



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2017-1091

Delaunay

(Appellant)

v.

Registrar of the International Court of Justice

(Respondent)

Order No. 301 (2017)

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

Background

2. Ms. Delaunay worked for the ICJ as Senior Medical Officer from 1 May 2009 until 31 December 2015. Her initial contract dated 27 April 2009 as well as subsequent contracts provided for a 25 per cent part-time arrangement and stipulated that by virtue of her appointment she would become a participant in the United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund). She was assigned a Pension Fund number and throughout her appointment, her contributions to the UNJSPF (amounting to USD 24,235.00) were deducted from her salary and the ICJ as her employer paid another USD 52,988.26 into the Pension Fund.

3. At the end of 2015, Ms. Delaunay was recruited by the European Space Agency (ESA) and informed the ICJ that she would resign from service effective 31 December 2015 and asked for her pension rights to be transferred to the ESA based on an agreement on the transfer of pension rights concluded between the UNJSPF and ESA in July 2007 (Transfer Agreement). In this context, it was discovered that Ms. Delaunay should not have

been enrolled in the Pension Fund in the first place since, by virtue of Supplementary Article A of the UNJSPF Regulations, staff members who work on a part-time basis of less than 50 per cent do not become participants in the Pension Fund. Ms. Delaunay was so informed in December 2015. On 1 February 2016, Ms. Delaunay submitted a complaint against the ICJ asking for compensation in the amount of USD 125,908 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.

4. Following an extensive e-mail exchange between the UNJSPF, the ICJ and Ms. Delaunay, respectively, the UNJSPF proposed in June 2016 to allow Ms. Delaunay to remain in the Pension Fund on an exceptional basis and to transfer an amount equivalent to a withdrawal settlement under Article 31(b)(i) of the UNJSPF Regulations (i.e. her own contributions) to the ESA in accordance with Article 2.2(b) of the Transfer Agreement. The Pension Fund based its proposal on a conversion of her six years and eight months 25 per cent part-time employment to a one year and eight months full-time employment arguing that, as a result, she did not fulfill the required minimum participation of five years in order to be eligible for a pension benefit which could have been transferred to the ESA under Article 2.2(b) of the Transfer Agreement. The Pension Fund informed Ms. Delaunay of its position on 27 and 29 September 2016. By e-mail dated 29 September 2016 to the UNJSPF, the ICJ reaffirmed its previously expressed position that it had no objection to the inclusion of its contributions in the computation of Ms. Delaunay's transfer package.

5. In view of the UNJSPF's position which Ms. Delaunay claimed did not allow her to be fully compensated for the prejudice she had suffered and the alleged inability of the ICJ to find a common solution with the UNJSPF, Ms. Delaunay informed the ICJ Registrar by e-mail dated 3 October 2016 that she wished to pursue her request for compensation against the ICJ submitted on 1 February 2016. On 11 October 2016, the ICJ Deputy Registrar rejected Ms. Delaunay's complaint and her request for compensation stating that the UNJSPF's decision dated 29 September 2016 allowed her to benefit from the rights that she was led to believe she had acquired and thus rendered her complaint moot. Upon request for reconsideration, the ICJ Deputy Registrar upheld this decision on 3 November 2016.

6. In response to a complaint submitted by Ms. Delaunay on 29 November 2016, the ICJ Conciliation Committee issued its report on 30 May 2017 finding, *inter alia*, that Ms. Delaunay legitimately believed that she was entitled to a pension benefit, but that

she did not suffer any prejudice from the fact that the ICJ's contributions were not taken into consideration in the calculation of her benefits. Instead, she had suffered harm as a result of the Pension Fund's decision to convert her part-time employment into a less than five-year full time employment as she was deprived of the choice between a withdrawal settlement and a defined benefit under the deferred retirement benefit option. However, the Conciliation Committee found that it was within the exclusive competence of the UNJSPF to determine if a staff member was entitled to pension benefits under the applicable rules. Therefore, the ICJ's only option at this point was to invite the UNJSPF to reconsider its position. 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 in view of the advanced stage of the proceedings it would not be necessary for Ms. Delaunay to exhaust the remedies provided for in the UNJSPF Regulations before filing such an appeal with the Appeals Tribunal.

7. The ICJ contacted the UNJSPF on 2 June 2017 inviting it to issue a definitive decision by the Pension Board in accordance with the Conciliation Committee's recommendation and to communicate its response directly to Ms. Delaunay. Upon her inquiry, the Pension Fund informed Ms. Delaunay by e-mail dated 16 June 2017 that "[t]he Fund [was] still reviewing [her] file and [would] submit its response to the [ICJ]". She did not receive a response to her follow-up e-mail dated 26 June 2017. On 29 June 2017, Ms. Delaunay filed her appeal with the Appeals Tribunal asking for damages in the amount of USD 52,988 plus moral damages and costs. In a letter dated 28 July 2017 addressed to the ICJ Deputy Registrar, the Chief, UNJSPF, Geneva Office replied to the 2 June 2017 request reaffirming the UNJSPF's previous position. On 9 August 2017, Ms. Delaunay filed a motion requesting the 28 July 2017 letter to be admitted as new evidence on appeal.

Considerations

8. Ms. Delaunay's motion for leave to file additional evidence fulfills the requirements contained in Article 2(5) of the Appeals Tribunal Statute as she had already filed her appeal when she received the letter, so that she could not have submitted it together with her appeal and the document may be relevant and necessary to assess the appeal, and therefore exceptional circumstances, the interest of justice and the need for an efficient and expeditious resolution of the proceedings justify the admission of the letter into evidence. Therefore, her motion **IS GRANTED**.

9. In accordance with Article 31 of the Appeals Tribunal Rules of Procedure, "[a]ll matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Appeals Tribunal on the particular case, by virtue of the powers conferred on it by article 6 of its statute".

10. Having considered the record as well as the parties' submissions, we find that the appropriate solution at this point is for Ms. Delaunay to file a request before the Pension Fund to review the decision to convert her six years and eight months 25 per cent part-time employment into one year and eight months full-time employment in accordance with Section K of the Administrative Rules of the UNJSPF. In light of the exceptional circumstances in the case at hand—as recognized by all parties involved—we are further of the view that the interests of justice demand that the Pension Fund 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 Administrative Rules of the UNJSPF.

11. We invite the Pension Fund to consider pursuing one of the following options: (i) 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.

IT IS HEREBY ORDERED that the current matter against the ICJ Registrar is stayed, pending the outcome of the Pension Fund's decision, if any. If no action is taken by Ms. Delaunay vis-à-vis the UNJSPF on or before 30 November 2017, the Appeals Tribunal will assume that Ms. Delaunay does not wish to pursue legal action against the Pension Fund and continue with the adjudication on the present case against the ICJ Registrar.

Original and Authoritative Version: English

Dated 27th day of October 2017
in New York, United States.

(Signed)
Judge Sabine Knierim, Presiding
Judge Deborah Thomas-Felix
Judge Martha Halfeld

Entered in the Register on this 30th day of
October 2017 in New York, United States.

(Signed)
Weicheng Lin, Registrar