

SEVENTY-FIRST SESSION

In re NAJMAN (No. 6)

Judgment 1105

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Dragoljub Najman against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 3 September 1990 and corrected on 12 October, UNESCO's reply of 7 December 1990, the complainant's rejoinder of 13 February 1991 and the Organization's surrejoinder of 12 April 1991;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal, UNESCO Staff Regulations 9.1 and 11.2 and paragraphs 5 and 7 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant is a citizen of Yugoslavia and was born in 1931. His career with UNESCO is summed up in Judgments 781, 809 and 810 under A. He joined the staff of UNESCO in 1957 at grade P.1 and had risen to the rank of Assistant Director-General by 1976. His earlier troubles with the Organization, which began in 1982, are described in the same judgments.

On 30 April 1986 the then Director-General decided to terminate the complainant's appointment under UNESCO Staff Regulation 9.1 on the grounds of abolition of his post. He lodged an internal appeal against that decision. In its report of 3 April 1987 on that appeal the Appeals Board recommended negotiation between the two sides. The Director-

General agreed. After negotiation the complainant consented to termination as at 31 August 1986 and early retirement as from 1 September 1986. Termination was under Regulation 9.1.2, which reads:

"The Director-General may terminate an appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Constitution, provided that the action is not contested by the staff member concerned."

The complainant was paid a termination indemnity equivalent to eighteen months' pay, or 88,312 United States dollars.

A new Director-General took over on 15 November 1987.

In February 1989 the Director-General went on mission to the United States. On 22 February he met several people connected with a cultural body known as the Heritage Foundation at its headquarters in Washington D.C. and he answered questions they put to him, including one about reinstatement of staff who had left UNESCO during his predecessor's time.

On 1 March 1989 a friend of the complainant's, the editor of The National Interest, a review published in Washington, wrote him a letter about that meeting saying, among other things:

"Of particular interest to you will be the remarks the Director-General made concerning you ... saying that when your appointment was terminated you had received a very large sum of money, in return for which you had agreed to sever your connection with UNESCO permanently."

The writer of the letter added that he had later checked with three others present at the meeting and that: "As in my case, they were left with the impression that [the Director-General] was virtually saying that you had been bought off".

On 20 March the complainant wrote the Director-General a letter expressing outrage at that report of his remarks of 22 February, which the complainant described as false and slanderous, and especially surprising and saddening from someone he had regarded as a friend; asking him to write within two months to everyone who had heard them to set the record straight; and adding that, failing that, he was lodging a "protest" under paragraph 7(a) of the Statutes of the UNESCO Appeals Board.

Having got no answer within the two months' time limit set by paragraph 7(b) in fine of the Statutes, the complainant lodged notice of appeal with the Board on 18 July 1989 against the implied rejection of his claim. He also made known in other letters to the President of the Board and to the Director-General his doubt about the Board's competence.

There followed talks between the complainant or his counsel and the Director-General to try to settle the case, but in a letter of 9 October 1989 the Director-General told his counsel that it was better to let the Board report.

In its report of 10 April 1990 the Board declared that it was competent to hear the case; held that the remarks imputed to the Director-General, if correctly reported, had caused the complainant injury; and recommended that the Director-General write him a letter explaining just how he had come to leave and confirming that no slight had been intended.

Having got no answer, the complainant sent the Director-General a letter of reminder on 22 May.

By a letter dated 21 May 1990, which the complainant got on 8 June, the Director-General rejected the appeal and the Board's recommendation; affirmed that the appeal was irreceivable and that the Board was not competent anyway; but added that his remarks of 22 February 1989 had not been intended to harm and that the complainant had been terminated by common consent under Regulation 9.1.2 and that it was because of the agreement between the two sides that the Organization had been able to pay him all the sums he was entitled to. That is the impugned decision.

B. The complainant submits that, though it is not clear from paragraph 5 of the Statutes of the Appeals Board whether a former official may appeal, paragraph 7 suggests that he may, and the Tribunal's case law confirms that. But in any event UNESCO is in bad faith in denying the Board's competence and is indeed estopped from doing so since, though aware of the complainant's doubts on that score, the Director-General encouraged him to go ahead by breaking off the attempts at conciliation and saying he wanted the Board to report. The Board was competent because the dispute relates to the complainant's conditions of service at the time when he was under contract with UNESCO, and more particularly the circumstances in which his relations with it came to an end. The Tribunal is competent for the same reason.

UNESCO is mistaken in contending that there is no challengeable administrative decision. Though the Director-

General's remarks in Washington did not amount to such a decision his refusal to make amends does; and the case law shows that the internal appeal body and the Tribunal are competent to entertain appeals against refusal to afford redress for slander.

Since the only reasons the Director-General gave for his refusal were the Board's lack of competence and the irreceivability of the appeal and since those reasons were mistaken, the final decision shows a fatal mistake of law.

Besides, the complainant's claim was sound. Although in his letter of 21 May 1990 the Director-General does acknowledge that UNESCO paid the complainant "all the sums he was entitled to", the letter does not afford him full redress. For one thing, it says nothing of the hurtful remark that he had agreed to sever his links with UNESCO for good; for another, since it is in the form of rejection of his appeal he cannot use it to restore his reputation.

What the Director-General said in Washington was untrue and slanderous in two respects. First, the complainant was not given "a very large sum of money" to induce him to leave: he was paid no more than he was entitled to, the sum was fairly small and there was no financial deal between the parties. Secondly, he never agreed to break off permanently his connection with UNESCO: he merely consented to termination under Staff Regulation 9.1.2 out of a desire to reach a settlement. He rejects the insinuation that he is self-seeking and that he is feigning dedication to the Organization: if he were he would have acted quite differently in many ways. He says that several people, whom he names, did express surprise at the Director-General's remarks and get the impression that the Director-

General believed he had been bought off. The injury to him is great. He asks the Tribunal to set the impugned decision aside and grant him such redress as it deems fit and an award of costs.

C. In its reply UNESCO gives its own version of the facts of the case. It says that the complainant's letter of 20 March 1989 was astonishing not only because of its angry tone but also because he based his case not on any exact record of the Director-General's remarks but on the impression they had made on a friend of his, who had not even quoted them. In its report the Appeals Board held that there was no reason to apologise since the Director-General's remarks had not been prompted by malice. The Board said nevertheless that he was entitled to a letter of clarification, and that is what the Director-General sent him on 21 May 1990.

The Director-General gave the explanations in his letter of that date in a desire to reach an understanding with the complainant. Even if unsound his objections to the Board's competence and to the receivability of the complainant's internal appeal would not be fatal to the impugned decision: the Tribunal would simply declare the complaint receivable and go into the merits.

As for what the Director-General said to him before the Board reported, UNESCO is free to plead as it thinks fit and is not constrained by the Director-General's refusal to let the complainant go straight to the Tribunal. The Director-General gave him no wrong information and took a stand that caused him no injury, and there is no estoppel.

The Board was competent *ratione personae*, but not *ratione materiae*, because the dispute was not about the Organization's liability under the contract of service or the Staff Regulations. The claim to a letter of apology was irreceivable because it had not been put earlier to the Director-General.

Though the Director-General's letter of 21 May 1990 is a challengeable decision and the complainant has access to the Tribunal, his claim to such redress as the Tribunal deems fit is obscure. Insofar as it goes beyond the scope of his internal appeal it is irreceivable for failure to exhaust the internal means of redress; it is not clear whether he waives any of the claims in his internal appeal; and if he does claim an apology that is not a form of redress the Tribunal may grant.

As to the merits, UNESCO points out that the complainant bases his case on a third party's understanding of oral remarks which he himself never heard and has no formal record of. The risk of misrepresentation was great, not because the Director-General's remarks were unclear, but because the third party did not know just how the complainant had come to leave the Organization.

In his letter of 20 March 1989 to the Director-General the complainant himself distorted what his friend had written, and he has continued since to distort it: he is asking the Director-General to correct a statement that he never made and indeed had no reason to make, namely that the complainant had agreed to sever his links with the Organization and never work for it again. In any event, even if the Director-General had made the remarks imputed to him, the complainant fails to show malice, which is the essence of slander. That there was no malice is plain from several circumstances UNESCO sets out. The remarks imputed to the Director-General, even supposing that they were made, were not slanderous and caused him no actionable injury. His claims to redress, insofar as they are receivable, are unfounded. Even though the Director-General's letter of 21 May 1990 states objections to the Board's competence and to the receivability of his internal appeal he may still send the text to anyone who was at the meeting in Washington: he has obtained satisfaction.

D. In his rejoinder the complainant observes that UNESCO's reply, though conciliatory in tone, still shows stubborn reluctance to acknowledge the wrong it has done him; yet it might have done so simply by sending him a letter explaining the circumstances of his departure from the Organization and stating in particular that he never agreed to sever his connection with it permanently. He again states why the Director-General's letter of 21 May 1990 does not satisfy him.

With references to the case law he sees as material he enlarges on his pleas and seeks to refute the Organization's on all the procedural and substantive issues.

He discusses the nature of his claims to redress, which he submits are both receivable and clear. He explains how UNESCO's cavalier attitude, dilatory tactics and bad faith, which he describes, have worked to his detriment.

He appends a letter dated 5 February 1991 from the friend who originally wrote to him about the Director-

General's remarks and to whom he has shown the reply. That letter reaffirms that "a group of highly competent people" were left with the clear understanding that he had been "bought off"; it says that the reason why the Director-General's remarks were not quoted word for word was a reasonable inability to remember their exact sequence; and it expresses indignation at the Organization's "squirming".

He presses his claims.

E. In its surrejoinder the Organization develops the case made out in its reply. It observes that the complainant's constant shifting of ground betrays his difficulty in finding sound objections to its case. It maintains in particular that the impugned decision is not tainted with any procedural flaw, that any claim to the writing of a letter of apology is irreceivable, that the Board proceedings show no defect and that there is no truth in the charge that dilatory tactics compounded the supposed injury to the complainant's interests.

As to the merits it reaffirms that there is no actionable injury attributable to the Director-General. The complainant has failed to prove that the Director-General alleged that he had undertaken never to work for UNESCO again and had received a very large sum of money. And it is gratuitous to suppose that the Director-General said that he had been "bought off". Besides, even if the Director-General had made such remarks they would not amount to slander because they were not prompted by malice, not uttered in public and not defamatory. The complainant's claims to redress, which have varied throughout the proceedings and are vague anyway, are unfounded. He has already been granted satisfaction.

CONSIDERATIONS:

1. On 27 October 1989 the complainant submitted an appeal to the Appeals Board of UNESCO asking that the Director-General write him a letter that would clearly set out the circumstances in which he had left the Organization and offer him an apology for slanderous remarks which he alleged the Director-General had made about him in Washington on 22 February 1989.

In its report of 10 April 1990 the Board declared itself competent under paragraph 5 of its Statutes and recommended that the Director-General send a letter describing exactly how he had come to leave and denying any intention to treat him slightly or inconsiderately. The Board said that he could make whatever use of the letter he thought fit.

In a letter of 21 May 1990 the Director-General informed him of the rejection of his appeal and of the Board's recommendation. The Director-General explained that the appeal was irreceivable and the Board had not been competent to hear it anyway.

The complainant seeks the quashing of that decision and awards of damages and costs.

2. The complainant is objecting to a decision based on a statement allegedly made by the Director-General about the circumstances of his departure from UNESCO.

The Tribunal is competent ratione personae: under Article II(6) of its Statute it is open to former officials of UNESCO.

It is not, however, competent ratione materiae. According to Article II(5) of its Statute it may hear "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations"; and Regulation 11.2 of the Staff Regulations of UNESCO confirms that:

"The Administrative Tribunal ... shall be the final court of appeal ... against a decision of the Director-General alleged to conflict with their terms of appointment, or with any relevant regulation."

Competence is therefore restricted to complaints which allege breach of the terms of the serving or former staff member's appointment or of the Staff Regulations or of both. The complainant is not alleging breach of the terms of his appointment or of the Staff Regulations of UNESCO. He must show not just some connection with the terms of his appointment but also "non-observance" of them.

The Tribunal not being competent, the complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Jacques Ducoux
Mella Carroll
José Maria Ruda
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.