



Before: Judge Thomas Laker
Registry: Geneva
Registrar: Víctor Rodríguez

HEPWORTH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Arnold Kreilhuber, UNEP
Chacha Odera

Introduction

1. In an appeal submitted on 25 November 2009 to the United Nations Dispute Tribunal, the applicant contests the decision of the Executive Director, United Nations Environment Programme (“UNEP”), not to renew his fixed-term appointment beyond 26 July 2009.

Facts

2. The applicant joined UNEP in 2000 as Deputy Director, D-1, of the then Division of Environmental Conventions, at Headquarters in Nairobi. He also worked in parallel on ecosystem management related issues for the Division of Environmental Policy Implementation (“DEPI”).

3. In 2004, the applicant was transferred by the then Executive Director, UNEP, from his position in Nairobi to Bonn as Acting Executive Secretary for the Secretariat of the Convention of Migratory Species of Wild Animals (“CMS”). The applicant consented to his transfer after discussions with the Executive Director. During these discussions, the applicant and the Executive Director held a meeting on 15 April 2004 of which confidential minutes were taken. These minutes recorded the wish of the Executive Director to make the applicant Officer-in-Charge of CMS. They state that “the [Executive Director] will give three or four months as [Officer-in-charge] (extendable until [the Executive Director] makes final selection for the post). During the time [the applicant] can demonstrate his ability to handle the position ... [the applicant] said that he would give it a try and that he is happy that he will culminate his career in CMS.”

4. In 2005, whilst serving as Acting Executive Secretary, CMS, the applicant applied for the position of Executive Secretary, CMS, at the D-1 level. Upon his selection, he was granted a two years’ fixed-term appointment effective 26 July 2005. His letter of appointment stated that “[a] [f]ixed-[t]erm [a]ppointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations” and that his

appointment was limited to service with UNEP. The applicant's appointment expired on 25 July 2007.

5. Effective 26 July 2007, the applicant was granted another two years' fixed-term appointment. His letter of appointment stated that the appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations" and that it was limited to service with UNEP.

6. By letter dated 17 April 2008, the German Federal Ministry for the Environment, Nature Conservations and Nuclear Safety expressed to the applicant its concerns about the fulfilment of tasks of the CMS Secretariat, and some staffing and administrative matters. It requested the applicant's urgent attention and corrective measures with regard to the issues indicated.

7. By letter dated 2 July 2008, the German Federal Ministry for the Environment, Nature Conservations and Nuclear Safety expressed its concerns to the Executive Director about the applicant's actions following its letter dated 17 April 2008. It noted that rather than trying to resolve the situation, the applicant had hardened his position and showed an unacceptable behaviour. The Ministry expressed its wish to find a solution to that problem which was satisfactory and constructive for all concerned.

8. On 24 February 2009, the Executive Director, UNEP, verbally offered the applicant the D-1 post of Special Advisor on Biodiversity within DEPI in Nairobi.

9. By memorandum dated 26 February 2009, the applicant responded to the Executive Director, UNEP, declining the offer for professional and personal reasons.

10. On 26 March 2009, the applicant was informed by the Chef de Cabinet of the Executive Director's decision to reassign him to Nairobi. On the same day, the applicant sent an email to the Chef de Cabinet, copied to the Executive Director, in which he reiterated his reasons for not accepting a reassignment to Nairobi. On 27 March 2009, the applicant sent a further email to the same effect to the Chef de Cabinet and the Executive Director.

11. By memorandum dated 1 April 2009, the Executive Director, UNEP, formally informed the applicant of his decision to reassign him to the post of Special Advisor on Biodiversity, DEPI, at Headquarters in Nairobi effective 15 July 2009.

12. By email dated 15 May 2009 to the Chairman of the CMS Standing Committee, copied to the Executive Director, UNEP, the applicant indicated that he was neither prepared to take up the position of Special Advisor on Biodiversity in Nairobi nor to sign a new contract with UNEP in that capacity.

13. On 5 June 2009, the applicant submitted to the Secretary-General a request for review of the Executive Director's decision to reassign him to Nairobi.

14. By letter dated 15 June 2009, the Executive Director, UNEP, informed the applicant that in view of the latter's decision "not to come to Nairobi as instructed, ... UNEP [was] not in a position to extend [his] appointment beyond its expiration".

15. By letter dated 15 July 2009 to the Secretary-General, the applicant requested a management evaluation of the decision not to extend his fixed-term appointment. He also withdrew his initial request for review dated 5 June 2009 since he considered that it had become moot because the decision not to renew his fixed-term appointment was a consequence of his refusal to accept a reassignment to Nairobi.

16. On 15 July 2009, the applicant submitted to the Tribunal a request for suspension of action of the decision not to renew his appointment beyond 26 July 2009. The Tribunal rejected his request by decision dated 22 July 2009.

17. On 25 July 2009, the applicant's fixed-term appointment expired.

18. By letter dated 25 August 2009, the Under-Secretary-General for Management replied to the applicant's request for management evaluation and informed him that the Secretary-General had decided to uphold the contested decision.

19. On 25 November 2009, the applicant filed an appeal before the Tribunal. On 9 December 2009, the Tribunal requested the respondent to submit his reply to the application. On 6 January 2010, counsel for the respondent submitted his reply. On 12 March 2010, the applicant submitted his observations. On 29 April 2010, a directions hearing took place.

20. During the hearing, the following issues were discussed: (1) the alleged promise of renewal; (2) the connection between the previous transfer decision and the decision not to renew the applicant's fixed-term appointment and to what extent the legality of that transfer decision could be the subject of the present proceedings; (3) the given and "hidden" reasons for the decision of non-renewal; and (4) the confidential communications submitted by the respondent in the course of the proceedings in front of the Tribunal.

21. Following the hearing, the Tribunal issued Order No. 52 (GVA/2010), dated 30 April 2010, whereby the respondent was instructed to provide information about the filling of the post of Executive Secretary, CMS, UNEP, in Bonn and the post of Special Advisor on Biodiversity, DEPI, in Nairobi, by 7 May 2010. The applicant was further instructed to submit by 21 May 2010 final observations concerning the issues raised at the directions hearing.

22. On 5 May 2010, the respondent informed the Tribunal that the post of Executive Secretary, CMS, had been filled on 1 December 2009 and that the post of Senior Advisor on Biodiversity had been filled on 4 April 2010. The applicant submitted his final observations on 26 May 2010. On 20 August 2010, the respondent submitted comments on the applicant's final observations.

23. On 18 October 2010, an oral hearing took place in which the applicant, his counsel and two counsel for the respondent participated.

Parties' contentions

24. The applicant's principal contentions are:

a. The decision to transfer the applicant from Bonn to Nairobi and the decision not to renew his appointment were motivated by political considerations, namely undue influence from the German Government which had requested that the applicant be removed from his post;

b. Both decisions, i.e., the imposed transfer and subsequent non-renewal, were not taken in good faith. The initial invitation to transfer which changed into an imposed transfer was unlawful. The decision not to renew his contract was a veiled disciplinary sanction for his failure to abide by the instruction to move to Nairobi. It was an improper exercise of discretion on the part of the Organization;

c. The post of Special Advisor on Biodiversity within DEPI in Nairobi was created to provide an opportunity for the Executive Director to remove the applicant from Bonn. The Executive Director offered the position to the applicant emphasizing that it needed to be filled “urgently”. Nevertheless, no post of Special Advisor at the D-1 level was available when the applicant was notified of the compulsory transfer. Furthermore, the post available in Nairobi was at the P-5 level. The post of Special Advisor was advertised only after the applicant filed his appeal before the Tribunal and six months after he communicated his refusal to transfer. This fact ran counter to the interest of the Organization and its alleged organizational needs;

d. His transfer was not in the interest of the Organization. Whereas he was only two years’ short of the mandatory retirement age, the imposed transfer had no benefit to UNEP. His experience and qualifications did not correspond to the job description of the post in Nairobi. Furthermore, the post of Special Advisor had not been created at that time and no replacement was available to take over his functions of Executive Secretary. This situation was aggravated because the former Deputy Executive Secretary was transferred out of Bonn in early 2009 and his functions were performed by an interim appointee;

e. The Executive Director failed to consult him regarding the transfer. It was a unilateral decision without meaningful consultation. The Executive Director did not take into account the applicant's concerns, which included the education of his adopted Kenyan-born child and the difficulties he had with the Kenyan authorities in relation to a property in Nairobi;

f. A former Honorary Ambassador who collaborated with CMS informed the applicant that a former colleague of the German Federal Government had revealed to him that during a meeting in November 2008, a Head of Department said that the applicant would return to Nairobi to take another post. This Head of Department had held a meeting with the Executive Director in Nairobi on 22 August 2008. Hence, the applicant deduced that the Executive Director had informed the German Federal Government that he would be transferred to Nairobi at least three months before he was first informed of the potential reassignment;

g. His refusal to be transferred to Nairobi did not entail that the Executive Director was no longer required to consider fairly the renewal of his appointment. He had a reasonable expectation of renewal of his contract because his position was not abolished and there was no recorded lapse in his performance. Furthermore, at the time of his application, UNEP had not appointed a replacement for the position of Executive Secretary and the duties were performed by an interim appointee acting as Officer-in-Charge. The failure to appoint a successor to his former post is evidence that there was no legitimate reason for not renewing his appointment as Executive Secretary;

h. He had an expectancy of renewal based on the minutes of the meeting held on 15 April 2004 between himself and the then Executive Director. These minutes demonstrate that whereas the initial period as Acting Executive Secretary would enable him to prove his "ability" to handle the position, he would then be able to "culminate his career in CMS". Furthermore, the then Deputy Executive Director confirmed that this was the understanding in an email dated 17 August 2009. It was a

promise for the applicant to conclude his career in Bonn as Executive Secretary;

i. The letter dated 2 July 2008 from the German Government to the Executive Director, UNEP, confirmed his contention that the decision not to renew his appointment was prompted by political pressure. The Executive Director at no point in time made an effort to conduct a meeting with him to discuss the damaged relation or to obtain his interpretation of the circumstances and response to the serious allegations, let alone did he instruct the parties to convene to resolve the concerns;

25. The applicant requests the Tribunal to declare the contested decision null and void, to order the applicant's reinstatement with retroactive effect and to order compensation in his favour for all violations of his contractual rights.

26. The respondent's principal contentions are:

a. The decision not to renew the applicant's fixed-term appointment subsequent to the applicant's decision not to accept a transfer to UNEP Headquarters constituted a reasonable and valid exercise of discretion;

b. The applicant had no expectancy of renewal based on his contract with UNEP. He did not prove that there were countervailing circumstances that would have allowed him to expect a renewal. According to staff regulation 4.5(c) and staff rule 9.4, a fixed-term appointment does not carry any expectancy of renewal or conversion to any type of appointment. It expires automatically and without prior notice on the expiration date specified in the letter of appointment. The Organization is not bound to give any reason or justification for not extending a fixed-term appointment. Furthermore, in his motion for suspension of action, the applicant himself acknowledged that there was no legal expectancy for renewal of his appointment as Executive Secretary, CMS;

c. The applicant's claim that he had a reasonable expectancy of renewal is unsubstantiated. The minutes of the meeting held on 15 April 2004 on which the applicant relies to support his claim constitute

neither a legally binding agreement nor a promise on the part of the former Executive Director. The minutes only show that the applicant received an offer to be Officer-in-Charge until the formal selection of a new Executive Secretary of CMS was completed. In a handwritten note in the margin of the minutes, the applicant stated that he “[could] probably accept being [Officer-in-Charge] until the Galaxy process [was] completed but that [he] [would] need a guarantee, in writing, of two-year contract extension irrespective of the outcome”. This note, which was written by the applicant, is not a binding agreement between management and the applicant that the latter would remain Executive Secretary of CMS until his retirement some eight years later;

d. The email dated 17 August 2009 of the former Deputy Executive Director, UNEP, which was produced by the applicant as further evidence for the existence of a guarantee by the previous management for his tenure in Bonn, does not support the applicant’s claim. The former Deputy Executive Director merely stated that according to his recollection, in 2005 UNEP had the intention that the applicant should remain as Executive Secretary of CMS in Bonn until his retirement. This document cannot serve as evidence for the existence of an express promise or a legally binding guarantee;

e. The decision not to renew the applicant’s appointment was a proper exercise of managerial discretion by the Executive Director of UNEP and it was not motivated by extraneous considerations. The applicant provides no evidence which would allow to conclude that the non-renewal of his appointment was motivated by political pressure on the part of the German Government;

f. The applicant failed to prove any connection between the letter dated 2 July 2008 and the decision not to renew his appointment one year later. The suggestion by the applicant that the Executive Director was acting under instruction of the German Government not only when he decided to transfer the applicant but also in not extending his appointment is not supported by any evidence. The letter in question does not request

that the applicant be transferred or that his fixed-term appointment not be renewed, and even if it did, there is nothing to suggest the Executive Director would have acted on it;

g. The Executive Director gave suitable and fair consideration to the applicant for renewal of his contract with UNEP. He offered him another position at the same level, which would have allowed him to pursue his career with UNEP beyond the expiry date of his fixed-term appointment;

h. Contrary to what is alleged by the applicant, the position of Special Advisor was created due to organizational needs related to the upcoming International Year of Biodiversity and the preparation of a new biennial work programme in the field of biodiversity, as well as the implementation of UNEP Medium Term Strategy. The functions of the position were classified in March 2009 at the D-1 level. The Executive Director chose to reassign the applicant to that new position given his professional profile and long-standing experience;

i. The transfer of the staff member was in the interest of the Organization. The applicant, who had served in the Organization since 2000 and occupied various senior positions in UNEP in the area of biodiversity, was well suited for this position and management was convinced that he would bring tangible results and notable contributions to the Organization in that capacity;

j. Contrary to the applicant's claim, the Executive Director consulted the applicant regarding his reassignment during meetings and in writing in February and March 2009. On these occasions, the applicant expressed his concerns vis-à-vis the transfer to Nairobi. However, consultation does not mean that management has to decide in the staff member's favour, it means that it has to take the staff member's concerns into account when making the final decision. The Executive Director considered the applicant's concerns and tried to accommodate them as far as possible;

27. The respondent requests the Tribunal to reject the application.

Considerations

28. The applicant's fixed-term appointment was governed by the former Staff Rules. Former staff rule 104.12(b)(ii) provides as follows:

The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.

29. Former staff rule 109.7 further provides that:

A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

30. It results from the foregoing provisions that a staff member who, like the applicant, is serving on a fixed-term appointment does not have a right to renewal. Nevertheless, the Tribunal will examine whether countervailing circumstances existed, including whether the non-renewal decision was tainted by improper motives. The Tribunal has stated in its jurisprudence that even though a staff member does not have a right to the renewal of his or her contract, that decision may not be taken for improper motives (see for example Judgment UNDT/2010/005, *Azzouni* and Judgment UNDT/2010/161, *Ahmed*). The former UN Administrative Tribunal also stated, for example:

[U]nless there exist countervailing circumstances, ... staff members [on fixed-term contracts] may see their relationship with the Organization terminated when the last of their ... appointments expires. Countervailing circumstances may include (1) an abuse of discretion in not extending the appointment, or (2) an express promise by the Administration that gives a staff member an expectancy that his or her appointment will be extended. The Respondent's exercise of his discretionary power in not extending a [fixed-term] contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors that may flaw his decision. (See Judgement No. 1402 (2008), quoting Judgment No. 885, *Handelsman* (1998))

31. First, the Tribunal considers that the applicant did not have a legitimate expectancy of renewal. No express promise by the Administration could be found.

In this respect, the Tribunal in its decision UNDT/2009/003, rejecting the applicant's request for suspension of action, already pointed out the following:

The [a]pplicant had no reasonable expectancy to renewal of subject appointment. In support of this claim he relies only on minutes of a meeting held on 15 April 2004. According to the clear wording of these minutes no express promise of the Administration can be found. It only states the views of the [a]pplicant saying he is happy that he will culminate his career in CMS. No express or even implied word covers the whole period of time until the retirement of the [a]pplicant, which was no less than some eight years ahead at that time.

32. There is no need to amend this view in the light of the applicant's further arguments. The email from the then Deputy Executive Director of UNEP, dated 17 August 2009, does not prove that an express promise was made to the applicant. According to this email, its author and the then Executive Director of UNEP "had decided in 2005 after [the applicant's] success in the global competition that [he] will/should be enabled to stay in Bonn at the head of CMS Secretariat until [his] retirement in 2012". This email does not claim that the applicant had been informed about this "decision". Therefore, no express promise to the applicant can be drawn from it.

33. Even assuming that some kind of promise was made to the applicant in 2004 and/or in 2005, these promises could not have any effect on his contractual situation when his last contract expired in July 2009. As a matter of fact, from 2005 on, he had two consecutive temporary, fixed-term appointments of two years each. The corresponding letters of appointment, signed by the applicant, explicitly state that these fixed-term appointments do not carry any expectancy of renewal. It follows from this situation that the applicant should not have signed these appointments since they were not in accordance with the alleged promise given to him. Since, on the contrary, he did sign them he accepted their content, including their limitation in time. No promise given could override the clear words of the letters of appointment signed subsequently.

34. As a result, any alleged promise of renewal could only have covered the next temporary contract at the most. Any longer lasting promise would have been in contradiction to the Organization's general practice of issuing temporary

appointments. The applicant accepted this practice by signing the appointment letters in 2005 and 2007. If there had ever been promises of renewal in 2004 or 2005, they would not have had any impact on 21 August 2007 when the applicant signed his last fixed-term appointment.

35. Second, it cannot be stated that the decision of non-renewal was based on improper motives or otherwise constituted an abuse of discretion. The applicant does not substantiate his allegation that this decision was motivated by political pressure of the German Government. The applicant's allegation is based on a letter dated 2 July 2008 in which the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety expressed its concerns to the Executive Director about certain actions of the applicant as Executive Secretary, CMS. However, the Tribunal noted that this letter was in fact the follow-up to another letter dated 17 April 2008 addressed to the applicant in which the German Ministry expressed concerns about the fulfillment of tasks of the CMS Secretariat and about some staffing and administrative matters. While it is true that in both letters the German Ministry expressed worries about the management of the CMS Secretariat, these documents do not allow the Tribunal to conclude that the decision not to renew the applicant's appointment was due to political pressure. The criticisms contained in these letters cannot be equated with a request not to renew the applicant's contract.

36. In this context it has to be noted that in a memorandum dated 26 February 2009 to the Executive Director—in which the applicant's declined the offer to be transferred to Nairobi—the applicant stated that he had been elected chair of all the UN agencies in Germany and that he was spending considerable efforts on the task. He pointed out that "his efforts so far [had] been appreciated by the German Government and the City of Bonn". It follows from this statement that even according to the applicant, the relations between him and the German Government were rather good.

37. The applicant does not substantiate either his claim that the decision not to renew his appointment was a veiled disciplinary sanction for his refusal to be reassigned to Nairobi. While it is true that there is a direct link between the applicant's refusal to be transferred to Nairobi, as per official instructions

communicated to him on 1 April 2009, and the decision dated 15 June 2009 not to extend his appointment, this only shows a sequence of events in terms of time, not in terms of causes. The Tribunal in its decision UNDT/2009/003, dated 22 July 2009, already stated that :

There is no evidence that this decision is a veiled disciplinary sanction for the [a]pplicant's non-compliance with respect to his transfer to Nairobi. Since it is clear - in the words of the [a]pplicant's request - "that he ... does not have an automatic right to renewal of the appointment" for his current position as Executive Secretary of CMS, it is even arguable, that offering the Nairobi post to the [a]pplicant was a suitable and fair consideration for the renewal of the [a]pplicant's FTA. Offering another position at the same level may be a way to protect the [a]pplicant from the difficulties he may face while finding a new position at his age in the private sector.

38. As the Tribunal has also pointed out in the above-mentioned decision, the Organization was not bound to give any justification for not extending the applicant's fixed-term appointment. A fixed-term appointment is in nature a temporary contract which is due to expire on the date specified in it. The fact that the applicant's contract was not renewed after he had refused to accept his transfer to Nairobi does not show, in itself, that the last decision was motivated by the first one.

39. Even assuming that the non-renewal of the applicant's contract was a consequence of the applicant's refusal to accept the transfer, the decision not to renew his contract was a valid exercise of the respondent's discretion. The Organization considered that the applicant was the best qualified to fill the post of Special Advisor on Biodiversity, DEPI, in Nairobi. The applicant's refusal to accept the position constituted a valid reason for the Organization not to renew his appointment as Executive Secretary, CMS, in Bonn.

40. Concerning the decision to transfer the applicant to Nairobi, the Tribunal notes that by letter dated 15 July 2009, he withdrew his initial request for management evaluation of this decision. Since the applicant decided not to go through with the management evaluation, which is a mandatory requirement to contest an administrative decision before the Tribunal, the decision to transfer him

cannot be reviewed as part of the present case. At this stage, that decision can only be considered as a fact which is no longer open to judicial review.

41. Even assuming that the decision to transfer the applicant was properly before the Tribunal, in view of the facts of the case and the broad discretion of the Organization in assigning its employees to different functions as deemed appropriate, such a decision could not be considered as illegal or improperly motivated. In accordance with former staff regulation 1.2(c), former staff rule 101.2(b) and section 2.4 of ST/AI/2006/3 (Staff selection system), staff members are subject to the authority of the Secretary-General, who may assign them to any of the activities or offices of the Organization. There is no requirement to obtain the consent of the concerned staff member. The obligation of staff to accept such assignments in the interest of the Organization has been consistently upheld by the former UN Administrative Tribunal and endorsed by this Tribunal, provided the decision is not improperly motivated (see Judgment UNDT/2010/009, *Allen*). In general, it is for the Organization to determine whether or not a measure of this nature is in its interest.

42. The applicant holds that the decision to reassign him was unlawful because there was no available post at the D-1 level in Nairobi, his experience and qualifications did not correspond to the requirements of the post and the Executive Director failed to consult him regarding the transfer. In the present case, the evidence provided by the applicant does not support his contention. The evidence shows that 1) the post of Special Advisor on Biodiversity issues, at the D-1 level, was established, advertised and finally filled in April 2010; 2) the applicant's professional profile, qualifications and experience made him suitable for that position; and 3) the Executive Director consulted the applicant about the transfer before taking the decision. The fact that the decision was taken in spite of the applicant's concerns does not mean that consultations did not take place.

43. The applicant also alleges that the German Government exerted pressure for him to be transferred to Nairobi. In support of his claim, he brought to the attention of the Tribunal the statement of a former Honorary Ambassador who collaborated with CMS and who had allegedly been informed by an agent of the German Government—who in turn had received the information from a Head of

Department who had had a meeting with the Executive Director—that the applicant would be transferred to Nairobi. Based on this statement, the applicant claims that the German Government had been informed of his transfer at least three months before he had himself been advised for the first time of his potential transfer. However, this is no evidence that the German Government exerted pressure on UNEP. It remains that the decision to transfer the applicant was taken on 1 April 2009, that the applicant was consulted about his potential transfer before the decision was taken, and that some nine months passed between the letter of 2 July 2008 in which the German Government expressed concerns to the Executive Director, UNEP, about the applicant and the decision to transfer the latter. Therefore, it is not proved that the decision was improperly motivated.

Conclusion

44. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 28th day of October 2010

Entered in the Register on this 28th day of October 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva