



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NOGUEIRA

v.

SECRETARY-GENERAL

OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Yusuf Bagha

Counsel for respondent:
Elizabeth Mrema
Arnold Kreilhuber

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.

THE HEARING

1. The United Nations Dispute Tribunal in Nairobi heard the instant case on 8 and 9 September 2009. The Applicant participated in the hearing by teleconference from Dubai, United Arab Emirates. Counsel for both parties attended the hearing in person.

EMPLOYMENT HISTORY

2. The Applicant was first employed as a staff member of the United Nations on 20 November 2000 as a Principal Officer (D-1) in the Implementation and Outreach Division of the Secretariat of the Convention on Biological Diversity (SCBD/the Secretariat) in Montreal, Canada.¹ The Applicant worked at the Secretariat under the direct supervision of the Executive Secretary, Mr. Hamdallah Zedan. In January 2006, Mr. Ahmed Djoghlaif took over as Executive Secretary and supervisor to the Applicant².
3. The Applicant was reassigned to the Division of Environmental Law and Conventions (DELCO) at the Headquarters of the United Nations Environment Programme (UNEP) in Nairobi by the Executive Director of UNEP by a memo dated 16 November 2006³ and he assumed duty on 31 January 2007.
4. By a memo dated 27 November 2007, the Chief of Human Resources Management Services informed the Applicant that his fixed-term appointment will not be renewed beyond its expiry date of 31 January 2008.⁴

¹ See paragraph 7 of Applicant's Statement of Appeal.

² Annex 4 to Statement of Appeal, p.1.

³ See Annex 20 to the Statement of Appeal.

⁴ Annex 1 to the Statement of Appeal.

5. On 3 December 2007, the Applicant requested the Secretary-General of the United Nations to review UNEP's decision not to renew his contract.⁵ The Secretary-General responded by a letter dated 15 January 2008, signed by Ms. Adèle Grant.⁶ The Applicant was informed as follows:

Reference is made to your letter of 3 December 2007 requesting administrative review of the decision by the United Nations Environment Programme (UNEP) not to extend your appointment beyond 31 January 2008. Please find attached a copy of the comments of 10 January 2008 received from Achim Steiner, Executive Director, UNEP. Please consider this letter, with its attachment, the administrative review in accordance with staff rule 111.2 (a) (i).⁷

6. The Applicant was informed that he could appeal the administrative review decision to the Joint Appeals Board in Nairobi.
7. On 3 December 2007, the Applicant filed a request for suspension of action with the Nairobi Joint Appeals Board (Nairobi JAB).
8. On 16 January 2008, the Nairobi JAB recommended that the Secretary-General deny the Applicant's request for suspension of action on grounds that there was no evidence of arbitrariness or extraneous motives in the decision not to extend the Applicant's appointment and that the non-renewal would not irreparably harm the Applicant's rights under the Staff Regulations and Rules.
9. The Secretary-General overruled the recommendation of the Nairobi JAB and suspended the contested decision until 26 February 2008 to allow the Ethics Office to conclude its review of the Applicant's request for protection against

⁵ Annex 12 to the Statement of Appeal.

⁶ Annex 15 to the Statement of Appeal.

⁷ The document referred to is a memo dated 10 January 2009 from Mr. Achim Steiner to Ms. Adèle Grant marked as Annex 4 to the Statement of Appeal.

retaliation dated 7 December 2007. The decision of the Secretary-General was communicated to the Applicant in a letter dated 31 January 2008.⁸

10. The Applicant filed this appeal on 14 March 2008 with the now defunct Nairobi Joint Appeals Board. The Applicant moved the court:

- (a) To be allowed access to the report of the Investigation Panel established by UNEP under ST/AI/371 on 18 July 2007. The report has been with the Executive Director of UNEP since November 2007. Contrary to paragraph 3 of ST/AI/371, Mr. Steiner has not taken any decision on its findings. The findings of the report have a direct bearing on the issues covered by this appeal;
- (b) To allow the Applicant to review this appeal after he is allowed access to the report mentioned in (a) above;
- (c) To rule that the sequence of events starting in 2005 [sic] until the non-renewal of the Applicant's fixed-term appointment in February 2008 constitutes a single unit for the assessment of his case;
- (d) To rule that the argumentation presented by Mr. Achim Steiner in his memorandum to Ms. Adèle Grant, Chief, Administrative Law Unit/OHRM dated 10 January 2008 and by Mr. Joerg Weich, Representative of the Secretary General, UNON, in his memorandum to the Nairobi JAB dated 8 January 2008, for not renewing the Applicant's fixed-term appointment with UNEP is mostly false, and does not justify UNEP's decision;
- (e) To rule that UNEP's decision to not renew the Applicant's fixed-term appointment in November 2007 was a violation of the Applicant's right to due process; and

⁸ Annex 16 to the Statement of Appeal. See also paragraph 29 of the Statement of Appeal where the Applicant confirmed that UNEP extended his fixed-term appointment to 26 February 2008.

(f) In view of (e) above, to establish a compensation of no less than two years of salary.

11. On 1 July 2009, this appeal was transferred to the United Nations Dispute Tribunal in accordance with the provisions of section IV, paragraph 44 of United Nations General Assembly Resolution 63/253 and section 2 of ST/SGB/2009/11 on Transitional Measures Related to the Introduction of the New System of Administration of Justice.

FACTUAL ISSUES

12. The Tribunal notes that the number of pleadings exchanged by the Parties and the number of documents filed was so voluminous that it led to several repetitions in averments and documentary evidence.

13. Having considered the contents of the file, the Tribunal concludes that the crux of the instant matter is the non-renewal of the Applicant's appointment on grounds of his performance. In addition to the Applicant's performance, the Respondent also relies on the contention that a fixed term appointment does not carry any expectation of renewal.

14. As the pleadings have referred to a number of events, for the sake of clarity and a proper understanding of the issues and context, the Tribunal will consider the events in Montreal, which led to the Applicant being reassigned to Nairobi and the events in Nairobi which culminated in the contested non-renewal.

EVENTS IN MONTREAL

Allegations against the Executive Secretary of the SCBD in Montreal

15. When he was serving at the SCBD in Montreal, the Applicant made a number of allegations against its Executive Secretary, Mr. Ahmed Djoghlaif.

16. The Applicant complained of harassment and an attempt at constructive dismissal by Mr. Ahmed Djoghlaif in a memo dated 9 June 2006. The Applicant addressed his first memo to the Deputy Executive Director of UNEP, the Assistant Secretary-General in the Office of Human Resources Management (OHRM) and the Investigation Division of Office of Internal Oversight Services (OIOS) in New York. He reiterated the allegation of harassment and added allegations of abuse of power and constructive dismissal by the Executive Secretary on 14 May 2007.⁹ This latter memo was forwarded to the Secretary General. On 2 August 2007, the Applicant followed up his complaints with another memo.¹⁰

Harassment

17. The Applicant submits that he was harassed and intimidated by his former supervisor Mr. Ahmed Djoghlaif. This pattern, the Applicant states, began from the very start of Mr. Djoghlaif's tenure at the SCBD.

18. In April 2006, the Applicant was divested of his responsibilities because he refused to comply with a request of the Executive Secretary to manipulate an official document that had already been agreed to by Parties to the Convention on

⁹ See Annex 9 to the Applicant's Statement of Appeal.

¹⁰ See Annexes 7 and 10 to Applicant's Statement of Appeal.

Biological Diversity (CBD).¹¹ The Applicant claimed that when he refused to alter the report, the Executive Secretary altered the document himself. The Applicant adds that the aim of Mr. Djoghalf was clearly to create a situation whereby his contract will not be renewed.

19. The Applicant gives a number of instances of what he qualifies as “concrete cases” of intimidation and harassment¹². *Inter alia*, these are that:

- a) He was threatened both verbally and in writing with disciplinary action and summary dismissal.¹³
- b) The Performance Appraisal System (PAS) was manipulated to falsify the evaluation of his performance.
- c) There were demeaning remarks made by Mr. Djoghlaf in public and through e-mails. He added that he was the target of offensive messages, emails, and memoranda containing accusations.

20. In July 2006, the Applicant decided to cancel his annual leave but he was prevented from doing so by Mr. Djoghlaf notwithstanding the fact that Mr. Djoghlaf had told him that there needed to be a “minimum of representation of senior staff in the secretariat.”

21. In November 2006, as the Applicant was working from home, his secretary was transferred without his knowledge and without any official reasons.

22. During the hearing, Ms. Mary Soliman, who worked with both the Applicant and Mr. Djoghalf in the Secretariat of the CBD, testified for the Applicant. In response to a question on what she knew about the Applicant’s allegations of

¹¹ Final report of the Ad- hoc open-ended Working Group on the Review of Implementation of the Convention on Biological Diversity (WGRI) (Montreal, September 2005).

¹² Annex 7 to Statement of Appeal, p. 47.

¹³ Annex 7 to Statement of Appeal, p. 47.

harassment by the Executive Secretary, the witness testified on how the “certain components” of the Applicant’s responsibilities were removed from him at a staff meeting called by Mr Djoghlaflaf on his first day in office. The witness went on to testify that the atmosphere was always “confrontational, very loud voice, very abusive language, very intimidating, as well. Like it's always threatening, *"If you're not going to do this, the contract is not going to be renewed."*¹⁴

23. The Tribunal notes that Counsel for the Respondent did not cross-examine the witness or make any submissions to rebut the testimony of the witness.¹⁵

Allegations against the Applicant by the Executive Secretary of CBD

24. The Executive Secretary of the SCBD made counter-complaints against the Applicant.¹⁶

25. A summary of Mr. Djoghlaflaf’s complaints is to be found in the report of the Investigating Panel, dated 22 October 2007.

[...] Mr. Nogueira, and Ms. Soliman had been engaged in a campaign against him coordinated by Mr. Zedan for the purpose of initially preventing his appointment and when that proved unsuccessful to undermine his ability to perform his duties...[...] For the sake of economy of procedure these complaints can be summarized as follows: Mr. Zedan had coordinated together with Mr. Nogueira and Ms. Soliman a systematic, well orchestrated campaign of denigration, misrepresentation and lobbying aimed at tarnishing his credibility with staff, governments and representatives,

¹⁴ Transcripts (T.) 8 September 2009, p. 31.

¹⁵ T. 8 September 2009, p. 34.

¹⁶ Annex 5 to the Respondent’s Reply dated 17 July 2008.

and undermining his ability to perform his duties. [...] Mr. Nogueira and Ms. Soliman had tried to convince other staff members to sign a petition to the Secretary-General concerning his unsuitability for the office of the Executive Secretary and had behaved in an aggressive and confrontational manner towards him and had spread rumours about him.¹⁷

Fact-Finding Mission in Montreal.

26. In view of the complaints and counter-complaints, the Executive Director of UNEP, Mr. Achim Steiner, requested Mr. Suleiman Elmi, Chief of Human Resources and Management Services (HRMS) of the United Nations Office at Nairobi (UNON), to undertake a fact-finding mission at the Secretariat in Montreal. That assignment was undertaken from 15 to 17 August 2006 at the SCBD.

27. Mr. Elmi found that there were¹⁸

[...] a number of factors that have led to insecurity and uncertainty among some of the staff in CBD, Briefly, they include:

- The unfavourable manner in which the change of leadership took place and the negative effects of the antagonism between Mr. Djoghlaif and the former Executive Secretary.
- Rumours that Mr. Djoghlaif was planning to weed out some staff and bring cronies from Nairobi
- Reform actions by Mr. Djoghlaif such as suspension of recruitment in progress, restructuring plans and, in some areas, work redistribution and introduction of new overtime policy. The combined impact was job insecurity and anxiety among some of the staff [...].

¹⁷ Report of Investigation Panel set up by the Executive Director of UNEP, Mr. Achim Steiner, 22 October 2007.

¹⁸ See paragraph 3 of Annex 3 to Respondent's Reply dated 17 July 2008.

The above notwithstanding, the conflict in CBD is limited to Mr. Nogueira, [...]. Mr. Djoghlafl has already started to take steps to deal with the concerns of the other staff. However, reconciliation with Mr. Nogueira and Ms Soliman is not, in my view, feasible.

28. Mr. Elmi concluded that:

The continued presence of Mr. Nogueira will run the risk of more confrontations with Mr. Djoghlafl. Operationally, he does not agree with Mr. Djoghlafl's strategy – emphasis on implementation and raising the profile of the CBD. He believes that CBD work programme should be directed at servicing meetings for the Parties. Mr. Nogueira is worried about the fact that his contract will expire in November 2006 and needs reassurance that it will be extended. Meanwhile, he has agreed to de-escalate the conflict and wait for Management's decision on his grievance.¹⁹

29. Mr. Elmi made the following recommendations:

- Mr. Nogueira's relationship with CBD must be brought to a swift end. His presence will fuel the conflict and have a negative influence on the other staff.
- He must be reassigned as urgently as possible to another position outside CBD.
- While the search for a suitable post is continuing, he should either
 - (a) be given an assignment whereby he could work from home, or
 - (b) be placed on leave with full pay.²⁰

The cooperative attitude of Applicant in Montreal.

¹⁹ Annex 3 to Respondent's Reply dated 17 July 2008, p. 2.

²⁰ See paragraph 4.1 at page 2 of Annex 3 to Respondent's Reply dated 17 July 2008.

30. The Applicant avers that he cooperated with the Executive Secretary of the CBD.
31. The Applicant states that he never adopted a confrontational attitude towards Mr. Djoghlaf. He never disobeyed his instructions or refused to comply with his requests. He never attacked him; never used inappropriate language; never raised his voice and never intimidated or blackmailed him. He adds that he never showed any form of disrespect or insubordination towards the Executive Secretary.²¹
32. The Applicant claims that he assisted the Executive Secretary with initiatives and advice whenever possible up until his very last day at the office in Montreal.²²
33. The Applicant also refers to his attempts to contact Mr. Steiner in order to find a solution to the situation prevailing in Montreal. This is what he says:

It must be noted that, prior to sending my initial 9 June 2006 complaint to the UN, I tried to contact Mr. Steiner directly to arrive at a solution that would avoid further conflict. The attached emails first from me to Mr. Steiner and later involving Mr. Djoghlaf as well – I had copied Mr. Djoghlaf to ensure transparency and show my good will – constitutes evidence not only of my open and unwavering honest intentions to find a way out that would suit all parties concerned, but also of Mr. Djoghlaf's consistent efforts to spoil and derail all such efforts.²³

²¹ See paragraph 29 at page 9 of Annex 10 to Statement of Appeal being Addendum to the Applicant's Memorandum dated 9 June 2006 concerning a complaint on harassment, abuse of power and constructive dismissal against Mr. Ahmed Djoghlaf.

²² See Annex 10 to Statement of Appeal dated 14 March 2008, pp. 9-10.

²³ Annex 10 to the Statement of Appeal, p.10.

34. According to the Applicant Mr. Steiner never responded to his requests or contacted him.²⁴ Subsequently, the Applicant attempted to contact Mr. Steiner while in Nairobi and also during a flight stop-over in Ankara. He alleges that Mr. Steiner refused to have any contact with him.²⁵

35. The Applicant also tried to find a solution through the good offices of [the] Deputy Executive Director, UNEP, to no avail.²⁶

36. On his efforts to cooperate the Applicant concludes:

I remained consistently careful to avoid problems or situations that made Mr. Djoghlaflaf uncomfortable, as I was fully aware he felt uncomfortable whenever I was present. My concern to avoid conflict is expressed, for example, in the attached exchange of emails with Mr. Djoghlaflaf's special assistant.²⁷

The Investigation Panel

37. In addition to the fact finding mission undertaken by Mr. Elmi, the Executive Director of UNEP, on 18 July 2007, also referred a number of matters to an Investigation Panel, comprising two members and a secretary, pursuant to *ST/AI/371*. The Terms of Reference of the Investigation Panel were to conduct an "initial investigation and fact-finding in connection with the allegations made by Mr. [...], Ms. Mary Soliman, Mr. Arthur Nogueira and Ms. [...] against Mr. Ahmed Djoghlaflaf" and *vice-versa*.²⁸ The Panel was further instructed that their task was to

²⁴ Annex 10 to Statement of Appeal dated 14 March 2008, p. 10.

²⁵ Annex 10 to Statement of Appeal dated 14 March 2008, p. 11.

²⁶ Ibid.

²⁷ Annex 10 to Statement of Appeal, p. 11.

²⁸ See Annex 5 to Respondent's Reply of 17 July 2008.

[...] establish the facts. [You] are not required to make any determination on the legal consequences of the facts as established. [I] would appreciate a full picture of what occurred so that we may determine whether the allegations have any basis in fact.

38. The Panel was provided with the following documents:

- a) 9 June 2006: Complaint of Mr. Arthur Nogueira regarding alleged harassment and attempted constructive dismissal.
- b) 30 November 2006: Mr. Djoghlaf's account of the situation at the Secretariat of the CBD, including counter-allegations against Mr. [...], Ms. Soliman, Mr. Nogueira and Ms. [...].
- c) 14 May 2007: Memorandum from Mr. Nogueira to the Secretary-General reiterating his complaint against Mr. Djoghlaf and complaining of the attempts to resolve his issues.
- d) 18 June 2007: Memorandum from Mr. Djoghlaf to Mr. Steiner attaching a note setting out complaints against Ms. Soliman, Mr. Nogueira and Ms. [...].²⁹

Report of the Investigation Panel (IPR/the Report)

39. The Investigation Panel issued its report on 22 October 2009 and found, *inter alia* that:³⁰

[...] the allegation by Mr. Djoghlaf that Mr. Nogueira and Ms. Soliman, together with Mr. Zedan, were engaged in a coordinated campaign against him both prior to and following his appointment is not sustainable.

The allegation that Mr. Nogueira and Ms. Soliman had actively engaged in an attempt to convince staff members to sign a petition against him and had behaved

²⁹ Annex 1 to Annex 5 to Respondent's Reply dated 17 July 2008.

³⁰ Report of the Investigation Panel dated 22 October 2007, p. 34.

in an aggressive and rude behaviour as well as spreading rumours about him lacks merit.

The conclusion reached by the Panel is that ample evidence is available to substantiate the accusations of – inter alia – harassment, abuse of authority, unfair treatment and violation of privacy by Mr. Djoghla. However, some accusations against him have not been corroborated. On the other hand, the allegations by Mr. Djoghla against the UN staff members had to be dismissed for lack of evidence.

Access to the Report of the Investigation Panel

40. The report was communicated to the Executive Director of UNEP.

41. On 2 September 2009, the Applicant filed an application with the Tribunal moving the court to order disclosure of the final report. The Respondent objected to the application and contended that the report in question holds no relevance in determining the case before the Dispute Tribunal. The Tribunal granted the Applicant's motion for disclosure on 7 September 2009, which disclosure was then made on the first day of the hearing.

The Relevance of the Investigating Panel Report Dated 22 October 2007 (IPR)

42. Counsel for the Respondent argued that the IPR was irrelevant and therefore inadmissible as there was no connection between events that occurred in Montreal and the non-renewal of the Applicant's appointment in Nairobi.³¹ The Respondent further averred that:

³¹ Paragraph 6 of Respondent's Reply dated 17 July 2008.

[t]he issue in this appeal is whether the decision to not renew the Applicant's fixed-term appointment was motivated by prejudice, bias, or other extraneous factors. A distinction must be made from the onset between the facts relating to the preliminary fact-finding exercise established by UNEP pursuant to ST/AI/371 Revised Disciplinary Measures and Procedures into issues of alleged misconduct by the Executive Secretary of the Secretariat of the Convention on Biological Diversity (SCBD) and others (the Applicant included) and the facts in relation to the non-renewal of the Applicant's fixed-term appointment [...] contrary to the Applicant's claim, the decision not to renew the Applicant's contract was a valid exercise of the Executive Director's discretionary power. It is in no way linked to the events that led to the establishment of a fact finding exercise pursuant to ST/AI/371 Revised Disciplinary Measures and Procedures into issues of alleged misconduct by the Executive Secretary of the Secretariat of the Convention of Biological Diversity (SCBD) and others (the Applicant included).³²

43. Having made extensive submissions as to the irrelevance of the IPR, the Respondent went on to cite it to show that it was the Applicant who requested his reassignment to Nairobi. Reference is made to the same report by Counsel during the course of oral submissions to show that the allegation of constructive dismissal against Mr. Djoghlaif was unfounded, and that the Applicant consented to being transferred to Nairobi.³³

44. The Applicant, on the other hand, contended that there was a connection between the events that happened in Montreal and the non-renewal of his fixed-term appointment in Nairobi.³⁴

45. The parameters of what is admissible before this court is provided for in Article 18 of the UNDT Rules of Procedure. In relevant part, the Article states that the Tribunal

³² Paragraph 6 of Respondent's Reply dated 17 July 2008.

³³ T. 9 September 2009, pp. 9, 17.

³⁴ See paragraphs 20, 21, 39, 40, 41, 42 and 43 of the Statement of Appeal of Applicant.

- (1) shall determine the admissibility of *any* evidence; and
- (5) [...] may exclude evidence which it considers irrelevant, frivolous or lacking in probative value. [Emphasis added]

46. The Tribunal dismissed the Respondent's arguments as to the relevance of the Report when it ordered that the Report be disclosed. It must be noted here that although both Parties referred to the Report in some detail, the Applicant never sought to have it admitted for the truth of its contents as such.

47. For the purposes of the present case, the Tribunal takes the view that the Report is relevant only to the extent that it sheds light on the live issues in respect of the non extension of the appointment of the Applicant.

Reassignment of the Applicant to Nairobi

48. According to Mr. Elmi, the Applicant *consented* to his reassignment to Nairobi.³⁵ For its part, the Respondent maintains that the Applicant *requested* the reassignment and the Executive Director of UNEP approved it.

49. The approval of the reassignment was first communicated to the Applicant on 28 August 2006³⁶ by [the] Chief of Office of the Executive Director of UNEP. [...] wrote:

I am pleased to inform you that the Executive Director has accepted your request for reassignment within UNEP and is actively looking for a suitable position for you before the end of November. I will inform you on the offer as soon as possible.

³⁵ See Annex 3 to Respondent's Reply dated 17 July 2008 (Report of Mr. Suleiman Elmi entitled "My Visit to CBD").

³⁶ Annex 08 to the Statement of Appeal and it is also attached as Annex 4 to the Respondent's Reply dated 17 July 2008.

Pending your reassignment, the ED would expect you to undertake an assignment, working from home, to prepare a long term strategy in the Latin America and the Caribbean region, and an action plan for its implementation with timeframe and benchmarks, to implement the biodiversity target agreed at the WSSD.

50. By a memorandum dated 17 November 2006³⁷ the Applicant was offered a one year extension of his contract on his reassignment to Nairobi together with his job description. It should be noted, as mentioned above, that his contract was extended to 26 February 2008.

51. In response to his reassignment, on 21 November 2006, the Applicant requested Mr. [...] to convey his appreciation for the proposal to extend him for another year on his reassignment to Nairobi. The Applicant wrote:³⁸

I also wish to thank you for putting on record my concerns expressed during our 16 November telephone conversation. Although I did not express reservations about the duration of the suggested contract at that point, I was indeed worried about the precarious nature of the scenario you proposed on the phone.

Motive for Reassignment to Nairobi

52. According to the Applicant his reassignment to Nairobi was a result of the evaluation of the situation in Montreal by Mr. Elmi. “The reassignment was the first step towards UNEP’s ultimate goal to have him dismissed, while simultaneously protecting the Organisation against any future allegation of unfair treatment.”³⁹

³⁷ Annex 20 to Statement of Appeal (Memo dated 17 November 2006 by [...], Chief of Office, Executive Director, UNEP to Applicant).

³⁸ See Annex 8 to UNEP Surrejoinder (dated 17 September 2008) to Remarks made by Applicant dated 17 September 2008.

³⁹ Statement of Appeal, 14 March 2008, p. 4.

53. The Applicant contends that the Respondent acted in bad faith in dealing with the events in the SCBD which led to his reassignment to Nairobi. Given that the outcome of the investigations faulted his former supervisor, and absolved the Applicant, the decision to reassign him to Nairobi cannot have been properly made.⁴⁰

54. On the issue of whether he consented to being reassigned to Nairobi, the Applicant argues:⁴¹

On 28 August 2006, I received a memorandum from Mr. Amedeo Buonajuti, Chief, Office of the Executive Director, UNEP, announcing that the Executive Director had accepted “[my] request for reassignment with UNEP and is actively looking for a suitable position for you before the end of November.” This was encouraging news, although I have no record or recollection of having made an official request to be assigned within UNEP.

In the same breath, Mr. [...] informed me that, “pending your reassignment, the ED would expect you to undertake an assignment working from home to prepare a long term strategy in the Latin America and the Caribbean region, and an action plan for its implementation with timeframe and benchmarks, to implement the biodiversity target agreed at WSSD,” which I later entitled SAPLAC. I informed the SCBD administration appropriately of the above and removed myself from the Secretariat for two months. The SAPLAC was concluded and sent to Mr. Achim Steiner on 26 October 2006, never to be heard of again. The working from-home period elapsed without incidents.

Mr. [...] memorandum on behalf of Mr. Steiner begs the question: can an insubordinate, guilty staff member be rewarded with a contract and avoid [sic] being disciplined. The fact that no disciplinary action was brought against me vindicates my position.

⁴⁰ T. 8 September 2009, pp. 12 – 14.

⁴¹ See paragraphs 44, 45, 46, 49, 53, 54 of Annex 10 to Applicant's Statement of Appeal.

[...]I accepted the offer and agreed to be reassigned to Nairobi, but under tough conditions none to my liking. Lack of another option was the final and decisive argument that led me to accept Mr. Steiner's initiative. It should also be noted that all this happened while my complaint had been totally ignored and therefore I had no expectation of Justice or redress: It clearly was a take-it-or-leave-it situation;

The only bright aspect of this reassignment was Mr. [...]’s promise, on behalf of Mr. Achim Steiner, that I was being offered “the opportunity to advance [my] career in a position commensurate with [my] qualifications and experience in UNEP.”

[...]I simply had no other choice, the basis for my acceptance to come to Nairobi and relinquish, without any official reason, my fully regularized position with the SCBD, was that Mr. Steiner offered me an “opportunity to advance [my] career in a position commensurate with [my] qualifications and experience in UNEP. Subsequent denials of this promise is one of the major reasons that led me to write to the Secretary-General of the United Nations on 14 May 2007.

55. In response to the Respondent's contention that the reassignment of the Applicant to Nairobi was an effort by the Respondent to remedy the situation in Montreal, the Applicant avers:

[...]While reassigning staff may, under certain circumstances, palliate conflict situations, this practice is not necessarily a final and complete solution for problems related to human resources. At least two caveats apply: (i) the reassignment must be bona fide and well intentioned, and the reassigned staff must be placed in an environment where s/he can resume her/his professional career and private life under normal conditions; (ii) if the situation involves formal and fully substantiated complaints these must be addressed, possibly through a formal investigation. The first caveat was not complied with in the Applicant's case; the second only occurred

after New York put pressure on the Respondent to act. In short, the reassignment of the Applicant to Nairobi was not an adequate solution to the events that occurred in Montreal, but an attempt to avoid investigating alleged mismanagement of the SCBD by Mr. Ahmed Djoghla⁴².

56. In respect of the motive for reassignment of the Applicant to Nairobi, the Respondent avers:

In response to complaints made by the Applicant and others of alleged misconduct by the Executive Secretary of the SCBD and complaints made by the Executive Secretary of the SCBD of alleged misconduct by the Applicant and others, the Chief of the Human Resources and Management section of the United Nations Office at Nairobi (HRMS/UNON), Mr. Suleiman Elmi, was sent to Montreal by the Executive Director in August 2006 in order to assess the alleged situation and made recommendations on how to enable a more positive working environment at the Secretariat.⁴³

Subsequently, Mr. Elmi recommended to the management of UNEP, among others, the immediate transfer of the Applicant to work from home on specific tasks. This recommendation was pursued with the Applicant and the Executive Director made a good faith effort to accommodate the Applicant in UNEP Nairobi.⁴⁴

⁴² See paragraph 7(a) of Applicant's Final Remarks to the UNEP's Surrejoinder dated 17 September 2008.

⁴³ See paragraph 13 of the Respondent's Reply dated 17 July 2008.

⁴⁴ Paragraph 13 of Respondent's Reply dated 17 July 2008.

EVENTS IN NAIROBI

WORK PLAN OF THE APPLICANT

57. The Applicant was reassigned to Nairobi to handle the Montevideo Programme on Environmental Law in DELC. A Memorandum was issued by Mr. [...] (Chief, Office of Executive Director) on behalf of the Executive Director on 16 November 2006 to this effect and an offer was also made to extend the fixed-term appointment of the Applicant by one year.

58. The specific tasks that had to be undertaken as indicated in the job description attached for the Montevideo Programme were to:⁴⁵

1. Collate, compile and prepare for publication a compendium of all activities with performance and verifiable indicators which UNEP has undertaken in the execution and implementation of the Montevideo Programme III;
2. Critically review, evaluate and assess impacts and results created as a result of all the activities undertaken under the Programme;
3. On the basis of the critical review to be undertaken at item 2 above, identify lessons learned as well as challenges faced in the implementation of the Programme;
4. Identify activities under Montevideo Programme III which have not yet been implemented and reasons, if any, for their non-implementation;
5. Assess the on-going and future trends in the development and implementation of environmental law and identify priority areas and/or themes which could be proposed to Governments for their consideration for implementation under Montevideo Programme IV.
6. Organize at an appropriate time, intergovernmental expert meeting(s) to review the work done under the Montevideo Programme III and assist UNEP

⁴⁵ Annex 20, Statement of Appeal – Memorandum from Mr [...] to the Applicant, 16 November 2006.

in the preparation of the Montevideo Programme IV for consideration and endorsement by Governments.

7. Develop appropriate proposal(s) for fund raising for the necessary activities on the process of the review and development of the Montevideo Programme IV.
8. Undertake any other related duties and tasks to be requested by the Director or senior management.

59. With the restructuring of DELC, however, this assignment appears to have substantively changed from that of the Montevideo Programme to one of Governance.

60. The Respondent alleges that the Applicant failed to perform and produce results once assigned to Nairobi. The averments relate to the failure of the Applicant to finalise his work plan and/or his Terms of Reference (TOR) and his failure to perform. The Respondent submits that the Applicant failed to:⁴⁶

i) participate in the divisional process for the elaboration of divisional TOR and subsequently, staff work plans and consequently, the Applicant's own TOR and workplan.

ii) take the lead and guide DELC units in the development of the governance component of their TOR for the units which would have inevitably led to the Applicant's own TOR and workplan.

iii) develop a detailed work plan on the building blocks for the TOR provided by his supervisor to submit his e-PAS according to the applicable rules and regulations.

⁴⁶ See paragraphs 50 and 51 of the Respondent's Reply dated 17 July 2008.

61. The Respondent further avers that

[for] the entire period the Applicant worked at UNEP Headquarters in Nairobi, he failed to submit his work plan in accordance with the rules and guidelines for the e-PAS system. The extensive back and forth communication, both orally and in writing, between the Applicant and his supervisor to enable the Applicant to come to terms with his duties and the results expected from him proved fruitless in the end.⁴⁷

62. In view of this failure, the Director of DELC had to personally assist the Applicant in the writing of his TOR to enable him to draft his work plan and PAS. Those elements or building blocks had already been mentioned in various meetings, including at a retreat where staff actively discussed their TOR and work plans and the way forward for the Division in a new strategic direction. Despite this, the Applicant was unable to expand on those building blocks with concrete actions and indicators for success and he expected the Director of DELC to let him know “what actions he would have undertaken to implement the TOR.”⁴⁸

63. The Respondent submits that as a senior advisor to the Director as well as to the five units of the Division on matters of governance, the Applicant was expected to effectively own his work agenda and develop it by himself with a view to implementation, in line with agreed building blocks, as did all other staff in the Division.

64. An email was sent to staff by Mr. Kante on 17 May 2007 informing them that the status of TORs for each unit and senior adviser will be discussed.⁴⁹ Mr. Kante

⁴⁷ See Paragraph 12 at page 3 of the Respondent’s Reply dated 17 July 2008, and Paragraph 34 of Respondent’s Reply dated 17 July 2008. The Respondent relied on Annex 13 to the Respondent’s Reply.

⁴⁸ Paragraph 34 of Respondent’s Reply dated 17 July 2008. The Respondent relied on Annex 14 of the Respondent’s Reply (being email exchanges between the Applicant and his supervisor).

⁴⁹ Annex 21 to Statement of Appeal, p. 46.

wanted to see the Applicant to discuss his duties as Chief Governance officer.⁵⁰
Mr. Kante wrote:⁵¹

Dear Arthur,

I would like sometime tomorrow to discuss with you the following duties that you will be expected to carry-out as the Chief, Governance Advisor:

Under the overall guidance of the Director of DELC, the Chief Governance Adviser will undertake the following tasks:

- Analyze partnerships UNEP wide and between UNEP and other international institutions, and develop a strategy on how to further improve cooperation
- Act as focal point for interaction between DELC on MEA issues and UNEPs [sic] various Divisions. Specific tasks include:
 - o Based on inputs of the various DELC units, summarize, MEA COP Decisions for UNEP action and work with the Divisions to ensure their timely action
 - o Work with the UNEP Divisions to summarize activities in response to MEA COP Decisions and provide these as input to DELCs [sic] units for the development of UNEP reports to MEA COPs/MOPs
 - o Work with the various UNEP Divisions to ensure that UNEP products and issues of comparative advantage are highlighted within MEA processes, for example, leverage DEWA's scientific results or DEPI's work on ecosystem services for MEA processes. Ensure that these inputs are passed on to DELC various Units for action.
 - o Prepare analysis of requests from MEA processes for UNEP action, responses by UNEP Divisions and then develop a strategy to improve UNEP's performance in this regard for the Directors action
 - o Take on additional activities based on the decision of the Director on this issue

⁵⁰ Annex 21 to Statement of Appeal, p. 47.

⁵¹ Annex 21 to Statement of Appeal dated 14 March 2008, p. 47.

- Serve as the Divisions focal point for the preparation and submission of reports to the UNEP Governing Council, including the quarterly reports on the implementation of past GC decisions.

With best regards,
Bakary

65. In response to the duties proposed by Mr Kante, the Applicant submitted by email of 17 May 2007 the job descriptions for the Chief, Governance Advisor and an intern that read as follows:⁵²

Dear Bakary,

For the purpose of the next Heads of Units meeting (tomorrow, Friday), please find attached hereto a revised version of my TORs that reflects the results of the DELC retreat and my discussions with the Heads of Units last May 9. I believe it would be useful to circulate it to DELC's colleagues for their information, particularly considering the close relation between my mandate and those of DELC's five units and the ensuing need for sustained cooperation between all of us. I leave it, however, to your decision whether we should discuss it between the two of us before I circulate it to the Heads of Units.

I also attach hereto the TORs for an intern I would like to engage to assist me with my mandate.

Best regards,
Arthur

Attachment 1 to email of 17 May 2007-

“Chief, Governance Adviser

⁵² Annex 21 to Statement of Appeal, p. 45.

Under the overall guidance of the Director of DELC and with the support of the Inter-Linkages and Synergies Unit, the Chief Governance Adviser will undertake the following tasks:

1. Analyze partnerships UNEP-wide and between UNEP and other international institutions, and develop a strategy on how to further improve cooperation.

2. Act as focal point for interaction on MEA issues between DELC and UNEP's various Divisions. Specific tasks include:

2.1. Based on inputs of the various DELC units, analyze MEA COP decisions for UNEP action and work with the Divisions to ensure their timely action. In particular, prepare a document with all un-responded requests from MEAs' COPs, on one side; analyze the Divisions' mandates, on the other, and try to establish natural links between these two sets;

2.2. Work with the UNEP Divisions to summarize activities in response to MEA COP Decisions and provide these as input to DELCs [sic] units for the development of UNEP reports to MEA COPs/MOPs

2.3. Based on the indentified requests from MEA processes for UNEP action and on the responses by UNEP's Divisions, conceive and propose a coordination routine/strategy within UNEP to ensure that inputs by UNEP into MEAs decision-making processes are relevant and on time, and that inputs from MEAs COPs can feed into UNEP's processes in a similarly effective manner, in particular into the Governing Council time schedule;

2.4. Work with the various UNEP Divisions to ensure that UNEP products and issues of comparative advantage are highlighted within MEA processes. Ensure that these inputs are passed on to DELC various units for action;

2.5. Take on additional activities based on the decision of the Director on the issue.

3. Serve as the Divisions focal point for the preparation and submission of reports to the UNEP Governing Council, including the quarterly reports on the implementation of past GC decisions.”

Attachment 2 to email of 17 May 2007-

“TORs FOR AN INTERN TO ASSIST THE CHIEF GOVERNANCE ADVISOR

Under the overall guidance of the Chief Governance Advisor of DELC, the Intern will undertake the following tasks and activities:

- h) Assist the Chief Governance Advisor in performing research on issues from academic, UN, MEAs and other sources to provide a theoretical base for his work;
- i) Provide assistance in summarizing and systematizing requests for UNEP action and inputs from Divisions into MEA processes, and support the analysis of such requests and inputs;
- j) Provide inputs and suggestions on ways to highlight UNEP products and participation in specific MEA processes and ongoing negotiations (for example, the in-depth review of the Work Program on Forest Biodiversity, at the CBD, or the discussions on Reducing Emissions by Deforestation in Developing Countries, at the UNFCCC);
- k) Support the compilation and analysis of research documents and other process documents, and perform complementary research, as needed;
- l) Assist the Chief Governance Advisor in the preparation of reports to the UNEP Governing Council, including the quarterly reports on the implementation of past GC decisions, and in the preparation of any other document related to the mandate of the Chief Governance Advisor;
- m) Perform additional activities as requested by the Chief Governance Advisor in relation to this issue.

66. Mr Kante responded to the Applicant on 24 May 2007 and expressed his appreciation for the efforts of the Applicant to revise the TOR. He stated as follows:⁵³

Dear Arthur,

I appreciate your efforts to revise and modify the terms of reference for the Governance Advisor in DELC. It is of utmost importance, however, that they reflect accurately the guidance received from UNEP's Executive Office and the Strategic Implementation Team. Therefore, I would like to take the original ToR communicated to you prior to our retreat and discuss how we can effectively draw up a roadmap for their implementation, while considering some of the new elements you have mentioned. The ToR for the senior advisors in the Director's office are different from those for the units in that the units have to deliver on a programmatic basis, whereas the advisors will have to deliver more on a conceptual/advisory basis. You and I will have to see how that can be clearly captured in your ToR.

Hence if you agree, I would like to meet with you tomorrow after the Heads of Unit Meeting to discuss this and make sure that my understanding of your role in DELC is clear to both of us. The position of Chief Governance Advisor in the Director's office is central to making sure the Division can deliver its ambitious programme and I am always available to you for guidance and discussion regarding your mandate.

Arthur, in addition to the ToR, we also need to give some serious thought to drawing up your e-pas as a next step. This will also help us to fill this position of Chief Governance Advisor with concrete outputs. I would like to encourage you to already think about deliverables and targets which can include in this regard.

I am looking forward to meeting with you tomorrow.

With best regards.

Bakary

⁵³ Annex 21 to Statement of Appeal, p. 43.

67. The Applicant replied by an email dated 29 May 2007 as follows:⁵⁴

Dear Bakary,

I am glad my suggestions for the “TORs” (faute d’un nom plus approprié), contained in my 17 May e-mail, were found to be agreeable to you in their entirety. As requested, I will now prepare a programme of work that will serve as the basis for the PAS. Your remarks on the role of the Chief Governance Advisor (CGA) will serve as guidelines: the CGA must show ability to help the Organisation to have programmes, to advise, suggest and provide guidance to the Director on issues which can be implemented by DELC and other UNEP Divisions and that can be taken to the ED as suggestions for action.

Best regards.

Arthur

68. In an email dated 29 May 2007, Mr. Arnold Kreilhuber refers to the mutual agreement reached on the revised TOR for the position of Chief Governance Officer and to the acceptance by the Applicant to “conceive benchmarks and deliverables under the TOR. He added that these benchmarks and deliverables would provide the basis for the PAS of the Applicant.”⁵⁵

69. By email dated 19 June 2007, the Applicant sent Mr. Kante details of a Plan of Work (PoW) for the position of Chief Governance Advisor July 2007-January 2008 and wrote the following⁵⁶:

Dear Bakary,

As requested, please find attached a first draft programme of work on the issue of governance, developed within the parameters approved by you last 29 May. To assist your assessment of this first draft, I kindly note that:

⁵⁴ Annex 21 to Statement of Appeal, p. 43.

⁵⁵ Annex 21 to Statement of Appeal, p. 42.

⁵⁶ Annex 21 to Statement of Appeal, p. 39.

- a) My understanding of the 29 May parameters places the proposed PoW between the activities implemented by DELC's units (the executive level) and the policy level developed at the OED;
- b) In view of the above, and considering the 29 May parameters, the bulk of my activities will deal with UNEP's divisions and Governing Bodies, through the Secretariat of the Governing Bodies (Beverly Miller), with the assistance of the DELC's units (Inter-Linkages and Synergies in particular) and under your guidance;
- c) The role of the Chief Governance Advisor is essentially one of advising the Director;
- d) The PoW has a time horizon of 7 months (until 31 January 2008);
- e) This position within DELC was established on ad hoc basis and its contents were created sometime during the month of April. I am not, therefore, adjusting myself to preexisting conditions, to an ongoing programme or an established structure, but I am actually creating my own job for the next 7 months;
- f) I will need a personal assistant and at least an intern to deliver the mandate.

These considerations were very present in my mind when drafting the attached draft PoW. I kindly invite you to comment on it and amend it as necessary, and I look forward to an opportunity to discuss it with you.

Best regards

Arthur

70. Mr. Kante replied by email on 20 June 2007⁵⁷ and thanked the Applicant for the PoW and added that he had forwarded the PoW to management for comment in

⁵⁷ See Annex 21 to the Statement of Appeal, p.38.

order to avoid any misinterpretation/misunderstanding at this juncture to elaborate the PAS.

71. In response to the above email, on 25 June 2007, Mr. Elmi wrote stating that he had reviewed the draft submitted by the Applicant.⁵⁸ In HRMS view, it needed further strengthening to justify a D-1 level grade, the current activities are junior levels. Mr Elmi however did not explain how the draft did not meet the requirements of D-1 level; nor did he give any specifics or guidelines how the draft could be upgraded to a D-1 level position.

72. This observation of Mr. Elmi was forwarded to the Applicant on 26 June 2007 and on the same day the Applicant sent the following response to Mr. Kante:

I cannot but agree with Suleiman on this issue. The original TORS impose a tight constraint on my programme of work and allow no room for more than what I wrote. I therefore propose we revise them entirely.⁵⁹

73. A meeting took place between the Applicant and Mr. Kante, following which Mr. Kante suggested the following to the Applicant by email dated 27 June 2007⁶⁰ sent on behalf of Mr. Kante by [...]:

Following our meeting of yesterday evening, please find attached building blocks that form the structure that will further be developed to form your JD (Job Description). If you agree I will further develop a detailed JD which I will also share with you before sending it to management.⁶¹

⁵⁸ See Annex 21 to Statement of Appeal, p. 37.

⁵⁹ Annex 21 to Statement of Appeal, p. 36.

⁶⁰ See Annex 21 to Statement of Appeal, pp. 35 - 36

⁶¹ Annex 21 to Statement of Appeal, p. 35.

74. The building blocks proposed were:⁶²

- Explore means, modalities and propose mechanism for better and coordinated working relations between UNEP and MEAs Secretariats as well as UNEP and its governing body.
- Provide advise, policy options, briefs and reports on how best can the UNEP GC interact with MEAs governing bodies as well as MEA secretariats
- Develop better understanding, advice and oversee good governance at both national and international level.
- Develop strategic framework for national governance and institutional arrangements for environmental legislation and national implementation of MEAs.
- Advise the ED on programmatic aspects of governance issues as well as UNEP-MEAs support.
- Explore and identify modalities and mechanisms for better working relations with WTO on trade issues related to environmental management and advise the UNEP management on the same.
- Develop a strategic action plan for UNEP on the nexus between trade and environmental management, with particular emphasis on MEAs.

75. On the same day the Applicant responds to Mr Bakary and states that *the new proposal represents a significant step forward as compared to the previous one*. While he found the issues to be interesting, he wondered:

what sort of concrete products can be attached to this general framework and secondly whether these guidelines would meet

⁶² See Annex 14 to Respondent's Reply dated 17 July 2008 - Email from Mr. Kante to the Applicant on the points for TOR.

HRMS' (Human Resources Management Service) requisites for a D1 position.⁶³

76. While conceding that the new TOR was “... *of a much more interesting and dense nature*”⁶⁴ the Applicant still considered these TOR “*to be undeliverable*”⁶⁵. He explained the reasons for his view in an email to Mr Steiner on 11 July 2007⁶⁶:

On 27 June, that is a full five months after my arrival at UNEP, Bakary (Mr. Kante) proposed my third TORs which I initially considered to be a good improvement on the second as I indicated to him. Nevertheless, after much document reading, consultations with colleagues inside UNEP and outside within the UN family and weighing all aspects of the new mandate I realize that it is no better than the second draft TORs and will not allow me the opportunity to undertake any significant work for the benefit of the Organisation. In fact, at my level and under the current working conditions, those TORs will not allow me to focus on the implementation of concrete activities “activities for junior levels” or participate at the policy formulation level; which is located in your office. In addition, the TOR elements contained in this third proposal are already dealt with by other divisions (e.g. DTIE) or bodies (e.g. EMG). You will agree that an academic study on governance is not an option either.

77. The Applicant also avers that one of his colleagues “*characterized [his] TORs as “weird” and another was displeased to find they overlapped with her own mandate.*”⁶⁷

⁶³ Email by Applicant to Mr. Kante dated 27 June 2007 in Annex 14 to Respondent’s Reply dated 17 July 2008.

⁶⁴ Page 23 of Annex 21 to Statement of Appeal.

⁶⁵ Ibid.

⁶⁶ Page 26 of Annex 21 to Statement of Appeal.

⁶⁷ Annex 21 to Statement of Appeal, p. 23.

78. Notwithstanding his strong reservations the Applicant states that he “...*still made efforts to develop a programme of work based on the TORs including activities related to MEAs.*”⁶⁸ To support this, the Applicant referred to a document sent by email on 3 July 2007 to Mr. Kante entitled Elements for a Programme of Work/PAS Chief Governance Officer-DEL⁶⁹. He explained that what he was proposing in the document was one possible way of developing the elements contained therein into a full blown programme of work and from there into his PAS.

79. In an email dated 29 June 2007⁷⁰ sent by Mr. Kante to the Applicant, the former expressed his satisfaction that the Applicant agreed with the building blocks proposed by him. Mr Kante also agreed with the idea of the Applicant “*to merge some bullets*” as suggested by the Applicant. Mr. Kante added:

You may also re-write up other clearly understood building blocks by developing further the points you have already agreed upon into TOR with benchmarks and indicators as well as relevant actions for execution⁷¹.

80. It is significant to note that in an email dated 26 June 2007,⁷² Ms. Elizabeth Maruma Mrema, Senior Legal Officer, Biodiversity and Land Law Governance Unit sent the building blocks to Mr. Kante and these were sent to the Applicant without any change. Ms Mrema expressed her surprise at the fact that the Applicant had still not managed to develop his TOR. This is what she wrote to Mr. Kante⁷³:

⁶⁸ Annex 21 to Statement of Appeal dated 14 March 2008, p.23.

⁶⁹ Annex 21 to Statement of Appeal, p. 20.

⁷⁰ Annex 21 to Statement of Appeal, p. 34.

⁷¹ Paragraph 2 of email by Bakary Kante dated 29 June 2007 in Annex 14 to the Respondent’s Reply dated 17 July 2008.

⁷² Annex 13 to Respondent’s Reply dated 17 July 2008.

⁷³ Ibid.

Dear Bakary,

I have tried to jot down few issues for consideration for the Adviser to focus on for your review and consideration. I wish he could have been able to at least summarize some of the many inputs he received from colleagues in a meeting he had convened specifically to assist him with ideas on his TOR. Unfortunately, I missed it but I have talked to Barbara and Masa who attended it and they are really surprised that he has not developed his appropriate TOR to date [sic] after spending their over one and a half hours of their time.

81. Equally of interest is the email dated 28 June 2007 sent to Mr. Kante by Ms Mrema where she wrote, *inter alia*:⁷⁴

You have provided guidance in terms of building blocks for him (the Applicant) to consider and if agreed, which he has, to develop them further, just as you did for all our Units where you gave us general framework and we used them to elaborate on our Units TOR and now developing them further into measurable actions. It is very unfair and, I think, wrong to ask the Director to also develop for him (the Applicant) all the details required on the concepts given which should be expanded by him. I (sic) will be difficult, in fact for him to execute the TOR if he would not own them the process leaving alone that it is not as Director your responsibility.

82. The email sent by the Applicant to Mr. Kante in which he explored the possibility of going to HRMS was brought to the attention of Ms. Mrema and she reacted as follows in the same email dated 28 June 2007.⁷⁵

I do not understand why HRMS is brought into this process of developing TOR. These TOR came because the TOR he had developed before were not building blocks to be done by an Advisor at his (Applicant's) level. If at all, I am sure, you were to take them to HRMS and used them to determine his

⁷⁴ See email by Ms Elizabeth Mrema to Mr. Kante dated 28 June 2007 in Annex 14 to Respondent's Reply dated 17 July 2008.

⁷⁵ Paragraph 2 of email By Elizabeth Mrema dated 28 June 2007 in Annex 14 to Respondent's Reply dated 17 July 2008.

level, he would have been totally embarrassed unless it is suggested here that the previous draft were shared by HRMS and had agreed with them for which I will really be surprised.

83. Thereafter a meeting took place on 11 July 2007 between the Applicant and Mr. Kante as is evidenced by a correspondence the Applicant sent to Mr. Achim Steiner on 11 July 2007⁷⁶ copying Mr. Kante. In that email, the Applicant referred to the fact that he was not to work on the Montevideo programme and recorded his strong reservations on the TOR proposed by Mr. Kante. These have been mentioned above.

84. On 12 July 2007⁷⁷ Mr Kante responded conceding that a change to the TORs had to be effected as the Applicant was assigned to DELC at a time when the Division was in the process of restructuring. He also states that the Applicant never objected to being Chief Governance Advisor. He added however that the Applicant had stated that issues of governance would not fall within the scope of his professional expertise and background because “...*his rank, experience, skills and his natural profile were those of a manager and administrator.*” For these reasons the Applicant would not be able to deliver on his mandate.⁷⁸

85. Mr. Kante went on to say that during the restructuring of the DELC he “*adopted a uniform process for the development of TORs for all his heads of units and senior advisers with a view to achieving clear, result oriented management objectives and deliverables true to our new mandate in the fields of law, negotiations and governance*”⁷⁹. The heads of units and senior advisers developed the TORs based on guidance given by him in bilateral meetings including the Applicant. Discussions had taken place at the DELC retreat and the TORS were revised in

⁷⁶ Annex 21 to Statement of Appeal, p. 26.

⁷⁷ Annex 21 to Statement of Appeal, p. 24.

⁷⁸ Ibid.

⁷⁹ Ibid.

several Divisional Management Meetings as well as during a one day seminar held at the end of May 2007⁸⁰.

86. According to Mr. Kante, as at 12 July 2007 all TORs had been finalised except that of the Applicant:

Arthur had not managed to complete a substantive outline of objectives (let alone a draft of possible deliverables and targets) before the Retreat, during the Retreat, the Staff Seminar, one of the Divisional management Meetings or any other time. In order to facilitate a solution, the building blocks on the possible TORs and workplan provided to Arthur in April or later were always just that, building blocks. His own input was scattered at best and, as he confirms, HRMS found it too “junior” for a D-1.⁸¹

87. Mr. Kante emphasised that he went out of his way to support the Applicant to develop concrete objectives for his position. He facilitated meetings within the DELC and outside to help the Applicant find a niche. He even “*afforded the Applicant the opportunity to present his ideas in a dedicated evening session during the DELC Retreat in order to gather feedback from colleagues and my other senior adviser including Mr. [...]. All this proved fruitless.*”⁸²

88. Mr. Kante concluded by saying it was his conviction that “*Mr. Noguiera should own the process and I should not be compelled to do the work for him. As a D-1, Mr. Noguiera should have the desire to and be capable of offering meaningful propositions to filling his post with clear objectives and deliverables.*”⁸³ Mr.

⁸⁰ Annex 21 to Statement of Appeal, p. 24.

⁸¹ Annex 21 to Statement of Appeal, pp. 24 – 25.

⁸² Annex 21 to Statement of Appeal, p. 25.

⁸³ Ibid.

Kante wondered whether his “*continuing commitment to finding a solution will achieve anything.*”⁸⁴

89. The Applicant again wrote to Mr. Steiner on 16 July 2007.⁸⁵ In that email he stated that he wanted to share with the Executive Director “*some brief and broad considerations on the position of Chief Governance Advisor.*” He expressed the belief that “*the obligation and accountability for providing guidance to the staff reside with the office of the Director of the Division, who delegates authority to the heads of the units and special advisors.*” He was also of the view that “*it is the Administration’s duty and Bakary’s (Mr. Kante) in particular as Head of the Division, to be able to finalise the TORs of the staff within DELC as these instances are the ones supposed to know the niche and the needs of the Organisation and hence are better placed to provide clear understanding, vision and guidance on what is to be expected at the level of the programme delivery.*” He also stated that the “*CGA’s TORs are a novelty that I may reasonably presume resulted from consultations between the DELC Director and the Executive Director.*” He emphasised that unless his director provided him with a clear guidance it would be difficult for him to guess what was required to be achieved. By stating this he was not asking his director, Mr. Kante to do his job. He concluded by saying that “*the staff member is already on board and the job is being created “ex post facto.”*”

90. On 14 August 2007⁸⁶ Mr. Kante wrote to the Applicant stating that he was following up on that correspondence. He sent the Applicant a job description as Governor Advisor in DELC. He added that:

⁸⁴ Ibid.

⁸⁵ Annex 21 to Statement of Appeal, p. 21.

⁸⁶ Annex 21 to Statement of Appeal, p. 15.

For the remainder of the PAS period [the Applicant] should focus on items 2 and 3 of the job description and submit to him a detailed and prioritized work plan with timelines based on the activities and job results included therein.

91. According to the Applicant, this latest job description resulted from his complaint to Mr. Steiner.⁸⁷

92. By email of 20 August 2007 the Applicant sent Mr. Kante a preliminary draft programme of work based on the job description he received on 14 August 2007.⁸⁸ The Applicant also informed Mr. Kante that he:

[...] will revert [...] shortly with a more substantive document in which I intend not only to put the proposed job description into historical and contextual perspective, but also to suggest developments and possible future scenarios for the IEG process.

93. The Applicant also made the following observation in the mail:

While I have complied with your request, I wish to note that this belated job description, provided that it had been fully discussed between you and me, could have avoided much delay and misunderstanding had it been proposed upon, or shortly after my arrival.⁸⁹

94. He concluded that:

[...]it should also be noted that the remaining five and a half months in which I am supposed to deliver on the job description are not adequate time to satisfactorily produce sufficiently meaningful and substantive outputs.⁹⁰

⁸⁷ Annex 21 to Statement of Appeal, p. 10.

⁸⁸ Annex 21 to the Statement of Appeal, p. 14.

⁸⁹ Annex 21 to the Statement of Appeal, p. 14.

⁹⁰ Annex 21 to the Statement of Appeal dated 14 March 2008, p.14.

95. By email of 9 October 2007, the Applicant confirmed that the proposed PAS were in line with the latest job description. He pointed out that as there were three remaining months in his contract it would be feasible to prepare one document. He reiterated his view that he did not consider the duties suitable at a D-1 level but he would comply with the request of Mr. Kante. He also reiterated the fact that he had been reassigned to Nairobi to work on the Montevideo Programme and would not have applied for a position in the area of governance. He would, however, continue to perform to the best of his ability.⁹¹

96. On 26 October 2007, Mr. Kante asked the Applicant to put the draft plan he had submitted in the proper results-based format, post it on the e-PAS system and print it out for his review. Only after that process would there be a discussion on the elements of the programme before it could be submitted electronically.⁹²

97. On 6 November 2007, Mr. Kante informed the Applicant that the draft he had sent him needed to be *reworked and revised along the lines of the applicable guidelines and rules for the e-Pas (see for example the documents provided by HRMS on the subject), as well as the guidance on the results based PAS developed by the management of this division*. Mr. Kante also told the Applicant that the one goal he had listed was too vague. He ended by telling the Applicant: *I urge you to develop a plan detailing how you plan to advise me as my Senior Advisor, on the issues outlined in the TOR*.⁹³

98. The Applicant did not perform any of the tasks listed in the job description for the Montevideo Programme. In fact he was informed on his arrival in Nairobi that he

⁹¹ Annex 21 to the Statement of Appeal, pp.8-9.

⁹² Annex 21 to Statement of Appeal, p.8.

⁹³ Annex 21 to Statement of Appeal, pp. 6-7.

was no longer required to work on that programme. In an email dated 11/10/2007 to the Executive Director, the Applicant wrote:⁹⁴

On my first day at UNEP (31 January 2007), however, I was informed by Bakary that I was not to work on the Montevideo III programme after all, as this was a job description that had been put together hastily just to allow the administration to bring me to Nairobi. He would craft some new ToRs for me in due course. On 11 April, Bakary informed me that I was to be Chief Governance Advisor with the mandate contained in annex 2 to this message. Discussion on the details of the mandate were delayed and protracted for various reasons (waiting for the divisional retreat, missions abroad by Bakary, other pressing matters) and when we finally managed to come to a more concrete job description it was refused by the Chief of Personnel with the argument that it needed **‘further strengthening to justify a D-1 level grade, the current activities are for junior levels’** (e-mail from Suleiman Elmi, 25 June 2007, annex 3). I must concur with Elmi’s assessment and that I had always had a connection with the 11 April TORs.

99. On the other hand it is pleaded by the Respondent that the Applicant was not capable of handling the Montevideo programme.⁹⁵ The question that falls to be answered is on what basis was the Applicant found to be incapable of handling the Montevideo Programme if he was never given the opportunity to work on it. Could that have been the start of the *process that led to the removal of the Applicant from the Organisation?*

⁹⁴ Annex 21 to Statement of Appeal, p.26.

⁹⁵ UNEP’s Surrejoinder, 17 September 2008, paragraph 26.

FINDINGS ON THE ABSENCE OF WORK PLAN

100. It must be emphasised at the outset that when the Applicant reached Nairobi there was no agreed Job Description for the him as Chief Governance Advisor in the Division of Environmental Law and Conventions.

101. The rules on the performance and appraisal of staff provide that ⁹⁶:

(a) Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff members compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

(b) The Secretary-General shall seek to ensure that appropriate learning and development programmes are available for the benefit of staff.

(c) Performance reports shall be prepared regularly for all staff members, including at the Assistant Secretary-General level and above, in accordance with procedures promulgated by the Secretary-General.

102. As first reporting officer it was the responsibility of Mr. Bakary Kante to set out the work plan with the Applicant; to conduct the mid-point review and the final appraisal; and to provide supervision on the overall work of the Applicant during the course the reporting period.⁹⁷ The Applicant arrived in Nairobi on 31 January 2007. The deadline for the work plan, according to the guide on the Performance Appraisal System (PAS), is March/April of each year.⁹⁸

⁹⁶ Staff Rules ST/SGB/2009/7, 21 October 2009, formerly Rule 101.3 of Staff Rules ST/SGB/1999/5 Consolidated Text 1 January 2001.

⁹⁷ Section 4.1 ST/AI/2002/3.

⁹⁸ Section 2.2. ST/AI/2002/3; and the Guide on the Use of E-Pas.

103. The Applicant received his first terms of reference from Mr Kante on 11 April 2007. The Respondent proffered no explanation on why it took so long for the applicant to be given his first terms of reference. It is obvious to the Tribunal that that delay was but the start of the tribulations the Applicant was going to be put through.

104. A work plan is a process that requires a discussion between the staff member and his supervisor or first reporting officer⁹⁹. A work plan cannot be imposed on a staff member in an arbitrary manner. The Applicant had to work with Mr. Kante as his first reporting officer to devise the plan for the performance cycle and to determine the competencies that will be used to carry out the work plan.¹⁰⁰

105. When the Applicant pointed out the difficulties in the Terms of Reference, he was told that nothing could be changed as it was based on directions of the Executive Director.

106. The evidence shows that the Applicant had in fact prepared a detailed paper but was told that it would have to wait for the retreat at the end of April for further discussion. By then the Applicant would have spent three months in Nairobi. The case file shows that the Applicant prepared and submitted 4 versions of TORs - on 17 May 2007; on 19 June 2007; on 3rd July 2007 and on 20 August 2007. There is also an attachment dated 9 October 2007 entitled PAS in an email of the same date sent by the Applicant to Mr. Kante,¹⁰¹ and a document entitled "PAS Governance Advisor –DELIC, 9 November 2007- version 2."

107. Since a work plan is personal to a staff member, bearing in mind the overall interest of the Organisation, one might wonder why Mr. Kante was reluctant to discuss the TOR in a timely manner instead of waiting for the retreat. Mr. Kante

⁹⁹ Section 6.1 ST/AI/2002/3.

¹⁰⁰ Section 6.1 ST/AI/2002/3.

¹⁰¹ Annex 21 to Statement of Appeal, pp. 8-9.

himself has clarified that there be more clarity on the delivery of the Chief Governance Advisor's mandate only at or after the retreat.

108. If, as at April 2007, the mandate of the Chief Governance Advisor was not clear to Mr. Kante, how could the Applicant have been aware of what was required of him? A supervisor is entrusted with the important responsibility of ensuring that a work plan is worked out with a staff member. The facts of this case demonstrate that that responsibility was not met.

109. From May through November, Mr. Kante appears to have wavered in his evaluation and approval of the different TORs or work plans or programmes of work prepared by the Applicant. It is clear, however, that he almost never sat down with the Applicant to have a serious and in-depth discussion on how to resolve what was clearly a situation of conflict with regard to the TOR/PAS/work programme. As a supervisor, this consideration should have been paramount in the mind of Mr Kante as is required by the Administrative Instruction on PAS.

110. It was also the responsibility of Mr. Kante, as the first reporting officer, to implement all aspects of the PAS in a timely manner. That meant that all the PAS forms should have been duly completed.¹⁰² Instead of trying to attain that important objective Mr. Kante was more interested in embarking on confrontation with the Applicant with the result that no PAS was ever completed. It is imperative that a supervisor is seen to have met his share of the duties and tasks incumbent on him as supervisor and as detailed in the Administrative Instruction on PAS.

111. The Executive Director of UNEP (ED), as head of the Programme, bears the responsibility of ensuring that the purpose of the PAS set out in section 2 of the

¹⁰² Section 7.4 ST/AI/2002/3.

Administrative Instruction was fully implemented.¹⁰³ This responsibility was also not met. Despite communications sent to the ED by the Applicant on the difficulties he was encountering in DELC, Mr. Steiner remained silent and took no visible remedial action, thus shirking his responsibility as second reporting officer/Head of office in the implementation of PAS.¹⁰⁴

112. In the case of a shortcoming in the performance of a staff member, the first reporting officer should have discussed the situation with the latter and taken steps to rectify the situation, such as the development of a performance improvement plan, in consultation with the staff member.¹⁰⁵ While the Respondent seems to allege incompetence and shortcomings on the part of the Applicant in several instances, the record is silent as to what remedial action was taken to address those shortcomings.

113. Whatever may have been the situation, the Respondent cannot escape responsibility by casting all the blame on the Applicant for the absence of a work plan and a PAS during the reporting period. The suggestion that the absence of a workplan was solely the fault of the Applicant is disingenuous at best.

PERFORMANCE OF THE APPLICANT

i) PAS/Workplan

114. In support of the alleged non performance of the Applicant, the Respondent listed a number of matters relating both to the work plan and to several other instances relating to the job performance.

¹⁰³ ST/AI/2002/3.

¹⁰⁴ Section 7.1 ST/AI/2002/3.

¹⁰⁵ Section 8.3 ST/AI/2002/3.

115. The Tribunal has already dealt with the work plan aspect and will now consider the additional factors adduced by the Respondent.

ii) **Failure to Lead, Guide and Supervise the Development of Project Proposals for the Millennium Development Goals Achievement Fund supported by the Government of Spain.**¹⁰⁶

116. To support this allegation the Respondent relies on Annexes 9, 12, 13, 18, 19 and 20. It is averred that in May 2007, the Applicant was assigned the focal point for the development of project proposals for the MDG Achievement Fund supported by the Government of Spain. The Respondent relies on a statement by the Applicant that he had never written a project proposal for fundraising activities in his entire UN career and comments:

One wonders how the Applicant had been able to justify resources for the activities he had been executing, if at all, without development of concept papers and proposals to justify such funds. Nonetheless his junior colleagues were prepared to couch (sic) him on preparation of project proposals.¹⁰⁷

117. The Applicant's response to this is that his words were quoted out of context. In fact what he said in May 2007 was "*I have never written a project proposal in my entire UN career; it was not required or necessary as a staff member of the SCBD.*"¹⁰⁸ The Applicant adds that his successor at the CBD is also not required to do project writing. The Applicant filed the job description for his previous position to support his contention.¹⁰⁹

¹⁰⁶ Annexes 9, 12 18, 19 and 20 to Respondent's Reply dated 17 July 2008.

¹⁰⁷ Respondent's Reply dated 17 July 2008, paragraph 39.

¹⁰⁸ Applicant's Reply dated 13 August 2008.

¹⁰⁹ Annex 4 (Vol 2).

118. The Applicant wrote to Ms. [...] saying he was willing to cooperate with Ms. [...] and Ms. [...] on MDG projects. He adds that *[my] previous experience of six years with CBD did not include administration of projects as the CBD has no implementation mandate.*¹¹⁰ Prior to this Ms. [...] did write to the Applicant stating that she will be more than happy to assist him with a proposal in relation to the MDG-F requirements so that the Applicant could gain experience.¹¹¹ Ms. [...] also consented to help the Applicant *to have hands-on experience in project development and implementation.*¹¹²

119. The Respondent did not challenge the Applicant's response to this averment. His previous job description is on the record to corroborate his submission that the drafting of a project proposal has never been required of him in his UN career. Be that as it may, the Applicant sought help to fulfill this objective. Given the Applicant's background, the Tribunal finds it difficult to understand how not having drafted a project proposal before could be so grave a failing on the part of the Applicant as to warrant the tag of incompetence.

iii) Failure to advise the Executive Director (ED) of UNEP on the status of the negotiations for the future regime on Access and Benefit Sharing (ABS) under the Convention on Biological Diversity.¹¹³

120. The Respondent avers that in March 2007, the Applicant was asked to prepare a brief for the Executive Director on the status of the negotiations for the future regime on Access and Benefit Sharing (ABS) under the Convention on Biological Diversity, as the Applicant had worked on the CBD for 6 years prior to be assigned to DELC in Nairobi. The Respondent contends that the Applicant's brief

¹¹⁰ Annex 18 email dated 7/06/07.

¹¹¹ Annex 18 email dated 05/06/07.

¹¹² Annex 18 email dated 13/02/08.

¹¹³ Annex 25 to the Respondent's Reply dated 17 July 2008.

to the ED contained a factual error, which error was spotted by a junior staff member. The report/brief thus had to be amended before issuance.

121. The Applicant, in his brief/report stated that “[T]he current working document on the international regime (on ABS) is based on the Bonn Guidelines on implementing ABS developed after the entering into force of the CBD.”¹¹⁴ According to the Respondent, the international regime was not being framed on the Bonn guidelines and that, this error showed that Applicant was not fully conversant with critical CBD issues. The Respondent submits that “such serious factual errors could have caused measurable diplomatic irritations among governments and negative consequences for UNEP.”¹¹⁵

122. The Applicant submits that the factual error was detected by Mr. [...], then officer-in-charge of DELC. In an email dated 14 March 2007, Mr. [...] along with Ms [...] pointed out the error and added that¹¹⁶:

[t]he issue is that some countries such as Japan, Korea, Canada, Australia and New Zealand are less interested, in the creation of an international regime, or any framework, on ABS and are proposing a gap analysis and national focus instead. The gap analysis being based on the understanding that the ABS international regime will be composed of all the instruments such as ITPGRFA, WTO, TRIPS, African Model Law, etc. The national focus is where the link to the Bonn Guidelines comes in.

123. The Applicant further submits that given the observations of Mr. [...], the reference to the Bonn Guidelines was not in fact wrong. But even on the

¹¹⁴ Respondent’s Reply dated 17 July 2008 paragraph 42.

¹¹⁵ Respondent’s Reply dated 17 July 2008 paragraph 43.

¹¹⁶ Annex 21 to the Respondent’s Reply dated 17 July 2008.

assumption that it was, it could not have had the consequences the Respondent alludes to.¹¹⁷

124. Annex 21 does not support the contention that the Applicant failed to advise the Director. The Respondent's Counsel did not lead any evidence to prove that such a factual error was so material as to lead to the conclusion that the Applicant failed to advise the Director of UNEP on the future status of the negotiations for the future regime on ABS. The averments of the Respondent that the error detected in the Report would have led to disastrous diplomatic consequences, and would have impacted negatively on UNEP, seem to the Tribunal to be speculative. To claim that that one factual error is indicative of the Applicant's incompetence despite six years of satisfactory service in Montreal smacks of a case of giving a dog a bad name and hanging it. The Tribunal finds the argument specious.

*iv) Failure as Officer in Charge to effectively brief and report back to the Director of Division of Environmental Law and Conventions.*¹¹⁸

125. The Respondent states that the Applicant had been designated as officer in charge of DELC in the absence of the Director on numerous occasions. The Applicant consistently failed to brief the Director upon his return about meetings which took place or conferences the Applicant had attended in the absence of the Director.¹¹⁹ In support of this allegation the Respondent refers to two emails.¹²⁰ In one the Applicant was requested to attend an exit conference on 8 June 2008 and in the other one there is a request from Mr. Bakary Kante to the Applicant that a senior manager represents him at a meeting on 5 July 2008.

¹¹⁷ Applicant's Remarks dated 13 August 2008.

¹¹⁸ Annexes 22 & 23 to the Respondent's Reply dated 17 July 2008.

¹¹⁹ Respondent's Reply dated 17 July 2008.

¹²⁰ Annexes 22 and 23 of the Respondent's Reply, 17 July 2008.

126. The Applicant responds by stating that reports were made orally in the early working hours of the day when the Director resumed duty, and that this reporting format was approved by Mr. Kante.

127. The Respondent cites these two examples to persuade the Tribunal of a systematic failure on the part of the Applicant of not reporting appropriately to the Director. The Tribunal has considered Annexes 22 and 23 and does not find them to support the Respondent's contention. Nothing further is adduced to show that the Applicant systematically failed to report to the Director on occasions when he has acted in his stead.

128. There is nothing on the record to challenge the Applicant's submission that he made his reports orally; that the format of oral reports were not approved by the Director; or that a written report was required, requested and not produced by the Applicant. The Tribunal is not persuaded and finds the argument itself flimsy.

v) **Failure to Effectively Contribute to the Development of the Medium Term Strategy for UNEP.**¹²¹

129. The Respondent avers that in September 2007, the Applicant was assigned to provide input on behalf of DELC to UNEP's Mid Term Strategy as it relates to DELC and International Environmental Governance during its development. The Applicant tried to delegate the task and asked other staff for help, including the Executive Director's Chief Advisor on Policy and Operational Matters. Two drafts were prepared by the Applicant, which the Respondent claims were of such "low quality" that other staff (at lower level) had to be assigned to complete the task.

¹²¹ Paragraph 46 of the Respondent's Reply dated 17 July 2008. The Respondent relied on Annex 24 to the Respondent's Reply.

130. The Applicant denies that he ever delegated the task of preparing the inputs. He contacted [...], because he was aware that Mr. [...] was at the origin of the draft, for guidance on what was expected. He adds that late on 27 September, Mr. Kante went to his office with the first draft and told him he was satisfied with it except for the second paragraph. He used the words *I can live with the rest of the text*. When Mr. Kante told the Applicant he would ask someone else to draft the second paragraph anew, the Applicant insisted he would do it, hence the second version of the document. He was never told that his work was not satisfactory. Finally a draft prepared by Ms. [...] was revised by the office of the Executive Director and submitted to Member States. That draft was revised substantially by Member States. It was the view of the Applicant that Ms. [...] should not be blamed if the documents were substantially altered because early drafts undergo many changes until they are finally adopted.¹²²

131. Reliance is placed on e-mails that contain two draft documents titled DELC CONTRIBUTION TO THE MTS Version 1 and Version 2.¹²³ Annex 24 does not, on the face of it, support the allegation that the Applicant failed to effectively contribute to the development of MTS as alleged by the Respondent. The Respondent's Counsel did not lead evidence to establish that the documents were of such "low quality" and that staff junior to the Applicant did a better job.

132. The documents in question can best be judged by experts in that particular field and not by the Tribunal in the absence of expert evidence. It is impossible, and it would indeed be unwise for the Tribunal, to evaluate such documents in the absence of technical evidence to prove or disprove the contention. The Applicant counter-contents that he was never told that the work he had produced was of poor quality. The Applicant's rebuttal was not challenged by the Respondent. The

¹²² Applicant's remarks dated 13 August 2008.

¹²³ Annex 24 to Respondent's Reply dated 17 July 2008.

Tribunal cannot therefore conclude on the plausibility of the Respondent's submissions on this element.

vi) **An Unacceptable Lack of Key Core Competencies for UN staff while working at the UNEP headquarters in Nairobi.**¹²⁴

133. The Respondent avers that the Applicant violated basic principles of professionalism. As an example the Respondent states that the Applicant displayed lack of team spirit, and planning and organisation skills. The Respondent refers to the Millennium Development Goals which was a team effort. The Applicant is alleged to have "*failed to become part of the team even after his junior colleagues volunteered to tutor him on project development and after he confessed his inability to perform.*" From this the Respondent concludes that the Applicant lacked team spirit, a core competency in the United Nations.

134. The Respondent further avers that the Applicant

displayed a lack of planning and organisational skills which became apparent in terms of the Applicant's failure to effectively contribute to the participatory process for the development of TOR across DELC including his own as well as in the Applicant's failure to properly brief the Director of DELC about his actions as Officer in Charge of DELC.¹²⁵

135. The Applicant submits that he possessed all the core competencies when he served for five years in Montreal and cannot understand how these seem to have disappeared so quickly in Nairobi.

¹²⁴ Paragraphs 47 and 51 of the Respondent's Reply dated 17 July 2009.

¹²⁵ Respondent's Reply dated 17 July 2008 paragraph 47.

136. It is well established that the Organisation attaches much importance to core competencies that are reflected in the PAS. These core competencies are communication, teamwork, planning and Organisation, accountability, creativity, client orientation, technological awareness, commitment to continuous learning. In his PAS at the end of December 2005, the Applicant was rated as outstanding on the following core competencies: integrity, professionalism, communication, teamwork, planning and Organisation, and creativity.

137. The Respondent relies on contentions (i) – (v) above, to show that the Applicant lacked the relevant core competencies required in the United Nations. The Tribunal finds the Respondent's arguments in respect of the links between those allegations and this, to be tenuous. In any event, the Tribunal has not been persuaded by the arguments made by the Respondent in respect of performance or competence of the Applicant.

138. It is conceivable that the performance of a staff member at any level may fluctuate. The system has processes in place to deal with these fluctuations in performance.

139. That said, a party making an argument alleging incompetence must make a case showing the same. This is particularly imperative where the allegation of incompetence is made of a staff member who has, for so long, been rated as outstanding in the core competencies.

140. The Tribunal cannot find incompetence on the evidence presented.

LEGAL ISSUES RELATING TO PERFORMANCE OF A STAFF MEMBER

The Rules on efficiency, competence and integrity

Article 101 of the Charter of the United Nations

141. Article 101 of the Charter of the United Nations provides for the rules of efficiency, competence and integrity as follows:

[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.¹²⁶

Regulations made under the Charter

142. Under the authority of the Charter, Article 101.3 of the Staff Regulations was promulgated to regulate the recruitment of staff, their conditions of service and their overall treatment. The scope and purpose of these Regulations are to:¹²⁷

[...] embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions “United Nations Secretariat”, “staff members” or “staff” shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are

¹²⁶ See Article 101 of the Charter of the United Nations and Article 101.3 of the Staff Rules and Regulations 2009 (ST/SGB/2009/6).

¹²⁷ Staff Regulations ST/SGB/1999/5 Consolidated Text 1 January 2001; ST/SGB/2002/1, 1 January 2002 and ST/SGB/2009/6.

defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101 paragraph 1, of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary.

143. Regulation 4.2 of the former Regulations that regulated the terms of service of the Applicant read as follows:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.¹²⁸

144. The new Regulation 4.2 provides¹²⁹:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity.

145. The responsibility of a first reporting officer in respect of conducting and completing a performance appraisal extends to the taking of remedial action if required.¹³⁰ Such remedial action is required as soon as a performance shortcoming is identified, in that the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, including the development of a performance improvement plan.¹³¹

¹²⁸ Staff Regulations ST/SGB/1999/5 Consolidated Text 1 January 2001; ST/SGB/2002/1; 1 January 2002.

¹²⁹ Staff Regulations ST/SGB/2009/6.

¹³⁰ Section 7.4 ST/AI/2002/3.

¹³¹ Section 8.3 ST/AI/2002/3.

146. Given that the Applicant was never even informed of his performance being wanting, it is unlikely that any remedial action could have been attempted. The Respondent is silent on what, if any, action was taken by management to put the Applicant on notice as to his performance or to remedy the alleged shortcomings.

Principles of the rule of law and due process

147. In the case of *Tadonki v The Secretary General*¹³² the Tribunal wrote:

The core principle that guided the stakeholders involved in the reform of the administration of justice within the UN was the need to,

“...establish a new, independent, transparent, professionalized, adequately resourced and decentralised system of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.”¹³³

Employment gives rise to civil rights and this is recognized by various international legal instruments. The right to work is enshrined in Article 23.1 of the Universal Declaration of Human Rights and is further codified in Article 6 of the International Covenant on Economic, Social and Cultural Rights emphasising the need for “*productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*”¹³⁴

¹³² Case UNDT/NBI/2009/36, Judgment 1 September 2009.

¹³³ General Assembly Resolution A/Res/62/253.

¹³⁴ Art. 23 states that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; Art. 6 (1) The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right, (2) The steps to be taken by a State party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and

The European Court of Human Rights has ruled that the right to continue in professional practice is a civil right.¹³⁵ There is no reason why that principle should not be applicable to all contracts of employment in any civilized society. It follows that disputes arising out of a contract of employment should be dealt with according to fair procedures and the provisions guaranteeing the right to work should be interpreted according to international human rights norms.

Due process requires that Management complies with its own rules relating to staff. The Staff Rules embody the principles that should be observed in the application of due process to staff members and they are to be found in Rule 1.1 (c)

*The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.*¹³⁶

The Tribunal also notes that the Heads of State and Government, who gathered at the United Nations Headquarters in New York from 14 to 16 September 2005, reaffirmed their faith in the United Nations and their commitment to the purposes and principles of the Charter of the United Nations and international law. They also resolved to ensure full respect for the fundamental principles and rights at work.¹³⁷

It follows therefore that the rules and regulations of the United Nations relating to employment should be interpreted and applied in a manner that takes into account international norms and standards. They should not be

full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

¹³⁵ *Albert and Le Compte v. Belgium*, European Court of Human Rights, 10 February 1983, A058.

¹³⁶ Staff Rules and Regulations, Secretary General Bulletin ST/SGB/2009/7 16 June 2009, Rule 1.1 (c).

¹³⁷ General Assembly Resolution, A/RES/60/1, 2005, World Summit Outcome.

narrowly construed in view of the well established principle that statutes should, if possible, be construed so as to conform to international instruments.

The way in which the employment is terminated should therefore be considered in the context of the rights of the employee to due process and the compliance by the decision maker to international law and principles of the rule of law. Article 1.3 of the Charter of the United Nations enjoins the Organisation to promote and encourage respect for human rights. Compliance with the international human rights norms and the interpretation of the rules and regulations of the Organisation in accordance with international standards would therefore mean that a staff member has the right to work under the terms and conditions he agreed to and is entitled to just conditions of work and to protection against unfair dealings in the course of his employment”.

148. The Tribunal endorses the above observations for the purposes of the case.

The need to comply with the PAS Rules

149. There are Rules to deal with the performance of staff members. There must be an appraisal of the performance of staff members at the end of the performance year.¹³⁸ The Tribunal has already considered the evidence relating to the performance of the Applicant and has found that the evidence presented by the Respondent falls short of establishing that the Applicant was not performing his duties as required of him

¹³⁸ Section 9.1 ST/AI/2002/3.

The Appraisal

150. At the end of the performance year, the first reporting officer and the staff member shall meet to discuss the overall performance during the reporting period. The first reporting officer appraises the extent to which the staff member has achieved the performance expectations as agreed in the work planning phase¹³⁹.

151. The internal procedure with regard to the PAS rules was simply flouted here. The purposes of performance appraisal, as laid down in the relevant Administrative Instruction of the Organisation, are meant to pinpoint the strengths and weaknesses of the staff member and to seek remedial action where that is required. This was not done. There is no evidence that the Applicant was informed of his shortcomings. All that the Respondent attempted to show was that the Applicant had failed to prepare a work plan or draw up his TOR. This matter has already been dealt with above.

FINDINGS ON PERFORMANCE

152. When the Applicant was reassigned to Nairobi he did not know what was expected of him. He was made to believe that he would be in charge of the Montevideo programme. The Respondent contends that at the time of the Applicant's reassignment to Nairobi, UNEP was confident of his ability to effectively contribute to the development of a new Montevideo Programme (Montevideo IV), work effectively with other senior colleagues on the topic, as well as guide junior and mid-level colleagues. After all, based on information in his resume, the Applicant had an extensive legal experience, expertise in global and regional environmental issues, knowledge of the environmental challenges and experience in the management of staff.

¹³⁹ Section 9.1 ST/AI/2002/3.

However, soon after the Applicant reported to Nairobi, he demonstrated clearly that he lacked the necessary factual competencies, i.e. experience, knowledge and basic understanding of the subject matter to be given responsibilities in this area commensurate with his level as D1¹⁴⁰.

153. To justify the ineptness of the Applicant and to substantiate the contention that the Applicant was incapable of managing the Montevideo Programme, the Respondent relies on a letter that the Applicant sent to Mr. [...], Chief of the Office of the Executive Director, UNEP.¹⁴¹ According to the Respondent, the Applicant had confessed that he had never heard about that programme, which they further submit “*was added proof that it would have been irresponsible to entrust the Applicant with such an important and prominent Programme as the Montevideo Programme.*”¹⁴²

154. The Applicant contests the statement of Respondent that he had never heard about the Montevideo Programme. He explains that he was referring to former colleagues in SCBD and not to himself.¹⁴³

155. The Tribunal does not find the Applicant’s letter to be a demonstration of lack of competence or experience. What the Applicant was trying to achieve in that letter was a discussion on the job description and the TOR of the assignment to deal with the Montevideo programme in relation to his qualifications and experience.

156. The Tribunal finds it curious that the Applicant, who was appraised as fully meeting expectations in Montreal, was suddenly, and so abruptly, considered so

¹⁴⁰ UNEP’s Surrejoinder, 17 September 2008, paragraph 26.

¹⁴¹ Letter of Applicant dated 21 November 2006, Annex 8 to the Surrejoinder of 17 September 2006.

¹⁴² Respondent’s Reply dated 17 July 2008.

¹⁴³ Applicant’s Final Remarks dated 17 October 2008.

inept in the eyes of the management of UNEP. The Respondent's submissions do not offer an explanation on how this came to be.

157. In the Tribunal's view, there also seems to be a blatant contradiction in the Respondent's explanation. The Respondent, on the one hand, avers that the Applicant lacked the necessary factual competencies required for the Montevideo Programme so that assigning the same to him would have been irresponsible on the part of Management. On the other hand, the Respondent also submits that with the restructuring of the Division of Environmental Law and Conventions, the Applicant's assignment had to be substantively changed and that a new assignment had to be found for the Applicant. This was the position of Chief Governance Advisor.

158. It is clear to the Tribunal that the Applicant was not fairly appraised. Fairness in accordance with high principles enshrined in the Charter and Rules required that an appraisal be made on his performance, and that he be given an opportunity to rebut the appraisal according to the existing procedure.¹⁴⁴

159. The decision of the Respondent not to renew the appointment of the Applicant on grounds of performance cannot be sustained. Even on the assumption that the evidence could lead to the inference of poor performance, the Respondent's decision is flawed as it did not follow its own procedures. *An organisation must conduct its affairs in a way that allows its employees to rely on the fact that its rules will be followed.*¹⁴⁵

¹⁴⁴ Section 15 ST/AI/2002/3.

¹⁴⁵ Judgment 2170, ILOAT.

160. As pointed out by ILOAT:

The fundamental considerations which lead to the conclusions that an organisation must comply with the rules which it has established also dictate the conclusion that it cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance.¹⁴⁶

161. The Respondent cannot rely on the absence of a PAS to sustain its decision. Reference can aptly be made to the following observations of ILOAT, where the court held that¹⁴⁷

A staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed. These are fundamental aspects of the duty of an international Organisation to act in good faith towards its staff members and to respect their dignity.

162. As has already been noted, between his arrival in Nairobi at the end of January 2007 and November of the same year, the Applicant prepared four TORs and a work plan. Mr. Kante never definitively dealt with the Applicant's draft TORs and workplan. The very absence of that report or any report deprived the Applicant of the opportunity to contest adverse comments on his performance prior to the non renewal of his appointment.¹⁴⁸

¹⁴⁶ Judgment 2414, ILOAT, 2 February 2005.

¹⁴⁷ Judgment 2414, ILOAT, 2 February 2005.

¹⁴⁸ See for example *In re Ahmad* (N0.2) Judgment 1298, ILOAT, 14 July 1993.

163. The Applicant rightly refers to an email sent to him by Mr. Steiner

Mr. Steiner finally recommended that I should not focus on administrative minutiae like not having staff and concentrate instead on my new mandate, with a view to delivering it to the best of my capacity. He reiterated his March remarks that **he was glad to renew my contract for one additional year at the end of 2007, but reserved his right not to do so in case performance was considered below expectations.**¹⁴⁹. (Emphasis added).

164. It would seem that the elementary rules of fairness were simply jettisoned. From a reading of the relevant provisions relating to the PAS, it cannot be disputed that this mechanism exists in the interest of staff members, management and of the Organisation. For staff members, PAS procedures ensure that the members of the staff are rated fairly, guided in case of shortcomings and have an opportunity of challenging a rating that they do not agree with. For Management, PAS procedures enable it to enhance the work of its respective departments or sections by placing on them the onus of devising a work plan and making sure that the highest standard of efficiency is achieved through guidance and dialogue. For the Organisation, PAS procedures ensure that the aim and purpose of the Organisation as set out in Article 101(3) of the Charter is complied with.

165. Notwithstanding the statement of Mr. Steiner that renewal would depend on performance, extraneous considerations clearly tainted the process. The Respondent patently ignored the basic rules on appraisal and rebuttal.

Allegations of Insubordination

166. To justify its non-renewal of the Applicant's appointment, the Respondent also avers that

¹⁴⁹ Annex 8 to the Respondent's Reply dated 17 July 2008.

the Applicant resorted to insubordination and threats vis-à-vis his supervisor and the management. On 17 July, the Applicant resorted to insubordination and threats against his supervisor and the management in a personal discussion between the Applicant and his supervisor. The Applicant acknowledged this incident. It needs to be unmistakably stated here that such acts are contrary to the UN ethical values and core competencies to work and act with professionalism. Threats, blackmail and insubordination should not be tolerated in the UN system nor should they be a legitimate mechanism to force extension or renewal of contract.¹⁵⁰

167. On 17 July 2007, during the course of a meeting between the Applicant and Mr. Kante, the Applicant is said to have uttered words that would amount to threats or insubordination. Mr. Kante recorded this in an e-mail dated the same day to the Applicant.¹⁵¹ The matter was also reported to Mr. Steiner nine days later, on 26 July 2007.

168. On 27 July, Mr. Steiner wrote to the Applicant:

On 26th July, I received an e-mail from Mr. Bakary Kante, Director DELC. In that e-mail, copy of which is attached herewith, he states that during a meeting with you, you were insubordinate and threatened and/or attempted to coerce him.¹⁵²

169. The Applicant was asked to respond, and did on 3 August. The Applicant disagreed with Mr. Kante's account of the 17 July meeting. He added that:

Mr. Kante's account as presented reflects some comments which I may have made in reaction to comments made by him, but his account takes them

¹⁵⁰ Respondent's Reply dated 17 July 2008 paragraph 48.

¹⁵¹ Annex 25 of Respondent's Reply dated 17 July 2008.

¹⁵² Annex 25 of Respondent's Reply dated 17 July 2008.

completely out of context. In due course and at the right time I will prove this[...]

More importantly, I never – repeat never - attacked or tried to intimidate [...] implicitly or explicitly during our conversation.¹⁵³

170. The accusations made by Mr. Kante are very serious; serious enough to have warranted a thorough and independent investigation. Such an investigation would have allowed the Applicant to present his version of events, and for the facts as presented by both parties to be properly and independently verified. This was never done.

171. The Respondent led no evidence to establish the authenticity of the claims made in that email. It is obvious to this court that Mr. Kante's version of events was accepted at face value by the management of UNEP. The guilt of the Applicant appears to have been established without an adequate or appropriate right of response.

172. Management now appears to be adding insult to injury by using these spurious accusations to justify the non renewal of the Applicant's appointment. If management did not itself find the allegations serious enough to warrant an investigation, it is disingenuous for them to suggest however that it justifies the non-renewal of the Applicant's appointment.

173. Under the circumstances, the Tribunal cannot but disregard these contemptuous allegations in its entirety.

¹⁵³ Annex 25 of Respondent's Reply dated 17 July 2008.

The Interests of the Organisation and the Reassignment of the Applicant to Nairobi

174. Having considered the facts and arguments adduced by both Parties, and the testimony of Ms Soliman, the Tribunal can only conclude that the Applicant's reassignment to Nairobi was a masquerade perpetrated by the management of UNEP in the interest of the Executive Secretary of the CBD, Mr. Ahmed Djoghlaif. While Mr. Elmi reached the sweeping conclusion that the Applicant had to be reassigned even if that meant that he would have to work from home or be placed on leave with pay, management lessons were recommended to deal with the challenges caused by the attitude of the Executive Secretary.
175. The Tribunal finds that the Applicant was reassigned not so much in the interest of the Organisation, or in the pursuit of using the best resources of the Organisation for the achievement of the purposes under the Charter, and Rules and Regulations made under its authority, but rather in the interest of the Executive Secretary.
176. It is obvious to the Tribunal that the process undertaken was a waste of material and human resources. Why such a process was embarked upon if the results and recommendations were going to be ignored, or used selectively, is both unclear and troubling.
177. Had those, whose paramount responsibility it is to ensure compliance with avowed objectives of the Organisation, been more objective and mindful of the Organisation, surely the Applicant, even if he had to be reassigned, would have been entrusted with responsibilities more commensurate with his skills and experience.

178. Whether the Applicant “volunteered” for this reassignment is immaterial. He appears to have agreed to be reassigned to Nairobi in good faith and in the spirit of cooperativeness; and because he was given a promise that this would advance his career, that he would be responsible for the Montevideo Programme and *would start a new, refreshed, professional phase of [his] life.*¹⁵⁴

THE DISCRETION NOT TO RENEW A FIXED TERM APPOINTMENT

179. The Respondent also makes the point that since the Applicant was on a fixed term contract there was no expectancy of renewal as provided by Rule 104.12 (b) (ii) of the Staff Rules applicable at the time. The Respondent argues that the Staff Regulations and Rules make it clear that it is within the Secretary-General’s discretion to make hiring, termination, and non-renewal decisions. In the present case that power of the Secretary-General has been delegated to the Executive Director of UNEP.¹⁵⁵

180. As the Respondent rightly points out, that discretion is not unfettered.

181. It is trite law that any discretion conferred on a public body or authority must be exercised in a judicious manner. In this regard, the Tribunal finds the *Wednesbury* principle (as it has come to be known) instructive. The court held:

A failure by a public authority to have regard to matters which ought to have been considered, which is to be derived either expressly or by implication from the statute under which it purports to act, will be an abuse of its discretion. Similarly, if certain matters are considered, which from the subject matter and the general interpretation of the statute are held by the

¹⁵⁴ Synopsis of Events after 9 June 2006 Annex 10.

¹⁵⁵ A/C.5/1505/Rev.1, 19 October 1973.

court to be irrelevant, then this will amount to a defect in the decision-making process.¹⁵⁶

182. The burden of proof is of course on the Applicant to establish that the discretion has been exercised injudiciously. Once the Applicant has stated his case, it remains open to the Respondent to rebut the Applicant's contentions or to state their own case. The Tribunal must then consider the evidence in its entirety and determine if he who avers has made out a case on a balance of probabilities.

183. Having paid the most anxious scrutiny to the Parties submissions, the Tribunal finds that the Applicant has met that burden. He has referred to the events which led to him being reassigned to Nairobi from Montreal to be in charge of the Montevideo Programme and how he was removed from that assignment without any reason being given to him. He has explained the circumstances that led to his PAS not being completed. His performance as a professional was judged to be of such poor quality without the Respondent affording him an opportunity to respond to such a calumny. The facts also establish that the Applicant was arbitrarily judged guilty of insubordination, blackmail, and uttering threats without a proper hearing.

Remedy

184. The Applicant has prayed for compensation for the moral, financial and professional losses he has suffered. The Applicant also seeks this compensation for the "terminal and irreparable harm" caused to his career in the United Nations.¹⁵⁷

¹⁵⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 King's Bench p. 223, at p. 228.

¹⁵⁷ Letter to the United Nations Dispute Tribunal, 21 August 2009.

185. In light of the findings stated above, the Tribunal orders the Respondent to pay to the Applicant the equivalent of twenty-four (24) months net base salary, at the level he was entitled to before his appointment was not renewed.

(signed)

Judge Boolell

Dated this 16th day of December 2009

Entered in the Register on this 16th day of December 2009

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi