

SIXTY-FIRST ORDINARY SESSION

***In re* NAJMAN (Nos. 1 and 4)**

Judgment 809

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mr. Dragoljub Najman against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 October 1984, as corrected on 10 November and supplemented by his counsel's letter of 6 December 1984 to the President of the Tribunal, and the Organization's reply of 8 February 1985;

Considering the order made by the President of the Tribunal on 15 April 1985;

Considering the fourth complaint filed by Mr. Najman against UNESCO on 19 March 1986 as corrected on 28 May;

Considering the President's order of 16 April 1986;

Considering the complainant's rejoinder of 26 May 1986 in his first complaint, his application of 28 May for oral proceedings, the Organization's surrejoinder of 23 July, the complainant's further observations and further application for oral proceedings, dated 25 September, and the Organization's comments of 15 October on the application and of 6 November on the further observations;

Considering the Organization's reply of 22 July 1986 to the complainant's fourth complaint, the complainant's rejoinder and application for oral proceedings, dated 25 September, the Organization's comments of 10 October on the application and its surrejoinder of 6 November 1986;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal, Article 54 of the Rules of Procedure of the Executive Board of UNESCO, UNESCO Staff Regulations 1.2, 4.4, 4.5 and 9.1, Staff Rules 102.1, 104.14, 105.2(b), 110.3, 111.2(b) and 112.2(b), Manual paragraph 2515 B and paragraph 7(a) of the Statutes of the UNESCO Appeals Board;

Having heard in public on 20 February 1987 oral submissions from Mr. Alain Pellet, counsel for the complainant, and from Miss Marie-Claude Dock, Mr. Gabriel Mpozagara and Mrs. Monique Chemillier Gendreau, agents of UNESCO;

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

A. The complainant's career in UNESCO is summed up in part in Judgment 781, under A. In 1962 he was granted an indeterminate appointment at grade P.5. He became acting Assistant Director-General in 1975 and Assistant Director-General in 1976. He held three two-year appointments at that rank but kept his indeterminate one at P.5. He was in charge of co-operation for development and external relations (ADG/CPX).

His third two-year appointment as Assistant Director-

General was to expire on 31 May 1982. In a letter of 25 May the Director-General informed him that he would get one year's extension, to 31 May 1983, and be transferred. With the Director-General's consent he was on leave from 1 July 1982 until 31 May 1983. He turned up for duty on 1 June 1983 and went to the office he had left eleven months before. What happened then prompted his second complaint, which the Tribunal allowed in Judgment 781.

Also on 1 June 1983 the Director of the Bureau of Personnel wrote the complainant a minute and a letter. The minute said that another office would be his from 2 June; the letter that the Director-General wanted him to resume duty forthwith at the grade of his indeterminate appointment, P.5, and he was to choose between two posts at that grade, one in Nigeria and one in Samoa. In a letter of 9 June he observed that the state of his health forbade a

posting in the tropics or out of reach of proper medical care, and on 20 and 30 June he wrote inviting the Director-General to reconsider. The Director-General replied on 30 June: "on compassionate grounds" another field post would be sought for him; pending the new assignment and in any event from 1 June 1983 until 31 May 1984 he would be on special leave in accordance with Staff Rule 105.2(b); and he would hold an "unclassified" post on an Assistant Director-General's pay.

After eleven days' sick leave the complainant wrote, on 19 July 1983, to the Director-General lodging a "protest" against the decision of 30 June under paragraph 7(a) of the Statutes of the UNESCO Appeals Board. The Director of the Bureau of Personnel confirmed the decision on 25 August 1983. The Director-General having refused direct appeal to the Tribunal under Staff Rule III.2(b), the complainant filed notice of his first internal appeal on 19 September 1983.

By a minute of 15 May 1984, notified to him on 21 May, the Director told him of a decision by the Director-General to extend by two months, to 31 July 1984, the special leave and his assignment to the unclassified post so as to allow time for the Appeals Board to report. On 1 June 1984 he wrote to the Director-General protesting against the decision, again under paragraph 7(a), but by a minute of 20 June 1984 the Director told him that the Director-General confirmed the decision of 15 May. He lodged an appeal - the second one - with the Appeals Board on 19 July 1984.

He was again on sick leave from 9 July to 5 November 1984.

The Board reported on his first appeal on 28 June 1984 and recommended rejecting it. In a letter of 25 July 1984, the decision he impugns in his first complaint, the Director-

General informed him that, though he disagreed with some of the Board's findings and opinions, he accepted its recommendation to reject the first appeal.

The Appeals Board took up the appeal against the decision of 15 May 1984 and, according to a letter addressed by its Chairman to the Director-General on 30 September 1985, recommended rejecting it. In a letter of 31 December 1985 a Deputy Director-General informed the complainant that though the Director-General considered that the Chairman's letter was not a valid report by the Appeals Board, he endorsed the recommendation to reject the second appeal. That is the final decision that the complainant is impugning in his fourth complaint.

B. The complainant observes in his first complaint that, though the decision of 30 June 1983 maintained his pay as an Assistant Director-General, it harmed his professional career, honour and dignity. (1) There were procedural defects. (a) The Director-General disregarded Article 54 of the Rules of Procedure of the Executive Board, which requires him to consult the Board on appointments or extensions of appointment of officials at grades D.1 and above. (b) The Appeals Board proceedings suffered from many defects, which relate to the Board's membership, the oral proceedings and the form of the Board's report. The Director-General also wrote a bitterly critical letter to its Chairman on 24 September 1984 which sought to put pressure on the Board. (2) There were errors of law. (a) Under Rule 102.1(c) the Director-General may indeed establish "unclassified" posts, but only at "salaries falling within those allotted" to "categories and grades" that do not include that of Assistant Director-General and "for special purposes" of which there were none in this case. Nor were the conditions met for making an exception to the Staff Rules under Rule 112.2(b). No valid reasons have been or can be given for stripping him of the rank of Assistant Director-General: the sole purpose was to wound him. (b) In putting him on special leave the Director-General acted in breach of his right to be given work to do. Rule 105.2(b) says that "staff members may be required to take special leave with pay" but only "in exceptional circumstances", which did not obtain. There was also breach of Regulation 4.4 ("... staff members ... shall be given priority of consideration for vacant posts"; many posts were and still are vacant) and of Manual paragraph 2515 B, which entitled him to reinstatement as Assistant Director-General on termination of his leave in 1982-83. (c) There was no reason to offer him a post in the field when many suitable posts were vacant at headquarters at grades D.1 and above, and it was in breach of Regulation 1.2, which requires the Director-General, in assigning staff, to pay "due regard to their qualifications and experience". (3) The decision rested on mistakes of fact, failed to take account of essential facts and drew clearly mistaken conclusions from the evidence. The complainant identifies many differences between the parties on issues of fact, and he applies for oral proceedings to shed light on those issues. He discusses them in detail. (4) There was abuse of authority: the decision was prompted not by "compassion" or a desire to serve the Organization's interests but by malice and in particular a desire to drive him out of the Organization altogether. It was a covert sanction.

He details the circumstances which, in his submission, compound the moral injury and the Organization's liability. He believes that reinstatement as Assistant Director-General as from 1 June 1983 would afford proper redress. He invites the Tribunal to quash the decision of 30 June 1983 and award him whatever compensation it deems fit and costs.

C. In its reply to the first complaint the Organization gives a version of the facts which differs in some respects from the complainant's. It observes that the Director-General was displeased with the complainant's many harmful breaches of discretion, his disloyalty to the Organization and the mismanagement of the sector he was in charge of. It describes in detail what the Director-General regarded as his errors of judgment and misdemeanours. It traces back to 1977 the origins of the Director-General's dissatisfaction, which was made known to him time and again. His patience worn out, the Director-General at last wrote to him on 25 May 1982 informing him of his impending transfer to other duties. When he went on study leave shortly thereafter it was plain that, though the matter of his reassignment was still open, he was no longer Assistant Director-General. The office he reported to on 1 June 1983, that of the ADG/CPX, was no longer his.

(1) The Organization denies that there were procedural flaws. (a) Article 54 of the Executive Board's Rules of Procedure was inapplicable because the decision of 30 June 1983 related merely to the transfer of an official who already held an indeterminate appointment. (b) For reasons the Organization expounds, there were no defects in the Appeals Board proceedings. The Director-General could not put pressure on the Board by writing a letter to its Chairman after it had reported.

(2) There were no errors of law. (a) Rule 102.1(c) was applied correctly, and in keeping with practice, to create an unclassified post. The grades the rule covers include that of Assistant Director-General and an unclassified post may be created at that level. The reference in Regulation 4.5 to "Assistant Directors-General, and officials of equivalent status" can mean only officials on unclassified posts who are being paid an Assistant Director-General's salary. In any event the decision to put the complainant on such a post was in his interest since otherwise he would have got only P.5 pay. Rule 112.2(b) is irrelevant because no exception to the Staff Rules was needed. (b) There was no error of law in putting the complainant on special leave. The measure was not punitive. To support an adverse assessment of someone as senior as an Assistant Director-General the Director-General need not establish facts warranting a sanction: his own lack of confidence is enough. Besides, the special leave caused the complainant no injury, the purpose of it being to find a suitable reassignment. Regulation 4.4 is inapposite because he never applied for any vacant post and does not even allege that the Organization gave priority to others. His claim to reinstatement as Assistant Director-General is irreceivable because what removed him from his post was the decision of 25 May 1982, confirmed on 1 June 1983, and he has failed to challenge it. Besides, the claim is unsound: Manual paragraph 2515 B confers a right to reinstatement only on conditions that are not fulfilled in his case. He had no right to renewal of his fixed-term appointment as Assistant Director-General: that is why it is wrong to speak of relegation to P.5. Rule 104.14 authorises transfer to a post of lower grade, which in this case took the form of non-renewal of a period of promotion. That is a discretionary decision over which the Tribunal has only a limited power of review, and in this case there was no fatal defect. Nor has the complainant any right to the title of Assistant Director-General: the removal of the grade was lawful and the title cannot survive in a void. (c) His objection to the Director-General's considering only field assignments is irreceivable: only an actual decision, not an intention, may be challenged. Besides, the Director-General has discretion under Regulation 1.2 to assign the complainant to a field post.

(3) The Organization discusses the issues of fact at length and submits that there were no mistakes of fact, no essential facts were overlooked and no mistaken conclusions were drawn from the evidence.

(4) It denies abuse of authority. The decisions of 30 June 1983 and 27 July 1984 were more favourable to the complainant than that of 1 June. He fails to discharge the burden of proving malice and personal prejudice. The reasons for the decision of 30 June 1983 were plainly stated, objective and beyond reproach. There was no attempt to drive him out even if it was legitimate to consider finding him a post elsewhere.

His allegations of moral injury are gratuitous. The treatment of him was always patient and tactful. The Organization invites the Tribunal to dismiss his claims and order the striking out of two items of evidence which it submits he has improperly disclosed.

D. In his rejoinder in his first case the complainant objects in many respects to the Organization's account of the facts, which he regards as tendentious and injurious to his honour. In his view there is no understanding why he

was given many delicate missions on UNESCO's behalf, even after 25 May 1982, if he was as disloyal, indiscreet and incompetent as is made out. He develops his pleas relating to procedural defects, errors of law, issues of fact and abuse of authority and he answers in detail the submissions in the reply.

He contends that the decision challenged in his first complaint was born of a consistently malicious policy aimed, for no objective reason, at getting rid of him altogether. He cites, besides many other acts, the search of his office on 1 June 1983, which he objected to in his second complaint; the decision of 15 May 1984 extending his special leave, which he challenges in his fourth complaint; the decision of 27 July 1984, which he impugns in his fifth complaint; and the decision of 30 April 1986 dismissing him from the Organization. It is, he submits, worse to have his material interests preserved by spiteful decisions such as those he challenges in his first, fourth and fifth complaints than to suffer material injury, provided he keeps honour and dignity. UNESCO's talk of "compassion" and "patience" is humbug.

As is notorious, since 1982 UNESCO has been in political and financial difficulty, and the Director-General has aroused such severe reproof both within and outside the Organization that he fears for renewal of his term of office. He feels threatened by a veteran like the complainant, who enjoys the trust of many government representatives and whom the press has often spoken of as a possible successor. Though loth to say so he believes that that is where all the trouble began.

The Tribunal may find it hard to gauge the moral injury unless it takes account of later events. He presses his claims and his application for oral proceedings. He objects to the striking out of the items cited by the Organization and invites the Tribunal to order disclosure of others which reveal the vindictive treatment of the official who represented him before the Appeals Board.

E. In its surrejoinder in the first case UNESCO confirms the account of the facts and develops the pleas in its reply.

It submits that the rejoinder obscures the issues of law by trying to give the case political undertones, put the management of the Organization on trial, and mingle the material facts with later events. The main issue is whether the Director-General was right not to renew the fixed-term appointment of an Assistant Director-General whose performance he was justifiably dissatisfied with. His discretionary authority is greater where the staff member has senior rank and responsibilities so demanding that the Director-General's full confidence in him is essential.

UNESCO presses its application for the striking out of two items of evidence, observing that, besides betraying their confidentiality, their disclosure usurps the Tribunal's authority. It invites the Tribunal to reject the complainant's application for the production of papers about his former counsel, which it submits are immaterial, though it is willing to disclose them to the Tribunal itself. Though not opposed to oral proceedings ordered in accordance with Article 16 of the Rules of Court, it objects to the hearing of witnesses from political and diplomatic circles, whose evidence would be immaterial.

F. Having obtained permission from the President of the Tribunal, the complainant filed a further brief addressing several issues raised by seven new items of evidence appended to the surrejoinder, of which three had hitherto been unknown to him. The Organization lodged further observations on those issues.

G. Inviting the Tribunal to join his first and fourth complaints, the complainant contends that the fourth raises much the same issues in law as the first and he puts forward the same pleas: the decision of 15 May 1984 is, in his view, open to the same objections as the earlier decision, that of 30 June 1983, which it renewed. The decision of 15 May 1984 aggravated the moral injury caused by the earlier one. Its sole purpose was to mislead the Appeals Board into thinking that the Director-General's intention was to keep the complainant on at an Assistant Director-General's pay: that intention was belied by the decision taken on 27 July 1984, just a month after the Board had reported on his first appeal, to pack him off to Bucharest at grade D.I, and by the later shabby treatment meted out to him, culminating in the termination of his appointment on 30 April 1986. In the proceedings on the second internal appeal the Organization dropped several charges of inadequacy it had brought against him in the proceedings on his first appeal; such a shift in its position shows abuse of authority. He invites the Tribunal to quash the decision of 15 May 1984 and award him damages for moral injury and his costs.

H. In its reply to the fourth complaint UNESCO refers to the facts set out in its reply to the first one as well as to its earlier pleas, which apply, *mutatis mutandis*, to the fourth one as well. It further rejects the contention that the Director-General was seeking to mislead the Appeals Board by his decision of 15 May 1984: the purpose of the

decision was to prevent, *pendente lite*, any change in the complainant's position in law. Had there been any such change the complainant would no doubt have accused the Director-General of seeking to put pressure on the Board or of acting arbitrarily and without awaiting its report. Prejudging the Tribunal's decision on his application for joinder of his fifth complaint, he mistakenly seeks to establish a link between the decision of 15 May 1984 and that of 27 July 1984 to assign him to a post in Bucharest. In the proceedings relating to the decision of 15 May 1984 the Organization did not drop the charges of inadequacy it adduced in support of the decision of 30 June 1983: it expressly confirmed them but saw no need to repeat them in extenso. It confirms them again in full. It rejects the plea of abuse of authority and invites the Tribunal to dismiss the fourth complaint as devoid of merit.

1. The complainant's rejoinder is mainly devoted to rebuttal of UNESCO's arguments in the surrejoinder summarised in E above, though it also goes over in detail the reply to his fourth complaint and enlarges on his own contentions.

He refers in particular to the Director-General's failure to consult the Executive Board and to the irregularities committed by the Organization in the course of the Appeals Board proceedings. He maintains that the Director-General's alleged "loss of confidence" did not warrant denying him the right to transfer to a post that suited his qualifications, and without his having to apply for it.

He presses his claims and seeks disclosure of papers relating to the transfer of the staff member who represented him in the Board proceedings and of other items of evidence.

J. In its surrejoinder the Organization dwells at length on the criticisms of the complainant's behaviour already referred to in the two replies and the surrejoinder recapitulated in C, E and H above. It contends that according to usage and the material rules the Executive Board is not consulted and it observes that the complainant cannot cite a single case in which it was. It maintains that the complainant's behaviour was remiss: staff members must be loyal to the Director-

General so long as he remains in office and acts on the Organization's behalf.

UNESCO asks the Tribunal to dismiss the application for disclosure of certain texts.

CONSIDERATIONS:

Joinder

1. The complainant applies for joinder of the complaints to form the subject of a single judgment.

His first complaint challenges a decision of which the main effect was to put him on special leave with full pay for a period not to exceed one year. In his fourth complaint he seeks the quashing of a decision to extend the period of that leave by two months. Both complaints rely on the same facts and pleas and they are therefore joined.

In Judgment 781 of 12 December 1986 the Tribunal dismissed an application by the complainant for joinder of his second complaint with the others.

Withdrawal of his third complaint was recorded in Judgment 728 of 17 March 1986.

His fifth one challenges his transfer to a post in Bucharest and the grading of the post. The link between that decision and the ones he impugns in his first and fourth complaints is not sufficient to warrant joinder.

The complainant, and in its oral pleadings the Organization, have applied for the joinder of further complaints that are to be filed later.

The Tribunal will take up a case when it is ready for hearing.

The complainant's application for disclosure of evidence, for the hearing of witnesses and for oral proceedings

2. The parties have had an opportunity to make submissions that are fuller than the Tribunal ordinarily allows. Written testimonies and many items of evidence have been adduced. Although the written submissions were sufficient to enable the Tribunal to pass judgment it allowed oral proceedings so that counsel for the parties might

briefly address any material issues not explored in their written pleadings.

UNESCO'S application for the striking out of several items

3. The Tribunal will discount as immaterial the items UNESCO cites and its application is therefore without substance.

The complainant's career up to 30 June 1983

4. The complainant joined the Organization in January 1957 at the age of 25. In 1962 he was granted a permanent appointment at grade P.4. He had an outstanding career, becoming Director in 1968 and as from 1 June 1976 Assistant Director-General in charge of cooperation for development and external relations, a post he had already held provisionally. Assistant Directors-General are not granted permanent appointments but, in accordance with Regulation 4.5 of the UNESCO Staff Regulations, are appointed for successive periods "no one of which shall exceed five years" and which in practice are two years. In 1978 and 1980 the Director-General renewed the complainant's appointment to his post in letters that also praised the quality of his services.

But there was a change both in tone and in substance when his appointment came up for renewal on 1 June 1982. By a letter of 25 May 1982 the Director-General extended it again, but for only one year this time and with the qualification that there was to be a change in his duties. And instead of the praise of earlier years there was a sentence in which the Director-General said he looked forward to receiving from the complainant in his new position the loyal support that was to be expected of him.

In a letter of 7 June 1982 the complainant asked that his reappointment should be for the usual two years. He did not speak of the change of duties. In the end, after a common friend had interceded, he asked for and was granted study leave which, combined with annual leave, was to end on 31 May 1983. But the Director-General refused to change his mind about the period of the reappointment. The matter of the change of duties was not raised, or at least not officially.

5. The letter of 25 May 1982 did not prompt any internal appeal and is not now challenged, but it is worth summing up what it said.

It renewed for one year the complainant's appointment as Assistant Director-General and informed him he was to be assigned other duties.

The Organization maintains that the wording made it quite plain he was withdrawn from the post he had at the time, the nature of some other possible assignment being left undecided.

The Tribunal cannot quite read the letter in that way. In accordance with Regulation 4.5 it renewed the complainant's appointment as Assistant Director-General. Though it did not actually mention the post the omission, whether wilful or not, makes no difference to the substance of the decision, which is clear from both wording and context. The Director-General did not appoint anyone to replace him in his post. The various branches of UNESCO continued to give him his title throughout the period of the reappointment. When he went on leave he arranged for someone to take over while he was away, and the fact that the Organization did not demur suggests he was still to be regarded as holding the post from 1 June 1982 up to 31 May 1983.

The letter goes on to speak of a "decision" to have the complainant perform other duties. The word "decision" denotes not mere intent but a positive act which was of legal effect. Though the decision was incomplete because the nature of the new post - an essential element - was not stated, the letter made it known to the complainant that there was no question of keeping him on in the post he then held.

To sum up, the letter embodied two decisions: one to keep the complainant on for one year in his post; the other to give him, at the end of the year, a new assignment of some unexplained nature. To that extent the decisions in the letter are beyond challenge.

6. Another decision was conveyed to the complainant on the Director-General's behalf on 1 June 1983, and its purpose was to give effect to what had been broadly determined in the letter of 25 May 1982. He was to resume duty forthwith and to be assigned new duties "at the grade of the permanent appointment" he was holding "at present". He was offered a choice between two posts, one as UNESCO Representative for Benin, Ghana, Nigeria

and Togo and one as sub-regional adviser on education for the Pacific. Both posts were P.5, the grade he had held 15 years earlier before becoming Director.

He responded in three ways, by writing to the Director of Personnel to say that in any event he was not well enough to take up either post; by seeking an interview with the Director-General, who saw him on 17 June; and by lodging an internal appeal against the decision of 1 June in order to safeguard his rights pending an official reply. There followed the decision impugned in his first complaint, that of 30 June 1983.

The decision of 30 June 1983

7. The Director-General's letter of 30 June 1983 was in two parts, of which the first stated the grounds for the decision. It observed that the Director-General had on several occasions informed the complainant of the reasons why, as he had been warned in the letter of 25 May 1982, he would not be given duties that carried the same grade as those he had performed up to 31 May 1982. It referred to his expressed wish to take early retirement in 1986 and to continue until then to draw the same material benefits as before. To meet that wish and to take account of the state of his health as shown by his medical case-history, the Director-General conveyed the decisions which he had taken "on compassionate grounds" and which were set out in the second part of the letter.

The Director-General would give instructions that some field assignment should be sought other than those offered on 1 June 1983. Although on a strict interpretation of the rules the complainant was entitled to an assignment at no higher grade than that of his permanent appointment he would be put on special leave with full pay under Rule 105.2(b) as from 1 June 1983 pending a new assignment and in any event for not more than one year, and for the purpose an unclassified post would be created which would carry the salary of an Assistant Director-

General.

8. The decision was challenged in time and in accordance with the procedure prescribed in the Staff Regulations. The Appeals Board reported on 28 June 1984. Both before and after the report was written there were incidents which the Tribunal will not go into since they are immaterial. The long and the short of it is that though the Director-General rejected parts of the report he accepted the recommendations, which were that he uphold the decision of 30 June 1983, on the grounds, in substance, that he had properly exercised his discretion.

9. The decision of 30 June 1983 is the only one challenged in the first complaint. Though he had lodged an internal appeal against the decision of 1 June 1983 he did not follow it through. He was right. While not expressly setting aside the decision of 1 June, the one of 30 June superseded it. Both as to the grade and as to the assignment the later decision did not square with the earlier one. Both took effect as from 1 June 1983, the earlier one was not put into effect, and it is therefore to be deemed cancelled. The complainant acted correctly in refraining from challenging it since had he done so his claims would have been irreceivable.

Loss of the title of Assistant Director-General

10. The complainant contends that it was the decision of 30 June 1983 that stripped him of his post as Assistant Director-General.

The Organization's answer is that it was the decision of 1 June 1983, which has gone unchallenged, that did so. But, as was stated in 9 above, the decision of 1 June was cancelled and therefore had no effect in law.

The letter of 25 May 1982, which UNESCO also relies on, did. It has already been explained why the effect of that letter was to inform the complainant that his duties as Assistant Director-General in charge of cooperation for development and external relations would not be renewed as from 1 June 1983. That decision is now beyond challenge, and he may not validly contend that the impugned decision was the one that took away his title.

The Director-General could of course have appointed him to another post for an Assistant Director-General, but had he done so there would not have been mere renewal of his appointment but a new appointment. The complainant has no valid claim to continuance of his appointment to the post he held up to 31 May 1983.

There are other grounds, however, on which his case may rest, and the other pleas are now taken up.

The decision to seek only a field assignment

11. The complainant objects to the Director-General's having resolved to offer him only a field assignment.

The Organization answers that the plea is mistaken because it is not the intent but the actual outcome that may cause injury. At one point it even argues that the wording of the letter did not rule out an assignment at headquarters, and it also maintains that in any event the Director-General may put a staff member on any post whatever provided account is taken of his qualifications and experience.

Though the issue is not a straightforward one, the Tribunal takes the view that on this point the decision of 30 June 1983 causes the complainant no injury but merely states an intent that was not binding on the Organization. The matter of the field assignment is looked at further in the context of the fifth complaint challenging the transfer to Bucharest.

The creation of an unclassified post

12. The Organization pleads that the decision caused the complainant no injury since he kept his full pay as Assistant Director-General and that it was taken out of sheer consideration for him.

The Tribunal will not go into the issue but will state the matter quite simply. At the same time as he was assigned to the unclassified post the complainant was made idle by being put on special leave. The actual text of the decision shows that the only purpose of creating the unclassified post was to make him bide his time and give him nothing whatever to do. The two parts of the decision being inextricable, there is no doubt but that the whole did cause him injury. While bearing in mind that the two parts form a single decision, the Tribunal will, for the sake of clarity, take them up separately.

13. The rule that the Organization applied was Rule 102.1, which is headed "Classified and unclassified posts". The text provides in clause (a) for two sorts of official: those who hold a Deputy or Assistant Director-General's post and those who are "classified in three categories and thirteen grades". What are known as "unclassified posts" are covered by a separate clause, (c), which reads:

"The Director-General may, for special purposes, establish posts at annual salaries falling within those allotted to the categories and grades mentioned in (a) and (b) above, without assigning grades to such posts; a post so established shall be known as an unclassified post and shall, for the purpose of the Staff Regulations and Rules, be treated as being in the grade and category according to which the annual salary is fixed."

The arrangements provided for in clause (c) are based on assimilation of "unclassified" to "classified" posts. Since an Assistant Director-General's post is not a classified one the Director-General was not free to make the assimilation he did.

14. In rebuttal the Organization argues first from the actual text. It says that there is an Assistant Director-General grade that corresponds to Assistant Director-General posts and that such posts therefore fit into the staff categories. But such a construction is plainly wrong because it is at odds with the text. It would be tantamount to saying that a post the Director-General's letter described as unclassified was in fact classified and that there are not just thirteen grades, as said, but fifteen.

Secondly, the Organization submits that it followed a practice introduced by the Master Standard for job classification which the International Civil Service Commission has approved and which applies throughout the United Nations system.

But the Master Standard does not apply directly to the staff of the international organisations: it consists of mere guidelines which the organisations are free to introduce into their own regulations. Since UNESCO has not done so, it is not the Master Standard that can afford any basis for the creation of the unclassified post.

15. For a third, and subsidiary, argument the Organization relies on another provision of the Staff Rules. Rule 112.2(b), it points out, empowers the Director-General to "make exceptions to the Rules, in specific cases, provided that such exceptions are not inconsistent with the Staff Regulations and do not constitute a breach of contract or prejudice the acquired rights of staff members, and are in the interests of the Organization".

That rule does confer wide discretion on the Director-

General in dealing with difficult circumstances and it would arguably cover the present case. But there is no need to go into the matter since the Tribunal allows the complainant's plea of another substantive flaw and holds the decision to be unlawful anyway.

16. The Director-General omitted to consult the Executive Board of UNESCO before taking his decision, though Article 54 of the Board's Rules of Procedure reads:

"The Director-General shall consult the members of the Executive Board with regard to the appointment or renewal of a contract of officials at D.1 and above whose posts come under the Regular Budget of the Organization."

UNESCO submits that there was no call for such consultation because the decision was neither appointment nor renewal of contract but just the assignment of a P.5 official.

That is not so. The effect of the decision was to appoint the complainant for a period of up to one year to a grade above D.1. He was to have a post that carried an Assistant Director-

General's pay, even though by 1 June 1983 he had lost his Assistant Director-General's post because of the decision of 25 May 1982, which is now beyond challenge. Thus the impugned decision may be seen either as "renewal of a contract" as regards pay, since the complainant was to go on receiving the same amount, or else as an "appointment" to a grade above D.1, since he was to have a new title. Whichever it was, the Board's Rules of Procedure applied. As for UNESCO's plea that the decision was just an assignment of a P.5 official, such a derogation from the Staff Regulations is inadmissible and might even amount to an abuse of authority. Besides, the Tribunal does not see what the implications of the plea are in law.

Lastly, although Rule 112.2(b) also says that exceptions shall just be "made known" to the Executive Board and not that the Board shall be consulted, it cannot do away with a safeguard in a text that sets forth the Board's powers and requires that the Board state its opinion whenever the Director-General wants to establish a senior post and appoint someone to it. Indeed the anomaly of creating a high-ranking post but giving it no content made consulting the Board the more imperative, if only for financial reasons.

The special leave

17. As was said in 7, the complainant, besides being appointed to an unclassified post, was made to take special leave at full pay. The material provision is Rule 105.2(b):

"In exceptional circumstances staff members may be required to take special leave with pay, this measure being without prejudice to the rights of the staff member."

The wording makes it plain that such a decision will be exceptional. Unless leave is granted at his own wish or he is on sick leave - which is just an incident of employment - a paid staff member is entitled to be given work to do that matches his grade. Any exception the Staff Regulations may authorise is to be narrowly construed. The commonest is suspension from duty pending disciplinary investigation, and indeed Rule 110.3 says that a staff member may be suspended from his functions with pay in such circumstances and delimits the Director-General's authority in the matter. There are two conditions: there must be prima facie evidence of serious misconduct, and continuance in service must prejudice the Organization's interests. Of course the suspension ends once action is taken.

Although compulsory special leave has the same effect its purpose is different from and even incompatible with that of suspension. Leave is granted under Rule 105.2(b) for the sake of efficiency when there is some unexpected or exceptional contingency: there is no hint of sanction. It would be an abuse of authority for the Organization to make use of the provision just to get rid of someone who had committed some disciplinary offence that did not warrant suspension. That the draughtsman was quite aware of that is clear from the rider that the staff member may be required to take special leave only in exceptional circumstances and "without prejudice to his rights" - a phrase that may be ambiguous but is significant for the intent it expresses.

18. The complainant maintains that there is no exceptional circumstance the Organization may cite that warrants the decision: the Administration had got itself into the plight it was in.

The reasons for the impugned decision are stated: the Director-General says he is giving instructions that some assignment be offered to the complainant; in the meantime and on compassionate grounds he is putting the

complainant on special leave which will entitle him to a salary and to further pension rights.

The Organization submits that it was the complainant who had created an unexpected problem by turning down the earlier offers and some arrangement had to be found to put things on a proper footing. The conditions set in 105.2(b) were therefore met. Moreover, it would have been in his interest to fall in with the arrangement: the Director-General had lost confidence in him, says the Organization, and "a senior officer the Director-General does not get on with cannot do what is expected of him".

That is how the Organization's argument runs in its original reply. Later it shifts ground and taxes the complainant with serious shortcomings in his conduct as an international civil servant.

19. It is in truth no breach of the letter or spirit of 105.2(b) to make a staff member take provisional special leave until some new assignment is found for him and to let him go on drawing the material benefits of his previous grade or post. But that is not sufficient justification of the decision impugned in this case. What must be shown is that use was not made of the special leave for any purpose extraneous to the Organization's interests and that the arrangement was a reasonable though not necessarily the only reasonable way out of the dilemma.

20. The facts of the case have been dwelt on at length and some of them are beyond dispute. One is that, as has been said, the Director-General had decided as early as May 1982 that the complainant must leave his post on 1 June 1983. So over a year was allowed to go by before the impugned decision was taken and in that time the Organization seems to have given scant thought to his future. Indeed only a few days before the period of special leave was to run out the Director-General conveyed to him a suggestion not to turn up for duty. He refused and was offered two posts on 1 June 1983, the very day after his leave ended. The Organization says that his attitude shows that it was he who created the "exceptional circumstances" that brought Rule 105.2(b) into play.

On receiving his internal appeal the Director-General resolved at once to discount the decision to offer him the two P.5 posts. Those posts and the grade they carried were such that the decision was tantamount to a sanction. An organisation is bound to show due regard to the dignity and good name of its staff. True enough, the complainant was not entitled to an Assistant Director-General's post: on that score the decision of 1982 was no longer open to challenge. Yet it was not certain he was to be reappointed at the grade he had held back in 1968 and indeed there was no reason to suppose that his new duties would carry so much lower a grade. Regulation 1.2 makes staff members "subject to the authority of the Director-General, and to assignment by him, with due regard to their qualifications and experience, to any post in the Organization". The Director-General's authority is not absolute and quite plainly he failed in this case to pay due regard to the complainant's qualifications and experience in picking P.5 posts.

The Organization is not saying that no suitable post was vacant at the time the impugned decision was taken nor fell vacant in the course of the fourteen months' special leave. Nor does it maintain that it made the efforts it could have made to find a solution. All it does say is that the complainant never applied at the time for a single post. In fact it was for the Organization to take the initiative, and the Tribunal cannot accept that no work could be found either at headquarters or elsewhere for someone with such a long record of service.

Both because of the circumstances that led the Director-

General to take the decision and because of the long duration of the special leave the Tribunal concludes that the conditions set in Rule 105.2(b) were not met.

That leaves the Organization's charge of serious shortcomings in the complainant's conduct as an international civil servant.

The professional misdemeanours he is accused of, even if proven, occurred before May 1982 and in any event before 1 June 1983, after which date he had no work. Yet in May 1982 the Director-General wrote to say he would be given duties as from 1 June 1983. The alleged misdemeanours cannot therefore have warranted putting him on the special leave.

On the broader issue, if the Organization's intent was that the decision should be some sort of disciplinary sanction, then it would have perverted Rule 105.2(b): when an international civil servant commits a serious breach of duty, there is a disciplinary procedure to be followed and 105.2(b) is not the proper rule.

The decision of 15 May 1984

21. The effect of the decision of 15 May 1984 was to extend by two months, to 31 July 1984, the period of validity of the decision of 30 June 1983, which had come into force on 1 June 1983. The complainant exhausted the internal means of redress, the Director-General rejected his internal appeal by a decision of 31 December 1985, and his fourth complaint, which impugns the decision, is receivable.

It is also well-founded insofar as the decision of 1 June 1983 is unlawful, i.e. as to the creation of an unclassified post and the grant of special leave. The reasons why the earlier decision is unlawful make the later one unlawful as well.

Redress

22. From 1 June 1983 to 31 July 1984 the complainant was on an Assistant Director-General's pay and kept his pension rights in full. The question of the period after 31 July 1984 is reserved. Though the impugned decisions are unlawful as to the creation of the unclassified post and the compulsory special leave, the Tribunal will not quash them but instead will exercise the power vested in it by Article VIII of its Statute and award the complainant damages.

He has sustained moral injury under two heads: first, he was debarred from working in an organisation he had served faithfully and well for 26 years, and secondly, there was damage to his good name in UNESCO.

The ratio decidendi makes many of his pleas irrelevant, particularly those about his conduct and performance, an issue that is immaterial to the determination of the amount of moral damages. In a case in which feelings run high the Tribunal will rule solely on issues of law. Damages are set at 50,000 French francs.

23. He is also awarded 100,000 French francs in costs.

DECISION:

For the above reasons,

1. The impugned decisions are declared unlawful insofar as they put the complainant on an unclassified post and on compulsory special leave.
2. The Organization shall pay him 50,000 French francs in moral damages.
3. It shall pay him 100,000 French francs in costs.
4. His other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 13 March 1987.

(Signed)

André Grisel

Jacques Ducoux

Mohamed Suffian

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

In re NAJMAN (Nos. 1 and 2)

ORDER

The President of the Administrative Tribunal,

Considering Mr. Dragoljub Najman's first and second complaints against the United Nations Educational, Scientific

and Cultural Organization,

Considering the complainant's brief of 13 February 1985 seeking the joinder of the complaints and the suspension of the proceedings,

Considering the Organization's observations of 28 March 1985 expressing willingness to leave the matter of joinder to the Tribunal's discretion and seeking rejection of the application for suspension;

CONSIDERATIONS:

Joinder

It is the Tribunal itself, not its President, that determines whether to join.

The Tribunal not being in session, the application for joinder must be dismissed at this point in the proceedings.

Suspension

The President may direct proceedings and even if not expressly so empowered may order suspension.

Since a complainant may withdraw a complaint he may also apply for suspension.

Such application will succeed unless the advantage to the complainant of suspending the proceedings is outweighed by the advantage to the defendant of pursuing them.

Since in this case it is not, the application will be allowed.

DECISION:

For the above reasons,

1. The application for joinder is dismissed at this point in the proceedings.
2. The proceedings are suspended sine die but the complainant is invited to apply for their resumption on the conclusion of the internal appeal proceedings.(signed)

Lausanne, 15 April 1985.

André Grisel, President.

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

In re NAJMAN (Nos. 1, 2, 4 and 5)

ORDER

The President of the Administrative Tribunal,

Considering Mr. Dragoljub Najman's first and second complaints against the United Nations Educational, Scientific and Cultural Organization,

Considering the President's order of 15 April 1985 suspending the proceedings sine die but inviting the complainant to apply for their resumption on the conclusion of the internal appeal proceedings,

Considering the complainant's brief of 24 January 1986 announcing the filing of another two complaints and applying for continuation of the suspension pending the Tribunal's ruling on the joinder of those complaints and the two already filed,

Considering the Organization's observations of 19 March 1986 asking the Tribunal to reject that application and rule on the application for joinder of the first and second complaints,

Considering the complainant's fourth and fifth complaints;

CONSIDERATIONS:

An application for suspension will succeed unless the advantage to the complainant is outweighed by the advantage to the defendant of pursuing the proceedings.

In support of his application for continuation of the suspension the complainant observes that he intends to apply for the joinder of his first, second, fourth and fifth complaints.

Though the President may not himself join, precedent suggests that the joinder of the four complaints is at least unlikely.

Continuation of the suspension might therefore needlessly hold up the proceedings and cause detriment to the defendant without serving the interests of the complainant.

The application accordingly fails and the Registrar is called upon to proceed insofar as he is competent to do so.

As for the application for joinder, the Tribunal will make a ruling when it deems fit.

DECISION:

1. The application for continuation of the suspension of proceedings in the first and second complaints is dismissed.
2. The Registrar shall proceed insofar as he is competent to do so.
3. The Tribunal will rule on the application for joinder when it deems fit.

(signed)

Lausanne, 16 April 1986.

André Grisel, President.