

Translated from French

**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

**Frechon
(Appellant)**

v.

**United Nations Joint Staff Pension Board
(Respondent)**

**JUDGMENT
[No. 2010-UNAT-003]**

Before:	Judge Jean Courtial, Presiding Judge Mark P. Painter Judge Luis María Simón
Case No.:	2009-004
Date:	30 March 2010
Registrar:	Weicheng Lin

Counsel for Appellant:	Hugh McCairley
Counsel for the Respondent:	Bernard Cochemé

Judge Jean Courtial, Presiding Judge

Synopsis

1. The United Nations Appeals Tribunal received an appeal submitted by Ms. Frechon (“the appellant”) on 16 October 2009 against the decision by the Standing Committee of the United Nations Joint Staff Pension Board at its meeting of 15 July 2009, of which the appellant was notified by a letter dated 21 July 2009, to reject her request for a disability benefit (“the contested decision”). The Tribunal considers that the Standing Committee could not reject the request unless it disregarded the provisions of article 33 (a) of the Pension Fund Regulations. The Tribunal rescinds the contested decision, but, considering that it is not in a position to rule on the basis of uncertain and disputed facts, it remands the appellant’s appeal to the Standing Committee of the United Nations Joint Staff Pension Board so that the Committee may take a decision on the matter on the basis of the reasons set out in this judgment.

Facts and procedure

2. The appellant was hired as an interpreter in the Department of Peacekeeping Operations on 8 June 1998. She was subsequently recruited as a translator on a fixed-term contract by the International Criminal Tribunal for Rwanda in June 2001. She separated from service at the Tribunal on 31 July 2007, the date of expiration of her appointment (which was not renewed).

3. In 2003, the appellant began to suffer from pain in her left arm. On 20 July 2003, she was diagnosed with “cubital tunnel syndrome and complex regional pain”. Following an operation, she resumed work from 27 January 2004 until the end of November 2004. She was then placed on sick leave. During 2005 and 2006 she underwent two medical examinations, one in Geneva and the other in New York, to determine whether she could resume work. These examinations concluded that while the appellant was physically incapable of using a computer keyboard, she could nevertheless resume work that did not require the use of a keyboard. The International Criminal Tribunal for Rwanda agreed to modify the appellant’s working conditions to compensate for her inability to use a computer keyboard. The appellant, however, declined to return to Arusha, where she would be unable to receive any medical treatment appropriate to her condition.

4. At her request, the appellant was examined by a medical board on 11 April 2007. The board noted persistent pain of the ulnar nerve in the shoulder area and diagnosed probable algoneurodystrophy syndrome and hand-shoulder syndrome. It considered that Ms. Frechon was unable to resume her former work in Arusha because, on the one hand, it had become impossible for her to use a computer keyboard and, on the other, appropriate treatment could not be provided to her there. Following this examination, the Administration decided not to renew her appointment beyond 31 July 2007 and, in accordance with the recommendation of the Advisory Board on Compensation Claims, decided to award her compensation in the amount of US\$ 35,167, corresponding to a 20 per cent permanent loss of function, of which 75 per cent was recognized as being related to the performance of her duties.

5. On 30 September 2007, the appellant submitted a request to the United Nations Joint Staff Pension Fund for a disability benefit under article 33 (a) of its Regulations. This request, submitted on the basis of annex I, rule H.4, of the Regulations, was rejected on 28 May 2008 by the United Nations Staff Pension Committee. The Committee, having received an appeal from the appellant, upheld its decision on 19 November 2008.

6. The appellant filed an appeal with the Standing Committee of the United Nations Joint Staff Pension Board on the basis of annex I, section K, of the Regulations; the Standing Committee confirmed the rejection of the request at its meeting of 15 July 2009. It considered that the inability to use a computer keyboard was not reasonably incompatible with the continued performance by Ms. Frechon of her duties in a member organization. This is the contested decision. The appellant was notified of the Standing Committee's decision by a letter dated 21 July 2009.

Submissions

Appellant

7. The appellant argues that:

- In view of her education and professional qualifications, she could be employed only as a translator;
- The documentation that she has submitted — namely, statements from translation professionals, the Language Service of the Court of Justice of the European Communities, the Ecole supérieure d'interprètes et de traducteurs in Paris and the Ecole de traduction et d'interprétation at the University of Geneva — proves that her impairment prevents her from effectively performing the tasks required of a translator;
- The United Nations Joint Staff Pension Fund, which has declined to provide her with the record of the meeting at which it adopted the contested decision or to submit this record to the Appeals Tribunal, has not demonstrated that she would be able, despite her impairment, to effectively perform the tasks required of a translator.

Respondent

8. The respondent argued that the contested decision adopted by the Standing Committee was based on the recognition that the documents submitted by the appellant, including medical reports, failed to establish that, on the date of her separation from the employing organization, she was unable to perform certain tasks required of a translator without using a computer keyboard. The Standing Committee noted that the International Criminal Tribunal for Rwanda had offered to modify the appellant's working conditions, including by providing assistance from a voice recognition system that would have enabled her to perform translation duties, but that she refused to resume her post.

9. The respondent maintained that, while the health of the appellant, whose due process rights were respected, prevented her from effectively using a computer keyboard, this impairment nonetheless did not constitute an incapacity for further service in a member organization. The appellant was therefore not entitled to receive a disability benefit under article 33 (a) of the Pension Fund Regulations.

Considerations

10. Article 2, paragraph 9, of the statute of the United Nations Appeals Tribunal provides that the Tribunal shall be competent to hear and pass judgement on an appeal of a decision of the United Nations Joint Staff Pension Board (or its Standing Committee) alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund. In this case, Ms. Frechon argues that the decision to reject her request disregards article 33 (a) of the Pension Fund Regulations.

11. Ms. Frechon's appeal first of all raises the issue of how article 33 (a) should be understood. It provides that entitlement to a disability benefit is recognized only when the Board finds a staff member "to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration".

12. In the view of the Appeals Tribunal, it follows from article 33 (a) that the service of which it is necessary to assess the reasonable compatibility with the abilities of a staff member who is suffering from an impairment that is permanent or of long duration and who is requesting disability benefit must be understood as the duties which the staff member could perform, taking into account his or her state of health, in a member organization and which correspond to the duties performed by the staff member on the date of his or her separation, or at least duties commensurate with his or her education and professional qualifications.

13. It emerges from the investigation of this case, and moreover it is not contested, that the appellant's impairment is an incapacity which is permanent or of long duration and which prevents her from using a computer keyboard in her work. The duties whose reasonable compatibility with her abilities need to be assessed are those of a translator or at least duties commensurate with her education and professional qualifications.

14. Secondly, it is appropriate to ask what checks the Fund administration should carry out when it is required to make a decision on a request under article 33 (a).

15. The Appeals Tribunal considers that it is the responsibility of the Pension Fund administration, when it receives a request from the employing organization under annex I, rule H.3, of the Regulations, or from the staff member under annex I, rule H.4, not only to determine the nature of the impairment suffered by the staff member in question and its effects on his or her ability to work, but also to investigate whether, in the light of the impairment and its effects, the further service of the staff member as defined above is reasonably compatible with his or her abilities, taking into account the actual working conditions in member organizations and possible ways of modifying those working conditions.

16. Thirdly, while it is the appellant's responsibility to demonstrate that the Standing Committee disregarded article 33 of the Regulations, the Appeals Tribunal considers that she cannot be required to provide negative proof, namely of the fact that she would be incapacitated for further service reasonably compatible with her impairment. Not only can she rely on all evidence to that effect but she can also argue that the Standing Committee took the contested decision without having carried out all the checks for which it was responsible, as stated above. The respondent may contest the appellant's claims by submitting all other evidence to the contrary to the Appeals Tribunal.

17. In this case, the letter dated 21 July 2009 indicates that the Standing Committee rejected the appellant's request in general terms and merely restated the terms of article 33 (a) of the Regulations. In the absence of the record of the meeting at which the appellant's request was considered, to which she might have been able to refer, the summary of the reasons for the decision does not on its own demonstrate that the Standing Committee specifically investigated whether or not the appellant, given her claimed impairment, is capable of service reasonably compatible with her abilities, bearing in mind the actual working conditions of a translator in member organizations and possible ways of compensating for her inability to use a keyboard.

18. The appellant also has good reason to assert that the decision not to renew her contract beyond 31 July 2007 was taken because of her inability, for health reasons, to resume her duties as a translator. She argues further, with reference to specific and detailed statements from translation professionals, the Language Service of the Registry of the Court of Justice of the European Communities, the Ecole supérieure d'interprètes et de traducteurs in Paris and the Ecole de traduction et d'interprétation of the University of Geneva, that the technology currently available, including voice recognition technology, is not such as to enable a person incapable of using a keyboard to perform the duties of a translator satisfactorily.

19. The respondent did not give a satisfactory answer to the appellant's arguments, since it referred only to the medical reports, in particular the report dated 27 May 2008 by the Director of the Medical Services Division stating that the appellant was capable of performing those duties of a translator that did not require the use of a keyboard if certain modifications were made to her working conditions, without specifying the effectiveness of those modifications in relation to the actual demands made of a translator working in a member organization.

20. The Appeals Tribunal considers that, under these circumstances, the appellant has good reason to assert that the Standing Committee could not reject her request unless it disregarded article 33 (a) of the Fund Regulations.

21. However, while this consideration implies that the contested decision should be rescinded, it does not necessarily imply that the Appeals Tribunal should order, in accordance with the powers conferred on it by article 9, paragraph 1 (a), of its statute, the specific performance mentioned by the appellant. The Appeals Tribunal considers that it is not in a position to rule on the basis of uncertain and disputed facts, namely whether it is actually possible for Ms. Frechon to perform the duties of a translator in a member organization, or at least duties commensurate with her education and professional qualifications and which are reasonably compatible with her impairment, taking into account the duties actually required of a translator and the technology available to compensate for her inability to use a computer keyboard. The Appeals Tribunal considers that, for this reason, the Standing Committee should reconsider Ms. Frechon's request after carrying out the required checks, for example finding out from the translation services of member organizations what technology is available that might compensate effectively for the appellant's impairment and to what extent it would compensate for that impairment in the light of the duties actually required of a translator in those organizations.

22. It follows from the above that it is necessary only to rescind the decision of 15 July 2009 of the Standing Committee of the United Nations Joint Staff Pension Board and to remand the appellant's case to the Committee, so that the Committee

may review its decision on her request on the basis of the reasons set out in this judgment.

Judgment

23. Therefore the Appeals Tribunal:

- Rescinds the decision taken by the Standing Committee of the United Nations Joint Staff Pension Board at its meeting on 15 July 2009 with regard to Ms. Frechon’s request;
- Remands Ms. Frechon’s request to the Standing Committee of the United Nations Joint Staff Pension Board so that it may review its decision on the basis of the reasons set out in this judgment.

(Signed) Judge Courtial
Presiding

(Signed) Judge Painter

(Signed) Judge Simon

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010
in New York, United States.

(Signed) Weicheng Lin, Registrar, UNAT
