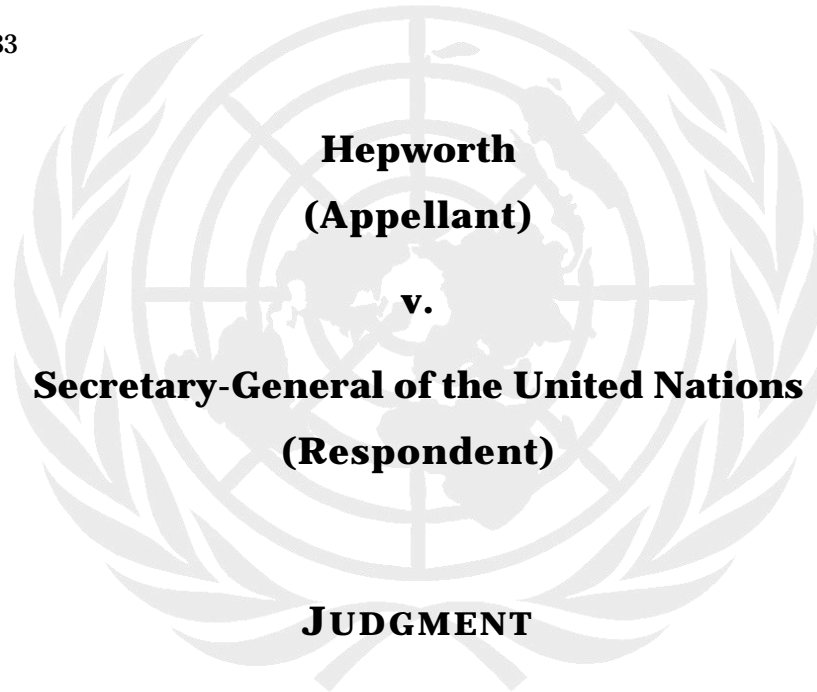




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-183



**Hepworth
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Kamaljit Singh Garewal
Judge Mark P. Painter

Judgment No.: 2011-UNAT-178

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Appellant: Bart Willemsen

Counsel for Respondent: John Stompor

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The burden of proving improper motivation lies with the staff member contesting the decision not to renew his or her contract, and the burden of proving that the first instance Judge erred on a question of fact resulting in a manifestly unreasonable decision lies with the appellant.¹ In the instant case, however, due process requires that Mr. Robert Hepworth be given the opportunity to submit the evidence. For this reason, the case is remanded back to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) for determination of the facts and merits of the application.

Facts and Procedure

2. Mr. Hepworth joined the United Nations Environment Programme (UNEP) in 2000 as Deputy Director, D-1, of the then Division of Environmental Conventions in Nairobi, Kenya. He also worked on ecosystem management-related issues for the Division of Environmental Policy Implementation (DEPI).

3. In 2004, the former UNEP Executive Director transferred Mr. Hepworth from his position in Nairobi to a position as Acting Executive Secretary of the Secretariat of the Convention of Migratory Species of Wild Animals (CMS) in Bonn, Germany. In 2005, Mr. Hepworth applied for the D-1 level position of CMS Executive Secretary. He was selected and was granted a two years' fixed-term appointment effective 26 July 2005. In 2007, Mr. Hepworth received another two years' fixed-term appointment until 25 July 2009.

4. By letter dated 17 April 2008, the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety informed Mr. Hepworth of the Ministry's concerns about the fulfillment of tasks by the CMS Secretariat and some staffing and administrative matters. This letter was sent in the context of Germany being a member of the CMS Standing Committee as well as its support for the CMS as the host country of the CMS Secretariat. It requested Mr. Hepworth's urgent attention and corrective measures with regard to the issues indicated. By letter dated 2 July 2008, the German

¹ Cf. *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-185.

Federal Ministry for the Environment, Nature Conservation and Nuclear Safety expressed its concerns to the UNEP Executive Director about Mr. Hepworth's actions, including a hardening of his position, following the earlier letter.

5. On 24 February 2009, the UNEP Executive Director discussed with Mr. Hepworth the intention to reassign him to the D-1 level position of Special Advisor on Biodiversity within DEPI at UNEP Headquarters in Nairobi. By memorandum dated 26 February 2009, Mr. Hepworth responded to the UNEP Executive Director, declining the offer for professional and personal reasons. On 26 March 2009, Mr. Hepworth was informed by the Chef de Cabinet of the Executive Director's decision to reassign him to Nairobi. On the same day, Mr. Hepworth sent an email to the Chef de Cabinet, copied to the UNEP Executive Director, in which he reiterated his reasons for not accepting a reassignment to Nairobi. On 27 March 2009, Mr. Hepworth sent a further email to the same effect to the Chef de Cabinet and the UNEP Executive Director.

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

7. By email dated 15 May 2009 addressed to the Chairman of the CMS Standing Committee, copied to the UNEP Executive Director, Mr. Hepworth indicated that he was not prepared to take up the suggested position in Nairobi.

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

9. By letter dated 15 June 2009, the UNEP Executive Director informed Mr. Hepworth 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".

10. On 15 July 2009, Mr. Hepworth submitted to the UNDT a request for suspension of action of the decision not to renew his appointment beyond its expiration. The UNDT rejected the request.

11. On 25 July 2009, Mr. Hepworth's fixed-term appointment expired.

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

13. Mr. Hepworth filed an application with the UNDT, which rendered its Judgment No. UNDT/2010/193 on 28 October 2010. The UNDT in Geneva found that Mr. Hepworth had no legitimate expectancy of renewal of his fixed-term appointment, that there were no improper motives that tainted the non-renewal decision, and that such decision was the valid exercise of the Organization's discretion. Accordingly, the UNDT rejected the application.

14. On 13 December 2010, Mr. Hepworth appealed the UNDT Judgment. On 13 January 2011, Mr. Hepworth filed a request for leave to file a supplemental authority in support of his appeal. By Order No. 37 (2011) dated 19 January 2011, the United Nations Appeals Tribunal (Appeals Tribunal) granted the request. On 15 February 2011, the Secretary-General filed his answer to the appeal.

15. Upon Mr. Hepworth's request, the Appeals Tribunal held an oral hearing in his case on 14 October 2011 in New York. Both parties attended the hearing.

Submissions

Mr. Hepworth's Appeal and Additional Submission

16. Mr. Hepworth submits that the UNDT acted outside its statutory powers in rejecting his request to call both himself and the former Deputy Executive Director as witnesses and for an order to require the author of the impugned decision to appear for cross-examination. In the alternative, Mr. Hepworth submits that the UNDT failed to provide reasons in order to determine whether this decision was a reasonable exercise of its judicial discretion. The UNDT's rejection, without motivation, amounts to an error of law that invalidates the Judgment.

17. Mr. Hepworth next contends that the UNDT erred in fact in finding that he did not prove that the impugned decision was a veiled disciplinary measure. The wording of the Judgment reveals that, contrary to the UNDT's conclusion, there was more than a temporal connection between Mr. Hepworth's refusal to transfer to Nairobi and the non-renewal

decision. Also, the UNDT's statement that even assuming that the non-renewal was a direct consequence of Mr. Hepworth's refusal to transfer, this refusal would have been a valid reason for the Secretary-General not to renew Mr. Hepworth's appointment. Mr. Hepworth argues that if the refusal to transfer was indeed the reason for the subsequent non-renewal of the position with CMS in Bonn, this was indisputably a veiled and improper disciplinary measure. The UNDT's failure to appreciate the same amounts to an error of law.

18. Mr. Hepworth submits that the UNDT erred in fact in finding that he had failed to prove that the impugned decision was influenced by political pressure from the German Government. He in particular alleges that the UNDT mischaracterized his argument and the unambiguous terms of the letter from the German Government; that the UNDT failed to appreciate the significance of the fact that the Executive Director had never discussed the letter and its serious allegations with Mr. Hepworth; and that the UNDT failed to appreciate the significance of UNEP's delay in advertising the post after Mr. Hepworth's refusal.

19. Mr. Hepworth further contends that the UNDT erred in law and fact in finding that he failed to prove that he had been given a promise that he could remain the Executive Secretary of CMS until his retirement.

20. Mr. Hepworth contends that the UNDT erred in concluding that the Secretary-General was not obliged to provide a reason for the non-renewal decision. He contends that, if so requested, the Organization must provide reasons not to extend a fixed-term appointment. The clause relating to the non-expectation of renewal of a fixed-term appointment does not mean that a non-renewal decision may be based on illegal motives and that the Secretary-General can evade the internal justice system by withholding the reason for the non-renewal.

21. Mr. Hepworth submits that the UNDT Judge failed to recuse himself from the proceedings. He argues that Judge Laker had previously ruled on his request for suspension of action. The language used in the Judgment revealed that he entered the deliberations with a preconceived opinion on the merits and did not make a fair assessment of the totality of the evidence advanced at trial.

22. Mr. Hepworth requests that the Appeals Tribunal reverse the UNDT Judgment and award compensation in the amount of two years' net base salary as well as

compensation for moral injuries. In the alternative, Mr. Hepworth requests that the case be remanded to the UNDT in either Nairobi or New York with an instruction to evaluate his request to call live evidence.

23. In his additional submission, Mr. Hepworth submits an excerpt of the Judgment rendered by this Tribunal in *Azzouni*.²

Secretary-General's Answer

24. The Secretary-General submits that the UNDT correctly concluded that a fixed-term appointment carries no expectancy of renewal.

25. The Secretary-General submits that Mr. Hepworth has failed to establish that the UNDT erred in its conclusion that there were no countervailing circumstances creating an expectancy of renewal or vitiating the non-renewal decision.

26. The Secretary-General submits that Mr. Hepworth failed to establish that the UNDT made any error in procedure warranting a reversal of its decision to reject his application.

27. The Secretary-General requests that the Appeals Tribunal affirm the UNDT's rejection of Mr. Hepworth's application and dismiss the appeal in its entirety.

Considerations

28. The UNDT Judgment states as follows:

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.... [T]hese documents do not allow the Tribunal to conclude that the decision not to renew the applicant's appointment was due to political pressure.

29. The burden of proving improper motivation lies with the staff member contesting the decision not to renew his or her contract, and that of proving that the first instance

² *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.

Judge erred on a question of fact resulting in a manifestly unreasonable decision lies with the appellant.³

30. In the instant case, however, Mr. Hepworth was not given an opportunity to call witnesses at trial. And even before, he was not able to discuss with his supervisor the reasons for his transfer to Nairobi in 2009 after serving on two fixed-term appointments of two years each in Bonn.

31. We hold that the appeal is receivable at this point, because the UNDT has committed “an error in procedure, such as to affect the decision of the case” under Article 2(1)(d) of the Statute of the Appeals Tribunal when limiting the evidence.

32. Due process requires that a staff member must know the reasons for a decision so that he or she can act on it. The complainant was left in an unfair position in terms of attempts to resolve the dispute when deprived of the opportunity to consider the reasons for his lateral transfer.⁴

33. The case is remanded to the UNDT for a determination of the facts and the merits of the application.

³ Cf. *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-185.

⁴ ILOAT Judgment No. 3041, 6 July 2011.

Judgment

34. The appeal is allowed and the case is remanded to the UNDT.

Original and authoritative version: English

Dated this 21st day of October 2011 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Garewal

(Signed)

Judge Painter

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar