

ADMINISTRATIVE TRIBUNAL

Judgement No. 480

Case No. 505: LOPEZ

Against: The Secretary-General
of the United Nations

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

Whereas, at the request of Laura Lopez, a former staff member specially recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 November 1988, 31 January, 28 February and 31 March 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1989, the Applicant filed an application, the pleas of which read in part as follows:

"II. PLEAS

7.The Applicant respectfully requests the Administrative Tribunal:

A. Preliminary Measures

(1)To direct the Respondent, pursuant to article 10 of the Rules of the Tribunal, to:

- (a)Furnish the Applicant with certified true copies of the Minutes of the UNICEF Appointment and Placement Committee, indicating the specific reasons for rejecting every one of the seventeen applications submitted by the Applicant for suitable vacant posts in UNICEF during the period 1981 to 1988, as listed in (...); and
- (b)Furnish the Applicant with certified copies of the relevant reports of the External Auditors, criticizing UNICEF for maintaining the Applicant's

services on a continuing basis under Consultancy Contracts, Special Service Agreements for Consultants, and Short-Term Contracts ...

B. Substantive Measures

...

- (10) To order the Secretary-General:
- (a) To rescind his decision of 1 June 1988 to maintain the contested decision taken by UNICEF not to award the Applicant [an] appropriate contract for her continuing service beyond 31 December 1986.
 - (b) To reinstate the Applicant in UNICEF, retroactive from 1 January 1987.
 - (c) To pay the Applicant her salary and allowances (less the hourly wages paid to her during 1987), as well as appropriate contributions on her behalf and on behalf of the UNICEF to the Pension Fund, retroactive from 1 January 1987 until the implementation of the judgement on this case.
- (11) To award the Applicant appropriate and adequate compensation for considerable financial loss and severe moral injuries suffered by her as a direct consequence of the aforesaid arbitrary, capricious, discriminatory and prejudicial decisions taken by UNICEF and by the Respondent, causing thereby a 'miscarriage of justice'.
- (12) To hold oral proceedings in order to hear the testimony of the Applicant and of the witnesses concerned."

Whereas, on 21 July 1989, the Applicant informed the Executive Secretary of the Tribunal that she was amending her pleas in part as follows:

- "(12) To hold oral proceedings in order to hear the testimony of the Applicant and of the witnesses concerned, particularly the following:

...

- (13) To award the Applicant as legal costs a sum of \$3,000.00."

Whereas the Respondent filed his answer on 29 November 1989;
Whereas the Applicant filed written observations on

31 January 1990;

Whereas, on 19 March 1990, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 27 April 1990, the Tribunal put questions to the Respondent and on 3 May 1990, he provided answers thereto;

Whereas, on 14 May 1990, the Applicant submitted comments on the answer provided by the Respondent;

Whereas the facts in the case are as follows:

The Applicant was recruited by UNICEF on 3 January 1978, as Personal Assistant to the Special Representative for the International Year of the Child. She was initially offered a two year and twenty-nine day fixed-term appointment at the P-3 level, "limited to service with the International Year of the Child Secretariat". This appointment was extended first, for a further fixed-term period until 30 June 1980 and then, until 30 September 1980, as an External Relations Officer at the Office of the UNICEF Executive Board and Liaison with Non-Governmental Organizations.

The Applicant was subsequently employed by UNICEF as a consultant. She was offered a series of special service agreements, with intermittent, short breaks in service between them, commencing on 29 October 1980 and ending on 31 December 1985. Her assignments were related to the International Year of the Child, the Kampuchea emergency operation and a History Project, all specific UNICEF projects.

According to the record of the case, during the course of her employment on special service agreements, an extensive exchange of correspondence ensued between the Administration, the Applicant and lastly, the Applicant's father, then Permanent Representative of the Philippines to the United Nations and the Executive Director of UNICEF, concerning the modalities of the Applicant's employment, her career prospects with UNICEF and the Applicant's activities in the Staff Union. The Applicant was anxious to regularize her contractual situation and to obtain an appointment as a staff

member. In a note for the file dated 4 February 1983, a Policy Officer at the Division of Personnel (DOP) acknowledged that "by keeping Ms. Lopez-Lising on SSAs [Special Service Agreements] for more than two years, we are breaching the requirements of A.I.[Administrative Instruction] 318, which sets 126 working days in any period of 12 months as the normal duration for which a consultant may be employed". In a memorandum dated 4 February 1983, the Deputy Executive Director discussed the Applicant's career prospects with UNICEF. She pointed out that although the Applicant had "performed a very useful role in a number of capacities ... these [had] been of a temporary and short-term nature". The Administration had given "careful consideration" to the Applicant's suggestion that a post be created as Reports Officer but "regrettably this suggestion ... [was] not possible in the current budgetary climate". She also noted that she understood the Applicant had been offered "employment of a more permanent nature in terms of a field assignment, but that this did not accord with [the Applicant's] personal preferences".

In February 1984, when the Project Officer for the History Project, who was the Applicant's supervisor, requested an extension of the Applicant's special service agreement, the then Director, DOP, informed her that UNICEF could not "continue [granting the Applicant] SSA's forever" and that the Applicant should submit her candidacy for available vacant posts. On 1 March 1984, the Applicant wrote to the Director, DOP, concerning his statement and listed all the jobs for which she had applied for from August 1981 to March 1983.

On 20 March 1984, the Acting Chief, Recruitment and Placement, informed the Applicant that a new consultancy contract would be issued through 31 March 1984, but that from thereon, UNICEF would "not be in a position to consider further extensions ..." since UNICEF was, "in this regard, trying to keep to the administrative policy on Special Service Agreements". In addition, he noted that in the past year the Applicant had "not applied for

any of the advertised positions". The Applicant's consultancy contracts were however extended until 31 December 1985.

On 18 December 1985, the Director, DOP, informed the History Project that he would not process the Department's request for an extension of the Applicant's services for a further month, since UNICEF had "received critical observations by the External Auditors regarding the ... consultants who worked for the History Project in 1985 ..." and UNICEF had "made a commitment and promise to the External Auditors that [they] would observe UNICEF's regulation and the U.N. rule regarding use of consultants ...".

The Applicant was subsequently employed on two short-term appointments under the 300 Series of the Staff Regulations and Rules to work on the History Project. The first appointment was for a period of six months, commencing on 1 February 1986 and ending on 31 July 1986, the second was for a period of four months, commencing on 1 September 1986 and ending on 31 December 1986. The last appointment was not extended and the Applicant separated from the service of UNICEF on 31 December 1986.

According to the record of the case, the Applicant was subsequently hired as a consultant, from 15 March 1987 through 31 December 1987, at the wage rate of US\$14 per hour, to work in classifying and archiving historical materials for the UNICEF History Project. Funds for this contract were obtained from the Mutual Assistance Fund of the Standing Group of the National Committees for UNICEF ("Mutual Assistance Fund"), a group of non-governmental organizations whose objective is to raise funds for UNICEF.

In a letter dated 30 April 1987, the Applicant requested the Secretary-General, in accordance with staff rule 111.2(a), to conduct administrative review "of the change in [her] status from short-term staff member under the 300 Series to employee remunerated by UNICEF through the Mutual Assistance Fund". She also requested the Secretary-General to review UNICEF's denial of an extension of her "staff member appointment" which had expired at the end of

December 1986. She asked that steps be taken to "regularize" her prior employment (for approximately eight years, both as a staff member and as a consultant/independent contractor) with UNICEF.

On 13 July 1987, the Acting Executive Director of UNICEF informed the Applicant that her request for administrative review of a decision taken on 31 December 1986, was time-barred under staff rule 111.2(a). He also stated that the Applicant's employment prospects with UNICEF had always been made clear to her. Although UNICEF had no obligation to employ the Applicant following expiration of her fixed-term appointment with the International Year of the Child Secretariat, UNICEF had hired her as a consultant, which had been to the Applicant's benefit.

On 15 September 1987, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 26 May 1988. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

40. The Panel decides to waive the time-limits for the filing of an appeal in the present case.
41. The Panel concludes that the decision not to renew the appellant's contract was not in breach of established jurisprudence of the United Nations Tribunal in that the appellant could not have had a reasonable expectancy of continued employment.
42. The Panel also concludes that, although the succession of SSAs approved by the UNICEF administration was irregular, it did not constitute unfair treatment of the appellant.
43. The Panel trusts that UNICEF view any subsequent application for employment in the context of the considerations outlined in the previous section.
44. The Panel makes no further recommendation in support of the appeal."

On 1 June 1988, the Under-Secretary-General for Administration and Management informed 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 decision and to take no further action on her case. The Applicant was also informed that should she wish to apply for a suitable post, her application would be fairly and objectively considered within the established procedures.

On 31 March 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. UNICEF's unfair and discriminatory practice of awarding Consultancy Contracts, SSAs and Hourly Wage Contracts for performing the substantive functions of a regular staff member was abusive and contravened United Nations and UNICEF's Administrative Instructions governing the employment of consultants.

2. UNICEF's decision not to award the Applicant a permanent appointment and to reject every one of her applications for suitable vacant posts in UNICEF was arbitrary and vitiated by caprice, discrimination and prejudice.

3. The Applicant suffered injury because of UNICEF's discriminatory employment practices against women under consultancy or short-term contracts and her staff association activities.

4. The Applicant had a legal expectancy of continuing employment in UNICEF, after a distinguished service for a total of ten years and a presumptive right to consideration for posts elsewhere in UNICEF.

5. The JAB's failure to review the Applicant's appeal fairly, independently and impartially caused her a "miscarriage of justice".

Whereas the Respondent's principal contentions are:

1. The Applicant's legal status is governed exclusively by the terms of her employment contracts; her SSAs provided that during the period of her employment under those contracts, the Applicant had the legal status of an independent contractor and not that of a

staff member, while her appointments as a staff member carried no expectancy of renewal.

2. The Applicant's claim to all allowances, grants and payments she would have received but for the Respondent having (in the Applicant's submission, wrongfully) denied her the legal status of a staff member during her independent contractor employment, is time-barred under staff rule 103.15.

3. The Applicant has not discharged the burden borne by her to prove that UNICEF's decision with respect to the renewal of her appointment as a staff member and "denial" of a career appointment was vitiated by prejudice, arbitrariness or discrimination.

The Tribunal, having deliberated from 1 to 22 May 1990, now pronounces the following judgement:

I. The Applicant was employed as a UNICEF staff member from 3 January 1978 to 30 September 1980, from 1 February to 31 July 1986, and from 1 September to 31 December 1986. The question presented to the Tribunal is whether the Applicant was wrongfully denied a continuation of her employment as a UNICEF staff member at the expiration of these appointments and between them. She performed, between those appointments and thereafter, services to UNICEF in the capacity of a consultant, without the advantages she would have had as a staff member - e.g. annual leave, Pension Fund participation and medical insurance. The Applicant claims she should be reinstated as a staff member from 1 January 1987 and that the period of service covered by consultancy and similar agreements be deemed to have been performed by a staff member. The Respondent contends that the Applicant had no expectancy of an extension of her contract of employment as a staff member when her short-term appointment expired on 31 December 1986. The Respondent further contends that her interim employment from 29 October 1980 to 31 December 1985, as a consultant, under special service and similar agreements, with short, intermittent breaks between them, was

justified by the nature of her functions which were substantially different from those of a staff member and were performed for separate, temporary projects of UNICEF.

II. The Tribunal must resolve these issues in the light of its previous findings on the relationship between periods of service performed as a staff member and periods of service performed under special service agreements. (Cf. Judgement No. 423, Isaacs (1988), Judgement No. 281, Hernández de Vittorioso (1982) and Judgement No. 233, Teixeira (1978)). In those Judgements, the Tribunal established that a staff member who, on the expiration of his or her contract of employment, continues to perform the same functions but is denied the status of a staff member and is given special service agreements instead, has the right to have the original status continued for the duration of those agreements.

The Tribunal also stated that:

"... 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". (Judgement No. 281, Hernández de Vittorioso, para. II)

In Judgement No. 423, Isaacs, paragraph X, the Tribunal added that:

"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."

III. The Tribunal must analyse the situation in the present case in this context. When the Applicant was originally employed as a staff member on a two year and 29 day fixed-term appointment from 3 January 1978 to 31 January 1980, it was stated in her letter of appointment that her employment was "limited to service with the International Year of the Child Secretariat", i.e. for a specific purpose, in connection with a particular project. When this

appointment was extended for two further fixed-term periods until 30 September 1980, it was still for the same purpose and still "limited to service with the International Year of the Child Secretariat". Thereafter, the Applicant was employed on a series of special service agreements, to perform further duties, still connected with the International Year of the Child. These special service agreements ran from 29 October 1980 until 31 March 1981.

The subsequent special service and other similar agreements from 6 April 1981 to 31 December 1985, with short intermittent breaks between them, and her later appointments as a staff member on short-term contracts from 1 February to 31 July 1986 and from 1 September to 31 December 1986, were for purposes no longer connected to the International Year of the Child, but to special projects such as the Kampuchea Operation and the History Project. These appointments covered a period of almost five years.

IV. In order to determine whether the functions performed by the Applicant were functions identical with, or similar to those performed by staff members, the Tribunal requested the Respondent to describe the Applicant's functions when she was employed under special service agreements. In his reply to the questions put by the Tribunal, the Respondent stated that: "... the work [the] Applicant performed during her consultancies was of a temporary, specific nature, related to the temporary projects ... [(a) the finalization of the International Year of the Child report; the Kampuchea emergency operations; (c) the newly created History Project which was a specific organizational activity intended to record UNICEF's 40-year history] and for which the necessary expertise was not readily available within UNICEF".

V. In the light of the views expressed by the Tribunal on the appropriateness of using special service agreements, it would seem that the period immediately following the expiration of the Applicant's original contract of employment, namely from 29 October

1980 until 31 March 1981, was in essence an extension of the original appointment. The Applicant continued to perform the same functions but was denied the status of a staff member and was given special service agreements instead. However, it is clear that the various subsequent functions performed by the Applicant, not related to her original employment for the International Year of the Child, cannot be considered extensions of the original appointment.

VI. The Tribunal finds that in this case, the tasks performed by the Applicant after completion of the International Year of the Child Project, were of an ad hoc and temporary nature; namely for the Kampuchea Operation and the History Project. The Respondent may very well have been justified in employing the Applicant under special service agreements, if the alternative was that the Applicant would have had no employment at all. Unlike in Isaacs, it cannot be considered that these agreements were a substitute for an appointment as a staff member, or an extension of her original appointment.

VII. In the Tribunal's view, in accordance with its jurisprudence, no legal expectancy of further employment could have arisen at the expiration of the special service agreements, nor after the addition of another period of service performed under a short-term contract as a staff member.

VIII. The Tribunal notes that during the course of her employment, the Applicant applied for a series of posts, but was unsuccessful in obtaining permanent employment. The Respondent, in order to accommodate her, extended the Applicant's consultancies, but informed her on a number of occasions, that he was not in a position to consider further extensions of the consultancies because he was acting against his own directives concerning long-term employment on special service agreements. The Tribunal considers that this practice, although favourable to the Applicant in this case, since

it enabled her to continue rendering services and receiving remuneration, should not be resorted to by the Administration.

IX. In the light of the above, the Tribunal is satisfied that on the facts of this case, the Applicant did not have a legal expectancy of continued employment as a staff member, neither at the expiration of her fixed-term appointment on 30 September 1980, nor at the expiration of her short-term appointments on 31 July and 31 December 1986.

It finds, however, that the period of service following the expiration of the Applicant's fixed-term appointment on 30 September 1980, for the International Year of the Child, was in essence an extension of her original appointment and was improperly treated by the Respondent as not being a period of service performed by a staff member. Accordingly, the Tribunal orders the Respondent to pay the Applicant the difference between what the Applicant would have earned had she been employed as a staff member at the P-3, step III level (the grade and level at her separation from service), and what she earned as a consultant from 29 October to 31 December 1980 and 1 January until 31 March 1981.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant:

1. A sum equal to the difference between what the Applicant would have earned had she been employed as a staff member at the P-3, step III level, and what she earned as a consultant from 29 October to 31 December 1980 and from 1 January until 31 March 1981.

2. Interest of 10 per cent a year, as of 31 March 1989, the date of the filing of the application, until the date of payment of the sum due to the Applicant under 1 above.

XI. All other pleas of the Applicant are rejected, including her requests for production of documents and testimony and her request

for costs.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

Geneva, 22 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary