113th Session **Judgment No. 3147**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs E.S. P. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 15 April 2010 and corrected on 6 August, UNESCO's reply of 10 November, the complainant's rejoinder of 16 December 2010 and the Organization's surrejoinder of 16 February 2011;

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 national of Argentina and France born in 1946. She joined UNESCO in June 1978 under a "supernumerary" contract, which was extended several times. On 19 March 1990 she was offered a six-month temporary contract with retroactive effect from 1 January 1990, which she accepted. On 13 June she was informed that the conversion of her short-term contract into a one-year

fixed-term contract as from 1 July 1990 had been approved. Hence, as from 1 July she held a fixed-term contract, which was renewed periodically until 30 September 2008, when she retired.

By a letter of 14 November 2008 the United Nations Joint Staff Pension Fund (UNJSPF) notified the complainant that she had contributed to the Pension Fund from 1 January 1990 to 30 September 2008 and that her pension benefit amounted to 1,916.59 euros per month, which would be paid to her as of October 2008. On 8 December she submitted a protest to the Director-General, contesting UNESCO's decision not to enrol her in the Pension Fund as from 1978, when she had joined the Organization as a supernumerary. She explained that she had been informed for the first time on 14 November 2008 of UNESCO's decision to pay pension contributions to the Pension Fund only as from 1 January 1990. She also alleged that the decision to employ her as a supernumerary was tainted by an error of law, as it aimed at depriving her of the entitlements granted to staff members, in particular pension entitlements. As a result of this decision, her pension was reduced by half. She consequently asked the Director-General to "regularise" her situation, particularly with respect to her pension entitlements, and sought permission to appeal directly to the Tribunal in the event of a negative response. On 22 January 2009 the Director of the Bureau of Human Resources Management replied that her protest was not admissible, as it had been submitted more than two months after she had left the Organization. The Director also noted that the complainant had not contested her terms of employment as a supernumerary at the relevant time, i.e. between 1978 and 1990, and had not referred the dispute to the Chairperson of the UNESCO Appeals Board for a decision, as foreseen in paragraph 14 of the General Conditions Applicable to Supernumeraries.

On 20 March 2009 the complainant filed a notice of appeal with the Secretary of the Appeals Board and on 17 April she submitted her detailed appeal. She sought regularisation of her situation with the

UNJSPF, i.e. payment of pension contributions for the period when she was employed as a supernumerary or, subsidiarily, payment with effect from the date of separation of an amount equivalent to the difference in the pension she receives and that she would have received had she been enrolled in the Pension Fund since 1978. In its report of 9 December 2009 the Board held that it had no jurisdiction to examine a complaint against the UNJSPF. It also noted that, prior to 1 January 1990, the complainant was not eligible for participation in the Pension Fund as she was not a staff member but a supernumerary and that she was now time-barred from contesting her contractual situation as a supernumerary. The Board therefore recommended that the appeal should be rejected as irreceivable.

By a letter of 25 January 2010, which is the impugned decision, the Director of the Bureau of Human Resources Management informed the complainant that the Director-General had decided to endorse the Appeals Board's recommendation.

B. The complainant contends that the impugned decision was taken on the basis of a flawed report from the Appeals Board. The latter erred in concluding that it had no jurisdiction to examine her appeal as it was directed against UNESCO and not against the UNJSPF. Indeed, she contested the Organization's decision, reflected in the letter of 14 November 2008, to pay contributions to the Pension Fund only for the period from 1 January 1990 to 30 September 2008. The Board also erred in finding that her appeal was irreceivable *ratione materiae*. In her view, paragraph 14 of the General Conditions Applicable to Supernumeraries was not relevant, as it deals with disputes concerning the execution or interpretation of a supernumerary contract, whereas her case was about "re-characterization" of her successive supernumerary contracts spanning a period of almost 12 years.

According to the complainant, her appeal was also receivable *ratione temporis*, as she submitted her protest to the Director-General on 8 December 2008, i.e. within one month of receipt of the contested decision of 14 November. She asserts that, before receiving that

decision, she was not aware that UNESCO had paid contributions to the Pension Fund only as from 1 January 1990.

On the merits, she alleges that the impugned decision is tainted with an error of law. She contends that her status as supernumerary for almost 12 years was fictitious and aimed at depriving her of the entitlements she would have been granted had she been considered as a staff member immediately upon being recruited. She draws attention to a judgment of the Administrative Tribunal of the Asian Development Bank, in which that Tribunal decided to redefine an employment relationship on the grounds that the Bank had not provided good reasons for employing a person under temporary contracts when the true relationship of the employee to the Bank was that of a staff member holding a regular appointment and that its failure to pay pension contributions on account of its unfair employment practice had caused that person material and moral injury. The complainant also refers to the case law of the present Tribunal to support her view that she should be considered as a staff member since 1978, as her status as a supernumerary was fictitious.

The complainant asks the Tribunal to set aside the impugned decision, to "re-characterize" the supernumerary contracts granted to her from 1978 to 1990 as "regular" contracts resulting in her being entitled to pension benefits in respect of that period. She also asks the Tribunal to order UNESCO to take the necessary measures with the UNJSPF to ensure that the amount of her pension corresponds to the amount that she would have received had she been enrolled in the Pension Fund since 1 July 1978, subject to her paying her share of the contributions to the Fund for the period from 1 July 1978 to 31 December 1989. Subsidiarily, she asks to be granted 394,831 euros in material damages, adding that this amount "may be technically corrected with the help of the Fund" and that she is willing to pay her share of the contributions to the Pension Fund for the period from 1 July 1978 to 31 December 1989. Lastly, she claims costs.

C. In its reply UNESCO asserts that the Tribunal lacks competence *ratione personae* to examine the complainant's claims relating to her supernumerary contracts, as it is clear from the Organization's rules that supernumeraries are not staff members. It also asserts that her complaint is irreceivable *ratione materiae* given that the letter of 14 November 2008 from the UNJSPF was not a decision taken by UNESCO, and the Tribunal is not competent to consider a complaint contesting a decision taken by the UNJSPF. It adds that the Organization is a member of the UNJSPF, but that it is not competent to calculate or adjust the pension of participants or to guarantee the information given by the UNJSPF to its participants.

UNESCO argues that the Appeals Board was right in concluding that the complainant's appeal was time-barred insofar as she did not request that her employment relationship be redefined when she was recruited as a staff member in early 1990. It indicates that the letter of appointment of 19 March 1990, which the complainant accepted without reservations, was a clear offer of appointment in which it was stated that she would be enrolled in the Pension Fund as from 1 January 1990. Moreover, paragraph 14 of the General Conditions Applicable to Supernumeraries provides that disputes concerning the execution or interpretation of a supernumerary contract shall be submitted to the Chairperson of the UNESCO Appeals Board acting as sole arbitrator; consequently, the Tribunal is not competent with respect to the complainant's claim for redefinition of her employment relationship as a supernumerary.

The defendant replies subsidiarily on the merits, submitting that, as decisions concerning appointments and entitlements of employees fall within the Director-General's discretion, the decision concerning the complainant's contracts is subject to only limited review by the Tribunal.

It denies that the complainant was unlawfully deprived of pension entitlements for the duration of her employment as a supernumerary. In its view, it fulfilled its obligation to provide her with adequate

remuneration and social protection, as she had the possibility when she was a supernumerary to contribute to the French social security scheme and thus to benefit in due course from its pension scheme. Since she decided not to do so, the Organization cannot be blamed for her own negligence.

D. In her rejoinder the complainant reiterates her arguments. She stresses that the letter of 14 November 2008 is the only individual notification she received concerning her pension benefits and reiterates that, prior to that date, she was not aware that her contractual situation would not be corrected later. Indeed, since her employment relationship had already been modified in part as from 1 January 1990, she had reason to believe that her contractual situation as a whole would eventually be "corrected". She asserts that no pension coverage was foreseen for non-French supernumeraries.

In addition, the complainant stresses that, according to the Tribunal's case law, the contractual situation of a person who has held several types of contract over a long period of time may be redefined to enable him or her to be considered as a regular staff member and to benefit retroactively from all the entitlements granted to a staff member, including pension entitlements.

E. In its surrejoinder UNESCO maintains its position.

CONSIDERATIONS

1. The complainant was in the employ of UNESCO from 5 June 1978 to 31 March 1990 as a supernumerary and became a staff member retroactively with effect from 1 January 1990. She worked until reaching the statutory retirement age of 62 and retired on 30 September 2008.

In an appeal dated 17 April 2009 the complainant impugned an implied decision on the part of the Organization regarding her pension entitlements as reflected in the UNJSPF's letter of 14 November 2008, detailing the amount of her pension for October 2008. She contested

the fact that the Organization did not consider her almost 12 years of work as a supernumerary when calculating her pension entitlements.

In its report, dated 9 December 2009, the Appeals Board unanimously recommended that the Director-General should dismiss the appeal as irreceivable since there was no administrative decision capable of being contested. By a letter dated 25 January 2010, which is the impugned decision, the complainant was informed of the Director-General's decision to endorse the Board's recommendation.

2. The Organization asserts that supernumeraries do not have the status of staff members and do not have access to the Tribunal. Indeed, paragraph 14 of the General Conditions Applicable to Supernumeraries provides that disputes concerning the interpretation or execution of a supernumerary contract shall be submitted to arbitration. Since the complainant became a staff member on 1 January 1990, she was enrolled in the Pension Fund also from that date. UNESCO contends that she should have contested the lack of pension coverage as a supernumerary through arbitration at the pertinent time (i.e. when she was employed as a supernumerary) as she was fully aware at the time of the non-coverage as detailed in her supernumerary contract. In its view, the complaint is consequently irreceivable. Subsidiarily, the Organization submits that the complaint is unfounded.

3. The complainant puts forward a number of pleas and claims which are set out under B, above.

In support of her claims, she submits in particular that her complaint is receivable as she contested the implied decision reflected in the letter of 14 November 2008 within the prescribed time limits. She argues that the Tribunal is competent because the decision was taken when she was a staff member. She adds that the characterisation of her contractual situation as a supernumerary was erroneous and aimed at depriving her of the entirety of the entitlements she would otherwise have received if she had been considered as a staff member from 1978; and that she suffered material prejudice as she was

deprived of pension entitlements for the period of almost 12 years during which she worked as a supernumerary.

4. The Tribunal finds itself competent as the question raised in the complaint does not relate to the interpretation and execution of supernumerary contracts, but instead relates to the claim raised by a former staff member, that those supernumerary contracts were "fictitious" and that staff holding such contracts must be considered as regular staff members who are eligible to participate in the UNJSPF.

5. However, the Tribunal finds the complaint irreceivable as time-barred. Indeed, the complainant contests the information in a letter which is merely the consequence of decisions taken in 1990. The letter of 19 March 1990 offering an employment to the complainant constituted a decision to grant her a temporary contract for six months as from 1 January 1990 and clearly informed her that she would be enrolled in the Pension Fund with effect from that date. That was subsequently confirmed in the letter of 13 June 1990 approving the conversion of her status from a six-month temporary appointment (effective 1 January 1990) to a one-year fixed-term appointment (effective 1 July 1990). Therefore, it was clear that her years as a supernumerary were not included. The complainant's assertions that she was unaware of the non-inclusion of her years as a supernumerary in the calculation of her pension until receiving the letter of 14 November 2008 and that she was not in a position, prior to receiving that letter, to know that the situation regarding her pension would never be corrected to include her years as a supernumerary, apart from being contradictory, are not supported by the evidence.

To the extent, if any, that both letters are to be construed as constituting decisions not to convert the complainant's supernumerary status from an earlier point of time, the complainant is clearly out of time to contest them. Moreover, the complainant did not contest within the applicable time limits the characterisation of the contracts she held between 1978 and 1989 as a supernumerary, which therefore became stable and cannot now be challenged. Indeed, as the Tribunal

has held in Judgment 1393, in consideration 7, for reasons of stability in law time limits must be treated as binding.

6. The Tribunal notes that the complainant's hope that her supernumerary contracts would one day be included in her pension calculation cannot be equated with a reasonable expectation. The complainant has not put forth any convincing argument to show that the Organization had given her any specific indication, creating a reasonable expectation, that such a "re-characterisation" or pension recalculation would occur.

7. In light of the above, the Tribunal finds itself competent but will dismiss the complaint as irreceivable, *ratione temporis*. As such, the complainant shall bear her own costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet