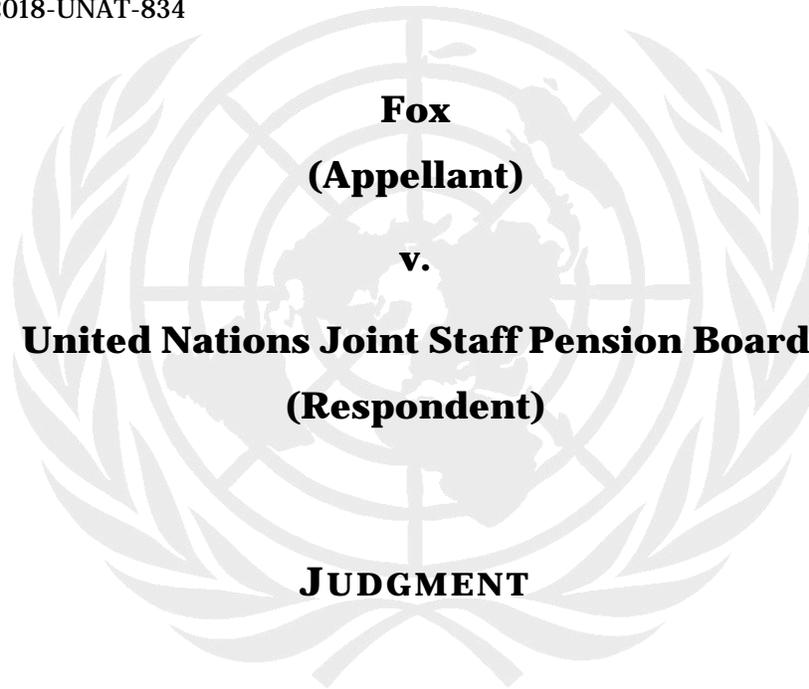




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-834



Before:	Judge John Murphy, Presiding Judge Richard Lussick Judge Martha Halfeld
Case No.:	2017-1123
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Sergio B. Arvizú

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Stephanie Fox against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB, respectively) communicated to Ms. Fox on 31 July 2017. Ms. Fox filed her appeal on 27 October 2017, and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) filed its answer on 20 December 2017.

Facts and Procedure

2. Ms. Fox who is a national of the United States, participated in the Fund from 4 January 2010 to 3 January 2015, as a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). During the first three years of her participation, Ms. Fox was employed in regular pay status. During the last two years of her participation, Ms. Fox was on Special Leave Without Pay (SLWOP) from UNRWA.

3. Ms. Fox elected from the outset of her SLWOP to continue her participation in the Fund in accordance with Article 25(b) of the Fund's Regulations. During her period of SLWOP, she paid both her own share of contributions to the Fund as well as her employing organization's share of contributions to the Fund, in accordance with Article 25(b)(i) of the Fund's Regulations.

4. At the start of her SLWOP in January 2013, Ms. Fox had queries regarding the effect of her period of SLWOP on the calculation of her contributions and on the length of her participation that were forwarded to the Fund by UNRWA and to which the Fund responded on 29 January 2013. Ms. Fox asked specific questions concerning her pension rights while on SLWOP, including whether she could withdraw her contributions at any time. The Fund advised her as follows: "Incorrect. You can only withdraw your contribution upon your separation from service."

5. Ms. Fox wrote to the Fund on 11 September 2014 and 28 September 2014, respectively, stating that her SLWOP would expire in January 2015, at which time she would have accrued five years of contributory service, and asked about her options with respect to her pension. By e-mail dated 12 December 2014, the Fund asked Ms. Fox to clarify if what she required was an estimate of her pension benefits with effect from 31 January 2015. Ms. Fox responded on 18 December 2014, indicating that she would be separating from service on 4 January 2015

(she incorrectly stated “4 January 2014” but the timing and context of the letter made it obvious that she was referring to 2015) and informing the Fund that she had continued while on SLWOP to pay both her and UNRWA’s contributions to the Fund. She asked the following questions:

Can you please confirm what my payout will be at that time?

Can I opt not to take the pay out in case I return to the UN?

If so, for how long can I do this?

How will this affect my future pension?

6. The Fund did not immediately respond to the questions posed by Ms. Fox in her e-mail of 18 December 2014. Ms. Fox separated from service on 4 January 2015.

7. Almost two months after submitting her queries regarding the nature of the benefit available to her and the implications of any election she might make, and without having received an answer to her queries, Ms. Fox, on 7 February 2015, submitted payment instructions, in which she elected a withdrawal settlement. The standard form for the instructions for payment of benefits for participants with five or more years of contributory service identified four options available to Ms. Fox in terms of the Regulations of the Fund, being: a) retirement benefit for participants who have reached the normal retirement age (Article 28); b) early retirement benefit for participants who have reached age 55, but have not reached the normal retirement age (Article 29); c) deferred retirement benefit for participants at any age under the normal retirement age (Article 30); and d) withdrawal settlement at any age under the normal retirement age (Article 31). In her circumstances, Ms. Fox was thus entitled to elect either a deferred pension or a withdrawal settlement. Ms. Fox marked the relevant box with an “X” signifying her election of a withdrawal settlement, which is described in the form to be “[a] final cash withdrawal settlement which will extinguish all other entitlements”. She appended her signature to the document which is dated 7 February 2015.

8. On 8 July 2015, Ms. Fox received the withdrawal settlement payment in the amount of USD 61,053.79, comprised of her own contributions in the amount of USD 57,313.94 and USD 3,739.85 in interest. This amount excluded the amount Ms. Fox had contributed as the employer contributions during her SLWOP.

9. On 11 August 2015, Ms. Fox wrote to the Fund stating that the amount she had received was approximately USD 50,000 less than what she had paid into the Fund. By e-mail dated 3 May 2016, nine months after Ms. Fox had queried her payment, the Fund informed Ms. Fox that in the case of a withdrawal settlement, only the contributions made by the participant plus interest are paid out, and the member organization's share of contributions is not paid out. The Fund further advised that, having elected a withdrawal settlement, she could, if she again became a participant in the Fund in the future, elect to restore her prior contributory service.

10. On 8 May 2016, Ms. Fox forwarded the Fund's response to UNRWA. She commented as follows:

Regarding my pension payout, I have finally received a response from the UNJSPF...

This explanation is different from what I understood from UNRWA when I decided to continue to participate in the pension fund during my SLWOP and pay UNRWA's portion, as well as my own. Clearly, if I had known that I would not get back UNRWA's portion that I personally paid, I would not have decided to pay it and continued to participate in the fund.

11. When she received no further information or assistance from the Fund, Ms. Fox on 18 December 2016, wrote to the Office of Staff Legal Assistance (OSLA), and copied UNRWA and the Fund, seeking legal assistance with her case. On 20 December 2016, the Fund responded bringing to OSLA's attention the e-mail it wrote to Ms. Fox on 3 May 2016, as well as the Fund's interpretation of the relevant Regulations.

12. On 30 March 2017, UNRWA advised the Fund that it had not provided any guidance to Ms. Fox, and that Ms. Fox had been referred to the Fund for advice.

13. On 16 February 2017 and 2 March 2017, Ms. Fox requested review, by the United Nations Staff Pension Committee (UNSPC), of the Fund's decision to deny her request to be reimbursed the pension contributions she paid on behalf of UNRWA during the two-year period of SLWOP. By letter dated 18 April 2017, Ms. Fox was informed that the UNSPC upheld the Fund's decision.

14. On 6 May 2017, Ms. Fox submitted an appeal to the Standing Committee. The Standing Committee considered the case at its meeting held on 21 July 2017, and upheld the decision of the UNSPC. By letter dated 31 July 2017, Ms. Fox was informed of the Standing Committee's decision. The relevant part of the letter reads:

After reviewing all the documents, the Committee decided to uphold the decision of the UNSPC. The Committee noted that you were paid the benefit due to you following your separation from the United Nations and election for a withdrawal settlement under Article 31 of the Regulations of the United Nations Joint Staff Pension Fund. The Regulations do not provide for the member organization's share of contributions to be paid out, regardless of whether those contributions are remitted by the member organization, or by the participant in cases of SLWOP. Furthermore, the Committee noted that the Fund is a defined benefit plan rather than a defined contribution plan and that, as such, the benefits paid out to beneficiaries do not correlate to the contributions paid in by participants. The Committee also noted that you did obtain a benefit by continuing to contribute to the Fund during your period of SLWOP: in particular, you reached five years of contributory service and vested in the Fund, which would have entitled you to receive, had you so elected, a deferred retirement benefit, which carries with it the possibility of a survivor's benefit. Finally, the Committee noted that, if you again become a participant in the Fund, the fact that you elected a withdrawal settlement would allow you to restore your prior contributory service of five years under Article 24 of the Fund's Regulations.

Submissions

Ms. Fox's Appeal

15. Ms. Fox submits that the Standing Committee erred in law in its interpretation and application of the relevant Regulations and Rules of the UNJSPF. She contends that the definition of "own contributions" under Article 1(o) of the UNJSPF Regulations, which means only the percentage paid as the participant (as opposed to the employer) contribution applies only to periods of contributory service during which a participant is in "pay status" under Article 22(a) of the UNJSPF Regulations and does not extend to a participant on SLWOP under Article 22(b), who has contributed the combined organizational and participant shares. She refers to the wording of Article 22 which provides that contributory service shall accrue to a participant in "pay status" from the date of commencement to the end of their participation. This, she argues, is further confirmed by Administrative Rules G.1. and G.2., which make a distinction between a participant in "pay status" and a participant on "leave without pay". Article 31 of the UNJSPF Regulations which restricts the amount of a withdrawal settlement to

the participant's "own contributions" should be interpreted as only applicable to the withdrawal settlement made by a participant in pay status.

16. In the alternative, Ms. Fox contends that the term "contributions" is very generally defined under Article 1(o) of the Regulations. For the purposes of determining "own contributions" in the case of contributions made by a participant on SLWOP, the provisions of Articles 22(b), 25(b)(i) and 31(b) of the UNJSPF Regulations should be read together as providing that where a staff member continues to pay the combined amount of the contributions due, the withdrawal settlement will include the amount of a participant's combined contributions within "own contributions".

17. The Standing Committee further erred in fact resulting in a manifestly unreasonable decision. Contrary to the conclusions of the Standing Committee, the Fund failed to inform Ms. Fox that, if she paid the member organization's share of contributions during her period of SLWOP and subsequently elected a withdrawal settlement, the member organization's share of contributions would not be paid out to her. She maintains that the evidence shows that while she repeatedly sought clarification on the Regulations and Rules of the Fund, she either did not receive a response at all, or in other instances received a response which failed to address or to clarify in plain language the substantive and crucial issue at hand, namely the actual amount she would receive from a withdrawal settlement, and that she would lose two thirds of the contributions she had made while on SLWOP. She submits that the Fund failed in its "obligations of due diligence to inform" her of her benefits, which duty forms part of its mandate.

18. In this regard, Ms. Fox refers to several e-mails and, in particular, her e-mail exchange with the Fund in January 2013 in which she asked whether she could withdraw her contributions at any time and was advised that she could only withdraw her contributions upon separation from service. Furthermore, prior to electing a withdrawal settlement, Ms. Fox requested but was not provided with estimates showing the anticipated amount of her withdrawal settlement and other benefit options. She also refers to the 2017 Annual Letter in which the Fund appears to concede that it needs to enhance its communications capacity. It also provides that an estimate of a participant's benefit options may be requested within six months of a participant's anticipated separation. Ms. Fox points out that she attempted to obtain this information on two occasions without success. At no point, despite her queries, was she ever told that her withdrawal settlement would not include the full amount of her contributions made during her SLWOP. She adds that at "at no point, was the financial outcome of the choice between the

deferred benefit and withdrawal settlement presented”. This failure “to provide the requested, accurate [] information to beneficiaries about separation option[s] in a manner which would have reasonably clarified the situation and consequences” to allow her to make an informed decision “constitutes a failure of due diligence” which has caused her considerable damages.

19. Ms. Fox accordingly requests that the Appeals Tribunal reverse the decision of the Standing Committee and return to her the outstanding amount of USD 46,389.54 consisting of the (organization’s) contributions she made over a period of two years, plus interest. In the alternative, she requests that the Appeals Tribunal order payment of this amount for the damages suffered from the failure to follow procedure and provide an estimate of the withdrawal settlement. Ms. Fox further requests that the Appeals Tribunal hold an oral hearing.

The Fund’s Answer

20. The definition of “own contributions” in Article 1(o) of the UNJSPF Regulations refers to “contributory service under article 22”, without drawing a distinction between contributory service during a period of pay status (Article 22(a)) and contributory service during a period of SLWOP (Article 22(b)). If the definition of “own contributions” were intended to apply only to contributory service during a period of pay status, it would refer specifically to Article 22(a). Instead, it refers to Article 22 in its entirety, thereby also applying to contributory service during a period of SLWOP.

21. The Fund further submits that, contrary to Ms. Fox’s alternative contention, Article 25(b) providing for contributions during SLWOP does not contain an exception to the limitations set forth in Article 25(a), column B which provides the normal rates of contribution during a period of pay status. The only exception that Article 25(b) sets out relative to Article 25(a) is that it grants flexibility to participants and their employing member organizations to decide how to apportion the contributions due to the Fund during a period of SLWOP. The definition of “own contributions” is explicitly pegged to “column B” of the table in Article 25(a), indicating that the intention of the Regulations is to ensure that the amount of the withdrawal settlement is calculated in accordance with Article 31(b) of the UNJSPF Regulations, not with reference to the total contributions actually paid by the participant, but with reference only to the participant’s regular one-third share of contributions.

22. The Fund is a defined benefit plan, not a defined contribution plan. A participant in the UNJSPF, as a defined benefit plan, has no ownership right to any of the contributions paid in; rather, he or she has a right to a guaranteed (defined) benefit calculated in accordance with the plan's regulatory framework. There is no basis on which the withdrawal settlement paid to Ms. Fox can be calculated differently because she remitted her member organization's share of contributions during her SLWOP. In all cases, the withdrawal settlement corresponds to the contributions made by the participant, not to exceed one third of the total contributions made to the Fund, plus interest, increased by 10 per cent for each year of contributory service above five years, to a maximum of 100 per cent. Reimbursing Ms. Fox the organization's share of contributions would go against the nature of the Fund as a defined benefit plan, and constitute an unjust enrichment of Ms. Fox at the expense of all other Fund participants and beneficiaries.

23. By continuing to contribute to the Fund during her period of SLWOP, Ms. Fox accrued the benefit of having two further years of contributory service, thereby reaching five years of contributory service in the Fund. As a result, she had the option to elect a deferred retirement benefit under Article 30 of the UNJSPF Regulations upon her separation, which would have provided her with a guaranteed income stream once she reached her retirement age, as well as related survivor's benefits in the event of her death. Ms. Fox ultimately elected a withdrawal settlement foregoing the option of a deferred retirement benefit but preserving her right to elect restoration of her contributory service should she rejoin a member organization of the Fund in the future.

24. The General Assembly recently considered the fact that the organization's share of contributions is retained by the Fund in cases of withdrawal settlements. The Advisory Committee on Administrative and Budgetary Questions noted that, if the UNJSPF Regulations were changed to allow for the return of member organizations' contributions to the member organization in cases of withdrawal settlements, the Fund's liabilities would increase, offsetting the gains resulting from the recent increase in normal retirement age. No modification to the provision was made. It would be contrary to the plain language and the legislative intent of the Regulations, as well as the fundamental nature of the Fund as a defined benefit plan, for Ms. Fox to be paid the member organization's share of the contributions that she paid during her SLWOP.

25. As regards Ms. Fox's contention that the Fund failed to inform her that, if she paid the member organization's share of contributions during her SLWOP and subsequently elected a withdrawal settlement, the organization's share of contributions would not be paid out to her, the Fund contends that the e-mail exchange she refers to focused on when she could elect a withdrawal settlement, and not on how the withdrawal settlement would be calculated. Ignorance of the rules cannot be invoked as an excuse for a failure to comply with them and the fact that Ms. Fox may not have understood the UNJSPF Regulations regarding the non-return of the member organization's share of contributions in the event of a withdrawal settlement provides no basis on which to grant her an exception from the application of the UNJSPF Regulations.

26. As to Ms. Fox's argument regarding the Fund's failure to provide estimates showing the anticipated amount of her withdrawal settlement and other benefit options, the Fund contends that Ms. Fox requested an estimate of her benefit options in September 2014; the Fund responded on 12 December 2014 seeking clarification as to the effective date of the estimate that Ms. Fox sought; and Ms. Fox responded on 18 December 2014, providing the incorrect separation date of 4 January 2014 (instead of 4 January 2015). She then proceeded to submit payment instructions electing a withdrawal settlement on 7 February 2015 without waiting for a response from the Fund. It is unclear why, if the receipt of an estimate from the Fund was determinative to her benefit election, she did not wait to receive the estimate before submitting her benefit election.

27. The Fund requests that the Appeals Tribunal dismiss the appeal and uphold the decision of the Standing Committee. The Fund submits that there is no need for an oral hearing.

Considerations

28. Ms. Fox has requested an oral hearing in the appeal. We see no benefit in holding an oral hearing in this appeal. The facts and arguments are fully ventilated on the record and in the briefs. The seminal issues are also relatively straightforward and can be determined without hearing oral argument. An oral hearing in this appeal would not assist in the expeditious and fair disposal of the appeal.

29. The only two benefit options available to Ms. Fox at the time of her separation were those in terms of Article 30 and Article 31 of the UNJSPF Regulations.

30. The deferred pension option under Article 30 is payable on separation to participants younger than the normal retirement age and whose contributory service was five years or longer. Ms. Fox accordingly qualified for this benefit. The benefit is payable at the standard annual rate for a retirement benefit and ordinarily shall commence at the normal retirement age or at a reduced amount at the early retirement age of 55.

31. Ms. Fox, however, opted for the withdrawal settlement under Article 31(b)(ii) rather than a deferred pension under Article 30. Article 31 provides:

(a) A withdrawal settlement shall be payable to a participant whose age on separation is less than the normal retirement age, or if the participant is the normal retirement age or more on separation but is not entitled to a retirement benefit.

(b) The settlement shall consist of:

(i) The participant's own contributions, if the contributory service of the participant was less than five years; or

(ii) The participant's own contributions increased by 10 per cent for each year in excess of five up to a maximum of 100 per cent, if the contributory service of the participant was more than five years.

32. Article 1(o) of the UNJSPF Regulations in so far as it is relevant defines "*own contributions*" to mean:

the contributions, not exceeding the percentage of his or her pensionable remuneration specified in article 25(a), column B, made to the Fund by or on behalf of a participant in respect of contributory service under article 22, with interest ...

33. Article 22 is concerned with contributory service. The applicable part reads:

(a) Contributory service shall accrue to a participant in pay status from the date of commencement to the date of cessation of participation ...

(b) Contributory service may accrue in respect of leave without pay if contributions are received by the Fund in accordance with article 25(b).

34. Article 25 deals with contributions to the Fund. The relevant part of it reads:

(a) Contributions by the participant and by the employing member organization shall be payable to the Fund concurrently with the accrual of contributory service under article 22(a) at the percentage rates of pensionable remuneration specified below:

A	B	C
For periods of contributory service	Participant (percentage)	Employing member organization (percentage)
Before 1984	7.00	14.00
As from 1 January 1984 to 30 June 1988	7.25	14.50
As from 1 July 1988 to 30 June 1989	7.40	14.80
As from 1 July 1989 to 31 December 1989	7.50	15.00
As from 1 January 1990	7.90	15.80

(b) (i) Contributions for the purpose of article 22(b) in respect of a period of leave without pay shall be at a percentage rate of the pensionable remuneration of the participant equal to the applicable rates specified in (a) above as payable by the participant and by the employing member organization, combined. Such contributions shall be payable concurrently with such leave, by the participant in full or by the organization in full, or in part by the participant and in part by the organization[.]

35. Thus, the ordinary rates of contribution are 7.9 per cent of pensionable remuneration payable by the participant and 15.8 per cent of pensionable remuneration payable by the employing member organization, being a total of 23.7 per cent of pensionable remuneration of which the participant contributes one-third and the employer two-third.

36. Ms. Fox maintains that the 15.8 per cent she personally contributed as the employer contribution for two years during her SLWOP should be regarded as “own contributions” and thus form part of her withdrawal settlement.

37. Contributions to the Fund during SLWOP are governed by Article 22(b) read with Article 25(b)(i) of the UNJSPF Regulations. These provisions afford a participant on SLWOP the right to continue accruing contributory service provided he or she pays the employer’s contribution for the period of the SLWOP. Article 22(b) provides that contributory service may accrue during a period of leave without pay, provided contributions are received by the Fund in accordance with Article 25(b), which requires the payment of the same total contributions during SLWOP as would have been payable under Article 25(a) had the participant remained ordinarily employed. The issue arising in this appeal is whether such contributions form part of a participant’s “own contributions” payable as part of a withdrawal settlement under Article 31.

38. The argument of Ms. Fox that the definition of “own contributions” in Article 1(o) refers to “contributory service under article 22” in periods where the participant is in pay status is not sustainable. The definition draws no distinction between contributory service during a period of pay status (Article 22(a)) and contributory service during a period of SLWOP (Article 22(b)). If the definition of “own contributions” were intended to apply only to contributory service during a period of pay status, it would refer specifically to Article 22(a). Instead, it refers to Article 22 in its entirety, thereby also applying to contributory service during a period of SLWOP.

39. Hence, “own contributions” are “the contributions, not exceeding the percentage of his or her pensionable remuneration specified in Article 25(a), column B, made to the Fund by or on behalf of a participant in respect of contributory service under Article 22, with interest”. The explicit reference in the definition of “own contributions” to column B of Article 25(a) can leave no doubt that what is intended as the withdrawal settlement in the Fund, as the defined benefit payable in terms of Article 31, is the 7.9 per cent of pensionable remuneration paid as one third of the total contributions.

40. The defined benefit on withdrawal is accordingly capped and expressly intended to be limited to one third of the total contributions made to the Fund, regardless of whether the participant may have made additional contributions to cover the employer’s share during SLWOP. This circumscribed benefit is not unusual in defined benefit pension funds, where the employer in effect guarantees or underwrites the defined benefits to the advantage of longer serving staff members. Defined benefit funds differ from defined contribution funds in this important respect. In a defined contribution fund, the participant’s defined contributions are invested on behalf of the participant and vest in the participant who is entitled to all the contributions together with any growth on the investment on withdrawal. By contrast, in a defined benefit fund, the benefits are calculated actuarially in terms of pre-defined formulae (including actuarially assessed rates of pre-retirement withdrawal, mortality etc.) and are funded through the Fund’s assets, rather than exclusively through the contributions. The participant in a defined benefit fund, unlike a participant in a defined contribution fund, has no ownership (real or beneficial) in the contributions to the fund. He or she has only a right to a defined benefit, the nature and extent of which is defined in the rules of the fund, and which will often not correspond to the amount received, invested or grown in the investment markets by the fund.

41. It is therefore intrinsic to the funding arrangements and the benefit design of defined benefit funds that the employer contributions to the fund remain part of the fund and do not vest in staff members who separate after shorter periods of service. The employer contributions of staff members who leave their employment after short service remain in the fund and are used to subsidize the liabilities of the employer and to minimize its risk or financial exposure. The limited withdrawal benefit in Article 31 is consistent with that design and purpose.

42. Nowhere in the Regulations is it indicated that the calculation of the defined withdrawal settlement in Article 31 is required to be modified in cases where the participant has during a period of SLWOP paid both the participant's share and the employer's share of contributions. On the contrary, the defined benefit of "own contributions", as explained, is explicitly pegged to column B in Article 25(a). In consequence, the Fund is correct that the intention of the provision is not to define the benefit with reference to the contributions paid (which would be the case in a defined contribution fund), but with reference to the participant's regular one-third share of contributions, without any regard for who paid the two-third employer contribution. The Fund has no discretion to increase the amount of the defined withdrawal benefit payable under Article 31. To reimburse Ms. Fox the employer contributions paid by her would constitute an arbitrary variance of the formula established by the UNJSPF Regulations, which would not be in the interests of the Fund and its members and would inconsistently alter the carefully formulated benefit design. To permit the supplementing of benefits in this way would increase the Fund's liabilities exponentially and introduce a lack of predictability in the funding requirements.

43. Thus, the Fund is correct in its submission that Ms. Fox is not entitled in terms of the Regulations or in law to the return of the employer contributions she paid during her SLWOP. A finding of that order no doubt will be a bitter pill to swallow and is of harsh consequence. Ms. Fox has paid a substantial sum of money to the Fund without much in the way of concomitant benefit. It is true that by continuing to contribute to the Fund during her period of SLWOP, Ms. Fox accrued the benefit of having two further years of contributory service, thereby reaching five years of contributory service in the Fund. This gave her the option to elect a deferred retirement benefit under Article 30 of the UNJSPF Regulations upon separation, which would have provided her with a guaranteed income stream once she reached her retirement age, as well as related survivor's benefits in the event of her death. But that is cold comfort in the face of her not electing that benefit in ignorance.

44. Ms. Fox contends that the Fund failed to adequately inform her that the employer contributions would not be paid out to her, if she paid the member organization's share of contributions during her period of SLWOP and subsequently elected a withdrawal settlement. Her complaint is well-founded. The evidence shows that she more than once sought clarification about her benefits on separation and did not receive much in the way of a response appropriately clarifying the nature, content and extent of the defined benefits to which she would become entitled.

45. Nor, it seems, was Ms. Fox ever informed that she would lose two thirds of the contributions she had made while on SLWOP, if she elected a withdrawal settlement. In her e-mail of 29 January 2013, before she commenced paying the employer contributions, Ms. Fox asked if it was correct that she could withdraw her contributions ("my contributions") at any time. The Fund replied that her belief was "incorrect" and that she could "only withdraw [her] contribution upon [her] separation from service". The reply is strictly speaking correct, albeit somewhat ambiguous, depending on how one understands the term "your contribution". In her appeal brief, Ms. Fox does not allege that the answer to her query was a misrepresentation inducing her to pay the employer contributions. There is no evidentiary basis for a finding to that effect. An incomplete and ambiguous opinion by a pension fund administrator about a future legal entitlement does not, without more, constitute a misrepresentation of an order entitling rescission and restitution. Nonetheless, the Fund could have done better by providing fuller clarification to Ms. Fox at that stage and in response to her later inquiries regarding her benefit estimate. It not having done so, says Ms. Fox, is a dereliction of duty and a failure by the Fund in its "obligations of due diligence to inform" her of her benefits.

46. The Fund, in its answer, does not address the issue of whether it has a duty to provide participants with sufficient information to make appropriate benefit choices on separating from employment with the Organization. Without evident concern for any disproportionate consequence, it discounts the importance of the questions posed by Ms. Fox to the Fund concerning her benefit choices. It points to the fact that Ms. Fox did not specifically seek clarification as to how a withdrawal settlement would be calculated when the onus was on her to do so. Had she asked for additional information in this regard, it says, it would have been provided. The fact that Ms. Fox did not understand the (evidently complex) rules, it argues, is no basis for granting an exception to the UNJSPF Regulations. The Fund also criticizes Ms. Fox

for not waiting for a response to her letter of 12 December 2014 before making her election (after two months without a reply) in February 2015.

47. This Tribunal has repeatedly held that it is a staff member's responsibility to ensure that he or she is aware of the provisions of the rules and regulations governing her employment and ignorance of the law is no excuse.¹ The onus was indeed on Ms. Fox to determine the nature and extent of the withdrawal settlement she would receive on separation. However, as just explained, Ms. Fox contends that the Fund is not without obligation to assist participants with information in relation to their benefit choices, especially when information in that regard is consciously sought from the Fund. As there is no specific provision in the UNJSPF Regulations requiring the Fund to provide information to participants exercising their benefit choices, Ms. Fox relies on what she refers to as "an obligation of due diligence".

48. The relationship between a pension fund and its members and beneficiaries is determined principally by the Regulations of the Fund, which form a contract between the beneficiaries and the Fund. Article 4(b) of the UNJSPF Regulations provides that the administration of the Fund shall be in accordance with the UNJSPF Regulations and with Administrative Rules consistent therewith. There is no other explicit contractual basis obliging the Fund to assume duties beyond those expressly provided for in the Regulations and Administrative Rules.

49. However, in accordance with the general principles of law accepted and recognized by the international community of states, contracts should be executed or performed in good faith. Courts internationally have sought to ameliorate contractual unfairness through specific applications of the implied principle of good faith and the requirement that contracts should not be enforced contrary to public policy or the prevailing convictions of the community (the *boni mores*). Good faith, as a value or principle, underlies and informs the technical rules of the law of contract and may be given added, albeit limited, concrete content in the operation of a contract in specific circumstances.

¹ *Al-Dawoud v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-664, para. 21; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 26; and *Diagne et al. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067, para. 22

50. Pension funds by their nature involve an arrangement through which assets are held and controlled for the benefit of the membership and thus legitimately may be expected to observe quasi-fiduciary standards of care and diligence in relation to their participants who are compelled by the terms and conditions of their employment to belong to the fund. An implied duty to act in good faith thus arises not from the express rules of the fund but from the structural arrangements, international doctrine and, in the present context, from the ethos of the United Nations Organization requiring proportionality in decisions affecting in one way or another those subject to the jurisdiction of its organs. A pension fund rule which is necessary and suitably tailored, as in this instance, should not be enforced as to place an excessive or harsh burden on individual participants which is disproportionate in relation to the collective interest. The principle of good faith and the concomitant duty of care demand due consideration of the interests of individual participants to avoid causing them disproportionate harm or prejudice.

51. By way of caution, it must be emphasized that the implied principle of good faith in contracts is of narrow import and application. The requirement that courts must enforce the contractual terms agreed to by parties to a contract, expressed in the universal norm *pacta sunt servanda*, is obviously necessary as a general principle. The law does not recognize a general right of a court or tribunal to release a contracting party from the consequences of an agreement duly entered into merely because the agreement appears to be unreasonable or unfair. Courts therefore should pause before re-writing the bargain between the contracting parties by allowing the terms of a contract to be open to attack because they are subjectively perceived to be unreasonable. Acceptance of the notion that judges can set aside a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.

52. The scope of the principle of good faith in contract, therefore, is restricted and applies exceptionally to ensuring fairness or proportionality in the performance and enforcement of a contract; and more so where the contract has been concluded as a compulsory requirement of employment. In such instances, courts may intervene in a limited fashion on the grounds of public policy where the enforcement of the contract (the Regulations) is unreasonable, unconscionable or oppressive because strict enforcement will be contrary to the *boni mores*. Public policy, in the form of a general sense of justice of the community, is a flexible instrument for judicial control of contractual performance and enforcement.

53. Hence, in the performance of the pension promise in a defined benefit fund there is no place for a court to re-define the benefit. However, in a situation where a participant must exercise a choice between alternative benefits or courses of action, the Fund has a duty in response to a pertinent inquiry to inform the participant properly of all the alternatives open to him or her in a clear and understandable way as to allow a proper opportunity for making an informed choice. The duty is enhanced where the participant overtly seeks assistance about making that choice, and especially where the applicable provisions are opaque or complex. This is often the case when determining the defined pension rights of participants by the interpretation and application of technical definition clauses, which at the best of times are challenging to experienced legal practitioners.

54. The correspondence directed by Ms. Fox to the Fund indicates that she clearly needed assistance and further information before making her choice of benefit on separation, no matter how deficient or imprecise her inquiry. The evidence establishes convincingly that the Fund delayed replying to Ms. Fox's queries and when it did eventually get around to replying to her, it did so insufficiently by failing to furnish full and coherent information. Its conduct breached the implied duty of good faith towards Ms. Fox, resulting in her exercising her choice of benefit on the basis of incomplete information and perhaps precipitously. Had she known that the employer contributions would not form part of the withdrawal settlement, she might have opted for a deferred pension in terms of Article 30. As already explained, she had no right to any other benefit or payment.

55. The specific breach of the duty of good faith in this case, absent any misrepresentation inducing her choice to pay the employer contributions during her SLWOP, does not permit this Tribunal to adjust the contractual bargain or re-define the pension benefit by awarding Ms. Fox re-payment of the employer contributions paid during her SLWOP. At most, she must be afforded an opportunity to re-exercise her choice of benefit on appropriate terms and conditions. The order that follows is to that effect.

Judgment

56. The appeal is upheld to the limited extent provided in this order.

57. If the Appellant so wishes, and on re-payment to the Fund of the withdrawal settlement paid to the Appellant by the Fund on 8 July 2015, together with interest at the rate of the Fund, the Fund shall afford the Appellant the opportunity to elect a deferred retirement benefit in terms of Article 30 with effect from the date of her separation.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Halfeld

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar