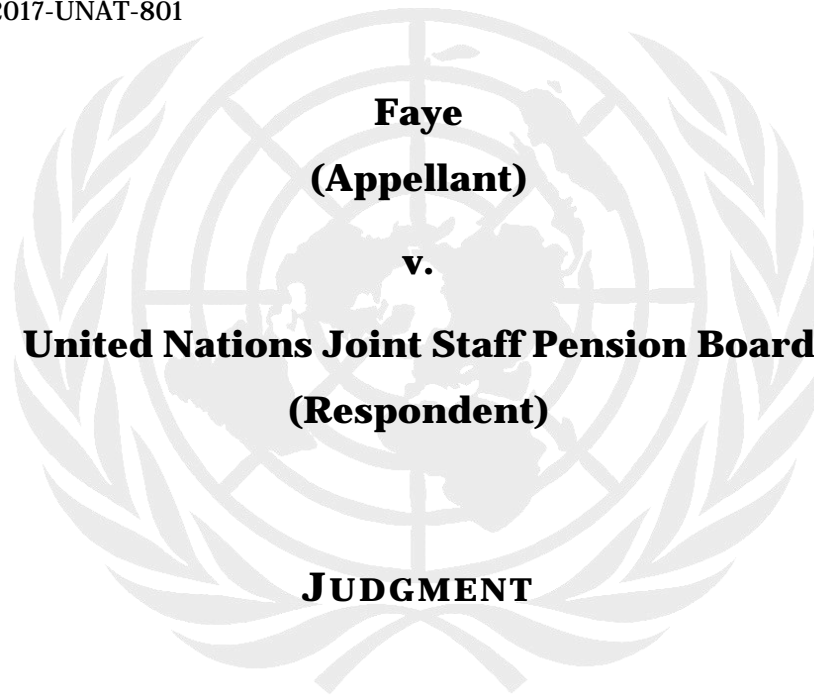




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-801



**Faye
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Richard Lussick Judge Sabine Knierim
Case No.:	2017-1086
Date:	27 October 2017
Registrar:	Weicheng Lin

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

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Ibrahima Faye against the decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and Pension Board or UNJSPB, respectively) to deny him access to the Pension Board documents and bar him from participating in any formal preparations for the UNJSPB sessions or attending any meetings of the UNJSPB and its constituent groups, committees and working groups “until such time as the conflict of interest has been resolved”. Mr. Faye filed his appeal on 16 June 2017, and the United Nations Joint Staff Pension Fund (Fund or UNJSPF) filed its answer on 1 August 2017.

Facts and Procedure

2. Mr. Faye is a staff member of the Fund on a permanent appointment. On 1 March 2017, he responded to a call from the Chairperson of the Polling Officers of the Coordinating Committee for International Staff Unions and Associations (CCISUA) for nomination of staff representatives to UNJSPF’s Staff Pension Committee (UNSPC). He was one of the 43 candidates nominated for election to the UNSPC. The online election was scheduled to be open from 31 March 2017 through 10 April 2017.

3. In an e-mail dated 30 March 2017, the Chief, Risk Management and Legal Services Section, UNJSPF, advised the Chairperson of the CCISUA Polling Officers that Mr. Faye, as a Fund staff member, should not be eligible to participate in the UNSPC election and requested that his name be removed from the nomination list before the start of the election. In her view, if Mr. Faye was to be elected to the UNSPC and consequently to the Pension Board, it would mean that he “would be overseeing his (...) own work and that of the [the Chief Executive Officer (CEO) of the Fund], as well as approve the budget requests and decide on appeals against the Fund. **This would result in a serious conflict of interest and remove any objective checks and balances from the governance of the Fund.**”¹

4. In a reply dated 31 March 2017, the Chairperson of the CCISUA Polling Officers stated that the election would proceed as scheduled and Mr. Faye would stand for election, because he met the eligibility guidelines for election to the UNSPC as he was a participant in the Fund and on

¹ Bold in original.

the staff of the United Nations Organization, and that the Polling Officers were not aware of any other rule, regulation or guideline that would make staff of the UNJSPF such as Mr. Faye ineligible for election to the UNSPC.

5. According to an announcement posted on CCISUA's website on 13 April 2017, Mr. Faye, along with another UNJSPF staff member, Ms. Rockcliffe, was elected to the UNSPC.

6. According to the Fund, on 9 May 2017, the Acting Assistant Secretary-General for the Office of Human Resources Management met with both Mr. Faye and Ms. Rockcliffe and presented them with two options: i) to remain on the UNSPC and accept to be moved to an appropriate post elsewhere in the Secretariat outside the Fund's secretariat; or (ii) to continue to work in the Fund's secretariat and resign from the UNSPC and the Pension Board. Mr. Faye and Ms. Rockcliffe rejected both options.

7. In a letter dated 13 June 2017, the Chairman of the 199th Standing Committee meeting of the Pension Board informed Mr. Faye that the UNJSPB had held a meeting on 8 June 2017 to discuss the conflict of interest arising from the fact that Mr. Faye had been elected to the UNSPC while a staff member of the Fund. The Chairperson advised Mr. Faye of the decision of the Standing Committee that he would not be given access to the UNJSPB documents nor could he participate in any formal preparations for the UNJSPB sessions and meetings and of its constituent groups, committees and working groups, "until such time as the conflict of interest has been resolved".

8. On 16 June 2017, when he appealed the decision of the Pension Board to the Appeals Tribunal, Mr. Faye also filed a motion for interim measures. In Order No. 284 (2017), the President of the Appeals Tribunal rejected Mr. Faye's motion, finding that the Appeals Tribunal had no competence to entertain a motion for interim measures filed by a staff member of the Fund such as Mr. Faye.

Submissions

Mr. Faye's Appeal

9. Mr. Faye submits that the Standing Committee made errors of procedure such as to affect the decision on the case in deviation of the standard set by the Appeals Tribunal in *Pio*.² The

² *Pio v. United Nations Joint Staff Pension Board*, Judgment No. 2013-UNAT-344.

decision of the Standing Committee was published through a mass broadcast statement before Mr. Faye received the notification letter from the Chairperson of the Standing Committee, in violation of his right to due process, integrity, confidentiality and honourability. Moreover, the Secretary of the Pension Board and the Chairman of the Pension Board failed to convene an UNSPC meeting to review the request from a party before an appeal could be submitted to the Standing Committee.

10. The Standing Committee exceeded its jurisdiction and abused its authority by restricting Mr. Faye's rights as a duly elected representative to the UNSPC to unrestricted access to the Pension Board documents, unrestricted participation in any formal preparations for the UNJSPB sessions and meetings and its constituent groups, committees and working groups. The decision is illegal and has no legal basis.

11. The contested decision of the Standing Committee violates the legal order on electoral matters applicable to the United Nations. The only requirement for being a member on the UNSPC is that he or she must be a participant in the Fund and on the staff of the United Nations.

12. The Fund's Regulations did not provide for any restrictions to candidates from the UNJSPF to run for office and to serve on the UNSPC. The decision of the Standing Committee modified the Fund's Regulations by restricting the equal rights of a certain category of staff members to participate in the Fund's governance structure. Such a modification would have had to be decided by the General Assembly.

13. The Fund's argument that there is a conflict of interest has no merit. There is no such inherent conflict in representing the interests of the Fund's participants, especially given that the Pension Board ordinarily operates by consensus and is constituted by 33 members. There is no direct relationship or interaction between Mr. Faye and the CEO of the Fund/Secretary to the UNJSPB. The latter is neither the first reporting officer nor the second reporting officer for the former, and Mr. Faye is not a manager or holding any managerial functions in the Fund under the direct supervision of the CEO of the Fund/Secretary to the UNJSPB. Furthermore, Mr. Faye has no direct financial interest in an enterprise that conducts business with the Fund. The remedy in cases of a potential conflict is disclosure and recusal from the decision-making. This would apply equally to all representatives whether from the governing body, participants' group or executive head group. If the Fund was that concerned about conflicts of interest, why did it fail to change the Fund's Rules for over 24 years? The 1992 opinion from the Office of Legal Affairs

(OLA) cited by the Fund does not override the decisions of the Dispute Tribunal and the Appeals Tribunal that the Secretary-General of the United Nations has no power to interfere or intervene in the elections of members to the UNSPC, and that these elections are governed exclusively by the Fund's Regulations.³ The implementation of OLA's 1992 opinion would constitute intervention and interference by the Secretary-General of the United Nations.

14. Mr. Faye requests that the Appeals Tribunal award him USD 3 million for injuries that he has suffered from the actions and decisions by the Secretary to the UNJSPB, Chairman of the UNJSPB and the Standing Committee, in violation of his due process rights.

The Fund's Answer

15. Mr. Faye's appeal is not receivable, as the case does not concern his individual rights under Article 21 of the Fund's Regulations and Section K of the Fund's Administrative Rules as a participant of the Fund; it concerns a matter relating to the governance of the Fund. His case derives from his election to the UNSPC. It was appropriate for the Standing Committee to convene to address the issue of conflict of interest arising from Mr. Faye's election to the UNSPC, pursuant to its power under Article 4(c) of the Fund's Regulations and Section B.4 of the Fund's Rules of Procedure.

16. Contrary to Mr. Faye's assertion, there was no basis for the UNSPC to consider his case, because it did not concern any of his pension rights (e.g., right to validation or restoration or challenge to the award of a disability benefit). There is no role for the UNSPC to play in the decision regarding the conflict of interest in Mr. Faye's case.

17. On the merits, the Fund maintains that the contested decision by the Standing Committee and the manner in which it was conveyed to Mr. Faye did not violate his pension rights or due process rights, because the rights under Article 21 of the Fund's Regulations and Section K of the Fund's Administrative Rules do not apply to him in his capacity as a participants' representative on the UNSPC, and the Standing Committee did not act to review issues relating to Mr. Faye's pension rights; it exercised its authority with regard to the general control on the operations of the Fund, within its mandate.

³ Citing *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-517.

18. Mr. Faye has no standing to seek moral damages as the matter of election to the UNSPC does not pertain to any contractual obligation between him and the Fund. Furthermore, he has not provided any medical or other evidence of the injury suffered. The amount sought could be seen as an indication of the frivolousness of his case and an abuse of process.

19. The Fund requests that the Appeals Tribunal reject Mr. Faye's appeal.

Considerations

20. The Fund submits that Mr. Faye's appeal is not receivable within the meaning of Article 2(9) of the Statute of the Appeals Tribunal (Statute) or Article 48 of the Fund's Regulations, namely because the case does not concern his individual rights as a participant of the Fund under Article 21 of the Fund's Regulations and Section K of the Fund's Administrative Rules; it concerns a matter relating to the governance of the Fund. We disagree with the interpretation given to our Statute and the UNJSPF's Regulations by the Fund.

21. Article 2(9) of our Statute states that:⁴

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal of a decision of the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board, alleging nonobservance of *the regulations* of the United Nations Joint Staff Pension Fund, submitted by:

(a) Any staff member of a member organization of the Pension Fund which has accepted the jurisdiction of the Appeals Tribunal in Pension Fund cases who is eligible

⁴ Emphasis added.

Article 21 of the UNJSPF Regulations reads:

Participation

(a) Every full-time member of the staff of each member organization shall become a participant in the Fund:

(i) Upon commencing employment under an appointment for six months or longer or upon accepting such an appointment while in employment; or,

(ii) Upon completing, in the same or more than one member organization, six months of service without an interruption of more than thirty days,

whichever is earlier, provided that participation is not expressly excluded by the terms of staff member's appointment.

(b) Participation shall cease when the organization by which the participant is employed ceases to be a member organization, or when he or she dies or 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 36 months after separation without a benefit having been paid.

(c) Notwithstanding the provisions of (b) above, a participant is deemed to have separated when he or she has completed (i) a consecutive period of three years on leave without pay without concurrent contributions having been paid in accordance with article 25(b). To re-enter the Fund, such former participant would have to satisfy the requirements for participation set out in (a) above.

under article 21 of the regulations of the Fund as a participant in the Fund, even if his or her employment has ceased, and any person who has acceded to such staff member's rights upon his or her death;

(b) Any other person who can show that he or she is entitled to rights under the regulations of the Pension Fund by virtue of the participation in the Fund of a staff member of such member organization.

In such cases, remands, if any, shall be to the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board.

22. Article 48 of the Fund's Regulations states *inter alia*:⁵

JURISDICTION OF THE UNITED NATIONS APPEALS TRIBUNAL

(a) Applications alleging non-observance of *these Regulations* arising out of decisions of the Board may be submitted directly to the United Nations Appeals Tribunal by:

(i) Any staff member of a member organization which has accepted the jurisdiction of the Tribunal in Joint Staff Pension Fund cases who is eligible under article 21 of these Regulations as a participant in the Fund, even after his or her employment has ceased, and any person who has succeeded to such staff member's rights upon his or her death;

(ii) Any other person who can show that he or she is entitled to rights under these Regulations by virtue of the participation in the Fund of a staff member of such member organization.

23. It is thus clear from the plain language of Article 2(9) of the Statute and Article 48 of the Fund's Regulations that the words "the regulations" and "these Regulations" in the Statute and the Fund's Regulations refer to the entirety of the UNJSPF Regulations including Article 6 entitled "Staff pension committees", without any limitation or qualification. Paragraph (a) of Article 6 relevant to the present case is quoted below:⁶

The United Nations Staff Pension Committee shall consist of four members and four alternate members elected by the General Assembly, four members and two alternate members appointed by the Secretary-General, and *four members and two alternate members, who shall be participants in the Fund and on the staff of the United Nations, elected by the participants in service in the United Nations by secret ballot.*

⁵ Emphasis added.

⁶ Emphasis added.

The Appeals Tribunal is therefore competent to hear and pass judgment on appeals alleging non-observance of these Regulations including Article 6.

24. That is what Mr. Faye alleged. In his appeal, Mr. Faye alleges that by restricting his participation as an elected participants' representative in the meetings and deliberations of the Pension Board and its subsidiary committees, the Fund has violated Article 6 of the UNJSPF Regulations.

25. We therefore conclude that Mr. Faye's appeal meets the requirements of Article 2(9) of the Statute and Article 48 of the Fund's Regulations and is receivable.

26. The main issue for the Appeals Tribunal's consideration is whether Mr. Faye was lawfully elected to office and if so whether he can be lawfully restricted or excluded from the Pension Board sessions and meetings, among other things.

27. When Mr. Faye decided to be a candidate in the election there was no law which prevented him from being elected to the UNSPC once he met the requisite requirements of an eligible candidate, which he did. It is noteworthy that before the elections were held, the Chairperson of the CCISUA Polling Officers informed the Chief, Risk Management and Legal Services Section of the Fund that Mr. Faye fulfilled the eligibility requirements for election to the UNSPC. This information is uncontroverted and is not in contention by the parties, as it is accepted that Mr. Faye was duly elected.

28. It therefore follows that, as a direct consequence of his election to the UNSPC, the same rights and privileges, which are bestowed upon an elected member, are conferred upon Mr. Faye. There is no provision in law which empowers the Standing Committee to remove, restrict or interfere with, any of these rights and privileges.

29. The Standing Committee's decision to deny Mr. Faye access to the Pension Board documents and to prevent him from participating in any formal preparations for the sessions and meetings of the UNJSPB and its constituent groups, committees and working groups is not in accordance with the law and is flawed. While we will not comment on the policies of the Fund, we note, however, that this is not a conundrum which was created suddenly in 2017. In fact, the evidence suggests that this issue raised its head some 25 years ago in 1992, and again in 2012.

30. It is the ruling of the Appeals Tribunal that Mr. Faye as a duly elected member of the UNSPC has the same rights and privileges which are bestowed on other members and which ought not to be restricted or denied.

Order

31. We order that Mr. Faye be granted access to all of the relevant Pension Board documents. We further order that he be allowed to participate and function as an elected member in all relevant areas including the preparations for the sessions and meetings of the UNJPSB and its constituent groups, committees and working groups.

32. Mr. Faye seeks from the Appeals Tribunal an award of USD 3 million for injuries which he has allegedly suffered from the actions and decisions “by both the Standing Committee of [the] UNJSPB, the Chairman of the Pension Board and the Secretary of the Pension Board”. As there is no evidence to support this request, Mr. Faye’s claim is denied.

Judgment

33. The appeal is granted and the decision of the Standing Committee, acting on behalf of the Pension Board, is vacated in its entirety.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Knierim

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar