



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1363

Case No. 1441

Against: United Nations Joint Staff  
Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, Vice-President; Sir Bob Hepple;

Whereas, on 13 October 2005, a participant in the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF or the Fund), filed an Application requesting the Tribunal, inter alia:

- “1. To rescind the ... decision ... of the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) ... upholding the decision of the Pension Fund’s Secretary ... as to the calculation of the Applicant’s retirement benefits according to article 28 (c);
2. To direct, by way of relief, that the UNJSPB recalculate [the] Applicant’s retirement benefit in accordance with the rates of accumulation set forth in article 28 (c) of the Regulations of the ... Fund, with retroactive effect to Applicant’s date of retirement on 31 March 2005, with interest;
3. To direct UNJSPB to pay Applicant the sum of €10,000 for moral damages; and,
4. To ... direct the UNJSPB to pay the Applicant’s reasonable legal fees ...”

Whereas the Respondent filed his Answer on 25 January 2006;

Whereas the Applicant filed Written Observations on 23 February 2006 and, on 27 September 2007, the Respondent commented thereon;

Whereas the facts of the case read as follows:

The Applicant, who was born on 21 February 1941, joined the International Atomic Energy Agency (IAEA) on 8 October 1982. He separated from IAEA service upon his resignation, effective 19 May 1985. During this period, the Applicant had been a Fund participant. After his separation, the Applicant received a UNJSPF withdrawal settlement, pursuant to his payment instructions to the Pension Fund. On 10 August 1987, he re-entered the Fund, again as an IAEA participant, and then elected to restore his prior period of UNJSPF contributory service, in accordance with article 24 of the UNJSPF Regulations. He retired from IAEA service on 31 March 2005.

Shortly after his return to service, the Applicant noticed from his annual statement from the Fund, that his future retirement benefit would be lower than he expected from the Regulations. After several requests to review the calculation of his retirement benefit, the Applicant was advised by the Secretary of the Fund that the 2 per cent rate specified in article 28 (c) would be applicable to his contributory service from 8 October 1982 until 19 May 1985, however that for the period from 10 August 1987, the applicable rates would be those specified in article 28 (b). Following further exchanges of correspondence, the Applicant finally made a request to the Standing Committee of the Pension Board to review his case. At its 186<sup>th</sup> meeting, held in July 2003, the Standing Committee decided that the Applicant's request for review was premature, since he was still in active service at that time and his UNJSPF pension benefit had consequently not been calculated as yet by the Fund secretariat. He was again advised that the Pension Fund would be applying article 28 (b) of the UNJSPF Regulations to determine the rates of accumulation relating to the period of Fund participation that commenced on 10 August 1987.

Following his separation from IAEA service on 31 March 2005 and having submitted his payment instructions, the Applicant was advised, on 7 April, of the amount of his retirement benefit, "calculated under article 28" of the Pension Fund Regulations. On the same day, the Applicant submitted a request for review by the Standing Committee, pursuant to article K.5 of the Administrative Rules of the Fund. The Standing Committee at its 188<sup>th</sup> meeting, held from 5-8 July, decided, by majority, to uphold the decision taken by the Fund as to the accumulation rates that applied to the determination of the Applicant's retirement benefit. The Applicant was informed of this decision on 29 July.

On 13 October 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. His participation in the Fund commenced on 8 October 1982 and never ceased.
2. The Fund's calculation has impermissibly discriminated against him.
3. The English version of the Fund's Regulations is ambiguous; however, the valid and equally applicable Spanish version of the Fund's Regulations unambiguously demonstrates that the Applicant's participation never ceased and that he had an acquired right to pension benefits calculated under article 28 (c).

Whereas the Respondent's principal contentions are:

1. The Applicant participated in the Fund in two distinct time periods.
2. The Applicant's interpretation of article 21 of the Regulations of the Fund is wrong.
3. The measures did not discriminate against the Applicant.

4. No words or terms in the Spanish version of the UNJSPF Regulations form part of the legislative history of the provisions; in any case, the English version is very clear.

The Tribunal, having deliberated from 31 October to 21 November 2007, now pronounces the following Judgement:

I. The Applicant challenges a decision of the UNJSPB, calculating the Applicant's retirement benefit. Specifically, the Applicant asserts that the calculation of his retirement benefit was erroneous, in that his two periods of service should be treated as one for purposes of article 28 of the UNJSPF Regulations and that, therefore, his retirement benefit was incorrectly calculated pursuant to article 28 (b) of the Regulations, instead of pursuant to article 28 (c). Asserting that he maintained continuous participation in the Fund from the date of his entry into service in 1982 until he retired in 2005, the Applicant requests that the Tribunal (1) rescind the decision of the Standing Committee, denying his request for review and recalculation of his retirement benefit, so as to be calculated pursuant to article 28 (c), with retroactive effect to his date of retirement on 31 March 2005; (2) award moral damages; and, (3) award reasonable legal fees and costs. The Respondent, on the other hand, asserts that the Applicant had two periods of service - one from 1982-1985 and one from 1987-2005 - for purposes of calculating the retirement benefit and that the calculation of the Applicant's pension benefit by the UNJSPF under article 28 (b) was correct.

II. The Applicant entered the service of IAEA on 8 October 1982. At the time, in accordance with the terms and conditions of his employment, he became a participant in the UNJSPF. Thereafter, the Applicant, apparently at the request of his government, resigned his post at IAEA and returned to his national atomic energy agency. On 19 May 1985, the Applicant separated from the service of IAEA. Upon his separation from service, the Applicant was entitled to, and did, receive a withdrawal settlement pursuant to article 31 of the UNJSPF Regulations, which provides:

**“WITHDRAWAL SETTLEMENT**

(a) A withdrawal settlement shall be payable to a participant whose age on separation is less than the normal retirement age, or if the participant is the normal retirement age or more on separation but is not entitled to a retirement benefit.

(b) The settlement shall consist of:

(i) The participant's own contributions, if the contributory service of the participant was less than five years ...”

Two years later, on 10 August 1987, the Applicant re-entered the service of the Agency.

III. At the time the Applicant re-entered the service of IAEA, article 21 of the Regulations provided the terms and conditions under which a participant who had left the service of a member organization could maintain

continuity of participation in the event of separation from service. Specifically, article 21 (b) in force at the time provided, in relevant part, that “[p]articipation shall cease when ... he or she separates from such member organization, except that participation shall not be deemed to have ceased where a participant resumes contributory service with a member organization within 12 months after separation without a benefit having been paid”. The Tribunal notes that this provision of article 21 was subsequently amended, as of 1 January 2002, to allow re-entry within 36 months, but at the time the Applicant was re-entering, the Regulations required re-entry within the 12-month period set forth above.

IV. Thus, in order for the Applicant to maintain seamless participation in the Fund, such that he would not have been deemed to have ceased his employment or his participation in the Fund, the Applicant would have had to have both resumed his contributory service within 12 months *and* failed to have received any “benefit” from the Organization upon his separation. Unfortunately for the Applicant, his re-entry in service occurred approximately 26 months following his separation from service, so he was not eligible to be treated as if his participation never ceased. Although the Applicant argues that the testing period should have been the 36 months stipulated in the version of article 21 (b) that was in effect when he retired, the Tribunal cannot agree. At the time of the re-entry, the provision in effect, and with which he would have had to comply, required re-entry within 12 months, not 36 months. Therefore, the Applicant did not satisfy the first prong of article 21 (b). As the requirement of article 21 (b) was a two-pronged requirement, the Applicant’s failure to satisfy one part of the requirement prevented him from qualifying under the provision. That being said, the Tribunal notes that the Applicant also failed to satisfy the second prong of article 21 (b) - i.e., the requirement that no benefit was paid - by virtue of his receipt of a withdrawal settlement upon his separation from service in 1985. Although the Applicant argues that such a withdrawal settlement was not a benefit, as intended under article 21, again, the Tribunal cannot agree. Part V of the Regulations, entitled “Benefits”, sets forth the various types of benefits to which staff members and others whose interest derives from staff members might be entitled. Part V specifically includes article 31, “Withdrawal Settlement”. Thus, the Tribunal is of the opinion that a withdrawal settlement is indeed a benefit. Having received a benefit, the Applicant could not have satisfied the requirements of article 21 (b), even had his re-entry been timely. As he satisfied neither prong of article 21 (b), the Tribunal holds that his participation ceased upon his separation from service in 1985 and then started for a second time when he re-entered service on 10 August 1987. (See Judgement No. 524, *Stein* (1991).)

V. At the time of his re-entry, however, the Applicant, pursuant to articles 22, 24 and 25 of the Regulations of the UNJSPF in effect in 1987, was able to restore his prior contributory service - for the period 1982-1985 - by returning to the Organization the amount of the withdrawal settlement he received plus interest from the date of payment of the benefit. Article 22 provides, in relevant part:

“(a) Contributory service shall accrue to a participant in pay status from the date of commencement to the date of cessation of his participation. For the purposes of each of the articles 28 (b) and (c) and 29 (b), separate periods of contributory service shall be aggregated except that in such aggregation no account

shall be taken of periods of service in respect of which a withdrawal settlement was paid and which were not subsequently restored.”

Article 24, in relevant parts, provides:

“(a) A participant re-entering the Fund after 1 January 1983 may, within one year of the re-commencement of participation, elect to restore his or her prior contributory service, provided that on separation of the participant became entitled to a withdrawal settlement under article 31 (b) (i), and provided further that the service was the most recent prior to the re-entry. “

...

(d) Restoration under (a) above shall be subject to receipt by the Fund of contributions in accordance with article 25 (d).”

Finally, article 25 (d) further provides, in relevant part “[c]ontributions for the purpose of restoration under article 24 (a) shall consist of the withdrawal settlement received by the participant in respect of the previous participation ... with interest from the date of payment of the benefit ...”

Thus, upon the Applicant’s repayment to the Organization of the withdrawal settlement plus interest, the Applicant restored his prior contributory service - from 1982-1985 - thus enabling him to have earnings from that period included in calculating the value of his pension. As the Tribunal held in *Stein (ibid.)* “[a] conditional right to restoration of prior contributory service, however, by no means creates or implies the existence of a right with respect to rates of accumulation applicable to potential service in the future”. Thus, in determining the rate at which his retirement benefit would be calculated, the Applicant was further subject to the provisions of article 28. Article 28, in relevant part, provides:

**“RETIREMENT BENEFIT**

...

(b) The benefit shall, subject to (d), (e), and (f) below, in respect of any period or period of participation commencing on or after 1 January 1983, be payable at the standard rate obtained by multiplying:

- (i) the first five years of the participant’s contributory service, by 1.5 per cent of the final average remuneration;
- (ii) the next five years of contributory service, by 1.765 per cent of the final average remuneration;
- (iii) the next 25 years of contributory service, by 2 per cent of the final average remuneration;

...

(c) The benefit shall, subject to (d), (e) and (f) below, in respect of any period of participation commencing prior to 1 January 1983, be payable at the standard annual rate obtained by multiplying:

- (i) The first 30 years of the participant’s contributory service, by 2 per cent of the final average remuneration...”

Applying the rates of article 28 (b) and (c) to the Applicant's years of service, the Applicant was entitled to a retirement benefit calculated at two different rates: one rate pursuant to article 28 (b) for that period of participation commencing subsequent to 1 January 1983 (the period of service commencing in 1987 and continuing until his retirement in 2005) and another rate pursuant to article 28 (c) for that period of participation commencing prior to 1 January 1983 (i.e., the period of his service from 1982-1985). This was the method utilized by the Organization in calculating the Applicant's retirement benefit, and the Tribunal finds that this method was the correct one.

VI. For the foregoing reasons, the Tribunal rejects all pleas.

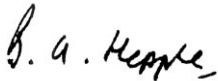
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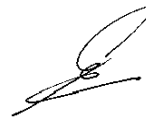
**Spyridon Flogaitis**  
President



**Jacqueline R. Scott**  
Vice-President



**Bob Hepple**  
Member



**Maritza Struyvenberg**  
Executive Secretary

New York, 21 November 2007