UN in Swaziland to the Government of Swaziland to the effect that arrears of pay etc. arising from pay award to the civil servants of the Government is not to be paid to the UN-OPAS personnel serving with them. (The advice of Resident Representative may have been around June 1976 when arrears of salary as per pay award was drawn and paid to all civil servants of the Government of Swaziland.)

- “(iv) The UN Contracts (OPAS) between the UN Organisation and Mr. Hans Raj Laroya, an OPAS personnel who during the tenure from mid-1974 onwards served as Chief Architect, Government of Swaziland. Monthly ‘Statement of Earnings and Deductions’ drawn for him during the period showing the category, level, step, gross salary and deductions towards pension contribution duly supported by workings to clarify as to how the actual pension contributions corresponded with the pensionable remuneration as relevant to the level and step in which the salaries were so drawn, both before and after promotion to level 05 from level 04.
- “(v) Communication, if any at all, addressed to above Mr. Hans Raj Laroya advising him that his period of assignment as OPAS personnel will be treated as a UN staff service on ‘leave without pay status’ and also advising the basis for recovery of his pension contribution during the period of the OPAS assignment and his consent thereto.
- “(vi) Staff Regulations of the United Nations for the relevant period 1974 to 1976 and in particular Article III on Salaries and Related Allowances—Regulations 3.1 to 3.3.

“2. *The Secretary, United Nations Joint Staff Pension Board* may please be requested to produce before Tribunal adequate copies of the booklet ‘Regulations and Rules of the United Nations Joint Staff Pension Fund’ published by it (Reference General JSPB/G.4/Rev.9 dated 1 January 1977).

“(b) *The decisions which the applicant is contesting and whose rescission he is requesting under article 9, paragraph 1, of the statute.*

- “(i) The administrative decision of the UN Organisation, contained in their communications of 17 December 1980 (see annex 6) and PRU 81 of 6 April 1981 (see annex 7), to the effect that ‘Your OPAS services cannot be validated for the purpose of enabling you to participate in the United Nations Joint Pension Fund during these services’.
- “(ii) The decision of the United Nations Joint Staff Pension Fund, communicated in their letter A/121120 of 26 February 1980 (see annex 3), to the effect that the Fund is not competent to adjudicate on my terms of employment; and that ‘during the service in question, you were not a staff member of a member organization of the Fund, but an official of a government. Consequently, you are unable to validate the service in question with the Pension Fund.’
- “(iii) The conclusion drawn by the United Nations Joint Staff Pension Fund, in their letter A/121120 of 21 April 1980 (see annex 4), to the effect ‘What your status was during any particular period in a member organization of the Fund is determined by that organization and by that organization alone’ and that ‘it is clear that the service in question was not service performed by a staff member of a member organization of the Fund which alone can be made contributory for Pension Fund purposes’.

“(c) *The obligations which the applicant is invoking and whose specific performance he is requesting under article 9, paragraph 1, of the statute.*

- “(i) In the context of the terms of my OPAS contract with the UN organization; together with the actual facts of the situation of my service as OPAS personnel, my claim seeking validation of such service from 5 July 1974 to 31 December 1976 under Article 23 of the Regulations and Rules of the United Nations Joint Staff Pension Fund (see annex 8) is valid and justified and the respondents are obliged to recognise the same.
- “(ii) The Tribunal is requested to direct the UN Organisation and UN Joint Staff Pension Board to admit my request, validate and make eligible my above service for Pension Fund participation now and fulfill their obligations under the UN Joint Staff Pension Fund regulations and in particular under Article 25 (c)/25 (e)—(see annex 8).
- “(d) *The amount of compensation claimed in the event the Secretary-General decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the statute.*
- “(i) A capital fund which, together with my share of pension fund contributions, can reasonably be expected to provide for me in India from 1 January 1982 i.e. after my reaching the retirement age of 60 at the close of the year 1981, a tax free annuity equivalent to the UN retirement benefit (pension) that I will otherwise qualify for and get under Article 29 of the UN Joint Staff Pension Fund regulations.
- “In deciding the actual quantum the following may please be taken into consideration:
- “(a) The UN retirement benefit (pension) amount, after retirement, is subject to escalation to provide protection against inflationary cost of living. Such a formula is built in the scheme itself as modified recently and such a provision be also included while defining the capital fund administration.
- “(b) Such retirement benefits (pensions) from the UN, to its retired officers resident in India, are now not subject to Indian Income Tax under the convention on privileges and immunities of the United Nations and its member organisations. However, it becomes taxable if the same is separated from such an arrangement.
- “(c) The amount can be worked out conveniently by the UN Joint Staff Pension Fund secretariat.
- “(ii) In the event the service of mine as UN-OPAS officer from 5 July 1974 to 31 December 1976 is not accepted as UN service as a staff member then, as a consequence, the claims mentioned hereinbelow be also fixed for compensation.
- “(a) The arrears from pay award given by the Swaziland Government first but later recovered on the advice of Resident Representative of UN in Swaziland contrary to item 5 V(i) of the Financial Terms of OPEX appointment indicated to us (see annex 9). The amount is about—U.S. \$2,000/-.

“(b) When the OPAS service is not recognised as a UN service as a staff member, the deduction of staff assessment amounts from the salaries drawn during the period of such OPAS service loses its sanction, and so unauthorised. This amount be also decided for *refund*. Actual amount so deducted will be available with UN organisation. Approximately the amount involved is over U.S. \$205,000/-.

“(e) *Any other relief which the applicant may request in accordance with the statute.*

“(i) Under item (d) of the ‘pleas’ compensation is claimed under two headings i.e.

“(1) a capital fund to provide an annuity equivalent to the retirement benefit (pension) otherwise receivable and

“(2) in the event my UN-OPAS service is not recognised as service as a staff member, compensation for the pay award arrears given by the Swaziland Government first but later recovered at the instance of Resident Representative of UN and refund of staff assessment recoveries made that then loses sanction for such deductions.

“I request that the administration of the first item i.e. ‘capital fund’ and the payment of monthly pension or annuity amount be entrusted to the UN Joint Staff Pension Fund. This is specially requested as otherwise the capital fund/annuity may attract Indian Income Tax and these are quite heavy and vary each year.

“Similarly the refund/compensation under the second item will attract Indian Income Tax in the said event of UN treating the service as not a service as a staff member.

“In both the above cases the Tribunal is requested to provide for the reimbursement of the additional income tax liability on me on such compensation as well either directly or under the provisions of Article II item 3 of the OPAS contract of service (see annex 1).

“(ii) The Tribunal may award at its own discretion any amount it thinks fit to compensate for the mental anxiety and injury suffered by me between the period of request for validation on 16 February 1979 and now.”

Whereas, on 13 October 1981, a copy of the application was transmitted to the United Nations Joint Staff Pension Board under article 21 of the Rules;

Whereas the Secretary of the United Nations Joint Staff Pension Board submitted observations on the application on 29 October 1981;

Whereas the Respondent filed his answer on 20 November 1981;

Whereas the Applicant filed written observations on 3 February 1982;

Whereas the Respondent submitted additional information at the request of the Tribunal on 29 April 1982;

Whereas the facts in the case are as follows:

The Applicant served as Financial Controller, Water and Sewerage Services, in Swaziland from 5 July 1974 to 31 December 1976 under the OPAS Programme. He later

joined the World Health Organization and subsequently became a full participant in the United Nations Joint Staff Pension Fund. In communications to the Pension Fund dated 16 February 1979 and 2 October 1979 the Applicant requested validation of his non-contributory service as an OPAS officer. On 26 February 1980 the Secretary of the United Nations Joint Staff Pension Board advised him that his request had been denied on the following grounds:

“ . . .

“The attachments to your letter [of 2 October 1979] relate to the interpretation of your terms of employment upon which the Fund is not competent to adjudicate. However, in accordance with the United Nations Office of Personnel Services, the conditions of service for OPAS described in the resolutions of the General Assembly are that of a direct employment relationship between the expert and his recipient Government. The expert serves as a civil servant of the Government concerned; the Government is his employer. He does not have the status of a staff member of the United Nations, and he is not subject to the United Nations Staff Regulations and Staff Rules. This is the legal basis which disqualifies your OPAS service from validation.

“As I indicated earlier, during the service in question, you were not a staff member of a member organization of the Fund, but an official of a government. Consequently, you are unable to validate the service in question with the Pension Fund.”

On 21 April 1980 the Secretary reiterated in a further letter to the Applicant that the points raised by him were in no way matters within the competency of the Pension Fund, adding:

“What your status was during any particular period in a member organization of the Fund is determined by that organization and by that organization alone. The appropriate office in that organization informs the Fund of that status if it is relevant for participation in the Fund. In your case, this office in reply to an inquiry based on your letter to the Secretary of the WHO Staff Pension Committee as to what your status was during the period from 5 July 1974 to 31 December 1976 was informed by the competent United Nations office, the Department of Technical Co-operation for Development, that you were not a staff member of the UN during that period

“ . . .

“If you wish to challenge the determination made by the UN with regard to your status during the period 5 July 1974 to 31 December 1976 this cannot be before the Pension Board or its organs which are not competent to entertain such a challenge. Instead, it must be submitted to those organs which are appropriate.”

The Applicant accordingly asked the Department of Technical Co-operation for Development to take a final decision on the matter and on 17 December 1980 the Technical Assistance Recruitment Service advised him as follows:

“ . . . we regret to inform you that, as a final decision, a validation of your OPAS service for purposes of your participation in the United Nations Joint Staff Pension Fund cannot be determined.

“The status of OPAS personnel as spelled out in Article VII, Clause 3 of the contract is not that of a U.N. staff member. Your services for the host Government

were only supplemented by a stipend without giving you a salary applicable for U.N. staff members. No Regulations, Rules or Decisions exist which allow for a participation in the UNJSPF. You did not qualify for the only exemption, as contained in Article II, Clause 4 of the OPAS contract, because you have not been a former U.N. staff member, who can be considered to be on Leave Without Pay and thus remain staff member even during the OPAS service."

On 6 April 1981 the Office of Personnel Services informed the Applicant that the Secretary-General had reviewed, and saw no basis for rescinding, the administrative decision communicated to the Applicant by the Technical Assistance Recruitment Service. In the meantime the Applicant had submitted an appeal to the Joint Appeals Board in a letter of 28 March/1 April 1981. On 6 May 1981 the Secretary of the Joint Appeals Board drew his attention to article V (on settlement of disputes) of his OPAS contracts and informed him that she was referring his letter to the Office of Personnel Services so that they might advise him as to the machinery that the Organization would provide to hear and to decide the dispute between the Organization and him. On 17 August 1981 the Applicant filed with the Tribunal the application referred to earlier. In a letter dated 25 September 1981, the Director of the Division of Personnel Administration informed him that the Secretary-General would not object to the submission directly to the Tribunal of his application concerning validation of his OPAS service for pension purposes, although he (the Secretary-General) noted that the Applicant's only contract with the United Nations had been as an OPAS officer in the service of the Government of Swaziland; the letter continued:

"In so doing, the Secretary-General's intention is to comply with Article V of your contract with the United Nations, which stipulates that the Organization will 'establish machinery to hear and decide disputes between itself and the officer in which the latter asserts non-observance of the terms of this contract'. In view of your claim to validation of your OPAS service for United Nations Joint Staff Pension Fund purposes, the Secretary-General would interpose no objection to the United Nations Administrative Tribunal's hearing and deciding the case.

"The Secretary-General, however, reserves his position on all aspects of this case, including the timeliness of your claim or appeal."

Whereas the Applicant's principal contentions are:

1. The United Nations of its own volition treated the Applicant as an official and staff member of the United Nations and paid his United Nations staff salary and emoluments, thus overriding contrary intentions, if any, implied elsewhere.
2. The Applicant tacitly accepted those actions and practices as realities of the changes constructively brought out and implemented by the United Nations.
3. All the OPAS officers then in Swaziland were given the impression by the United Nations and by the UNDP office that they all were United Nations staff and were so treated.
4. The duties performed by the Applicant after his appointment as an OPAS officer were pursuant to his contract of service with the United Nations, so that the service rendered to the Government of Swaziland automatically became a service—full time—rendered to the United Nations. An employer-employee relationship between the United Nations and the Applicant is therefore established.
5. It follows from article II, paragraph 4, of the OPAS contract that OPAS service

was not repugnant to pension participation. The contract terms otherwise do not expressly exclude participation in the Pension Fund. Hence, such service is to be deemed as non-contributory for Pension Fund participation, or as a contributory service deemed to accrue.

6. In the case of another OPAS officer in Swaziland, the OPAS service was accepted for admission to Pension Fund participation.

Whereas the Respondent's principal contentions are:

1. The contractual status of the Applicant did not entitle him to the rights of a United Nations staff member and, in particular, it did not entitle him to participation in the Pension Fund.

2. The Applicant cannot use his factual situation as an argument to claim a legal status different from his contractual status.

3. The Applicant's prior non-contributory service cannot be validated since the Applicant was precluded from participating in the Pension Fund by the terms of his contract and the Government of Swaziland, his then employer, was not a member organization of the Fund.

4. Allegations that another OPAS officer was treated differently are irrelevant since that other officer was a participant of the Fund prior to his OPAS service.

The Tribunal, having deliberated from 27 April to 6 May 1982, now pronounces the following judgement:

I. The Tribunal has considered the Applicant's request for the production, as a preliminary measure, of further documents or evidence. These are not considered by the Tribunal to be relevant to its decision, and the request is accordingly rejected.

II. Under article 23 of the Pension Fund Regulations, only "prior service" may be validated for the purposes of the Fund. "Service" is defined in article 1 (*u*) of the Regulations as meaning "employment as a full-time member of the staff of a member organization".

III. In his OPAS contract with the United Nations the Applicant is referred to as "the Officer" and it is expressly provided by article VII.3 that "the Officer does not have the status of an official or a staff member of the Organization". An introductory paragraph of that contract reads as follows:

"[The United Nations Organization and the Officer] Desiring to specify the conditions under which the Officer, as employee, agrees to place his services at the disposal of *the Government* [of Swaziland] *as his employer*" [emphasis added],

from which it is clear that the Applicant was to be employed by that Government and not by the United Nations.

IV. The Tribunal is therefore of the opinion that, under his contract with the United Nations, the Applicant was not to be a member of the staff of that Organization, but was to be an employee of the Government of Swaziland which was not and is not a member organization of the Pension Fund.

V. The Applicant has contended that the course of conduct of the United Nations subsequent to the conclusion of his contract has been sufficient to override the provisions of the contract and to change his status to that of a staff member of the United Nations. He rests this argument principally on the inclusion of his name in the list of officials of the United Nations in pursuance of the Convention on the Privileges and Immunities of the United Nations, and on the deduction of staff assessment from payment of his stipend.

The inclusion of the Applicant's name in the list in question was not justified and has no bearing on his status as an employee of the Government of Swaziland. The deduction of staff assessment, while appearing on his statement of earnings and deductions for accounting purposes, was not actually made and he in fact received the full stipend to which he was entitled under his contract. The Tribunal reaches the conclusion that nothing in the course of conduct subsequent to the conclusion of the Applicant's contract changed his status to that of a staff member of the United Nations. Indeed, if it had been the intention of the parties to make so significant a change, it would be expected to be done by means of a formal amendment of the existing contract or by superseding it with a new contract. Neither course was adopted and there was no correspondence between the Applicant and the United Nations which referred to the possibility of, or desire for, such a change of status.

VI. The Tribunal is also of the opinion that the Applicant cannot rely, as evidence of his status or entitlement, on communications addressed to another person (Mr. Hans Raj Laroya) in different circumstances.

VII. Accordingly, the Applicant's claim to validation of his period of service under the OPAS Programme is rejected, inasmuch as it was not "prior service" within the meaning of article 23 of the Pension Fund Regulations. Consequently, the Applicant's related claims also fail.

VIII. The Applicant's claims concerning payments by the Government of Swaziland are not within the jurisdiction of the Tribunal.

(Signatures)

Endre USTOR

President

Arnold KEAN

Member

Geneva, 6 May 1982

Herbert REIS

Member

Jean HARDY

Executive Secretary
