The Administrative Tribunal,

Considering the complaint filed by Mrs A. Z. against the United Nations Industrial Development Organization (UNIDO) on 22 March 2006, the Organization's reply of 28 June, the complainant's rejoinder of 26 September 2006 and UNIDO's surrejoinder of 23 January 2007;

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. The complainant is a Swedish national born in 1946. She joined UNIDO in Vienna in 1970 on a fixed-term appointment at grade G-4 and was granted a permanent appointment in 1972. In 1989, after having served for 19 years in the General Service category, and having been promoted four times during that period, she was selected for a post in the Professional category. Consequently, with effect from 1 December 1989 her grade changed from G-8 to P-2. She was promoted to grade P-3 in 1992 and was separated from service on early retirement on 16 August 2001.

As the Tribunal explained in Judgment 2123, the entitlement to an end-of-service benefit upon retirement was incorporated into Austrian law in 1971. From 1 January 1972 to 30 September 1987 the salary scales applicable to General Service staff in Vienna were adjusted to compensate for the fact that no such benefit was offered by the Vienna-based organisations. In 1987 the International Civil Service Commission recommended that the Vienna-based organisations establish an end-of-service benefit scheme. Further to that recommendation, UNIDO announced in an Administrative Circular of 8 November 1989 that, with retroactive effect from 1 October 1987, an end-of-service allowance (EOSA) would be payable upon retirement to staff in the General Service category. Thereafter, General Service salaries no longer included the above-mentioned adjustment.

On 2 April 2002, several months after separation from service, the complainant wrote to the Director of the Human Resource Management Branch (HRM), requesting payment of the end-of-service allowance. In a letter of 9 April 2002 the Director of HRM rejected her request, informing her that she was not eligible for the EOSA because she had separated from service as a staff member of the Professional category. By a letter dated 3 May 2002 the complainant asked the Director-General to review the decision of the Director of HRM and to authorise the payment of her EOSA. Replying on behalf of the Director-General on 24 May 2002, the Director of HRM confirmed his earlier decision.

On 11 July 2002 the complainant lodged an appeal with the Joint Appeals Board against the decision of 24 May 2002. In its report of 13 December 2005 the Board considered that the appeal was receivable and recommended that the complainant "should be paid EOSA corresponding to [her] 19 years of service in the General Service category". In a memorandum dated 12 January 2006 the Director-General advised the Secretary of the Appeals Board of his decision to reject the Board's recommendation. His reasons were, firstly, that the appeal was irreceivable, and secondly, that upon separation from service on early retirement the complainant had received her entitlements as a staff member of the Professional category. That is the impugned decision.

B. The complainant submits, firstly, that UNIDO's refusal to pay the EOSA deprives her of an entitlement she acquired during her 19 years of service as a staff member of the General Service category. The practice adopted by the Organization in 1989, upon a recommendation of the International Civil Service Commission, did not diminish her acquired right to the EOSA but merely changed the time at which the allowance became payable. She contends that she did not waive her right to the EOSA when she was promoted to the Professional category and points out that, as noted by the Appeals Board, neither Appendix B to the Staff Rules nor any other rule indicates that entitlement to an EOSA is forfeited upon conversion to the Professional category.

Secondly, the complainant argues that the protracted internal appeal process amounts to a breach of her right to due process. Her appeal involved a single and relatively straightforward issue, yet it took the Administration some four years to conclude its review of the case and provide her with a final decision. This, she asserts, infringed her right to an efficient internal means of redress.

Thirdly, she submits that the Director-General failed to substantiate the reasons for his decision to reject the recommendation of the Joint Appeals Board. In this respect, she observes that the issue of receivability was not put forward by the Director of HRM as a reason for rejecting her request. She asserts that her claim for payment was submitted well within the one-year time limit provided for in Staff Rule 106.10(a)(ii).

The complainant asks the Tribunal to set aside the impugned decision and to order the Organization to pay her the EOSA corresponding to her 19 years of service in the General Service category, less the EOSA received for the period from 1972 to 1987. She also claims moral damages in the amount of 25,000 euros for breaches of due process as well as legal costs.

C. In its reply UNIDO contends that the internal appeal was time-barred, the complaint being thus irreceivable. It submits that the Joint Appeals Board erroneously relied on Staff Rule 106.10 for establishing the time limits for the filing of the internal appeal, given that the provision applicable to the case at hand is Staff Rule 112.02. Moreover, the Board mistakenly considered that the letter of 9 April 2002 by the Director of HRM was the administrative decision that the complainant appealed, when in fact it merely confirmed an earlier decision concerning her separation-related entitlements, of which she was notified in a memorandum of 29 June 2001 and in the standard Personnel Payroll Clearance Action that she signed on 14 August 2001. This being so, the complainant ought to have sought a review by the Director-General of the decision concerning her separation-related entitlements at the latest within 60 days from 3 September 2001, the date on which she received her final payment from the Organization. She did not do so, nor did she at any point challenge UNIDO's decision concerning her separation entitlements or the fact that these did not include the end-of-service allowance.

On the merits the Organization refutes the complainant's plea that, at the time of her promotion to the Professional category, she had acquired a right to receive the EOSA upon separation from service. In this regard it submits that, prior to November 1989, there was no entitlement to an accrued EOSA for staff members in the General Service category. Thus, contrary to what the complainant alleges, the Circular of 8 November 1989 entailed not only a change in the time of the payment of the allowance but also a change in the nature of the allowance, which at that point became an accrued entitlement.

Furthermore, unlike the rules adopted by other Vienna-based organisations, UNIDO's aforementioned Circular did not provide for the payment of the allowance to staff promoted from the General Service to the Professional category. Provision for the payment of the EOSA upon promotion to the Professional category was only made in the amended EOSA Circular of 25 October 2001 and only for General Service staff who were promoted to the Professional category as of 1 September 2001. It follows that the rules in force at the time when the complainant became a Professional staff member did not provide for the payment of the EOSA to General Service staff upon promotion to the Professional category. Having thus become a staff member in the Professional category, the complainant was no longer eligible for an EOSA upon separation from service. She nevertheless received benefits and entitlements, including a repatriation grant, that she would not have received had she remained a member of the General Service category. The Organization adds that the complainant could not have been unaware of UNIDO's rules on this matter in view of her long-standing experience with human resources issues and her role as a member of the UNIDO Staff Council.

With regard to the complainant's allegation that her right to due process was infringed as a result of the delay in the internal appeal, the Organization submits that this delay was to a large extent attributable to the fact that the complainant waited for almost 22 months before submitting her reply to the statement of the Director-General. It considers that she has not demonstrated that she suffered moral injury as a result of the Organization's action. UNIDO also refutes the allegation that the impugned decision was insufficiently substantiated, maintaining that the decision of the Director-General addressed both the issue of receivability and the merits of the appeal.

D. In her rejoinder the complainant maintains that her complaint is receivable. She contends that Staff Rule 106.10(a)(ii) is applicable to her case and that its interpretation by the Administration ascribes to it a meaning "that simply does not accord with its plain language". She contests the argument that she ought to have challenged the memorandum of 29 June 2001 or the Personnel Payroll Clearance Action, since she was never informed that these

documents constituted administrative decisions identifying the total sum of the entitlements she would receive. She relies on the Tribunal's case law in emphasising that the Organization's failure to inform her of the nature of its communications and of her rights under the applicable rules amounts to a serious breach of its duty to act in good faith.

Referring to the wording of the Circular of 8 November 1989, she asserts that the criterion for determining eligibility for the end-of-service allowance is not separation from service as a staff member in the General Service category but rather "continuous service" over a period of time in that category.

In the complainant's view UNIDO's withholding of the EOSA to which she is entitled not only infringes the Flemming principle, according to which the pay of staff in the General Service category should be aligned with the best prevailing conditions at each duty station, but also constitutes a form of unjust enrichment. Moreover, she argues that she was denied treatment equal to that of other staff members, who did receive an EOSA for their service in the General Service category. The mere fact that she was a Professional staff member upon separation from service cannot be considered as a sufficient reason to justify unequal treatment.

She maintains that she pursued her appeal diligently and denies that her conduct hindered in any way the internal proceedings. In addition, she submits that in the course of the appeal she was not given the opportunity to provide her comments on two documents submitted by the Administration to the Joint Appeals Board. This, she contends, amounts to a failure on the part of the Administration to observe the rules of due process.

E. In its surrejoinder the Organization insists that the complaint is irreceivable. Regarding the allegation that it failed to act in good faith, it states that, although the memorandum of 29 June 2001 did not alone constitute an administrative decision for the purpose of determining the time limit for seeking review, the Administration's actions concerning the complainant's separation entitlements, including the payment of a repatriation grant, "constitute[d] a clear and unambiguous administrative decision that the complainant was free to challenge by filing an internal appeal". It emphasises that there is no requirement that a decision by the Administration must take a specific form or that "it must expressly state that it constitutes an administrative decision subject to appeal". The fact that the memorandum of 29 June 2001 did not mention entitlements provided to General Service staff members is "not surprising" given that the complainant was separating as a Professional staff member.

UNIDO submits that the argument of unjust enrichment is unfounded because the complainant was not entitled to an EOSA upon separation. It considers her allegations of unequal treatment and breach of the Flemming principle as devoid of merit: having become a Professional staff member she was not in the same legal position as other General Service staff, nor was the Flemming principle applicable in her case.

In response to the complainant's contention that she was not informed of documents submitted by the Administration to the Joint Appeals Board, UNIDO states that the documents referred to, namely the complainant's letter of appointment and documentation concerning her conversion to the Professional category, were requested by the Board which did not consider it necessary to share them with the complainant.

CONSIDERATIONS

1. The complainant joined UNIDO in the General Service category and was promoted to the Professional category with effect from 1 December 1989. She took early retirement on 16 August 2001 after almost 31 years of continuous service.

2. On 2 April 2002, some months after her separation from service, the complainant claimed payment of an end-of-service allowance but she was informed on 9 April that she was not eligible to receive it. She lodged an appeal with the Joint Appeals Board on 11 July 2002.

3. In its report of 13 December 2005 the Board considered that, contrary to the arguments of the Organization, the appeal was receivable and recommended that the complainant be paid the EOSA corresponding to her 19 years of service in the General Service category. The complainant was informed by a letter dated 12 January 2006 that the Director-General had decided to reject that recommendation on the grounds that her appeal had not been filed within the time limits set by Staff Rule 112.02 and also that, as she was a member of the Professional category when she retired, she had no entitlement to an EOSA.

4. Before the Tribunal UNIDO repeats its contention that the internal appeal was time-barred. In this respect it argues that the letter of 9 April 2002 merely confirmed an earlier decision that the complainant was not entitled to the EOSA. That earlier decision, it is said, was contained in a memorandum dated 29 June 2001 setting out her separation entitlements and in the Personnel Payroll Clearance Action, signed on 14 August 2001, which was a standardised form with boxes against various items, including "[t]ermination indemnity" and "EOSA". The boxes against some items were marked either "[y]es" or "[n]o". For example, the boxes relating to "[t]ermination indemnity" and "[c]ompensation in lieu of notice" were each marked "[n]o". Other boxes were left blank. Thus, various boxes relating to allowances, including the EOSA, were left blank. It is to be inferred that the personnel officer who prepared the form took the view that it was only necessary to mark these particular boxes if the complainant had some entitlement to the specified allowance. The complainant signed the form and, on 3 September 2001, she was paid the allowances in respect of which an entitlement was indicated in the relevant box.

5. The complainant contests the Organization's arguments regarding the receivability of her internal appeal on the basis that she applied in time for payment of the EOSA pursuant to Staff Rule 106.10(a), which relevantly provides:

"A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such 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 […] payment."

6. Staff Rule 106.10(a) operates to limit the time within which a claim may be made. It does not operate where there has already been a final decision with respect to the matter at issue. Thus, if the memorandum of 29 June 2001 constituted a final decision with respect to the complainant's entitlement to the EOSA, Staff Rule 106.10(a) would not permit her to circumvent the time limits with respect to internal appeals by making a fresh claim. It is thus necessary to consider whether the memorandum of 29 June 2001 did constitute a final decision with respect to the complainant's entitlement to the EOSA.

7. The memorandum of 29 June 2001 does not constitute a final decision with respect to the complainant's entitlements on separation. At best, it appears to be a document setting out a number of matters that had to be attended to by various UNIDO departments and also by the complainant, on or before separation. The same can be said with regard to the Personnel Payroll Clearance Form which indicates that the complainant was to return her ground pass, her commissary card and car plates, and which the complainant was expected to complete in due course. Nor is there anything to indicate that the complainant understood that the form she signed on 14 August 2001 constituted a final decision. Her signature merely verifies her future mailing address and her instructions as to the payment of her final cheque.

8. There are occasions when a staff member may treat a communication or other action (for example, a payment to his or her bank account) as embodying a decision with respect to his or her entitlements (see Judgment 2629, also delivered this day). However, where, as here, there is no indication that the communication in question constitutes a final decision, there are and may be circumstances that lead a staff member to reasonably conclude that it does not. Particularly is that so if, as in the present case, it concerns a matter that has not been the subject of an express claim or there is nothing to suggest that the matter in question has been considered by a person with authority to make a final decision thereon.

9. There is nothing to indicate that the complainant understood that the memorandum of 29 June 2001 or indeed the Personnel Payroll Clearance Action constituted a final decision with respect to her entitlement to the EOSA and there is nothing to indicate that she should have. Accordingly, neither the memorandum of 29 June 2001 nor the form signed on 14 August 2001 can be held to be the communication of a final decision on that matter. The only communication that satisfies that description is the letter of 9 April 2002. Internal appeal procedures were instituted within 60 days of that date in accordance with Staff Rule 112.02. It follows that the internal appeal was receivable, as is the complaint before the Tribunal.

10. So far as concerns the merits of the complaint, the complainant contends that she had an acquired right to the EOSA by virtue of the terms of the Circular issued in November 1989, that she did not waive that right upon

promotion to the Professional category and that no provision of the Circular or of the Staff Rules provided for the forfeiture of that right. It is true that, if there was an existing right to the EOSA at the time of her promotion, the complainant did not waive it and nothing in the applicable Rules or the Circular of November 1989 provided for its forfeiture. Thus, the question to be determined is whether she then had such a right.

11. It is clear that until 1987 the complainant had no right to the payment of an allowance on separation from UNIDO. Her only entitlement was to the payment of a salary that included an EOSA component. Her rights thereafter were those set out in the Circular of 8 November 1989, which bore the heading "End-of-service allowance for staff members in the General Service and related categories". When the Circular was issued, the complainant was a staff member of the General Service category and, accordingly, the Circular then applied to her. It provided that "[p]ayment of EOSA w[ould] be made to staff members separating from UNIDO" on certain specified conditions. In context, the words "staff members" clearly refer only to staff in the General Service and related categories and not to staff in the Professional category. Thus, the right to an EOSA was conditioned in particular on the complainant separating from UNIDO as a staff member of the General Service category. The right was not an acquired right as claimed by the complainant: in the present case, the condition attached to the payment of the end-of-service allowance, namely separation from service as a member of the General Service category, was never satisfied and, thus, the complainant never acquired a right to the EOSA. Her claim in that regard must therefore be rejected.

12. The evidence does not establish that the complainant was treated less favourably than other persons in the same position in fact and in law. Accordingly, the claim of unequal treatment must be dismissed.

13. As a subsidiary matter, the complainant seeks moral damages for the delay in deciding her appeal. The Joint Appeals Board received the complainant's appeal on 21 August 2002 and issued its report on 13 December 2005. UNIDO contends that the complainant contributed to this delay because she did not file her reply until 30 June 2004, some 22 months after the Organization filed its answer. However, as the complainant points out, this did not contribute to the delay as the Joint Appeals Board was not constituted until December 2004. The complainant should be awarded moral damages in the sum of 5,000 euros in consequence of that delay. She is also entitled to costs that the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant 5,000 euros in moral damages.

2. It shall also pay her 2,000 euros in costs.

3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 10 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet