

SIXTY-FIRST ORDINARY SESSION

***In re* NAJMAN (No. 5)**

Judgment 810

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Dragoljub Najman against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 19 March 1986;

Considering the order made by the President of the Tribunal on 16 April 1986;

Considering the corrected version of the complaint, lodged on 19 May 1986, the Organization's reply of 20 August, the complainant's rejoinder of 30 September 1986 and the Organization's surrejoinder of 9 January 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulation 1.2, Staff Rules 104.14 and 110.1(a), Article 54 of the Rules of Procedure of the Executive Board of UNESCO, Manual paragraphs 244 D, 2405 F-2, 2416 I and 2445 A-3, and paragraph 7 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 case and the pleadings may be summed up as follows:

A. The complainant's career has been sketched in Judgments 781 and 809, under A. On 27 July 1984 the Director of the Bureau of Personnel wrote to tell him that the Director-General had appointed him as from 1 August as special adviser to the European Centre for Higher Education in Bucharest, he would hold a D.1 post created for the purpose, he would remain in Bucharest until some suitable permanent assignment was found for him, and he was to go to Romania as soon as he was fit to take up duty (he was on sick leave at the time). He submitted a protest to the Director-General on 31 August 1984 under paragraph 7(a) of the Statutes of the UNESCO Appeals Board and, having got no answer, filed notice of appeal with the Board on 11 October.

The Board took up that and an earlier appeal in April 1985. Its Chairman addressed to the Director-General a text dated 30 September 1985, said to have been "adopted by a majority vote". Two members later submitted dissenting opinions. The text recommended setting aside the decision of 27 July 1984, assigning the complainant to a suitable post, reviewing the downgrading to D.1, assessing any loss of income he had suffered and acting to secure for him the privileges and immunities of a senior officer in accordance with the headquarters agreement with the French Government. On 30 December 1985 the Director-General wrote to the Chairman of the Board to say that the text ought to have been signed by all its members and he could not regard it as a proper report. On 31 December he wrote to the complainant sending a copy of his letter to the Chairman and saying that, though the report was invalid, he was rejecting the recommendations and the appeal anyway. That is the decision impugned.

B. The complainant gives a lengthy account of the events that led up to the impugned decision. He alleges that the decision impugned is just one of many that make up the policy of malicious and vindictive harassment he has had to put up with for years since falling foul of the Director-General. By way of illustration he cites the Organization's refusal to help in getting the renewal of his diplomatic residence permit for France and obstacles the medical service put in the way of granting him sick leave. He may have had to make several complaints: there is but a single case.

(a) The decision to appoint him at grade D.1 was tainted with procedural flaws. Since that was the grade he held in 1968 he should have been consulted in keeping with Staff Rule 104.14, the only material rule unless the decision is treated as a sanction: "When it is proposed to transfer a staff member to a post of lower grade he may elect, in lieu thereof, to be terminated and shall receive notice equivalent to that which would apply in case of termination...".

There should have been consultation of the Executive Board of UNESCO, since Article 54 of its Rules of Procedure requires the Director-General to consult it on appointments to senior posts funded out of the budget. The failure to respect 104.14 was also a mistake of law. Even when acting at discretion the Director-General was not free to do as he pleased. He overlooked the complainant's legitimate expectancy of renewal of his appointment as an Assistant Director-General. An international official may ordinarily expect promotion and a fortiori protection from unwarranted downgrading. Nearly all senior officers get a series of renewals. Indeed Rule 110.1(a) treats downgrading as a severe form of sanction, such is the practice in the Organization, and there were no grounds for punishing the complainant. It was humbug to protest compassion and at the same time pack him off at a lower grade to a bogus job in the field. There was breach of commitments entered into towards him in the letters of 30 June 1983 and 15 May 1984. Even if assimilated to non-renewal of his fixed-term appointment the decision was arbitrary and taken for reasons irrelevant to the Organization's interests. In any event it was unlawful because when he got notice of it he was on sick leave; the general principle is that an international official's status may not be altered to his detriment while he is ill.

(b) The assignment to Bucharest was unlawful. 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". The creation of the post was improper. The procedure set out in Manual paragraph 2416 I for establishing it was not followed. The Centre for Higher Education did not ask for it. A job description was trumped up much later. The duties did not meet any requirements of the Organization's work. The description says little of the Centre, and what it does say does not warrant D.1. The Director of the Centre himself had that grade and had no need of an adviser at the same rank. The post was as swiftly done away with, as from 1 February 1986, as it had been created. Its creation was just a pretext for getting rid of the complainant.

He contends subsidiarily that the procedure for assigning him to the post was improper: it did not comply with Manual paragraph 2445 A-3, which required a prior request from the competent department; 2405 F-2, which stipulates a medical check-up; or 244 D, which demands consultation of the staff member on his assignment to the field. It was wrong to order him to take up duty in a matter of days. The Director-General acted in breach of an obligation to take account of his interests and wishes. Of the 27 senior posts which were vacant at the time 19 headquarters posts, which he lists, would have been suitable.

(c) The decision as a whole was an abuse of authority. Far from having UNESCO's interests at heart the Director-

General acted out of animosity towards the complainant; even if he kept within the bounds of his authority he abused it. The complainant was being asked to take up, within a few days, a temporary post for which there was no job description and which carried token duties. He cites many other circumstances as evidence of animosity, some of them described in his other complaints: the grant of special leave, the search of his office, the loss of his title and diplomatic immunity, and so forth; as well as others subsequent to the impugned decision, ending in his dismissal as from 30 April 1986. From 1 June 1983 onwards he was kept in doubt that wore him down, the constant purpose being to drive him to resign.

No reasons were given at the time for the decisions of 27 July 1984 and 31 December 1985. The Organization has since shifted ground but its main explanation is that the Director-General had "lost confidence" in the complainant. Whatever brushes there were between them did not so upset the Director-General up to May 1982 as to cause him to refuse renewal of the complainant's appointment as Assistant Director-General. And the complainant can have given no cause after that date since he was in turn on study leave, kept idle, on special leave, on sick leave, and on sick leave and special leave combined before his dismissal in 1986. He can only surmise that the Director-General saw a veteran official like himself as a rival at a time when the Organization was in political trouble and the press was mooting his chances as successor. If that is the true explanation - and he fears it was - it is quite inadmissible: the impugned decision was a covert and improper sanction imposed in disregard of due process.

Its consequences were many. His pension rights and pay fell. He lost his privileges and immunities as a senior officer under the headquarters agreement with the French Government since he was deemed to be on transfer to Bucharest as from 1 August 1984. He suffered grave moral injury: the Appeals Board thought the Administration guilty of "total disregard of the elementary duty of due consideration and respect". There was damage to his good name and dignity, the greater because of his rank.

He invites the Tribunal to quash the decision of 27 July 1984 as confirmed on 31 December 1985 and to order his retroactive reinstatement. Failing that, he seeks an award of damages for injury. He asks for compensation for the

material and moral injury he sustained on account of UNESCO's attitude towards his legal status in the host country. He invites the Tribunal to grant him damages for moral injury in a sum determined *ex aequo et bono* and to allow him costs.

C. In its reply UNESCO submits that the complainant's charges of malice and vindictiveness betray a constantly suspicious and distrustful nature and his utter refusal to see in their true light its attempts to respect his interests. It points out what it regards as the many distortions, irrelevancies and downright errors in his narrative. It rejects his contention that he kept the Director-General's confidence up to May 1982: from 1978 onwards the Director-General time and again made known to him, orally and in writing, dissatisfaction with his behaviour, especially the breaches of loyalty and discretion he committed within and outside the Organization, and his inefficient and lax management. UNESCO gives many examples to bear out the charges against him. It rejects as groundless his own accusations that it made trouble over his residence permit and sick leave. It explains why it believes the Director-General was right to refuse to treat the letter signed by the Chairman of the Appeals Board as a valid report.

As to the impugned decision the Organization contends that the complainant was entitled neither to promotion to senior rank nor to the renewal of it, the Director-General having especially wide discretion in such matters. An Assistant Director-General is someone who enjoys the Director-General's full confidence and the geographical distribution of his peers matters in appointing him. That is why he never gets a permanent appointment and he has no expectancy of renewal. The average tenure is only four years. There was no commitment in the letters of 30 June 1983 or 15 May 1984 to reappointing the complainant Assistant Director-General.

Since the complainant had no right to promotion the grant of grade D.1 was no downgrading. He still held a grade above that of his permanent appointment, P.5. There is no evidence to support his contention that custom precludes transfer of a staff member while he is on sick leave. Ought it really to have kept him on in the unclassified post in Bucharest just because he was on sick leave and even though he challenged the lawfulness of establishing that post? Besides, when the decision was taken the Organization had reason to believe that, not being in hospital, he would soon be fit to take up duty.

His assignment to Bucharest was lawful. The Director-

General enjoys wide discretion in the matter under Regulation 1.2, especially in assigning officers of the complainant's rank, and in this instance he paid due regard to the Organization's interests, his aim being to put by old quarrels, give the complainant a chance to turn over a new leaf and stop paying him a high salary for doing nothing at all.

As to the creation of the post, there is nothing to prevent the Director-General from deciding to create one, as he did here. There is no need for the job description to be drawn up before the transfer is decided on. Besides, breach of the rule governing the job description does not warrant setting a decision aside unless the official has suffered prejudice. How can the complainant contend that the post was a fictitious one when he never performed the duties? In any event the duties were real.

The procedure for assigning the complainant to the post was also correctly followed. He was not required to consent to the transfer, and inasmuch as he had talks with the Director-General about the matter, for example on 17 June 1983, he was duly consulted. The Executive Board did not need to be consulted: Article 54 of its Rules of Procedure requires consultation of it only on appointments and extensions of appointment of senior officers. There was no requirement in the rules that he should first undergo a medical check-up. He was not ordered to take up duty in a few days but only as soon as he was fit to do so. Since he does not argue that he was unqualified for the post, the existence of what he says were suitable vacancies at headquarters is irrelevant. Besides, he had himself suggested that he be transferred to the field. He never refused the transfer, and indeed on 9 February 1985 he wrote a minute asking Personnel to arrange for his travel to Bucharest.

There was no abuse of authority. There is much evidence to show that the Director-General acted considerately and in a spirit of reconciliation. The complainant offers no solid proof of any animosity towards him and his attempts to amalgamate all the decisions taken concerning him so as to show such animosity are quite unconvincing. Many of those decisions have no bearing on this case, and even if the impugned decision were unlawful that would still be no evidence of animosity.

For reasons the Organization explains at some length his allegations that the Director-General saw him as a rival

hold no water.

As for the matter of his status in the host country, that formed the subject of his third complaint, which he withdrew, and he may not now seek redress on that account.

Since his transfer to Bucharest was due to his own shortcomings and to disagreement with the Director-General, the Organization may not be held liable for the moral injury he alleges.

The Organization concludes that the Director-General did not exceed the bounds of his discretion in assigning to an important post a senior official with whom he no longer got on well, especially since the purpose was to allow time to look for another suitable assignment. It invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant develops his account of the facts and the pleas in his original brief. He submits in particular that the fact that he was given many important missions before May 1982 belies the allegation that by then the Director-General had "lost confidence" in him. In any event the alleged loss of confidence does not justify the impugned decision and the utterly arbitrary exercise of authority that marked his assignment. No post description had been made and the legal obligation of consulting him was ignored. Nor did the Director-General pay any heed to the Appeals Board's report of 30 September 1985, though it was perfectly valid and sheds much light on the facts of the case. Nor did he consult the Executive Board.

The tone of the reply, he observes, falls far short of the standard of propriety to be expected of an employer and affords further proof of the Organization's vindictiveness. The injury he has sustained is both moral and physical.

E. In its surrejoinder the Organization reaffirms the seriousness of the complainant's shortcomings. It maintains that the missions he speaks of are to be seen as evidence of the Director-General's good nature and forbearance, not of his full confidence. His unsatisfactory service and the bad blood he was constantly making inside the Organization warranted the decision, and the Director-General had the authority to take it. He had himself suggested a field assignment, and the transfer was the outcome of his earlier conversations with the Director-General. The lawfulness of the transfer required, not his consent, but merely prior consultation. As for his plea that the Executive Board ought to have been consulted, in many United Nations agencies - and UNESCO is no exception - the executive head is under no duty to consult the governing body on extensions of appointment, promotions and transfers of officials at grade D.1 and above.

Lastly, the Organization denies causing any injury to his health.

It invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. The complainant's career in UNESCO is described in Judgment 809, which is delivered on the same date as this one. The decision he is impugning follows the decisions to put him on special leave from 1 June 1983 to 31 July 1984 at full pay, namely that of an Assistant Director-General.

A few days before the leave ended, on 27 July 1984, the Director of Personnel informed the complainant, who was on sick leave, of a decision by the Director-General to appoint him as from 1 August 1984 as special adviser to the European Centre for Higher Education in Bucharest, a D.1 post to be established for six months. He was to take up duty as soon as he was fit to do so. The appointment was, it was stressed, a temporary one pending his assignment to duties that would match his qualifications and experience. There was no job description and none was notified to him until 22 August.

Mainly for reasons of health he did not take up the post. He was dismissed on 7 May 1986.

2. In a letter of 13 August 1984 he objected to the position he had been put in. He lodged an internal appeal under paragraph 7(a) of the Statutes of the Appeals Board and at the same time applied for assignment to an Assistant Director-General's post.

The internal appeal proceedings were long and not until 30 September 1985 did the Board report. Its recommendations were broadly unfavourable to the Organization, though it refrained from recommending the quashing of a decision that was a dead letter. Without going in detail into its reasoning, which it set out at length,

the Tribunal will cite some of its recommendations. It proposed that the Director-General should assign the complainant to a post better suited to his qualifications and experience and to the Organization's interests. It said that the state of his health should be taken into account in choosing the duty station. It suggested reconsidering the decision to downgrade him.

The report stated that it was adopted by a majority and named the two members who dissented, and whose opinion was appended. Only its Chairman signed.

The Deputy Director-General rejected the internal appeal on the Director-General's behalf by a decision of 31 December 1985. He said that the text received from the Chairman showed formal flaws and could not be treated as a report by the Board, but that even if it could the Director-General rejected the findings and recommendations.

The Tribunal sees no reason to treat the report as invalid. The fact that only the Chairman signed is not in itself a flaw. It is not argued that the text fails to record the views of the majority of the Board. In any event it is before the Tribunal and, like any other item produced by the parties, the Tribunal will take it into account in ruling on the case.

The complainant's application for further investigation

3. In its judgment on the first and fourth complaints the Tribunal rules on most of the complainant's applications for further investigation and it will not take the matter up again. It will merely comment on his application for disclosure by the Organization of a medical report on a check-up he underwent on 20 September 1985.

It was on the strength of that check-up that on 7 October 1985 he was granted sick leave as from 22 April to 15 December 1985. The decision is not challenged and he does not say that the medical report is material to this case. The decision of 31 December 1985 merely confirmed the original one and makes no difference. The application for disclosure is therefore rejected.

The claims

4. The parties dwell on many issues and there is call to set out the claims as they appear in the complaint, apart from the application for further investigation on which the ruling is as above.

The first claim is to the quashing of the Director-

General's decision of 27 July 1984, which he confirmed on 31 December 1985, and to the consequences in law of the quashing. The sole material issue is the lawfulness of those two decisions: the others cited in the pleadings are not material, whether they relate to the complainant's sick leave or to his administrative status.

The second claim is to proper redress. He wants to have his status as an official retroactively restored with reinstatement as an Assistant Director-General as from the date on which the impugned decision took effect. Failing that he claims damages. He asks for compensation for the material and moral injury he sustained on account of the stand UNESCO took on his legal status in the host country. He alleges that the Organization's treatment of him caused him moral injury.

Thirdly, he claims costs.

The quashing of the impugned decisions

5. Regulation 1.2 of the UNESCO Staff Regulations reads:

"Staff members are 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. They are responsible to him in the exercise of their functions."

That text and indeed the general principles that govern the international civil service make it plain that an executive head has wide discretion in assigning staff in the organisation's interest. But his authority is not absolute and the lawfulness of his decision is subject to review, albeit limited review because the Tribunal may not meddle in the actual running of the organisation. It will determine whether there is a formal or procedural flaw or a mistake of

law or of fact, or whether some essential fact has been overlooked or a clearly mistaken conclusion drawn from the evidence, or whether there is abuse of authority. Such are the principles that apply to this case, in which the complainant's many pleas relate to matters of form, procedure and substance, including abuse of authority.

6. As the Tribunal says in its judgment on the complainant's first and fourth complaints - and the fact is relevant in this case too - the Director-General decided on 25 May 1982 that he would be assigned to new duties as from 1 June 1983. Actually the decision did not hold good entirely since he was put on leave from 1 June 1983 up to 31 July 1984. The decision impugned in this complaint did assign him to a post, but one that was established for only six months, and it repeated the decisions taken in 1982 and 1983 in that it said he would later get a final assignment to some post that matched his qualifications and experience.

Over two years after the original decision, and for all the assurances the Director-General himself had given in his decisions of 1982 and 1983, UNESCO was still keeping the complainant waiting.

It is hard to believe that in an organisation like UNESCO posts did not fall vacant in that period in Paris or elsewhere. And though the Director-General's decision of 30 June 1983 spoke only of field assignments, the Organization has affirmed in its pleadings that that was not to be taken literally and that a headquarters assignment was possible. Judgment 809 records that affirmation and holds that in that respect the decision of 30 June 1983 caused the complainant no injury.

The Tribunal has not been told how many field posts were vacant at the time. The complainant submits a list of 19 vacancies at headquarters for which he believes he was qualified. The Organization does not demur but says he may not ask the Tribunal to replace the Director-General's opinion with its own as to which posts he could have been assigned to. It explains that because he was on bad terms with the Director-General it preferred to have him away from headquarters for a while. It saw his appointment to Bucharest as a step in the right direction. Assigning him to a post for only six months was intended to let the Director-General consider, should he turn out well, either making him Director of the Centre in Bucharest, a post that became available on 31 August 1986, or even bringing him back to Paris. In other words, he was to be on trial.

7. The complainant alleges formal and procedural flaws.

His first plea is breach of Rule 104.14, which says that when a staff member is to be transferred to a post of lower grade he may elect to be terminated instead. He submits that if he was to have the choice he ought to have been well warned of what the Organization had in mind, and in fact he was not.

The Organization retorts that the plea is unsound in fact: he had long known he might get a field assignment and had actually suggested it himself to the Director-General.

But that is not quite right: as was said above, UNESCO has acknowledged in its pleadings that a field assignment was not the only possible expedient.

In fact the issue goes rather wider.

The complainant's position being peculiar, perhaps the rule does not apply and the Tribunal therefore prefers to rely on the general principles that govern the international civil service, particularly that of good faith. What good faith requires is that when someone is transferred he should be given proper notice, and not just of a vague intention, but of the nature of the post he is to get and of the duty station. The principle does have to be applied flexibly, and a transfer may be lawful even if no notice is given provided that there is enough time before it takes effect.

But in this case there was not. A decision that is made known five days before it comes into effect leaves the official no time in which to act or even to think. What is more, it did not say what the complainant's duties were to be and it was very vague about the title of the post. The Director of the Centre does not seem even to have been consulted. Nor is there any suggestion that the matter was or might prove urgent. It was UNESCO that had set the period of the leave and so given itself fourteen months in which to find some other assignment.

The conclusion is that the complainant was not given due notice of the decision of 27 July 1984.

8. Of his other pleas as to procedure one is that the Executive Board of UNESCO was not consulted.

The Rules of Procedure of the Board say in Article 54.1: "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 Programme of the Organization."

Neither side disputes the fact that the decision of 27 July 1984 to appoint the complainant at D.1 was not put to the Board. But, says the Organization, there was no call for that since the Board is consulted only on "the appointment or renewal of a contract of officials at D.1 and above", not on non-renewal of promotion, non-renewal of appointment or dismissal of an official at D.1 and above. The Organization also cites practice in other organisations, though it does not produce the texts they apply.

Since at the date of the decision the complainant was not a grade D.1 official the case does concern an appointment at that grade. There was therefore an obligation to consult the Board, and it is immaterial whether the Board acts in the matter as do the personnel advisory boards established for officials of lower grades: the Director-General is bound by the Board's Rules of Procedure.

There was the greater need to consult the Board in that the Director-General and the complainant were, as UNESCO acknowledges, at loggerheads and to bring in an independent body might have proved helpful. Yet from 1982 onwards the Organization omitted to consult the Board: when the complainant was having his appointment as Assistant Director-General renewed for a year; when an unclassified post was being established on a par with an Assistant Director-General's; and again when he was being appointed to grade D.1. The Board had been consulted in 1976, 1978 and 1980, whereas from 1982 the omission was constant even though Article 54.1 applied in all instances.

9. The complainant has other pleas. One is that the post he was appointed to was fictitious. The Appeals Board allowed the plea and it may well have been right. Though the Tribunal takes the view that it cannot rule on the strength of the evidence before it, it will not order further submissions. What has already been said warrants setting the impugned decisions aside and shows how serious the Organization's errors were.

To sum up, the decision signed on 27 July 1984 on the Director-General's behalf was tainted with several flaws. The Director-General had a long time in which to take it. Yet it was made known only a matter of days before the leave expired, there was no preparation for it, the duties were not even stated, and the Executive Board was not consulted, though that might have exerted a predominant influence. Nor is it shown to have served UNESCO's interests.

The decision of 27 July 1984 was unlawful. Neither it nor the decision of 31 December 1985 to reject the internal appeal can stand.

Redress

10. There is no objection of principle to retroactively restoring the complainant's status as an official over the period covered by the decision.

Contrary to what he maintains, that does not, for reasons that are explained in Judgment 809 under point 10, entail appointing him to an Assistant Director-General's post.

But the Director-General will exercise his discretion in executing this judgment. The Tribunal may not give directions but trusts that the matter will be looked into, after consultation with the complainant, in an attempt to reach a settlement.

11. The complainant is claiming damages for material and moral injury.

Since his status is restored he need not be awarded damages for material injury on that score. At most he will be entitled to interest at the rate of 10 per cent a year on the sums due to him by way of remuneration as from the date on which they fell due.

He claims damages for injury allegedly caused by the Organization's stand on the matter of his legal status in the host country. No award is made under this head: he alleges no quantifiable injury that is directly attributable to the impugned decision.

12. He claims moral damages over and above damages due on account of the restoration of his status as an official.

In the circumstances the claim will be allowed and the amount set at 50,000 French francs.

13. Lastly, he is awarded 25,000 French francs in costs.

DECISION:

For the above reasons,

1. The impugned decisions are quashed.

2. The complainant is referred back to the Organization for restoration of his status as an official over the period covered by the decision of 27 July 1984. Any sums payable to him shall bear interest at the rate of 10 per cent a year as from the date on which they fell due.

3. The Organization shall pay him 50,000 French francs in moral damages.

4. It shall pay him 25,000 francs in costs.

5. 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