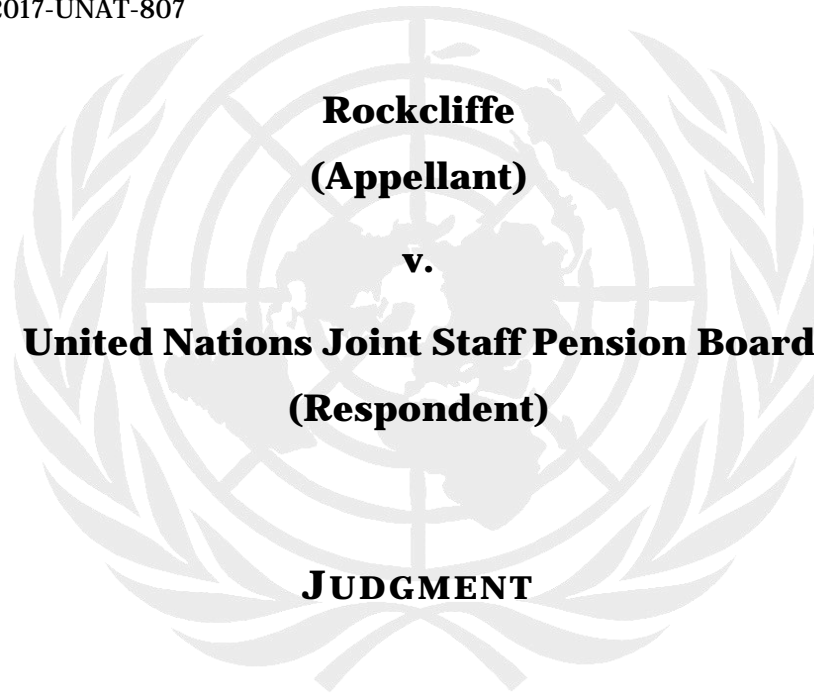




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-807



Before:	Judge Deborah Thomas-Felix, Presiding Judge Richard Lussick Judge Sabine Knierim
Case No.:	2017-1093
Date:	27 October 2017
Registrar:	Weicheng Lin

Counsel for Appellant:	George G. Irving
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 Ms. Michelle Rockcliffe against the decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and Pension Board or UNJSPB, respectively) “refusing to recognize [Ms. Rockcliffe’s] election as a participants’ representative to the [United Nations] Joint Staff Pension Committee and refusing to allow her to participate in the meetings and activities of the Pension Board”. Ms. Rockcliffe filed her appeal on 3 July 2017, and the United Nations Joint Staff Pension Fund (Fund or UNJSPF) filed an answer on 25 August 2017.

Facts and Procedure

2. Ms. Rockcliffe is a Functional Expert on Entitlements with the UNJSPF on a permanent appointment. In February or March 2017, she 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). She 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 Ms. Rockcliffe, as a UNJSPF staff member, should not be eligible to participate in the UNSPC election and requested that her name be removed from the nomination list before the start of the election. In her view, if Ms. Rockcliffe was to be elected to the UNSPC and consequently to the Pension Board, it would mean that she “would be overseeing ... her own work and that of the [Chief Executive Officer of the UNJSPF (CEO)], 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 Ms. Rockcliffe would stand for election, because she met the eligibility guidelines for election to the UNSPC as she was a participant in the Fund and on the staff of the Organization, and that the Polling Officers were not aware of any

¹ Bold in original.

other rule, regulation or guideline that would make staff of the UNJSPF such as Ms. Rockcliffe ineligible for election to the UNSPC.

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

6. In a letter dated 28 April 2017 to the Acting Assistant Secretary-General for the Office of Human Resources Management (Acting ASG/OHRM), the Chairman of the UNJSPB sought the former's assistance in resolving the issue of a structural conflict of interest arising from the election of Ms. Rockcliffe and Mr. Faye to the UNSPC and consequently to the Pension Board while working in the secretariat of the Fund. He proposed two options for Ms. Rockcliffe and Mr. Faye to choose from. They may i) remain on the UNJSPB and accept to be moved to an appropriate post elsewhere in the Secretariat outside the Fund, or (ii) continue to work in the Fund and resign from the Pension Board and the UNSPC.

7. On 1 May 2017, the Chairman of the UNJSPB wrote to The Legal Counsel, Office of Legal Affairs (OLA), seeking a legal opinion on the issue of conflict of interest arising from the election of Ms. Rockcliffe and Mr. Faye to the UNSPC and the Pension Board. According to the Pension Board, OLA provided an opinion dated 24 November 1992 on the same issue that confirmed that the election of a staff member of the Fund to the UNSPC would give rise to a conflict of interest, as the staff member reports to the CEO of the Fund and cannot at the same time act as a UNJSPB member.²

8. According to the Acting ASG/OHRM, on 9 May 2017, he met with both Ms. Rockcliffe and Mr. Faye and presented them with the two options detailed in paragraph 6 above. But Ms. Rockcliffe and Mr. Raye rejected both options.

9. In a letter dated 13 June 2017, the Chairman of the 199th Standing Committee meeting of the UNJSPB informed Ms. Rockcliffe that the Pension Board held a meeting on 8 June 2017 to discuss the conflict of interest arising from the fact that she had been elected to the UNSPC and consequently to the UNJSPB while a staff member of the UNJSPF. The Chairperson advised Ms. Rockcliffe of the decision of the Standing Committee that she would not be given access

² In an interoffice memorandum dated 24 November 1992 to the CEO of the Fund and Secretary of the UNJSPB, then-Legal Counsel stated: "I agree that it would be a conflict of interest for Mr. Ercolini to serve simultaneously as a member (or alternate member) of the [United Nations] Staff Pension Committee (and consequently of the [the United Nations] Joint Staff Pension Board) and as a staff member of the Secretariat of the Pension Fund".

to Pension Board documents nor could she participate in any formal preparations for the Pension Board sessions and meetings or its constituent groups, committees and working groups, “until such time as the conflict of interest has been resolved”.

10. After she appealed the Pension Board’s decision to the Appeals Tribunal, on 4 July 2017, Ms. Rockcliffe filed a motion for interim measures pending review of the contested decision. In Order No. 284 (2017), the Appeals Tribunal rejected a similar motion for interim measures that Mr. Faye had earlier filed. On 11 July 2017, Ms. Rockcliffe filed a new motion for consideration of her 4 July motion by a three-judge panel. The President of the Appeals Tribunal granted Ms. Rockcliffe’s request. In Order No. 288 (2017) dated 14 July 2017, the three-judge panel dismissed Ms. Rockcliffe’s motion of 4 July 2017 for interim measures, without prejudice to the hearing and determination on the merits of her appeal and that of Mr. Faye.

11. On 20 September 2017, Ms. Rockcliffe filed a motion for expedited review of her appeal so that the legal issues could be resolved before the UNSPC’s next scheduled meetings in November 2017 and April 2018 and the Pension Board’s next meeting in July 2018. On 2 October 2017, the Fund filed comments on Ms. Rockcliffe’s latest motion.

Submissions

Ms. Rockcliffe’s Appeal

12. Ms. Rockcliffe submits that the decision to refer the matter to the Standing Committee, prior to review by the Pension Board or the General Assembly and without consultation with the UNSPC, lacked any basis in law. Furthermore, the Standing Committee was improperly constituted, in that there were no representatives of the United Nations participating in the meeting of 8 June 2017. No United Nations participants’ representatives were invited, and no staff representative observers were present. The misuse of the UNJSPF proceedings to frustrate the free and independent election of the participants’ representatives constitutes an abuse of process.

13. The Standing Committee based the contested decision on a 1992 legal opinion and nothing else. That legal opinion is of dubious relevance. It appears never to have been put into effect since the staff member concerned was permitted to run for election in 1992, as was another staff member from the Fund several years later in 2012. The legal opinion goes against that of the Polling Officers, who have ultimate jurisdiction on the conduct of elections and who have

determined that Ms. Rockcliffe met all the stated requirements to serve on the UNSPC. In any event, the legal opinion cannot override or amend the UNJSPF Regulations and Rules adopted by the General Assembly.

14. The definition of conflict of interest for the Organization does not assume a conflict by virtue of mere association but generally applies in cases of reviewing one's own prior decisions or having a financial interest in the outcome. There is no such inherent conflict for Ms. Rockcliffe to represent the interests of the participants, especially given that the Pension Board ordinarily operates by consensus and confidential information under Rule B.4 of the UNJSPF Regulations is not discussed in the Pension Board. The remedy in cases of a potential conflict is disclosure and recusal from the decision-making, including over personnel and policy issues, and this would apply equally to all representatives.

15. The CEO of the Fund is seeking to supplement the Fund's Regulations and Rules with his own interpretation in order to exclude the participants' representatives whom he does not like, as staff representatives have in the past disagreed with him on their conditions of service and personnel policies.

16. Ms. Rockcliffe requests that the Appeals Tribunal rescind the contested decision of the Standing Committee, order provision of the relevant documentation for the Pension Board, reimburse her personal expenses in connection with her attendance at all UNJSPB related committee meetings, compensate her for violation of her rights, and award her costs.

The Fund's Answer

17. The Fund avers that Ms. Rockcliffe's appeal is not receivable, as the case does not concern her 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. The case derives from her election to the UNSPC. This matter cannot be considered as an appeal to the Appeals Tribunal under Article 48 of the Fund's Regulations and Article 2(9) of the Statute of the Appeals Tribunal (Statute).

18. It was appropriate for the Standing Committee to convene, in the context of exercising general control on the operations of the Fund when the Pension Board was not in session, to address the issue of conflict of interest arising from Ms. Rockcliffe'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. The Fund has never disputed the results of the UNSPC election or interfered with the administration of the election.

19. Contrary to Ms. Rockcliffe's assertion, there was no basis for the UNSPC to consider her case, because it did not concern any of her pension rights (e.g., right to validation or restoration or challenge to the award of a disability benefit). Nor was there any basis for UNSPC's two constituent groups, i.e., members appointed by the General Assembly and those nominated by the United Nations Secretary-General, to decide on an issue concerning another constituent group – the participants' representatives.

20. Ms. Rockcliffe states that the United Nations Administration proposed an arrangement for fulltime release. However, this arrangement was never formally presented to the Fund. Releasing Ms. Rockcliffe and Mr. Faye to act as full-time staff representatives would not change the fact that they still represent the staff of the Fund as well as the participants in the Fund, and that this type of dual role may not be compatible with the interests of the Fund, which the participants' representatives are elected to protect. Ms. Rockcliffe was provided with a solution for resolving the matter, but she rejected it.

21. There was no basis for Ms. Rockcliffe, and Mr. Faye, to travel to attend the Pension Board and its committee meetings, in view of the decision of the Standing Committee and Order Nos. 284 and 288 (2017) of the Appeals Tribunal. Her request for reimbursement of her personal expenses should therefore be dismissed. Likewise, her request for costs should be dismissed as there has not been any violation of Ms. Rockcliffe's due process rights.

22. Ms. Rockcliffe's criticism that there were no staff representatives present at the Pension Board meetings shows her lack of understanding of the Fund's governance structure. There is no provision under the Fund's Regulations for staff representatives on the UNJSPB. Her statements about the CEO of the Fund "are incorrect, extraneous and improper and demonstrate the *mala fide* approach of [Ms. Rockcliffe]. They have no bearing to the issue in question."

23. The Fund requests that the Appeals Tribunal dismiss Ms. Rockcliffe's appeal.

Considerations

24. We take note of the motion for expedited review of her appeal, which Ms. Rockcliffe filed on 20 September 2017, and the Fund's comments thereon. As Ms. Rockcliffe's case has already been included in the docket for the 2017 Fall Session, there is no need to address her motion.

25. The Fund submits that Ms. Rockcliffe's appeal is not receivable within the meaning of Article 2(9) of the Statute or Article 48 of the Fund's Regulations, namely because the case does not arise out of her eligibility as a participant under Article 21 of the Fund's Regulations or her rights as a Fund's participant.³ We disagree, and find the Fund's statutory interpretation too restrictive.

26. Article 2(9) of the 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 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;

³ Article 21 of the Fund's 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.

⁴ Emphasis added.

(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.

27. 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.

28. 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 Regulations of the Fund including Article 6 entitled "Staff pension committees", without any limitation or qualification. Paragraph (a) of Article 6 of the Fund's Regulations 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.*

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

⁵ Emphasis added.

⁶ Emphasis added.

29. That is what Ms. Rockcliffe alleges. In her appeal, Ms. Rockcliffe submits that by objecting to and prohibiting her participation as an elected participants' representative in the meetings and deliberations of the Pension Board and its subsidiary committees, the UNJSPB violated Article 6 of the Fund's Regulations, among others. We therefore conclude that Ms. Rockcliffe's appeal meets the requirements of Article 2(9) of the Statute and Article 48 of the Fund's Regulations and is receivable.

30. The main issue for the Appeals Tribunal's consideration is whether Ms. Rockcliffe was lawfully elected to office and, if so, whether she can be lawfully excluded from the Pension Board meetings, among other things.

31. At the time when Ms. Rockcliffe decided to be a candidate in the election there was no law which prevented her from being elected to the UNSPC, the only precondition for election being to meet the requisite requirements of an eligible candidate, which she did. Indeed, 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 UNJSPF that Ms. Rockcliffe fulfilled the eligibility requirements for election to the UNSPC. This information is not in contention by the parties and it is accepted that Ms. Rockcliffe was duly elected.

32. It therefore follows that as a direct consequence of her election to the UNSPC the same rights and privileges pertaining to an elected member are conferred upon Ms. Rockcliffe. There is no law which empowers the Standing Committee to remove or restrict these rights and privileges.

33. The Standing Committee's decision to deny Ms. Rockcliffe access to the Pension Board documents and to prevent her from participating in any formal preparations for the Pension Board sessions and meetings and its constituent groups, committees and working groups is not in accordance with the law and is therefore 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.

34. It is the ruling of the Appeals Tribunal that Ms. Rockcliffe as a duly elected member of the UNSPC has the same rights and privileges which are bestowed on other UNSPC members and she ought not to be denied those rights. We therefore order that Ms. Rockcliffe is granted access to all relevant Pension Board documents. We further order that she is allowed to participate and function as an elected member to the UNSPC in all relevant areas including the preparations for the Pension Board sessions and meetings and its constituent groups, committees and working groups.

35. Ms. Rockcliffe in her appeal seeks reimbursement of her personal expenses in connection with her attendance at all UNJSPB related committee meetings. In Order No. 288 dated 14 July 2017, the Appeals Tribunal dismissed Ms. Rockcliffe's motion of 4 July (2017) for interim measures. It is clear from that Order that the Appeals Tribunal did not rule on her request to attend meetings. Therefore, it is difficult to comprehend the reason why she attended the respective meetings. In the circumstance, Ms. Rockcliffe's request for reimbursement of her personal expenses to attend meetings is denied; her claim for costs is also denied.

Judgment

36. The appeal is granted. 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