

Endre USTOR
Vice-President

New York, 11 October 1979

Jean HARDY
Executive Secretary

Judgement No. 252

(Original: English)

Case No. 235:
Zañartu

Against: **The United Nations Joint
Staff Pension Board**

Request for the payment of an early retirement benefit, commuted into a lump sum, instead of a disability benefit.

Death of the Applicant.—Succession of his widow and sons to his rights.—The Tribunal is competent to pass judgement on the application.

Article 28 of the Regulations of the Joint Staff Pension Fund.—Applicant's memorandum to the Secretary of the Joint Staff Pension Board electing to receive an early retirement benefit, commuted into a lump sum.—Rejection of that election by the Secretary on the ground that the Applicant had become entitled to a disability benefit.—Advantage to the Applicant of the early retirement benefit, commuted, in view of his frail health.—Rule H.3 of the Administrative Rules of the Pension Fund.—Request of the United Nations Children's Fund (UNICEF) for determination of the Applicant's incapacity for the purpose of a disability benefit.—Decision of the United Nations Staff Pension Committee granting the disability benefit.—Voiding of the UNICEF request with the consent of the Applicant.—The Pension Committee's decision is rendered void ab initio.—Indication by the Applicant of his intention to retire early.—His reaction when informed of the granting of a disability benefit.—The Tribunal orders the Respondent to give effect to the election by the Applicant to receive an early retirement benefit and to commute it into a lump sum.—Request for interest denied.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS.

Composed of Madame Paul Bastid, President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Francisco A. Forteza;

Whereas at the request of José I. Zañartu, a former staff member of the United Nations specifically recruited for the United Nations Children's Fund, hereinafter called UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended by thirty days the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 January 1979, the Applicant filed an application in which he requested that the Tribunal:

“A. Order the United Nations Joint Staff Pension Fund to allow the Applicant to exercise his right to elect an early retirement benefit under the provisions of article

30 of the Regulations of the Fund as from the date of his retirement instead of being compelled by the Fund to receive a disability benefit.

“B. Order the Fund to pay appropriate interest from the date of his retirement to the day of payment on the part of the early retirement benefit which the Applicant decides to commute as provided under article 30.”;

Whereas the Respondent filed his answer on 30 March 1979;

Whereas the Applicant filed written observations on 1 August 1979;

Whereas, by memorandum dated 12 September 1979, counsel for the Applicant informed the Tribunal that the Applicant had died on that day and that his widow wished counsel to continue to act on her behalf in the case initiated by her late husband before the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, who was born on 16 August 1919, entered the service of UNICEF on 10 September 1951. On 7 January 1977, having been on sick leave for some time and contemplating the possibility of retirement within that year, he wrote to the Secretary of the Joint Staff Pension Board expressing his interest in an early retirement benefit and requesting information as to the amount of such benefit if he were to retire in August 1977. On 14 January 1977 the Secretary informed him that because of the time required to calculate estimates under the various options available there would be some delay in providing him with an answer. On 3 February 1977 the Applicant wrote again to the Secretary asking that, as his retirement would have to take place sooner than he had expected because of health reasons, his requests be treated as an urgent matter. On 7 February 1977 the Secretary provided him with the requested information. On 14 February 1977 the Medical Director of the United Nations advised the Director of Personnel Administration of UNICEF that he was recommending the Applicant for a disability benefit as he had become physically incapable of carrying on his job for medical reasons. By a memorandum dated 23 February 1977 a Senior Personnel Officer of UNICEF requested the Secretary to submit the Applicant's case to the United Nations Staff Pension Committee for consideration for a disability benefit. On 11 May 1977 the Secretary informed the Applicant that the United Nations Staff Pension Committee had decided to grant him a disability benefit under article 34 of the Pension Fund Regulations. On 7 June 1977 the Applicant asked the Secretary to provide him with information on the amounts of his disability benefit in order to compare it with the early retirement figures he had received earlier and to be able to decide whether or not to appeal against the decision of the Committee. On 13 June 1977 the Secretary provided him with the requested information. On 8 December 1977 the Chief of the Personnel Services Section of UNICEF advised the Secretary that the Applicant had resigned from service effective 28 October 1977 and had elected to receive an early retirement benefit under article 30 of the Pension Fund Regulations commuted in part into a lump sum and that in view of such resignation the UNICEF memorandum of 23 February 1977 was to be considered as void. On 13 December 1977 the Secretary informed the Applicant that, in view of the provisions of article 28 (a) of the Pension Fund Regulations and of the determination by the United Nations Staff Pension Committee that he was incapacitated for further service, the Secretary was precluded from giving effect to instructions for the payment of any benefit other than a disability benefit. On 19 December 1977 the Applicant informed the Secretary of his intention to request a review of the decision of the Staff Pension Committee not to allow him an early retirement benefit. On 28 February 1978 the Applicant submitted

his request for review under Rule K.1 of the Administrative Rules of the Pension Fund. On 31 March 1978 the Secretary advised him that inasmuch as the decision to deny his request for an early retirement benefit was a decision of the Secretary and not of the United Nations Staff Pension Committee, the review which the Applicant requested required to be carried out by the Standing Committee of the Joint Staff Pension Board in terms of Rule K.2, rather than by the United Nations Staff Pension Committee in terms of Rule K.1. The Applicant's request for a review was accordingly placed before the Standing Committee in August 1978 together with the Secretary's comments. On 26 September 1978 the Secretary informed the Applicant that the Standing Committee had decided to confirm the decision of the Secretary as being in conformity with the Pension Fund Regulations and Rules. On 31 January 1979 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. It cannot be the intention of article 28 (a) of the Pension Fund Regulations to deprive a disabled participant with over five years' service of a free choice between benefits available under the Regulations, as is the case with any other participant separating before age 60, particularly when it can be argued that because of the life expectancy of the participant the disability benefit is significantly inferior to a commuted early retirement benefit. The purpose of the article is to prevent payment of a double benefit in cases of disability, i.e., a disability benefit and an early retirement benefit or a withdrawal settlement.

2. The position taken by the Standing Committee of the Joint Staff Pension Board is unjust and discriminatory when one considers that by implication the Committee is arguing that of two participants retiring say at age 58, with identical periods of service, the one who is not disabled should be allowed to take a lump sum by commuting one third of his entitlement, while the same right must be denied to the participant who retires early because of ill health.

3. Assuming for argument's sake that a disabled participant is only entitled to a disability benefit, even under these circumstances the Pension Fund had no right to award a disability benefit because the requirements of Rule H.4 of the Administrative Rules of the Pension Fund were not fulfilled.

Whereas the Respondent's principal contentions are:

1. The Applicant who is eligible for a disability benefit under article 34 of the Pension Fund Regulations has no right to elect to receive an early retirement benefit instead of the disability benefit. This follows both from the language of article 28 of the Regulations and from the purpose of the disability benefit, which is to provide adequate protection against the consequences of disability by assuring a reasonable minimum annual income for the incapacitated participant and by not allowing the participant to commute the disability benefit into a lump sum because such commutation would result in the reduction of the annual payments below the level fixed in the Regulations for the disability benefit. In order to achieve that purpose it was necessary to establish the exclusivity of the scheme and its non-optional character.

2. The United Nations Staff Pension Committee was empowered to determine that the Applicant is incapacitated within the meaning of article 34 (a) of the Regulations.

3. The Organization was under the duty to take the steps necessary to provide the

Applicant with the protection designed by the disability benefit scheme and the Organization is not in a position to overlook that responsibility.

4. The actual modality of the Applicant's separation from service has no bearing on the decision to award him a disability benefit.

The Tribunal, having deliberated from 27 September to 11 October 1979, now pronounces the following judgement:

I. The Tribunal has been informed that the Applicant died on 12 September 1979.

By letter dated 27 September 1979 the widow of the Applicant, Nelly Zañartu, and his sons, Miguel, Luis and Carlos Zañartu, announced to the Tribunal their decision to pursue the application before the Tribunal and to empower for that purpose the counsel chosen by the Applicant. By letter dated 2 October 1979 Gonzalo Zañartu, the fourth son of the Applicant, joined in the decision.

The Tribunal finds that the dossier of the Applicant shows that he designated as his dependants his widow and his four sons, Miguel, Luis, Carlos and Gonzalo, but that the sole dependants were, from 1 January 1977, Carlos, born 18 October 1958 and Gonzalo, born 16 May 1960.

The application seeks to establish for the benefit of the Applicant, following upon his resignation, an early retirement benefit pursuant to article 30 of the Pension Fund Regulations (the "Regulations"), commuted into a lump sum pursuant to article 29 (d) (i). Thus the sums to be paid by the Pension Fund to the Applicant from the date of his resignation to the date of his death are subject to the Tribunal's decision in this case.

It is not debatable that the widow and the sons of the deceased Applicant succeeded on his death to the rights of the deceased Applicant. Consequently, under article 2, paragraph 2 (a) of the Statute of the Tribunal, the Tribunal is open to them.

The Tribunal therefore declares itself competent to pass judgement on the application.

II. Article 28 of the Regulations reads in part as follows:

"Entitlement to benefits

"(a) A participant who is not eligible for a retirement benefit under article 29 or a disability benefit under article 34 may elect on separation to receive an early retirement benefit or a deferred retirement benefit or a withdrawal settlement if he satisfies the conditions of article 30, 31 or 32 respectively." [Emphasis added.]

The Applicant resigned from the service on 28 October 1977 and, as per memorandum dated 8 December 1977 to the Secretary of the Joint Staff Pension Board (the "Secretary") from the Chief of the Personnel Services Section of UNICEF, elected to receive an early retirement benefit under article 30 of the Regulations, commuted into a lump sum under article 29 (d) (i) to the extent of one third of its actuarial equivalent. If his election had been accepted by the Secretary, he would have received (calculated as at 31 August 1977) a reduced pension of \$14,630 per year (reduced from a full pension of \$21,950 per year), plus a lump sum (maximum) of \$107,810.

The Secretary rejected the election on the ground that under article 28 (a) of the Regulations the Applicant was not entitled to make such election because he had become entitled to a disability benefit under article 34 by decision of the United Nations Staff Pension Committee notified to him by the Secretary by letter dated 11 May 1977. The letter stated: "Please note that payment of your benefit will begin on the date following that on which you cease to be entitled to salary and emoluments from the United Nations."

Such disability benefit would amount as at 27 October 1977 to approximately \$24,700 per year.

Obviously, in view of the Applicant's frail health, the early retirement benefit, commuted, sought by the Applicant was far more favourable to him than the disability benefit.

III. Under Rule H.3 of the Administrative Rules of the Pension Fund, which is the provision applicable to the case, the determination of incapacity for the purpose of disability benefits may be made *only* at the request of the organization involved (UNICEF). In this case the request was made on behalf of UNICEF by memorandum addressed to the Secretary dated 23 February 1977, signed by Miss Mary Taylor, Senior Personnel Officer. It requested that the Applicant's case be submitted to the next meeting of the United Nations Staff Pension Committee for consideration for a disability benefit. As stated above, the Committee granted the disability benefit.

However, the UNICEF memorandum of 8 December 1977 mentioned above stated that, in view of the Applicant's decision to resign from service effective 28 October 1977, "our memorandum of 23 February 1977 addressed to you by Miss Mary Taylor, Senior Personnel Officer, is to be considered as void."

This UNICEF memorandum, written with the consent of the Applicant, in so many words voided the UNICEF memorandum of 23 February 1977, which, under Rule H.3, formed the only basis for the Committee's grant of a disability benefit to the Applicant. The voiding of the request destroyed the basis for the grant of a disability benefit and therefore rendered it void and ineffective *ab initio*.

IV. If it be noted that the UNICEF memorandum of 8 December 1977 was signed after the Applicant's resignation on 28 October 1977, it should also be noted that the Applicant had, by his letters of 7 January, 3 February and 7 June 1977, indicated that his intention was to retire early.

The Tribunal further observes that by the letter dated 11 May 1977 advising him that the United Nations Staff Pension Committee had decided to grant him a disability benefit, the Applicant was asked to indicate his instructions regarding the manner of payment of the benefit by filling out and returning form Pens. E/2, which was enclosed in the letter, to the Secretary. He failed to do so, however, and no reminder appears to have been sent to him. On 13 December 1977 the Secretary, in informing the Applicant that no benefit other than a disability benefit could be paid to him, sent him a further copy of form Pens. E/2 and invited him to complete and return it at his convenience. On 19 December 1977 the Applicant did return the form as requested, specifying, however, that he did so "without prejudice to [his] rights" under the procedure for review. Furthermore, it is clear from a letter from the Secretary to the Applicant dated 24 February 1978 that the first periodic payment of the benefit was not effected until 3 February 1978.

Therefore, the provision in the UNICEF memorandum of 8 December 1977 which purported to void *ab initio* the UNICEF request of 23 February 1977 and the consequent disability benefit, was effective and enforceable.

V. Since the grant of a disability benefit was rendered void and ineffective *ab initio* as a result of the UNICEF memorandum of 8 December 1977, it follows that the Applicant was entitled to elect to receive an early retirement benefit under article 30 of the Regulations and to commute it into a lump sum under article 29 (d) (i) to the extent of one third of its actuarial equivalent.

VI. For the foregoing reasons, the Tribunal orders the Respondent to give effect to the election by the Applicant to receive an early retirement benefit under article 30 of the Regulations and to commute it into a lump sum under article 29 (d) (i) to the extent of one third of its actuarial equivalent.

VII. In view of the provision in article 45 of the Regulations that the Pension Fund shall not be liable for interest on any due but unpaid benefit, the request for interest is denied.

(Signatures)

Suzanne BASTID
President

Francisco A. FORTEZA
Member

Francis T. P. PLIMPTON
Vice-President

Jean HARDY
Executive Secretary

New York, 11 October 1979

Judgement No. 253

(Original: French)

Case No. 236:
Klee

**Against: The Secretary-General
of the United Nations**

Request for interpretation of Judgement No. 242.

Dispute concerning the date to be applied in determining the exchange rate applicable to the conversion into schillings of the amount of 15 months' salary awarded to the Applicant by Judgement No. 242.—Application by the Respondent of the exchange rate on the date of payment.—The texts invoked by the Respondent do not refer to the payment of compensation fixed by a judgement.—Irrelevance of the question of benefits due to staff members upon separation from service.—Irrelevance of Judgements Nos. 234 and 196.—Need to refer to the terms used by the Tribunal in fixing the compensation due to the Applicant.—The Tribunal intended to reconstruct the Applicant's career.—The Tribunal decides that the compensation must be calculated by reference to the sums which the Applicant would have earned in schillings had he been maintained in service over the 15-month period, on the basis of the various successive exchange rates prevailing during that period.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Madame Paul Bastid, President; Mr. Francisco A. Forteza; Mr. T. Mutuale;

Whereas, in Judgement No. 242 delivered on 22 May 1979, the Tribunal decided that the Respondent should "pay the Applicant the amount of 15 months' salary at the