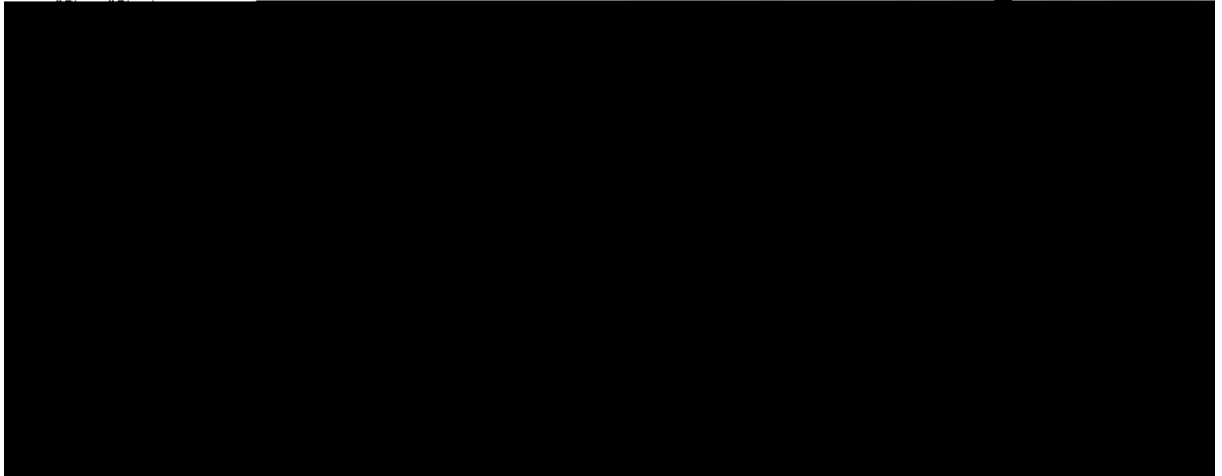




Judgment No. 2015-UNAT-608



Counsel for Appellant: George Irving

Counsel for Respondent Sergio Arvizú

JUDGE MARY FAHERTY , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Tesfaye Teklu, on behalf of his deceased wife, Ms. Wagaye Assebe, against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee or Committee and Board, respectively) made on 25 July 2014. Mr. Teklu appealed on 21 October 2014 and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) answered on 16 December 2014.

Facts and Procedure

2. Ms. Assebe was a United Nations employee since 1985. Her last position was as a G-7

7. On 23 December 2013, after being informed of the death of Ms. Assebe, the Fund requested the Executive Office charged with OSAA (EO/OSAA) matters to relay to Mr. Teklu that they required Ms. Assebe's signed payment instructions form (Pens.E/7) with respect to her choice of benefit following her separation from service.

8. On 27 December 2013, the EO/OSAA e-mailed Mr. Teklu and requested that he advise the Fund whether he had found his wife's signed Pens.E/7 payment instructions form.

9. On 28 January 2014, Mr. Teklu wrote to the Fund notifying them of his wife's intention to request an early retirement benefit under Article 29 of the Fund Regulations, with a one-third lump sum commutation for the benefit of their daughter. He explained that his wife had been unable to complete the necessary payment instructions immediately after her separation due to the sudden deterioration of her health.

10. On 26 February 2014, Mr. Teklu forwarded a Pens.E/7 payment instructions form that he had signed on behalf of his wife to the Fund reflecting the instructions set out in his letter of 28

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Submissions

Mr. Teklu's Appeal

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18. While there is no specific provision in the Fund Regulations that addresses the situation, an analogy can be drawn to Article 46(d), which prohibits the forfeiture by a participant of the right to a retirement, early retirement, deferred retirement or disability benefit, by reason of failure to submit payment instructions if the exercise of the right has been “prevented by circumstances beyond the control of the beneficiary”. Moreover, Article 46(e) vests the Board with discretion to restore any benefit that has been forfeited if, in its opinion, the circumstances so warrant. Mr. Teklu submits that these provisions could be applied *mutatis mutandis*

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consideration of Mr. Teklu's request of 28 January 2014. As the text of the key provisions in question is nonetheless essentially the same, we refer hereafter to the 2014 Fund Regulations.

30. The starting point for the purposes of the present consideration is Article 27 of the

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(a) The payment to a participant of a withdrawal settlement, or the exercise by a participant of a choice among available benefits, or between a form of benefit involving payment in a lump sum and another form, may be deferred at the participant's request for a period of 36 months.

(b) A participant who deferred a choice under (a) above shall, if the choice is not made within the period by submitting applicable payment instructions, be deemed to have chosen a deferred retirement benefit if his or her age on separation was less than the normal retirement age.

34. Ms. Assebe had requested voluntary termination on 17 October 2013, which was agreed to by the Secretary-General on 29 November 2013, with the termination effective as of 30 November 2013. By the time of her receipt of the decision to terminate her service, Ms. Assebe's medical condition had deteriorated considerably, as a result of which she passed away on 2 December 2013. She never completed a form selecting her preferred benefit.

35. On 23 December 2013, some three weeks after her death, her erstwhile employer made contact with the Fund advising them that Mr. Teklu wished to discuss the position in respect of Ms. Assebe's pension. On the same date, the Fund advised that it required Ms. Assebe's payment instructions form Pens.E/7⁵ "with her original signature and a date on the form, if available, else if the late Mrs. Assebe did not complete payment instructions before passing, we will have to request the Fund's Legal Office for guidance on what benefit is payable in this case and to whom".

36. It is common cause that on 26 February 2014, Mr. Teklu completed and signed a payment instructions form and elected for an early retirement benefit with a one-third lump sum by way of commutation, as provided for o.1(ms7 n).1()JT31 -1.73 9u(yab)nl e. ct of

37. Following Mr. Teklu's request for review, the Standing Committee upheld the CEO's decision to deny Mr. Teklu's request for a benefit under Article 29(e) of the Fund Regulations, noting that the Fund Regulations did not provide for a third-party election of benefit on behalf of a former participant posthumously. The Standing Committee also confirmed that a deferred retirement benefit and a widower's benefit under Article 35 of the Fund Regulations were payable.

38. In the first instance, having regard to the reasons underpinning the Standing Committee's decision, the issue for determination is whether the Standing Committee was correct in law in requiring that for the requisite benefit election to have been made pursuant to the Fund Regulations and Rules, the election had to be made in writing by the Fund participant and not by a third party, and in holding that Ms. Assebe had not signed the requisite payment instructions form or otherwise informed the Fund of any benefit election. Additionally, the issue is whether the only benefit Ms. Assebe was eligible to receive at the time of her death was a deferred retirement benefit pursuant to Article 30(a) of the Fund Regulations.

39. The Standing Committee correctly determined that the applicable Fund Rules provide that the pension participant is required to inform the Fund in writing of the benefit election made and of any commutation elected. Administrative Rule J.2(a) of the Fund Rules provides:

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

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Article 29. Accordingly, the Standing Committee erred in relying on the provisions of Article 30 when it affirmed the decision of the Fund's CEO to deny Mr. Teklu's request relating to Article 29 of the Fund Regulations.

48. In its answer to the present appeal, the Fund also relies on the provisions of Article 32(b) of the Fund Regulations, above, in support of its contention that Ms. Assebe's entitlement, upon separation from service, was to a deferred retirement benefit. With regard to this argument however, the Standing Committee did not seek to justify its decision by reference to Article 32(b). This provision, therefore, cannot be the basis of the Standing Committee's decision and the Fund cannot retroactively seek to justify the contested decision on this basis.⁶

49. Contrary to the Fund's submissions, the situation which presented to the Standing Committee was one for which neither the Fund Regulations nor Rules provided, namely a pension participant who, within two days of being separated from service and who was not of normal retirement age, sadly passed away without having had the opportunity, by reason of her illness, to exercise her right of election pursuant to Article 27 of the Fund Regulations.

50. Although the Fund, in its submissions to this Tribunal, argues that Ms. Assebe could have exercised the necessary election *prior* to being separated from service, Administrative Rule J.1 of the Fund Rules explicitly provides that the "member organization [...] shall, *upon separation*, inform the secretary of the pension committee of the participant's last day of service and [...] furnish such further information as the secretary may require for the purpose of computing the entitlements under the Regulations".⁷ That is true. However, it is equally the case that pursuant to Administrative Rule J.1 and, more particularly, to Article 27 of the Fund Regulations, an election post-separation remains an option for any pension participant. Thus, we hold that the Standing Committee's submission on this issue cannot be dispositive of the appeal.

51. While the Standing Committee in our view properly proceeded on the basis that Ms. Assebe should not be denied a right of election, given the unique circumstances of the case, it nevertheless considered itself compelled to tr

Standing Committee, relying as it does on the provisions of Article 30(b) to deny the request for an early retirement benefit, cannot be regarded as having been arrived at on a rational or sound basis. The absence of a specific rule in the Fund Regulations addressing the set of circumstances which presented before the Standing Committee does not entitle the Standing Committee to arbitrarily pluck a provision from the Fund Regulations as a substitute for the lacunae in the Fund Regulations. It follows that the matter must be remanded to the Standing Committee for de novo consideration as to how it should proceed in all the circumstances of the case.

Due process issues raised by Mr. Teklu

52. Mr. Teklu submits that his due process rights before the Standing Committee were not respected. He argues that he was not allowed to express his view or give oral testimony to the Standing Committee and that it is his belief that the review which was carried out was perfunctory. He also argues that the absence of a clear record of what transpired at the Standing Committee is problematic.

53. The allegations Mr. Teklu raises in his appeal are similar to those raised in the appeal by Mr. Pio, also considered this session⁸ and in Mr. Larghi's appeal, which the Appeals Tribunal previously rejected.⁹ In Larghi, we affirmed our decision in Ansa-Emmim, stating:¹⁰

... [...] “[A]ll proceedings which culminate in appealable decisions must be conducted in a reviewable manner, by observing the principles of natural justice. The affected party must get a proper hearing, and the order detailing a decision must contain sound reasons which can be judicially scrutinized upon appeal.” This is the standard we have set for appeals before the Standing Committee.

54. In the present case, we are not persuaded that Mr. Teklu's due process rights were violated by reason of his not being present before the Standing Committee. There is no suggestion from the correspondence he furnished to this Tribunal that he sought to be heard by the Standing Committee in person. While Mr. Teklu has raised the concern that his appeal is submitted to the Standing Committee by the very person whose decision he is appealing, we are satisfied that this concern is alleviated both by the fact that his case is presented in written form to the Standing Committee and by the composition of that body, which includes

⁸ Pio v. United Nations Joint Staff Pension Board, Judgment No. 2015-UNAT-569.

⁹ Larghi v. United Nations Joint Staff Pension Board, Judgment No. 2013-UNAT-343.

¹⁰ Ibid, para. 40, citing Ansa-Emmim v. United Nations Joint Staff Pension Board, Judgment No. 2011-UNAT-155.

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Original and Authoritative Version: English

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

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 26th day of January 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar