Judgement No. 281

(Original: English)

Case No. 267:
Hernández de Vittorioso

Against: **The Secretary-General of the United Nations**

Request by a former staff member of the Office of the United Nations High Commissioner for Refugees that she should be recognized as having been a staff member for the period of her service under special service agreements.

Clause included in special service agreements stipulating that the contractor shall not be considered in any respect as being a staff member of the United Nations.—Difference from the Teixeira case, since the special service agreements concluded with the Applicant specified that she would work on a "full-time basis".—Basic contradiction inherent in such an arrangement, which accords more fully with the status of a staff member.—The application is time-barred under Staff Rule 103.15 and article 23 of the Pension Fund Regulations.—Application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. Herbert Reis; Mr. Luis de Posadas Montero;

Whereas at the request of Mrs. Lidia Hernández de Vittorioso, a former staff member of the Office of the United Nations High Commissioner for Refugees, hereinafter called UNHCR, the President of the Tribunal, with the agreement of the Respondent, extended to 4 September 1981 the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 August 1981, the Applicant filed an application the pleas of which read as follows:

"3. The decision that Applicant is hereby contesting is embodied in a letter dated 17 March 1981 from the Assistant Secretary-General for Personnel Services. . . . It was taken on a report of the Joint Appeals Board dated 22 December 1980. . . .

"4. The aforementioned letter of 17 March 1981 . . . embodies two decisions, namely (1) not to extend Applicant's last fixed-term appointment beyond retirement age and (2) not to recognize Applicant as a staff member for the period of her service (1 June 1973 to 31 January 1975) with UNHCR under special service agreements.

"5. It is only against the latter of the two decisions that Applicant is hereby appealing.

"6. Applicant respectfully requests the Tribunal to rescind the decision she is contesting and to adjudge and declare that (1) during the aforementioned period of service under special service agreements her status was, in law, that of a staff member of the United Nations, that (2) her grade as such was the one at which she was recruited . . . as a staff member of UNHCR, namely P-2, and that (3) Respondent is under a duty to take all the actions necessary to place applicant in the situation in which she would now find herself had she, instead of serving during that period under special service agreements, served as a staff member of UNHCR at the P-2 grade."

Whereas the Respondent filed his answer on 4 September 1981;

Whereas the Applicant filed written observations on 4 December 1981;

Whereas the facts in the case are as follows:

The Applicant served with the UNHCR Branch Office for Southern Latin America at Buenos Aires from 1 June 1973 to 31 January 1975 under three consecutive special service agreements. On 1 February 1975 she received a fixed-term appointment for one year which was subsequently extended for another year. On 1 February 1977 this appointment was extended for five months. On 24 June 1977 the Applicant reached the age of 60. On 1 July 1977 her appointment was extended "for a period of six months beyond retirement date" i.e. until 31 December 1977, the last two extensions being covered by a single letter of appointment for eleven months.

In letters exchanged between the Applicant and various officials of UNHCR during 1977, the Applicant had expressed a desire for a further extension of appointment and had been advised that no such extension could be envisaged. On 16 September 1977 she addressed to the Secretary-General a letter reading in part:

". . .

"I wish to continue working with the United Nations (or one of the organizations of the United Nations system), not only because I feel eager and fit to continue serving the noble purposes of the Organization, but also in order to complete the minimum period of service required for a pension benefit from the United Nations Joint Staff Pension Fund.

"In support of my request I wish to draw your attention to a number of circumstances. If during the initial period in which my association with the United Nations was based on special service agreements, as distinct from letters of appointment, I had, instead, served as a staff member, I would be only six months short of the minimum period required for the pension benefit. Since, as pointed out earlier, the conditions in which I performed my duties were, to all intents and purposes, performed exactly as if I had been a staff member, I cannot help feeling that if I cannot, by continuing my service, qualify for a pension, I shall have been, to a considerable degree, the victim of a technicality. I would further observe that paragraph 5 of the Administrative Instruction relevant to my case (ST/AI/213 of 20 June 1972) includes, among the factors to be taken into account in dealing with a request such as this, 'the performance record of the staff member', and 'the amount of pension the staff member has already earned'. For in my case my performance has been characterized by the High Commissioner as 'outstanding' and, if I am not allowed to continue working for the United Nations or an affiliated organization during at least two years and one month after my separation from service with the High Commissioner, I shall never receive, by way of a pension, an income larger than the pension I am now receiving by virtue of my service with national institutions. And this pension is, even though many of my retired countrymen have to manage with no more, pitifully low. (I attach a slip showing the amount of my pension, which is the equivalent in Argentine pesos of little more than $US 100 per month).

"For all these reasons I am requesting that you kindly conduct a survey of the vacancies existing at present in the United Nations Secretariat, to ascertain whether a suitable opening could be found for me and that you use your discretion under the

above-mentioned Administrative Instruction in order that I may complete the minimum period of service required to qualify for a pension from the United Nations.

". . ."

On 19 October 1977 the Chief of Staff Services replied:

". . .

"As you are aware, the retirement age of staff members in the United Nations is 60 years. Any extension beyond the retirement age is authorized at the discretion of the Secretary-General in exceptional cases in the interest of the Organization. You have accordingly been granted an extension of your appointment beyond your retirement age through 31 December 1977 as an exception to Staff Regulation 9.5.

"Administrative Instruction ST/AI/213, to which you have referred states, in addition to the factors mentioned by you, that considerations such as availability of a suitable replacement whether by promotion from within the Secretariat or by recruitment from outside, should also be taken into account before exercising the discretionary authority to retain staff members beyond the retirement age. In your case, these considerations apply with a greater emphasis as you have already received one extension beyond the age of retirement. The High Commissioner for Refugees has correctly pointed out in his letter to you dated 10 August 1977, that we cannot request too many exceptions to the provisions of Staff Regulation 9.5 in the light of the established considerations covering retention of staff members who are serving on extensions beyond retirement age.

"I, therefore, have to confirm your retirement date as 31 December 1977. . . ."

On 28 November 1977 the Applicant again wrote to the Secretary-General referring to her earlier letter and adding:

"I wish further to avail myself of this opportunity to reinforce the arguments I advanced therein in support of my request by drawing attention to two recent judgements (Nos. 230 and 245) by which the ILO Administrative Tribunal stated that in determining the duration of an employment contract an organization could not disregard the right of the staff member concerned to a pension and that, by not granting him an appointment of appropriate duration, the organization had failed 'to take an essential fact into consideration'. I understand, moreover, that in at least one case similar to mine, namely that of a technical assistance expert, United Nations Secretariat *motu proprio* applied the principles I have quoted by taking action along the lines of that which I have requested.

". . ."

On 30 December 1977 the Applicant reiterated her request for an extension of appointment in a letter addressed to the Director of Administration of UNHCR. In a reply dated 19 January 1978 to the Applicant's letter of 28 November 1977, the Assistant Secretary-General for Personnel Services advised her that the Secretary-General, having reviewed her case, had decided to take no further action on her request; he added:

"The possible implications of the ILO Administrative Tribunal judgements cited by you were considered despite the lack of direct relevance. The two judgements in question referred to the duration of fixed-term appointments for staff below retirement age are not relevant to the case of staff extended beyond retirement age.

The case of a technical assistance expert is also irrelevant because staff appointed under the 200 series of the Staff Rules can be employed beyond the age of sixty."

On 16 March 1978 the Applicant sent the following letter to UNHCR:

"In my letter to Mr. Moussalli of 30 December 1977, . . . I intimated that if the UNHCR administration did not (1) recognize that I have continuously served UNHCR *as a staff member* from the date on which my first special service agreement with UNHCR became effective, namely 1 June 1973, to 31 December 1977, (2) take action retroactively to regularize my situation accordingly and (3) recognize its obligation to do all in its power to find employment for me during the minimum period of five months required for me to qualify for a pension from the United Nations, I would, to my regret, be compelled to seek relief in this respect under Chapter XI of the Staff Regulations and Rules and the Statute of the United Nations Administrative Tribunal.

"Since this letter . . . has remained without a reply to this day, I have no alternative but to initiate an appeal.

"Inasmuch as no decision exists yet which I can appeal under Staff Rule 111.3 (*a*), I hereby formally request you to be so kind as to take a position on the three claims I have formulated above and very respectfully put you on notice that, failing receipt by me of a communication from you taking such a position by 12 May 1978, I shall consider that I have been, for the purposes of Staff Rule 111.3 (*a*), notified of a negative decision on my three claims."

In a reply dated 14 June 1978, the Deputy Director of Administration of UNHCR stated *inter alia:*

"In your two letters [of 30 December 1977 and 16 March 1978] you did not indicate that you had addressed to the Secretary-General a request for review dated 28 November 1977 to which you received a negative reply dated 19 January 1978. In your memorandum of 16 March however, you raise a new point, namely that your period of service under three consecutive SSAs [special service agreements] be recognized as regular service, giving rise to participation in the Pension Fund.

"In your *aide-mémoire,* you allege that if this request is granted, you would only be five months short of the qualifying period of five years of service required to make you eligible for pension benefit. Assuming for the sake of argument that the SSAs are considered regular appointments, your statement to the effect that you would be only five months short of the period of five years would still be incorrect. In fact, your first SSA was for the duration of seven months through December 1973; your second SSA was for the duration of one year from 1 January to 31 December 1974. Article 21 of the Regulations of the UNJSPF provides that participation would commence 'upon commencing employment under an appointment for one year or longer or upon accepting such an appointment while in employment'. Therefore, the date of commencement of your hypothetical participation would be 1 January 1974. You would need to have served through 31 December 1978 in order to complete the five-year period. You would, therefore, be a full year short of the qualifying period and not only five months short as you seem to believe.

"Incidentally, as you probably know, under Regulation 9.5, retention of a staff member's services after retirement age is a discretionary decision which the Sec-

retary-General or the High Commissioner in the case of UNHCR staff, may take 'in the interest of the Organization'. There is absolutely no entitlement to superannuation, and none of the Judgements you are referring to, whether of the ILO Tribunal or of UNAT, deal with the question of retaining staff members beyond retirement age, as opposed to the simple question of determining the duration of an extension of a fixed-term appointment.

"UNHCR also feels that at no stage were you given to understand that you could expect to continue working for the Office beyond the statutory retirement age. It was therefore assumed that as you joined our Organization at a late stage in your working life, you had made other arrangements concerning your social security coverage.

"As to your claim regarding your status as a staff member during the period 1 June 1973 to 31 January 1975 . . . it is regretted that you did not submit your views in this respect at the time you accepted your SSA, which in its paragraph 4 stated clearly that you would not be considered a UN official. . . ."

On 27 July 1978 the Applicant requested the Secretary-General to review the decision rejecting her three claims. On 15 August 1978 she was advised that, having requested review of the decision not to retain her services beyond retirement age on 28 November 1977 and having received a negative reply on 19 January 1978, she had failed to observe the time-limits for the filing of an appeal; it was suggested to her, however, that she might choose to file an appeal anyway and request the Joint Appeals Board to waive the prescribed time-limits. On 13 November 1978 the Applicant lodged an appeal with the Joint Appeals Board which submitted its report on 22 December 1980. The Board's considerations, conclusion and recommendation read in part as follows:

"*Considerations*

". . .

"42. The Board found that the appellant had, in her letter of 16 March 1978, submitted various claims, which though related to the question of the extension of her employment by the United Nations, had not been mentioned in her original request for a review, that the Respondent had replied to these claims in a manner which could be regarded as an administrative decision against them and that the appellant had appealed in a timely manner against that decision. The Board therefore decided to examine the appeal in substance.

"43. The Board next examined the appellant's request to be recognized as having served as a regular staff member during the period of her service under special service agreements and to be paid the difference between the remuneration and allowances to which a staff member at the P-2 level would have been entitled and those which she received under the special service agreements.

"44. The Board found merit in the claim of the appellant that the functions for which she was engaged under the special service agreements were substantially the same for which she was later employed as a staff member on fixed-term appointment at the P-2 level. The Board noted that the appellant performed functions of a continuous nature and of substantial duration which, in terms of the policy contained in Personnel Directive No. 4/63 should not have been performed under special service agreements.

"45. The Board noted, however, that these agreements were freely entered

into by the appellant on three separate occasions and were performed by both sides according to their terms, except that the last agreement was tacitly brought to a conclusion when the appellant was appointed under fixed-term contract as a staff member as from 1 February 1975. The first time that the appellant questioned the validity of these agreements was on 30 December 1977.

"46. The Board finds an essential similarity, though there are some points of factual difference, between this appeal and the case of Mr. Ib Teixeira, which was dealt with substantively by the United Nations Administrative Tribunal in its Judgement No. 233. Mr. Teixeira had served under a long series of special service agreements, performing functions which he claimed gave him in fact the status of a regular employee. The Tribunal found that Mr. Teixeira, by entering into a series of special service agreements, had waived his rights to be 'considered in any respect as being a staff member of the United Nations' and could not use his factual situation as an argument to claim a legal status different from his contractual status. The Tribunal rejected Mr. Teixeira's claim concerning the inequality between his remuneration and that of his colleagues with a different contractual status.

"47. The Board therefore found that the appellant waived the right to contest the terms of her special service agreements by not contesting them during or at least immediately after their time of application.

"48. The Board considered that the remaining contentions of the appellant relating to the obligation by the Administration to provide renewed employment to her for a sufficient period for her to earn a pension could usefully be examined only if the appellant's period of service under her special service agreements could be validated as contributory service under the Joint Staff Pension Fund. Since the Board had found that it could not be regarded as a regular employment, *a fortiori* it could not be considered for validation as pensionable service.

"*Conclusion and recommendation*

"49. For the above reasons, the Board decides to make no recommendation in support of the present appeal."

On 17 March 1981 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General, having re-examined her case in the light of the Board's report, had decided to maintain the contested decisions. On 12 August 1981 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The special service agreements are extremely ambiguous regarding the question whether the Applicant's status thereunder was that of an independent contractor or that of a staff member.

2. The Applicant performed her obligations under the special service agreements under the full and constant authority of the head of the Buenos Aires Office and as an integral and essential part of the Office, for which reasons her status was necessarily that of a staff member.

3. A comparison of the Applicant's case with Tribunal case No. 214, *Teixeira*, confirms that her application is well founded.

4. The Respondent cannot maintain that the Applicant is estopped from claiming that the special service agreements should not be interpreted in the manner in which they

were interpreted in practice on the ground that she made no such claim while the agreements were still in force.

5. The *contra proferentem* rule of interpretation of contracts supports the Applicant's position.

Whereas the Respondent's principal contentions are:

1. The legal status of the Applicant is governed exclusively by the terms of the contract which expressly precludes her from being considered a staff member.

2. Contracts of employment with international organizations are governed exclusively by the International Administrative Law including in particular, the terms of the contract itself and any statutory rules adopted by the organization concerned but not by any given system of municipal law.

3. Even if the factual relations between UNHCR and the Applicant went beyond those normally associated with an independent contractor, these could not alter the Applicant's legal status to that of a staff member and an official of the United Nations.

4. The Applicant concluded the special service agreements freely and willingly, accepted her earlier status as a contractor and not as a staff member and never contested the validity of that status at the time or upon her subsequent appointment as a staff member.

The Tribunal, having deliberated from 27 April to 5 May 1982, now pronounces the following judgement:

I. Under a special service agreement commencing 1 June 1973, the Applicant worked as a contractor in the Office of the United Nations High Commissioner for Refugees in Buenos Aires. There followed two additional special service agreements until, after twenty months and without a break in work, the Applicant was employed as a staff member under a one-year fixed-term appointment beginning 1 February 1975. This appointment was twice renewed over a total period of thirty-five months when further employment was withheld since the Applicant had reached the 60-year mandatory retirement age. The claims put forward by the Applicant appear first to have been raised in a letter dated 16 September 1977 which she addressed to the Secretary-General. In that letter she requested, *inter alia,* that her work under the special service agreements be considered to have been employment as a staff member under regular appointment in order to count those twenty months as a period of contributory service in the context of an eventual pension. The plea now made by the Applicant asks the Tribunal to find that she had the status of staff member under the special service agreements, the consequences being that she would be entitled to salary and allowances payable to a staff member but not paid to her as a contractor, and to have the period of the special service agreements treated as a period of contributory service in the pension context.

II. The Tribunal cannot ignore the fact that the special service agreements into which the Applicant freely entered from 1 June 1973 contained a standard clause reciting that "The contractor shall not be considered in any respect as being a staff member of the United Nations". In this connexion, however, the Tribunal notes that the facts of this case are distinct from those of Teixeira (Judgement No. 233) where the Applicant worked episodically as a translator for the Economic Commission for Latin America. In the current case, the Applicant was employed under a special service agreement which expressly required her to perform services as an "Internal Subscriber on a full-time basis" for the Office of the United Nations High Commissioner for Refugees in Buenos Aires;

the subsequent special service agreements contained an identical clause specifying work to be performed "on a full-time basis". The Tribunal considers that it is inherently contradictory for the Administration to enter repeatedly into a special service agreement with an individual for services as a contractor where the agreement itself specifies work on a full-time basis, where this work is performed over a period of years, and where this work is without break. The facts in such a case are likely to comport more fully with the status of staff member than with that of independent contractor. While the Tribunal is not unaware of reasons why the Administration may wish on occasion to use the special service agreement rather than to employ on fixed-term appointment, long-term and repeated use of the special service agreement may produce unintended consequences where work performed is full-time, continuous and in other important respects indistinguishable from the work of individuals in the same office who have the status of staff member.

III. It is not in dispute that the Applicant was employed as a staff member on a fixed-term appointment on 1 February 1975. Whatever her earlier status, she was as of that date a staff member. Consequently, any possible claim for recomputation of the payments received by her under the special service agreements is excluded by Staff Rule 103.15, which prohibits retroactive receipt of an allowance, grant or payment "unless the staff member has made written claim . . . (ii) . . . within one year following the date on which the staff member would have been entitled to the initial payment." With respect to the possible consequence in terms of credit under the Pension Fund, Article 23 of the Pension Fund Regulations enables a participant, which the Applicant became no later than 1 February 1975, to "elect", subject to specified conditions, "within one year of the commencement of his participation, to validate prior service during which he was not eligible under these Regulations for participation . . .". Any claim for credit as contributory service would thus have been timely only if made by 1 February 1976.

IV. Thus, even were the Tribunal to determine that the Applicant should be considered to have had the status of staff member during the period of the special service agreements from 1 June 1973 through 31 January 1975, she would be entitled neither to a retroactive salary recomputation nor to a recalculation of contributory service under the Pension Fund because of failure to present claims in a timely manner.

V. For the foregoing reasons, the Tribunal rejects the pleas of the Applicant.

(Signatures)

Endre USTOR
President

Luis de POSADAS MONTERO
Member

Herbert REIS
Member

Jean HARDY
Executive Secretary

Geneva, 5 May 1982