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ADMINISTRATIVE TRIBUNAL

Judgement No. 1068

Case No. 1174: THIAM

Against: The United Nations  
Joint Staff Pension  
Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Ms. Brigitte  
Stern;

Whereas, on 12 October 2000, Oumar Doudou Thiam, a former staff member of the Office of the United Nations High Commissioner for Refugees, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 1 March 2001, the Applicant, after making the necessary corrections, again filed an application containing pleas which read as follows:

**"SECTION II**

**PLEA**

The Applicant, most respectfully requests the Tribunal to order immediate payment of Applicant's disability benefits as estimated by the secretariat of the United Nations Joint Staff Pension Fund (UNJSPF) on August 8 1984 ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2001 and thereafter until 30 September 2001;

Whereas the Respondent filed his Answer on 28 September 2001;

Whereas the Applicant filed Written Observations on 17 January 2002;

Whereas on 14 March 2002, the Respondent submitted his comments on the Applicant's Written Observations and, on 16 May 2002, the Applicant commented thereon.

Whereas the facts in the case are as follows:

The Applicant was a participant in the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) for various periods between 1 August 1974 and 26 October 1992.

In 1981, the Applicant sustained a service-incurred injury to his right eye. The Applicant was awarded compensation equivalent to 24 per cent loss of function, under Appendix D of the Staff Regulations and Rules; however, no award was made for loss of earning capacity. (See Judgement No. 715, *Thiam* 1995.)

On 10 August 1984, the Geneva Office of UNJSPF provided the Applicant with information regarding his pension, were he to receive disability benefit from 5 January 1985.

The Applicant separated from service on 8 January 1985, but was subsequently re-hired, on fixed-term appointments, the last of which expired on 26 October 1992.

On 21 March 1997, the Applicant wrote to the Chief, Geneva office, UNJSPF, indicating that he wished to be considered for a disability benefit from the date of his separation from service in 1985. His case was considered by the Staff Pension Committee on 15 October 1998. The Committee found that the application was not receivable, since it was submitted some 12 years after the Applicant's 1985 separation and five years after his 1992 separation, with no evidence of exceptional circumstances. On the merits, the Committee concluded that the Applicant failed to demonstrate that, when he separated from service, whether in 1985 or in 1992, he was "incapacitated for further service" within the terms of article 33 of the Fund's Regulations and indeed, he had had a further period of contributory service in 1992. Consequently, the Staff Pension Committee denied the Applicant's request for disability benefits. The Applicant was informed of this decision on 16 October 1998.

On 30 October 1998, the Applicant wrote to the Secretary of the UNJSPF, requesting review of the decision taken by the Staff Pension Committee, under Section K of the Fund's Administrative Rules. On 23 July 1999, the Chief Executive Officer, UNJSPF, informed the Applicant that the Standing Committee had confirmed the decision of the Staff Pension Committee.

On 1 March 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Standing Committee erred in denying the Applicant's request for disability benefit. The Applicant's request was not time-barred, as it was initially presented to UNJSPF in Geneva as early as July 1984.
2. The work undertaken by the Applicant following his separation from service in 1985 involved different physical demands which did not place a burden on his eyes.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is time-barred. The Applicant did not offer any evidence of "exceptional circumstances" to justify the late submission of his claim.
2. The fact that the Applicant worked for the United Nations in 1989 and in 1992 constitutes clear evidence that he was not incapacitated for further service as from 1985.
3. The Applicant has not produced a copy of any application for disability benefit submitted to the UNJSPF in 1984.

The Tribunal, having deliberated from 28 June to 26 July, now pronounces the following Judgement:

I. The Applicant, who separated from service in 1992, claims that the Respondent improperly refused to grant him a disability benefit on separation. He was completely or almost blind in one eye and had "evolutive" cataracts in the other, which he claims incapacitated him for further service under article 33 of the UNJSPF Regulations. The Applicant was originally scheduled to separate from service on 30 June 1984 but remained on staff pending medical reviews until 8 January 1985. He then served under two short fixed-term contracts, the last of which expired on 26 October 1992. The Applicant received a withdrawal settlement from the UNJSPF in May 1994 and also received compensation for service related injuries to an eye. This Application is distinct from the challenge to his 1992 termination from service, which was considered in Judgement No. 715, *Thiam* (1995).

II. This case requires the Tribunal to address several issues, two of which are fundamental. First, there is a disagreement regarding whether the Application is receivable. The Tribunal may review whether this issue was properly decided by the Fund and, of course,

must decide whether the Application is receivable under its own Statute. In some cases in which an exceptional circumstances claim was made, the Tribunal has agreed that special circumstances existed. (See Judgement No. 640, *Mourad* (1994).) In other cases it has decided not to accept a finding of receivability. (See Judgement No. 549, *Renninger* (1992).) In at least one case the Tribunal rejected certain pleas as time-barred but accepted others as timely. (See Judgement No.645, *Fussimanya-Reyna* (1994).) If the Application is receivable, a second fundamental issue is whether the Applicant met his burden of proving that he was incapacitated for further service.

In this case the Tribunal accepts the determination by the Respondent that the circumstances presented, including the serious illness of the Applicant, were not exceptional circumstances that justified the extremely long delays in pursuing the request for a disability benefit. In addition, it decides not to waive its own time limits in this case, thereby distinguishing it from Judgement No. 715, as explained below. Consequently, the Tribunal does not reach the merits of the case.

III. The Tribunal notes that the Applicant bears the burden of proving his claims. (See Judgement No. 672, *Burtis* (1994).) On the other hand, an organization must interpret the statements of a staff member in good faith. In accordance with its duty to spare a staff member unnecessary injury, the Organization might be called on to provide procedural guidance and to help put right a mistake.

IV. The Applicant's request for a determination by the Joint Staff Pension Committee under article 33 (a) (disability benefit) is governed by the four-month rule of UNJSPF administrative rule H.5 (a). The rule provides that the

"request shall be in writing, addressed to the Secretary of the [Joint Staff Pension] Committee, and in the case of a participant shall be made not later than four months after the date of separation . . . , unless in the opinion of the committee there are exceptional circumstances justifying submission of the request at a later date."

V. Article 33 (a), as interpreted by the Administrative Rules of the UNJSPF, contains two procedures for making a request to the Joint Staff Pension Committee. Under certain conditions the organization "shall" make such a request, including when on the expiry of an appointment there is reason to believe that the participant may be incapacitated and when an

appointment is terminated for reasons of health. (Administrative rule H.3) There is no stated time limit in this part of the administrative rule. The Respondent never made such a request, although several medical reports in 1983-1985 had raised questions about the Applicant's sight.

The second procedure is available to participants. At the request of a participant, the Joint Staff Pension Committee "shall" make a determination under article 33 (a), when the Organization "has not acted" under administrative rule H.3 or when a participant claims to have been incapacitated on the date of separation. (Administrative rule H.4) The relevant language states that the participant's request must be made generally "not later than four months after the date of separation". (Administrative rule H.5) Reading the two procedures together and the applicable time limit on the participant's request, the obvious reading is that the "shall" governing the Organization's request is not mandatory, because the participant can pursue the request on his own but within a short time frame. The goal appears to be to know as soon as possible after the end of service about a claim of disability and to begin the process of considering the claim.

VI. If the operative date of separation was 1984, the Applicant submits that he made an administrative rule H.5 (a) request to the Geneva office of the UNJSPF in July 1984, after receiving notification that his fixed-term contract would not be extended beyond 30 June 1984, but that the request was lost. The Tribunal notes that by 1984 the Applicant's sight had deteriorated and that a series of medical consultations and four operations had begun. However, neither the Applicant nor the Respondent presented a document that supports the Applicant's claim. He did pursue the medical treatment recommended by the United Nations and requested medical reports when they were not submitted in a timely fashion. There is no evidence that the Applicant sought a specific decision in spite of the passage of time and the absence of some final response from the Respondent.

The record indicates that the matter of a possible disability benefit was an issue in July 1984 because, as explained in a "Note for the File", the Medical Service had refused to give a medical clearance for the Applicant's expected 30 June 1984 separation. There is no clear indication that this refusal was connected to an administrative rule H.5 (a) request by the Applicant. However, in accordance with a recommendation of the Medical Service, an appointment with an ophthalmologist was made for the Applicant who was to be informed of his administrative situation.

Additionally, there was some communication between the parties regarding disability benefits because, in a 10 August 1984 letter to the Applicant, the Geneva office of the UNJSPF referred to "figures were you to be granted a disability benefit at 5.1.85". The Applicant claims this letter was a reply to his H.5 (a) request. It was reasonable to interpret this as a general inquiry - not a claim - about possible benefits made by the Applicant.

VII. If the operative separation was in 1992, the Respondent asserts that the request was still time-barred because it was not submitted to the UNJSPF until 21 March 1997. Again, the Respondent was justified in concluding that, in spite of the severe health problems faced by the Applicant and the medical reports, no exceptional circumstances existed to justify such long delays or the failure of the Applicant to pursue a 1984 submission.

VIII. The Tribunal notes that the timeliness of the claims in this case and in Judgement No. 715 has been resolved differently by the various bodies that have considered the claims. Within the Pension Fund system, the request of the Applicant was received by the UNJSPF Standing Committee, which then "decided to uphold" the Joint Staff Pension Committee's finding that the request was time-barred. It noted that the Applicant "had pursued his claim for service-incurred injury, consistently and successfully as from 1988, through the appropriate [United Nations] body". This apparently refers to Judgement No. 715 not to the instant Application. In the communication to the Applicant regarding the Standing Committee's decision, the Chief Executive Officer, UNJSPF, explained that the Applicant's "initial request for the award of a disability benefit, made in 1997, was not receivable by the [Joint Staff Pension] Committee, given that the request was received some twelve years after the Applicant's 1985 separation and five years after his 1992 separation".

In the claim regarding his termination there was a mixed response regarding receivability. In a September 1988 report, the Advisory Board on Compensation Claims ruled the claim non-receivable, citing article 12 of Appendix D to the Staff Regulations and Rules. In June 1991, the Joint Appeals Board (JAB) found that the Applicant's progressive illness and extensive medical treatment amounted to such exceptional circumstances that its time limits were waived under staff rule 111.2 (f). It noted the Applicant's "grave eye problems, involving a number of operations". In a subsequent Application to the Tribunal, the Tribunal, applying article 7.5 of its Statute, exempted the Applicant from its time limits

"for humanitarian reasons, in view of the progression of the disease from which he suffered". (Judgement No. 715, para. IX.).

Thus the record contains two approaches to the receivability of the Applicant's claims before the Organization and the Tribunal. In both instances, the body considering the claim could waive the time limits for exceptional circumstances. In the termination case, the JAB and the Tribunal found reason to excuse the delays. Within the Fund, the opposite view prevailed.

IX. The Tribunal must also decide whether it may receive this Application. The competence of the Tribunal in matters related to the Pension Fund is governed by article 13.2 of its Statute and not by article 7.1 (regarding cases that were heard by a joint appeals body). Its competence under article 14.2 extends to "applications alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund arising out of decisions of the United Nations Joint Staff Pension Board". The relevant functions of the Board regarding disability benefits were delegated to the Standing Committee.

X. Article 14.2 of the Statute contains no temporal limit on the competence of the Tribunal, in contrast to article 7.4. However, article 48 (d) of the Regulations of the UNJSPF cross-references article 7 of the Tribunal's Statute (ninety days) and begins the tolling of the time bar "from the date of the communication of the contested decision of the Board". The communication was dated 23 July 1999 but the Applicant filed his Application only on 1 March 2001, more than ninety days later.

The UNJSPF Regulations attempt to make the procedural time limits for pension fund cases parallel those of other agencies, although the express language of the Statute has no such limit. The Tribunal considers that this inconsistency between articles 7 and 14 was an oversight and a drafting error. When the Statute of the Tribunal was amended in 1997 to add jurisdiction over cases concerning the Fund, it is self-evident that some limit on the potential liability of the Fund was intended. Under those circumstances, it is reasonable for the Tribunal to read some time bar into its Statute. Like the Fund, the Tribunal believes there is no reason to adopt a different period of limitation for applications involving the Fund.

XI. The Tribunal notes that the cross-reference seems to omit the possibility of a suspension of time limits, as provided in article 7.5 or in exceptional circumstances as

contemplated by administrative rule H.5 (a). The Tribunal may suspend its time limits under article 7.5 of its Statute "[i]n any particular case", *e.g.*, because of particular factual circumstances. To maintain full consistency, the Tribunal also reads article 7.5 into the implied rule on time limits for cases filed under article 14 of the Statute. However, as explained above, it finds no reason to excuse the delay in this case.

XII. It is evident that this result is different from that in Judgement No. 715, where the Tribunal decided on humanitarian grounds to receive the Application. First, the Applicant could have raised these issues in the Application that led to Judgement No. 715. Also, while the basic facts are alike in the two cases, the relative importance of certain events is not the same in the two Applications, because different claims are made.

XIII. In view of the foregoing and having considered the pleas, the contentions and the record, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY  
President

Marsha ECHOLS  
Member

Brigitte STERN  
Member

Geneva, 26 July 2002

Maritza Struyvenberg  
Executive Secretary