



Judgment No. 2016-UNAT-658



Counsel for Appellant: Robbie Leighton, OSLA

Counsel for Respondent: Sergio Arvizú

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Daniel Kutner against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB, respectively) made on 22 July 2015. Mr. Kutner filed his appeal on 30 October 2015, and the United

10. On 18 July 2014, Mr. Kutner responded to the 14 July 2014 communication after consulting his lawyer. He stated that he disagreed with the interpretation of Article 35 *bis*, in particular the conclusion that his spouse had met the condition that he and his spouse had been married for at least 10 years during which contributions were paid to the Fund on his account (the 10-year contributions requirement). In essence, he claimed that the 10-year period ran from 1 January 2005 (the date on which IPU became a member organization of the Fund and from which contributions were paid to the Fund) and expired at the end of 2014. On 21 July 2014, the representative of the Fund informed Mr. Kutner that the matter would be referred for legal advice.

11. By judgment dated 4 September 2014, the Tribunal of First Instance in the Canton of Geneva dissolved Mr. Kutner's marriage. Mr. Kutner's divorce became final with effect from 10 October 2014.

12. On 28 October 2014, a Legal Officer of th

15. On 6 March 2015, Mr. Kutner requested a review of the 4 February 2015 decision by the United Nations Staff Pension Committee (Pension Committee) under the Administrative Rules of the Fund. By letter dated 4 May 2015, Mr. Kutner was informed that the Pension Committee had decided to uphold the 4 February 2015 decision. The Pension Committee concluded that his Beginning Contributory Service date was 15 February 2004 and, consequently, his former spouse met the first requirement for eligibility for a potential divorced surviving spouse's benefit under Article 35 *bis* (b)(i) of the Regulations.

16. On 29 May 2015, Mr. Kutner appealed ag

20. The Standing Committee incorrectly equated the “period ... during which contributions were paid to the Fund” to his period of contributory service with the Fund, which began on 15 February 2004. The Standing Committee’s interpretation of Article 35 *bis* (b)(i) is contrary to the normal meaning of the Article. The phrase “contributory service” is used commonly in the Regulations, but it is not used in Article 35 *bis* (b)(i). According to the Article’s natural meaning, the payment of contributions specifically into the Fund is required in order to determine whether the 10-year contributions requirement is met. Treating his contributory service with IPU as contributions paid to the Fund is not consistent with the temporal element of Article 35 *bis* (b)(i).

21. Mr. Kutner also submits that he has a legitimate expectation that his former spouse will not qualify for a divorced surviving spouse’s benefit as a consequence of the Fund’s representations to him. The Standing Committee did not consider his legitimate expectation claim. On 30 September 2013, the Fund unequivocally stated in writing that the start date for determining whether the 10-year contributions requirement was met under Article 35 *bis* (b)(i) was 1 January 2005. He reasonably concluded that, should his divorce be finalized prior to 1 January 2015 (which it was), his former spouse would not be entitled to a divorced surviving spouse’s benefit. He relied upon the Fund’s representation to his detriment. By the time that the Fund informed him that the date to be used under Article 35 *bis* (b)(i) was in fact 15 February 2004, it was too late for him to correct his earlier

sufficient to make appropriate provision for his current wife should his former spouse be entitled to a divorced surviving spouse's benefit.

The Fund's Answer

24. The Fund contends that the date on which Mr. Kutner began his contributory service with the Fund (15 February 2004) will be used to calculate all of his pension benefits, including any widow's benefit and divorced surviving spouse's benefit. Contributory service accrues to a participant from the date of commencement of participation in the Fund to the date of cessation of participation. Additional contributory service may accrue to a participant, for example where service in a member organization prior to its admission to membership of the Fund is recognized under Article 22 of the Regulations.

25. The date on which Mr. Kutner began his contributory service with the Fund should also be used to determine whether his former spouse is entitled to a divorced surviving spouse's benefit in accordance with Article 35 *bis* (b)(i) of the Regulations. This is a consequence of Mr. Kutner's election to have his contributory service with IPU in 2004 recognized as contributory service with the Fund. Further, this approach is in accordance with the spirit and letter of the Regulations. The Chief Executive Officer of the Fund cannot adopt two different dates for the calculation of benefits that result from the same service. Mr. Kutner's election means that his period of contributory service with IPU in 2004 counts toward the calculation of his pension benefits (which include widow's benefit and divorced surviving spouse's benefit) and the 10-year contributions requirement in Article 35 *bis*

Considerations

29. Mr. Kutner's appeal concerns the interpretation of Article 35 *bis* (Divorced surviving spouse's benefit) of the UNJSPF's Regulations. Article 35 *bis* states in part:

(a) Any divorced spouse of a participant or former participant, separated on or after 1 April 1999, who was entitled to a retirement, early retirement, deferred retirement or disability benefit, or of a participant who died in service on or after that date, may, subject to the provisions of article 34(b) (applicable also to widowers), request a former spouse's benefit, if the conditions specified in paragraph (b) below are fulfilled.

(b) Subject to paragraph (d) below, the divorced spouse is entitled to the benefit set out in paragraph (c) below, payable prospectively following receipt of the request for a divorced surviving spouse's benefit, if, in the opinion of the Chief Executive Officer of the Fund, all of the following conditions are fulfilled:

(i) The participant had been married to the former spouse for a continuous period of at least ten years, during which contributions were paid to the Fund on account of the participant or the participant was awarded a disability benefit under article 33 of the Regulations;

(ii) The participant's death occurred within 15 years of the date when the divorce became final, unless the former spouse proves that at the time of death the participant was under a legal obligation to pay maintenance to the former spouse;

(iii) The former spouse has reached the age of 40. Otherwise the benefit entitlement shall commence on the day immediately following the day that age is reached; and

(iv) Evidence is provided that a divorce settlement does not have an express renunciation of UNJSPF pension benefit entitlements;

(c) A former spouse who, in the opinion of the Chief Executive Officer, has met the conditions set out in paragraph (b) above shall be entitled to the widow's or widower's benefit under article 34 or 35 as the case may be; however, if the participant is survived by both one or more such former spouses and/or by a spouse entitled to a benefit under article 34 or 35, the benefit payable under article 34 or 35 shall be divided between the spouse and former spouse(s) in proportion to the duration of their marriages to the participant.

30. IPU became a member organization of the Fund with effect from 1 January 2005. On 31 December 2004, Mr. Kutner elected to have his service with IPU prior to 1 January 2005 recognized as contributory service with the Fund, in accordance with an agreement between the Fund and IPU, and Article 22(c) of the Regulations. As a result, the Fund's

annual statements informed Mr. Kutner that his contributory service commenced on 15 February 2004.

31. Mr. Kutner challenges the decision of the Standing Committee to equate the period during which contributions were paid to the Fund to the period of contributory service with the Fund for the purposes of Article 35 *bis* (b)(i) of the Regulations.

32. He wants the Standing Committee to accept the period of contributory service with the Fund in order to calculate his own benefit, but to take into account the period during which contributions were paid to the Fund vis-à-vis his former spouse.

33. Article 22 of the Regulations defines contributory service as follows:

(a) Contributory service shall accrue to a participant in pay status from the date of commencement to the date of cessation of participation. For the purposes of articles 28(b) and (c) and 29(b), 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.

...

(c) Additional contributory service may accrue to a participant if prior service is validated or restored in accordance with article 23 or 24, or if service in a member organization prior to its admission to membership has been recognized as contributory.

34. The Appeals Tribunal has held that: ³

The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation.

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Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Chapman

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar