

ADMINISTRATIVE TRIBUNAL

Judgement No. 423

Case No. 453: ISAACS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, Vice-President, presiding;
Mr. Ahmed Osman; Mr. Francisco A. Forteza;

Whereas, on 10 December 1987, Laurel Robin Isaacs, a staff member of the United Nations and former staff member of the United Nations Institute for Training and Research, hereinafter referred to as UNITAR, filed an application, the pleas of which read as follows:

"II P L E A S

[The] Applicant respectfully requests the Administra- tive Tribunal to take the following decisions and order the following measures:

- 1 - To decide that [the] Applicant has been a full-time member of the staff of UNITAR since 1 August 1975.
- 2 - To decide that throughout her service with UNITAR, [the] Applicant was not expressly excluded by the terms of her appointment from participation in the United Nations Joint Staff Pension Fund in accordance with the proviso to article 21 of the Regulations of the United Nations Joint Staff Pension Fund (...).
- 3 - To decide that the Executive Director of UNITAR, in his employment of [the] Applicant, had not fully observed the conditions of para. 2 of article V of the UNITAR Statute (...) i.e. that 'The terms and conditions of service of the staff shall generally conform to the United Nations Staff Regulations and Rules, subject to such arrangements for special rules or terms of appointment as may be agreed by the

Executive Director and the Secretary-General.'

- 4 - To decide that no special rules or terms of appointment had ever been agreed by the Executive Director and the Secretary-General which would have the effect of excluding [the] Applicant from participation in the Joint Staff Pension Fund.
- 5 - To decide that the de facto non-inclusion of [the] Applicant in the Joint Staff Pension Fund between 1 August 1975 and 31 December 1984 was inconsistent with [the] United Nations staff rule 106.1 (...) which provides that 'Staff members whose appointments are for six months¹ or longer or who complete six months* of service under shorter appointments without an interruption of more than 30 days shall become participants in the United Nations Joint Staff Pension Fund, provided that participation is not excluded by their letters of appointment.'
- 6 - To order the Respondents to accept and implement the validation of [the] Applicant's non-contributory service for the period of 1 August 1975 through December 1984 in conformity with article 23(a) of the Regulations of the United Nations Joint Staff Pension Fund.
- 7 - To order the Respondents to pay forthwith into the United Nations Pension Fund the UNITAR contribution of 14 per cent of [the] Applicant's pensionable remuneration, with interest, for the aforesaid period i.e. from 1 August 1975 through December 1984 in accordance with article 25(c) of the Regulations of the United Nations Joint Staff Pension Fund, bearing in mind that [the] Applicant has consistently expressed her willingness to pay her share of 7 per cent, with interest, for the same period."

Whereas the Respondent filed his answer on 13 July 1988;

Whereas the Applicant filed written observations on 3 August 1988;

Whereas, on 26 September 1988, the Executive Secretary of the Tribunal transmitted to the Secretary of the United Nations Joint Staff Pension Board (UNJSPB) the pleadings concerning this case, under article 21 of the Rules of the Tribunal;

¹ In 1975 the staff rule stipulated a period of one year. The rule was amended effective 1 January 1983 to limit the period to six months.

Whereas, on 12 October 1988, the Tribunal put questions to the Respondent and on 17 and 21 October 1988, the Respondent provided answers thereto;

Whereas, on 25 October 1988, the Secretary of the UNJSPB submitted comments on the case;

Whereas the facts in the case are as follows:

Laurel Robin Isaacs entered the service of UNITAR on 1 August 1975. She was initially offered a three month special service agreement as a consultant to UNITAR "on all matters concerning the production and dissemination of the Institute's publications...". The agreement stipulated that the Applicant would "be considered as having the legal status of an independent contractor" and would "not be considered in any respect as being a staff member of the Institute". As regards her rights and obligations, they would be "strictly limited to the terms and conditions of [the] agreement" and she would "not be entitled to any benefit, payment, subsidy, compensation or entitlement, except as expressly provided in [the] agreement."

The Applicant was then offered a nine month "special fellowship," effective 1 November 1975, under specified terms and conditions set forth in a Letter of Award. The Applicant was entitled to a \$1,200 monthly payment and to "other entitlements and benefits" such as annual leave, sick leave and compensation in the event of death, injury or illness attributable to the performance of services on behalf of the Institute. Although the Letter of Award provided that the Applicant would "not be entitled to any other benefits or payments", under a section on General conditions, it was specified that during the tenure of the appointment, the Applicant would "have the status of an official of the United Nations in accordance with article V of the UNITAR Statute" and that "conditions of service other than those referred to in this letter will be governed generally by the United Nations Staff Regulations and Rules." According to the statement of facts agreed to by the

Applicant and the Respondent, the Letter of Award which expired on 31 July 1976² was extended for a series of successive fixed-term periods of four months, until 31 December 1976; one year until 31 December 1977; six months until 30 June 1978; one year until 30 June 1979; one year until 30 June 1980; six months until 31 December 1980; one year until 31 December 1981; one year until 31 December 1982; six months until 30 June 1983; six months until 31 December 1983 and, finally, three months until 31 March 1984.

In every letter advising the Applicant that the Executive Director had approved an extension of her "special fellowship" for a fixed-term period of one year or less, UNITAR stipulated that "the terms and conditions [of the appointment] will remain the same". In some of these extensions, changes were made with regard to the monthly salary and the functional title.

On 1 April 1984, the Applicant was offered a six months special service agreement, as a "Consultant responsible for UNITAR publications". The special service agreement was extended for two successive fixed-term periods of two months, and one month until 31 December 1984.

On 1 January 1985, the Applicant was offered a one year fixed-term appointment under the 100 Series of the Staff Regulations and Rules. The appointment included a reference, in clause 4, to the Regulations and Rules of the United Nations Joint Staff Pension Fund (UNJSPF). The Personnel Action form processed to implement the letter of appointment indicated that the Applicant was a participant in the Pension Fund.

The Applicant's appointment was successively extended for a series of further fixed-term periods of seven months until 31 July 1986; five months until 31 December 1986; one year until 31 December 1987; six months until 30 June 1988, and two months until 31 August 1988. During the course of this last appointment, on 1 August 1988,

² Although the month of August is not accounted for, the Respondent agrees that the Applicant "had an accrued annual leave balance ... enough to cover the entire month of August...".

the Applicant was transferred to the United Nations Secretariat. She presently works in the Department of International Economic and Social Affairs (DIESA).

In a memorandum dated 19 November 1985, the Applicant requested the Secretary, UNJSPF, to validate her "prior service for the purpose of pension benefit based on [her] employment by UNITAR, which began in August 1975 on a three month Special Service Agreement, continued from 1 November 1975 under a Letter of Award, and was finally converted to a 100 Series retroactive to 1 January 1985". The Applicant attached to her memorandum a copy of decisions adopted by the UNITAR Board of Trustees at the conclusion of its twenty-third session. In its decision 4(2) (1985) the Board had authorized the Executive Director to make a 1986 General Fund budget allocation of US\$100,000, comprising the first of three payments, to settle Pension Fund claims of former UNITAR holders of Letters of Award.

On 31 March 1986, the Executive Director of UNITAR wrote to the Secretary of the Pension Fund concerning claims for validation of non-contributory service with UNITAR by holders of Letters of Award, such as the Applicant. He asserted that he had found no written evidence to contradict "the mutual understanding by UNITAR Administration and the holders of LOA [Letter of Award] contracts that pension entitlement was among the excluded benefits." He noted that a legal concession by UNITAR could have serious financial consequences far beyond the US\$250,000 involved in six earlier claims, with the addition of new claims such as the Applicant's, and the possibility of legal claims concerning other benefits. He therefore proposed that previous service under Letters of Award be validated for pension purposes for seven claimants, including the Applicant, from the year of the Administrative Management Service study which recommended rationalization of the UNITAR system of employment contracts. After the study's completion and implementation in 1981, UNITAR had acknowledged the inadequacy of the Letter of Award contracts and decided to add all the excluded

staff benefits, including pension. As regards the Applicant, the Executive Director's proposal covered the Applicant's period of non-contributory service from 1 July 1980 to 31 March 1984.

In a reply dated 16 May 1986, the Secretary of the Pension Fund challenged the Executive Director's conclusion that "there was no doubt on both sides about the deliberate exclusion of pension benefits in the LOA [Letter of Award]". He noted that under article 21 of the Pension Fund's Regulations, in order to exclude a staff member from participation in the Fund, the exclusion "must be clearly spelled out by the terms of his appointment. In other words, under the Fund's Regulations, exclusion must be explicit, and not merely implied." As regards the Executive Director's proposal concerning the starting point at which UNITAR should be willing to recognize service as pensionable, this was a "matter that UNITAR should negotiate with the staff members". Once an agreement had been reached, it should be put in writing and signed by the staff members of UNITAR.

In a letter dated 26 January 1987, the Executive Director proposed to the Applicant to recognize as contributory service during her employment with UNITAR under several Letters of Award, the period running from 1 July 1980 until 31 March 1984, "even though [her] claim related to a period during which [her] entitlements did not include participation in the Fund". He also indicated his intention "to make appropriate arrangements to facilitate recognition of [her] period [of service] under Special Service Agreement from 1 April to 31 December 1984". The proposal represented 54 months of prior non-contributory service with UNITAR.

The Executive Director asked the Applicant to let him know in writing not later than 28 February 1987, whether she accepted the terms of this settlement, including her commitment to pay to UNITAR her lump sum contribution of US\$8,455.35 by 31 July 1987.

In a reply dated 19 February 1987, the Applicant rejected the Executive Director's proposal, since failure to recognize the first five years of her service would mean, upon retirement, a loss of

possibly thirty percent of her final remuneration, an amount she could not afford to relinquish in view of her personal circumstances. She therefore requested to validate her prior non-contributory service from the original date of her entry on duty at UNITAR, 1 August 1975. In a memorandum dated 27 February 1987, the Executive Director informed the Applicant that his proposal was intended as a final settlement of her claim, and "without prejudice to the basic legal position of UNITAR," which in her case meant that when she accepted a series of UNITAR Letters of Award since 1975, she had been fully aware that she had not been "appointed as a regular staff member under the 100 or 200 Series of the United Nations Staff Rules, but rather as a UNITAR Fellow with a certain number of staff benefits as enumerated in the contracts, but not including pension and other benefits".

In a reply dated 10 March 1987, the Applicant proposed that the Executive Director proceed to validate her service with UNITAR from 1 July 1980 through 1 January 1985, without prejudice to what he considered was UNITAR's basic legal position and with the understanding that she had not waived her right to have the remaining period of uncovered service validated, namely from 1 August 1975 through 30 June 1980.

Not having received a reply, on 13 March 1987, the Applicant requested the Secretary-General to review UNITAR's Executive Director's administrative decision. On 13 May 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 1 June 1987, the Applicant requested the Secretary-General's agreement to submit her application directly to the Administrative Tribunal. On 22 October 1987, the Secretary-General granted the Applicant's request.

On 10 December 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Executive Director and the Secretary-General have

not agreed to any "special rules" or "terms of appointment", pursuant to article V.2 of the UNITAR Statute, that would preclude the application of UN staff Regulations and Rules to UNITAR staff.

2. Exclusion of full-time UNITAR staff from participation in the Pension Fund is not provided for in the UNITAR Statute and would not only run counter to the UN Staff Regulations and Rules but would be inconsistent both with article V of the UNITAR Statute and with article 21(a) of the Regulations of the UNJSPF.

3. The Applicant's service with UNITAR from 1 August 1975 through 31 March 1984 was governed by letters of appointment that included no reference to the Pension Fund and no express exclusion from participation.

4. Conditions of service set forth in the Staff Regulations and Rules and in the Regulations of the UNJSPF confer inherent rights upon UN staff, and UNITAR staff as clearly stipulated in article V of the UNITAR Statute. These rights should not be subject to negotiation, compromise or bargaining.

Whereas the Respondent's principal contentions are:

1. During the Applicant's employment with UNITAR under four separate Special Service Agreements she was an independent contractor, was neither an official nor a staff member of the United Nations and was, therefore, ineligible for participation in the UNJSPF.

2. The Applicant was an official and a staff member of the United Nations during the period from 1 November 1976 to 31 March 1984. Notwithstanding that status and its presumption of participation in the UNJSPF, the Applicant was nevertheless not entitled to participate by the terms of her Letter of Award.

3. Under its Statute, UNITAR's Executive Director is authorized to appoint staff whose terms and conditions of service need not fully conform to the UN Staff Regulations and Rules; the exercise of that authority by the Executive Director was unaffected by lack of a formal agreement with the UN Secretary-General.

4. Since the Applicant's claim would require retroactive payments by the Respondent, it is subject to staff rule 103.15, which prohibits such payments if not claimed within one year of the due date.

5. The Respondent disputes the Applicant's assertion that the settlement offer she received "implicitly recognized" the validity of her claim and requests the Tribunal not to consider parts of the application which refer to that offer.

The Tribunal, having deliberated from 11 October 1988 to 26 October 1988, now pronounces the following judgement:

I. This case involves the following questions:

(a) Was the Applicant, who was employed continuously by UNITAR from 1 August 1975 to 31 July 1988, and who became a participant in the Pension Fund on 1 January 1985, a UN staff member during the period of her employment?

(b) If the answer is in the affirmative, was she entitled at any time, under the Regulations of the UNJSPF, to become a participant in the Fund during such employment?

(c) If she was so entitled, and was not validly excluded, is UNITAR obliged to correct its administrative error?

II. This being so, it is clear that no question of "validation" in the sense of article 23 of the UNJSPF Regulations is involved, but only a question of entitlement to participation in the Fund.

III. In regard to I(a), the preliminary question to be answered is whether UNITAR was part of the UN. In Judgement No. 390, Walter (1986), the Tribunal held that "UNITAR has no legal status of its own." It was established at the request of the General Assembly by the Secretary-General. The Statute defines UNITAR as "an autonomous institution ... within the framework of the UN ...". This indicates that UNITAR is part of the UN and, hence, that staff members of

UNITAR are staff members of the UN.

IV. Was the Applicant a staff member of UNITAR?

There seems to be no doubt that, except for the periods during which she was a consultant, employed under special service agreements, which, by definition, gave her a status other than as a staff member (i.e., from 1 August to 31 October 1975 and from 1 April to 31 December 1984), the Applicant was a staff member, i.e., between 1 November 1975 and 31 March 1984. As such, she would, under the then existing UNJSPF Regulations have become a participant as from 1 November 1976, when, under her original nine-months appointment and its subsequent extensions, she completed one year of service. The Applicant could then have validated the prior year of non-pensionable service unless she was validly excluded by her original appointment. However, UNITAR did not enter her in the Fund because it considered that she was excluded from participation by her original letter of appointment. The Respondent's contention that the reference in the extensions of the appointment to the clause in the original Letter of Award to the effect that "you will not be entitled to any other benefits or payments" than those specifically listed, which did not include participation in the Pension Fund, amounts to an exclusion from the Fund, is in the Tribunal's opinion, not tenable.

V. The absence of an explicit mention of entitlement to Pension Fund participation in the first Letter of Award can properly be explained by the fact that because the Applicant's appointment was for less than a year, she was not entitled to such participation. Hence, reference to the Pension Fund or the absence thereof, did not affect the Applicant's rights. Listing participation among the Applicant's entitlements, or not listing them in the original Letter of Award, made no difference. An express provision of exclusion would have had to be included in the original Letter of Award if UNITAR's intention was that even under future contracts, which might

carry with them the right of participation in the Fund, the Applicant should have no right to validate that period.

VI. As the original contract did not contain such a provision, subsequent contracts which merely reiterated a clause having no bearing on the Applicant's pension rights, actual or potential, cannot be construed as having been converted to what it never was, i.e., an exclusion from the Pension Fund.

VII. From this analysis, it follows that not entering the Applicant in the Fund on 1 November 1976 was an administrative error which should be corrected. The Pension Fund no doubt will expect UNITAR to pay the actuarial cost of a retroactively pensionable period, including that from 1 November 1975, which could have been validated, with the Applicant paying the contribution which would have been due from her, together with interest.

VIII. Not much argument is required to refute the Respondent's contention, that irrespective of whether the clause "you will not be entitled to any other benefits or payments" effected exclusion from participation in the Pension Fund, the Applicant understood that this was its purpose and consented to it. Such a contention overlooks the fact that the requirement for clarity, or in other words, for an "express" provision of exclusion in order to make it effective is not solely for the benefit of the two parties to the contract of employment.

It is equally important for the Pension Fund to ensure that staff members eligible to enter the Fund do not find themselves excluded due to misinterpretation of such clauses in their contracts.

To leave the matter to tacit understandings between two parties - which could not be proven or could even be manufactured ex post facto as a result of collusion - would harm the Fund, its participants and beneficiaries.

Therefore, while an exclusion clause may not be valid unless the staff member is made aware of it and understands what it is, an invalid clause cannot be made effective by agreement between the two parties.

As to what language meets the test of an express exclusion from participation in the Pension Fund, the Tribunal, in Judgement No. 89, Young vs the Secretary-General of the International Civil Aviation Organization, (1963), made it clear that a clause which "does not specifically mention the right of participation in the Fund ... cannot be regarded as a specific exclusion clause" (para. X).

IX. Equally irrelevant is the Respondent's contention, that payment of the actuarial cost of converting the Applicant's status in the Fund between 1976 and 1984 would violate staff rule 103.15 against retroactive payments to a staff member if not claimed "within one year following the date on which the staff member would have been entitled to the initial payment."

As what is involved is not a payment by the Executive Director of UNITAR to the staff member, but to the Pension Fund, the provision is not applicable. No similar provision in the UNJSPF Regulations and Rules governs debts by a Member Organization to the Pension Fund.

X. Returning now to the periods 1 August to 31 October 1975 and 1 April to 31 December 1984, when the Applicant was employed under special service agreements and for which she also now claims to be credited with contributory service in the Pension Fund, the Tribunal recalls its Judgements No. 233, Teixeira (1978) and No. 281, Hernández de Vittorioso (1982) in which it enunciated its views on the proper use and the abuse of special service agreements. Thus, in the latter case the Tribunal stated:

"... 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."

These considerations apply a fortiori when the continuous service of a staff member which entails participation in the Fund, is broken by a special service agreement.

On the other hand, where at the outset of employment an employee freely enters into a special service agreement, as in the case of Teixeira, there is no reason for the Tribunal to upset that agreement.

XI. In the light of these considerations, the Tribunal finds that the period under a special service agreement preceding the Applicant's status as a staff member, i.e., from 1 August to 31 October 1975 cannot be counted for Pension Fund purposes, but that, in the special circumstances of this case, the period of service subsequent thereto, performed under a special service agreement from 1 April to 31 December 1984, should be included in the period to be credited as pensionable service, it being deemed to have been performed by a staff member.

XII. For the reasons set forth above,

(a) The Tribunal finds that the Applicant was a staff member of the United Nations from 1 November 1975 and was consequently entitled to participate in the UNJSPF;

(b) That under the terms of the original Letter of Award and its eleven extensions, the Applicant's participation in the UNJSPF was not excluded;

(c) That the Applicant's period of service under a special service agreement from 1 April to 31 December 1984, should be included in the period to be credited as pensionable service;

(d) That the Applicant's claim is not time-barred by staff rule 103.15.

XIII. Consequently, the Tribunal orders the Respondent:

1. To make the necessary arrangements for the period 1 November 1975 to 31 December 1984 to be credited to the Applicant as pensionable service in the UNJSPF;

2. To make such payments to the UNJSPF as are required for that purpose, it being understood that, for the same period, the Applicant will pay her contributions with the statutory rate of interest.

(Signatures)

Roger PINTO
Vice-President, presiding

Ahmed OSMAN
Member

Francisco A. FORTEZA
Member

New York, 26 October 1988

R. Maria VICIEN-MILBURN
Executive Secretary