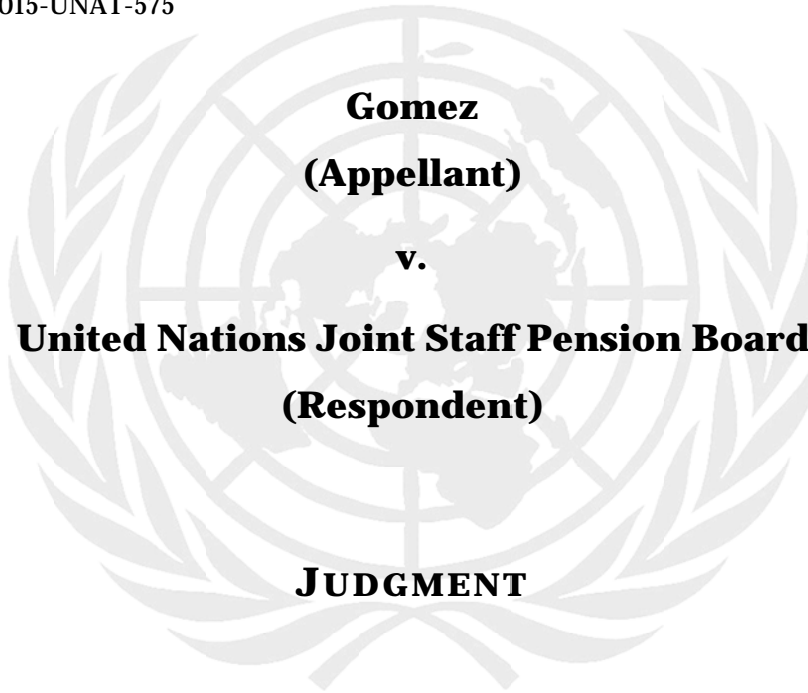




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-575



**Gomez
(Appellant)**

v.

**United Nations Joint Staff Pension Board
(Respondent)**

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Mary Faherty Judge Richard Lussick
Case No.:	2014-667
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Appellant:	Robbie Leighton/OSLA
Counsel for Respondent:	Sergio Arvizú

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of decision R/B5873 of the Standing Committee of the United Nations Joint Staff Pension Board filed by Mr. Roberto Oscar Gomez on 23 October 2014. The United Nations Joint Staff Pension Fund (UNJSPF or Fund) filed its answer on 10 December 2014.

Facts and Procedure

2. Mr. Gomez was a participant in the UNJSPF from 10 October 1997 until 30 September 2010, as a staff member of the International Atomic Energy Agency (IAEA). He married his former spouse on 23 March 1973 in Buenos Aires, Argentina. At the time of his separation from IAEA, Mr. Gomez elected to receive part of his retirement benefit as a lump sum, and was paid USD 218,735.60 and a monthly periodic benefit of USD 3,095.72.

3. On 16 August 2001, Mr. Gomez and his former spouse signed a divorce notary deed in Austria, in which it was agreed that Mr. Gomez would pay to his former spouse 50 per cent of his net base pension once retired from active service.

4. By judgment regarding alimony issued on 13 March 2013, the Regional Civil Court of Vienna upheld a court judgment issued by the District Court Donaustadt on 5 November 2012, which established that Mr. Gomez' former spouse was entitled to receive 50 per cent of Mr. Gomez' monthly UNJSPF pension benefit entitlement.

5. On 12 August 2013, the Fund's CEO approved the deduction of 50 per cent of Mr. Gomez' full monthly pension benefit to his wife pursuant to Article 45 of the UNJSPF Regulations.

6. By letter to the Fund's CEO dated 20 January 2014, Mr. Gomez requested that the base amount for the Article 45 deduction be his net pension benefit *after* deduction of his After Service Health Insurance (ASHI) premium.

7. The Fund's CEO decided that Article 45 could only be applied to the gross or full monthly pension benefit entitlement *before* deduction of the ASHI premium as the latter was unrelated to Mr. Gomez' UNJSPF pension benefit entitlement under the Fund's Regulations and Administrative Rules and, therefore could not form a basis for reducing the base amount

for the deduction pursuant to the order of the Austrian court that his former spouse was entitled to receive 50 per cent. By letter dated 20 March 2014, Mr. Gomez was informed of the decision.

8. On 5 May 2014, following an exchange of communications, Mr. Gomez requested the Standing Committee to review the CEO's decision. The Standing Committee considered Mr. Gomez' request at its 196th meeting on 16 July 2014 and upheld the decision of the CEO, as set out in its letter to Mr. Gomez dated 25 July 2014.

Submissions

Mr. Gomez' Appeal

9. Mr. Gomez challenges the Standing Committee's decision to deny his request that the deduction of 50 per cent of his pension benefit paid to his former spouse be applied to his monthly periodic benefit *after* deduction of his ASHI premium. Mr. Gomez submits that the percentage ordered by the Austrian court was based on Mr. Gomez' *net* pension income. The clear language of the notary deed referenced in the order of the Regional Civil Court of Vienna of 13 March 2013 refers to "net income i.e. his pension" and "yearly net income".

10. The Standing Committee erred in law in its definition of "net". While it first noted that "ASHI premiums are not related to the UNJSPF pension benefit entitlement in that they are not covered by the Fund's Regulations", it then distinguished between mandatory amounts such as income tax under national law and non-mandatory payments, noting that in case of mandatory amounts, a deduction could have justified a reduced base amount for the deduction under Article 45. The logic employed by the Standing Committee is flawed in that it first creates a requirement for a payment to be "covered by the Fund's Regulations" and subsequently presents an example which does not correspond to this requirement. Taxes may be mandatory but they are not covered by the Fund's Regulations.

11. The Standing Committee further erred in law in limiting its definition of "net" base pension benefit, thereby derogating from the definition it ordinarily employed. The UNJSPF ordinarily defines ASHI payments as not forming part of a staff member's net pension benefit. In support of his contention, Mr. Gomez refers to the wording of the 20 March 2014 letter as well as two documents in which the UNJSPF distinguishes between income in net and gross form. The Standing Committee erred in law by applying a different

definition of “net” in Mr. Gomez’ case which is unsupported by any rule or precedent and based on unsound logic.

12. Should the Appeals Tribunal find that the UNJSPF’s routine definition of “net” pension benefit was not the appropriate definition to apply in Mr. Gomez’ case, the appropriate body to adjudicate on the definition could be the Austrian Tribunal. The UNJSPF’s actions have, however, specifically prevented such ruling being provided by the Austrian judiciary. When requested for an indication as to Mr. Gomez’ pension benefit, the UNJSPF provided only the gross figure. Had the UNJSPF provided what it itself defines as gross and net pension benefits, it would have been available to the Austrian Court to decide within its jurisdiction whether Mr. Gomez’ ASHI payments represented part of his net pension benefit. Having created the conditions whereby this issue was not defined by the Austrian Court, the UNJSPF should be estopped from applying any definition of “net” other than that routinely used within their organization.

13. Should clarification be required on this issue, it would be available to Mr. Gomez’ former spouse to request such. Mr. Gomez relied on the UNJSPF’s routine definition of “net” and “gross” pension benefit when conducting his litigation before the Austrian court. The Standing Committee erred in fact and law by failing to take this into account in its determination. Such error has created a manifestly unreasonable decision where Mr. Gomez is penalized for shortcomings in the UNJSPF’s handling of his case.

14. Further or in the alternative, Mr. Gomez contends that he will incur loss as a result of the UNJSPF’s actions preventing the Austrian Tribunal from defining whether his net pension benefit includes his ASHI payments. He will incur costs if he is required to revert to the Austrian Tribunal for such precision. Since these costs result from the application of a mistranslation by the UNJSPF, he should be compensated for this loss.

15. Mr. Gomez requests that the Appeals Tribunal reverse the decision of the Standing Committee and that deduction from his pension benefit be calculated as 50 per cent of his net pension benefits taking into account his ASHI payment. He further asks that the Appeals Tribunal award him compensation for the loss incurred as a result of the Fund having calculated deductions as a percentage of his gross pension benefit up until the date of its judgment plus interest. In the alternative, he requests compensation for legal fees and

other costs that might be incurred in seeking clarification from the Austrian Tribunal as to the proper definition of his “net” pension benefit under Austrian law.

The UNJSPF’s Answer

16. The issue in this case concerns the nature of the ASHI premium and its relationship to a retiree’s UNJSPF pension benefit entitlement and whether it serves to create what the retiree has called his “net pension”. The arrangement for the Fund’s role in facilitating the deduction of ASHI premiums was put into place following consideration of a proposal by Secretaries of Staff Pension Committees in 1983 that the Fund facilitate the collection of health insurance premiums for ASHI and pay them directly to the member organization. A model memorandum of understanding between the Fund and UNJSPF member organizations was thereafter developed in respect of the deduction of ASHI premiums from pension benefit entitlements and IAEA entered into its agreement with the Fund on 9 November 2005.

17. Under the agreement, a pension beneficiary has to provide the Fund with authorization to remit to a third party part of the monthly pension benefit due to him or her in accordance with the Fund’s Regulations. ASHI deductions are therefore not covered by the Fund Regulations and the amount that is paid to a retiree after deduction of ASHI premiums cannot be deemed to be the net pension of a retiree. The amount of the premium is based on a direct relationship between the former employing organization and the retiree, and the Fund merely facilitates the collection of the premium. The decision by a retiree to enter into such agreement is voluntary and can be revoked at any time. Moreover, not all retirees or beneficiaries choose to subscribe to after health insurance offered by their former employing organization.

18. Both the Austrian judgments of 5 November 2012 and 13 March 2013 regard the notarial deed as obligating Mr. Gomez to pay part of his earnings to his former spouse. The Fund’s CEO based his decision on the interpretation that the notarial deed states that the amount payable is 50 per cent of Mr. Gomez’ average net income *or* his retirement pension. The reference to *net* income applies to his salary while there is no qualification regarding his pension. Unless there is a clear basis for using a different amount for the deduction, deductions to third parties under Article 45 are effected from the full or gross monthly pension benefit entitlement of a retiree, and not from any net amount that would take into account ASHI deductions or other deductions under Article 45 of the Regulations. Since the ASHI deduction does not bear any relationship to the benefits established under the Fund’s Regulations, the base amount for application

of the 50 per cent is Mr. Gomez' full monthly benefit and not the amount payable after deduction of ASHI contributions.

19. Turning to Mr. Gomez' request for compensation for legal fees and other costs that "might" be incurred in seeking clarification from the Austrian Tribunal as to the proper definition of his "net" pension benefit under Austrian law, the prudent course of action would have been to seek clarification first at the time he challenged the decision of the Fund's CEO or before starting the appeal process and seeking damages for a course of action that he may or may not take. There is no proof of such request and therefore, such compensation would be purely speculative.

20. The Fund asks that the Appeals Tribunal reject Mr. Gomez' appeal in its entirety.

Considerations

21. Mr. Gomez has challenged the Standing Committee's decision to deny his request under Article 45 of the Regulations of the Fund that his former spouse be paid 50 per cent of his monthly periodic pension benefit after the deduction of his ASHI premium. He contends that the Standing Committee erred in law in its interpretation of the phrase "net base pension benefit", thereby derogating from the ordinary definition of that phrase.

22. Generally speaking, the term gross pension is used to describe the aggregate pension before the deduction of taxes and other statutory deductions. Net base pension benefit therefore is the sum which is left after compulsory/statutory deductions.

23. It is noteworthy that in this case, Mr. Gomez's retirement benefit from the Fund including the monthly periodic pension benefit is not subject to taxation and/or payment of statutory deductions.

24. Additionally, the ASHI premium is a voluntary payment which is deducted by the Fund at the behest of a beneficiary of the Fund, in this case Mr. Gomez.

25. These deductions are voluntary and personal to Mr. Gomez and therefore cannot be treated as or deemed to be statutory deductions. In our view, to categorise this monthly insurance payment otherwise would mean that Mr. Gomez' former wife is made to contribute towards the payment of the monthly insurance premium, an insurance which is for his benefit.

Since there are no statutory deductions from Mr. Gomez' monthly periodic pension benefit there is in fact no net base premium benefit to be considered by the Fund. Therefore, any challenge with respect to the application and meaning to the words "gross" and "net" is a journey into the realm of semantics.

26. In view of the foregoing, we uphold the decision of the Standing Committee.

27. We also find that there is no proper basis to support the claim for legal fees; therefore that claim is dismissed.

Judgment

28. The appeal is dismissed and the Standing Committee's decision is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar