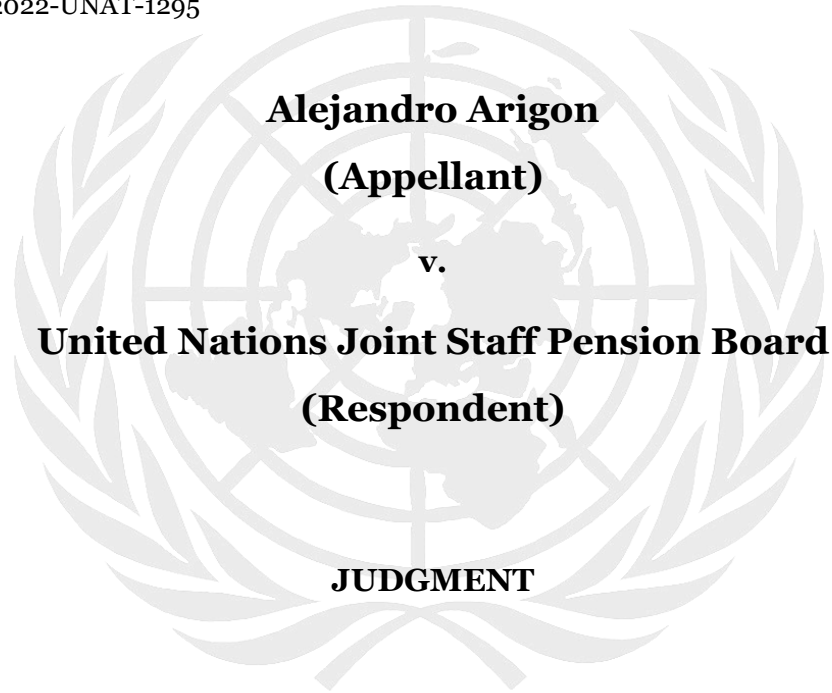




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1295



Before:	Judge John Raymond Murphy, Presiding Judge Kanwaldeep Sandhu Judge Sabine Knierim
Case No.:	2021-1621
Date of Decision:	28 October 2022
Date of Publication:	21 December 2022
Registrar:	Juliet Johnson

Counsel for Appellant: Cayetano Nunez

Counsel for Respondent: Rosemarie McClean

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Mr. Alejandro Arigon appeals to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) the decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB or Pension Board, respectively), which upheld the decision of the Chief Executive of Pension Administration of the United Nations Joint Staff Pension Fund (UNJSPF) to deny his request to restore his prior period of contributory service on the ground that he had made the request after the expiry of the applicable deadline under Article 24(a) of the UNJSPF's Regulations (the Regulations). Mr. Arigon argues that he should be afforded an exception from the time limits contained in Article 24(a) of the Regulations because he was unaware of his right to restore following an amendment to Article 24(a) in 2007 to extend the availability of restoration. The UNJSPF maintains that information regarding the amendment was readily available to Mr. Arigon at the relevant time and that it accordingly discharged its duty of good faith to Mr. Arigon who had failed to acquaint himself with the relevant rules. For the reasons that follow, we dismiss the appeal and affirm the decision of the Standing Committee.

Facts and Procedure

2. Mr. Arigon has had two participations in the UNJSPF. His first participation commenced on 9 November 1985 and ended on 31 January 1999, and his second participation commenced on 22 May 2002 and is ongoing.

3. At the time of his first separation from service, on 31 January 1999, and under the then applicable Regulations, Mr. Arigon had the option of electing a withdrawal settlement, a deferred retirement benefit, or to defer his choice of benefit for up to 12 months. At that time, Article 32(a) of the Regulations allowed a beneficiary to defer his or her choice of benefit for a maximum of 12 months. Article 32(b) provided that a participant who deferred his or her choice of benefit but failed within the 12-month period to make an election would be deemed to have chosen a deferred retirement benefit.¹ By payment instructions dated 16 March 1999, Mr. Arigon opted to defer his choice of benefit for up to 12 months. However, he did not submit a benefit election within the applicable 12-month period and, therefore, by operation of Article 32(b) he was deemed to have elected a deferred retirement benefit under Article 30 of

¹ Article 32 was amended with effect from 1 January 2001, together with a number of other amendments to the Regulations, to allow for a maximum deferral period of 36 months.

the Regulations. He later submitted a payment instructions form, dated 30 January 2002, in which he confirmed his election of a deferred retirement benefit. His deferred retirement benefit was calculated and confirmed to him by letter dated 5 September 2002.

4. Mr. Arigon commenced his second period of participation in May 2002. At that time, the provisions of Article 24(a) of the Regulations, insofar as relevant, provided that a participant re-entering the UNJSPF after 1 January 1983 could, within one year of the re-commencement of participation, elect to restore his or her prior contributory service, provided that upon separation therefrom the participant was entitled to a withdrawal settlement under Article 31(b)(i) of the Regulations and had less than five years of contributory service at the time of withdrawal. Thus, at the time Mr. Arigon commenced his second period of participation in the UNJSPF, the Regulations did not permit him to restore his prior contributory service because restoration was only allowed for participants who had received a withdrawal settlement following a prior period of contributory service of less than five years. Mr. Arigon's prior period of contributory service, from 1985 to 1999, was greater than five years and he had elected a deferred pension benefit.

5. In May 2003, a year after his second period of participation commenced, Mr. Arigon submitted a copy of his A/2 form (*Designation of recipient of a residual settlement*) to the UNJSPF. In his letter accompanying the A/2 form, he noted that he did *not need to send the* "Notice of Election to Restore" or "Notice of Election to Validate" as they did not apply to him. Thus, indicating that he was aware of the limitation on him restoring contributory service.

6. Article 24(a) of the Regulations was amended in 2007. The amendment extended the availability of restoration in certain cases. After the 2007 amendment, Article 24(a) read as follows:

A participant re-entering the Fund on or after 1 April 2007, who previously had not, or could not have, opted for a periodic retirement benefit following his or her separation from service, may, within one year of the recommencement of participation, elect to restore his or her most recent period of prior contributory service. Any participant in active service who re-entered the Fund before 1 April 2007 and was previously ineligible to elect to restore prior contributory service owing to the length of such prior service, may now do so by an election to that effect made before 1 April 2008.

7. The 2007 amendment removed the previous restriction that made restoration only available to participants whose prior service was less than five years, and extended restoration to all participants re-entering the UNJSPF on or after 1 April 2007 who previously had not, or could not have, opted for a period retirement benefit, regardless of the length of their prior service, provided that such participants made the election to restore within one year of their re-entry into the UNJSPF. Most relevantly, the 2007 amendment to Article 24(a) further provided for a one-year window, from 1 April 2007 to 1 April 2008, during which participants who were then in active service (like Mr. Arigon) and who had previously been precluded from restoring their most recent period of prior contributory service because the length of such prior period was greater than five years could elect to restore their prior contributory service. However, to benefit from restoration, such participants had to make an election to that effect before 1 April 2008.

8. It is common cause that the UNJSPF did not write personally to Mr. Arigon to inform him of the 2007 amendment to Article 24(a) of the Regulations. It did however take certain steps to ensure that the changes to Article 24 and the deadline contained therein were disseminated. It posted the amended Regulations on its website and also publicized the amendment to Article 24 through its 2007 annual letter, which described the changes to Article 24 and emphasized the deadline for those eligible who wished to restore prior contributory service. Moreover, throughout the years prior to 2007, participants were informed in the published annual letters that the UNJSPB had established a tripartite Working Group to undertake a fundamental review of the UNJSPF's benefit provisions, including amending the limitations on the right to restore prior service. The 2004 annual letter stated that the General Assembly had approved, in principle, the removal of the limitation on right to restoration based on the length of prior contributory service; and the 2005 letter stated that the Pension Board intended to address in 2006, subject to a favourable actuarial valuation, the possible elimination on the right to restoration based on length of prior service.

9. The 2007 annual letter addressed to all the participants, retirees and beneficiaries of the UNJSPF stated:²

The Fund will transmit letters to those participants whose records indicate eligibility under this new provision. However, as some cases involve older records and/or changes in names, the Fund cannot guarantee it will be able to contact all those who

² Original emphases.

are eligible. ***If you believe you are eligible under this new measure and you do not receive a letter from the UNJSPF to this effect, by the end of April 2007, you should contact the Fund as soon as possible. If you are in fact deemed entitled, you must make a formal election to restore your eligible prior service before 1 April 2008.***

10. Additionally, the UNJSPF posted a dedicated link on its website connected to a two-page PDF document that described the changes to Article 24(a) which stated the following about the deadline of 1 April 2008:³

*To apply for restoration, participants must submit form 'PENS.C/1 – Notice of Election to Restore' ***before 1 April 2008 or before separation from service,*** whichever is earlier.*

*It should be noted that ***failure to apply within the given deadline means that the right to restore such prior contributory service is irrevocably forfeited.****

The UNJSPF is currently reviewing its database to identify current active participants who may be eligible to restore under the new provisions. Those identified will receive a letter from the Fund advising them of this one-time opportunity to exercise their right to restore. If you believe you are eligible under this new measure and have not received a letter from the Fund to this effect by the end of April 2007, we will request you to contact the Fund at that time.

11. The UNJSPF endeavoured to notify active participants who were impacted by the change to Article 24 through letters directed to them personally. Cognizant of the risk of not reaching all eligible participants, however, it specifically noted, both in its 2007 annual letter and in the website link that it could not guarantee that it would be able to reach everyone who was eligible. As mentioned, Mr. Arigon did not receive a personalized letter in that regard.

12. In 2010 and again in 2013, Article 24 was again amended to clarify its provisions and to delete the transitional provision applicable to participants in active service in 2007, which ended on 1 April 2008 and had become superfluous. The 2010 and 2013 amendments did not otherwise change the substantive aspects of Article 24 that had been introduced in 2007 and retained a deadline of one year for participants re-entering the UNJSPF to request restoration.

³ Original emphases.

13. Mr. Arigon did not make a request to restore his prior contributory service related to his deferred retirement benefit nor did he seek information from the UNJSPF in that regard prior to the 1 April 2008 deadline. He only raised the issue of restoration in January 2014, nearly seven years after the 2007 amendment to Article 24(a). On 25 May 2012, he e-mailed the UNJSPF stating that he was trying to generate a pension estimate but that he did not know his pension number, and on 20 June 2012, he again wrote stating that he “would like to ask some questions” and sought an appointment. The UNJSPF advised him to address any query to the UNJSPF via e-mail or by telephone. Then on 13 January 2014, Mr. Arigon wrote to the UNJSPF asking, among other things, for restoration of his prior period of contributory service. On 15 February 2014, the UNJSPF informed him that he was not eligible to restore his prior period of contributory service and that, since he had two separate periods of participation, he would be entitled to two separate benefits. Mr. Arigon did not challenge the UNJSPF’s determination regarding his ineligibility to restore at that time.

14. Four years after his first request, on 14 March 2018, Mr. Arigon made a new request to restore his prior contributory service. Specifically, he requested the UNJSPF to “aggregate” his contributory service from his two participations based on his reading of Article 22(a) of the Regulations. Article 22(a) provides that contributory service shall accrue to a participant in pay status from the date of commencement to the date of cessation of participation and that separate periods of contributory service shall be aggregated except that in such aggregation no account shall be taken of periods of service in respect of which a withdrawal settlement was paid, and which were not subsequently restored. On 27 March 2018, the UNJSPF informed Mr. Arigon that his two participations could not be aggregated under Article 22(a) because they accrued during separate periods of participation. Article 22(a) only applies to contributory service that accrues during a single period of participation (hence its reference to “the date of cessation of participation”). A prior period of participation can only be added to a current period of participation under the restoration provisions of Article 24.

15. After further communication during 2018 and 2019, Mr. Arigon wrote to the UNJSPF requesting restoration of his prior period of contributory service. The UNJSPF replied on 3 June 2020, again confirming that he was not eligible to restore his prior period of contributory service. On 23 June 2020, Mr. Arigon once again wrote to the UNJSPF, seeking reconsideration of the determination that he was ineligible to restore his prior service. On

2 September 2020, the UNJSPF confirmed its reasons why Mr. Arigon was ineligible to restore his prior period of contributory service.

16. Mr. Arigon then filed his request for review to the United Nations Staff Pension Committee (UNSPC) on 30 November 2020. The UNSPC considered his request for review on 4 May 2021 and upheld the decision of the Chief Executive of Pension Administration. The UNSPC's decision was conveyed to Mr. Arigon by letter dated 7 May 2021. On 5 June 2021, he appealed the UNSPC's decision to the Standing Committee. The Standing Committee considered his request at its 205th meeting held on 14 July 2021 and upheld the UNSPC's decision. The Standing Committee's decision was conveyed to the Appellant by letter dated 26 July 2021 and Mr. Arigon subsequently filed his appeal with the Appeals Tribunal in terms of Article 2(9) of the Statute of the UNAT.

Submissions

Mr. Arigon's Appeal

17. Mr. Arigon concedes that the provisions of Article 24 of the Regulations deny him the right to restore his prior contributory service.

18. He argues rather that he was not properly informed of the amendments and given appropriate advice about his choices, and this has caused material harm to his future life. He complains that his various attempts to get information were not adequately responded to by the UNJSPF.

19. He requests on the basis of fairness that he be allowed to restore his prior contributory service.

The UNJSPF's Answer

20. The UNJSPF argues that Mr. Arigon is disqualified from restoring his prior contributory service. The option to restore was originally not available to Mr. Arigon because Article 24, as it then was, limited the option to participants whose previous period of contributory service was less than five years and who had received a withdrawal settlement. He then failed to avail himself of the one-year window, from 1 April 2007 to 1 April 2008 to restore his prior period of contributory service in terms of the amendment to Article 24.

21. The UNJSPF submits that it took reasonable steps to inform participants as widely as possible of the changes and thus fulfilled its duty to disclose information in good faith through the publication of its annual letters and information on the website. It was under no clear duty to communicate personally with Mr. Arigon about the amendments to the rules and it was incumbent on Mr. Arigon to keep abreast of rule changes and to acquaint himself properly with them.

22. The UNJSPF further intimates that it has no discretion to award benefits which are not prescribed by the rules in cases of individual hardship.

23. It accordingly requests the appeal to be dismissed and for the decision of the Standing Committee to be affirmed.

Considerations

24. The matter for determination in this appeal is straightforward. At the time of Mr. Arigon's entry into participation in 2002, Article 24 did not allow him the option to restore his prior contributory service because that option was limited to participants whose previous period of contributory service was less than five years and who had received a withdrawal settlement; neither of which applied to him. When the 2007 amendment to Article 24 was introduced, he had a one-year window, from 1 April 2007 to 1 April 2008, during which he could elect to restore his prior period of contributory service. It is undisputed that he failed to make any such election during the statutory time period. He missed the deadline by several years. Having not made a request to restore his prior contributory service by the 1 April 2008 deadline, Mr. Arigon is now ineligible to do so. And the UNJSPF has no discretion to award a benefit contrary to the explicit terms of its Regulations at the expense of all participants.

25. The only question is whether Mr. Arigon is entitled to any other relief on the basis that the UNJSPF did not discharge its duty of care or good faith by not adequately informing Mr. Arigon of the 2007 amendment.

26. There is no provision in the Regulations that requires the UNJSPF to inform participants of any changes or amendments to the Regulations personally. However, the implied duty of good faith requires that the UNJSPF should properly disclose and communicate information that affects the entitlement of participants. The nature and extent of that duty is context specific and thus will depend on the circumstances.

27. In *Fox*,⁴ this Tribunal confirmed that where a participant must exercise a choice between alternative benefits or courses of conduct, the UNJSPF has a duty in response to a pertinent enquiry to inform the participant properly of all the alternatives in a clear and understandable way as to allow for a proper opportunity for making an informed choice. The duty of good faith makes it incumbent on the UNJSPF to respond appropriately to requests for information. However, Mr. Arigon did not raise any pertinent enquiry during the window period in which he was entitled to restore his prior contributory service. He raised the matter for the first time seven or more years after the close of the window period. Any argument that the UNJSPF did not adequately respond to a pertinent enquiry about benefit choices is therefore not sustainable in the present context.

28. In this instance the UNJSPF took reasonable general steps to inform participants as widely as possible of the changes. In advance of the amendments to Article 24(a) being approved, it openly publicized, in its annual letters, that the UNJSPB was considering the issue. Once the amendments to Article 24(a) were approved, the UNJSPF took further, specific steps. It posted the amended Regulations on its website; it highlighted the changes in its 2007 annual letter; and it posted a dedicated link on its website, which clearly set out the changes to Article 24(a) and the relevant deadline. The information was easily accessible on the website.

29. Ideally, it might have been better if each potentially affected participant was personally informed of the amendment. But it would set the bar too high, if only for prudential reasons, to impose a duty on the UNJSPF to identify each member or beneficiary of the UNJSPF potentially affected by a generic change in the Regulations and benefit structure and to then inform them personally of the implications of the statutory change for them. That would be an onerous, time-consuming task bedevilled by contingencies and the need to obtain specific information that might or might not be available.

30. The only other possible argument available to Mr. Arigon is that the UNJSPF in some way fell short in its general means of disclosure. Normally, the duty to disclose relevant generic information to members and beneficiaries will be fulfilled if it is communicated by reasonably available means. The annual letters have as their purpose the disclosure of generic information. Participants, retirees and beneficiaries will be well-advised to read them carefully.

⁴ *Fox v. United Nations Joint Staff Pension Board*, Judgment No. 2018-UNAT-834.

31. Moreover, it is a basic principle that ignorance of the law is no excuse and that participants of the UNJSPF are required to know the rules that apply to them. As said, the duty of good faith makes it incumbent on the UNJSPF to respond appropriately to requests for information. However, the onus is on the participant to acquaint him/herself with his or her benefit entitlements under the rules and to seek information from the UNJSPF if he or she is unsure of how to interpret the Regulations. There is no duty on the UNJSPF to keep each and every member abreast of changes that may or may not affect him or her.⁵ Likewise, the UNJSPF has no discretion to afford Mr. Arigon exceptional treatment at the expense of the other members and beneficiaries of the UNJSPF by affording him benefits to which he is not legally entitled.

32. The appeal must accordingly be dismissed.

⁵ *Eric Bertrand Pierre Duflos v. United Nations Joint Staff Pension Board*, Judgment No. 2021-UNAT-1144, para. 28; *Schepens v. United Nations Joint Staff Pension Board*, Judgment No. 2018-UNAT-830, paras. 33 and 34.

Judgment

33. The appeal is dismissed, and the decision of the Standing Committee is affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Knierim

Judgment published and entered into the Register on this 21st day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar