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**Judgement No. 313***(Original: French)***Case No. 287:**  
**Passetti Bombardella****Against: The United Nations  
Joint Staff Pension  
Board**

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*Request by a former staff member of UNESCO to rule that the disability benefit awarded to him under article 34 (a) of the Regulations of the Staff Pension Fund should commence on the date of his separation from UNESCO rather than on the date on which his entitlement to sick leave would have been exhausted had his appointment been extended by UNESCO.*

*Application by UNESCO for intervention under article 20 of the Tribunal's rules conceded.*

*Acknowledgement by the Respondent that the disability benefit is due to the Applicant from the date of his separation from UNESCO.*

*The Tribunal determines that date to be 1 October 1978 and rules that the benefit should be paid retroactively as of that date.—Compensation awarded for the damage suffered as a result of abnormal delay in payment, amounting to interest at the annual rate of 10 per cent on the sums due.—Award of \$US 800 as costs.—All other claims rejected.*

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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. T. Mutuale; Mr. Roger Pinto;

Whereas, on 27 July 1982, Giulio Pasetti Bombardella, a former staff member of the United Nations Educational, Scientific and Cultural Organization, hereinafter referred to as UNESCO, filed an application containing pleas in which:

“(1) The Tribunal is respectfully requested to rescind the decision of the Secretary of the Board, which was communicated to the Applicant in the Secretary's letter of 18 November 1980 . . . and upheld by the Standing Committee following an appeal filed by the Applicant . . . , that the disability benefit awarded to the Applicant by the decision of the UNESCO Staff Pension Committee in pursuance of article 34 (a) of the Fund's Regulations is payable from 1 July 1979;

“(2) The Tribunal is respectfully requested to state and to rule that, in accordance with the provisions of article 34 (b) of the Fund's Regulations, the disability benefit referred to in the foregoing subparagraph is payable to the Applicant from 1 October 1978;

“(3) The Tribunal is respectfully requested to order the Secretary of the Board to recalculate the Applicant's entitlements on the basis of the date from which the disability benefit became payable, namely, 1 October 1978, and to pay to the Applicant all the amounts that he should have received from that date onwards;

“(4) The Tribunal is respectfully requested to grant the Applicant appropriate compensation for the damage he suffered as a result of the inordinate delay in the consideration of his appeal by the Fund's competent officers; such compensation might take the form of interest on the amounts

overdue, at a rate set by the Tribunal, or such other form as the Tribunal may deem appropriate;

“(5) The Applicant reserves the right subsequently to request reimbursement of the costs incurred by him in submitting the present application, in the event of his having to incur such costs in the course of the proceedings.”

Whereas, on 14 February 1983, the Respondent filed his answer;

Whereas, on 5 May 1983, the Respondent supplied additional information at the Applicant's request;

Whereas, on 30 June 1983, UNESCO submitted a request for intervention in the case;

Whereas, on 6 July 1983, the Applicant submitted written observations on the Respondent's answer;

Whereas the final paragraphs of those written observations read as follows:

“26. In the event that the Tribunal reaches a conclusion entailing administrative and financial obligations for UNESCO, the Applicant requests the Tribunal to apply—as it did *vis-à-vis* the World Health Organization in its Judgement No. 226—article II of the special agreement of 23 September 1955 between the United Nations and UNESCO extending the Tribunal's jurisdiction to UNESCO with regard to applications alleging non-observance of the Pension Fund Regulations submitted by staff members of that organization.

“27. The Applicant respectfully requests the Tribunal to grant him appropriate compensation, in the form of interest on the amounts overdue or in such other form as the Tribunal may deem appropriate, for the damage suffered as a result of the abnormal delay in settling this case . . . The Applicant believes that this request does not fall within the scope of article 45 of the Fund's Regulations relating to the case of a benefit due but not paid but concerns compensation for abnormal damage, which the Tribunal granted in its Judgement No. 196 (Back).

“28. The Applicant also respectfully requests the Tribunal to grant him a sum of \$800 as costs. In preparing the application and the present written observations, the Applicant has had to consult colleagues at UNESCO headquarters, and the sum requested represents the cost of telephone calls—in addition to postal and telegram costs—as well as the cost of two journeys from Brussels to Paris.”

Whereas, on 16 August 1983, UNESCO filed a statement and plea in which the Tribunal is requested to rule that the disability benefit should be paid from the date of the Applicant's separation, namely, 1 October 1978;

Whereas, on 21 September 1983, the Respondent submitted observations on the statement of UNESCO in which he requested the Tribunal:

“to rule that the Applicant is entitled to a disability benefit as of the proper date of his separation from UNESCO, but without specifying the said date. Such a determination would enable the Applicant, if he so desires, to initiate action against UNESCO in the appropriate fora with regard to his entitlement to sick leave on half pay which he has not been allowed to exercise. In the meantime, and until such time as the competent judicial organ rules in favour of the Applicant—if it does so—the *de facto* date of separation would be 1 October 1978, and Respondent would undertake, without prejudice to the outcome of the possible action of the Applicant

against UNESCO, to pay the Applicant a disability benefit at the rate of \$8,522.16 a year retroactive to 1 October 1978, as he requests. If the Applicant initiates action against UNESCO and the action is successful, i.e., if the judgement is that his contract should have been renewed to 30 June 1979, the disability benefit will be recalculated in the light thereof and appropriate adjustments will be made by the Fund to the periodic payments to the Applicant."

Whereas the facts of the case are as follows:

The Applicant, who was born on 15 July 1922, entered the service of UNESCO on 3 July 1972 under a two-year appointment as Chief of the Division of International Standards in the Office of International Standards and Legal Affairs. His appointment was successively extended until 31 July 1977 and 31 July 1978. When informing the Applicant, in his memorandum of 23 May 1977, of the latter extension, the Director of Personnel urged him, on behalf of the Director-General, to take account of the comments made in the most recent assessments of his professional performance, adding that unless he did so "the Director-General will not be in a position to extend your appointment at its next expiry date". On 14 March 1978, the Applicant, whose health had been less than good since 1977, informed the Director-General that, in his doctors' opinion, he was unfortunately not cured and that:

"As I am no longer able, despite my efforts, to continue doing my work, to my great regret I am obliged to request you to terminate my employment with UNESCO on the expiry of my contract, that is, on 31 July 1978."

On 12 June 1978, a personnel officer replied to the Applicant informing him that his "resignation" as of 31 July 1978 had been accepted by the Director-General with regret. On 19 June 1978 the Applicant sent the following letter to the Director-General:

"Three months ago I wrote you a letter stating that my state of health unfortunately prevented me from continuing to work beyond 31 July 1978.

"I wish, therefore, to elaborate on that letter, written too hastily and without knowing my rights, in this further letter concerning my state of health and my future.

"Contrary to what I believed—and hoped—my incapacity for work and my treatment will be very lengthy, according to my doctors, who are unable to tell me when, if ever, I shall be able to resume normal activities.

"I have consulted the Staff Rules and ascertained that under rule 106.1 of the Staff Rules I am entitled to nine months on full salary and nine months on half salary. I should therefore like to avail myself of my entitlements under those provisions after 30 July 1978.

"Lastly, it is possible that later on my doctors may request a disability benefit (art. 34), which can be awarded to me only as from the date on which I have exhausted all my sick-leave entitlements under the Rules.

"These are the matters I am concerned about at present, and I beg you to excuse these belated comments, which result from the state of my health at the time when I wrote you my letter of resignation. . . ."

On 25 July 1978 the Director of Personnel sent the following reply to the Applicant:

"1. Since your fixed-term appointment was due to expire on 31 July 1978, you wrote to the Director-General on 14 March 1978 indicating that you did not wish your appointment to be extended. You are at present on sick leave, with the approval of the Organization's Chief Medical Officer,

until 30 September 1978 and you are now requesting an extension of your appointment so that you may avail yourself on your sick-leave entitlements under the Staff Rules.

"2. You are no doubt aware that under Staff Rule 104.6 a fixed-term appointment does not carry any expectancy of renewal and that unless the Director-General decides to extend it, such an appointment expires on the date set, without notice and without compensation. The fact that you are on sick leave and have not exhausted the maximum number of days of leave provided for in Rule 106.1 creates no legal obligation for the Organization to extend your appointment.

"3. Nevertheless, the Director-General has decided to offer you *ex gratia* a final extension until 30 September 1978, subject to one condition. Although your entitlement to sick leave on full salary was exhausted on 17 July 1978, as of that date you had accrued a considerable number of days of annual leave. The Director-General is willing to grant you the extension you request, provided that you opt to take your annual leave from 18 July until the expiry of your appointment and to receive no monetary compensation other than that for the balance of leave due to you upon separation. It is to be understood that you can be granted no further extension beyond 30 September 1978."

On 31 July 1978 the Applicant's appointment was therefore extended until 30 September 1978. On 9 September 1978 the Applicant sent the Director of Personnel a medical certificate indicating that he was still under treatment and that his convalescence would extend until 30 November 1978. The Applicant added:

"I was therefore unable to take my annual leave in the period which you asked me to opt for in your letter of 25 July 1978. I am sure that UNESCO will not want to deny me the fundamental, inalienable, indefeasible and sacrosanct right to annual leave, a right recognized throughout the world owing, in particular, to the normative work of ILO.

"That right would clearly be violated if the administration—having offered, *ex gratia*, to extend my contract until 30 September 1978 (an offer that I accept with gratitude) and thus undertaken to fulfil all the obligations arising from that offer, in accordance with mandatory principles from which there can be no derogation—refused to compensate me for unused days of annual leave."

On 27 October 1978 the Applicant submitted an application for a disability benefit to the UNESCO Staff Pension Committee. On 26 April 1979 the Secretary of the Committee informed him that the Committee had rejected his request on 29 March 1979, having concluded, on the basis of the medical information available to it, that the Applicant's state of health did not justify the award of a disability benefit within the meaning of article 34 of the Pension Fund Regulations. On 15 May 1979 the Applicant requested that the decision should be reviewed in accordance with the procedure laid down in section K of the Pension Fund's Administrative Rules. On 19 June 1979 the Secretary of the UNESCO Staff Pension Committee informed the Applicant that the Committee had decided to obtain the advice of a medical board, in accordance with Administrative Rule K.7. On 10 June 1980 the Applicant was informed that on 13 May 1980 the Committee had revoked its earlier decision and decided, on the basis of the conclusions of the Medical Board, to award him a disability benefit from 1 October 1978, the day after the date of his separation from service; he was advised, however, that payment of the benefit was subject to

approval by the Secretary of the United Nations Joint Staff Pension Board. On 3 July 1980 the Secretary of the Board, who had been informed of that decision on 20 May 1980, wrote to the Secretary of the UNESCO Staff Pension Committee in the following terms:

"1. While the [UNESCO Staff Pension] Committee is competent to take a decision on whether or not a disability benefit should be awarded, the question of the date on which such a benefit commences is not part of such a decision.

"2. While section H.1 of the Administrative Rules states that 'The determination of incapacity *for the purpose of disability benefits under article 34 (a) and (b)* . . . shall . . . be made in each case by the staff pension committee . . .' (emphasis supplied), Rules H.3 and H.4 specify that in order to achieve that purpose the Committee makes a determination under article 34 (a) and not under article 34 (b). The only time the committee is competent to act under article 34 (b) is when the question involved relates to whether or not the benefit awarded under article 34 (a) is to be continued, but not when it is to start.

"3. In the light of the above, I should like to ask you to inform me of the date on which the sick leave of the above would have been exhausted so that I can determine the date from which the disability benefit under article 34 (b) becomes payable."

On 18 November 1980 the Secretary of the Board informed the Applicant that the UNESCO Staff Pension Committee had awarded him a disability benefit, which would take effect on 1 July 1979. In replying to the Secretary of the Board by letter of 11 December 1980, the Applicant stated that under article 34 (b) of the Pension Fund Regulations the disability benefit awarded to him should commence on the date of separation and not on the date named by the Secretary. He therefore requested the Secretary to reconsider his decision or, failing that, to regard his letter as a request for review in accordance with Rule K.2 of the Pension Fund's Administrative Rules. The request was brought before the Standing Committee of the Board, whose decision was communicated to the Applicant by letter of 13 April 1982 from the Secretary of the Board, which read as follows:

"At its 153rd session, held at Nicosia in February 1982, the Standing Committee reviewed, in pursuance of Rule K.2 of the Fund's Administrative Rules, the determination of the Secretary of the Board that the disability benefit awarded to you by the UNESCO Staff Pension Committee on 1 October 1978 should not commence until your entitlement to leave without pay was exhausted, i.e., on 1 July 1979. The Standing Committee rejected your request and decided to uphold the Secretary's determination.

"The Standing Committee, in making this decision, relied on the clearly expressed intent of article 34 of the Regulations and confirmed that the Secretary's determination was not only fully consistent with those provisions but also in keeping with the established practice of the organizations members of the Fund in this sphere.

"In the Standing Committee's view, this consistent approach must continue to be applied, and any other seemingly conflicting provisions in other sections of the Staff Regulations and Rules of an affiliated organization concerning matters other than the award of a disability benefit and its commencement date under the Fund's Regulations must either be changed or be interpreted in accordance with this determination.

“In view of the foregoing, you may wish to request the organization that formerly employed you to pay you for the period of your sick leave.” On 27 July 1982 the Applicant filed the above-mentioned application.

Whereas the Applicant's principal contentions are:

1. The disputed decision was taken in violation of the unequivocal provisions of article 34 (b) of the Pension Fund Regulations, which does not provide that the disability benefit may commence on a date *after* separation from service.

2. The date 1 July 1979, named by the Respondent as the date on which the Applicant's disability benefit was to start, is the date on which his sick leave entitlement would have been *exhausted* if he had still been the holder of an appointment with UNESCO after 30 September 1978. However, UNESCO refused to extend the Applicant's appointment retroactively from 1 October 1978 to 30 June 1979. There is therefore a dispute between the Secretary of the Board and UNESCO, the former holding that UNESCO was obliged to extend the Applicant's appointment until 30 June 1979 and UNESCO denying the existence of such an obligation. The Applicant is thus being penalized by the Secretary of the Board for UNESCO's—real or imaginary—failure to fulfil its obligations.

Whereas the Respondent's principal contentions are:

1. Article 34 (b) of the Pension Fund Regulations and the practices accepted by organizations members of the Fund require exhaustion of all entitlements to paid leave, including sick leave on full and half pay, prior to the commencement of a disability benefit. The date of commencement of payment of a disability benefit is fixed by the Regulations of the Fund and cannot be altered by any organ of the Fund or by any member organization. Even if there were to be a contrary provision in other parts of its Staff Regulations, the organization, in order to join the Fund, having agreed under article 3 of the Regulations to accept the Fund's Regulations, must continue to abide by them.

2. With regard to the circumstances in which the UNESCO Staff Pension Committee awarded the disability benefit:

(a) The award of a disability benefit under article 34 should have been requested by UNESCO in accordance with Administrative Rule H.3 and not by the Applicant after he had ceased to be a staff member.

(b) Had UNESCO acted as required, the Applicant would have received the payment due to him from UNESCO during sick leave on half pay and a disability benefit thereafter at a higher rate.

Whereas the principal contentions of UNESCO are:

1. UNESCO had no legal obligation to extend the Applicant's contract on health grounds. The question of the extension of the appointment is within the jurisdiction of the ILO Administrative Tribunal. Morally speaking, extension of the contract beyond 30 September 1978 would have been justified only by reference to a future disability benefit and only in so far as there was reason to believe that the Applicant's illness might prove to be incapacitating within the meaning of article 34 of the Pension Fund Regulations, which was not the case.

2. The UNESCO Staff Pension Committee is competent to set the date of commencement of a disability benefit.

3. There can be only one interpretation of article 34 (b) of the Pension Fund Regulations, namely, that the benefit shall commence on the date of exhaustion of the entitlements of the person concerned to paid sick leave only if that date is earlier than the expiry date of his appointment.

4. There is no hierarchical relationship between the UNESCO Staff Rules and the Pension Fund Regulations, particularly between rule 106.1 (*h*) of the UNESCO Staff Rules and article 34 of the Pension Fund Regulations. The fact is that UNESCO has consistently interpreted Staff Rules 106.1 and 106.1 (*h*) as creating no legal obligation to extend the fixed-term appointment of a staff member who has not exhausted his or her sick leave under those provisions.

The Tribunal, having deliberated from 12 to 17 October 1983, now pronounces the following judgement:

I. The Tribunal concedes UNESCO's application for intervention under article 20 of its Rules.

II. In the latest stage in the proceedings, the Respondent, in the above-mentioned observations of 21 September 1983, acknowledges that the Applicant is entitled to a disability benefit as of the proper date of his separation from UNESCO and undertakes to pay the Applicant, if he so requests, a disability benefit of \$8,522.16 a year retroactively from 1 October 1978, the *de facto* date of the Applicant's separation from UNESCO. The Respondent requests the Tribunal, however, not to specify the proper date of the Applicant's separation.

III. The Tribunal notes that, this being the case, 1 October 1978, the *de facto* separation date, coincides with the *de jure* separation date. In fact, neither the Applicant nor UNESCO, his most recent employer, disputes that it is the proper date. At the time of the Tribunal's ruling, no appeal has as yet been filed with a competent authority with a view to establishing that the Applicant's contract should have been extended, specifically until 30 June 1979. Consequently, and without prejudice to such a determination being made, the Tribunal considers that the proper date of the Applicant's separation is 1 October 1978.

IV. The Applicant's request that his entitlements be recalculated as of 1 October 1978 is therefore well founded. The parties agree that the annual disability benefit due to the Applicant from that date shall be \$8,522.16. The Tribunal decides that the benefit thus determined shall be paid to the Applicant.

V. The Applicant requests the Tribunal to grant him appropriate compensation for the damage he suffered as a result of the abnormal delay in deciding on his benefit. The Respondent has made no reference to that request. However, his observations and amended plea of 21 September 1983 imply that he is opposed to that request since he offers to pay retroactively from 1 October 1978 the benefit due to the Applicant without any further compensation.

VI. In this case, there was an abnormal delay in paying the Applicant's benefit owing to the differences of opinion between the Respondent and UNESCO concerning the date on which entitlement to the benefit should commence. In his most recent statement, the Respondent acknowledges that, in the circumstances, he is required to pay the benefit from 1 October 1978. The Respondent is accordingly liable, and he owes the Applicant compensation for the damage he suffered as a result of the abnormal delay in the payment of his benefit. The Tribunal decides to fix that compensation by granting the Applicant interest on the sums due to him at an annual rate of 10 per cent; this interest shall be payable from 1 October 1978 until the date on which the amounts due to the Applicant by virtue of this judgement are paid.

VII. Lastly, the Applicant requests the Tribunal to order the Respondent to pay him the sum of \$800 as costs. This sum represents the cost of telephone calls and of two journeys from Brussels to Paris incurred by him in preparing his case. The sum requested is not excessive and corresponds to expenses actually

incurred by the Applicant. The Tribunal decides to award him the sum of \$800 to cover costs and expenses.

VIII. The Tribunal takes note specifically of the undertaking given by the Respondent—if the Applicant wishes to initiate and does in fact initiate action against UNESCO in the appropriate fora to obtain a ruling (i) that his contract should have been extended until 30 June 1979 and (ii) that he was entitled until that date to sick leave on half pay, and if judgement is given in his favour—to recalculate the Applicant's disability benefit in the light of such judgement and make the appropriate adjustments in the periodic payments to the Applicant.

IX. For these reasons the Tribunal decides that:

1. The Applicant's disability benefit became due on 1 October 1978.
2. On that date he was entitled to a disability benefit of \$8,522.16 per annum.
3. The Respondent is ordered to pay the Applicant all the sums that he should have received by way of disability benefit from 1 October 1978.
4. The Respondent is ordered to pay the Applicant a sum equivalent to the interest at 10 per cent per annum on the amount of the overdue benefit from 1 October 1978 until the date on which the Respondent pays the amount due to the Applicant by virtue of this judgement.
5. The Respondent is ordered to pay the Applicant the sum of \$800 to cover expenses.
6. All other claims are rejected.

*(Signatures)*

Endre USTOR  
*President*

T. MUTUALE  
*Member*

*New York, 17 October 1983*

Roger PINTO  
*Member*

Jean HARDY  
*Executive Secretary*

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### Judgement No. 314

*(Original: English)*

**Case No. 309:**  
**Tomiak**

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

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*Request by a staff member of the United Nations to rescind the administrative decision to omit her name from the G-5 Promotion Register for 1977; request for compensation for loss of salary expectancy.*

*Conclusion of the Joint Appeals Board that the recommendation of the Appointments and Promotion Panel which led to the contested decision had been taken on the basis of irregular procedure.—Recommendation to place the Applicant's name on the 1977 G-5 Promotion Register.—Recommendation rejected; Secretary-General's decision to refer the Joint Appeals Board report to appropriate bodies for future promotion reviews.*

*Consideration by the Tribunal of the circumstances of the case.—Finding that the carry-over of a staff member's name from one promotion register to the next one for three consecutive years*