

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

SIXTIETH ORDINARY SESSION

In re NAJMAN (No. 2)

Judgment No. 781

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Dragoljub Najman against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 October 1984 and corrected on 10 November, the complainant's application of 6 December 1984 for oral proceedings, and the Organization's reply of 8 February 1985;

Considering the order made by the President of the Tribunal on 15 April 1985 suspending the proceedings sine die and the President's further order of 16 April 1986 for their resumption;

Considering the complainant's rejoinder of 27 May 1986 his special application of 28 May concerning oral proceedings and the Organization's surrejoinder of 23 July 1986;

Considering Articles II, paragraph 5, and VII of the statute of the Tribunal, UNESCO Staff Rule 105.5 and Manual provision 2920;

Having examined the written evidence,

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

A. The complainant, a citizen of Yugoslavia born in 1931, joined the Organization in Paris in 1957, straight from university, at grade P.1, step 1. He was promoted to P.2 in 1959 and to P.4 in 1960. In 1962 he was granted an indeterminate appointment at P.5. He rose to D.1 in 1969, to D.2 in 1973, to acting Assistant Director-General in 1975 and to 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 the sector for 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. In his reply of 7 June the complainant asked for a two-year extension instead and "study leave long enough to enable him to write a book which would be of direct interest to the Organization". On 12 June the Director-General confirmed the decision of 25 May but invited from him a formal application for study leave. On 18 June he applied for such leave on full pay for nine months, from 1 September 1982 to 31 May 1983, after two months' preparatory work on annual leave; he would be attending the Universities of Belgrade and Harvard.

The Director-General having consented in a letter of 19 June 1982, the complainant was on leave from 1 July 1982 until 31 May 1983. At 9 o'clock on 1 June 1983 he turned up at the office he had occupied for several years until he had gone on leave. Shortly afterwards the Inspector-General of the Organization entered the office, accompanied by the acting head of CPX and told him the Director-General had ordered an inventory of the papers to be found there. A while later the Director of the Bureau of Personnel explained to him, both orally and in writing, that he was to be assigned elsewhere. The Inspector-General and two helpers were present throughout the day except for a break at lunch-time during which the door was locked and he kept the key. His work done, he had the locks changed, the private papers being locked up inside until the complainant signed the inventory. In a minute of 6 June the Inspector-General told him that the legal basis for the inventory was Manual provision 2920.B.1:

"As soon as the decision to separate or transfer a high-ranking official is known and, if possible, not later than one week prior to such separation or transfer, he delivers all official documents in his possession to ... a staff member designated for the purpose ... in the case of an ADG ... by the DG."

On 15 June the complainant wrote in protest to the Inspector-General who on 8 July retorted that he had made the inventory correctly. After further correspondence the complainant wrote, on 29 July and on 21 August, to the

Director-General who rejected his objections. He filed notice of appeal on 27 September and the appeal on 26 October 1983. In its report of 28 June 1984 the Board recommended rejecting it. By a letter of 25 July 1984, the decision now impugned, the Deputy Director-General informed the complainant that, though the Director-General could not endorse all the Board's findings and opinions, he accepted the recommendation.

B. The complainant gives his version of the facts. He alleges (1) procedural flaws, (2) a mistake of law and (3) mistakes of fact or at least misappraisal of the facts. (1) The procedural flaws relate to the internal appeal proceedings and are discussed in detail in his first complaint, to which he refers the Tribunal. (2) In ordering a search of his office the Director-General misconstrued Manual provision 2920, which did not justify it. The provision says that the staff member "delivers" all official documents: the Inspector-General simply took the papers while the complainant stood by. It authorises neither search nor inventory. It prescribes a procedure in several stages, not the hasty operation carried out. It had begun even before the complainant heard of his transfer. The Inspector-General's proper function was to look at the official papers: instead he scrutinised the private ones. Nor were there any grounds for locking up the office, changing the locks and confiscating the complainant's private papers until he had signed the inventory. The whole operation was unprecedented. The Director-General was mistaken in believing that the complainant was no longer Assistant Director-General on his return from leave: he had been treated as such till then and nothing in the letter of 25 May 1982 suggested he should not have been. The Administration's plea before the Appeals Board that his turning up on 1 June 1983 was an "act of provocation" that might cause a "public scandal" is nonsense: he was bound to report for duty on that day, and where else than at the office he had occupied for many years? (3) There was misappraisal of the facts. The complainant was in duty bound under Rule 105.5 to turn up for work on 1 June 1983 at his former office, and it is hard to see that as provocative.

The purpose of the procedure prescribed in Manual provision 2920, which is to ensure the continuity and completeness of the Organization's records, was perverted.

UNESCO was in breach of its duty to treat him with respect and compounded the humiliation he describes in his first complaint. It scorned his reputation and was guilty of a form of reprisals and an abuse of authority which was especially gross considering his rank and its own goals.

He invites the Tribunal to hold oral proceedings and hear evidence on the facts, quash the impugned decision, grant him such redress as it deems fit and award him costs.

C. In its reply the Organization submits that the complainant has twisted the facts. The main point is that, as the letter of 25 May 1982 announced, he was to be moved to other duties. His turning up at his old office was wilful insubordination and provocative, too, since the Executive Board of UNESCO was in session: he knew that the office was no longer "his" and that his duties were to be different. The Inspector-General's function was to receive from him in accordance with Manual provision 2920 any papers that appeared to be official. He said which papers were official and which private; the Inspector-General took his word for it and studied carefully only those that looked official but were identified as private. During the lunch-hour the papers were locked up at the complainant's own request. His private papers were locked up, again at his request, after the inventory was over. He was treated with courtesy and tact, and fellow staff would hardly have thought any the worse of him for what they saw going on.

(1) The Organization denies procedural flaws for the same reasons as those given in its reply to the first complaint. (2) There was no error of law. To ensure respect for the rules and safeguard UNESCO property the Director-General acted in exercise of his inherent authority as executive head and by virtue of Manual provision 2920. The provision obliged the complainant to hand over official papers "as soon as the decision" to transfer him was known. since his transfer had been decided on as early as 25 May 1982 he should have handed over the papers even before going on leave and was therefore in breach of duty. It was against the Organization's interests to brook any suggestion that he was still the Assistant Director-General in charge of the sector. Short of violence the Inspector-General could not take anything but what the complainant delivered to him. The inventory was just that, not a search. (3) There were no mistakes of fact. Though no longer Assistant Director-General by 1 June 1983, the complainant cannot have feared that anyone of his rank and experience would be charged with dereliction of duty under Rule 105.5. His allegation of reprisals is gratuitous: he was merely asked to deliver papers he should have handed over almost a year earlier.

Since the inventory was lawful and he has failed to show any serious moral injury or that he was in no way to

blame, he has no right to redress. UNESCO invites the Tribunal to hear evidence on the issues of fact.

D. In his rejoinder the complainant applies for joinder of the case with his other complaints, or else for adjournment of the case until the fourth and fifth are ready for hearing, on the grounds that the issues of fact are closely linked and the hearing of evidence necessary. Submitting that the Organization's version is tendentious, he enlarges on his own account, particularly of the circumstances surrounding his return to work, his status, the carrying out of the inventory and the way in which he was informed of the legal basis for it. In his submission the sole purpose of the operation, which must be seen in the context of other decisions, was to humble and dishearten him.

Manual provision 2920 was inapplicable: only on 1 June 1983 did he learn of his transfer and he could not be expected to deliver up his papers forthwith. There was nothing insubordinate or provocative in his going to his old office. In any event the inventory neither met the requirements of the provision nor was in line with the practice of the Organization, which cannot cite a single precedent. He explains that he is not necessarily seeking damages for the grave moral injury but satisfaction in such form as the Tribunal determines.

E. In its surrejoinder the Organization submits that the rejoinder distorts the facts, is short on legal argument and mistakenly tries to muddle the case with others.

It develops its main pleas, which are that what was carried out was an inventory and followed formal notice to the complainant confirming that he was no longer Assistant Director-General in charge of the sector; that Manual provision 2920 was applicable and was correctly applied the Organization having every right to demand delivery of papers he had come by as Assistant Director-General; that the operation was carried out in a spirit of courteous co-operation; and that his allegations of search and confiscation are fabrication.

The case being distinguishable from the others on the facts, the Organization invites the Tribunal not to adjourn it or, if it does, to adjourn it until all the cases, including those still before the Appeals Board, are ready for hearing; to reject the application for joinder; and to dismiss the claims.

CONSIDERATIONS:

The complainant's application for adjournment

1. The President of the Tribunal suspended the proceedings by an order of 15 April 1985. For reasons he gave in a further order of 16 April 1986 he refused the complainant's application for the continuation of the suspension and the written proceedings have since been completed. There are no grounds for any further adjournment.

The complainant's application for joinder

2. Before the Tribunal will join complaints and deal with them in one and the same judgment two conditions must be fulfilled: that both the substance of the claims and the material facts be the same.

Mr. Najman's first, fourth and fifth complaints relate to his administrative status whereas this one arises out of a single incident that occurred on his return to work from leave. Though some of his arguments are common to all his complaints, his claims in this case are not the same as in the others.

In any event no court of law is ever bound to join. In this instance joinder would merely complicate matters and would not make for any more effective treatment of the cases.

Oral proceedings

3. Although both parties apply for oral proceedings and the hearing of witnesses, no purpose would be served thereby since their written submissions and the evidence before the Tribunal are adequate.

Merits

4. By a decision of 19 June 1982 the Director-General of UNESCO granted two consecutive periods of leave to the complainant, the then Assistant Director-General in charge of co-operation for development and external relations (CPX). The first period ran from 1 July to 31 August 1982 and was annual leave. The other, from 1 September

1982 to 31 May 1983, was study leave. The Director-General told the complainant -- though nothing came of it at the time -- he was to be given other duties.

At 9 o'clock on the morning of 1 June 1983 the complainant reported for duty at his former office, which no-one else had occupied in his absence. Several minutes later there appeared the Inspector-General of UNESCO and the official who that day was in charge of CPX. Raving gone into the office, the Inspector-General said that the Director-General had ordered him to take over all the official papers, sort out the private ones and other personal effects and make an inventory. At first the complainant would have none of it but the Director of the Bureau of Personnel informed him that he was to resume work that very day and to be assigned forthwith to other duties -- though he did not say what they would be -- and the complainant thereupon consented. The Inspector-General and two helpers then set about the inventory, which proceeded apparently with courtesy on both sides.

Once the stocktaking was over the complainant was allocated another office, though he was given no work to do.

He then made a claim to "suitable redress" for the injury he alleged the Administration's behaviour had caused him.

Having received submissions from both parties, the App[^]12 Board recommended rejecting his claim -- though it found the incident "regrettable" -- and the Director-General did so.

5. In preliminary remarks the Organization submits that only in the light of the circumstances that obtained in 1983 can the reasons for the action the complainant is objecting to be properly understood. When the complainant turned up on 1 June 1983 at the office he had had before going off on leave, he was -- says UNESCO -- not just any staff member going back to work after a period of absence, but was committing a "wilful act of defiance and insubordination". Back in 1982 the Director-General had warned he would not be kept on in his post and a few weeks before his leave was to end a special adviser of the Director-General's had suggested he ask for another three months' leave. The complainant paid heed neither to the warning nor to the advice. What provoked the incident he takes exception to was his appearing at headquarters while the Executive Board was in session and taking over an office that was no longer his.

How cogent is all this?

The complainant's leave having expired on 31 May 1983, he was bound to report for duty on 1 June. Whatever the Organization may say he would have been in breach of duty or at least of courtesy, had he not turned up. Although he could have followed the advice and sought more leave, he had every right not to do so.

On entering the headquarters building he went straight and unobtrusively to his office. He had no contact with the members of the Executive Board, and the Organization does not say he sought any. He accordingly acted with the seemliness that was especially incumbent on him in the circumstances.

It was his old office he went back to. The Organization says that he was no longer Assistant Director-General by 1 June 1983, he maintains he was. Be that as it may, both agree he had not by then been given a new assignment. So there was no misconduct in going to an office that had in any event been empty for nearly a year. That was where all his official papers and personal effects were kept, and he understandably wanted to go over them, if only to sort them out, since he anticipated a new assignment and expected to have to hand some of them over to whoever replaced him.

The Tribunal concludes that there was none of the drama the Organization attributes to the events of that day and that nothing in the complainant's behaviour was calculated to put the Organization on its guard.

6. In taking up the complainant's various pleas, which it now will, the Tribunal will discount the high feelings the parties have allowed to colour the incident.

The complainant contends that the Director-General had no authority in the rules for ordering the Inspector-General to make the inventory of papers and effects in his old office.

The Organization retorts that the Inspector-General's task was to safeguard its property and get the complainant to hand over at once the official papers that were unlawfully in his possession. For that purpose it was free to resort to Manual paragraph 2920, which requires a senior official when informed of his transfer to make over forthwith all the official papers at his disposal before the inventory began the Director of the Bureau of Personnel duly informed

the complainant of his assignment to some unnamed post as from that very day, 1 June 1983.

Though 2920 does require a senior official to hand over official papers on his transfer, it does not intend seizure of them by the Organization itself. It is for the official, not the Organization, to act. Yet act is what it did. As the Inspector-General said in a minute of 6 June 1983: "In accordance with the procedure in Manual paragraph 2920 Mr. Krapf, Mr. Wilson and I made an inventory in your presence on 1 June 1983 of your official files, personal effects and papers, tobacco and alcohol". (Mr. Krapf and Mr. Wilson were the Inspector-General's helpers.) In other words, the complainant did not hand the papers over himself, instead it was someone appointed by the Director-General who did the stocktaking and took them over.

Although what happened is not provided for in 2920, an international organisation may sometimes act *proprio motu* to get back official papers. But it is an exceptional course and there must always be safeguards to ensure that on leaving the organisation or on transfer an official does not have to put up with needless harassment.

Of the several constructions that may be put on such behaviour the Tribunal will consider two that are arguable in this case.

Some passages in the defendant's pleadings suggest that its purpose in ordering the inventory was to protect its own property. They need not, however, be taken literally since it is clear on the evidence that the dispute raises no question about the complainant's honesty. Indeed the Organization maintains that the complainant directed the exercise and that the Inspector-General did not check any items he said were private. No justification can be found on such grounds for the stocktaking.

Another possible argument is that an official may fail to hand over official papers either by an oversight or for some other reason such as a professional dispute between him and his supervisor. Indeed Manual paragraph 2920 provides that the papers should be handed over as soon as the official has been told of his transfer and where possible one week before it takes place.

But the Inspector-General appeared only very shortly after the complainant arrived and without any warning. Moreover, the Inspector-General appears not even to have asked him whether he would hand the papers over of his own accord but to have left him no choice. The stocktaking began as soon as the Director of the Bureau of Personnel had notified the transfer to him. And although the Organization does say that over a year earlier the Director-General had made plain his intention of giving him another assignment no one in authority had since paid any attention to his papers or written to tell him to leave his office empty and follow the procedure in Manual paragraph 2920.

The other pleas being therefore immaterial, in particular those relating to the legal nature of the exercise, the Tribunal concludes that its main purpose was to impose a moral sanction unwarranted by anything in the rules or by any factual consideration.

7. The decision was unlawful and it caused the complainant injury in that it was an attack on his good name within the Organization. Though the injury is purely moral, his senior rank makes it the more serious.

This judgment affords some redress. The Tribunal further awards damages amounting to 50,000 French francs plus interest at 10 per cent a year from the date of the judgment.

8. The complainant is awarded 25,000 French francs in costs.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant 50,000 French francs, to bear interest at 10 per cent a year as from the date of the judgment.
2. It shall pay him 25,000 French francs in costs.
3. 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 12 December 1986.

André Grisel

Jacques Ducoux

Mohamed Suffian

ORDER

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

In re NAJMAN (Nos. 1 and 2)

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)

André Grisel,

President.

Lausanne, 15 April 1985.

ORDER

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

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

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)

André Grisel

President

Lausanne, 16 April 1986.

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