



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:

Suleiman Elmi, Chief, HRMS, UNON

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.



United Nations Nations Unies

UNITED NATIONS DISPUTE TRIBUNAL

TRIBUNAL DU CONTENTIEUX DES NATIONS UNIES

ORDER

1. By application, registered on 15 July 2009 under UNDT/GVA/2009/38 the Applicant, Executive Secretary with the Secretariat of the Convention on Migratory Species (hereinafter CMS) in Bonn, Germany, requested that the implementation of the decision dated 15 June 2009 not to renew his appointment beyond the date of expiration, which is 26 July 2009, be suspended during the pendency of the Management Evaluation.

SUMMARY OF THE FACTS

2. The Applicant joined the United Nations Environment Programme (hereinafter UNEP) in 2000 as Deputy Director of the Division of Environmental Conventions (hereinafter DEC) and also worked in parallel on wild life related issues for the Division of Environmental Policies Implementation (hereinafter DEPI) at the D-1 level. In 2004, while stationed in Nairobi, the Applicant accepted a transfer to Bonn to be appointed as acting Executive Secretary with the Secretariat of CMS, which acceptance was the result of discussion with the then Executive Director of UNEP. During these discussions the Applicant and the then Executive Director of UNEP held a meeting on 15 April 2004 of which confidential minutes had been taken. These minutes expressed the wish of the then Executive Director to make the Applicant Officer-in-Charge of CMS. They also say “the ED will give 3 or 4 months as OIC (extendable until ED 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. He will speak with his family first and give confirmation of this”. In 2005 - as acting Executive Secretary- the Applicant applied for the post of Executive Secretary

of CMS and was ultimately selected and recruited for the subject post. In 2007 UNEP renewed the Applicant's appointment as Executive Secretary of CMS for a further 2 years until 26 July 2009.

3. On 24 February 2009 the Executive Director of UNEP verbally offered the Applicant the position of Special Advisor on biodiversity within DEPI in Nairobi. On 26 February 2009, the Applicant responded to the Executive Director of UNEP - in writing - declining the offer providing both professional and personal reasons. After having received verbal communication on 26 March 2009 the Applicant requested the Executive Director to reconsider his decision to reassign the Applicant on the position of Special Advisor on Bio-Diversity in Nairobi. In a memorandum dated 1 April 2009 the Applicant was informed by the Executive Director of UNEP of his decision to reassign him to the Special Advisor post in Nairobi. In an email dated 15 May 2009, the Applicant indicated that he was not prepared to accept the reassignment offer in Nairobi nor would he sign a new contract with UNEP in that capacity. On 5 June 2009, the Applicant submitted to the Secretary-General a request for review in relation to the decision to transfer him to Nairobi.

4. By letter dated 15 June 2009 the Executive Director of UNEP wrote: "In view of your decision not to come to Nairobi as instructed, I regret to inform you that UNEP is not in a position to extend your current appointment beyond its expiration on 26 July 2009." On 15 July 2009 the Applicant submitted a request for management evaluation of the decision not to extend his fixed-term appointment (hereinafter FTA) beyond its 26 July 2009 expiration date.

CONTENTIONS OF THE PARTIES

5. The Applicant's principal contentions are:

1. The Applicant had a reasonable expectancy of renewal of the subject appointment. The confidential note concerning the meeting 15 April 2004 demonstrates that whereas the initial period as acting Executive Secretary

would enable the Applicant to prove his ability to handle the position the Applicant would be able to culminate his career in CMS. The transfer to Bonn would be the final move in the Applicant's career with UNEP before mandatory retirement in 2012 giving due regard to his personal situation.

2. The decision not to renew the contract was an improper exercise of discretion. The terms used in the letter of 15 June 2009 are unequivocal and demonstrate a direct and immediate link between the Applicant's decision not to move to Nairobi and the Executive Director's decision not to renew his appointment. The Executive Director has therefore used the fact that the Applicant decided not to move to Nairobi as the basis for the non-renewal, which is improper exercise of his discretionary authority. In this context the Applicant argues that this decision is a veiled disciplinary sanction. He also argues that the initial offer to transfer is irreconcilable with the subsequent decision to impose the same transfer. The Applicant says that the post of Biodiversity Advisor appears to have been hastily created for the sole purpose to transfer him out of Bonn. The transfer would provide no beneficial experience to the ultimate benefit of the Organization. The Executive Director failed to take into account the myriad of personal circumstances relevant to the suggested transfer. Relevant facts and circumstances demonstrate that the decision of non-renewal as well as the initial decision amount to an abuse of authority and can be qualified as an act of retaliation on the part of the Executive Director. For these reasons the decision appears *prima facie* unlawful.

3. The matter is of urgency because the decision will find implementation on 26 July 2009.

4. The implementation of the decision of non-renewal will result in irreparable harm. The prospects of finding a new position at the Applicant's age are grim, in particular considering that he is not a German national and he

may therefore be forced to move to the United Kingdom. UNEP and most particular CMS will suffer irreparable damage if the Applicant were to forcibly depart CMS as Executive Secretary.

6. The Respondent's principal contentions are:

1. The Applicant has not submitted evidence of a *prima facie* violation of his terms of appointment. The decision not to renew the Applicant's FTA is a valid exercise of the Respondent's discretionary authority and was not motivated by bias, discrimination, or any extraneous factors. The minutes of the meeting held 15 April 2004 merely indicate the Applicant's wish. It contains neither an express nor an implied promise on the part of the Executive Director that supports his view. The Applicant was given fair consideration for the renewal of his FTA. UNEP has indicated that reassignment as a Special Advisor on biodiversity at DEPI in Nairobi was meant to strengthen the capacity of its biodiversity activities at an important moment in its work.

2. The matter is not of urgency. The decision to reassign the Applicant is still valid and the Applicant could still assume the position in Nairobi on or before 26 July 2009. The Applicant was informed of the decision not to renew his contract on 15 June 2009 yet he waited until 15 July 2009 to file a request for suspension of action. This is a deliberate act to create urgency and an abuse of the process.

3. Irreparable harm is injury which cannot be adequately compensated in damages. In light of that definition the circumstances which the Applicant mentions as harm here do not seem irreparable. In addition, the issue of employment or the lack thereof would not have arisen had the Applicant moved to Nairobi as expected.

CONSIDERATIONS

7. Article 2.2 of the UNDT Statute, adopted by A/RES/63/253, reads as follows: “The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the Management Evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation where the decision appears *prima facie* to be unlawful in cases of particular urgency, and where its implementation would cause irreparable damage.”

8. A request for suspension of action can only be granted in cases where all criteria have been satisfied. It results from the words of the above cited provision that all three of the requirements for suspension – *prima facie* unlawfulness, urgency, irreparable damage - have to be fulfilled in a cumulative way. Otherwise the last requirement would have had to be added with an “or” instead of the word “and” which in fact is used in the Statute. Therefore every request has to be rejected if only one of the criteria is missing.

9. In the case at hand, the contested decision of non-renewal of the Applicant’s contract does not appear *prima facie* to be unlawful. For this reason the Tribunal will not decide upon the questions, whether the matter is urgent and/or whether the implementation of the contested decision would cause irreparable damages.

10. Further explanation is needed for the criteria that the contested decision “appears *prima facie* to be unlawful”. The Latin expression “*prima facie*” might be translated as “at first sight” and can have as such at least two meanings: it seems arguable that ‘at first sight’ means that the unlawfulness of the decision is that clear and far beyond every doubt that it can be discovered already at first sight. On the other hand - with accentuation of the word *first* - it implies that one can have *second* thoughts about it upon closer inspection which can lead to a different result from the first sight. It seems clear that these different approaches may lead to different results. Since the suspension of action is only an interim measure and not the final decision

of a case it may be more appropriate to assume that *prima facie* in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision. This understanding can also rely on the fact, that Art. 2.2 of the UNDT Statute only requires that the contested decision “appears” *prima facie* to be unlawful.

11. Even following this interpretation, which clearly is in favor of any request for suspension of action, the Respondent’s decision not to renew the Applicant’s FTA does not appear *prima facie* to be unlawful.

12. According to Staff Regulation 4.5 (c), a FTA does not carry any expectancy of renewal or conversion to any other type of appointment. Staff Rule 9.4 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”. Staff members who – like the Applicant – are serving under a FTA do not have a right to renewal, unless there are countervailing circumstances. According to the UN Administrative Tribunal’s jurisprudence

“countervailing circumstances may include (1) abuse of discretion in not extending the appointment, (2) an express promise by the administration that gives the staff member expectancy that his or her appointment will be extended. The Respondent’s exercise of his discretionary power in not extending a 200 series 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.” (Judgment N° 885, *Handelsman* (1998)).

13. In application of these criteria, which - although they do not bind the new Tribunal - may be used for a transitional period during the installation of the new system of Administration of Justice, no countervailing circumstances may be established.

1. The Applicant 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 Applicant 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 Applicant, which was no less than some eight years ahead at that time.

2. It can also not be stated that the decision of non-renewal was an improper exercise of discretion.

2.1 It is true that there is a direct and immediate link between the Applicant's decision not to move to Nairobi and the letter of 15 June 2009 saying that the Respondent was not in a position to extend the Applicant's appointment beyond its expiration on 26 July 2009. But this is only a description of the course of events in terms of time, not in terms of causes. There is no evidence that this decision is a veiled disciplinary sanction for the Applicant's non-compliance with respect to his transfer to Nairobi. Since it is clear - in the words of the Applicant'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 Applicant was a suitable and fair consideration for the renewal of the Applicant's FTA. Offering another position at the same level may be a way to protect the Applicant from the difficulties he may face while finding a new position at his age in the private sector.

2.2 The Applicant's objections against the transfer to Nairobi do not influence the contested decision of non-renewing the contract as Executive Secretary of CMS. The Respondent was not bound to give any justification for not extending the FTA. As stated above the Respondent did not base the decision of non-renewal on the non-compliance with the transfer to Nairobi. Even if the transfer to Nairobi would be unlawful this would not create a right to renewal of his FTA as Executive Secretary of CMS. Finally the Applicant obviously is not interested in reviewing the decision of transfer any longer: according to his request for management evaluation dated 15 July 2009 "the initial request for review has turned effectively moot and is hereby formally withdrawn."

2.3 Concerning the Applicant's claim that relevant facts and circumstances demonstrate that the decision of non-renewal amounts to an abuse of authority and can be qualified as an act of retaliation on the part of the Executive Director, the Tribunal deems that there is no evidence supporting this contention. Even if - as the Applicant sees it - he has raised certain politically sensitive issues with the German Ministry of the Environment, Nature Conservation and Nuclear Safety, and even if these issues were highly uncomfortable for this organ of the German government there is no evidence that the Executive Director of UNEP has decided not to re-assign the Applicant as Executive Secretary of CMS for these reasons. The Applicant's statements about these issues are no more than speculations and not circumstantiated by reliable facts.

CONCLUSION

For the reasons stated above

It is DECIDED that

The request lodged by the Applicant is rejected.

(Signed)

Judge Thomas Laker

Dated this 22nd day of July 2009

Entered in the Register on this 22nd day of July 2009

(Signed)

Víctor Rodríguez, Registrar, Geneva