Registry's translation, the French text alone being authoritative.

(Application for execution)

102nd Session **Judgment No. 2603**

The Administrative Tribunal,

Considering the application for execution of Judgments 1553, 1620 and 2185 filed by Mrs Y. M. d. G. on 29 March 2005 and corrected on 1 August, the reply of the United Nations Educational, Scientific and Cultural Organization (UNESCO) of 21 November 2005, the complainant's rejoinder of 21 March 2006 and the Organization's surrejoinder of 4 May 2006;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Certain facts relevant to the present case are set out in Judgments 1553, 1620 and 2185, which were delivered on 11 July 1996, 10 July 1997 and 3 February 2003 respectively. In the first of these judgments the Tribunal, under point 2 of the ruling, ordered UNESCO either to reinstate the complainant and grant her a new two-year contract or pay her a sum equivalent to four years and six months' salary and allowances plus interest. It also awarded the complainant 500,000 French francs in damages and 50,000 francs in costs. In the second judgment the Tribunal ordered the Organization to pay the complainant 50,000 francs in damages for failing to execute point 2 of the ruling in Judgment 1553 as well as 10,000 francs in costs. It imposed a penalty of 25,000 francs for each further month of delay if the Organization failed to execute the above-mentioned point 2 or to pay the two above-mentioned amounts within thirty days of the date of delivery of the judgment. UNESCO chose the second option offered in Judgment 1553 (in other words payment of damages instead of reinstatement), but because it deducted from the sums paid to the complainant what it estimated to be the amount she owed by way of repayments to the UNESCO Staff Savings and Loan Service, she filed another application for execution with the Tribunal. In Judgment 2185, delivered on that application, the Tribunal acknowledged the Organization's right to effect an overall set-off of the reciprocal debts of the complainant and UNESCO, subject to the fulfilment of certain conditions – corresponding to the guarantees afforded by judicial proceedings – regarding the certainty and due status of the claims set off. Accordingly, it referred the case back to the Organization for a decision on the amounts deducted from its debt to the complainant, adding that the decision was to be preceded by an investigation and taken in accordance with the rules of due process. It ordered the Organization to pay 700 euros as a partial award of costs and dismissed all other claims.

On 12 June 2003 the Organization sent the complainant a cheque for an amount corresponding to the costs. By a letter of 30 July 2003 the Director of the Office of Human Resources Management informed her of the outcome of the investigation which had been conducted by the Internal Oversight Service (hereinafter referred to as the "IOS"). The latter concluded that the sum of 798,327.68 French francs (or 128,555.18 United States dollars) which UNESCO had deducted from the indemnities she had received in August 1997 did in fact correspond to her outstanding debt to the Organization. The Director asked the complainant either to vouch that the above-mentioned amount tallied with the amount of her debt and to confirm in writing that the Organization had discharged its obligations to her, or to supply her comments in writing accompanied by any tangible proof, in order that they might be forwarded to the Organization's External Auditors for their opinion before the Director-General took a final decision. The complainant replied on 19 August 2004 in a long note challenging the opinion of the IOS, mainly because it merely recapitulated a document which had been produced before the French courts by the lawyer representing the Savings and Loan Service and which UNESCO's legal service had then submitted to the Tribunal, and because it had been drawn up without consulting her. In a letter of 16 November 2004, which is the impugned decision, the Director-General informed the complainant that, further to the IOS investigation and the

opinion of the External Auditors, the sum deducted from her compensation did correspond to her outstanding debts. He therefore gave “final” confirmation that the “final settlement and the method of calculating the amount deducted by way of a set-off from [the] final payment” were consistent with the terms of the loan agreements between her and the Savings and Loan Service as well as the relevant rules. He authorised her to appeal directly to the Tribunal if she wished to contest that decision.

B. In her submissions the complainant repeats *in extenso* the arguments set out in her note of 19 August 2004. She states that the Organization’s decisions concerning her case are tainted with errors of law and of fact, the omission of essential facts, incorrect assessments of the situation and manifest errors in the conclusions drawn from the evidence, misuse of procedure, personal prejudice and misuse of authority. She contends that the statement of account drawn up by the Savings and Loan Service, which was reproduced by the IOS, is inaccurate. Not only is the date on which she stopped paying instalments wrong (the end of February 1993 and not the end of January as the Savings and Loan Service claims), but the calculation of the outstanding balance is incorrect, as was found by the court of first instance in Nanterre (France). Indeed, she asserts that the Organization, which chose not to reinstate her although it had the possibility of doing so, had to recalculate the loans – and the accrued interest – on the basis of their actual terms, that is to say four years for one and nineteen months for the other. She submits that the Director-General imposed a disguised disciplinary measure on her and therefore committed a misuse of authority by deciding to “deprive her of her flat” and ordering her to make various payments even before the accounts of the Savings and Loan Service had been certified by the judicial authorities and despite the fact that the Tribunal had not ordered the set-off. She adds in conclusion that if it is accepted that loan agreements are cancelled when an employer terminates employment, it must be recognised that the quashing by the Tribunal of the decision to dismiss her also invalidates such cancellation.

Referring to the clause providing for immediate reimbursement of each of her two loans, the complainant submits that the conditions for resorting to that clause were not met. Referring to the case law of the French courts and of the Tribunal, she argues that since the latter held that she had been wrongfully dismissed this clause is inapplicable. In her opinion the loan agreement provides for immediate reimbursement only in the event of the voluntary resignation of an official and not in the event of dismissal by UNESCO. She adds that the Organization disregarded the Tribunal’s well-established case law by not stating the reasons for its decision not to opt for her reinstatement further to Judgment 1553.

The complainant claims that the set-off effected by the Organization was illegal. She produces a memorandum from the former Director of UNESCO’s Office of International Standards and Legal Affairs in which the latter warns the Administration that, in his opinion, the Tribunal’s Judgment 1553 would be executed correctly only if the sums due to the complainant were paid to her in accordance with her instructions. The complainant further denounces “the violation of general principles of law and of fundamental human rights”, in particular that of the principle of equal treatment, because other officials who had been dismissed were allowed to continue payment of the instalments on their loan while proceedings before the UNESCO Appeals Board and before the Tribunal were pending.

Lastly, the complainant submits that, since it was predictable that a decision not to reinstate her would have serious consequences for her, the Director-General ought to have eschewed that option, and that she has incurred other injuries related to the loss of her right to health insurance cover through UNESCO and to the repercussions of the impugned decision on her pension rights.

The complainant’s claims for relief are, for the most part, the same as were put forward in her third complaint (see Judgment 2185, under B).

C. In its reply UNESCO contends that the complainant is ignoring the principle of *res judicata* in that in presenting her claims she repeats almost word for word those that she already presented in her previous complaint. It invites the Tribunal to rule that all her claims are irreceivable, except for those concerning the payment with interest of the amount deducted on behalf of the Savings and Loan Service from the sums paid to the complainant, which it however considers to be ill-founded.

On the merits the Organization submits that, contrary to the statement made by the complainant in her note of 19 August 2004, an investigation and adversarial proceedings have been held since the findings of the initial review conducted by the IOS were forwarded to the complainant and she was able to present her comments. These were reviewed by the IOS to the satisfaction of the Organization’s External Auditors before the Director-General took his decision. With reference to the Statute and case law of the Tribunal, UNESCO argues that the issue of whether

the complainant could be required to reimburse the debt immediately must be determined solely on the basis of the law of the international civil service to the exclusion of any national law. Moreover, the complainant cannot cite any general principle of law or human rights allowing her to evade her obligation to repay her debt. It challenges her interpretation of the clause in the loan agreements which provides that the balance falls due automatically on cessation of employment. It adds that, since international civil servants may return to their country of origin, a statutory rule preventing the employer from demanding repayment of the balance of a loan in the event of cessation of employment would make it virtually impossible to recover the debt except by means of the set-off provided for in Staff Rule 103.19(c). The principle of a set-off was, in its opinion, accepted by the Tribunal in Judgment 2185, under 4(b), and therefore constitutes *res judicata*. As for the amount of the debt, it holds that the amount deducted from the sums due to the complainant was correctly calculated, as the Organization's External Auditors have confirmed.

D. In her rejoinder the complainant maintains that UNESCO has not abided by the principle of due process since she was never given the possibility of attending or participating in the investigation ordered by the Tribunal, and because in the Organization's reply she has discovered documents which were never disclosed to her. She considers that it is plain from the report of the Organization's External Auditors that they examined only the initial repayment statement, and that it is wrong to conclude from that statement that the amount claimed in respect of the outstanding debt was correct.

The complainant submits that the set-off effected by the Organization was illegal for the following reasons: there was no "valid or legal decision of the Administration" authorising it to proceed in that manner; the clause in the loan agreements whereby the balance becomes due automatically on cessation of employment must be understood to apply to officials who decide of their own free will to leave their post; even if this clause were to apply in the event of a decision by UNESCO to terminate an employment contract, it is obvious that such a decision would have to be lawful, which it was not in her case; when interpreting loan agreements, account must be taken of what the parties could reasonably understand and decide to accept on signature; the Organization has not acted in good faith or fairly; the set-off was contrary to French law, which does apply to her case; lastly the complainant worked for three months longer than shown in the Organization's calculations. Moreover, there was no risk that she would go abroad as she was settled in France where her children were attending school. She considers that UNESCO should not ask her to pay interest for the period after January 1993 – since it deducted the payments due as from that month – or possibly August 1993, when it became clear that the Administration had cancelled the loan agreements. She states that in view of the amount she had already repaid on a monthly basis and UNESCO's attachment of 490,000 French francs from the proceeds of the sale of her flat, she owed the Organization only 36,131 francs and that it therefore received an excess amount of 762,196.16 francs by virtue of the set-off.

The complainant alters her claims. She requests the Tribunal to:

"1) Find that UNESCO was not entitled on 31 January 1993 to withhold the due sum of […] 108,000 [United States dollars] which it should have paid the complainant by way of compensation;

2) Find that UNESCO was not entitled in August 1997 to set off the sum of […] 128,555.18 [dollars] against the complainant's debt to the Savings and Loan Service, with the result that this set-off was unlawful;

3) Find that the loan agreement ended on 31 January 1993;

4) Order UNESCO to pay the equivalent in [dollars] or [euros] of the […] 762,196.16 [French francs] due because of the complainant's double repayment of her debt, this being the excess sum received by the Organization from the set-off;

5) Order UNESCO to pay the amounts due in respect of the Organization's missing payments to the complainant's pension fund;

6) Order UNESCO to pay interest on the amount awarded under claims 4 and 5 above, as well as a penalty for default, as provided for in Judgment 2185, under 4 c, last paragraph;

7) Order UNESCO to pay compensation for moral injury to the complainant resulting from the loss of her flat which had a value of [...] 1.8 [million francs];

8) Order UNESCO to pay all the costs including an amount in respect of her counsel's fees."

E. In its surrejoinder the defendant objects to the receivability of the fifth claim on the grounds that, since the complainant was dismissed on 31 January 1993, no further payments were owed to the United Nations Joint Staff Pension Fund after that date. In its opinion, the seventh claim is also irreceivable because it is a request which is unrelated to the execution of Judgment 1553 and which has already resulted in the Organization being ordered to pay 500,000 francs in damages. If it were to be held that this claim has not already been ruled on, it should be deemed irreceivable as the internal remedies have not been exhausted. In addition, in Judgment 2185 the Tribunal has already ruled that these two claims, presented in a slightly different form, are irreceivable.

The other claims are ill-founded. UNESCO maintains that a procedure complying with the rules of due process has been followed and that the complainant's statements on this matter are inconsistent with reality. It submits that it was not incumbent upon the Organization's External Auditors to repeat the checks carried out by the IOS or to verify the legal justification for the calculation of interest. It adds that interest on a loan accrues until full settlement of the principal debt. It accuses the complainant of trying to cause confusion by making outlandish and completely unsubstantiated assertions.

CONSIDERATIONS

1. The matter at issue in this third application for execution from the complainant is the sum paid to her in execution of Judgments 1553, 1620 and 2185, UNESCO having deducted the amount which, in its opinion, the complainant owed for the reimbursement of loans she had taken out with the Savings and Loan Service, i.e. 798,327.68 French francs.

2. Pursuant to Judgment 2185 the Organization commissioned an investigation by the IOS, which concluded that the amount owed by the complainant was indeed that which had been deducted from the sums payable to her under the Tribunal's judgments.

On 30 July 2003 the Director of the Office of Human Resources Management sent the complainant a letter in which she informed her of the details and outcome of the investigation conducted by the IOS and invited her, should she wish to challenge the findings of this investigation, to submit her comments in writing accompanied by any tangible proof.

The complainant forwarded her comments to the Organization in a note of 19 August 2004. She considered that she had already replied amply to the Administration's questions and added that the findings of the investigation displayed some shortcomings and inaccuracies.

After consideration of the complainant's observations and the comments of the IOS, the matter was referred to the Organization's External Auditors for an opinion. According to UNESCO, they concluded that the IOS had checked the accounts drawn up by the Savings and Loan Service "in accordance with the required International Standards" and in such a way as "to obtain reasonable assurance that the financial statements were free of material misstatements".

On 16 November 2004 the Director-General sent the complainant a letter which reads as follows:

"[…]

I therefore give you final confirmation that the final settlement and the method of calculating the sum set off against your final payment are consistent with both the terms of your loan agreements with the Savings and Loan Service, including the latter's Rules of Management, and the relevant Staff Rules in force at the time your reinstatement in the Organization was refused.

Accordingly your final settlement, as recently audited again, closes your financial accounts with the Organization, which considers itself to be released from the payment of any amount to you."

He authorised the complainant to appeal directly to the Tribunal, which she did on 29 March 2005. In section 3 of the complaint form she indicates that the "challenged decision" is the one quoted above as well as two other decisions. The Tribunal considers that it can examine only the decision of 16 November 2004 as being taken in execution of Judgment 2185.

3. The complainant's claims, as set forth in the most recent written submissions filed by her counsel, are set forth under D above.

In this application the complainant reiterates the arguments she already put forward in her previous application for review, which gave rise to Judgment 2185.

In particular, she considers that the set-off effected by the Organization was illegal in the absence of a valid or legal decision by the Administration authorising such a set-off. For this reason, it should never have occurred in June 1997.

According to the complainant the amount of the debt, as deducted from the compensation she was owed, was not due at the time the Organization effected the set-off, and this amount, which was not due, was in fact less than the amount set off by the Organization, since she did not have to pay the interest on her loan after 31 January 1993, because the Administration had deducted the payments due after that date and had opted for a set-off.

She asserts that the Administration now owes her the sum of 762,196.16 French francs from an illegal set-off and above all because this money has been "stolen owing to glaring errors in the calculation of the amounts of the loan and of the interest on it".

4. The Organization contends that the complainant's claims are irreceivable, apart from those concerning immediate reimbursement and the amount of the complainant's debt to the Savings and Loan Service. It requests the Tribunal to rule that these claims are ill-founded.

5. The Tribunal notes that in its Judgment 2185, having recalled that in dealing with an application for execution, it was not its role to examine and rule on claims which a party intended to set off against amounts owed pursuant to the judgment, it decided to refer that issue back to the Organization for a decision, which was to be preceded by an investigation and taken in accordance with the rules of due process. It added that if the decision established that the complainant owed an amount equal to the amount previously withheld by the Organization, the latter could consider itself released with retroactive effect, so that it would be required to pay neither interest nor penalties. If it established that the Organization was not released from its debt, the Organization would owe interest and penalties as stipulated in Judgments 1553 and 1620, calculated *pro rata* on the basis of the outstanding balance in relation to the total amount due at the time the penalty had been set. It may be gathered from that decision of the Tribunal that the issue regarding the principle of the set-off had been implicitly decided when it was stated that "there is no doubt that had the Tribunal ruled expressly on this issue, it would have acknowledged the Organization's right to effect that set-off, subject to fulfilment of the conditions as to the certainty and due status of the claims set off".

Since the certainty of the debt was not disputed, the question which remained to be decided mainly concerned the due amount of the complainant's debt, which had to be determined after an investigation and a procedure complying with the rules of due process.

All the complainant's claims which are unrelated to this issue must be deemed irreceivable.

6. Having examined the parties' submissions, the Tribunal notes that the procedure culminating in the Organization's decision of 16 November 2004 failed to comply with the rules of due process in that not all the documents relating to the investigation had been forwarded to the complainant for her comments before the decision was taken. This applies in particular to the findings of the review of the file by the IOS and the findings of the Organization's External Auditors.

As a result, Judgment 2185 has not been executed correctly insofar as the complainant's right to be heard has been denied. She is therefore entitled to the award of 1,000 euros as compensation for the injury suffered.

7. As the parties do not agree on the amounts at issue, the Tribunal deems it necessary, prior to judgment, to order that a report be provided by a chartered accountant appointed in accordance with Article 11 of the Rules of the Tribunal, whose terms of reference shall be specified hereinafter.

8. Since the complainant partially succeeds, she is entitled to 2,000 euros in costs.

DECISION

For the above reasons,

1. Within thirty days of the delivery of this judgment the Organization shall pay the complainant the sum of 1,000 euros in compensation for the injury suffered.

2. A chartered accountant shall be appointed by order to determine the amount of the complainant's debt that was due on 8 August 1997, the date on which the Organization effected the payments.

3. The accountant shall take into consideration all the parties' submissions to the Tribunal and may request any relevant information from the parties, provided that the rules of due process are observed.

4. The accountant shall submit seven copies of his/her report to the Registrar of the Tribunal by 30 May 2007 at the latest.

5. The report shall be sent to both parties, which shall have thirty days to submit any comments they may wish to make.

6. The accountant's fees and expenses, the amount of which shall be subject to approval by the President of the Tribunal, shall be borne by the Organization.

7. The Organization shall pay the complainant 2,000 euros in costs. The Tribunal reserves judgment on costs in respect of the subsequent proceedings.

In witness of this judgment, adopted on 10 November 2006, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Seydou Ba

Mary G. Gaudron

Mr Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.