

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

**105th Session**

**Judgment No. 2740**

The Administrative Tribunal,

Considering the second complaint filed by Ms E.S.M. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 31 October 2006, the Organization's reply of 23 August 2007, the complainant's rejoinder of 8 September and UNESCO's surrejoinder of 20 December 2007;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Facts relevant to this case are to be found in Judgment 2536, delivered on 12 July 2006, in which the Tribunal dismissed the complainant's first complaint as irreceivable on the grounds that the complainant had not been notified of any appealable administrative decision. On 31 July the complainant, who considered that she was entitled to seek a ruling on the merits of her case, sent a letter to the Director-General in which she asked him to take a final administrative decision on the issues raised in her submissions. She sent him a reminder on 21 August. The Director of the Office of International Standards and Legal Affairs replied to her on behalf of the Director-General by a letter of 29 August, in which he stated that he considered her case closed, particularly because the Tribunal, which delivers the last- instance decision, had dismissed her complaint. He added that the Organization "[did] not intend to enter into any further correspondence [...] on [this matter]". The complainant filed a complaint with the Tribunal on 31 October 2006 in which she impugns the implicit rejection of her request of 31 July.

B. Referring to the contents of the letter of 29 August 2006, the complainant contends that UNESCO has committed an "abuse of procedure aimed at improperly extending the authority of *res judicata* to the merits of the case", on which no ruling has ever been given and which, in her opinion, "remains receivable on the conditions established by the [Tribunal's own] rules". Citing the case law, she submits that in this case an exception can be made to the principle that internal means of redress must be exhausted, as she has done her utmost to obtain a decision on the merits. Moreover, she reiterates the arguments she put forward in her first complaint. She recalls in particular that she was harassed because she had denounced the misappropriation of funds, that her performance reports were not drawn up from 1999 to 2003 and that the promise to promote her to grade P-5 was not honoured.

The complainant essentially claims the same relief as she sought in her first complaint. In the instant case she requests the Tribunal:

- “- to find her complaint receivable
- to acknowledge her withdrawal of claim concerning the two-year extension of her contract initially considered and to determine her rights and obligations as at 1 March 2003, the date of her retirement
- to rule that, in conformity with Article 40 of the new 'Standards of Conduct for the International Civil Service' and Article 101(3) of the United Nations Charter, Regulation 1.5 of UNESCO's Staff Regulations and Staff Rules concerning the duty of discretion cannot be used as a cover for crimes and offences punishable under national laws
- to rule that in accordance with Article 6 of the 'Standards of Conduct for the International Civil Service' (Article 7 of the new Standards), Regulation 1.5 of UNESCO's Staff Regulations and Staff Rules cannot be used to prevent compliance with the duty of loyalty arising under the above articles and to authorise [her] to inform the [United Nations Development Programme] of the losses sustained as a result of UNESCO's illegal actions

- to authorise [her] therefore, notwithstanding the provisions of Regulation 1.5 of UNESCO's Staff Regulations and Staff Rules, to inform the victims regarding the malpractices observed in this case and the losses and damage they have sustained as a result of UNESCO's illegal actions
- to order UNESCO to pay her compensation of 6,000 dollars for refusing to draw up [her] performance appraisals [...] for four years, from 1999 to 2003
- to promote [her], in accordance with the verbal promise given, to grade P-5 with effect from 1 July 1999, and to reconstitute her career accordingly
- to grant [her] 20,000 dollars in damages for moral injury
- to grant [her] 2,000 dollars in costs
- to grant [...] interest at the legal rate on any sums paid."

C. In its reply UNESCO submits that the complaint is irreceivable on several grounds. It asserts that there is no administrative decision to challenge, since the letter of 29 August 2006 did not notify the complainant of any decision. Furthermore, it argues that she has not complied with the requirement that internal means of redress must be exhausted for, even supposing that the said letter conveyed a decision which could be challenged, the complainant ought to have followed the internal appeal procedure. It adds that the claim that the duty of discretion should be waived is irreceivable inasmuch as the Tribunal is not competent to order such a measure. Lastly, it argues that the complaint is irreceivable in that it constitutes a disguised application for review of Judgment 2536. In this connection it draws attention to the fact that the Tribunal's judgments carry the authority of *res judicata* and may be reviewed only in exceptional circumstances which, in this case, do not obtain.

On the merits and subsidiarily, the defendant refers to the arguments it put forward in the reply and surrejoinder it presented in the context of the complainant's first complaint. It maintains with regard to her allegations of harassment and moral injury that no unlawful act took place and that she did not suffer injury.

D. In her rejoinder the complainant denies that her complaint is an application for the review of Judgment 2536 and explains that she does not at any point call into question the *res judicata* principle. She explains why she considers that she had reason to file a complaint directly with the Tribunal and she denounces the Organization's bad faith. In her view, the letter of 29 August 2006 contained a "final negative reply".

On the merits the complainant maintains her position. She asks the Tribunal to address several "fundamental issues" concerning, inter alia, the duty of discretion, the application of the Standards of Conduct for the International Civil Service, the scope and limits of UNESCO's privileges and immunities and the scope of the "duty of loyalty".

E. In its surrejoinder the Organization states that the arguments put forward in the rejoinder add nothing to the discussion of the merits and it reiterates its position.

## CONSIDERATIONS

1. When she retired on 28 February 2003 the complainant held the position of Chief of Section in the UNESCO Coupons Programme at grade P-4. On 17 October 2002 she had submitted a file to the Director-General containing accusations of misappropriation of funds and other forms of misconduct by her supervisors in the management of the Programme. Other allegations concerned the preparation of her performance reports, psychological harassment to which she claimed to have been subjected in the performance of her duties and the failure to honour a commitment allegedly made to promote her to grade P-5.

On 22 October 2002 the file she had sent was referred to the Deputy Director-General. The complainant was informed by an e-mail of 6 January 2003 that another official, whose grade was P-5, had been assigned to the Coupons Programme to assist her in her duties in view of her forthcoming retirement, and subsequently, by a memorandum of 18 January 2003, that her file had been referred to the Office of Internal Oversight for study and for recommendations thereon to the Director-General.

On 22 January 2003 the complainant filed a protest. On 27 January 2005 the Director- General decided to endorse the opinion of the Appeals Board, which had concluded that the above-mentioned e-mail and memorandum had not notified the complainant of an appealable administrative decision. In her first complaint, filed on 16 February 2005, the complainant challenged that decision. In consideration 5 of Judgment 2536, delivered on 12 July 2006, the Tribunal dismissed the complaint, holding that it was irreceivable on the grounds that the complainant had not been notified of any appealable administrative decision.

2. On 31 July 2006 the complainant asked the Director-General to take a final administrative decision on the issues raised in the file she had submitted on 17 October 2002. On 29 August 2006 the Director of the Office of International Standards and Legal Affairs sent her the following reply on behalf of the Director-General:

“[...]

You will recall that the Appeals Board, to which your appeal was referred, recommended to the Director-General, after carefully considering the arguments you had advanced on that occasion, that he dismiss your appeal.

Having taken note of the Board’s opinion and the contents of the file concerning your appeal, the Director-General decided to endorse that opinion and you were informed thereof by letter [...] of 7 [*sic*] January 2005.

In the light of the foregoing and bearing in mind that the Tribunal, which rules in the last instance, dismissed your complaint, I consider that this case is closed. The Organization does not intend to enter into any further correspondence on the matter in the future.”

That is the decision impugned by the complainant in her second complaint.

3. UNESCO submits that this new complaint is irreceivable mainly on three grounds: the absence of an appealable administrative decision, the fact that the complaint constitutes a disguised application for review of Judgment 2536 and the fact that one of the complainant’s claims seeks a waiver of the duty of discretion prescribed by Regulation 1.5 of UNESCO’s Staff Regulations, a matter which falls outside the Tribunal’s jurisdiction, as defined in Article II, paragraph 5, of its Statute.

All three of these objections are manifestly groundless.

(a) The defendant has not rendered an administrative decision on the merits of the request submitted to it on 17 October 2002. But it does not follow that the complainant thereby forfeits her right to obtain such a decision. To the extent that it contains an explicit refusal to rule on the request of 17 October 2002, the letter sent to the complainant on 29 August 2006 must be held to constitute a decision adversely affecting her and hence to be subject to an internal appeal or even a complaint to the Tribunal.

(b) The complaint does not seek, directly or indirectly, to have Judgment 2536 reviewed.

In that judgment the Tribunal merely observed, just as the Appeals Board and the Director-General had done previously, that neither the e-mail of 6 January 2003 nor the memorandum of 18 January 2003 contained an appealable administrative decision. The nature and scope of the judgment are in no way affected by the fact that the parties argued the merits of the case during the proceedings that led to its delivery.

The complainant does not request the Tribunal, directly or indirectly, to review its judgment. She merely requests it to declare her complaint receivable, pointing out that, since the only aspect of the case that constitutes *res judicata* concerns a procedural formality, she is still entitled to come before the Tribunal in order to obtain a ruling on the merits of the case.

(c) Even assuming that the complainant was mistaken, as UNESCO claims, as to the scope of the Tribunal’s jurisdiction, that would not render the complaint irreceivable as a whole but would merely limit the Tribunal’s power of review.

4. It remains to be considered whether, as UNESCO further submits, the complaint is irreceivable for failure to exhaust the internal means of redress.

(a) The letter of 29 August 2006 must be deemed to constitute an explicit decision to refuse to rule on the request

submitted by the complainant on 17 October 2002.

Such a decision may be brought before the Tribunal only after the means of redress open to the complainant have been exhausted (Article VII, paragraph 1, of the Tribunal's Statute). There can be no doubt that the decision of 29 August 2006 was not final in terms of procedure and that it could, in principle, have been appealed pursuant to the provisions of the Statutes of the Appeals Board to which UNESCO refers in its reply. The complainant could not have been unaware of those provisions, since she observed them before filing her first complaint.

(b) On receiving Judgment 2536, in which her complaint was held to be irreceivable, the complainant rightly approached the Director-General with a request that he respond, through a final administrative decision, to the issues raised in her claim of 17 October 2002. Instead of taking a decision on that request, the Director-General informed the complainant that, in his view, the judgment in question had closed the case, so that no further action on his part was required.

The fact that this decision was based on a manifestly erroneous interpretation of the scope of Judgment 2536 did not, in principle, exempt the complainant from the statutory obligation to bring the case before the internal appeal bodies before filing a second complaint with the Tribunal. Consequently, the complaint would, in the normal course of events, be irreceivable.

(c) In the present case, however, such an approach would result in a grave miscarriage of justice. Indeed, in view of the content of the letter of 29 August 2006, by which UNESCO notified the complainant of its refusal to take a decision, the complainant had good grounds to consider that any internal appeal would have proved a hollow and meaningless formality.

In the letter in question the Director of the Office of International Standards and Legal Affairs stated, on behalf of the Director-General, that the Organization would not enter into any further correspondence with the complainant regarding her request of 17 October 2002. Such a response could not be construed by the complainant as anything other than a final dismissal of her claims by the Organization itself.

The complainant was therefore entitled to have direct recourse to the Tribunal, after rightly concluding that the letter of 29 August 2006 contained an implicit waiver of the requirement that she first exhaust internal means of redress.

It follows that the complaint cannot be declared irreceivable under Article VII, paragraph 1, of the Tribunal's Statute.

5. That having been said, and notwithstanding the fact that the parties have again addressed the merits of the case in their submissions, the evidence adduced does not, at this juncture, permit the Tribunal to rule on their dispute in full knowledge of the facts.

The proper course is therefore to set aside the decision of 29 August 2006 and to send the case back to UNESCO for a reasoned decision on the complainant's claim of 17 October 2002 (see Judgments 1328 and 2582).

6. The complainant's remaining claims are premature and must for the time being be dismissed.

The complainant is entitled to 2,000 euros in compensation for the injury caused to her.

She should also be awarded costs, which the Tribunal sets at 1,000 euros.

## DECISION

For the above reasons,

1. The decision declining to address the issues raised by the complainant, of which she was notified on 29 August 2006, is set aside.

2. The case is sent back to UNESCO for a reasoned decision on the complainant's claim submitted to it on 17 October 2002.

3. UNESCO shall pay the complainant 2,000 euros in compensation for the injury caused to her.
4. It shall also pay her 1,000 euros in costs.
5. The complainant's remaining claims are dismissed for the time being.

In witness of this judgment, adopted on 2 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet