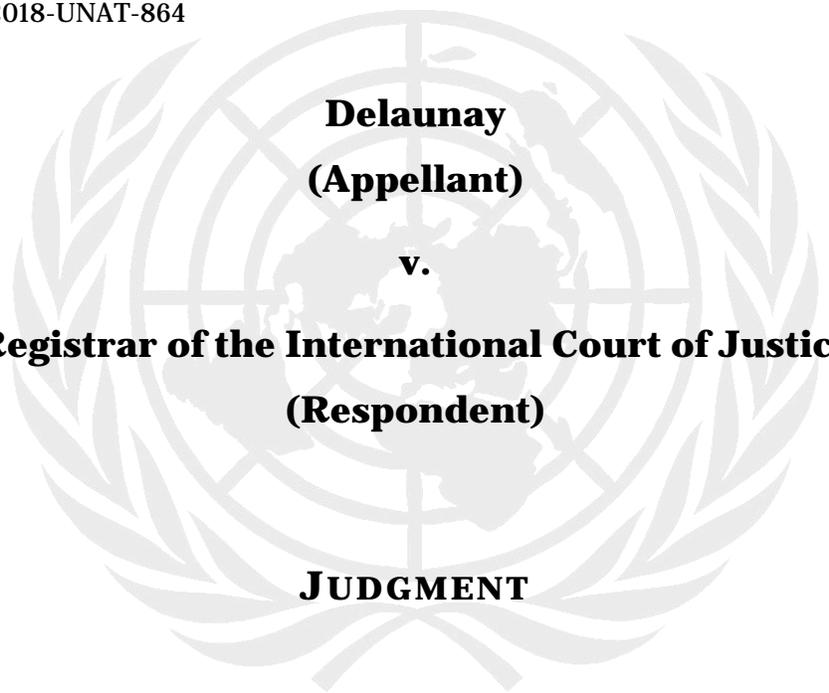




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-864



**Delaunay
(Appellant)**
v.
**Registrar of the International Court of Justice
(Respondent)**

JUDGMENT

Before: Judge Sabine Knierim, Presiding
Judge Deborah Thomas-Felix
Judge Martha Halfeld

Case No.: 2017-1091

Date: 26 October 2018

Registrar: Weicheng Lin

Counsel for Ms. Delaunay: Self-represented

Counsel for ICJ Registrar: Jean-Pelé Fomété

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an application against the Registrar of the International Court of Justice (ICJ Registrar and ICJ, respectively) filed by Ms. Nathalie Isabelle Eliane Dutertre-Delaunay. Ms. Delaunay filed her application on 29 June 2017 and the ICJ Registrar filed his answer on 28 August 2017.

Facts and Procedure

2. On 1 May 2009, Ms. Delaunay joined the ICJ as a Senior Medical Officer. Her initial contract and subsequent contract renewals provided for a 25 per cent part-time arrangement and stipulated, *inter alia*, that by virtue of her appointment she became a participant in the United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund). Her contributions to the UNJSPF were deducted from her salary throughout her service at the ICJ.

3. In response to an e-mail dated 13 July 2015 from the ICJ regarding Ms. Delaunay's participation in the UNJSPF as a staff member on a part-time employment basis, the UNJSPF informed the ICJ Registry on 15 December 2015 that under Supplementary Article A of the UNJSPF Regulations, staff members who work on a part-time basis of less than 50 per cent may not enroll in the Pension Fund.

4. At the end of 2015, Ms. Delaunay was recruited by the European Space Agency (ESA) and informed the ICJ of her resignation from service effective 31 December 2015. She requested her pension rights to be transferred from the UNJSPF to the ESA pension scheme based on the Agreement on the transfer of pension rights between the UNJSPF and the ESA of 1 January 2007.

5. Following several months of negotiations with the ICJ and ESA, the UNJSPF suggested to allow, on an exceptional basis, a transfer of Ms. Delaunay's pension contributions to ESA in the amount of a withdrawal settlement, which only includes the staff member's, but not the organization's pension contributions. Under Article 31 of the UNJSPF Regulations, staff members who participated in the Pension Fund for less than five years are only entitled to such a withdrawal settlement. The UNJSPF converted Ms. Delaunay's six years and eight months of 25 per cent part-time employment into one year and eight months of full-time employment with the ICJ. By e-mails dated 4 July 2016 and 29 September 2016 to the UNJSPF, the ICJ Deputy-Registrar expressed that the ICJ had no objection to its own

pension contributions being included in the computation of the package to be transferred to ESA and asked the UNJSPF to reconsider its decision not to include them.

6. As the UNJSPF subsequently confirmed its refusal to transfer the organization's contributions, Ms. Delaunay informed the ICJ Registrar, by e-mail dated 3 October 2016, that she wished to pursue her request from 1 February 2016 by which she had asked for compensation from the ICJ for the injury she claimed to have suffered from having contributed to the Pension Fund while being under the illusion that she would receive a pension benefit. On 11 October 2016, the Deputy-Registrar replied to her complaint and, on 3 November 2016, to her request for reconsideration stating, *inter alia*, that the ICJ Registry did not have the competence to oblige the Pension Fund to revise its position.

7. On 29 November 2016, Ms. Delaunay submitted a complaint to the ICJ Conciliation Committee asking for compensation in an amount equivalent to her pension contributions (USD 26,494.13) as well as those of the ICJ (USD 52,988.26) adding up to a total of USD 79,482.39. On 30 May 2017, the Conciliation Committee submitted its report, considering, *inter alia*, that the ICJ had led Ms. Delaunay to legitimately believe that she was entitled to a pension benefit, but noted that she did not suffer any prejudice from the fact that the ICJ's contributions were not taken into consideration as they were not determinative for the calculation of either a withdrawal settlement or a deferred pension benefit. The Conciliation Committee further considered that Ms. Delaunay suffered harm as a result of the UNJSPF's decision to convert her six-year eight-month part-time employment into an 18-month full-time employment, as this decision deprived her of the choice between a withdrawal settlement and a retirement benefit. However, it dismissed Ms. Delaunay's calculation of her compensation claim and held that it fell within the UNJSPF's exclusive competence to determine if a staff member was entitled to pension benefits. Finding that it did not have the competence to issue recommendations vis-à-vis the Pension Fund, the Conciliation Committee recommended that the ICJ approach the Pension Fund in order to obtain a definitive decision by the United Nations Joint Staff Pension Board (Pension Board) which Ms. Delaunay could then challenge before the Appeals Tribunal. The Conciliation Committee expressed "hope" that it would not be necessary for Ms. Delaunay to exhaust the remedies provided for in the UNJSPF Regulations before filing an application with the Appeals Tribunal.

8. The ICJ contacted the UNJSPF on 2 June 2017 inviting it to communicate a definitive decision, in accordance with the Conciliation Committee's recommendation, directly to Ms. Delaunay.

9. On 29 June 2017, Ms. Delaunay filed an application with the Appeals Tribunal.

10. In response to the ICJ's 2 June 2017 request, the UNJSPF reaffirmed its position in a letter dated 28 July 2017 which Ms. Delaunay subsequently requested to be admitted as new evidence.

11. On 27 October 2017, the Appeals Tribunal issued Order No. 301 (2017) granting Ms. Delaunay's motion for leave to file the 28 July 2017 letter as additional evidence. The Appeals Tribunal further considered that the appropriate solution at that point was for Ms. Delaunay to file a request with the UNJSPF to review the decision to convert her six-year eight-month 25 per cent part-time employment into one-year eight-month full-time employment. In this context, it also stated that the interests of justice demanded the UNJSPF to consider that "good cause" was shown to grant a waiver, if any, of the time limit to file such request within the meaning of Section K of the UNJSPF Administrative Rules. Moreover, the Appeals Tribunal "invited" the Pension Fund to consider pursuing one of the following options:¹

.... The Pension Fund may—based on its own decision to allow Ms. Delaunay to remain a participant in the Pension Fund on an exceptional basis—apply the UNJSPF Regulations consistently and consider her to be entitled to a deferred pension benefit under Article 30(a) of the UNJSPF Regulations as her contributory service was longer than five years and thus agree to transfer the corresponding amount to the ESA under Article 2.2(a) of the Transfer Agreement; or (ii) the Pension Fund may consider that Ms. Delaunay's participation was unlawful *ab initio* and retribute the entirety of the contributions paid by both Ms. Delaunay and the ICJ in which case Ms. Delaunay could claim the sum corresponding to the employer's contributions from the ICJ.

The Appeals Tribunal also ordered that the matter against the ICJ Registrar be stayed, pending the outcome of the Pension Fund's decision, if any.

12. On 24 November 2017, the Pension Fund informed the Appeals Tribunal Registry that it had received an appeal from Ms. Delaunay, which would be submitted to the Standing Committee of the Pension Board (Standing Committee) for consideration at its

¹ *Delaunay v. Registrar of the International Court of Justice*, Order No. 301 (2017), para. 11.

following meeting in July 2018. On 30 November 2017, Ms. Delaunay also notified the Appeals Tribunal Registry of her appeal with the Pension Fund.

13. On 3 July 2018, the UNJSPF informed Ms. Delaunay that the Pension Fund had decided to act in accordance with option (ii) as contained in Order No. 301 (2017) and added as follows:

In that regard the [Pension] Fund will return the entirety of the contributions paid to [the] ICJ, and it would be for [the] ICJ to determine further action in regard to its contributions. [The] ICJ has confirmed that they are in agreement with the return of all contributions by the [Pension] Fund. As the return of the contributions would be in accordance with the [Pension] Fund's policy in cases of erroneous participation in the [Pension] Fund, there is no need to submit your case to the Standing Committee. I note that you included this option in your appeal to the Standing Committee.

Please confirm that you are ready for the [Pension] Fund to proceed with the return [of] all contributions to [the] ICJ.

14. In an ensuing e-mail exchange, the Pension Fund informed Ms. Delaunay that as far as contributions by participating organizations and participants are concerned, the Pension Fund only deals directly with the member organization and not the participants and, consequently, both her and the ICJ's contributions would be returned to the ICJ by deducting the amount from the ICJ's overall monthly contributions to the Pension Fund rather than being paid out directly to Ms. Delaunay. In response to her inquiry as to why the Pension Fund had changed its position from initially offering to repay the amount directly to her, the Pension Fund responded as follows by e-mail dated 5 July 2018:

In the earlier discussions that you are referring to, we were proposing to pay you a withdrawal settlement under Article 31 of the [Pension] Fund's Regulations comprising your contributions plus interest. In payment of a withdrawal settlement, the member organization's contributions are not payable to the participant or to the member organization.

In the settlement as proposed by the [Appeals] Tribunal, we are treating your participation as void *ab initio*, and returning the contributions paid by you and the member organization; no interest is payable in this case.

15. On 6 July 2018, Ms. Delaunay asked the UNJSPF to proceed with the transfer.

16. On 24 July 2018, the ICJ Deputy-Registrar informed the Appeals Tribunal Registrar that the Pension Fund had communicated its choice of option (ii) as contained in Order No. 301 (2017) to Ms. Delaunay and had agreed with the ICJ on an arrangement allowing the latter to transfer an

amount of USD 72,849.96 to Ms. Delaunay. The ICJ Deputy-Registrar added that the ICJ, having obtained Ms. Delaunay's concurrence, had instructed its bank on 20 July 2018 to transfer the equivalent in Euros of the above-mentioned amount into Ms. Delaunay's bank account.

17. On 10 August 2018, the Appeals Tribunal Registry notified Ms. Delaunay that in view of the 24 July 2018 letter, her case against the ICJ Registrar would be closed administratively.

18. By e-mail dated 13 August 2018, Ms. Delaunay informed the Appeals Tribunal Registry that she did not consider the matter to be resolved as she had asked for compensation which would also cover the "two years and a half during which [she] was unable to make the amount that she was due grow".² Ms. Delaunay further expressed her understanding that all her claims would now be adjudicated.

19. On 17 August 2018, the Appeals Tribunal issued Order No. 330 (2018) ordering Ms. Delaunay to provide clarification as to which claims contained in her original appeal she sought to pursue and to produce any relevant documents, including the decision of the Standing Committee, if any. The ICJ Registrar was ordered to produce a document, if any, containing the agreement between the Pension Fund and the ICJ on the transfer of USD 72,849.96 to Ms. Delaunay.

20. On 6 September 2018, Ms. Delaunay provided submissions in response to Order No. 330 (2018) and on 24 September 2018, the ICJ Registrar submitted his answer.

Submissions

Ms. Delaunay's Appeal

21. In her original appeal, Ms. Delaunay submitted that the ICJ had negligently led her to believe that she was entitled to pension benefits and since the solution proposed by the UNJSPF was unacceptable, she was entitled to compensation from the ICJ for not having acquired any pension rights. She further asserted that the ICJ Conciliation Committee had failed to fully consider her compensation claim against the ICJ and had acted *ultra vires* in recommending that the ICJ Registry approach the UNJSPF. On that basis, she requested that the Appeals Tribunal "order the [ICJ] to remedy the injury [she had] suffered by paying [her] the sum of USD 52,988

² Translation by the Appeals Tribunal Registry.

[namely the *de facto* equivalent of the ICJ's pension contributions], plus USD 10,000 for moral injury and USD 2,000 for costs [for the preparation of her appeals brief], with interest”.

22. In response to Order No. 330 (2018), Ms. Delaunay stated that she maintains the following claims: (i) compensation for moral damages, albeit at a reduced amount of USD 3,500, in light of the “period of uncertainty and waiting” she was put in as well as the “attitude of the [ICJ] Registry in dealing with [her] case”; and (ii) compensation for costs in the amount of USD 2,000 for “the time and money [she] spent on this case”. Moreover, Ms. Delaunay states that she has not received any interest payments from the Pension Fund or the ICJ and requests interest for the period from when she left the ICJ on 1 January 2016 to the date of payment on 20 July 2018 on the total amount of USD 72,849.96 which she claims she was unable to invest over that period. Based on the legal interest rates in France, she calculates the amount of interest due at USD 1,734.19.

The ICJ Registrar's Answer

23. In his original answer to the appeal, the ICJ Registrar submitted that Ms. Delaunay had no legal basis for taking action against the ICJ with regard to the value of her transferable rights since the question fell under the sole jurisdiction of the UNJSPF and that she had failed to fulfill the preconditions for a referral to the Appeals Tribunal as set out under the applicable UNJSPF procedure. On the merits, the ICJ Registrar contended that Ms. Delaunay had failed to demonstrate the existence of any moral injury attributable to the ICJ. Since the question of her admission as a participant in the UNJSPF had been resolved, the initial mistake of the ICJ and the UNJSPF “ha[d] been remedied in full”. As she had failed to exhaust the legal remedies provided by the Pension Fund, it was “premature to talk about any injury or to attribute it, *a fortiori*, to the ICJ”. Her claim for compensation on the basis of an alleged moral injury should be rejected as it does not meet the requirements established by the Appeals Tribunal's consistent jurisprudence.

24. In his submissions dated 24 September 2018, the ICJ Registrar requests that Ms. Delaunay's remaining claims be rejected in their entirety.

25. With respect to Ms. Delaunay's request for moral damages, the ICJ Registrar reiterates his view that the claim does not meet the criteria established by the Appeals Tribunal's consistent jurisprudence. Moreover, the uncertainty and length referred to by Ms. Delaunay are inherent to any judicial proceeding and apply to both parties. In terms of the ICJ Registry's “attitude”,

the ICJ Registrar argues that the ICJ has demonstrated its good faith in bringing about an arrangement favourable to Ms. Delaunay and has repeatedly expressed its hope that the ICJ's contributions could be paid to Ms. Delaunay.

26. Regarding Ms. Delaunay's claim for costs, the ICJ Registrar submits that, in the absence of a manifest abuse of the appeals process by a party as required by Article 9(2) of the Appeals Tribunal Statute, the relevant general principle before international courts applies, namely that each party bears his or her own costs.

27. As to Ms. Delaunay's request for payment of interest, the ICJ Registrar contends that by e-mail dated 6 July 2018, Ms. Delaunay agreed to the payment of the amount computed by the Pension Fund without any interest. Moreover, Ms. Delaunay has already been adequately compensated or even over-compensated. In this regard, the ICJ Registrar observes that a staff member working 50 per cent part-time and thus double Ms. Delaunay's time during the same period at the same grade and level would have received an estimated withdrawal settlement of USD 60,479.28 which is significantly less than what Ms. Delaunay obtained.

Considerations

Compensation for moral damages

28. Ms. Delaunay's request for compensation in the amount of USD 3,500 is rejected. Regardless of whether there was any illegality imputable to the ICJ, Ms. Delaunay is not entitled to compensation for the "period of uncertainty and waiting" or the "attitude" of the ICJ Registry. Under Article 9(1)(b) of the Appeals Tribunal Statute (Statute), compensation may only be awarded for harm suffered that is supported by evidence. The mere allegations of a staff member that he or she suffered emotional stress or anxiety are not considered to be such evidence under the jurisprudence of the Appeals Tribunal.³ Moreover, we agree with the ICJ Registrar that the ICJ was not responsible for the delays but rather demonstrated good faith in bringing about an arrangement favourable to Ms. Delaunay.

³ *Langué v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, paras. 14-17 and 20, citing *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, concurring Opinion of Judge Knierim, para. 2.

Compensation for costs for legal representation

29. Ms. Delaunay's request for USD 2,000 as compensation for the time and money she spent for her legal self-representation is also denied. Under Article 9(2) of the Statute, the Appeals Tribunal may only award costs against a party when that party has manifestly abused the appeals process. In the present case, we do not find that the ICJ Registrar manifestly abused the appeals process such as to merit an award of costs.

Interest

30. Finally, Ms. Delaunay's request for interest on the amount of USD 72,849.96 for the period from when she left the ICJ on 1 January 2016 to the date of payment on 20 July 2018 (USD 1,734.19) is also rejected. On 5 July 2018, the Pension Fund notified Ms. Delaunay in writing that her participation in the Pension Fund was treated as void *ab initio*, that contributions paid by herself and the ICJ would be returned to the latter, and that no interest was payable in this case. As Ms. Delaunay did not challenge the Pension Fund's decision, she is now estopped from claiming interest. Further, we can see no delay on the part of the ICJ; the sum of USD 72,849.96 was transferred to Ms. Delaunay immediately after the ICJ had received it from the Pension Fund.

Judgment

31. The application is dismissed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar