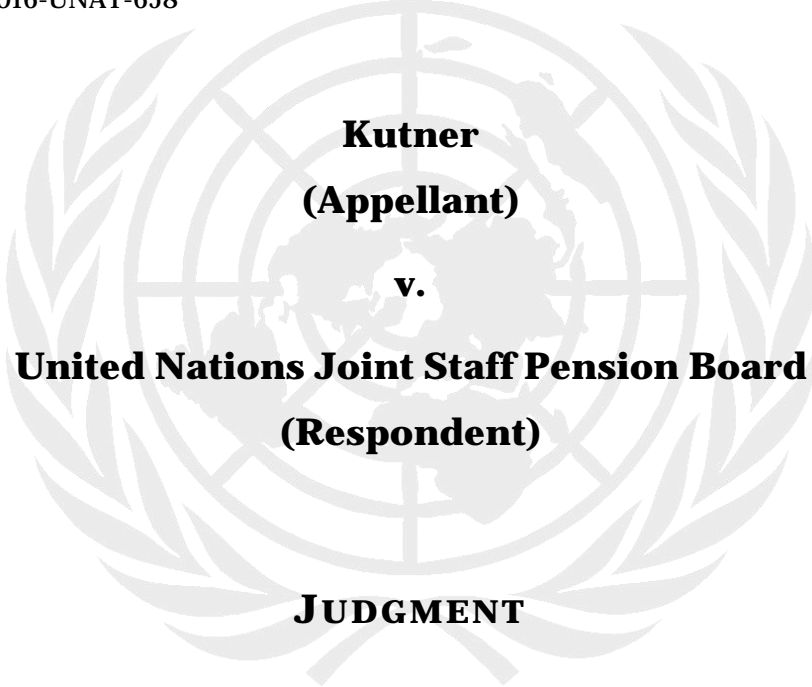




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-658



**Kutner
(Appellant)
v.
United Nations Joint Staff Pension Board
(Respondent)
JUDGMENT**

Before: Judge Inés Weinberg de Roca, Presiding
Judge Rosalyn Chapman
Judge Richard Lussick

Case No.: 2015-868

Date: 30 June 2016

Registrar: Weicheng Lin

Counsel for Appellant: Robbie Leighton, OSLA

Counsel for Respondent: Sergio Arvizú

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Daniel Kutner against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB, respectively) made on 22 July 2015. Mr. Kutner filed his appeal on 30 October 2015, and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) filed its answer on 16 December 2015.

Facts and Procedure

2. This appeal concerns Article 35 *bis* of the Regulations of the United Nations Joint Staff Pension Fund (Regulations) concerning divorced surviving spouse's benefit.

3. Mr. Kutner joined the Inter-Parliamentary Union (IPU) on 15 February 2004. At that time, IPU was not a member organization of the Fund. IPU became a member organization as from 1 January 2005.

4. On 31 December 2004, Mr. Kutner elected to have his service with IPU prior to 1 January 2005 recognized as contributory service with the Fund, in accordance with an agreement between the Fund and IPU, and Article 22(c) of the Regulations. Mr. Kutner's annual statements from the Fund have recorded his "beginning date" of contributory service as 15 February 2004, and his "date of entry into participation" as 1 January 2005.

5. Mr. Kutner separated from his first spouse in 2010, and divorce proceedings were commenced in Switzerland in 2012. From September 2013, Mr. Kutner and his lawyer engaged in correspondence with the Fund regarding Mr. Kutner's pension benefits and the divorced surviving spouse's benefit under Article 35 *bis* of the Regulations. The correspondence relevant to this appeal is summarised below.

6. On 30 September 2013, Mr. Kutner wrote to the Fund and inquired about the effect that his divorce would have on the surviving spouse's benefits in the event of his death:¹

I would like to know if it is possible to block payment of a portion of the surviving spouse's benefit to which my ex-wife would be entitled. I intend to remarry after the divorce and should like the entire sum of the surviving spouse's benefit to go either to

¹ Official translation of the original in French.

my future wife, or to my future wife and my three children (two born of my first marriage and one of the union with my future wife).

7. Also on 30 September 2013, a representative of the Fund responded by e-mail to Mr. Kutner's inquiry as follows: ²

Further to our telephone conversation this morning, I hereby confirm that your date of commencement of participation in the Fund is 1 January 2005 and that one of the conditions for your soon-to-be ex-wife to be eligible for a surviving spouse's benefit (under article 35 bis of the Regulations of the Pension Fund) is that "the participant had been married to the former spouse for a continuous period of at least ten years, during which contributions were paid to the Fund".

8. On 7 July 2014, Mr. Kutner wrote to the Fund as follows:

I was told by phone that if the divorce is pronounced in 2014 I will be able to name my future wife as beneficiary in the event of my death. This is of great importance to me[.] ... I would like to ensure that survivors' benefits are paid to the mother of the 2-year old[.] ...

Please confirm to me that if the divorce is finalized during 2014 I will be able to name my new spouse as beneficiary.

9. On 14 July 2014, a representative of the Fund (not the representative who had written to Mr. Kutner on 30 September 2013) responded as follows:

Should your estranged wife from whom you will be divorcing imminently outlive you, she will become entitled to a monthly pension benefit under Article 35bis (Divorced spouse's benefit) of the Fund's Regulations & Rules only if she fulfils all the conditions outlined in the said Article. ...

Please note that at this point your spouse currently meets two of the 4 conditions. Namely, that she was married for at least 10 years during which contributions were paid on account of your participation and that she is now over 40 years of age.

One of the two remaining conditions would depend on when your death would occur or if you have a legal obligation through the divorce to pay her a monthly amount at the point of death.

The last condition 4 will depend on the conditions of the divorce, whether she would have renounced the right to a monthly benefit from the UNJSPF.

² Official translation of the original in French.

10. On 18 July 2014, Mr. Kutner responded to the 14 July 2014 communication after consulting his lawyer. He stated that he disagreed with the interpretation of Article 35 *bis*, in particular the conclusion that his spouse had met the condition that he and his spouse had been married for at least 10 years during which contributions were paid to the Fund on his account (the 10-year contributions requirement). In essence, he claimed that the 10-year period ran from 1 January 2005 (the date on which IPU became a member organization of the Fund and from which contributions were paid to the Fund) and expired at the end of 2014. On 21 July 2014, the representative of the Fund informed Mr. Kutner that the matter would be referred for legal advice.

11. By judgment dated 4 September 2014, the Tribunal of First Instance in the Canton of Geneva dissolved Mr. Kutner's marriage. Mr. Kutner's divorce became final with effect from 10 October 2014.

12. On 28 October 2014, a Legal Officer of the Fund wrote to Mr. Kutner and explained that the determination of whether the 10-year contributions requirement was met "shall be based on [his] date of beginning of contributory service in the Fund which [was] 15 February 2004". This advice confirmed the Fund's earlier advice of 14 July 2014. On 29 October 2014, Mr. Kutner responded to the Legal Officer and reiterated his contention that the 10-year contributions requirement should be calculated from the beginning of 2005, not 15 February 2004. He also stated that he had been misinformed by the Fund in September 2013 regarding the matter.

13. From December 2014, Mr. Kutner sought further clarification from the Chief of the Legal and Compliance Unit of the Fund, who confirmed that the 10-year contributions requirement would be calculated from 15 February 2004.

14. By letter to Mr. Kutner dated 4 February 2015, the Chief, Geneva Office, UNJSPF, confirmed that his "Beginning Contributory Service" date was 15 February 2004. The letter noted that, following his decision on 31 December 2004 to have his prior contributory service with IPU recognized by the Fund, his Beginning Contributory Service date in relation to the start of his participation in the Fund was 15 February 2004.

15. On 6 March 2015, Mr. Kutner requested a review of the 4 February 2015 decision by the United Nations Staff Pension Committee (Pension Committee) under the Administrative Rules of the Fund. By letter dated 4 May 2015, Mr. Kutner was informed that the Pension Committee had decided to uphold the 4 February 2015 decision. The Pension Committee concluded that his Beginning Contributory Service date was 15 February 2004 and, consequently, his former spouse met the first requirement for eligibility for a potential divorced surviving spouse's benefit under Article 35 *bis* (b)(i) of the Regulations.

16. On 29 May 2015, Mr. Kutner appealed against the Pension Committee's decision to the Standing Committee under the Administrative Rules of the Fund. The Standing Committee considered Mr. Kutner's appeal at its 197th meeting, held on 22 July 2015.

17. By letter dated 3 August 2015, the Chief Executive Officer, UNJSPF, informed Mr. Kutner of the outcome of his appeal. The Standing Committee determined that Mr. Kutner's Beginning Contributory Service date for all benefits flowing from his participation in the Fund was 15 February 2004. This determination was based on his election on 31 December 2004 to have his service with IPU recognized as UNJSPF contributory service.

Submissions

Mr. Kutner's Appeal

18. Mr. Kutner argues that his appeal against the Standing Committee's decision is receivable. The decision regarding the Beginning Contributory Service date is final and has legal consequences. A final decision has been taken concerning one of the conditions that must be met in order for his former spouse to be entitled to a divorced surviving spouse's benefit under Article 35 *bis* of the Regulations.

19. Mr. Kutner claims that the Standing Committee's interpretation of Article 35 *bis* (b)(i) of the Regulations is contrary to its plain and normal meaning. The correct date for the commencement of the "period ... during which contributions were paid to the Fund" is 1 January 2005. This is the date that IPU became a member organization of the Fund and from which he began paying contributions to the Fund. He did not pay any contributions to the Fund in 2004.

20. The Standing Committee incorrectly equated the “period ... during which contributions were paid to the Fund” to his period of contributory service with the Fund, which began on 15 February 2004. The Standing Committee’s interpretation of Article 35 *bis* (b)(i) is contrary to the normal meaning of the Article. The phrase “contributory service” is used commonly in the Regulations, but it is not used in Article 35 *bis* (b)(i). According to the Article’s natural meaning, the payment of contributions specifically into the Fund is required in order to determine whether the 10-year contributions requirement is met. Treating his contributory service with IPU as contributions paid to the Fund is not consistent with the temporal element of Article 35 *bis* (b)(i).

21. Mr. Kutner also submits that he has a legitimate expectation that his former spouse will not qualify for a divorced surviving spouse’s benefit as a consequence of the Fund’s representations to him. The Standing Committee did not consider his legitimate expectation claim. On 30 September 2013, the Fund unequivocally stated in writing that the start date for determining whether the 10-year contributions requirement was met under Article 35 *bis* (b)(i) was 1 January 2005. He reasonably concluded that, should his divorce be finalized prior to 1 January 2015 (which it was), his former spouse would not be entitled to a divorced surviving spouse’s benefit. He relied upon the Fund’s representation to his detriment. By the time that the Fund informed him that the date to be used under Article 35 *bis* (b)(i) was in fact 15 February 2004, it was too late for him to correct his earlier reliance upon the Fund’s correspondence of 30 September 2013.

22. Mr. Kutner also argues that the Fund failed to specifically inform him that if his former spouse expressly renounced the pension benefit entitlements in the divorce settlement, she would not be entitled to a divorced surviving spouse’s benefit in accordance with Article 35 *bis* (b)(iv) of the Regulations. Relying upon this omission, he did not negotiate an explicit clause in which she renounced this benefit.

23. Mr. Kutner requests the Appeals Tribunal to rescind the Standing Committee’s decision and order that the date of 1 January 2005 be applied for the purposes of Article 35 *bis* (b)(i) of the Regulations. Should the Appeals Tribunal find that the Standing Committee’s interpretation of Article 35 *bis* (b)(i) is correct, he requests that the Appeals Tribunal find that he has a legitimate expectation that the date of 1 January 2005 will be applied in his case. In the alternative, he seeks compensation from the Fund

sufficient to make appropriate provision for his current wife should his former spouse be entitled to a divorced surviving spouse's benefit.

The Fund's Answer

24. The Fund contends that the date on which Mr. Kutner began his contributory service with the Fund (15 February 2004) will be used to calculate all of his pension benefits, including any widow's benefit and divorced surviving spouse's benefit. Contributory service accrues to a participant from the date of commencement of participation in the Fund to the date of cessation of participation. Additional contributory service may accrue to a participant, for example where service in a member organization prior to its admission to membership of the Fund is recognized under Article 22 of the Regulations.

25. The date on which Mr. Kutner began his contributory service with the Fund should also be used to determine whether his former spouse is entitled to a divorced surviving spouse's benefit in accordance with Article 35 *bis* (b)(i) of the Regulations. This is a consequence of Mr. Kutner's election to have his contributory service with IPU in 2004 recognized as contributory service with the Fund. Further, this approach is in accordance with the spirit and letter of the Regulations. The Chief Executive Officer of the Fund cannot adopt two different dates for the calculation of benefits that result from the same service. Mr. Kutner's election means that his period of contributory service with IPU in 2004 counts toward the calculation of his pension benefits (which include widow's benefit and divorced surviving spouse's benefit) and the 10-year contributions requirement in Article 35 *bis* (b)(i).

26. There was no reasonable basis for Mr. Kutner to believe that the date of 1 January 2005 would be used to determine if the 10-year contributions requirement in Article 35 *bis* (b)(i) was met. He was informed in writing on 14 July 2014 that the 10-year contributions requirement had been met. Further, his annual statements from 2005 record that his Beginning Contributory Service date is 15 February 2004.

27. Mr. Kutner's former spouse has a separate acquired right under Article 35 *bis* (b)(i) of the Regulations that can only be renounced as part of a divorce settlement. Absent such a renouncement, she may be able to challenge any determination that she is not entitled to a divorced surviving spouse's benefit.

28. The Fund requests the Appeals Tribunal to affirm the Standing Committee's decision.

Considerations

29. Mr. Kutner's appeal concerns the interpretation of Article 35 *bis* (Divorced surviving spouse's benefit) of the UNJSPF's Regulations. Article 35 *bis* states in part:

(a) Any divorced spouse of a participant or former participant, separated on or after 1 April 1999, who was entitled to a retirement, early retirement, deferred retirement or disability benefit, or of a participant who died in service on or after that date, may, subject to the provisions of article 34(b) (applicable also to widowers), request a former spouse's benefit, if the conditions specified in paragraph (b) below are fulfilled.

(b) Subject to paragraph (d) below, the divorced spouse is entitled to the benefit set out in paragraph (c) below, payable prospectively following receipt of the request for a divorced surviving spouse's benefit, if, in the opinion of the Chief Executive Officer of the Fund, all of the following conditions are fulfilled:

(i) The participant had been married to the former spouse for a continuous period of at least ten years, during which contributions were paid to the Fund on account of the participant or the participant was awarded a disability benefit under article 33 of the Regulations;

(ii) The participant's death occurred within 15 years of the date when the divorce became final, unless the former spouse proves that at the time of death the participant was under a legal obligation to pay maintenance to the former spouse;

(iii) The former spouse has reached the age of 40. Otherwise the benefit entitlement shall commence on the day immediately following the day that age is reached; and

(iv) Evidence is provided that a divorce settlement does not have an express renunciation of UNJSPF pension benefit entitlements;

(c) A former spouse who, in the opinion of the Chief Executive Officer, has met the conditions set out in paragraph (b) above shall be entitled to the widow's or widower's benefit under article 34 or 35 as the case may be; however, if the participant is survived by both one or more such former spouses and/or by a spouse entitled to a benefit under article 34 or 35, the benefit payable under article 34 or 35 shall be divided between the spouse and former spouse(s) in proportion to the duration of their marriages to the participant.

30. IPU became a member organization of the Fund with effect from 1 January 2005. On 31 December 2004, Mr. Kutner elected to have his service with IPU prior to 1 January 2005 recognized as contributory service with the Fund, in accordance with an agreement between the Fund and IPU, and Article 22(c) of the Regulations. As a result, the Fund's

annual statements informed Mr. Kutner that his contributory service commenced on 15 February 2004.

31. Mr. Kutner challenges the decision of the Standing Committee to equate the period during which contributions were paid to the Fund to the period of contributory service with the Fund for the purposes of Article 35 *bis* (b)(i) of the Regulations.

32. He wants the Standing Committee to accept the period of contributory service with the Fund in order to calculate his own benefit, but to take into account the period during which contributions were paid to the Fund vis-à-vis his former spouse.

33. Article 22 of the Regulations defines contributory service as follows:

(a) Contributory service shall accrue to a participant in pay status from the date of commencement to the date of cessation of participation. For the purposes of articles 28(b) and (c) and 29(b), separate periods of contributory service shall be aggregated except that in such aggregation no account shall be taken of periods of service in respect of which a withdrawal settlement was paid and which were not subsequently restored.

...

(c) Additional contributory service may accrue to a participant if prior service is validated or restored in accordance with article 23 or 24, or if service in a member organization prior to its admission to membership has been recognized as contributory.

34. The Appeals Tribunal has held that:³

The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the intent of the statute or regulation under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

³ *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

35. Articles 35 *bis* and 22 of the Regulations are clear and we cannot distinguish where the text is clear. For this reason, the same date will apply to the calculation of Mr. Kutner's benefits and the determination of whether his former spouse is entitled to a divorced surviving spouse's benefit under Article 35 *bis* (b)(i), i.e. 15 February 2004.

Judgment

36. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Chapman

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar