

VIII. The requests of the Applicant concerning the travel expenses incurred in connection with the education of his children for the school years 1977-1978 and 1978-1979 were not considered by the Joint Appeals Board and are not receivable under article 7 of the Statute of the Tribunal.

(Signatures)

Endre USTOR
President

T. MUTUALE
Member

Geneva, 27 May 1983

Roger PINTO
Member

Jean HARDY
Executive Secretary

Judgement No. 302

(Original: English)

Case No. 266:
Zemanek

Against: The Secretary-General
of the United Nations

Request of a former staff member of the United Nations to validate for pension purposes prior service as associate participant or to be compensated for loss resulting from inability to do so.

Question whether failure by the Applicant to apply for validation of prior service within prescribed time-limits is or is not due to the fault of the Administration.—Letter of appointment erroneously stated that the Applicant was associate participant, instead of (full) participant, of the Staff Pension Fund.—The Tribunal finds negligence by the Applicant in not ascertaining his true status since the Personnel Action Form specified that he was (full) participant in the Pension Fund.—The Tribunal holds that such negligence has severed any causal link between the fault of the Administration and the damage suffered by the Applicant.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Herbert Reis;
Mr. Luis de Posadas Montero;

Whereas, on 22 July 1981, Alexander Zemanek, a former staff member of the United Nations and of the United Nations Development Programme, filed an application the pleas of which read as follows:

“I wish to appeal the decision of the Secretary-General . . . and to request the Tribunal to order the Secretary-General to notify the Secretary of the United Nations Joint Staff Pension Fund that the United Nations Administration committed an error and that, therefore, the United Nations will bear the consequences of that error and pay the United Nations’ share towards validation of my first three-and-one-half years of service with the United Nations for pension purposes. I also request the Tribunal to order the Secretary-General to inform the Pension Fund that I am permitted retroactively to pay my contribution to the Pension Fund for that period, 16 July 1963 to 15 January 1967. In this context, I wish to point out that my records for the year in question, contrary to the statement of the

Secretary of the Pension Fund . . . , indicate that the notification by the Secretary of the Pension Fund regarding the possibility of validating my initial three-and-one-half years of service for full participation in the Pension Fund reached me only after the expiration of the one-year time limit for the validation of previous service.

"I am asking the United Nations to pay roughly the amount which it would have had to pay had the administrative error not been committed.";

Whereas, on 19 August 1981, a copy of the application was transmitted to the United Nations Joint Staff Pension Fund under article 21 of the Rules;

Whereas the Secretary of the United Nations Joint Staff Pension Board submitted observations on the application on 26 August 1981;

Whereas the Respondent filed his answer on 18 February 1982;

Whereas the Applicant filed written observations on 26 February 1982;

Whereas the Applicant requested oral proceedings on 20 September 1982;

Whereas, on 21 September 1982, the Respondent informed the Tribunal that in his view oral argument would serve no useful purpose in the case since the legal issues involved were well defined and had been considered in previous jurisprudence of the Tribunal;

Whereas, on 24 September 1982, the Applicant submitted an additional statement in which he restated his pleas as follows:

"The Applicant's *major plea* is . . . :

"to be permitted now to validate his prior service with regard to the Pension Fund, i.e. that the Pension Fund be obliged to accept validation, and that the Administration be obliged to pay its required additional contribution.

"Should the Tribunal regard the plea as justified, but technically or practically unfeasible, the Applicant's *first alternative plea* is: financial compensation in lieu of indemnification, namely:

"that the Respondent be obliged to pay to the Applicant the difference between the Applicant's actual present pension which he receives from the Pension Fund and the pension he would have received, had validation taken place, while at the same time the Applicant be obliged to pay to the Respondent the sum of 7% of gross income during the period of associate membership in the Fund, i.e. \$3,852 plus compounded interest since 1967.

"Should the Tribunal regard the previous pleas as justified in principle, but not as to the amount, the Applicant's *second alternative plea* is:

"that the Respondent be obliged to pay to the Applicant the sum of \$5,227 plus compounded interest, which is the sum by which the Respondent, based upon his mistake, was unjustly enriched to the disadvantage of the Applicant."

Whereas, on 28 September 1982, the Tribunal decided, at the request of the Respondent and with the agreement of the Applicant, to defer the case to its next session;

Whereas, on 8 December 1982, the Respondent submitted observations on the Applicant's additional statement;

Whereas the Tribunal decided, on 16 May 1983, that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 July 1963 under a fixed-term appointment for two years as an Information Officer. This appointment was extended for one year on 16 July 1965 and for six months on 16 July 1966. The three letters of appointment as well as the corresponding Personnel Action forms specified that the appointment carried entitlement to associate participation in the United Nations Joint Staff Pension Fund. On 16 January 1967, the Applicant's appointment was extended for eighteen months and, the total continuous period of his employment being thereby extended to five years, he became a (full) participant in the Pension Fund. The relevant Personnel Action form so provided. The letter of appointment, however, erroneously specified that the appointment carried entitlement to associate participation in the Fund. As a new participant in the Fund, the Applicant received from the Secretary of the United Nations Staff Pension Committee an undated Note to Participants transmitting a copy of the Pension Fund Regulations and Administrative Rules and two copies of a Participant's Declaration form to be completed and returned. The second paragraph of the Note read:

"The Regulations provide in Article III for the validation of certain periods of non-pensionable service if a participant elects to do so within a year of the commencement of his participation, and in Article XII for the restoration of prior contributory service in the case of a former participant who is re-employed. If you are eligible and wish to take advantage of these provisions, the necessary application forms may be obtained from this office."

The Participant's Declaration contained the following notice:

"If you wish to validate previous service in accordance with Article III, XII or XVI of the Regulations and consider that the eligibility requirements expressed in that article are met, you may obtain the necessary application forms from the Secretary of the Staff Pension Committee. Such application must be made within the time limits provided by the Regulations."

The Applicant signed the Declaration on 25 May 1968 and returned it to the Pension Fund. On 16 July 1968, the Applicant's appointment was extended until 20 December 1968; the letter of appointment contained no mention of Pension Fund participation and the Personnel Action form stated: "full" (participation). On 21 December 1968, the Applicant's appointment was extended to 19 February 1969; both the letter of appointment and the Personnel Action form specified that the appointment carried entitlement to full participation in the Pension Fund. Thereafter the Applicant received further extensions of appointment first with the United Nations and later with the United Nations Development Programme. On 7 May 1980 he requested validation of his non-pensionable service in a letter to the Secretary of the United Nations Joint Staff Pension Board which read:

"Since I am fairly close to retirement, I have recently gone through my papers in an attempt to ascertain why my full participation in the Pension Fund began only in January 1967, although I joined the United Nations in July 1963. I vaguely remember that, at the time I realized that I had become a full participant, I had inquired about validation of the time I had been an associate participant but was told that I had missed the deadline of one year and could not obtain a validation.

"Now, looking through the various appointments I have had since 1963, I think I know why I had missed that deadline: through some

bureaucratic oversight, the appointment from 16 January (for 1½ years) lists as 'Special Conditions': 'This appointment carries entitlement to Associate Participation in the UNJSPF.' But, in fact, with the commencement of that appointment on 16 January 1967, I had become a full participant, as shown in all the statements I have been receiving from your office.

"Here is a brief history of the relevant appointments (copies attached);

- "1. 16 July 1963—for 2 years;
- "2. 16 July 1965—for 1 year;
- "3. 16 July 1966—for 6 months;
- "4. 16 January 1967—for 1½ years;
- "5. 16 July 1968—for 5 months + 5 days;
- "6. 21 December 1968—for 1 month + 31 days;
- "7. 20 February 1969—for 2 years; etc.

"As mentioned above, appointment No. 4 should have stated full participation but stated associate participation. The next (No. 5) stated as special conditions, 'none'. Full participation was stated only in appointment No. 6 which began on 21 December 1968, i.e. *almost two years after I had, in effect, become a full participant*. No wonder, therefore, that when I realized I could revalidate my participation, it was too late.

"I am aware that to request validation now after so many years, will appear unusual. Nevertheless, I would want to make that request, in view of the extraordinary circumstances, in particular, the oversight in the wording of the relevant appointments mentioned above. I am also making this request because I will be wholly dependent on the United Nations pension, since I have no possibility of obtaining any pension from my country of origin (although I had paid into their social security for almost 20 years), and will be able to obtain only the minimal social security payment in the US, of which I am now a citizen. Recognition of an additional 3½ years in contributory service would obviously be crucial for me, to live decently in retirement.

"I would therefore, appreciate very much, if you could look into this matter and advise me what to do to obtain the validation, in view of the exceptional circumstances described above."

On 15 May 1980 the Secretary of the Pension Board informed the Applicant that his prior period of associate participation in the Fund from 16 July 1963 to 15 January 1967 could not be validated because he had failed to submit an application within the one year time-limit after becoming a full participant in the Fund on 16 January 1967. On 15 September 1980 the Applicant reiterated his request for validation in a letter addressed to the Secretary-General. On 13 February 1981 the Under-Secretary-General for Administration, Finance and Management sent him the following reply:

"In your letter to the Secretary-General you requested validation of your associate participation in the United Nations Joint Staff Pension Fund for the period 16 July 1963 to 16 January 1967 when you became a full participant in the pension fund. This request was based on your contention that due to an administrative oversight which occurred in 1967, you did not take the necessary steps to validate your associate participation within the prescribed time period.

“I understand that you had previously made a request for validation for that period to the Secretary of the United Nations Staff Pension Committee and that, based on the Regulations and Rules of the United Nations Joint Staff Pension Fund, your request was denied. Therefore, any further consideration of your request must be limited to the matter of ‘administrative oversight’ to which you refer.

“You contend that as a result of an erroneous notation on your letter of appointment, dated 16 January 1967, you were precluded from making the required validation election within the stipulated one-year period. Nonetheless, other documentation available to you, including a copy of your Personnel Action (P-5 form), dated 30 January 1967, would seem to indicate that you had been given adequate notice of your proper status at the time. Furthermore, had you been put on notice of your change of status only on 21 December 1968—as you state—the period for validation of your prior associate participation would have run from 21 December 1968 to 20 December 1969. The fact is that even on this alternative basis the deadline would now have been exceeded by more than ten years.

“As a result, and after careful inquiry into your case, I can find no basis in your claim which would warrant a modification of the determination on validation previously communicated to you by the Secretary of the United Nations Staff Pension Committee.”

On 14 May 1981, the Chief of Staff Services informed the Applicant that: “the Secretary-General will not object to the direct submission to the Administrative Tribunal of your application concerning validation of service for pension purposes. In so doing, the Secretary-General’s intention is to avoid the necessity of any consideration of the case by the JAB [Joint Appeals Board] pursuant to article 7 of the Tribunal’s Statute. The Secretary-General reserves his position on all other aspects of this case including, in particular, the timeliness of your claim of appeal.”

On 22 July 1981 the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant did neither know before May 1968 that he had become a full participant, nor of the consequences of this fact, namely of his right to validate his prior service.

2. The United Nations had an obligation to inform him about these facts. However, the United Nations not only did not inform him about his new membership status, but actually told him the opposite. The Administration has admitted this mistake, and it is responsible for the consequences of this mistake.

3. Had the Applicant known in time about the possibility to validate his prior service, he would have requested validation.

4. Since the Applicant has not been able to validate his prior service, his pension is now calculated and paid on the basis of 14 years and 5½ months only, instead of 17 years and 11½ months, namely instead of 3½ years more.

5. This reduced pension is a damage to the Applicant, caused by the mistake of the Respondent, and the Applicant now requests indemnification, namely that the situation be created which would have existed, if the damaging event had not occurred.

Whereas the Respondent’s principal contentions are:

1. The application, filed more than a decade after the events in issue, is untimely.

2. The Pension Fund Regulations permit prior non-contributory service to be included in contributory service only if proper application is made within one year of becoming a full participant and no facts exist which would entitle Applicant to make such election more than a decade after becoming a full participant.

The Tribunal, having deliberated from 16 to 27 May 1983, now pronounces the following judgement:

I. The chief task of the Tribunal has been to determine whether the failure by the Applicant to obtain validation for his services prior to 16 January 1967 is or is not due to a fault of the Administration. If a direct and indisputable link could be established between the conduct of the Administration and the prejudice suffered by the Applicant through losing 3½ years of pensionable services, then the Applicant's claim would be admissible.

II. The existence of an initial fault of the Administration is undeniable, as the letter of appointment issued to the Applicant on 16 January 1967 erroneously stated that he was to be considered an associate member of the Pension Fund when in fact his status was one of full member. But from the existence of such an error it does not follow that it has been the only cause of the prejudice suffered by the Applicant. Apart from this error, the Tribunal finds that there has been negligence on the part of the Applicant in not ascertaining his exact status in the Pension Fund.

III. In the view of the Tribunal, the most important instance of this negligence is the fact that at the same time he received the letter of appointment in which his status was mistakenly described as that of an associate participant, he was given a copy of the Personnel Action form in which it was specified that he had full participation in the Fund. In view of that disparity, the Applicant should have immediately sought an explanation, which he never did.

IV. In addition, effective 16 January 1967, a contribution to the Fund was deducted from the Applicant's salary. Again, this fact should have indicated to him that some modification in his status in connexion with the Fund might have taken place and should have induced him to make inquiries, which he failed to do.

V. In view of these circumstances, the Tribunal finds that the consequences of the initial error on the part of the Administration would not have adversely affected the Applicant's rights had he himself shown sufficient diligence in ascertaining his position in time.

The Applicant only showed his concern in the matter in May 1968 and that merely by way of oral inquiries at a moment when his rights to have previous services recognized had already ceased to exist.

VI. The Tribunal concludes that the responsibility of the Administration for its initial error has to be considered along with the negligence on the part of the Applicant and that the existence of such negligence has severed any causal link between the fault of the Administration and the damage suffered by the Applicant.

VII. For these reasons, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Herbert REIS
Member

Geneva, 27 May 1983

Luis de POSADAS MONTERO
Member

Jean HARDY
Executive Secretary