

NINETY-FOURTH SESSION

(Application for execution)

Judgment No. 2185

The Administrative Tribunal,

Considering the application for execution of Judgments 1553 and 1620 filed by Mrs Y. M. d. G. on 30 November 2001 and corrected on 20 March 2002, the reply of the United Nations Educational, Scientific and Cultural Organization (UNESCO) of 7 June, the complainant's rejoinder of 14 September and the Organization's surrejoinder of 4 November 2002;

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 and 1620, which were delivered on 11 July 1996 and 10 July 1997, respectively. In the first of these judgments the Tribunal ordered UNESCO, under point 2 of the ruling, to either reinstate the complainant under a new two-year contract or pay her a sum equivalent to four years and six months' salary and allowances. 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. In the event that the Organization failed to execute the said point 2 or to pay the two sums mentioned above within 30 days of the delivery of the judgment it ordered the payment of a penalty of 25,000 francs for each further month of delay.

By a letter of 3 June 1997 the Director of the Bureau of Personnel informed the complainant that the Director-General had decided in favour of the second option provided by the Tribunal in Judgment 1553, namely the payment of an amount equal to four years and six months' salary and allowances. The Director of Personnel asked the complainant to confirm that she wished to have this sum paid into her UNESCO Staff Savings and Loan Service account rather than into her bank account. By a letter of 9 June the complainant replied to the Director of Personnel that there must have been a misunderstanding and that she "expressly" wished that all sums owed to her be paid into her bank account "and not [into her] Savings and Loan Service account".

In a letter of 5 August to the complainant's counsel, the acting Director of the Bureau of Personnel provided a statement showing the amounts owed to the complainant by the Organization as well as those owed by the complainant to the Savings and Loan Service. He asked for a rapid indication from the complainant as to whether she agreed to the deduction of her debts to the Savings and Loan Service from the amount to be credited by UNESCO to her bank account. On 8 August the complainant replied to the acting Director of Personnel that she had express reservations as to the amounts shown and that she "[did] not authorise the deduction of any sum whatsoever in favour of the Savings and Loan Service, given that the dispute over [her] relations with that Service [had] yet to be resolved". The acting Director of Personnel acknowledged receipt of that letter the same day, stating that the Organization had paid the amounts owed. However, the documents attached to his letter as proof of payment indicated that 798,327.68 French francs (or 128,555.18 United States dollars) had been withheld to reimburse the loans taken out with the Savings and Loan Service. The complainant protested against this deduction to the acting Director of Personnel on 27 August. It was the manager in charge of loans at the Savings and Loan Service who, on 29 August 1997, acknowledged receipt of her letter and provided a statement showing the balance of the loans as they stood on 11 July 1996, when the first judgment was delivered. That same manager also

acknowledged receipt of the amount withheld in favour of the Savings and Loan Service.

Interpreting the absence of a reply to her letter of 27 August 1997 as an implied decision of rejection, the complainant informed the Director of Personnel in a letter of 21 April 1998 that she intended to file a further application for execution. The Director of Personnel simply acknowledged receipt of this letter on 25 May 1998. By a letter of 10 August 2001 to the Director of the Office of International Standards and Legal Affairs, the complainant's counsel expressed his regret at the position adopted by the Organization. He referred to the discussions which had been initiated with that director's predecessor and criticised the Organization for having shown bad faith in order to gain time. By a letter of 4 September 2001 the Director of the Office of International Standards and Legal Affairs replied that the discussions that had taken place contained no suggestion of "any consideration other than that which appears in the decisions already notified", and that all the Tribunal's judgments had been "executed in full since 1997".

B. The complainant criticises the Organization for having failed to execute, in full and in good faith, point 2 of the ruling of Judgment 1553. She produces a notice of personnel action of 2 September 1996 to show that the decision not to reinstate her had already been taken at that date, whereas she was not informed of it until she received the letter of 3 June 1997 from the Director of Personnel. She argues that the deduction from the amounts owed to her was contrary to her instructions, to the Tribunal's judgments and "to the law". She adds that the amount claimed by the Savings and Loan Service is incorrect. Since the Savings and Loan Service has itself seised a French court, it cannot refuse to apply the law of that country. Indeed, French law is very clear, in the event of unlawful dismissal, as regards the validity of clauses providing for the immediate reimbursement of loans granted by an employer. According to the complainant, when the Savings and Loan Service realised that its claim might be rendered void by the French court, it turned to UNESCO, which paid it the requested amounts despite the fact that the Savings and Loan Service is an independent entity and that the loan statement produced by it had been "declared non-compliant and illegal" by the French court.

The complainant points out that UNESCO has provided no explanation justifying its decision to favour the second option, that is to pay her compensation, and not reinstate her, which was contrary to the interests of both parties. Lastly, she accuses the Organization of being responsible for the substantial financial loss she suffered, in particular, as a result of the loss of her apartment, as recognised by the Tribunal in Judgment 1553. She asserts that this loss could have been avoided "had the Organization acted with due diligence" and she holds UNESCO and the Savings and Loan Service (the executive director of which is the Director-General of UNESCO) entirely responsible for it.

The complainant asks the Tribunal to:

- "1. declare that it has jurisdiction to rule on the present claims;
2. declare that the present application is receivable;
3. neither of the two options granted by the ILOAT in Judgment 1553 of 11 July 1996 (point 2 of the ruling) having yet been executed in full by the Organization, order the Organization to apply option 1, which is to reinstate the complainant in the Organization without delay under the terms stipulated by the Tribunal and until the age of sixty, in view of the fact that it has illegally ruined her career, defaulted on the judgment in breach of the principle of *res judicata* and delayed the matter for more than four years by refusing to this date to execute the judgment in full;
4. order UNESCO to pay the amount wrongfully deducted on 12 August 1997 in favour of the Savings and Loan Service from the amounts to which [the complainant] was legally entitled pursuant to Judgment 1553 of 11 July 1996, together with the accrued compound interest;
5. order UNESCO to pay the monthly penalties owed to [the complainant] pursuant to Judgment 1620 of 10 July 1997, together with compound interest at a rate of 10 per cent a year, calculated from the respective due dates of each monthly penalty defaulted on since 10 August 1997;
6. restore [the complainant] to her initial situation with regard to her real estate assets, by granting her sufficient compensation to acquire an apartment of similar value, at the present date, to that which she lost definitively in May 1997 as a result of the Organization's actions;
7. award the complainant damages, in an amount to be determined by the Tribunal, in respect of the cumulative

moral injury resulting from the Organization's refusal to execute Judgments 1553 and 1620;

8. award the complainant 50,000 French francs in costs;

9. reject the Organization's claims for whatever purpose.

Without prejudice.

In the event that the foregoing requests cannot be granted to:

1. order UNESCO to pay the amount wrongfully deducted on 12 August 1997 in favour of the Savings and Loan Service from the amounts to which [the complainant] was legally entitled pursuant to Judgment 1553 of 11 July 1996, together with compound interest; or recalculate the salary and pay it with interest calculated at a rate determined by the Tribunal, from the due date to the date of full payment;

2. order UNESCO to pay her salary and allowances from August 1997 to the age of sixty, since the Organization has contravened the principle of *res judicata*: having chosen option 2, [the Organization] has failed to this date to execute it as prescribed by the Tribunal (paid with compound interest at a rate of 10 per cent a year accruing from the actual due date);

3. pay the complainant the actuarial equivalent, in United States dollars, of the difference between her pension deferred to the age of sixty and the retirement pension to which she would have been entitled had her career not been ruined; since her pension has been reduced by more than 50 per cent she will be unable to cover the cost of the rent which she now has to pay, having definitively lost her apartment in May 1997 as a result of the Organization's actions;

4. pay in United States dollars of the actuarial equivalent of the difference between the cost of private health insurance and her contributions to the UNESCO Medical Benefits Fund as an associate participant, on the grounds that she was prevented from remaining a member of the Medical Benefits Fund after having contributed to it for twelve years;

5. order UNESCO to pay the monthly penalties owed to [the complainant] pursuant to Judgment 1620 of 10 July 1997, together with compound interest at a rate of 10 per cent from 10 August 1997 (interest calculated from the actual due date);

6. restore [the complainant] to her initial situation with regard to her real estate assets, by granting her sufficient compensation to acquire an apartment of similar value, at the present date, to that which she lost definitively in May 1997 as a result of the Organization's actions;

7. award the complainant damages in respect of the cumulative moral injury resulting from the Organization's refusal to execute Judgments 1553 and 1620 in full, as well as costs;

8. order the full and legally valid execution of Judgments 1553 and 1620 and apply all legal consequences of the failure to execute the above-mentioned judgments."

C. In its reply UNESCO challenges the receivability of the application, arguing that it has properly executed Judgments 1553 and 1620. It contends that the application concerns not the failure to execute these judgments but the manner in which they have been executed.

On the merits, it argues subsidiarily that the Savings and Loan Service is part of UNESCO and that debts owed to the former must be treated as debts owed to the Organization. The loan agreements entered into by the complainant stipulated as follows:

"In the event that I leave the Organization before the expiry of the loan term, the outstanding balance shall automatically become due. I hereby authorise the Financial Controller, in that event, to transfer to the Savings and Loan Service, without exceeding the total amount owed by me, any sum which UNESCO may owe to me by way of a final settlement, including my final month's salary."

To deny UNESCO the right to effect such deductions would be to disregard the very great difficulty faced by

international organisations in recovering sums owed by former staff members.

The Organization produces a detailed statement which it considers as proving the validity of the claims of the Savings and Loan Service. It therefore sees no dispute as to the evaluation of the amounts owed. The fact that the acting Director of Personnel sought the complainant's consent to the payment of her debt by set-off was merely a gesture aimed at finding an amicable solution. Contrary to that which the complainant appears to believe, this did not by any means amount to recognition of the absence of a claim to the amounts owed. Regarding the reference to French law, UNESCO points out that the present dispute is governed by the Staff Regulations and Staff Rules, the UNESCO Manual and the Regulations and Rules of the Savings and Loan Service, and not by the law of the host country. This remains the case regardless of the fact that the Savings and Loan Service seised the French courts in order to exercise its rights arising from the mortgage over the complainant's real estate asset.

UNESCO challenges in particular the basis of the complainant's principal claims 3, 6 and 7. First, to order it to choose one of the two available options, rather than the other, would be to deprive the word "option" of its meaning; this claim amounts to a request for review of Judgment 1553. Secondly, by awarding 500,000 French francs in damages, the Tribunal already intended to compensate the complainant for the loss she suffered as a result of the sale of her apartment by auction. The third of the above-mentioned claims is unfounded for the same reason.

D. In her rejoinder the complainant argues that the Organization wrongly interpreted Judgment 1553 by proceeding to set off two claims which were not of the same type when only the Tribunal could have ordered this measure. She maintains that the said judgment has not been executed insofar as she was not the recipient of the sums awarded to her by the Tribunal. Her application is therefore receivable.

On the merits, she submits that UNESCO has also misinterpreted the provision of the loan agreements which she cites: this provision does not concern dismissal (let alone illegal dismissal) of the borrower, but voluntary departure. Consequently, the balance of the loan only becomes due where the staff member decides to sell the real estate or to leave the Organization. She considers that the Organization's decision to withhold the amounts owed to the Savings and Loan Service is illegal in that it contravenes the terms of the loan agreements, that it is based on clearly mistaken conclusions and that it amounts to misuse of power. She points out that in a memorandum of 16 April 1997 to the Director of Personnel the former Director of the Office of International Standards and Legal Affairs wrote in particular the following:

"5. With regard to the question of payment of the amounts owed to [the complainant], [...] your note mentions the deduction from these amounts of debts owed by her to the Savings and Loan Service.

6. On this issue, I wish to draw your attention to the fact that in my view the decision of the Tribunal in Judgment 1553 of 11 July 1996 would only be properly executed if the sums owed to her were actually paid to her in accordance with the instructions given or to be given to you by her."

The complainant pleads abuse of authority. She accuses UNESCO of producing false documents and presenting facts which have no connection with the subject-matter of the dispute.

E. In its surrejoinder the Organization maintains its position with regard to the receivability of the application, arguing that the two financial claims were in fact of the same type and that their respective values were irrelevant. It considers that the complainant's claims are new ones which could only be examined in the context of a new complaint.

UNESCO reiterates its arguments on the merits. It points out that the Tribunal stated in Judgment 1888, under 11, that it "is not [...] a civil court of general jurisdiction in matters of delict and contract". UNESCO adds that "nothing in the fundamental principles of justice, law, human rights and civil liberties entitles anyone to evade a contractual obligation to honour a debt, nor requires the Organization to waive a claim that is legitimate and due". It considers the complainant's interpretation of the relevant provisions to be unfounded: these provisions encompass all forms of cessation of service, including expiry of an appointment and dismissal. Regarding the memorandum sent from one department of the UNESCO Secretariat to another, it argues that an internal document of this kind cannot bind the Organization and that the Tribunal can only base its conclusions on the official and final position of the Organization. That position is based on Staff Rule 103.19(c), which provides as follows:

"Deductions from payments shall also be made for indebtedness to the Organization."

Consequently, where two persons are mutually indebted, "there is an automatic set-off between them such that each person's debt is extinguished to the extent of the value of the other's". The Organization takes the view that in Judgment 1620, under 9, the Tribunal acknowledged the existence of the debts owed by the complainant to the Savings and Loan Service; thus, if its right to effect the disputed set-off were denied, the complainant would not only benefit from the amounts awarded by the Tribunal, but would also be able to evade her obligation to pay her debt. This would constitute "illegal and unjust enrichment" and would amount to punishing the Organization twice, in breach of the principle of *non bis in idem*. Lastly, UNESCO categorically rejects the complainant's defamatory accusations.

CONSIDERATIONS

1. In Judgment 1553 the Tribunal gave UNESCO the choice between reinstating the complainant and paying her the amounts stated in the ruling.

In Judgment 1620 ruling on an application for execution it ordered the Organization to pay the complainant damages for default and costs. It also made the following order under point 3:

"If the Organization fails to execute point 2 of the ruling in Judgment 1553 or to pay her those two amounts within thirty days of the date of delivery of this judgment, it shall pay her a penalty of 25,000 French francs for each further month of delay."

The Organization paid the complainant the amounts stipulated in Judgments 1553 and 1620, as well as 284,698.73 United States dollars. The sum of 128,555.18 dollars had been withheld by the Organization in order to redeem loans taken out with the Savings and Loan Service.

In her written submissions to the Tribunal the complainant does not contest the total amount calculated by the Organization for the purpose of executing point 2 of the ruling in Judgment 1553. She does, however, contest the deduction effected by UNESCO from the amounts owed to her, since she disputes not only the amount of her debt to the Savings and Loan Service but also the fact that the debt is due and the Organization's right to effect the said deduction.

The complainant's claims are set out under B, above.

The Organization submits that the application is irreceivable. It argues that Judgments 1553 and 1620 have been executed in full. With regard to the sum deducted from the amount owed to the complainant, UNESCO states in particular that this sum was due pursuant to a contractual clause stipulating that the balance of the loans would become due immediately in the event that the complainant's employment ceased. Furthermore, this deduction is consistent with the Tribunal's case law because, according to the Organization, the compensation had to be calculated on the basis of her actual salary, which would entitle the Organization to withhold sums owed for loan repayments. It also considers that the complainant's claims do not pertain to the execution of the judgment.

2. After the close of proceedings, the complainant sent the Tribunal additional documents concerning the sale of her apartment. Since these documents are not relevant to the outcome of the dispute the Tribunal has not taken them into consideration.

3. Under the procedure for execution of a judgment, the Tribunal, like the parties, is bound by the content of the judgment to be executed.

In the present case, the judgment left the Organization a margin for manoeuvre. The Organization clearly chose not to reinstate the complainant. Consequently, the complainant's claim for reinstatement is irreceivable. It should also be noted that since UNESCO applied the second option of Judgment 1553 to the complainant, she cannot seek to benefit from the first option as well.

Furthermore, the complainant cannot seek to rely on losses sustained after the judgment in question. Such claims can only be brought before the Tribunal if all internal appeal mechanisms have first been exhausted. Since her

claims in relation to these losses do not satisfy that requirement, they are irreceivable.

Since the issue of her contributions to the UNESCO Medical Benefits Fund was not dealt with in the judgment to be executed, her claim on this issue is likewise irreceivable.

However, the complainant's claims concerning the Administration's deduction from the sums owed to her and the payment of the penalty are receivable.

4. The onus is on the Organization to establish that it has executed its obligation.

Set-off is a mechanism by which obligations are extinguished; thus, a debtor may declare that he is setting off a claim against his debt, even where that claim is disputed.

(a) As a general rule, in the context of the execution of a judgment, the debtor can only obtain recognition of the fact that his debt is reduced by the amount set off on condition that his claim is a liquid claim, that is to say that there is no dispute as to the existence, amount and due status of the claim that he sets off against his debt. In addition, the debt to be extinguished must not be one requiring actual payment, which would preclude a set-off.

In the present case, since the complainant disputes not only the Organization's evaluation of the debts she owes to the Savings and Loan Service, but also their due status and the Organization's right to effect a set-off, that set-off cannot be accepted at the current stage, in the context of an application for execution.

(b) Nevertheless, it is necessary to examine whether in the present case the Tribunal's judgment entitled the Organization to exercise its right to recover the loans granted by the Savings and Loan Service, in the context of the global settlement occurring on cessation of the complainant's appointment, and even after the delivery of the said judgment.

The execution of a judgment, in the broad sense of the term, involves determining how the judgment is to be interpreted.

In the relations between an organisation and one of its staff members, any reciprocal debts that become due on expiry of a contract will usually be settled in the context of an overall set-off whereby the balance alone remains payable.

Indeed, in the present case, Judgments 1553 and 1620 cannot be interpreted as excluding the possibility of an overall set-off of that kind on expiry of the contract. Thus, 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, particularly since the parties had agreed, at the time when the loans were granted, to provide for reimbursement of the loans in the event of cessation of employment and the right of the Organization to effect a set-off.

(c) However, a judgment ordering the payment of a sum of money cannot be rendered inoperative by a set-off unless the acceptance of the claim that the debtor intends to set off carries the same guarantees as those afforded by judicial proceedings.

In the absence of a prior ruling on this issue or agreement between the parties, the settlement of the debts they owe each other on cessation of employment must be determined by a decision of the administration taken in the context of a procedure guaranteeing the rights of the staff member and providing for a final appeal to the Tribunal.

The same applies where the Organization intends to set off a claim against a debt resulting from a judgment against it.

In the present case, the Organization took no decision as to the amounts deducted from its debt to the complainant; at the very least, it gave no express indication on this issue that could be construed by the complainant as a decision against which she could appeal.

When an application for execution is before it, it is not the role of the Tribunal to examine and rule on claims which a party intends to set off against the judgment.

Consequently, the matter is referred to the Organization for a decision on this issue, preceded by an investigation and taken in accordance with the rules of due process.

If the decision establishes that the complainant owes an amount equal to the amount previously withheld by the Organization, the latter may consider itself released with retroactive effect, so that it shall be required to pay neither interest nor penalties.

If it establishes that the Organization is not released from its debt, the Organization shall 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 when the penalty was set.

5. Since the complainant's pleas succeed only very partially, she shall be entitled only to a partial award of costs.

DECISION

For the above reasons,

1. The case is referred to the Organization for it to proceed as stated above under 4(c).
2. UNESCO shall pay the complainant 700 euros as a partial award of costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2002, Mr Jean-François Egli, Presiding Judge for this case, Mr Seydou Ba, Judge and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Jean-François Egli

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet