

## NINETY-SECOND SESSION

*In re* Nasrawin

**Judgment No. 2112**

The Administrative Tribunal,

Considering the complaint filed by Mr Adnan Nasrawin against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 March 2001, UNESCO's reply of 10 May, the complainant's rejoinder of 27 June, the Organization's surrejoinder of 30 July, the complainant's further brief of 10 September and UNESCO's comments thereon of 2 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Jordanian citizen born in 1950, joined UNESCO in 1997 under consultancy contracts. On 1 January 1998 he was given a temporary appointment for eleven months at the Office of Publication Information (OPI) as an information officer at grade P.3. His appointment was extended three times until 31 December 1999. His post having been upgraded to P.4, he was promoted on 1 June 1999.

By a memorandum of 9 June 1999 the Director of the Executive Office of the Director-General informed the Director of the Bureau of Personnel and the Director of the OPI that the "Director-General [had] decided to create a P-4 post in the OPI as from 1 July 1999 ... and to appoint Mr Nasrawin to it ... on a fixed-term contract for two years". On 12 October he told the Director of the OPI and the Assistant Director-General of the Sector of Social and Human Sciences (SHS) that the Director-General had decided to transfer the complainant "with his post" from the OPI to the SHS as from 1 October 1999. Then in a letter of 9 November, a copy of which was sent to the above-mentioned officials, he informed the Director of the Budget Office that another post - at grade P.3 - which was to be created in the OPI under the draft programme and budget for the 2000-2001 biennium (document 30 C/5) would be transferred to the SHS and reclassified as P.4 to match the complainant's grade.

A new Director-General was appointed on 12 November 1999 and took up office on 15 November. On the same day the General Conference adopted a resolution, 30 C/72, inviting the new Director-General, among other things, "to review, with the aim of ensuring that the financial impact has been taken into account and the criteria [of competitiveness, expertise, efficiency and universality] have been satisfied, all posts that were reclassified, and all promotions and appointments that were made during the 1998-1999 biennium". By a note of 26 November the Director-General told senior officials that he had "decided to suspend temporarily the implementation of the most recent decisions - i.e. those taken as of 1 October 1999 - relating to appointments, reclassifications and promotions".

By a memorandum of 20 December 1999 the Director of Personnel informed the complainant that there would be no funding for his post as from 31 December so his appointment would not be renewed. The Director-General had nonetheless decided by way of an exception to pay him two months' salary in lieu of notice. On 18 January 2000 the acting Director of the Bureau of Personnel confirmed in writing to the complainant the Director-General's decision to grant him a "moratorium" of two months in the form of an extension of contract enabling his position to be reconsidered in the course of drawing up the staffing table for the 2000-2001 biennium. The complainant accepted the proposal in a letter of 21 January, adding a reminder about the former Director-General's "decision" to appoint him for two years. In a memorandum of 24 February the acting Director of Personnel informed him, on the

Director-General's behalf, that his appointment would not be extended beyond 29 February but that, exceptionally, he would receive an indemnity equal to two months' pay.

The complainant protested in a letter of 3 March 2000. On 22 March the acting Director of Personnel told him that the Director-General upheld the decision to terminate his appointment. The complainant filed a notice of appeal with the Secretary of the Appeals Board on 18 April. In its report of 4 December 2000 the Board criticised the Administration's position and recommended compensating the complainant for moral injury by paying him the equivalent of three months' salary over and above what he had already received. It also recommended that he should be shown particular consideration if he applied for any jobs. In a letter of 31 January 2000, the impugned decision, the Director-General rejected the appeal.

B. The complainant submits that the impugned decision has not been accounted for as it merely refers to the reasons the Administration gave in response to his appeal. The Organization has only addressed the non-renewal of his appointment, but what he is challenging is UNESCO's failure to meet the commitment given on 9 June 1999 to grant him a fixed-term appointment. He is objecting not to the new Director-General's revocation of his predecessor's decision but to the fact that nothing was done to implement that decision between 9 June 1999 and the expiry date of his temporary contract. He contends that the decision to give him a fixed-term appointment was quite lawful because, according to Staff Rule 104.8(b):

"A temporary appointment may, at the discretion of the Director-General, be extended, or converted to a fixed-term appointment ..."

Moreover, the decision came after a recommendation by the Bureau of Personnel and a good performance report in June 1999.

In his submission the Organization may not rely on instructions issued by the General Conference. The complainant cites Judgment 1987 (*in re* Dunseth and Mattmann) which, he says, recalled that an executive head of an organisation may not use a decision by member States as a pretext not to implement an earlier decision adopted lawfully.

He accuses the Director-General of drawing wrong conclusions from the evidence: pursuant to Conference resolution 30 C/72 the Director-General took the decision on 26 November 1999 to suspend implementation of decisions subsequent to 1 October 1999. But the decision concerning his appointment had been taken on 9 June 1999, that is before that date, and the one of 12 October 1999 to transfer him from the OPI to the SHS was not among the categories affected by the decision of 26 November 1999.

He asserts that a table bearing the reference "30 C/5 - Part II Chap. 4" showed that there was a post against which was written "foreseen for Mr Nasrawin". UNESCO's decision of 9 June 1999 being a commitment of a kind that has legal effect, he may plead breach of promise and hence breach of good faith as well as an affront to his professional dignity. He concludes that he has therefore suffered actual material and moral injury.

He asks the Tribunal to order the production of various documents he sought from the Organization, to set aside the impugned decision, to order the Organization to grant him the appointment referred to in the memorandum of 9 June 1999 or some other equivalent appointment, to award him material and moral damages in an amount equal to two-and-a-half years' salary, and costs.

C. In its reply UNESCO points out that its memorandum of 20 December 1999 informing the complainant that his temporary contract would not be renewed also indicated that his post could not be funded beyond 31 December 1999. Consequently, there was no need to repeat the reasons in the final decision of 31 January 2001.

It denies that there was any promise. The memorandum of 9 June 1999 sent by the Director of the Executive Office of the Director-General contained instructions to two heads of service in the secretariat, not a promise to the complainant or an administrative decision to be notified to him. Later correspondence between those officials brought to light that no funds were available to create a post under the current budget (1998-1999 biennium). However, a post was planned in the OPI under the draft programme and budget for the 2000-2001 biennium (document 30 C/5), not yet approved by the General Conference. The earlier instructions were therefore superseded by new ones issued on 9 November 1999 under which the future post - graded P.3 - would be transferred to the SHS and upgraded to P.4. But the new Director-General decided on 26 November 1999 to suspend his

predecessor's decisions subsequent to 1 October 1999, which included therefore the one of 9 November concerning the complainant. UNESCO has submitted a copy to the Tribunal of document 30 C/5, in which there is no mention of the complainant. It cites the Tribunal's case law that "comments that various officials may have made about the complainant's case are immaterial inasmuch as they were never addressed to [the complainant] on the Organization's behalf" (Judgment 1560, *in re* Ndédi). UNESCO having made no commitment to him, he may not claim injury.

In UNESCO's submission the fact that the complainant's case was still pending when the new Director-General took office does not amount to "abuse of authority". It observes that since his appointment in January 1998 he has benefited from more lenient application of the Staff Rules and unusually favourable treatment. As to Rule 104.8(b), which the complainant cites, it was not the purpose of the instructions of 9 November 1999 to convert a temporary into a fixed-term appointment. In any case conversions of that kind have not been possible since 8 November 1990 when Administrative Circular No. 1722 was issued. Lastly, the complainant having agreed to an exceptional extension of his appointment for two months, "the question of the implementation of the former Director-General's instructions became immaterial". UNESCO considers that "the fact of putting an end to abuses and applying the Organization's rules and regulations in a sound and correct manner could in no way be seen as a violation of the principle of equality of treatment or of the rule relating to acquired rights".

UNESCO asks the Tribunal to declare that:

- the Director-General's "instructions" of 9 June 1999 were replaced by those of 12 October, which were superseded by the ones of 9 November 1999;
- the "instructions" had no legal effect;
- the Director-General's decision of 26 November 1999 to suspend recent decisions regarding appointments, reclassifications and promotions, is not flawed;
- the above-mentioned decision applied to decisions concerning the complainant's administrative status; and
- the discussions on the former Director-General's instructions are no longer material since the complainant has agreed to the proposed moratorium.

It also asks the Tribunal to declare that the non-renewal of the complainant's temporary appointment was consistent with the rules in force.

D. In his rejoinder the complainant observes that the new Director-General stated before the Executive Board in October 2000 that decisions prior to 1 October 1999 could be called into question neither from a legal nor from a human point of view.

As to document "30 C/5 - Part II Chap. 4" of which he requested a copy in vain several times, he alleges that UNESCO hid it and sent the Tribunal an unlawfully changed version. Stating that he is ready to disclose his sources and produce evidence of his allegations, he affirms that he saw the document - which has since been torn up - in the offices of the OPI.

He asserts that the Director-General informed him in person on 11 June 1999 about the decision of 9 June, which made good an oral promise given several times since 1997. Staff Regulation 4.3.2, in the version in force until 14 November 1999, said:

"So far as is practicable selection shall be made on a competitive basis."

Being so worded it allowed the Director-General to waive the competition and appoint directly. Indeed, he says, that practice is common at UNESCO. The circumstances of the case ruled on in Judgment 1560 cited by the Organization are different from those of the present case.

He maintains that the memorandum of 9 June 1999 sent by the Director of the Executive Office of the Director-General does constitute a decision, and the Appeals Board found that it ought to be implemented. Moreover, all the criteria for determining the existence of a contract were met and there is no reason why he should bear the brunt of the Administration's negligence. The decision of 9 November 1999 to transfer him did not invalidate his

appointment of 9 June 1999. He observes that after the former Director-General left, several senior officials changed their mind about his appointment. He contends that the Administration has misread his letter of 21 January 2000 agreeing to the moratorium.

He deems libellous UNESCO's assertion that he received unusually favourable treatment: it casts doubts on his professional abilities. He asks the Tribunal to take account of that fact in assessing injury. He also asks the Tribunal to order the disclosure of further documents and presses his other claims.

E. In its surrejoinder UNESCO produces copies of several documents requested by the complainant, including the draft programme and budget (reference 30 C/5) and the corresponding final document (reference 30 C/5 approved), neither of which bear the annotation "foreseen for Mr Nasrawin". It observes that the complainant has produced no evidence in support of his allegation that a document with his name on it was hidden or torn up.

UNESCO denies that the criteria for showing the existence of a promise were met. As to Regulation 4.3.2, cited by the complainant, it authorises the Director-General to waive the competition procedure in the Organization's interests only where the grade or duties of the post so require. That was not the case here. It denies casting doubts on the complainant's professional ability.

F. In a further brief the complainant submits the transcript of a telephone conversation he had on 6 June 2001 with an official in the Administrative Unit of the OPI, which he recorded unbeknown to her. It proves, he says, that the document "30 C/5 - Part II Chap. 4" with the annotation "foreseen for Mr Nasrawin" did exist and was destroyed. It also proves that there was a promise of an appointment.

G. In observations it entered in reply to the complainant's further brief, UNESCO denies possession of any document other than the one it has already produced. Documents for submission to the Organization's decision-making bodies never refer to individual staff members. Even if another version of the document had existed, it would be of no legal value.

What the recorded conversation shows, says UNESCO, is that the OPI official categorically denied the complainant's allegations. Lastly, the complainant hardly behaved in a manner befitting his status as an international civil servant. In France, such conduct is a penal offence.

## CONSIDERATIONS

1. (a) The complainant joined UNESCO in 1997. Having started out under consultancy contracts, on 1 January 1998 he was given a temporary appointment for eleven months in the OPI as an information officer at grade P.3. That appointment was extended three times until 31 December 1999. His post having been upgraded to P.4, he was promoted on 1 June 1999.

(b) On 9 June 1999 the Director of the Executive Office of the Director-General sent a memorandum to the Director of the Bureau of Personnel and the Director of the OPI. It said:

"Having examined the work done by Mr Nasrawin since he enlisted his services in 1997, and in view of his performance as appraised for his promotion to grade P-4, the Director-General has decided to create a P-4 post in the OPI as from 1 July 1999 (as recommended in memo PER/ADM.2.B/98/744 of 7 December 1998) and to appoint Mr Nasrawin to it from the same date on a fixed-term appointment for two years.

A post being planned in 30 C/5, a copy of this memo will be sent to the president of the [High Level Task Force] inviting him to submit a recommendation as to the financing of Mr Nasrawin's services in the last six months of 1999.

I should be grateful if you would make the necessary arrangements to this end."

Copies of the above memorandum were sent to various services. Although given a copy unofficially, the complainant never received official notification of the memorandum.

A new Director-General took office on 15 November 1999. By resolution 30 C/72 adopted at its thirtieth session

held from 26 October to 17 November 1999, the General Conference, after noting that there were too many exceptions in the application of personnel policy and the personnel management system, invited the new Director-General "to review, with the aim of ensuring that the financial impact has been taken into account and the criteria [of competitiveness, expertise, efficiency and universality] have been satisfied, all posts that were reclassified, and all promotions and appointments that were made during the 1998-1999 biennium". Pursuant to that resolution the Director-General decided that "no temporary post ... financed from the staff costs budget or other in-house extra-budgetary funding sources [would] be renewed unless the services rendered [are] specifically linked to a vacant established post and [are] indispensable for programme or project execution". The complainant's case having been examined by an ad hoc task force on Secretariat structure, staffing and management systems, the Director-General found that the complainant's post was not indispensable.

On 20 December 1999 the Director of the Bureau of Personnel told the complainant that his appointment would not be renewed beyond 31 December 1999 but that he would be paid two months' salary in lieu of notice. The acting Director of the Bureau of Personnel wrote to him on 18 January 2000 confirming the Director-General's decision to grant to him and all other officials whose temporary appointments were not renewed, a two-month "moratorium" in the form of an extension of contract so that their positions could be reconsidered in the context of preparing the staffing table for the 2000-2001 biennium. On 21 January 2000 the complainant agreed to the proposal but drew attention to the former Director-General's "decision" to appoint him for two years. He was told on 24 February that his contract would not be extended after 29 February, but that as an exception he would receive an indemnity corresponding to two months' salary.

(c) On 3 March 2000, citing the memorandum of 9 June 1999, the complainant protested to the Director-General asking him to reconsider his decision and to "reinstate" him.

The Director-General having upheld his decision, the complainant filed a notice of appeal on 18 April with the Appeals Board. In its report of 4 December 2000 the Board recommended an award of moral damages and advised that particular consideration should be given to the complainant's candidature if he applied for any posts.

The Director-General rejected the appeal on 31 January 2001. That is the impugned decision.

2. He is asking the Tribunal to quash the impugned decision and to order UNESCO to grant him a fixed-term appointment for two years pursuant to the memorandum of 9 June 1999, or some equivalent appointment. He also claims two-and-a-half years' salary in material and moral damages, and costs. The thrust of his arguments is that, although a number of administrative steps were needed to implement it, the memorandum of 9 June 1999 nevertheless contains a decision by the Director-General to appoint him for two years as from 1 July 1999. Although UNESCO did not notify it to him officially, it informed him of the decision and made a copy of it available. He also appears to consider that by appointing him until 31 December 1999 UNESCO made a start on implementation and should now complete it. He therefore concludes that the decision was notified to him so he may rely on it in putting forth his case. The decision appointed him for two years and he is entitled to demand that it be implemented in full. It constitutes at the very least a promise by the former Director-General which UNESCO is bound to honour. The instructions issued by the General Conference at its thirtieth session do not authorise the Organization to disregard its commitments.

The Organization seeks dismissal of the complaint. It submits that the memorandum of 9 June 1999 is an internal document with no effect in law. Its purpose was merely to lay the ground for later decisions insofar as they were able to be implemented, and it only contained "instructions", so there was no need for notification to the complainant. If it let him have a copy unofficially, it was so that he could see how matters were progressing in view of future decisions concerning him. UNESCO was unable to renew his appointment essentially because it was outside the programme and budget approved by the General Conference - no post matching his duties had been created - and following review by the task force the Director-General found that the complainant's post was not indispensable.

3. The complainant also seeks disclosure of certain documents. The Organization having complied, his claim no longer shows a cause of action. In his rejoinder he sought a hearing of the Chairman of the Appeals Board to prove the contents of a note which, he says, does exist. Since it pertains to an issue which is not material to the outcome of the case the claim must be dismissed.

4. The complainant challenges the decision not to renew his appointment.

According to a steady line of precedent, such decisions are at the discretion of the appointing authority and as such may not be set aside unless they were taken without authority or in breach of a rule of form or of procedure, or were based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the evidence, or if there was abuse of authority.

5. The complainant submits that the impugned decision is not accounted for.

According to the case law, except in certain instances - in the event of disciplinary sanctions for example - a decision will be sufficiently accounted for where the staff member is able to learn of the grounds for it so that he may, among other things, challenge them on appeal. But the reasons need not be stated in the actual text notifying the decision. He may learn of them through reference to some other document or even in an answer given by the Administration to some later objection, provided that there is no obstacle to the exercise of his right of appeal (see, for example, Judgment 1590, *in re Nies*).

In this case, the explanation given by UNESCO is beyond reproach. The decision of 20 December 1999 stated the reason for not renewing the complainant's appointment: there were no funds available for the post. The decision of 22 March 2000 rejecting his protest referred the complainant to the reasons given in a memorandum of 24 February from the acting Director of Personnel. And the decision of 31 January 2001 rejecting his internal appeal refers to detailed explanations already given by the Administration. The complainant therefore had ample reasons on which to base an appeal.

The plea fails.

6. The Organization appears to think that the complainant has given up his claim pertaining to the memorandum of 9 June 1999, because he has accepted the moratorium exceptionally extending his appointment for two months and the indemnity paid in lieu of notice. But that is not borne out by the facts. The extension of contract with payment in lieu of notice was neither offered nor accepted as some extra-judicial transaction in which the complainant (and others in like case) would by implication abandon any other claims against the Organization. On the contrary: the complainant expressly drew attention at the time to the former Director-General's "decision" to appoint him for two years, and the Organization raised no objection.

7. The issue to be resolved, therefore, is whether the memorandum of 9 June 1999 contains a decision binding the Organization or a promise, or whether it is simply an internal document.

(a) A decision affecting an official will always be preceded by administrative formalities, but it will become binding on the organisation only when it is notified to the official, in the manner prescribed by the organisation (see Judgment 1560, under 9). Notification may also take some other form as long as it can be inferred from it that the organisation intended to notify the decision.

But information about the formalities themselves is clearly not notification. In the interests of clarity it is desirable, and indeed often the practice, for the person concerned by some future decision to be given such information. But to see it as notification of a decision would be wrong and could lead to serious confusion.

In this case the complainant may have misconstrued the Organization's intent in letting him have, unofficially, a copy of the memorandum of 9 June 1999. But it is clear from the document itself that it contained no decision which was binding on the Organization - or even a policy decision - and that it was not officially notified to him.

True to say, the memorandum does contain the words "the Director-General has decided", and the Director-General is the appointing authority. However, its content reveals that in substance it was not a real "decision" to appoint someone but an internal formality prior to such a decision. The administrative services were asked to "make the necessary arrangements to this end", which meant that they were to take steps to secure funding for the post in the second half of 1999, and to establish the necessary documents to proceed with an appointment. Had it been a decision to appoint him, the memorandum would have been notified to the complainant.

Consequently, there was no notification of a decision by the appointing authority. The complainant alleges that he was given a copy of the memorandum by the Executive Office of the Director-General, but has never made out that it was accompanied by any kind of promise.

(b) The complainant seems to see confirmation of the final and binding nature of what he terms a "decision" in the fact that it had already been implemented in part by the decision to appoint him for the second half of 1999.

If one saw the latter decision as an indication of UNESCO's wish to appoint the complainant, one could - and indeed the complainant should - also infer that an official decision was necessary in order for the appointment to be made, nothing having been decided as yet for the period after 1999.

(c) Subject to the conditions laid down in the case law, an organisation can, even where there is no decision, be bound by a promise or assurances given to a staff member.

In this case, the fact that the complainant was given a copy of the memorandum of 9 June 1999 clearly did not imply a promise that the formalities would culminate in a decision. There were still uncertainties, particularly regarding the 2000-2001 biennium: there might well be a new Director-General, the budget had not yet been adopted, and a post had to be identified.

In his further brief the complainant tries to prove that the words "foreseen for Mr Nasrawin" were written opposite a specific post in a budget document, or a copy of it kept by the Administration, which the complainant came across by chance. The Organization denies, and the complainant fails to prove, that that was so. In any event, it is immaterial for the reasons stated above. Being for internal administrative purposes only, the document would not constitute evidence of either a firm commitment or a promise by the Organization to appoint the complainant.

The complainant has produced no other evidence from which the existence of a promise to appoint him can be inferred (even if both he and the former Director-General wanted him to be appointed).

Consequently, he may rely neither on the existence of a contract for a period of two years nor a promise that such a contract would be concluded.

8. The complainant alleges that the procedure followed since the thirtieth session of the General Conference, under the authority of the new Director-General, which led to the non-renewal, was in breach of the rules which the Organization had itself set and which, in his submission, required the decisions and promises of the former Director-General to be implemented.

(a) For the reasons indicated above, the plea is unfounded in that it is based on the consideration that the complainant either had a two-year contract or at least a promise from the former Director-General that such a contract would be granted.

(b) Since there was no such promise, the Organization was not bound to complete the procedure appointing the complainant.

Appointments being at the discretion of the appointing authority, the Tribunal will not interfere. It will determine only whether there was anything unlawful in the procedure.

UNESCO points out that, at its thirtieth session the General Conference found that there had been too many exceptions in the application of staff policy and the personnel management system, and so invited the new Director-General to re-examine all reclassifications, promotions and appointments that were made during the 1998-1999 biennium.

Consequently, as a precautionary measure, on 26 November 1999 the Director-General ordered the suspension of all appointments, reclassifications and promotions decided on since 1 October 1999 and set up a task force to recommend either the maintenance or the cancellation of those decisions on a case-by-case basis. However, in a memorandum of 9 November 1999 the Chief of the Executive Office of the Director-General informed several services that the Director-General wanted to transfer the complainant's future post, which was to be established in the OPI at grade P.3, to the SHS and upgrade it to P.4. In UNESCO's view, the complainant's case was among those to be reviewed, since the memorandum came after 1 October 1999.

In the complainant's view, he was appointed by the decision of 9 June 1999 so his status could not have been changed after 1 October 1999 and the Director-General's decision of 26 November did not apply to him.

But the Administration did not overstep its discretionary authority by considering that the further instruction in the

letter of 9 November 1999 had the effect of applying to the complainant the Director-General's decision of 26 November: it implied change in the complainant's status (which still had to be made official by a decision to be notified to him), it also showed this status was still in progress, which justified the precautionary measure and the review of his case by the task force.

That being so, there is no need to establish whether the situation the complainant was in temporarily itself warranted reconsideration of his case - since his contract was to expire on 31 December 1999 and a decision had to be taken as to its renewal.

Consequently, there is no proof that the Organization broke the rules which it had itself set.

The plea therefore is without merit.

9. The complainant claims compensation for material and moral injury caused by UNESCO's failure to fulfill the "promise" made by the former Director-General to give him a fixed-term appointment and by the affront to his honour and good name.

(a) The ending of his employment relationship with the Organization undoubtedly caused the complainant disappointment, the more so as he knew that the former Director-General wanted to appoint him for two years and had set formalities in motion to that end. However, his termination not being due to some unlawful act or a breach of contract, the Organization cannot be held liable as there has been no especially grave wrong (see Judgment 447, *in re* Quiñones, under 11). The fact that UNESCO kept the complainant abreast of the formalities neither creates nor aggravates liability.

(b) The complainant objects to UNESCO's abrupt treatment of him.

Though he was undoubtedly very upset at the non-renewal of his appointment, nothing in the evidence indicates that the Organization failed, in this instance, in its duty of care.

The complainant sees the Organization's assertion that he benefited from particularly favourable treatment as a slight on his honour. That remark was directed not to the complainant but to the previous administration, and so his honour is intact.

His claim to compensation is therefore unfounded.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

*(Signed)*

Michel Gentot

Jean-François Egli

Seydou Ba



