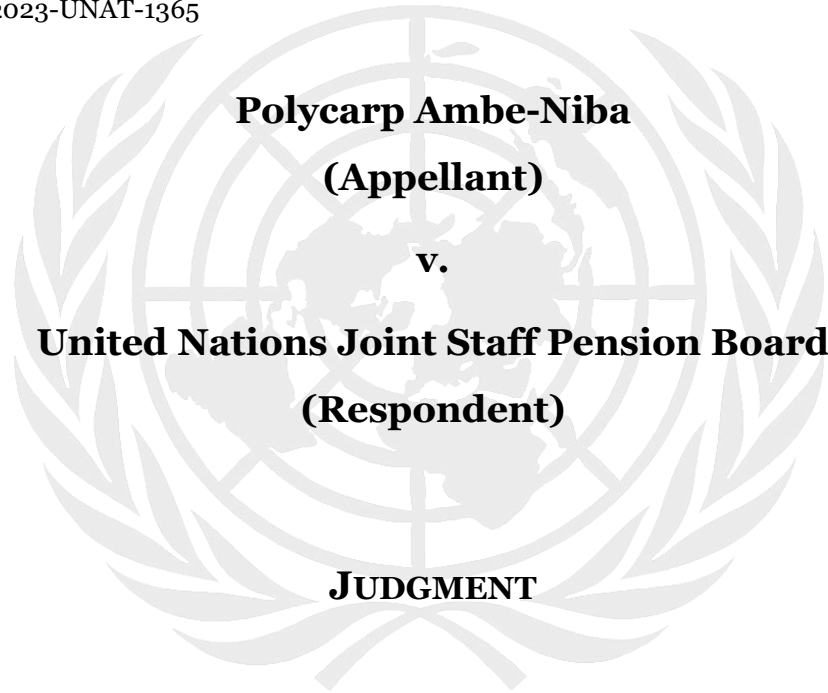




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2023-UNAT-1365



**Polycarp Ambe-Niba**

**(Appellant)**

**v.**

**United Nations Joint Staff Pension Board**

**(Respondent)**

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Martha Halfeld
Case No.:	2022-1729
Date of Decision:	30 June 2023
Date of Publication:	31 July 2023
Registrar:	Juliet Johnson

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Counsel for Appellant: Marcos Zunino, OSLA

Counsel for Respondent: Rosemarie McClean

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. Polycarp Ambe-Niba, a former staff member of the United Nations Assistance to the Khmer Rouge Trials (UNAKRT), contested the decision of the Chief Executive of the Pension Administration (CE/PA) of the United Nations Joint Staff Pension Fund (UNJSPF or Fund) rejecting his request that the Fund issue a duplicate withdrawal settlement following his claim that he did not receive his withdrawal settlement of USD 414,587.28 disbursed by the Fund on 18 July 2019 due to fraud (the contested decision).

2. By decision dated 19 July 2022 (impugned Decision),<sup>1</sup> the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee) upheld the contested decision. Mr. Ambe-Niba appeals and submits that the UNJSPF did not discharge its obligation to pay him his elected benefit, did not comply with its procedures for payment, which were not adequate, and did not act with diligence in being alerted to a fraud that was committed that resulted in his withdrawal settlement being paid to another individual.

3. For the following reasons and pursuant to Article 2(9) of the Appeals Tribunal Statute (Statute), the Appeals Tribunal remands the matter to the Standing Committee of the United Nations Joint Staff Pension Board for additional fact-finding as set out below.

**Facts and Procedure**

4. In the impugned Decision, the Standing Committee relied on a Statement of Facts and Applicable Law (Document No. JSPB/SC/203/R.6(a) with Annexes) upon which it made its determinations (Statement of Facts). The following facts are summarized therefrom and from the evidence as relevant to the appeal.

5. Mr. Ambe-Niba joined the Organization in 2002.<sup>2</sup> He participated in the Fund from 21 April 2002 to 31 December 2017. On 31 December 2017, he separated from service.

6. By e-mail dated 3 May 2018, the Economic and Social Commission for Asia and the Pacific (ESCAP) Payroll Team notified the Fund that it had sent Mr. Ambe-Niba's original pension documents to the Fund.<sup>3</sup>

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<sup>1</sup> UNJSPF case No. UID 000203147.

<sup>2</sup> Statement of Facts, para. 3.

<sup>3</sup> *Ibid.*, para. 4.

7. On 9 May 2018, the Fund received the first page<sup>4</sup> of Mr. Ambe-Niba's original payment instructions form, the Pens.E/7, dated 25 January 2018, but it did not contain his banking information.<sup>5</sup> In the course of e-mail correspondence from May 2018 until May 2019 between him and the Fund (with Mr. Ambe-Niba using a Yahoo e-mail address), concerning the benefit options available to him, he asked when he could expect his benefit to be paid "into [his] UNFCU account provided upon separation". However, he had not provided any banking information to the Fund upon separation.

8. The Fund advised him of the need to submit a new Pens.E/7 payment instructions form in order to make a benefit election.<sup>6</sup> On 10 June 2019, the Fund received by e-mail a new, original Pens.E/7 form dated 15 May 2019, which contained an election for a withdrawal settlement on the second page. The banking information fields were still blank. The contact in the address field on that same page specified a Gmail e-mail address and a mailing address in Cameroon.

9. On 18 June 2019, a Benefit Assistant for the Fund (Assistant) informed Mr. Ambe-Niba by e-mail (sent to both his Yahoo e-mail and two Gmail e-mail accounts that contained his name) that he still had not provided his banking information, and requested him to fill out a new Pens.E/7 form, including all relevant information, and to mail the original document to the Fund.<sup>7</sup> The Assistant stressed that the Fund could not accept any document or e-mail in lieu of the completed payment instructions form bearing his original signature.

10. On 18 June 2019, Mr. Ambe-Niba emailed a response to the Assistant that he did not send the banking information because he had previously provided information on his UNFCU bank account, which should be in his file and remained unchanged.<sup>8</sup> He asked the Assistant to recheck this information.

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<sup>4</sup> The second and third pages, which contain spaces for a benefit election and banking information, were not provided, in line with the instructions on the form itself, which stated that the second and third pages should not be provided if the participant is electing to defer his or her choice of benefit.

<sup>5</sup> Statement of Facts, para. 5.

<sup>6</sup> *Ibid.*, para. 6.

<sup>7</sup> *Ibid.*, para. 8.

<sup>8</sup> *Ibid.*, para. 9.

11. On 19 June 2019, the Assistant advised him that the Fund did not have any of his banking information.<sup>9</sup> He responded on 19 June 2019, confirming that he would “fill out the form accordingly and send it to the Assistant by DHL”.<sup>10</sup>

12. On 25 June 2019, in the course of exchanges from 25 June 2019 until 15 July 2019, the Assistant received from Mr. Ambe-Niba’s Gmail address, an advanced scanned copy of a new Pens.E/7 form dated 21 June 2019 in his name, which included banking information for an account held at Bank of America and his Cameroon address as the mailing address.<sup>11</sup> In addition, subsequently, the Assistant received, from this e-mail address, a scanned, signed letter with the election for a withdrawal settlement. On 29 June 2019, the Fund received, via DHL, the original signed Pens.E/7 form dated 21 June 2019. The form had both the Monthly and Lump Sum benefits completed with the Bank of America information. The DHL waybill listed Mr. Ambe-Niba’s name as the sender but the document had been sent from the Hilton Hotel in Nairobi, Kenya. The Fund considered that the signature on the original payment instructions form dated 21 June 2019 matched Mr. Ambe-Niba’s signature on file with the Fund.

13. On 26 June 2019, there were a number of e-mail exchanges between the Assistant (at their correct e-mail address) and what the Assistant considered was Mr. Ambe-Niba’s Gmail account.<sup>12</sup> On that date, the Assistant received an e-mail from this Gmail account asking whether the Fund had received the couriered payment instructions with Bank of America information. The Assistant responded they had not but noted that the scanned copy showed both the Monthly and Lump Sum benefits completed and asked for a corrected form. The Assistant received an e-mail response that the original documents had already been sent and to disregard the monthly benefit section. The

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<sup>9</sup> *Ibid.*, para. 10. Conversely, Annex 14F to the Statement of Facts, labeled as “Spoofed email received by Applicant (19 June 2019) *Unverified/Fraudulent*”, exhibits an e-mail message, seemingly from the Assistant, stating that the Fund verified Mr. Ambe-Niba’s payment instruction with UNFCU and that it was not necessary to send the payment instructions again by courier and that he was only required to send the new Pens.E/7 form by e-mail. However, the e-mail address for a reply is incorrect, showing one missing letter in comparison to the actual Assistant’s e-mail address.

<sup>10</sup> In contrast, Annex 15F, labeled as an “E-mail from Applicant to non-existent e-mail address (19 June 2019) *Unverified/Fraudulent*”, exhibits an e-mail sent (in response to the e-mail documented in Annex 14F) from Mr. Ambe-Niba’s e-mail account, acknowledging the Fund allowing him to simply complete the Pens.E/7 form and email it to the Assistant. It is seemingly intended to be addressed to the Assistant but to the incorrect e-mail address, with one letter missing in comparison to the actual Assistant’s e-mail address.

<sup>11</sup> Statement of Facts, para. 11; Annex 20.

<sup>12</sup> *Ibid.*, para. 26.

Assistant responded by requesting a signed letter confirming the election to this effect be emailed, which it was.<sup>13</sup>

14. On 15 July 2019, the Fund e-mailed Mr. Ambe-Niba to advise him that his withdrawal settlement was at the audit stage and would be released shortly.<sup>14</sup> The same day, the Fund received a response from him acknowledging the information.

15. On 15 July 2019 and 18 July 2019, the Assistant (at the correct e-mail address) received e-mails from Mr. Ambe-Niba, inquiring as to the status of the payment of his withdrawal settlement.<sup>15</sup> The same day, the Fund remitted his withdrawal settlement of USD 414,587.28 to the bank account held at the Bank of America listed on the payment instructions form dated 21 June 2019.

16. The Fund maintains that it did not receive further communications from him until 13 November 2019.<sup>16</sup>

17. Mr. Ambe-Niba asserts that on 30 October 2019, through the intervention of a UNFCU Senior Fraud Specialist who was investigating fraud incidents with Mr. Ambe-Niba's credit card, he discovered that in July 2019 the Fund had paid the withdrawal settlement into a Bank of America account which was not his.<sup>17</sup>

18. On 13 November 2019, Mr. Ambe-Niba telephoned the Fund and inquired as to the status of his withdrawal settlement.<sup>18</sup> Following the telephone call, he emailed the Fund from a new e-mail address, which had never been seen in previous correspondence with him, claiming that he had been defrauded. Specifically, he claimed that he had entrusted the payment instructions form to "the wife of [his] boss who knew someone traveling to the US" to mail to the Fund. He also alleged that he had received from the Fund an e-mail stating that his withdrawal settlement would

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<sup>13</sup> Among correspondence on that issue are e-mails exhibited in Annexes 28F to 33F, labeled as "Spoofed emails" and "*Unverified/Fraudulent*", which seem to be generally compatible with the actual exchanges between Mr. Ambe-Niba and the Assistant but differ from the appearance of verified contemporaneous e-mails in some visual elements.

<sup>14</sup> Statement of Facts, para. 13.

<sup>15</sup> *Ibid.*, para. 14; Annex 51.

<sup>16</sup> On 27 August 2019 and 30 September 2019, Mr. Ambe-Niba sent e-mails to the Assistant's incorrect e-mail address, reminding him that the payment was overdue. During this time, Mr. Ambe-Niba received e-mails, seemingly from a Benefits Administrator, stating that the payment instructions are with UNFCU. These e-mails are at Annexes 57F, 59F and 60F labeled as "Spoofed" and "*Unverified/Fraudulent*".

<sup>17</sup> Appeal brief, para. 9.

<sup>18</sup> Statement of Facts, para. 15.

be paid into his UNFCU account. The Fund denies sending this e-mail and maintains that it was likely fraudulent.

19. On 15 November 2019, the Fund contacted its own bank, JP Morgan Chase, to attempt to urgently recall the funds in question.<sup>19</sup> JP Morgan Chase immediately contacted Bank of America who then advised that Bank of America was unable to return the funds.

20. On 29 November 2019, having reviewed the matter internally, the Fund informed Mr. Ambe-Niba of the contested decision, namely that it had “reviewed [the] file in depth and based on the documents on file, [it could not] validate the possible fraud allegations”.<sup>20</sup>

21. On 28 December 2019, Mr. Ambe-Niba informed the Fund that he had “crosschecked with USPS”<sup>21</sup> and the USPS tracking information showed the package with his Pens./E/7 form citing his UNFCU account as having been delivered to the Fund.<sup>22</sup> He provided the following information:

Place of mailing: Ace Postal 8433 FM 1464 Ste L, Richmond TX 77407, USA  
Package ID/Tracking No. 2657 9405510200881046747281  
Recipient; C/O United Nations UNJSPF  
Sender: [M.K.]<sup>23</sup>  
Recorded: Delivered  
Date of Recorded Delivery: 5/24/2019  
Date of record: 12/28/2019 at 02:30 pm.

22. He advised the Fund that in “view of the problems of rampant fraud and crime in [his] home country, Cameroon, and the risk that this all[-]important mail may not be delivered (...), [he] gave the letter to the wife of [his] boss who knew someone traveling to the US. (...) She later called [him] to confirm that the letter was duly mailed to the UNJSPF”.<sup>24</sup> He has not provided a USPS receipt, nor evidence from the wife of his “boss”.

23. The Fund maintains that it never received a payment instructions form from Mr. Ambe-Niba containing his UNFCU bank account information.<sup>25</sup> The Fund provides the online

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<sup>19</sup> Statement of Facts, para. 19.

<sup>20</sup> *Ibid.*, para. 20.

<sup>21</sup> United States Postal Service.

<sup>22</sup> Annex 65 to the Statement of Facts.

<sup>23</sup> Mr. Ambe-Niba provided the first and last name of the sender.

<sup>24</sup> 13 November 2019 e-mail from Mr. Ambe-Niba to the Fund (Annex 63 to the Statement of Facts).

<sup>25</sup> Appendix to the Statement of Facts, para. 67.

USPS Tracking Results (as of 28 September 2022) of the tracking number Mr. Ambe-Niba provided. The results indicate that the label was created but not yet in the system. On 31 December 2019, the Fund informed him that the tracking information he had provided was “not valid and, therefore, [did] not allow to confirm the existence of this package”. It reiterated several times its advice that he contact Bank of America and/or the relevant authorities directly.

24. On 22 January 2020, Mr. Ambe-Niba travelled from Cameroon to New York to resolve the matter and met with the Fund’s legal department.<sup>26</sup> Having established his identity at these meetings, the Fund provided him with a copy of the payment instructions form that it had used to make the payment of his withdrawal settlement. The Fund advised him that the matter was between him and Bank of America.

25. The next day, on 23 January 2020, in the Fund’s offices in the presence of the Fund’s officials, Mr. Ambe-Niba contacted Bank of America via a telephone call and was told to file a police report, which he subsequently did on the same day, 23 January 2020, at the 17th Precinct of the New York Police Department.<sup>27</sup> In the telephone call on 23 January 2020, a representative of Bank of America also stated that “an account was opened in the name of Mr. Polycarp Ambe-Niba (...), however (...) the Social Security Number associated with this account and name is not the same”. The telephone call was summarized in an internal e-mail of the Fund on 23 January 2020.<sup>28</sup>

26. On 23 January 2020, Mr. Ambe-Niba also informed the Fund that he had, some weeks prior, received e-mails from an individual going by the name of “François Lucas”, who claimed to know the whereabouts of his withdrawal settlement.<sup>29</sup> He subsequently provided copies of the e-mails in question to the Fund, which were dated from 17 December 2019 to 8 January 2020. He informed the Fund that he had stopped corresponding with that individual and had deleted some of his e-mails after coming to the conclusion that “François Lucas” was likely a “hacker”.

27. On 3 February 2020, Mr. Ambe-Nibe filed his request for review before the Standing Committee.<sup>30</sup>

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<sup>26</sup> Statement of Facts, para. 25.

<sup>27</sup> However, according to his submission, he was informed that only residents could file police reports and that the Fund could file such a report to the authorities. He relayed this advice to the Fund.

<sup>28</sup> In Annex 77 to the Statement of Facts.

<sup>29</sup> Statement of Facts, para. 26.

<sup>30</sup> *Ibid.*, para. 28.

28. On or about 3 February 2020, the Fund again contacted its own bank, JP Morgan Chase.<sup>31</sup> JP Morgan Chase attempted, unsuccessfully, to recover the funds from Bank of America, and on 19 February 2020 informed the Fund that Bank of America had advised it that there were no funds available for recovery.

29. On 19 March 2020, Mr. Ambe-Niba provided copies of the messages he stated he had sent to, or received from, the Fund.<sup>32</sup> The Information Management Systems Service of the Fund (IMSS) reviewed the e-mails supplied and established the following:

(a) Most of the e-mails that he claimed had been sent to him by the Fund were sent to him through a third-party server, by an unknown sender, and were “spoofed” to make them falsely appear as though they had been sent by the Fund. Mr. Ambe-Niba himself noted that, when viewing the messages in Gmail, he “found a question mark in red next to certain messages and when [he] clicked on the question mark the following hidden caption appeared: ‘Gmail couldn’t verify that un.org actually sent this message (and not a spammer)’”. Whoever sent these e-mails did so without needing to access or compromise any of the UNJSPF’s e-mail accounts.

(b) The e-mails which he attempted to send to the Fund in response to the spoofed e-mails, were not sent to its genuine e-mail address and were not, therefore, ever received because the “reply-to” address in the spoofed e-mails, which is the address that determines how the “reply” field is automatically populated when one clicks “reply” to an e-mail, was a non-existent e-mail address. If a third party had access to his e-mail accounts, that third party would also have been able to access content in his “sent items” folder in order to create fraudulent, spoofed “responses” from the UNJSPF.

(c) The Fund never received any spoofed e-mails, nor was it ever deceived into responding to a non-existent e-mail address. This does not exclude the possibility that Mr. Ambe-Niba’s e-mail accounts were compromised in such a way that a third party could have used them to impersonate him in e-mails with the UNJSPF.

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<sup>31</sup> *Ibid.*, para. 27.

<sup>32</sup> *Ibid.*, para. 29.



30. According to Mr. Ambe-Niba, on 2 April 2020 he spoke to Bank of America who advised him that only the Fund could request recall of the funds.<sup>33</sup>

*The Impugned Decision*

31. On 8 June 2020, the Standing Committee rendered its Statement of Facts and applicable law.<sup>34</sup>

32. In reviewing the case at its 203<sup>rd</sup> meeting held on 8 July 2020, the Standing Committee considered that a fraud may have been perpetrated but it was not competent to reach a conclusion on the perpetrator of the fraud, and therefore requested CE/PA to refer the matter to the Office of Internal Oversight Services (OIOS) for possible investigation.<sup>35</sup> On 19 October 2020, OIOS informed the Fund that there was no indication that any staff member was implicated in the reported matter and that evidence possibly identifying implicated persons is held by entities beyond the United Nations authority, such as Bank of America.<sup>36</sup> Following the OIOS' response, the Pension Administration formally referred the matter to the Office of Legal Affairs (OLA), and OLA brought the matter to the attention of the United States Government.

33. The Standing Committee further considered Mr. Ambe-Niba's request for review at its 204<sup>th</sup>, 205<sup>th</sup>, 206<sup>th</sup> and 207<sup>th</sup> meetings held on 8 March 2021, 14 July 2021, 2 March 2022 and 6 July 2022, respectively.<sup>37</sup> On 30 March 2022, the Fund was formally notified that the national authorities of the United States had not initiated an investigation into the matter.

34. On 19 July 2022, the Standing Committee rendered the impugned Decision.<sup>38</sup> It upheld the contested Decision. The Standing Committee concluded that the Fund fully complied with its procedures in processing Mr. Ambe-Niba's withdrawal settlement.<sup>39</sup> The Standing Committee noted that the Fund corresponded with him through his designated e-mail address; that it received a written, signed payment instructions form in his name, which it crosschecked with his signature on record; that it sought confirmation of the paper-based payment instructions form via e-mail to his designated e-mail address; and that it paid his withdrawal settlement into a bank account held

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<sup>33</sup> Mr. Ambe-Niba's e-mail of 2 April 2020 (in document No. JSPB/SC/203/R.6(d)).

<sup>34</sup> *Ibid.*

<sup>35</sup> Impugned Decision.

<sup>36</sup> Memorandum dated 19 October 2020 (Annex 35 to the Respondent's answer).

<sup>37</sup> Impugned Decision.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

in his name at the Bank of America. The Committee pointed out the OIOS' finding that there was no indication that any staff member of the Fund was implicated in the alleged fraud and further noted that there was no mechanism through which it could compel the national authorities to investigate the case.

35. The Standing Committee found that upon the Fund advising him, on 29 November 2019, to directly contact the relevant authorities and/or Bank of America, Mr. Ambe-Niba contacted neither Bank of America nor other authorities until 23 December 2019 but continued corresponding with the Fund.<sup>40</sup>

36. Pursuant to a letter dated 8 June 2021, Bank of America confirmed to Mr. Ambe-Niba that he was not the “person responsible for opening the account” but considered his inquiry resolved with no further action needed.<sup>41</sup> On 9 June 2021, Mr. Ambe-Niba contacted Bank of America by telephone. In the conversation, according to his summarizing Note annexed to his comments submitted to the Standing Committee on 17 June 2021 for its 205<sup>th</sup> meeting, a representative of Bank of America stated that Mr. Ambe-Niba did “not have standing to request recovery of the funds (...)” as he was “not a member of the Bank” but “[o]nly the UNJSPF is entitled to initiate any procedure or file an application for recovery of the funds, as it is the initiator of the payment”.<sup>42</sup>

37. Mr. Ambe-Niba now provides copies of the bank statement and cancelled cheques from the Bank of America account into which his withdrawal settlement was deposited.<sup>43</sup> The bank statement from 1 July 2019 to 31 July 2019 records the deposit. The account is recorded to be in the name of “Janet N\*\*\*\* D\*\*\*\*s Sole Prop DBA Ambe-Niba Polycarp” with an address in Los Angeles, CA.

## Submissions

### Appellant's Appeal

38. Mr. Ambe-Niba requests the Appeals Tribunal to vacate the impugned Decision, order the payment of the withdrawal settlement with interest, and award compensation for pecuniary harm, loss of chance, and non-pecuniary harm.

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<sup>40</sup> *Ibid.*, para. 20.

<sup>41</sup> Annex 7 to the appeal.

<sup>42</sup> Annex 8 to the appeal.

<sup>43</sup> Annexes 15 and 16 to the appeal.

39. First, he argues that the Fund, by paying the settlement into the incorrect account, did not discharge its obligation pursuant to Article 31(a) of the Regulations, Rules and Pension Adjustment System of the UNJSPF (Regulations). He never submitted in writing a form instructing the Fund to pay his withdrawal settlement to the Bank of America account as required by Rule J.2 of the Administrative Rules of the UNJSPF (Administrative Rules). The form submitted in his name did not contain his signature; an expert opinion confirms that the signature on that form was not written by the same person who wrote the uncontested signatures. Moreover, it has been established that the Bank of America account was not opened or owned by or connected to him.

40. He submits that, in accordance with the general principle of civil law that to extinguish an obligation, the debtor has to pay the creditor; a payment made to the wrong person would not extinguish the obligation.

41. Second, Mr. Ambe-Niba contends that it is irrelevant whether the Fund complied with its procedures in processing the withdrawal settlement. It appears from the impugned Decision that the security features of the payment procedure include checking the signature on the payment instructions and executing the payment into a bank account held in the participant's name. The Fund failed to comply with reasonable procedures in these two aspects. A payment of almost half a million dollars demanded more than a mere cursory comparison of the signatures. Furthermore, the statement of the Bank of America account clearly demonstrates that the account was not held in his name but in the name of a third party.

42. Third, he submits that the Fund was negligent in dealing with the fraud and it had a fiduciary responsibility to ensure that it had adequate procedures and safeguards to prevent fraud. It failed to take appropriate measures to mitigate the harm. On 13 November 2019, Mr. Ambe-Niba alerted the Fund that he did not have an account with Bank of America and that there had been a fraud. On 15 November 2019, the Fund contacted its bank, JP Morgan Chase, to recall the funds and was advised that the latter was unable to return funds and instructed to contact the beneficiary directly. The Fund did not contact Bank of America nor has it provided any evidence that Bank of America advised that there were no funds available for recovery at that time. Only the Fund had the right to follow up the fraud referral and request recovery or promptly report the fraud to the national authorities. It repeatedly failed to do so but instead has shifted the burden to Mr. Ambe-Niba. Only on 3 February 2020, almost three months later, did the Fund contact JP Morgan Chase to report the fraud. It then took them 11 days to provide the bank with the information requested.

43. Finally, Mr. Ambe-Niba asserts that the refusal to pay him the settlement derailed his family's plans for his retirement and caused severe financial hardship. He had to withdraw USD 24,83.75, incurring USD 8,841.79 in fees and interest. The travel to New York was necessary for the Fund to finally establish his identity. Regarding loss of chance, he requests compensation in the amount of USD 50,000 due to the fact that the contested decision disrupted his daughters' education as, without the settlement, one could not pursue university studies and the other had to undertake employment damaging her academic performance. As to non-pecuniary harm, he requests compensation in the amount of another USD 50,000 because his suffering was compounded by having been subjected to allegations that he was implicated in the fraud; as a result, he had to seek the help of a clinical psychologist and has been diagnosed with several ailments as per the medical evidence provided.

### **Respondent's Answer**

44. The Fund requests that the Appeals Tribunal dismiss Mr. Ambe-Niba's appeal and uphold the impugned Decision. It says that the fraud was perpetrated largely through his personal e-mail account, which appears to have been compromised.

45. The Fund submits that the internal procedures of the UNJSPF in place at the material time included the following safeguards, all of which were adhered to in this case: (a) confirming the consistency of the name on the payment instructions form with the participant's name in the records of the UNJSPF; (b) verifying whether the original signature on the form matches a verified signature in the records;<sup>44</sup> (c) accepting payment instructions only in original, bearing the original ink signature of the participant; in the present case, Mr. Ambe-Niba's payment instructions dated 21 June 2019; (d) corresponding with the beneficiary only via a mail or e-mail address specifically designated by the participant; and (e) sending a one-time payment via wire transfer.<sup>45</sup>

46. The Fund argues that the record establishes that the UNJSPF at all times acted in accordance with its Regulations and Administrative Rules and took various precautions to confirm Mr. Ambe-Niba's identity. On the other hand, he failed to take basic precautions to

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<sup>44</sup> According to the Respondent, such verified signature would be available on the designation of beneficiary form Pens.A/2 which is collected through the employing organization at the time of the participant's onboarding. The Respondent disputes the relevancy and the accuracy of the "expert" signature assessment and its admissibility, not having been before UNJSPF or the Standing Committee.

<sup>45</sup> The Respondent further submits that any mismatch between the name on the account and the beneficiary's name would normally be identified in a wire transfer and payment would be rejected.

safeguard the integrity of his communications, and his own actions and inactions allowed the fraud to be perpetrated. He repeatedly ignored warning messages in his personal e-mail account that flagged incoming fraudulent e-mails as untrustworthy; he repeatedly sent e-mails, ostensibly intended to the UNJSPF, to non-existent e-mail addresses, and then ignored the delivery failure reports; he informed the UNJSPF that he would send his payment instructions via DHL, but subsequently claimed that he had entrusted the form, containing his personal and bank account information, to “the wife of [his] boss who knew someone traveling to the US”; he falsely claimed that the payment instructions form had been delivered and provided a tracking number that instead showed that the document had never been shipped; and he failed to act promptly when he discovered that there had been a fraud, delaying months in contacting Bank of America, where payment was sent, or the competent authorities.

47. In addition, the Fund says that the Appellant has not been transparent regarding his dealings with Bank of America as he has provided a bank account statement and cheques that he claims to have recently received from Bank of America, relating to an account into which his withdrawal settlement was paid but not explained how he was able to obtain such confidential documents if he has no connection to the account.

48. The Fund contends that, in view of Mr. Ambe-Niba’s gross negligence and omissions, there were no measures that the UNJSPF could have taken to prevent the fraud. The person whose identity was compromised must bear the liability if s/he was at fault, grossly negligent, careless, dishonest and/or if there is evidence of wilful misconduct on their part. As such, liability for the loss should rest with him, whose actions and omissions allowed the fraud to occur, and not with the UNJSPF.

49. The Fund submits that, even if the liability of the UNJSPF is affirmed, any award should be reduced to account for Mr. Ambe-Niba’s substantial negligence. The Fund is not liable for interest on any unpaid benefits.<sup>46</sup> Any alleged pecuniary or non-pecuniary loss was caused by the theft, as confirmed by the Report on Psychological Consultations, not by the manner in which the Fund acted since then. The alleged disruptions to his daughters’ education have no relationship to the actions of the Fund.

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<sup>46</sup> The Respondent references Article 44 of the Regulations.

## Considerations

### *I. Preliminary Matters: Request for an Oral Hearing*

50. Mr. Ambe-Nimba requests an oral hearing before the Appeals Tribunal because of the complexity of the case and the “insufficient substantiation before the UNJSPF Standing Committee”. The Respondent objects.

51. Under Article 8(3) of the Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules), the Appeals Tribunal may grant an oral hearing if it would “assist in the expeditious and fair disposal of the case”. An appeal before the Appeals Tribunal is not a rehearing of the matter. The relevant facts are set out by way of documentary evidence and the findings of the Standing Committee. There seems to be no dispute that a fraud may have been committed here.

52. However, the Standing Committee is obligated to set out its findings of fact upon which its decision is made. As set out below, we find that the Standing Committee has either failed to make critical findings of fact or has made relevant factual findings that were erroneous.

53. For these reasons, we remand the case back for additional fact-finding rather than convene an oral hearing at the Appeals Tribunal.

### *II. Admissibility of Expert Report on Mr. Ambe-Nimba’s Signature*

54. The Respondent objects to the admission of the “expert” signature assessment commissioned by Mr. Ambe-Nimba, which was not submitted to the Fund beforehand or to the Standing Committee as evidence.

55. Mr. Ambe-Nimba submits to the Appeals Tribunal a document titled “Expert Opinion” provided by S.G. (Master of Science in Forensic Science) as a result of a request dated 17 September 2022. S.G. examined the signature on the “United Nations Joint Staff Pension Fund Instructions for Payment of Benefits” dated 21 June 2019 (or the Pens.E/7 form) and compared it with Mr. Ambe-Nimba’s signature dated 25 January 2018 from a document titled “The Fund acted in full compliance with its procedures and took all reasonable measures to guard against fraud” and with his signature on his 28 June 2019 letter to the Fund. S.G.’s

opinion was that the signature on the Instructions for Payment of Benefits was not written by the same writer.

56. Article 2(5) of the Statute<sup>47</sup> permits the Appeals Tribunal to receive additional documentary evidence, including written testimony, where the Appeals Tribunal determines that the facts are likely to be established by means of such documentary evidence. However, the admission of additional documentary evidence will only be permissible in exceptional circumstances and if it is in the interest of justice and the efficient and expeditious resolution of the proceedings to do so. Additionally, the evidence will not be admissible if it was known at the time and should have been presented at the first instance level.<sup>48</sup>

57. Although the expert opinion is relevant, Mr. Ambe-Niba could have provided it earlier and as such, it constitutes new evidence that should have been presented to the Standing Committee. Further, Mr. Ambe-Niba has not sought leave to produce the evidence in the appeal pursuant to Article 10(1) of the Rules. Finally, there seems to be no real factual dispute that a fraud may have been perpetrated in this case.

58. Therefore, we find there are no exceptional circumstances to permit the admission of the expert opinion report of S.G. in this appeal. We will not rely upon it in our determination. However, it can be produced to the Standing Committee for review in their additional fact-finding and consideration of the matter.

### *III. Merits of the Appeal*

59. Article 48(a) of the Regulations provides that “Applications alleging non-observance of these Regulations arising out of the decision of the Board may be submitted directly to the United Nations Appeals Tribunal”.<sup>49</sup>

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<sup>47</sup> Article 2(5) states as follows: “In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. Where this is not the case, or where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written evidence, it shall remand the case to the Dispute Tribunal. The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.”

<sup>48</sup> *Rolli v. Secretary-General of the World Meteorological Organization*, Judgment No. 2019-UNAT-952, para. 31.

<sup>49</sup> JSPB/G.4/Rev.26, applicable from 1 January 2022 until 31 December 2022.

60. Article 2(9) of the Statute provides that the Appeals Tribunal shall be competent to hear and pass judgment on an appeal of a decision of the Standing Committee acting on behalf of the Fund, “*alleging nonobservance of the regulations*” of the Fund (emphasis added).

61. Therefore, the Tribunal’s jurisdiction on reviewing the decision of the Standing Committee is a narrow one and in many cases restricted to assessing whether there has been “nonobservance of the regulations”. As the Appeals Tribunal has noted in *Fox*<sup>50</sup>, “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”.

62. Consequently, one of the issues in the appeal is whether the Fund observed its Regulations in processing and paying Mr. Ambe-Nimbe’s withdrawal settlement.

63. However, the Appeals Tribunal has accepted that although 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”,<sup>51</sup> “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.” We have explained:<sup>52</sup>

(...) 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.

...

(...) The scope of the principle of good faith in contract 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*.

64. Article 31(a) of the Regulation provides: “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 the retirement

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<sup>50</sup> *Fox v. United Nations Joint Staff Pension Board*, Judgement No. 2018-UNAT-834, para. 48.

<sup>51</sup> *Op. cit.*, para. 48.

<sup>52</sup> *Op. cit.*, paras. 49 and 52.



benefit.”<sup>53</sup> The use of the word “shall” indicates the mandatory nature of the consequence and therefore places an obligation on the Fund.

65. Annex II to the Regulations (Financial rules of the United Nations Joint Staff Pension Fund), Section C (Payment of benefits and other utilization of funds; Expenditures) provides:

...

**Certifications and controls**

C.4 The Chief Executive Officer and the Representative of the Secretary-General, within their respective authority under the Regulations of the Fund and in consultation with the Chief Financial Officer, are responsible for:

(a) Establishing procedures for ensuring that all payments and disbursements are properly payable on the basis of supporting documents for payments under the Regulations, Administrative Rules and pension adjustment system of the Fund, or are properly payable for services or goods actually received by the Fund in accordance with the terms of contract or other agreement governing the provision of such goods or services to the Fund;

...

66. These provisions clearly place the onus or responsibility on the Fund to pay the withdrawal settlement to the participant and to make reasonable efforts to ensure all payments and disbursements are properly payable.

67. In the present case, the facts suggest that Mr. Ambe-Niba’s withdrawal settlement funds were paid into a bank account which he had not opened. As part of this appeal, he provides copies of statements from the Bank of America account. The statements are for the same Bank of America account as stated in the Pens.E/7 form. The statement is for July 2019 showing a deposit of US 414,587.28. The account number is in the name “Janet N\*\*\*\* D\*\*\*\*s Sole Proprietor DBA Polycarp Ambe-Niba” with an address on Harold Way, Los Angeles, United States. The bank statement (along with copies of canceled cheques) shows a number of large ATM withdrawals and cheques drawn on the account (not signed by Mr. Ambe-Niba) subsequent to the deposit.

68. In addition, Mr. Ambe-Niba provided a letter from Bank of America dated 8 June 2021 confirming that the results of their investigation show that he was not the person responsible for opening the account and that they would take no further action. Interestingly, the letter is addressed to Mr. Ambe-Niba with the same mailing address on Harold Way, Los Angeles, United

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<sup>53</sup> JSPB/G.4/Rev.23, applicable from 1 January 2019 until 31 December 2019.

States, as the bank statements. He also provides recordings of telephone conversations with Bank of America on 20 August 2022 wherein he inquired into his fraud complaint and is advised that he did not have a right of recovery to the funds deposited fraudulently, but the sender of the funds did have a right of recovery.

69. Therefore, on the face of the evidence it appears that the Fund has not met their onus and obligation of paying the withdrawal settlement to the participant, Mr. Ambe-Niba, but has paid the amount to someone else entirely.

70. However, there are some unanswered questions regarding the Bank of America bank account, including, if Mr. Ambe-Niba is not involved in the account, how was he able to obtain copies of bank statements and cancelled cheques and why did the Bank of America letter addressed to him, confirming he did not open the account, have the same mailing address (in Los Angeles) as the bank statements. These factual questions need further clarity and evidence.

71. Further evidence and clarity are also required as to why Mr. Ambe-Niba's withdrawal settlement was paid into an account not in his name and not opened by him but in the name of someone else. To support the payment retrospectively, the Fund seems to have relied on representations of Bank of America that the account was opened in the name of Mr. Ambe-Niba. For example, in an e-mail of 23 January 2020, the Fund's representative summarized a call with a representative of Bank of America who stated that the "account was opened in the name of Mr. Polycarp AMBE-NIBA". In addition, in an e-mail of 14 February 2020 from the Fund to the Fraud Department of JP Morgan Chase (the Fund's bank), the Fund advised that the "UNJSPF payment via JPMC [was] to an account in the same name as that of the individual with Bank of America". This seems to have been incorrect as the bank statements show that the account is in the name of a "Janet N\*\*\*\* D\*\*\*\* Sole Proprietor DBA Polycarp Ambe-Niba".

72. Nevertheless, the Statement of Facts before the Standing Committee, upon which the impugned Decision is based, repeats this seemingly inaccurate representation. In paragraph 25 of the Statement of Facts, the Standing Committee stated that "Bank of America confirmed that it had an account in the Applicant's name". On the face of the evidence, this appears to be factually incorrect. However, the Standing Committee relied on this statement in its impugned Decision

and made a finding which may also be incorrect, namely that the Fund “paid [the] withdrawal settlement into a bank account in [Mr. Ambe-Niba’s] name in the Bank of America”.

73. The Fund argues that they followed and observed the Regulations in payment of the withdrawal funds and this was sufficient and the only basis for review pursuant to Article 2(9) of the Statute.

74. Section J (Computation and payment of benefits) of Administrative Rules provides:

...

J.2 (a) The participant shall specify in writing, on a form provided for the purpose by the secretary of the committee, the benefit and any commutation thereof elected in accordance with the Regulations, instructions with respect to the method, currency and the banking or other institution, if such be the case, to which payment should be made on account of the participant. Subsequent changes in the election of benefits by the participant shall not be accepted unless no payment has yet been made by the Fund.

...

75. As required by Rule J.2 of the Administrative Rules, on 29 June 2019, the Fund says it received via DHL the Pens.E/7 form dated 21 June 2019, containing Bank of America banking information. The mailing address contained in the Pens.E/7 form was an address in Cameroon. However, the DHL waybill indicates that it was sent from Nairobi, Kenya. The Fund reviewed and considered that the signature on the Pens.E/7 form matched Mr. Ambe-Niba’s signature on file with the Fund.

76. Mr. Ambe-Niba submits that he never submitted this written form instructing the Fund to pay his withdrawal settlement to the Bank of America account. However, other than his statement, there is no evidence to support that he did not send the allegedly forged Pens.E/7, such as confirmation of his whereabouts on the date of the DHL waybill (25 June 2019). If he can show that he was not in Nairobi at that place and time, this could potentially be evidence that could support his claim.

77. In addition, Mr. Ambe-Niba says that he submitted, by registered mail, his request for a lump sum withdrawal settlement by way of signed payment instructions in a Pens.E/7 form requesting payment into his UNFCU account. He provided details to the Fund, including a USPS tracking number, the place of mailing in Richmond, TX, the sender (M.K.), and date of recorded delivery (24 May 2019). However, the Fund disputes this and provides a screenshot of USPS

Tracking status update on 28 September 2022 on the tracking number, which states: “Label created, not yet in system. A status update is not yet available on your Priority Mail® package. It will be available when the shipper provides an update or the package is delivered to USPS.” However, this by itself neither confirms nor disproves Mr. Ambe Niba’s claim that he submitted the correct Pens.E/7 form by registered mail. Mr. Ambe-Niba can support his claim that he sent by registered mail the correct Pens.E/7 form by providing, for example, evidence from USPS in the form of a USPS receipt of deposit with them. For example, if there is evidence (such as a USPS receipt) to show the deposit and date of deposit at USPS of the registered mail containing this Pens.E/7 form to be delivered to the Fund, this could constitute sufficient proof or a presumption that the correct payments instructions were properly sent and delivered to the Fund.<sup>54</sup>

78. In the impugned Decision, the Standing Committee found that it was sufficient to observe the Regulations for the Fund to accept the allegedly forged Pens.E/7 dated 15 May 2019, and received on 10 June 2019, and subsequent forged election letter and unverified and fraudulent e-mail correspondence and contestations. There is no evidence before us as to what the procedures are for verification of payment instructions other than the Fund’s submission that it checks the signature on the Pens.E/7 form with the participant’s signature on file. Given the large amount involved and given conflicting information the Fund had received (i.e. Mr. Ambe-Niba’s e-mail of 18 June 2019 to the Fund, referencing a UNFCU bank account), it appears that it should be incumbent on the Fund to have more stringent processes in place to verify information. We do not have before us the detailed processes normally used by the Fund in making these types of payments and wire transfers.

79. Rather, the Fund relied on e-mail communications (involving e-mail addresses which were apparently compromised) and a cursory check of the signatures. The Chief Executive of Pension Administration stated in the Answer to the Standing Committee that “[i]f there had been any mismatch between the name of the Applicant and the name of the bank account, the wire transfer would have been rejected immediately”. But there appears to be a mismatch in names in the present case. If so, there is no explanation as to why the wire transfer was allowed

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<sup>54</sup> As the Appeals Tribunal has noted in *Elmira Ela Banaj v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1357, para. 71: “It is a principle in evidence law that the burden of proof lies with the party who presents a claim. [The] document [provided in evidence] demonstrated a *prima facie* fact in favor of the [the party’s] position”. For example, in *Howard Andrew Giles III v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1106, para. 68, the Appeals Tribunal pointed out that tax documents, relevant to a former staff member’s claim for a partial disability benefit, i.e. a benefit distinct from but interconnected to the Fund’s disability benefit, “would presumably confirm the dates of [the] employment [undertaken by him]”.

to proceed and not “rejected immediately”. It may be that this is a matter that the Fund or its bank, JP Morgan Chase, need to pursue with Bank of America.

80. The Fund also submits that Mr. Ambe-Niba was to blame as he was negligent in handling his affairs and e-mail address and in protecting the integrity of his information. The Standing Committee makes no finding on this. However, the Statement of Facts makes numerous statements about the fraudulent e-mails that “Gmail would likely have identified the e-mail as possible spam and would have flagged it as such in the Applicant’s inbox”. However, no evidence in support is provided, for example evidence of e-mails being identified as spam or being flagged in Mr. Ambe-Niba’s inbox or the practice of Gmail.

81. In the impugned Decision, the Standing Committee fails to either make or explain key factual findings in relation to relevant issues or makes factual findings based on unsupported or erroneous statements of facts. The Standing Committee makes no or little attempt in the impugned Decision to analyze or assess all of the evidence before it as required to make specific factual findings on the probabilities. The assessment of the evidence is limited to the Standing Committee’s recitation of the Fund communicating with Mr. Ambe-Niba on his designated e-mail address and receiving written, signed payment instructions which included a signature that was cross-checked, and confirming and making the payment to the noted bank account. There is no analysis of other evidence or submissions made by the parties. Moreover, the Standing Committee may have erred on a critical finding of fact that the withdrawal settlement was paid to Mr. Ambe-Niba into an account in his name. Further, it noted the OIOS’s finding that there was no indication that any staff member was implicated in the alleged fraud. This does not seem determinative. The Standing Committee failed to consider the relevant issues of whether the Fund discharged its onus of paying the withdrawal settlement to the participant and whether the Regulations were observed in payment of the withdrawal settlement. Another issue the Standing Committee failed to consider and determine is whether the Fund acted in accordance with the implied duty to act in good faith, which is inherent in these matters.<sup>55</sup>

82. In conclusion, we find that there has not been proper fact-finding in relation to the key issues in this case. It is accordingly not possible to make a determination on the balance of probabilities as to whether the Regulations were observed and whether the Fund acted in good faith in paying the withdrawal settlement. Further, the possible loss of such a large lump sum

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<sup>55</sup> See *Fox, op. cit.*, para. 50.

pension will have serious consequences for a participant of the Fund. It likely will impact significantly on their life, health, status, financial security, as well as their family.

83. It is best therefore for the matter to be remanded to the Standing Committee pursuant to Article 2(9) of the Statute with a request that it conduct a proper fact-finding exercise and make clearer factual findings with fuller and more systematic reference in its decision and reasons to the evidentiary basis upon which they are made.

84. The Standing Committee should make its additional factual findings by taking into account the directions and comments as set out below:

a. Why did the Fund not question the allegedly forged Pens.E/7 form with the Bank of America account information when it previously had e-mails from Mr. Ambe Niba referring to a UNFCU account as his account?

b. What are the detailed processes used by the Fund to verify a participant's identity in making these types of payments and wire transfers?

c. How and why was Mr. Ambe-Niba's withdrawal settlement apparently paid into an account not in his name and not opened by him but in the name of someone else?

d. Why was the wire transfer with apparently mismatched names not rejected?

e. Can Mr. Ambe Niba provide proof of the registered mail with the correct Pens.E/7 form and payment instructions, and the deposit (and date of deposit) of these instructions with USPS, for example a USPS receipt of the deposit?

f. Where was Mr. Ambe Niba on the date of the DHL waybill, i.e. on 25 June 2019? Was he in Nairobi Kenya and what proof is there of his whereabouts at that time?

g. If he had no involvement in the account, how did Mr. Ambe-Niba obtain copies of the bank statements of Bank of America and the cancelled cheques?

h. Why is the 8 June 2021 letter from Bank of America addressed to Mr. Ambe-Niba with the same mailing address (in Los Angeles) as the bank statements?

**Judgment**

85. We remand the matter to the Standing Committee of the United Nations Joint Staff Pension Board, pursuant to Article 2(9) of the Appeals Tribunal Statute, for additional fact-finding as set out above.

Original and Authoritative Version: English

Decision dated this 30<sup>th</sup> day of June 2023 in New York, United States.

*(Signed)*

Judge Sandhu, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Halfeld

Judgment published and entered into the Register on this 31<sup>st</sup> day of July 2023 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar