



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

Judgment No. 2017-UNAT-729

**Zakharov
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Rosalyn Chapman Judge Sabine Knierim
Case No.:	2016-968
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Sergio B. Arvizú

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal in terms of Article 2(9) of the Statute of the Appeals Tribunal (Statute) by Mr. Alexandre Zakharov against the decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and Pension Board, respectively) dated 29 July 2016 upholding the decision of the United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund) rejecting his request for restoration of his prior contributory service in order to receive a deferred retirement benefit. Mr. Zakharov appealed on 7 September 2016, and the Pension Fund answered on 10 November 2016.

The Factual Background

2. The Appellant had two participations as a member of the Pension Fund. This appeal relates to the Appellant's first participation in the Pension Fund from 2 May 1980 to 3 August 1985 under Pension No. A/150842. His second participation was from 28 September 1990 to 31 May 1998 (A/236181).

3. On 2 May 1980, the Appellant joined the United Nations Centre for Human Settlements in Nairobi, Kenya, as a Human Settlements Officer on secondment from the Government of the former Union of Soviet Socialist Republics (USSR). He had a fixed-term appointment for two years and was eligible to participate in the Pension Fund upon taking up his appointment. His contract was renewed and ended on 3 August 1985.

4. The Appellant's complaint arises from a transfer of his pension benefit from the Pension Fund to the Social Security Fund of the USSR after the termination of his first period of service in terms of a transfer agreement between the Pension Fund and the Government of the USSR concluded in 1980 (the transfer agreement).

5. The transfer agreement arose from negotiations between the Pension Fund and various governments. During the 1970s, the Pension Fund was approached by the Governments of the former USSR, Ukrainian SSR and Byelorussian SSR for the conclusion of a transfer agreement in respect of their staff members seconded to the United Nations. At its 25th session in 1979, the Pension Fund decided that, provided the same principles embodied in the transfer agreement that was being negotiated with the Government of Canada at that time were respected, it had no objection in principle. Following negotiations between the representatives of the three governments and the Pension Fund, assisted by

actuaries and lawyers, the parties agreed on the text of the agreements. The General Assembly approved the agreements by its resolution 35/215 of 1 December 1980.

6. Pursuant to the terms of the transfer agreement, the Appellant signed a Pens.E/7 form on 2 August 1985 directing the Pension Fund to transfer his pension rights to the USSR Bank for Foreign Trade. He confirmed his instruction on 5 November 1985 in an application form addressed to the Pension Fund's Secretary stating that he wished the terms of the transfer agreement to be applied to his case. The total value of his pension rights was actuarially determined to be USD 37,917.

7. On 10 July 1986, the Secretary of the Pension Fund addressed a letter to the Representative of the Ministry of Social Security of the USSR advising that the sum of USD 37,917 would be transferred for the benefit of the Appellant to the Social Security Fund of the USSR. The letter recorded that the amount had become payable as a result of the Appellant's separation from the United Nations and his election to transfer his rights from the Pension Fund to the Social Security Fund of the USSR.

8. The general implementation of the transfer agreement gave rise to difficulties among several of the transferring participants. In view of a growing number of inquiries and complaints concerning the transfer agreements, the Pension Fund in 1991, after consultation with the actuaries, approved the Secretary's recommendation that restoration should exceptionally be permitted for those nationals of the three countries who re-enter the Pension Fund and otherwise meet the provisions for restoration under Article 24 of the Regulations of the Pension Fund.

9. Effective 2 January 1992, the Secretary suspended the processing of any transfers under the three transfer agreements until such time as the future status of the transfer agreements had been clarified. The Pension Fund agreed, in principle, to consider favourably concrete proposals for the reinstatement of the UNJSPF pension rights of clearly delineated groups of former Pension Fund participants if the amounts transferred under the agreements to the USSR Social Security Fund with respect to those former participants were re-paid to the Pension Fund, with appropriate interest.

10. However, in 1993, the Pension Fund decided not to pursue proposals aimed at providing *ad hoc* financial assistance from the Pension Fund to former USSR participants not in receipt of UNJSPF pension benefit entitlements. By resolution 57/286 of

20 December 2002, the General Assembly decided that the issue did not require further consideration by the General Assembly.

11. The Appellant re-entered the service of the Organization in September 1990 when he joined the United Nations Economic Commission for Africa and again became a participant in the Pension Fund.

12. On 6 March 1991, the Appellant wrote to the Pension Fund expressing his interest in restoring his prior contributory service from May 1980 to August 1985. The Pension Fund responded by letter dated 5 April 1991 informing him that his pension rights had been transferred to the Social Security Fund of the USSR under the transfer agreement, in accordance with his payment instructions of November 1985, and that it was not possible to restore his prior contributory service since there was no provision in the transfer agreement to return the funds once they had been transferred to the Social Security Fund of the USSR.

13. The Appellant responded in a letter dated 18 July 1991. He reiterated his wish to restore his contributory service and referred to the provisions of Section F of the Regulations and Rules of the Pension Fund and stated that he would like to restore his prior contributory service by payment in equal monthly installments, with interest, of the amount which the Pension Fund paid to the Social Security Fund of the USSR. The Secretary of the Pension Fund responded on 10 September 1991, stating that since the Appellant's contributory service in respect of his first participation had been more than five years, he was not eligible to restore his contributory service in terms of the Regulations and Rules of the Pension Fund. The relevant provisions of the Regulations and Rules (Article 24 read with Article 31(b)(i) – discussed below) provided that restoration was limited to those participants with less than five years of contributory service and whose only entitlement upon separation was a withdrawal settlement.

14. Some 18 months later, on 13 January 1993, the Appellant wrote to the Pension Fund again. He raised various issues and indicated that the basis for his request for restoration was the transfer agreement, which he believed required modification. He was particularly irked by the fact that the transfer agreement made no provision for the return of funds once they had been transferred to the Social Security Fund of the USSR. This “gap” in the transfer agreement he regarded as a violation of his human rights.

15. The Secretary of the Pension Fund responded on 24 March 1993, recalling the previous communications. He recorded that the transfer “extinguished all your UNJSPF entitlements based on your contributory service from 2 May 1980 to 3 August 1985 and severed your relationship with the UNJSPF”. The Secretary explained the legal position as follows:¹

We regret that we must confirm that the restoration option did not exist in your case. Your prior contributory service had ended after 1 January 1983 and its duration had not been for a period of less than five years; in actual fact, your prior service had ended on 3 May 1985, after five years and three months of UNJSPF contributory service. Consequently, when you renewed your request for restoration in July 1991, the negative response of 10 September 1991 that you received from the Fund referred to article 24 of the Fund’s Regulations (the provision dealing with the right of restoration) and stated that “the provision to restore was not met since your contributory service was over five years...” ... We sincerely regret that our reply could not be more favourable. However, we hope you understand that no other answer was possible under the Fund’s Regulations and Rules.

16. The Appellant separated from the Organization for a second time on 31 May 1998. He then elected an early retirement benefit under Article 29 of the UNJSPF Regulations and is receiving a gross monthly benefit of USD 1,330.

17. The matter of the former participants from the USSR remained under discussion in the Pension Board for a number of years. The Pension Fund next heard from the Appellant 21 years following the last communication to him on the subject, in letters to the Standing Committee of the Pension Fund dated 2 May 2014 and 16 June 2014 in which he again appealed for the restoration of his prior contributory service from May 1980 to August 1985 pursuant to Article 30 of the UNJSPF Regulations. He noted in the earlier letter that he had started to receive a pension from the Russian Federation in respect of his earlier contributory service which had been transferred, but that the pension is lower than the amount he would have received from the UNJSPF.

18. The Pension Fund responded on 26 August 2014 advising the Appellant, *inter alia*, that his appeal was time-barred, that the Pension Fund had no outstanding legal or financial obligations with respect to transfers made under the transfer agreement, and that any questions related to the sums remitted by the Pension Fund to the former Social Security Fund of the USSR should be resolved by the Russian Federation, which has assumed responsibility for the rights and obligations of the former USSR under the United Nations Charter. The Appellant responded to this letter on 4 November 2014 alleging fraud in regard to the

¹ Emphasis in original.

operation of the transfer agreement by officials of the USSR. The Pension Fund responded to the Appellant on 25 February 2015 stating that all decisions were taken in strict compliance with the Pension Fund's Regulations and Rules and the Pension Fund was in no position to take further action. It therefore was unable and unwilling to submit his case to the Standing Committee of the Pension Fund.

19. The Appellant filed an appeal with the Appeals Tribunal on 13 May 2015. The Pension Fund, on 22 May 2015, filed a motion for remand of the appeal to the Standing Committee, to which the Appellant responded on 18 June 2015. The Appeals Tribunal issued its judgment² on 30 October 2015 in which it held that the Pension Fund's decision not to submit the Appellant's appeal to the Standing Committee was a violation of his due process rights and accordingly remanded the case to the Standing Committee. It agreed with the Pension Fund that a referral to the Standing Committee was a jurisdictional pre-condition to an appeal to the Appeals Tribunal and hence that the appeal was not receivable.

20. By letter dated 29 July 2016, the Deputy Chief Executive Officer of the Pension Fund informed the Appellant that the Standing Committee, upon consideration of his request at its 198th meeting held on 20 July 2016, decided to affirm the decision of the Chief Executive Officer to reject the Appellant's request for restoration of his prior contributory service and thus to receive a deferred retirement benefit on the following grounds: i) his request was time-barred; ii) there was no legal or monetary basis upon which the Fund could pay a deferred retirement benefit as the actuarial value of his pension rights in the Pension Fund had been transferred to the USSR; and iii) since all pension rights were transferred to the Social Security Fund of the USSR, recourse is against the Government of the Russian Federation as successor to the USSR.

Mr. Zakharov's Appeal

21. The Appellant contends that the Standing Committee erred in rejecting his request for restoration of his prior contributory service and payment of a deferred retirement benefit as time-barred. In his opinion, the transfer agreement and rules for its implementation are void *ab initio* and thus can be challenged at any time. He argues that the Pension Fund incorrectly regarded his letter of 13 January 1993 as reiterating his earlier requests for restoration of his pension, when in fact the subject of his letter was the transfer agreement. In its letter dated 24 March 1993, the Pension Fund responded to a restoration request

² *Zakharov v. United Nations Joint Staff Pension Board*, Judgment No. 2015-UNAT-607.

he never made. The UNJSPF's contention that he appeals a decision conveyed to him on 24 March 1993 is therefore wrong.

22. It is common cause that the Appellant has been receiving a pension from the Russian federation since 2002. He nonetheless denies the Standing Committee's contention that he would be "double-dipping", if he received a deferred retirement benefit from the Pension Fund. He claims to have submitted his application to the Social Security Department of the USSR with a reservation of his right to undertake actions for the full restoration of rights with the UNJSPF. Moreover, the payments he currently receives, he maintains, are based on an invalid transfer agreement.

23. The Appellant also challenges the Standing Committee's position that recourse in his case lies with the Government of the Russian Federation as the successor of the USSR since all pension rights were transferred to the Social Security Fund of the USSR. The UNJSPF, he says, is responsible for misleading the General Assembly ultimately enabling the "legalized fraudulent transfer of pension rights of the former participants of the UNJSPF from the USSR, Ukrainian SSR and Byelorussian SSR". The transfer agreement, he says, is governed by public international law. Under the Vienna Convention on Law of Treaties between States and International Organizations, the Pension Fund is therefore "legally responsible for the problems with pension benefits".

24. The Appellant makes numerous allegations of fraud against the Pension Fund.

25. The Appellant requests that the Appeals Tribunal rescind the decision taken by the Standing Committee; order the Pension Fund to restore his contributory service for the period from 2 May 1980 to 3 August 1985 and to pay him "with interest rates and adjustments the amount of pension benefits from 20 February 1999 to the time he would start receiving pension payments for the period from 2 May 1980 to 3 August 1985".

The Pension Fund's Answer

26. The principal submission of the Pension Fund is that the Appellant's request is time-barred. The Appellant is appealing a decision conveyed to him by letter dated 24 March 1993. That letter was unequivocal and final in its determination that the Appellant would not be granted any benefit from the Pension Fund in relation to his contributory service which had been transferred. In terms of Section K5 of the Pension Fund's Administrative Rules, the Appellant had 90 days following receipt of the letter within which to submit his appeal, but waited until 2 May 2014, over 21 years later, to do so.

27. Moreover, the Pension Fund submits that there is no legal or monetary basis upon which the Pension Fund can pay a deferred retirement benefit. The actuarial value of the Appellant's pension rights in the Pension Fund was transferred to the USSR. The Russian Federation as the successor government started to pay a pension to the Appellant arising from the transfer of his UNJSPF pension rights as of 2003. Since he is receiving a pension and is now seeking a full restoration of his prior contributory service in the UNJSPF for the same period of time and payment of a deferred retirement benefit on account of such participation, he in fact would be "double-dipping".

28. Since all pension rights were transferred to the Social Security Fund of the USSR, recourse in this case lies with the Government of the Russian Federation as the successor to the USSR. Legally, the Fund is not responsible for the administration of national pension schemes; thus, there is no action that it can take to rectify any shortcomings faced by the Appellant in regard to the benefits he is receiving from his national government arising from the transfer of his UNJSPF pension benefit entitlements. Following a report of the Pension Fund to the General Assembly on the matter, the General Assembly by resolution 57/286 of 20 December 2002 decided that the issue of transfers under the transfer agreement did not require further consideration by the General Assembly.

29. The Pension Fund accordingly requests the Appeals Tribunal to dismiss the appeal.

Considerations

30. The ultimate remedy sought by the Appellant is for a deferred pension to be paid to him in respect of his contributory service for the period of his first participation in the Pension Fund. It is undisputed that he is in fact receiving a pension in respect of this period of contributory service from the Russian Federation, and has been for the last 15 years. His true grievance is that he wants more, because had the actuarial value remained in the UNJSPF he would receive a bigger pension.

31. It appears from paragraph 5 of the Appellant's initial submission to the Appeals Tribunal that he was fully apprised of the options available to him in relation to his pension benefits when his first contract with the Organisation ended in 1985. He elected to transfer his pension rights to the Social Security Fund of the USSR, with the result that the UNJSPF was no longer responsible for his benefits for that period. The Appellant's deliberate election to transfer his actuarial value to the Social Security Fund terminated his contractual relationship with the UNJSPF in respect of his participation between 1980 and 1985.

32. The Appellant's claim is based on his belief that he subsequently acquired contractual rights to restore his past contributory service. As explained to him in 1991, that right was only available to participants in terms of Article 24 of the UNJSPF Regulations who had less than five years' previous contributory service and whose only available benefit was a withdrawal settlement consisting of his or her own contributions to the Pension Fund. He did not fall into that category. The relevant provisions of Article 24 of the UNJSPF Regulations provide:

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

...

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

33. Article 31 of the UNJSPF Regulations governs withdrawal settlements. It reads:

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

(b) The settlement shall consist of:

(i) His own contributions, if the contributory service of the participant was less than five years; or

(ii) His own contributions increased by 10 per cent for each year in excess of five up to a maximum of 100 per cent, if the contributory service of the participant was five years or longer, subject to (c) below.

34. Hence, the contractual right to restore prior contributory service was available only to participants who had previously left the Pension Fund with a withdrawal benefit consisting of their own contributions by reason of having less than five years' service. The Appellant received a more generous benefit. Since he had more than five years' service he was entitled to more than his own contributions to the Pension Fund. He received his actuarial value (presumably in terms of Article 31(b)(ii) or some other provision and opted to transfer it to the Social Security Fund of the USSR in terms of the transfer agreement.

35. Under Section K5 of the Pension Fund's Administrative Rules governing the review and appeals process, the appeal to the Standing Committee was time-barred. This provision reads:

A review shall be initiated by delivery to the secretary of the staff pension committee, or to the Secretary of the Board if the review is by the Standing Committee, within ninety days of receipt of notification of the disputed decision, of a notice in writing stating the points of fact or of law contained in the decision which are disputed, and the grounds upon which the request for the review is founded; the staff pension committee, or the Standing Committee as the case may be, may nevertheless, upon good cause shown, accept for review a request notice of which was delivered after the expiry of the period prescribed above.

36. The Appellant first took up the issue of his previous contributory service in 1991 upon returning to participation in the Pension Fund in 1990. The correspondence between him and the Pension Fund came to an end with the letter of the Secretary of the Fund dated 24 March 1993 informing him unambiguously that the Pension Fund would not restore his previous contributory service. The Pension Fund next heard from the Appellant 21 years later when he addressed a letter to the Standing Committee of the Pension Fund on 2 May 2014. There is no reference in this letter to the decision sought to be reviewed by the Standing Committee, but the letter's heading refers to an "appeal" and although it ranges far and wide on a variety of issues about the transfer agreement, it concludes with a plea for the restoration of the prior contributory service. Therefore, the "disputed decision" subject to review logically can be only the one of the Secretary of the Pension Fund communicated in March 1993, 21 years before the Appellant submitted his letter asking for a review.

37. The Appellant was consequently way beyond the prescribed period of 90 days. Section K permits the Standing Committee to extend the period on good cause shown. It is not clear on the record whether the Appellant asked for an extension of the period or if the Standing Committee considered granting an extension. In its decision of 29 July 2016, it nonetheless unequivocally held that the Appellant was time-barred and thus impliedly refused to find good cause to extend the time limit. The Standing Committee acting in terms of this rule has a wide discretion in determining whether good cause exists to extend the prescribed period. A party called upon to show good cause must provide a reasonable explanation for the delay and have reasonable prospects of success on the merits. There is no clear explanation for the Appellant's delay on record and his prospects of success, for the reasons discussed, are weak. The Standing Committee thus did not err in holding the complaint time-barred. For that reason alone, the appeal must be dismissed.

38. The Appellant's unsubstantiated allegations of fraudulent collusion between the Pension Fund and the Government of the USSR are beyond the scope of the Appeals Tribunal's jurisdiction. Article 2(9) of the Appeals Tribunal Statute provides that the Appeals Tribunal shall be competent to hear and pass judgment on an appeal of a decision of the Standing Committee alleging "non-observance of the regulations" of the UNJSPF. For the reasons stated, the UNJSPF has acted strictly in compliance with the Regulations.

Judgment

39. The appeal is dismissed and the decision of the Standing Committee is upheld.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Knierim

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar