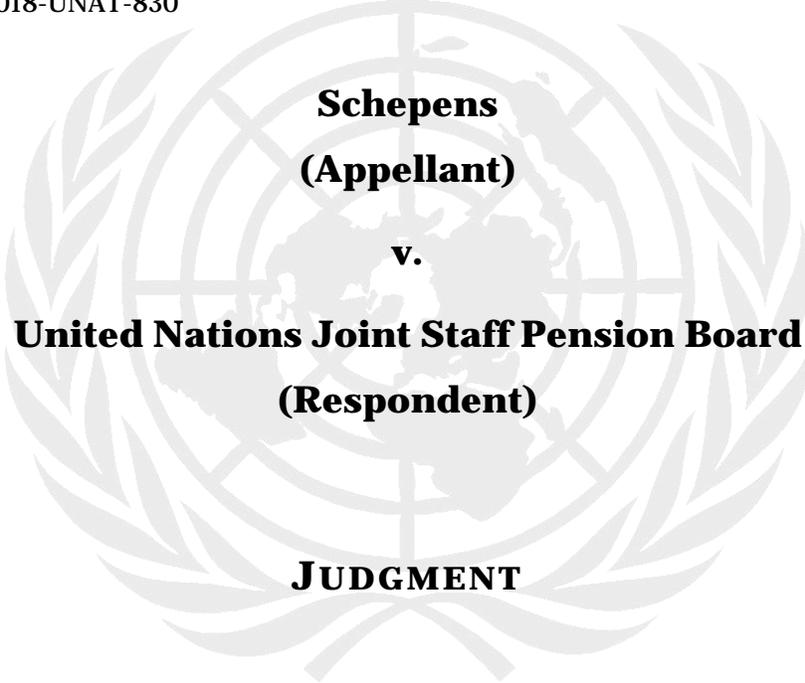




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2018-UNAT-830



**Schepens  
(Appellant)**  
**v.**  
**United Nations Joint Staff Pension Board  
(Respondent)**

**JUDGMENT**

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**Before:** Judge John Murphy, Presiding  
Judge Dimitrios Raikos  
Judge Martha Halfeld

**Case No.:** 2017-1119

**Date:** 22 March 2018

**Registrar:** Weicheng Lin

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**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. Anne C. Schepens against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB or the Pension Board, respectively) communicated to Ms. Schepens on 31 July 2017. Ms. Schepens filed her appeal on 18 October 2017, and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) filed its answer on 14 December 2017.

**Facts and Procedure**

2. Ms. Schepens entered the Fund for the first time on 18 February 2000 when employed as a Legal Officer with the United Nations Compensation Commission (UNCC). She separated from the service of UNCC on 28 February 2005.

3. On 20 April 2005, Ms. Schepens opted to defer her choice of benefit under Article 32 of the UNJSPF's Regulations. Article 32 provides that the payment to a participant of a withdrawal settlement, or the exercise by a participant of a choice among available benefits, or between a form of benefit involving payment in a lump sum and another form, may be deferred at the participant's request for a period of 36 months.

4. During the period in which she had deferred her choice of benefit, unbeknown to Ms. Schepens, Article 24(a) of the UNJSPF's Regulations, dealing with the restoration of prior contributory service for participants re-entering the Fund, was amended by the General Assembly in resolution 61/240 of 22 December 2006. The amendment made it easier for certain staff members to restore contributory service. Previously, only staff members with less than five years of contributory service who took a withdrawal settlement could restore service. The amendment of Article 24(a) made restoration of contributory service possible also for participants re-entering the Fund after 1 April 2007 with more than five years' prior contributory service who had opted for a withdrawal settlement or who had elected before 1 April 2007 to take a deferred retirement benefit.

5. By letter dated 5 December 2007, the Fund informed Ms. Schepens that the 36-month deferral period would expire on 28 February 2008, and requested her to complete and submit her payment instructions form. The letter incorrectly stated that Ms. Schepens had already

opted for a deferred retirement benefit, rather than that she had opted to defer her choice of retirement benefit.

6. After speaking to a Fund representative, Ms. Schepens, by e-mail dated 10 December 2007, requested the Fund to provide her with information on the total amount she would receive, if she were to opt for a withdrawal settlement. By e-mail dated 27 December 2007, the Fund provided Ms. Schepens with an estimate of the benefits corresponding to the various options available to her. She subsequently submitted an E/7 payment instructions form, dated 21 January 2008, in which she opted for a full deferred pension. By e-mail dated 2 February 2008, Ms. Schepens followed up on her submission of the E/7 form, confirming her election of a deferred retirement benefit.<sup>1</sup>

7. By letter dated 13 February 2008, the Fund provided Ms. Schepens with information about the commencement date of her deferred retirement benefit.

8. Ms. Schepens re-entered the Fund on 1 June 2014, as a staff member of the World Health Organization (WHO). On or about 28 May 2015, she submitted a request to the WHO Staff Pension Committee (SPC) Secretary to restore the most recent period of prior contributory service. On 5 February 2016, the WHO SPC Secretary informed her that she was not eligible to restore her most recent period of prior contributory service because she had opted for a deferred retirement benefit.

9. On 2 May 2016, Ms. Schepens requested the WHO SPC to review the decision of the WHO SPC Secretary. By letter dated 27 May 2016, Ms. Schepens was informed that the WHO SPC rejected her request.

10. On 26 July 2016, Ms. Schepens submitted an appeal to the Standing Committee in terms of Rule K.4 of the Administrative Rules of the UNJSPF.

11. The Standing Committee considered the case at its meeting of 21 July 2017, and upheld the decision of the WHO SPC. The Standing Committee found that Ms. Schepens did not meet the criteria for restoration as set out in Article 24(a) of the Regulations (as amended with effect from 1 April 2007) which provides that restoration of the most recent period of contributory

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<sup>1</sup> Participants whose contributory service was five years or longer on separation from service before normal retirement age are allowed by Article 30 of the UNJSPF's Regulations to opt for payment of a deferred retirement benefit payable at the standard annual rate for a retirement benefit and which shall commence at the normal retirement age unless the participant opts for payment of a reduced benefit at the age of 55.

service may be elected only by participants who had before 1 April 2007 elected a deferred retirement benefit. Since Ms. Schepens elected a deferred retirement benefit on 21 January 2008, the Standing Committee found that: i) Ms. Schepens did not meet the criteria for restoration as set out in Article 24(a); and ii) the Fund has no discretion to modify the application of Article 24(a) in an individual case. Ms. Schepens was informed of the Standing Committee's decision by letter dated 31 July 2017.

### **Submissions**

#### **Ms. Schepens' Appeal**

12. Ms. Schepens contends that during the deferment period she was not properly informed by the Fund of her rights under the amendment, neither before the entry into force of the amended Article 24(a) on 1 April 2007, nor when she was asked by the Fund to make a decision on benefit election in December 2007. As a consequence of that lack of information, she did not exercise her choice of benefit in full knowledge of her rights and did not make an informed decision at the material time. Had the Fund informed her properly, she would not have waited and, instead of electing a deferred benefit on 21 January 2008, would have made her election before 1 April 2007 and opted for either a deferred benefit then or for a withdrawal settlement.

13. Ms. Schepens emphasizes that the amendment to Article 24(a) occurred during the period of the deferment of her choice of benefit under Article 32 of the UNJSPF Regulations. The amendment had the effect of modifying the conditions for restoration of prior contributory service, including the elimination of the limitation on the right to restore contributory service for existing and future participants based on the years of prior service. Had she been made aware of the amendment she could have opted timeously for a withdrawal settlement or deferred pension without prejudicing any future contingent right to restore prior contributory service.

14. In addition to not being informed of the change in the conditions of restoration, the Fund's letter of 5 December 2007 asking Ms. Schepens to make the decision on benefit election was silent with regard to the changes, made no reference at all to the relevant applicable Regulations and Rules, and was misleading in that it incorrectly informed her that she had elected a deferred retirement benefit in April 2005.

15. Moreover, the Annual Letter of the Fund's Chief Executive Officer (CEO) addressed to participants, retirees and beneficiaries of the Fund, dated January 2007, noted that the General Assembly had approved, with effect from 1 April 2007, the elimination of the limitation on the right of restoration based on the length of prior contributory service. The CEO's letter stated that the Fund would transmit letters to those participants whose records indicate eligibility under the new provision. The Fund evidently sent letters to participants in order to satisfy that duty, but that was not done in her case. Ms. Schepens contends that the CEO's letter clearly showed that the Fund knew that it had a duty to inform participants of the changes in Article 24(a) and that it could not satisfy that duty by merely placing information on its website. By not informing her of her rights, Ms. Schepens submits, the Fund breached its duty of care towards her.

16. This breach has caused her considerable injury and must be appropriately remedied. The financial difference in her full retirement benefit at age 65 resulting from the non-restoration of her prior period of contribution may be estimated at USD 8,811 a year, which, taking into account an average life expectancy after retirement of between 20 and 25 years, amounts to an estimated total loss in her retirement pension of at least USD 200,000.

17. Finally, by giving the option to restore prior contributory service to participants in receipt of a withdrawal settlement, such participants have the double financial advantage of being able to use the funds during their employment outside of the common system and of benefitting from the increased accumulation rate resulting from joining their two pensions upon re-joining the Fund and restoration of prior contributory service. Participants who elected a deferred pension have none of these. This is not equitable. Furthermore, Article 24(a) is not consistent with the mobility policy of WHO and the United Nations and the portability of pensions that must accompany it.

### **The Fund's Answer**

18. The Fund avers that the Standing Committee's decision was correctly based on the fact that Ms. Schepens did not meet the conditions for restoration as set out in Article 24(a) of the Fund's Regulations. Ms. Schepens elected, after 1 April 2007, to receive a deferred retirement benefit under Article 30 of the Fund's Regulations in respect of her first period of contributory service. As such, she was precluded under Article 24(a) from restoring that period of prior contributory service when she subsequently again became a participant in the Fund.

There is no discretion to make an exception to its applicability in Ms. Schepens' case. In *Maher*,<sup>2</sup> the Appeals Tribunal confirmed that a participant who elected a deferred retirement benefit after 1 April 2007 was ineligible to restore his most recent period of prior contributory service.

19. Ms. Schepens' argument that the Fund failed to properly inform her of the amendments to Article 24(a) should be rejected. Ms. Schepens had a duty to acquaint herself with the Regulations and Rules in force from time to time, and to seek clarification from the Fund if necessary. She was in communication with the Fund during the relevant period, updated Regulations and Rules were at all material times available on the Fund's website, and the Fund disseminated information about amendments, including the amendments to Article 24(a), through the CEO's annual letters.

20. Furthermore, there is no merit in Ms. Schepens' contention that the Fund should have notified her of the changes to Article 24(a) when, in December 2007, it reminded her that her deferment period was coming to an end. The Fund undertook best efforts to contact all participants who had resumed employment and appeared to be potentially affected by the changes to Article 24(a), but there was no reason to selectively target Ms. Schepens who had not rejoined a member organization and, as such, was not among those whose eligibility to restore had changed by virtue of the amendment. Similarly, there would have been no reason for the Fund to advise Ms. Schepens of the provisions of Article 24(a) at the time of her separation from the service of UNCC on 28 February 2005, because she had accrued more than five years of contributory service and, at that time, Article 24(a) of the Fund's Regulations did not apply to participants who had more than five years of contributory service.

21. While the Appeals Tribunal in *Maher* stated that the Fund might want to re-examine the provisions of Article 24(a) to consider the impact of the amendments on its participants, and whether the Article is in fact achieving what it was intended to achieve, namely, the enhancement of the mobility of staff and the portability of pensions, the Fund refers to the fact that it was noted at the Pension Board's 64<sup>th</sup> session in July 2017, that the General Assembly had, in its resolution 59/269, decided that it would not consider any further proposals to enhance or improve pension benefits until action was taken on the issues contained in its earlier resolution 57/286 to reverse certain benefit changes that had been previously taken as

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<sup>2</sup> *Maher v. United Nations Joint Staff Pension Board*, Judgment No. 2016-UNAT-656.

cost-saving measures. It was also noted that the lengthy legislative history and previous Pension Board discussions on restoration needed to be fully researched. The Pension Board requested that the Fund secretariat continue to research the legislative history of the restoration provisions of the Fund and prepare a comprehensive document to inform a discussion at its 65<sup>th</sup> session in 2018.

22. The Fund requests that the Appeals Tribunal dismiss the appeal and uphold the decision of the Standing Committee.

### **Considerations**

23. This appeal raises two issues for consideration and decision. First, does Ms. Schepens have the right under Article 24(a) of the UNJSPF Regulations to restore her prior contributory service in circumstances where she elected to receive a deferred retirement benefit after 1 April 2007? Second, did the Fund have an obligation to inform her of the amendment of Article 24(a) of the UNJSPF Regulations and breached a duty in not adequately so doing?

24. This Tribunal's jurisdiction to hear and determine this appeal derives from, and is narrowly defined by, Article 2(9) of the Appeals Tribunal Statute. The relevant part of the provision reads:

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 alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund (...).

The jurisdiction of the Appeals Tribunal is accordingly limited to determining appeals alleging non-observance of the Regulations of the Fund.

25. Before its amendment, Article 24(a) of the Fund's Regulations read:<sup>3</sup>

A participant re-entering the Fund after 1 January 1983 may, within one year of the re-commencement of participation, elect to restore his or her prior contributory service, provided that on separation the participant became entitled to a withdrawal settlement under article 31**(b)**(i), and provided further that the service was the most recent prior to the re-entry.

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<sup>3</sup> Original emphasis.

Article 31 provided:

(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.

26. After its amendment Article 24(a) reads:

In certain circumstances, a participant may elect, within one year of the recommencement of participation, to restore his or her most recent period of contributory service. A participant re-entering the Fund on or after 1 April 2007, who previously had not, or could not have, opted for a periodic retirement benefit following his or her separation from service, may, within one year of the recommencement of participation, elect to restore his or her most recent period of prior contributory service. Furthermore, and under the same terms and conditions, restoration of the most recent period of contributory service may also be elected if, before 1 April 2007, a participant had elected under article 30, or was deemed to have elected under article 32, a periodic deferred retirement benefit that was not yet in payment at the time of election to restore.

27. In *Maher*,<sup>4</sup> this Tribunal interpreted Article 24(a) of the UNJSPF Regulations and confirmed that it confers the right to restore prior contributory service only to participants who upon separation had elected to receive a withdrawal settlement, or, who before 1 April 2007 had elected, or were deemed to have elected, to receive a deferred retirement benefit under Article 30 of the Fund's Regulations that was not yet in payment at the time of the election to restore and the provision thus does not provide a right to restore prior contributory service to participants who, on or after 1 April 2007, had elected to receive a deferred retirement benefit.

28. It is undisputed that Ms. Schepens elected to take a deferred retirement benefit after 1 April 2007 and did not take a withdrawal settlement. The Fund has no discretion to make an exception under Article 24(a).<sup>5</sup> Consequently, the conclusion is inescapable that Ms. Schepens

<sup>4</sup> *Maher v. United Nations Joint Staff Pension Board*, Judgment No. 2016-UNAT-656, paras. 25 and 26.

<sup>5</sup> *Neville v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-004, para. 14.

has no right in terms of the express terms of the Fund's Regulations to restore her prior contributory service. Accordingly, there has been observance of the terms of the Regulations of the Fund and the appeal is unsustainable on the first issue.

29. In support of her submission that the Fund was in breach of a duty of good faith by not adequately informing her of the amendment and its implications, Ms. Schepens does not rely on any specific provision of the Regulations or Administrative Rules of the Fund imposing a duty on the Fund to disclose or provide information to participants about their benefit choices. She relies rather upon Judgment No. 2768 of the Administrative Tribunal of the International Labour Organisation (ILOAT) of 4 February 2009. In that matter, the complainant had not been properly informed by her employer, the European Patent Organization (EPO), of a time limit for applying for the transfer of her pension rights in a United Kingdom pension fund to the EPO's pension scheme. The ILOAT accepted that the application for transfer was indeed time-barred. It however concluded that the EPO was in breach of the principle of good faith owed by an employer to an employee. It stated:<sup>6</sup>

The principle of good faith and the concomitant duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform employees in advance of any action that may imperil their rights or harm their rightful interests (...). The duty of care is greater in a rather opaque or particularly complex legal situation. This is often the case when it is necessary to determine staff rights in technical fields, such as the determination of pension rights or the transfer of rights acquired by the staff member under a public or private pension scheme prior to being recruited by an organisation.

The ILOAT held that the duty of the EPO to properly inform employees demanded that it draw to the attention of staff members the possibility of obtaining a transfer of pension rights and to inform them of the procedure to be followed. It essentially ordered the EPO to compensate the staff member for any financial loss she may have suffered as a result of the breach of duty.

30. The present case is in some respects distinguishable from the decision of the ILOAT which is founded upon an employer's duty of good faith under the employment contract. The duty of good faith in the contract of employment is an implied synallagmatic or mutual obligation, infusing the contract with moral content, by which the employee agrees to honestly and faithfully serve the employer, not to abuse confidence and to protect and advance the

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<sup>6</sup> ILOAT Judgment No. 2768 (2009), Consideration 4.

employer's interests by all reasonable means in respect to matters confided to the employee in the course of service. The reciprocal obligation consists in part in the employer informing employees in advance of any action that may harm their rightful interests.

31. The relationship between a pension fund and its members and beneficiaries is somewhat different to the employment relationship. Its content is determined principally by the rules of the fund because the association between the contracting parties is not informed by any moral duty based upon the confidence and good faith required in the essentially co-operative relationship of employment. Consistent with this notion, Article 4(b) of the UNJSPF Regulations provides that the administration of the Fund shall be in accordance with the Regulations and with Administrative Rules consistent therewith. Article 4(d) adds that the assets of the Fund shall be used solely for the purposes of, and in accordance with, the Regulations.

32. However, the doctrine of good faith still informs the technical rules of the pension contract. A pension fund by its nature involves arrangements through which assets are held and controlled for the benefit of others and thus it legitimately may be expected to observe quasi-fiduciary standards in relation to its participants who are compelled by their terms of employment to belong to a pension fund. An implied duty to act in good faith thus arises not from the express rules of a pension fund but from its structural arrangements.

33. The duty of good faith on the Fund includes responding appropriately to requests from participants for information regarding the exercise of their choice of benefit options. But, by the same token, this Tribunal has repeatedly held that it is the staff member's responsibility to ensure that he or she is aware of the provisions of the Regulations and the Administrative Rules and ignorance of the law is no excuse.<sup>7</sup>

34. On the evidence before us, Ms. Schepens neglected to familiarize herself fully with her options. In addition to the CEO's annual letters that publicized the amendments to Article 24(a), the updated version of the Regulations was available on the Fund's website. It was incumbent on Ms. Schepens, who is a lawyer, to have acquainted herself with the current Regulations and their import before exercising her election of a benefit. She was in

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<sup>7</sup> *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; *Diagne et al. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067, para. 22.

communication with the Fund during the relevant period, but raised no query about her right to restore contributory service if she later re-joined the Fund. Her queries were related to the nature of the benefits she could expect on separation. While the duty of good faith requires the Fund to respond appropriately to a participant's legitimate requests for information, it cannot be expected of the Fund to provide information in relation to every conceivable contingency or possibility that might or might not eventuate in the future. The information regarding the change to the right to restore contributory service, as just said, was updated in the Fund's Regulations and was at all material times available on the Fund's website. In the absence of a direct, pertinent enquiry for information regarding that option, there was no duty on the Fund to keep Ms. Schepens abreast of the changes and developments. There was no reason to selectively target Ms. Schepens, who had not re-joined a member organization at the time she opted for her benefit, and provide her with additional unsolicited information. In the premises, there was no breach of the duty of good faith in the circumstances of this case.

**Judgment**

35. The appeal is dismissed and the decision of the Standing Committee is affirmed.

Original and Authoritative Version: English

Dated this 22<sup>nd</sup> day of March 2018 in Amman, Jordan.

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Halfeld

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

*(Signed)*

Weicheng Lin, Registrar