



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

Judgment No. 2019-UNAT-908

**Rockcliffe
(Applicant)**

v.

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

**JUDGMENT ON APPLICATION FOR EXECUTION
OF JUDGMENT**

Before:	Judge Martha Halfeld, Presiding Judge Richard Lussick Judge John Raymond Murphy
Case No.:	2018-1201
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Applicant:	George G. Irving
Counsel for Respondent:	Paul Dooley

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an application for execution of Judgment No. 2017-UNAT-807 rendered by the Appeals Tribunal on 27 October 2017 in the case of *Rockcliffe v. United Nations Joint Staff Pension Board*. Ms. Michelle Rockcliffe filed her application on 22 October 2018 and the United Nations Joint Staff Pension Fund (Fund or UNJSPF) filed its comments on 15 November 2018.

Facts and Procedure

2. In Judgment No. 2017-UNAT-807, the Appeals Tribunal determined that the decision by the Standing Committee of the United Nations Joint Staff Pension Board (Pension Board) to deny Ms. Rockcliffe, a duly elected participants' representative, 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, was not in accordance with the law and was therefore flawed. Consequently, the Appeals Tribunal ruled that:¹

... Ms. Rockcliffe as a duly elected member of the [United Nations Staff Pension Committee (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.

3. The Pension Board held its 65th session from 26 July to 3 August 2018 in Rome, Italy. Ms. Rockcliffe attended that session as a participants' representative representing the United Nations. According to the report of the Pension Board,² she was also appointed by the Pension Board on the proposal of the participants' group to serve on the Budget Working Group (BWG). The BWG is an advisory body established to review the UNJSPF budget proposals for 2020 and make a recommendation thereon to the Pension Board. However, members of the Pension Board challenged Ms. Rockcliffe's candidacy for the BWG based on a perceived conflict of interest owing to the fact that she is a staff member of the Secretariat of

¹ *Rockcliffe v. United Nations Joint Staff Pension Board*, Judgment No. 2017-UNAT-807, para. 34.

² Report of the United Nations Joint Staff Pension Board, Sixty-fifth session (26 July-3 August 2018), General Assembly Official Records Seventy-third session, Supplement No. 9 (A/73/9), page 90.

the UNJSPF. Consequently, the Pension Board decided to seek advice from the Ethics Office as to whether for a staff member of the UNJSPF, who is also a member of the Pension Board, to serve on the BWG created a conflict of interest situation.

4. In a memorandum dated 12 October 2018, the Chairperson of the Pension Board's 65th session informed the Director of the Ethics Office of the decision by the Pension Board regarding Ms. Rockcliffe's appointment to the BWG and asked her to issue an opinion on whether it would be a conflict of interest for Ms. Rockcliffe to be an UNJSPF staff member, a member of the Pension Board and a member of the BWG.

5. On 16 October 2018, the Director of the Ethics Office responded in relevant part as follows:³

... by serving on the Pension Board, a staff member of the UNJSPF, while on the one hand accountable to the [Chief Executive Officer (CEO)] of the UNJSPF, at the same time also participates in overseeing the work of the CEO, thus acting in the role of both a supervisee to and a supervisor of the CEO. This situation would thus give rise to a conflict of functions and roles, and a conflict of interest, which may thus adversely impact upon the credibility of the Fund and the integrity of its institutions.

... The UN Ethics Office further notes that the Budget Working Group is responsible for reviewing budget proposals of the Fund secretariat and the [Investment and Management Division (IMD)], and making recommendations thereon for new posts, reclassification of posts, and the overall level of resources and organizational structure to be approved for any specific budget period. Accordingly, having a staff member involved in advising the Pension Board on such matters, which are directly related to and/or may have a direct impact on the status of staff members, may give rise to a perception of undue influence and/or may reflect adversely on the

³ Bold and underlines in original. At its 64th session in July 2017 in Vienna, Austria, the Pension Board amended Rule C.1 of Section C titled "Staff Pension Committees" of the Rules of Procedure of the UNJSPF by adding two sentences (in bold typeface) to the original C.1 as follows: "The composition of the staff pension committee of each member organization shall be in accordance with the provisions of article 6 of the Regulations. **Staff members of the secretariat of the Fund and of the Investments Management Division of the Fund, and staff members of the secretariat of each Staff Pension Committee shall not be eligible to be elected or appointed to represent any constituent group in the Staff Pension Committee of any member organization of the Fund, and consequently to serve on the Pension Board. Consistent with Rule A.9 (e), two UNJSPF retiree representatives shall be entitled to attend meetings of the [UN]SPC, but shall not have the right to vote.** Each committee shall hold at least one regular meeting each year. Special meetings shall be held either at the decision of the chairman, at the request of the competent authority or at the request in writing of three members."

staff member's required independence and impartiality, thus potentially reflecting adversely on the Fund and/or giving rise to reputational concerns.

... **Based on the foregoing, the UN Ethics Office notes that the fact that (i) a staff member, while serving on the Pension Board, participates in overseeing the performance of the CEO, who in turn manages the staff member's performance, and that (ii) by serving on the Budget Working Group, the staff member would have a say in the approval of his or her Office's budget and posts, including possibly his or her own position and benefits, gives rise to both a personal conflict of interest as well as a conflict of functions.**

... Accordingly, given the risk of reputational damages to the UNJSPF in the event of a conflict of interest, or even a perception or appearance thereof, the UN Ethics Office notes that it would be preferable for any UNJSPF staff member not to serve on the Pension Board, as indeed provided for in amended Rule C.1. Noting that amended Rule C.1 was adopted after the April 2017 election, from an ethics perspective, and to mitigate any potential conflict-of-interest risk arising from any staff member concurrently serving in the UNJSPF Secretariat (executing body) and on the Pension Board (governing body), the UN Ethics Office notes that it would be advisable to require any such staff member to restrict him- or herself from handling matters involving the UNJSPF, in accordance with the requirements of Staff Rule 1.2(q).

6. In an e-mail dated 19 October 2018, the Chairperson informed members of the 65th session of the Pension Board, including Ms. Rockcliffe, of the advice that he had received from the Director of the Ethics Office, and proposed that Mr. Fitzgerald, another participants' representative appointed to the BWG as an alternate, serve substantively on the BWG, in place of Ms. Rockcliffe. In a follow-up e-mail dated 22 October 2018, the Chairperson confirmed his proposed arrangement.

7. On 22 October 2018, Ms. Rockcliffe filed an application for execution of Judgment No. 2017-UNAT-807.

Submissions

Ms. Rockcliffe's Application for Execution

8. Ms. Rockcliffe claims that the Pension Board has failed to execute the Appeals Tribunal Judgment No. 2017-UNAT-807, in that, in violation of the order of the Appeals Tribunal that Ms. Rockcliffe be 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, the Chairperson had removed her name from the list of members of the BWG.

9. Ms. Rockcliffe maintains that the decision by the Chairperson was procedurally flawed as it circumvented the established process whereby only the Standing Committee of the Pension Board is authorized to act for the Pension Board when it is not in session.

10. Ms. Rockcliffe contends that the Chairperson based his decision on an opinion from the Ethics Office that he had personally solicited. That opinion in turn based its rationale on the amendment to the Rules of Procedure of the Fund that had been found to be “null and void”.

11. Ms. Rockcliffe believes that the decision to remove her from the BWG appeared to be a direct act of retaliation against her for expressing her agreement with the report of the Office of Internal Oversight Services (OIOS). It also demonstrates bad faith and collusion on the part of the secretariat of the Fund and the Chairperson.

12. Ms. Rockcliffe requests that the Appeals Tribunal order the execution of Judgment No. 2017-UNAT-807.

The Fund’s Comments

13. Judgment No. 2017-UNAT-807 issued by the Appeals Tribunal has been fully executed. Ms. Rockcliffe received documents and training for, and attended, the 324th UNSPC meeting on 8 November 2017. She also participated in the subsequent UNSPC meetings as well as the 65th session of the Pension Board from 26 July to 3 August 2018. In a word, Ms. Rockcliffe has not been denied her right to participate in the UNSPC and the Pension Board; she has been accorded all rights and privileges in accordance with the Appeals Tribunal Judgment, including access to all documents.

14. However, Ms. Rockcliffe’s participation in the Pension Board is not unfettered. It is governed by the norms of conduct that govern all members of the Pension Board, including acting with the highest standards of efficiency, competence and integrity. After the Ethics Office’s finding that there was a conflict of interest for Ms. Rockcliffe to serve as a member of the BWG, the matter should be, and was, resolved in favor of the interests of the Fund. There is no right for Ms. Rockcliffe to serve on the BWG. Aware of a possible conflict of interest in her case, the Pension Board nominated an alternate to take Ms. Rockcliffe’s place if the Ethics Office found

her serving on the BWG was a conflict of interest. While she is not a member of the BWG, Ms. Rockcliffe can continue to serve on the Pension Board.

15. Ms. Rockcliffe has failed to provide any proof to substantiate her allegations of bad faith, retaliation, or collusion for the delay in requesting an opinion from the Ethics Office.

Considerations

16. The crux of the matter for consideration and determination is whether Ms. Rockcliffe's appointment to, and her removal from, the BWG in 2018 falls within the scope of the Appeals Tribunal's order in Judgment No. 2017-UNAT-807 issued in 2017.

17. The primary issue to be resolved is thus whether the grounds of the present application could be considered as within the context already presented before this Tribunal.

18. The applicable law is Article 11(4) of the Statute of the Appeals Tribunal (Statute), which reads: "Where the judgement requires execution within a certain period of time and such execution has not been carried out, either party may apply to the Appeals Tribunal for an order for execution of the judgement." Article 27 of the Rules of Procedure of the Appeals Tribunal is a carbon copy of Article 11(4) of Statute.

19. In the previous case, Ms. Rockcliffe challenged the decision of the Standing Committee of the Pension Board not to give her access to Pension Board documents nor allow her participation 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".⁴

20. Conflict of interest was alleged to have arisen from the fact that Ms. Rockcliffe had been elected to the UNSPC and consequently to the Pension Board while a staff member of the Fund.⁵ It was contended 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 reported to the CEO of the Fund and could not at the same time act as a Pension Board member.⁶ This would mean that she would be overseeing her own work and that of the CEO of the Fund, as well as approving the budget requests and deciding on appeals against the Fund. This would result in a conflict of interest and remove any objective

⁴ *Rockcliffe v. United Nations Joint Staff Pension Board*, Judgment No. 2017-UNAT-807, para. 9.

⁵ *Ibid.*

⁶ *Ibid.*, para. 7.

checks and balances from the governance of the Fund.⁷ Ms. Rockcliffe was thus given two options: either remain on the Pension Board and accept to be moved to another post outside of the Fund, or continue to work in the Fund and resign from the Pension Board and the UNSPC.⁸

21. The main findings of the Appeals Tribunal on the merits were that i) there was no law then prohibiting Ms. Rockcliffe from running for election to the UNSPC; ii) she was lawfully elected; and iii) Ms. Rockcliffe should consequently be accorded the same rights and privileges as the other duly elected UNSPC members, including participating in Pension Board sessions and meetings and its constituent groups, committees and working groups.

22. Consequently, although the Appeals Tribunal did not explicitly address the issue of conflict of interest in its Judgment, it impliedly rejected it, by means of applying the law in force at the time. The Appeals Tribunal stated that: “[a]t 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”.⁹ The Appeals Tribunal held:¹⁰

... 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 empower the Standing Committee to remove or restrict these rights and privileges.

... *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.*

The Appeals Tribunal therefore ordered:¹¹

... 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.*

⁷ *Ibid.*, para. 3.

⁸ *Ibid.*, para. 6.

⁹ *Ibid.*, para. 31.

¹⁰ *Ibid.*, paras. 32 and 33 (Emphases added).

¹¹ *Ibid.*, para. 34 (Emphases added).

23. Subsequent to the Judgment, Ms. Rockcliffe, as a member of the UNSPC, was appointed by the Pension Board to be a member of the BWG. However, her name was removed from the list of its members, based on an opinion from the Ethics Office, which by and large repeated the earlier arguments of the Standing Committee which were vacated by this Tribunal in Judgment No. 2017-UNAT-807. Ms. Rockcliffe alleges that the Ethics Office opinion “made no mention of the binding [Appeals] Tribunal judgment and based its rationale on the amendment of the [UNJSPF Rules of Procedure] that had been found to be null and void”. She argues that this appeared to be a direct act of retaliation, that the regular procedure had not been followed and that the Fund demonstrated bad faith in delaying the request for an opinion from the Ethics Office by more than two months after the Pension Board’s session in July-August 2018.

24. First, we find that the argument of retaliation, flaws, bias and collusion cannot be considered in the present application for execution of judgment, since it was not dealt with in Judgment No. 2018-UNAT-807 and cannot be brought before this Tribunal at this stage.

25. Secondly, Ms. Rockcliffe’s allegation that the Chairperson had personally solicited an opinion from the Ethics Office and the Pension Board’s amendment to Rule C.1 of the UNJSPF Rules of Procedure had been found to be “null and void” is not correct. She participated in the Pension Board’s 2018 session, and knew it was the Board’s decision, and not the Chairperson’s personal inclination, to solicit an opinion from the Ethics Office. She also knew the amendment to Rule C.1 was challenged but eventually was upheld during the 2018 Pension Board session, although it is not in question here whether the amendment was legal and valid, since it was not deemed applicable by the Appeals Tribunal.

26. Thirdly, the answers of the Fund to the panel’s questionnaires indicate that the members of the Pension Board questioned Ms. Rockcliffe’s membership on the BWG on the grounds that she “would have a say” in the approval of her own employer’s budget, organizational structure, number and level of posts, including recommendations for new posts, reclassification of posts and level of resources which could possibly affect her own position. The fact that she would be involved in recommendations/decision-making that could have a direct impact on her own post would constitute a conflict of interest.

27. The Fund also submits that its previous decision not to give Ms. Rockcliffe access to documents or permit her to participate in meetings of the Pension Board or the UNSPC was that “it would constitute a conflict of interest for her to serve simultaneously as a member of the

UNSPC (and consequently of the Board) and as a staff member of the UNJSPF secretariat ... , following the 1992 legal opinion and the established practice of the Board.”

28. We find it egregious that the Fund has re-submitted that the previous decision not to give Ms. Rockcliffe access to documents and information and to deny her participation in meetings would constitute a conflict of interest. This matter has already been determined. The Fund is attempting to by-pass the order of this Tribunal by prohibiting Ms. Rockcliffe from participating in the BWG.

29. The argument that she would have a voice in the approval of the budget and in decisions that might have an impact on her personally is the same argument used to justify the Pension Board’s previous decision that had been vacated by this Tribunal, which referred to her overseeing her own work and that of the CEO, as well as approving issues concerning budget.¹² The argument ultimately was that she “was a staff member of the secretariat of the Fund”.¹³ In other words, the grounds to refuse Ms. Rockcliffe’s participation as an appointed member to the BWG are basically the same used with regard to her participation in the UNSPC, which have already been rejected by the Appeals Tribunal. What the Pension Board seems to seek through denying Ms. Rockcliffe the membership to the BWG based on the same argument of conflict of interest is to revisit the underlying factual and legal premises applicable to Ms. Rockcliffe’s situation, resulting from her being a staff member of the Fund.

30. Furthermore, the ruling of this Tribunal was explicit that Ms. Rockcliffe should be allowed “to participate and function as an elected member to the UNSPC in all relevant areas including ... [the Pension Board’s] constituent groups, committees and working groups”.¹⁴ We consider therefore that the previous order is broad. By preventing her from serving as a BWG member, the Pension Board has failed to comply with the Appeals Tribunal’s order. The Pension Board has erroneously concluded that a possible conflict of interest could justify excluding Ms. Rockcliffe from participation in any activity of the BWG. It would have been a better conclusion to comply with the Appeals Tribunal’s order and allow her to participate in the said group entirely. If any specific circumstance brings about an actual conflict of interest, the issue should be dealt with as it arises. If there is indeed a conflict, Ms. Rockcliffe can then

¹² *Ibid.*, para. 3.

¹³ Report of the United Nations Joint Staff Pension Board, Sixty-fifth session (26 July-3 August 2018), General Assembly Official Records Seventy-third session, Supplement No. 9 (A/73/9), para. 445.

¹⁴ *Rockcliffe v. United Nations Joint Staff Pension Board*, Judgment No. 2017-UNAT-807, para. 34.

appropriately recuse herself from that decision-making process, and that would be in keeping with the declaration in paragraph 3 of the Fund's comments on the present application.

31. We thus order that Ms. Rockcliffe be allowed to participate as an appointed member of the BWG, without prejudice to her recusing herself, if and when an actual conflict of interest emerges.

Judgment

32. Ms. Rockcliffe's application for execution of Judgment No. 2017-UNAT-807 is partially granted and the decision to remove her name from the list of members appointed to the BWG is hereby vacated.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar