

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Anne C. Schepens against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB or the Pension Board, respectively) communicated to Ms. Schepens on 31 July 2017. Ms. Schepens filed her appeal on 18 October 2017, and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) filed its answer on 14 December 2017.

Facts and Procedure

2. Ms. Schepens entered the Fund for the first time on 18 February 2000 when employed as a Legal Officer with the United Nations Compensation Commission (UNCC). She separated from the service of UNCC on 28 February 2005.

3. On 20 April 2005, Ms. Schepens opted to defer her choice of benefit under Article 32 of the UNJSPF's Regulations. Article 32 provides that 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.

4. During the period in which she had deferred her choice of benefit, unbeknown to Ms. Schepens, Article 24(a) of the UNJSPF's Regulations, dealing with the restoration of prior contributory service for participants re-entering the Fund, was amended by the General Assembly in resolution 61/240 of 22 December 2006. The amendment made it easier for certain staff members to restore contributory service. Previously, only staff members with

15. Moreover, the Annual Letter of the Fund's Chief Executive Officer (CEO) addressed to participants, retirees and beneficiaries of the Fund, dated January 2007, noted that the General Assembly had approved, with effect from 1 April 2007, the elimination of the limitation on the right of restoration based on the length of prior contributory service. The CEO's letter stated that the Fund would transmit letters to those participants whose records indicate eligibility under the new provision. The Fund evidently sent letters to participants in order to satisfy that duty, but that was not done in her case. Ms. Schepens contends that the CEO's letter clearly showed that the Fund knew that it had a duty to inform participants of the changes in Article 24(a) and that it could not satisfy that duty by merely placing information on its website. By not informing her of her rights, Ms. Schepens submits, the Fund breached its duty of care towards her.

16. This breach has caused her considerable injury and must be appropriately remedied. The financial difference in her full retirement benefit at age 65 resulting from the non-restoration of her prior period of contribution may be estimated at USD 8,811 a year, which, taking into account an average life expectancy after retirement of between 20 and 25 years, amounts to an estimated total loss in her retirement pension of at least USD 200,000.

17. Finally, by giving the option to restore prior contributory service to participants in receipt of a withdrawal settlement, such participants have the double financial advantage of being able to use the funds during their employment outside of the common system and of benefitting from the increased accumulation rate resulting from joining their two pensions upon re-joining the Fund and restoration of prior contributory service. Participants who elected a deferred pension have none of these. This is not equitable. Furthermore, Article 24(a) is not consistent with the mobility policy of WHO and the United Nations and the portability of pensions that must accompany it.

The Fund's Answer

18. The Fund avers that the Standing Committee's decision was correctly based on the fact that Ms. Schepens did not meet the conditions for restoration as set out in Article 24(a) of the Fund's Regulations. Ms. Schepens elected, after 1 April 2007, to receive a deferred retirement benefit under Article 30 of the Fund's

There is no discretion to make an exception to its applicability in Ms. Schepens' case. In *Maher*,² the Appeals Tribunal confirmed that a participant who elected a deferred retirement benefit after 1 April 2007 was ineligible to restore his most recent period of prior contributory service.

19. Ms. Schepens' argument that the Fund failed to properly inform her of the amendments to Article 24(a) should be rejected. Ms. Schepens had a duty to acquaint herself with the Regulations and Rules in force from time to ti

Article 31 provided:

- (a) 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 a retirement benefit.
- (b) The settlement shall consist of:
 - (i) The participant's own contributions, if the contributory service of the participant was less than five years; or

has no right in terms of the express terms of the Fund's Regulations to restore her prior contributory service. Accordingly, there has been observance of the terms of the Regulations of the Fund and the appeal is unsustainable on the first issue.

29. In support of her submission that the Fund was in breach of a duty of good faith by not adequately informing her of the amendment and its implications, Ms. Schepens does not rely on any specific provision of the Regulations or Administrative Rules of the Fund imposing a duty on the Fund to disclose or provide information to participants about their benefit choices. She relies rather upon Judgment No. 2768 of the Administrative Tribunal of the International Labour Organisation (ILOAT) of 4 February 2009. In that matter, the complainant had not been properly informed by her employer, the European Patent Organization (EPO), of a time limit for applying for the transfer of her pension rights in a United Kingdom pension fund to the EPO's pension scheme. The ILOAT accepted that the application for transfer was indeed time-barred. It however concluded that the EPO was in breach of the principle of good faith owed by an employer to an employee. It stated:⁶

The principle of good faith and the concomitant duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform employees in advance of any action that may imperil their rights or harm their rightful interests (...). The duty of care is greater in a rather opaque or particularly complex legal situation. This is often the case when it is necessary to determine staff rights in technical fields, such as the determination of pension rights or the transfer of rights acquired by the staff member under a public or private pension scheme prior to being recruited by an organisation.

The ILOAT held that the duty of the EPO to properly inform employees demanded that it draw to the attention of staff members the possibility of obtaining a transfer of pension rights and to inform them of the procedure to be followed. It essentially ordered the EPO to compensate the staff member for any financial loss she may have suffered as a result of the breach of duty.

30. The present case is in some respects distinguishable from the decision of the ILOAT which is founded upon an employer's duty of good faith under the employment contract. The duty of good faith in the contract of employment is an implied synallagmatic or mutual obligation, infusing the contract with moral content, by which the employee agrees to honestly and faithfully serve the employer, not to abuse confidence and to protect and advance the

⁶ ILOAT Judgment No. 2768 (2009), Consideration 4.

employer's interests by all reasonable means in respect to matters confided to the employee in the course of service. The reciprocal obligation consists in part in the employer informing employees in advance of any action that may harm their rightful interests.

31. The relationship between a pension fund and its members and beneficiaries is somewhat different to the employment relationship. Its content is determined principally by the rules of the fund because the association between the contracting parties is not informed by any moral duty based upon the confidence and good faith required in the essentially co-operative relationship of employment. Consistent with this notion, Article 4(b) of the UNJSPF Regulations provides that the administration of the Fund shall be in accordance with the Regulations and with Administrative Rules consistent therewith. Article 4(d) adds that the assets of the Fund shall be used solely for the purposes of, and in accordance with, the Regulations.

communication with the Fund during the relevant period, but raised no query about her right to restore contributory service if she later re-joined the Fund. Her queries were related to the nature of the benefits she could expect on separation. While the duty of good faith requires the Fund to respond appropriately to a participant's legitimate requests for information, it cannot be expected of the Fund to provide information in relation to every conceivable contingency or possibility that might or might not eventuate in the future. The information regarding the change to the right to restore contributory service, as just said, was updated in the Fund's Regulations and was at all material times available on the Fund's website. In the absence of a direct, pertinent enquiry for information regarding that option, there was no duty on the Fund to keep

Judgment

35. The appeal is dismissed and the decision of the Standing Committee is affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Halfeld

Entered in the Register on this 23rd day of March 2018 in Amman, Jordan.