XI. For the foregoing reasons, the application is rejected.

(Signatures)

R. VENKATARAMAN
President

Endre USTOR
Member

Roger STEVENS
Member

Jean HARDY
Executive Secretary

New York, 12 October 1978

Judgement No. 233

(Original: French)

Case No. 214: Teixeira

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

Request by a person who has concluded a series of special service agreements to be recognized as having the status of staff member.

Request that the Tribunal rule that the link established between the Applicant and the Economic Commission for Latin America (ECLA) gave him in fact the status of a regular employee.—Applicant agreed to the conclusion of special service agreements giving him the legal status of an independent contractor.—The Tribunal is not called upon to take into account personal considerations which may have led the Applicant to act in such a manner.—Conclusion of the Tribunal that the Applicant cannot use his factual situation as an argument to claim a legal status different from his contractual status.—Charge that the Respondent abusively used the special service agreement procedure.—Although improper, this practice was favourable to the Applicant.—Conclusion of the Tribunal that the Applicant is not entitled to claim that he sustained any injury because of the renewal of his special service agreements.—The Applicant's claims concerning the inequality between his remuneration and that of his colleagues are rejected.—Right of the Applicant to a termination indemnity.—The amount of the indemnity is fixed at $3,000.—All other requests are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. T. Mutuale; Mr. Francis T. P. Plimpton, Vice-President, alternate member;

Whereas, on 3 September 1976, Ib Teixeira filed an application in which, *inter alia*, he requested the Tribunal:

> "To rule that he had in fact become a staff member of ECLA [Economic Commission for Latin America] and that as such his appeal on the merits of the case should be receivable either by the Joint Appeals Board or directly, but subsequently, by the Tribunal itself";

Whereas by its Judgement No. 230 of 14 October 1977, the Tribunal declared itself competent to pass judgement on the application and decided that, unless the parties settled the matter, the Applicant could file with the Tribunal an explanatory memorandum and pleas dealing with the merits of the case;

Whereas, on 6 March 1978, the Applicant filed an explanatory memorandum in the pleas of which he requests the Tribunal:

"A. To rule that the link established between him and ECLA gave him in fact the status of a regular employee as opposed to that of an independent or occasional worker;

"B. To rule that the Administration committed a misuse of procedure by continuing, for improper purposes, to use the special service agreement procedure designed for independent or occasional workers rather than using the normal recruitment procedure;

"C. To rule that the Applicant was deprived of more substantial sums and advantages that were due to him by reason of his real status;

"D. Independently of paragraphs A, B and C, to rule that the Administration committed an error in acting contrary to certain general principles of law and certain basic rights recognized by international law and national labour laws by keeping the Applicant in a situation where for performing work equal to that performed by other employees he received a lower salary while obtaining neither the mandatory minimum periods of rest nor decent working conditions;

"E. To declare the agreements signed from April 1965 onwards null, because their essential clauses conflicted with certain principles and laws mentioned in paragraph D, because of their leonine character and because of the misuse of procedure;

"F. To condemn the Administration to pay the Applicant the sums due by virtue of paragraph C and to pay the damages resulting from the error mentioned in paragraph D. In both cases or in either case, the sum is evaluated at $201,186.42, according to the detailed calculations given in the explanatory memorandum.";

Whereas the Respondent filed his answer on 11 April 1978;

Whereas the Applicant filed written observations on 26 May 1978;

Whereas the Applicant submitted an additional written statement on 2 June 1978;

Whereas the facts in the case are set out in Judgement No. 230;

Whereas the Applicant's principal contentions are:

1. The Applicant's status vis-à-vis ECLA was in fact that of a regular employee, for it met all of the following criteria: the continuing character of the functions; the exclusive character of the functions; the effective character of the supervision exercised by the Administration; the nature of the function and in particular the fact that those functions were habitually performed under the direction of the employer; the fact that the employer provided the facilities for the performance of the work; the fact that the employee was paid on a time-linked and not on a piecework basis; the fact that the work performed formed part of the normal functioning of the organization; the fact that the parties to the contract behaved as though their situation were that of employer and agent; and the fact that it was a matter of public knowledge that the Applicant acted as an agent and was considered as such by the local community.

2. The Administration committed a misuse of power by using the special service agreement procedure improperly. The question whether that misuse of procedure was intentional or not can only alter the degree of gravity of the error and can in no way influence the existence of the error.

3. The Applicant was deprived of the salaries, indemnities and advantages pertaining to his functions.

4. The Administration failed to respect certain general principles of law and certain basic rights granted by the labour law of "civilized nations", notably that of equal rights for equal work, the right to rest and the right to social security.

5. The contracts signed by the Applicant from 1 April 1965 onwards should be declared null because their purpose is wrongful (avoidance of the obligations embodied in the Staff Regulations), because they are the outcome of a misuse of power and because of their leonine character.

Whereas the Respondent's principal contentions are:

1. The legal status of the Applicant is governed exclusively by the terms of the contract.

2. The contracts entered into by the Applicant established his status clearly and unambiguously.

3. The Applicant entered into those contracts freely and never contested their validity.

4. The improper use of established methods and procedures by ECLA is not a cause of action by the Applicant in the absence of wrongful intent.

5. Even if the factual relations between ECLA and the Applicant went beyond those normally associated with an independent contractor, they could not alter the Applicant's legal status.

6. The relationship between the Applicant and ECLA was not, in fact, that of a staff member. It was discontinuous as regards duration, assignments and levels and methods of remuneration. The Applicant was under no legal obligation to work exclusively for ECLA or to conform to any particular working hours. The services performed by the Applicant could properly have been performed under many special service agreements.

7. There is not the slightest evidence that the ECLA administration deliberately and with intent used the special service agreements for any wrongful purpose.

8. Speculation as to the career that the Applicant might have made had he been integrated into the staff is irrelevant.

9. The contracts entered into by the Applicant are not in any way contrary to fundamental principles of labour law applicable to independent contractors.

10. The Applicant's conduct shows that he did not consider that the contracts were leonine in character.

The Tribunal, having deliberated from 27 September to 13 October 1978, now pronounces the following judgement:

I. In his principal plea, the Applicant requests the Tribunal "to rule that the link established between him and ECLA gave him in fact the status of a regular employee as opposed to that of an independent or occasional worker". With regard to that link, the Tribunal notes first that the Applicant never contested the exact terms of the special service agreements defining the reciprocal legal relations between him and the Admin-

istration. He bases his request not on the clauses of those agreements but on his factual situation, which he claims is in contradiction with his contractual status.

II. The Tribunal notes that the Applicant himself at least contributed to the creation and renewal of that situation by agreeing to conclude with the Administration, during a period of almost 10 years, special service agreements under which he accepted the legal status of an independent contractor and expressly and unambiguously waived being "considered in any respect as being a staff member of the United Nations".

III. The Applicant mentions his condition as a political refugee and other circumstances which allegedly obliged him to enter into successive special service agreements in which he renounced that which he now requests. On this point, it suffices for the Tribunal to observe that in law the Applicant was free to refrain from entering into those agreements. Furthermore, the Tribunal is not called upon to take into account personal considerations which may have led the Applicant to accept a status other than that of a staff member of the United Nations. It agrees with the Respondent that those considerations could only be taken into account if it was established that the Administration had used the Applicant's condition as a refugee to treat him in an unfavourable manner. However, such is not the case in this instance. Moreover, the Tribunal observes that the Applicant did not raise any objections until his last contract had expired, in his memorandum of 25 July 1974 addressed to the Division of Administration of ECLA.

IV. For all these reasons, the Applicant cannot use his factual situation as an argument to claim a legal status different from his contractual status.

V. With regard to the charge that the Respondent abusively used the special service agreement procedure for improper purposes, the Tribunal notes that the Administration itself acknowledges that in the Applicant's case the use of that procedure was contrary to the relevant instructions (Personnel Directive No. 4/63 of 15 July 1963).

VI. However, the Tribunal notes that according to the memorandum of 13 January 1965 from the Chief of Information Services, ECLA sought to appoint the Applicant to a permanent post. However, ECLA was unable to offer him a post because it could not obtain the necessary funding from Headquarters and it therefore continued to have recourse to the practice of special service agreements. Thus, although improper, this practice, which is criticized by the Applicant, was favourable to him, since it enabled him to continue rendering services and receiving remuneration.

VII. The Tribunal further observes that the Applicant had been kept informed of the outcome of the steps taken on his behalf by ECLA. Although he was warned that he could not count on a contract as a staff member, the Applicant, who had signed a special service agreement on 30 July 1964, continued to enter into such agreements with the Administration until 31 October 1973, when his last agreement expired.

VIII. In these circumstances, The Tribunal considers that the Applicant is not entitled to claim that he sustained any injury because of the renewal of his special service agreements and especially of those concluded after ECLA had approached Headquarters. Consequently, the Applicant is not entitled to request the Tribunal to rule that those agreements were leonine and to declare them null.

IX. Furthermore, while admitting that on "25 occasions" he "clearly waived his statutory rights by agreeing to be maintained under as many special service agreements", the Applicant contends that "such waivers are not recognized as valid when they entail serious inequality of treatment among staff members" and that "as a full-time translator-

information officer he was paid $375 per month at a time when his colleagues performing equivalent duties were receiving more than four times as much''.

X. In the view of the Tribunal, the Applicant could not claim that he and his colleagues were treated unequally unless there were special service agreements providing that they would perform the same duties but receive different remunerations.

XI. There are thus no grounds for accepting the Applicant's claims concerning the inequality between his remuneration and that of his colleagues, or those concerning his right to rest and to social security: the Applicant derives those claims from a hypothetical situation which he alleges to have been his, but such claims are not grounded in law for the reasons set forth above.

XII. However, in view of the length of the period during which the Applicant worked for ECLA and the Administration's ratings of the quality of his work, as are contained in the dossier, the Tribunal considers that, although his contracts contained no provisions to that effect, the Applicant could count on receiving a termination indemnity from the Respondent. Given the circumstances of the case, the Tribunal decides that he was entitled to such an indemnity and fixes the amount thereof at $3,000.

XIII. All other pleas are rejected.

(Signatures)

Suzanne BASTID
Vice-President, presiding

Francis T. P. PLIMPTON
Vice-President, Alternate Member

Francisco A. FORTEZA
Member

Jean HARDY
Executive Secretary

T. MUTUALE
Member

New York, 13 October 1978

Judgement No. 234

(Original: French)

Case No. 203: Johnson *Against:* **The Secretary-General of the United Nations**

***Application for an interpretation of Judgement** No. 213.*

***Co-application for an interpretation of the** provisions of the Judgement concerning the payment of **compensation to the Applicant.—Dispute concerning** the meaning of the term ''two years' net base salary''.—**The Applicant's salary, established in dollars,** is paid in Swiss francs.—**Changes in the exchange rate of the dollar in Geneva.—In order to calculate** in Swiss francs the compensation awarded by the*