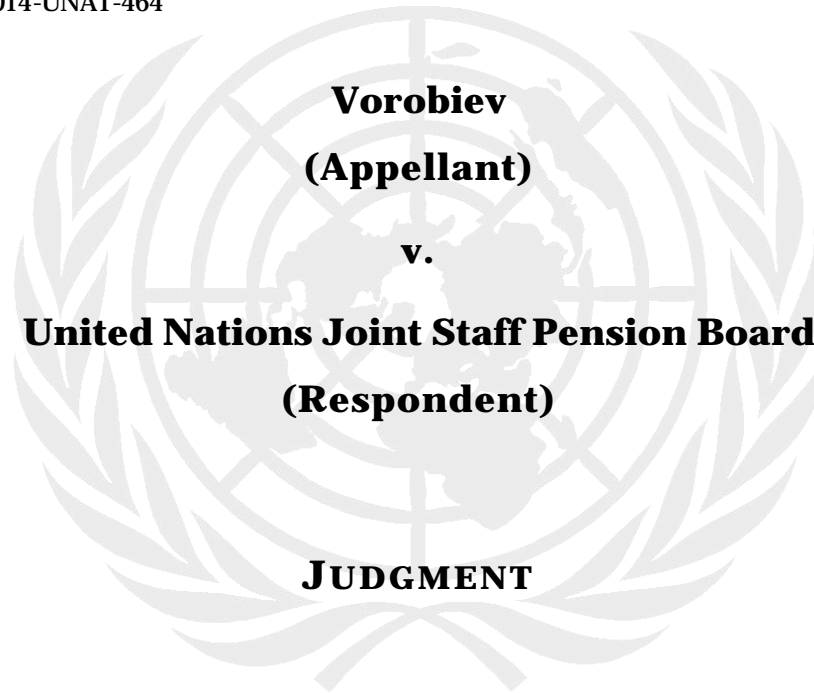




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-464



**Vorobiev
(Appellant)**

v.

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

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Inés Weinberg de Roca
Judge Sophia Adinyira

Case No.: 2013-534

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Appellant: Laurence Fauth

Counsel for Respondent: Sergio Arvizú

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Alexander Vorobiev of the decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB or Pension Board, respectively) dated 17 July 2013. Mr. Vorobiev filed his appeal on 21 October 2013, and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) filed its answer on 12 December 2013.

Facts and Procedure

2. Mr. Vorobiev was a staff member with the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) from 31 March 1997, until his resignation on 18 July 2006. During his employment with CTBTO, he was a participant in the CTBTO Provident Fund (Provident Fund).

3. On 1 August 2006, Mr. Vorobiev joined the United Nations Office at Vienna (UNOV), where he continues to work. He is currently Deputy Chief of Conference Management Service. As an UNOV staff member, Mr. Vorobiev is a participant in the Fund.

4. Effective 1 January 2005, the Fund and CTBTO entered into an “[a]greement on the transfer of pension rights of participants in the United Nations Joint Staff Pension Fund and of participants in the Provident Fund of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization” (Transfer Agreement).¹ Article 2.1 of the Transfer Agreement provides:

A former Provident Fund participant, who has not received a benefit under the Charter and Administrative Rules of the Provident Fund, may elect to be covered by the provisions of the present agreement upon entering the service of a member organization of the Pension Fund and becoming a Pension Fund participant within six months after separation from the service of [CTBTO], by electing within a further

¹ Article 13 of the Fund Regulations provides:

The Board may, subject to the concurrence of the General Assembly, approve agreements with Member States of a member organization and with intergovernmental organizations, with a view to securing continuity of pension rights between the governments of such States or organizations and the [Pension] Fund.

period of six months to transfer all the accrued entitlements in the Provident Fund to the Pension Fund.

5. On 19 September 2006, Mr. Vorobiev sent an e-mail to the Fund advising that he was “contemplating transferring [his] Provident Fund benefits to the UNJSPF in accordance with the Transfer Agreement ...”. He requested “assistance in providing [him] with the estimate of the pensionable service credit that [he] can expect in the UNJSPF”.

6. In response, the Fund, on 21 September 2006, requested Mr. Vorobiev and CTBTO to provide it with a copy of Mr. Vorobiev’s “leaver’s certificate from [his] Provident Fund”. On the same date, CTBTO provided the Fund with a document stating that Mr. Vorobiev had separated from the service of CTBTO on 18 July 2006 and had holdings (in both United States dollars and Euros) in the Provident Fund.

7. On 29 September 2006, the Chief of the Fund’s Participation, Entitlements and Contributions Section (C/PECS) wrote to Mr. Vorobiev advising him that his holdings in the Provident Fund “would purchase contributory service of *9 years and 3 months* in our Fund. Note however that this is just an estimate as the final determination can be done only upon receipt of the funds.”²

8. On 7 November 2006, Mr. Vorobiev responded to C/PECS, stating, in part:

I have checked the figures with my former colleague who joined UNIDO a few months ago ... and who was working in CTBTO and contributing to the Provident Fund practically at the same time with me. For the amounts of [his holdings] he was awarded contributory service of 8 years and 6 months. It roughly means that he was awarded each month[] for contributing *US\$2380*.

In my case, the total amount at the current exchange rate ... [i]f calculated against 9 years and 3 months of contributory service ... means that I am purchasing each month[] of contributory service at *US\$3220*.

Even if we are talking about a rough estimate, a difference of around US\$840 per month seems exorbitant.³

² Emphasis in original.

³ Emphases in original.

9. On 6 December 2006, Mr. Vorobiev asked C/PECS for “the legal basis for putting a cap on the number of years of contributory service credited to [him]”. He also expressed concern about the “time limit on the decision to transfer the funds”.

10. On 8 December 2006, C/PECS replied to Mr. Vorobiev, advising him that “the conditions of article 2.1 of the Transfer Agreement on time limits are fulfilled”. She further advised him that the “Pension Fund will get back to you on the limitation in purchase of years and months to your actual length of service with CTBTO. Any delay on our side will not count for time limits set-up in article 2. [sic] of the Transfer Agreement.”

11. On 20 February 2007, the Fund Senior Legal Officer (Fund SLO) sent Mr. Vorobiev a letter stating, in pertinent part:

You are correct in the assumption that UNJSPF does follow – without any exception – the well-established basic pension principle that recognition of past service (in a non-UNJSPF member organization) as pensionable cannot be in excess of the period of service actually performed by the Fund participant ... As the current provisions of the UNJSPF Regulations do not provide for an opportunity for the future or current active participants to *purchase* additional contributory service, allowing a new UNJSPF participant who wishes to transfer his/her pension rights from another pension plan to the UNJSPF to earn more contributory service than she or he has actually served would put such a category of staff in a privileged position compared to the other UNJSPF participants. Indeed, it would allow such staff *de facto* to purchase additional years of contributory service from a new, “receiving” pension plan, which is not necessarily comparable with the “sending” pension plan.

...

Therefore, if a participant wishes to transfer his/her pension rights to the UN Pension Fund[,] he/she is required to pay **an amount equal to the TOTAL benefit to which the CTBTO staff member would have been entitled** under the Provident Fund Rules, including any interest. ...

...

The decision to transfer benefits is always an individual choice. If a staff member does not wish to transfer his or her pension rights, she/he will retain all rights to individual benefits under his or her current plan, as they apply upon separation from service. The staff member may also withdraw the benefits and invest them privately. However, any transfer to the UNJSPF is covered by the relevant Transfer Agreement in force between the employing organizations. There are instances where a transferring employee would receive substantially less in pensionable service credits than she or she [sic] accrued with the “sending” Plan. The decision should therefore

depend on the combined benefits that one is expected to receive from the “receiving” Plan when the staff member eventually separate[s].⁴

12. On 8 March 2007, Mr. Vorobiev withdrew his holdings from the Provident Fund.

13. On 26 March 2007, the Fund SLO sent Mr. Vorobiev a follow-up to her e-mail of 20 February 2007, stating:

[The Fund] is now consulting with the CTBTO secretariat regarding certain issues related to your transfer request. You will be contacted again upon the conclusions of the discussions. ... These talks do not change the principle already conveyed that at a maximum, UNJSPF can only recognize as pensionable in UNJSPF a period that is equal to the total length of actual past CTBTO service performed by you; however, they concern the practical steps to be taken in this case.

14. On 27 March 2007, the Fund SLO wrote to the Personnel Office of CTBTO regarding Mr. Vorobiev’s transfer request and asked CTBTO to look into the matter. The Fund SLO advised CTBTO that Mr. Vorobiev would have an “excess balance” if his entire Provident Fund holdings were transferred to the Fund and the Fund could not retain that “excess balance”. She noted that Mr. Vorobiev’s situation was “not foreseen” in the Transfer Agreement between CTBTO and the Fund. Therefore, the Fund SLO proposed a process that might allow CTBTO to retain the “excess balance” after Mr. Vorobiev’s Provident Fund holdings were transferred on a 1:1 basis to the Pension Fund.

15. On the same day, the Personnel Office of CTBTO advised the Fund SLO that Mr. Vorobiev had decided not to transfer his Provident Fund benefits to the Fund and had withdrawn his Provident Fund holdings, stating that “[i]n light of the above, his separation from the Provident Fund has been completed”.

16. On 27 March 2007, the Fund SLO wrote to Mr. Vorobiev seeking clarification about his decision not to transfer his Provident Fund holdings to the Fund. Mr. Vorobiev answered: “I am very willing to hear what is the new procedure, especially in what respect it is different it is [sic] from the previous one, and will make my decision once I hear from you, as required by the Transfer Agreement.”

⁴ Emphasis and capitalization in original.

17. On 28 March 2007, the Fund SLO replied to Mr. Vorobiev, stating that “there are no new ‘arrangements’”. Moreover, she advised Mr. Vorobiev that there are other matters in which the Fund “deals directly with the organization, not with the individuals. There are no policy issues involved, and of course these are all moot, if you have decided not to transfer.” She then suggested that Mr. Vorobiev should contact the Chief of the UNJSPF Geneva Office if he had any further questions.

18. On 30 June 2007, the Finance Officer and Officer-in-Charge, UNJSPF Geneva Office, e-mailed Mr. Vorobiev:

Please note that a transfer of pension rights entails a transfer between organizations.

As you have taken out your “pension funds” from the CTBTO Provident Fund you are no longer eligible for a[...] transfer of your pension rights.

....

We therefore regret not to be able to proceed.

19. On 4 July 2007, the Chief, UNJSPF Geneva Office, advised Mr. Vorobiev that the Transfer Agreement no longer applied to him and he could not transfer his holdings to the Fund since he had withdrawn his holdings from the Provident Fund and, thus, received a benefit. It was further explained that “‘transfers’ are between organizations and from an individual to an organization. What you propose, being separated from the Provident Fund of CTBTO, is a ‘voluntary additional contribution’ (i.e. an individual buys additional years of contribution), which is not accepted by our present Fund’s Rules and Regulations.”

20. Mr. Vorobiev did not seek review by the Standing Committee of the 4 July 2007 decision.

21. Almost five years later, on 17 May 2012, Mr. Vorobiev wrote to the Fund Secretary/Chief Executive Officer (CEO) requesting the Fund “review the decision regarding the transfer of [his] pension rights from CTBTO to UNJSPF in view of the recent decision of UNJSPF concerning the transfer of pension rights from CTBTO to UNJSPF [of a former colleague]”.

22. On 21 June 2012, the Fund Secretary/CEO denied Mr. Vorobiev’s request, stating that “the Fund cannot entertain your request to review a decision taken back in 2007. You should have pursued the matter further earlier, eventually through formal recourse mechanisms, back in 2007.” The Fund Secretary/CEO further explained:

Please be reminded that the CTBTO had informed the Fund by email of 27 March 2007 that you had decided not to transfer your Provident Fund benefits to the UNJSPF and that in light thereof, your separation from the Provident Fund had been completed. In July 2007, you and your personnel section in CTBTO were informed that you could only be credited maximum years of pensionable rights corresponding to the period of actually performed [service], whereas the then eventual “excess balance” would have been retained by CTBTO, with the disposition to be resolved between the organization and you. However, you were also informed that in view of your having separated from the Provident Fund, the transfer agreement was no longer applicable to your case.

The exchanges with the UNJSPF clearly show that in July 2007, you were fully aware of the discussions and policy decisions taken by UNJSPF and CTBTO with respect to the handling of the then potential excess balance, if any, in case of a transfer from CRBTO to UNJSPF under the transfer agreement. Nevertheless, you decided not to pursue the matter further, after you received the negative response from the Chief of the Geneva Office on 4 July 2007, and only wrote to the Fund now, in May 2012, which is almost five years later.

23. On 27 June 2012, Mr. Vorobiev appealed the Secretary/CEO’s decision to the Standing Committee, and on 8 August 2012, he filed his supplemental statement of appeal.

24. On 17 July 2013, the Standing Committee issued its decision upholding the Fund’s decision. The Standing Committee noted that Mr. Vorobiev had made “an irrevocable” decision on 8 March 2007 to withdraw his holdings from the Provident Fund and, thus, he was “no longer covered” by the Transfer Agreement and a transfer of his pension rights to the Fund “was no longer possible”.

25. On 21 October 2013, Mr. Vorobiev filed the pending appeal challenging the Standing Committee’s decision. He requests that the Appeals Tribunal “rescind the contested decision and order specific performance and order: i) the Pension Fund to calculate the actuarial value of [his] years of service with the CTBTO under the conditions that prevailed at the time he initially made the request; and ii) the Pension Fund to allow [him] to pay the foregoing amount directly to the Pension Fund to receive credit for years of contributory service”.

Submissions

Mr. Vorobiev's Appeal

26. The Standing Committee did not find that Mr. Vorobiev's request was time-barred, and the Appeals Tribunal should accept that finding. In the event the issue of timeliness is raised on appeal by the Respondent or the Appeals Tribunal *sua sponte*, Mr. Vorobiev contends that his request is timely since the Fund and CTBTO were uncertain in July 2007 "respecting circumstances where an excess balance resulted from the actuarial calculation". It was not until 2010 and 2011 that the Fund made a final decision as to how to treat a staff member's excess balance, i.e., allowing an excess balance to be disposed of by agreement between the staff member and CTBTO.

27. Under the jurisprudence of the Administrative Tribunal of the International Labour Organization, an organization should not be allowed to assert time-bar where information has been withheld from the staff member in violation of its duty of good faith. The Fund officials did not properly advise Mr. Vorobiev that the treatment of a staff member's excess balance was under review and he would be advised of the outcome in due course, as it should have.

28. Under principles of equitable estoppel and good faith, the Fund is precluded from denying Mr. Vorobiev's "rights under the Transfer Agreement". The Fund has a fiduciary duty to its participants to provide accurate information, and Mr. Vorobiev was justified in relying on the advice from the Fund officials. The Standing Committee failed to address Mr. Vorobiev's claim that the Fund officials provided him with inaccurate information, specifically the correspondence of 20 February 2007, that "caused [him] to withdraw his holdings from the Provident Fund in March 2007".

29. The Fund has the power to permit Mr. Vorobiev's request to transfer funds into the Fund since it has made an exception to the Transfer Agreement provisions for a former colleague of Mr. Vorobiev's. Thus, the Fund has "the implied power to effect the terms of the Transfer Agreement, especially in circumstances where the alleged loss of the right [to transfer] derives from the Pension Fund's negligence".

30. Mr. Vorobiev requests that the Appeals Tribunal “rescind the contested decision and order specific performance and order: i) the Pension Fund to calculate the actuarial value of [his] years of service with CTBTO under the conditions that prevailed at the time he initially made the request; and ii) the Pension Fund to allow [him] to pay the foregoing amount directly to the Pension Fund to receive credit for years of contributory service”.

The Fund’s Answer

31. Mr. Vorobiev withdrew his pension from the Provident Fund in March 2007. Thus, he received a benefit, which under Article 2 of the Transfer Agreement between CTBTO and the Fund thereafter precluded him from transferring his Provident Fund pension to the Fund.

32. Mr. Vorobiev withdrew his pension from the Provident Fund while the Fund was actively seeking solutions about how to handle his novel situation, i.e., what to do about his “excess balance” in the Provident Fund. Rather than wait until this administrative matter was decided, he acted preemptively and withdrew his pension. This was his choice; not the Fund’s decision. Mr. Vorobiev has had the benefit of the funds he withdrew from the Provident Fund since March 2007. In 2007, Mr. Vorobiev failed to pursue available remedies to challenge any decision from the Fund about the transfer of his Provident Fund pension. At all pertinent times, the Fund rules provided a means to appeal the Fund’s decisions. Yet, Mr. Vorobiev did not utilize these available procedures. It is now too late – five years later – to attempt to reopen and review his case. This is not a situation in which a staff member availed himself of an appeals process, had his appeal been denied and then the Fund subsequently changed its policy. Since he did not timely appeal in 2007, his current request for review is untimely.

33. Under the Transfer Agreement, transfers were to be allowed for six months following a staff member entering the Fund. Although reasonable extensions may be made to that limitations period, five years is not a reasonable extension.

Considerations

34. Article 2(9)(a) of the Appeals Tribunal Statute (Statute) provides that 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”

submitted by a staff member “who is eligible under article 21 of the regulations of the Fund as a participant in the Fund”.⁵ Article 7(2) of the Statute requires that an appeal of a Standing Committee decision must be filed within 90 days of receipt of the decision.

35. Section K of the Fund’s Administrative Rules (Administrative Rules), in effect in 2007, required that the Standing Committee’s review of any decision by the Secretary of the UNSJPB “shall be initiated ... within sixty days of notification of the decision appealed against ...”. “[N]evertheless, upon good cause shown”, the Standing Committee may “agree to consider an appeal ... which was delivered after the expiry of the period prescribed above”.

36. Under Articles 2(9)(a) and 7(2) of the Statute, a decision by the Standing Committee is a prerequisite to judicial review by the Appeals Tribunal. Yet, Mr. Vorobiev did not seek review by the Standing Committee of the 4 July 2007 decision to preclude him from transferring his Provident Fund holdings to the Fund under Article 2 of the Transfer Agreement due to the fact that he had withdrawn his holdings from the Provident Fund. Instead, five years later, he requested that the Fund reopen and review his case.

37. The Fund denied Mr. Vorobiev’s request to reopen and review his case on the ground that “the Fund cannot entertain your request to review a decision taken back in 2007. You should have pursued the matter further earlier, eventually through formal recourse mechanisms, back in 2007.” The Standing Committee upheld this decision, and the Standing Committee’s decision is on appeal before the Appeals Tribunal.

38. The Fund’s use of the word “entertain” is similar to our use of the word “receive”. Under Section K of the Administrative Rules, Mr. Vorobiev was required to seek review by the Standing Committee of the 4 July 2007 decision within sixty days. However, he did not.

⁵ See also *Larghi v. UNJSPB*, Judgment No. 2013-UNAT-343, paras. 13-14; *Pio, v. UNJSPB*, Judgment No. 2013-UNAT-344, paras. 18-19; *Muthuswami v. UNJSPB*, Judgment No. 2010-UNAT-034, para. 19. Similarly, Article 48 of the Pension Fund Regulations, in effect in 2007, provided for appeals to the former United Nations Administrative Tribunal of decisions by the Standing Committee acting on behalf of the Pension Board:

“(a) Applications alleging non-observance of these Regulations arising out of decisions of the Board may be submitted directly to the United Nations Administrative Tribunal by:

(i) Any staff member of a member organization which has accepted the jurisdiction of the Tribunal in Pension Fund cases who is eligible under article 21 of these Regulations as a participant in the Fund.”

In essence, the Standing Committee determined that Mr. Vorobiev's application to reopen and review his case could not be received *ratione temporis* due to his failure to timely seek review under Section K of the Administrative Rules.

39. The Appeals Tribunal finds the Standing Committee did not err in refusing to receive *ratione temporis* Mr. Vorobiev's application. Moreover, in refusing to receive Mr. Vorobiev's application, the Standing Committee also implicitly refused to find "good cause" to waive the sixty days' time limit for review set forth in Section K of the Administrative Rules. The Appeals Tribunal also finds no error in this implicit determination. Certainly, a waiver of five years for review by the Standing Committee would be unreasonable – especially in light of the time limits in the Transfer Agreement. Accordingly, the decision of the Standing Committee should be affirmed and the appeal dismissed.

Judgment

40. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Adinyira

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar