



Case No.: UNDT/NY/2010/021/
UNAT/1634

Judgment No. UNDT/2012/006

Date: 11 January 2012

Introduction

1. The Applicant appeals against the decision not to renew his fixed-term appointment as the Executive Secretary, Convention on Biological Diversity (“CBD”) beyond 31 December 2005. The Applicant contends that the decision not to renew his appointment beyond 31 December 2005 was in breach of administrative arrangements between the Secretariat of the CBD and the United Nations Environment Programme (“UNEP”), which provides administrative support to the Secretariat of the CBD. The Applicant submits that he had a legitimate expectancy of renewal and that the decision was motivated by prejudice and extraneous considerations. The Applicant also submits that the decision was based on advice given by the Executive Director, UNEP, which was in retaliation for Applicant’s concerns with regard to inadequate support provided by UNEP and the United Nations Office at Nairobi (“UNON”) to the Secretariat of the CBD. The Applicant seeks equitable relief and monetary compensation.

2. The Respondent denies all allegations of unfairness and procedural impropriety and asserts that the decision was in compliance with the appropriate administrative arrangements and that the Applicant did not have a legitimate expectancy of renewal of his contract.

Employment background

3. The Applicant joined UNEP in 1983 and served on a series of fixed-term appointments until July 1991, when he was given a probationary appointment and subsequently promoted to the D-1 level Coordinator for Biological Diversity and Biotechnology. In April 1992, the Applicant’s probationary appointment was converted to a permanent appointment. In September 1999, the Applicant was appointed as Executive Secretary, CBD, at the D-2 level. In December 2000, his post was upgraded to the level of Assistant Secretary-General. The Applicant received a

further two-year fixed-term appointment at the level of Assistant Secretary-General, with effect from July 2002.

4. The fixed-term appointment was subsequently extended for one year, until 30 June 2005. According to the Applicant, at the end of this term he expected an extension of two years to 30 June 2007. However, he was given an extension of six months, to 31 December 2005, following which he separated from the Organization.

5. The central issue in this case concerns this final extension of six months, at the end of which a new Executive Secretary was to take office for a three-year period. The Applicant contends that he had a r

corroborate the contentions and assertions being advanced on behalf of the Respondent.

9. On 2 September 2011, the Tribunal held a hearing to hear evidence from the Applicant and consider the parties' closing submissions. It was agreed that in the absence of evidence from Mr. Klaus Töpfer, Executive Director, UNEP, or any of the decision-makers, the Tribunal should proceed to consider the case on the documents and the evidence available to it.

Facts

11. The Applicant accepts, in substantial ~~meas~~ the facts in the JAB report but describes it as incomplete and selective. The Respondent ~~re~~ relies upon the facts as presented in the JAB report.

12. The following relevant facts are as recorded in the JAB Report No. 06/2007:

7. In a letter dated 8 November 2004, the [Executive Director], UNEP, wrote to the President of ~~the~~ COP-7 [i.e., the Seventh Meeting of the COP] of the CBD – ~~namely~~ the Minister of Science, Technology, and the Environment, ~~Malaysia~~. The [Executive Director] referred to COP-7's decision VII/34¹ [“invi[ting] the President of the Conference of the Parties ~~to~~ consult with the Executive Director of the United Nations Environment Programme ~~and~~ liaise with the Office of the Secretary-General of the United Nations on future appointments”]. The [Executive Director] submitted that[,] accordingly, “based on [his] prerogative as the head of ~~the~~ organization providing secretariat support to the Convention, “he ~~int~~ended to recommend to the [Secretary-General], with the concurrence of the President/COP-7, the appointment of a new [Executive ~~Secretary~~] as of 1 July 2005. To this end, the [Executive Director] ~~wh~~ished to recommend for the President/COP-7's consideration, ~~the~~ candidature of Dr. Ahmed Djoghlaf, then the Assistant Executive ~~Director~~ of UNEP and Director of the Division of the Global Environment Facility.

8. In a note verbale dated 3 December 2004, the Ministry of Foreign Affairs, Malaysia, advised ~~the~~ [Executive Director], UNEP, that the Minister of Science, Technology, and the Environment, Malaysia, concurred with the [Executive Director]'s recommendation and supported Dr. Djoghlaf's candidature.

9. On 8 December 2004, the [Executive Director], UNEP, wrote to the [Secretary-General] advising ~~that~~ on behalf of the President of the COP-7 as well as on his ~~own~~ behalf, he was recommending Dr. Djoghlaf as the [Executive ~~Secretary~~], CBD, for a mandate of three years beginning 1 July 2005.

these matters will be conducted through the Bureau of the Conference of the Parties. ...

...

3. Posts and their levels are established by the Conference of the Parties for classification and recruitment purposes in conformity with the principles laid down by the General Assembly of the United Nations.

4. ... All appointments and promotions to posts above the D1/L-6 level, or termination of appointment above the D1/L-6 level require prior approval of the Secretary-General of the United Nations.

15. The relevant section of Decision VII/34 states:

5. Notes the recommendation of the Bureau of the sixth meeting of the Conference of the Parties to reappoint the current Executive Secretary. The Conference of the Parties further invites the President of the Conference of the Parties to consult with the Executive Director of the United Nations Environment Programme and liaise with the Office of the Secretary-General of the United Nations on future appointments.

16. The Charter of the United Nations provides as follows:

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

...

3. 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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Regulation 4.2

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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Regulation 4.3

In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

Applicant's submissions

18. The Applicant's principal contentions may be summarised as follows:

- a. The contested decision was in breach of Decision IV/17 of the COP, which states that the appointment and extension of appointment of the Executive Secretary, CBD, require consultation with the COP, through its Bureau. Further, the level and terms of office is determined by the COP;
- b. The correct procedure under Decisions IV/17 and VII/34 was not followed in terms of extension of the Applicant's appointment and the appointment of the new Executive Secretary, CBD;
- c. The contested decision ignores the views of the 188 State Parties to the CBD as expressed through the Bureau of the COP that unanimously supported the extension of the Applicant's contract until 30 June 2007 and did not support the appointment of a new Executive Secretary;
- d. The contested decision does not take into consideration the Applicant's legitimate expectancy of contract extension through to 30 June 2007;
- e. The renewal of the contract of the Applicant to 31 December 2005, instead of to 30 June 2007, and the appointment of a new Executive Secretary,

CBD, with effect from 1 January 2006, were vitiated by arbitrariness, prejudice, cronyism, and motivated by reasons other than the interests of the Organization;

f. The advice of the Executive Director, UNEP, to the Secretary-General

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23. The Administration's discretionary power in the matters of appointment, promotion, and termination is not unfettered (see *ad 2010-UNAT-021*). The Administration must act in good faith, respect procedural rules, and its decisions must not be arbitrary or motivated by factors inconsistent with proper administration. In addition, its decisions must not be based on erroneous, fallacious or improper motivation.

Was the Applicant properly considered for an extension of appointment?

24. The Respondent asserts that the Applicant was considered for an extension of appointment beyond 31 December 2005. However, the Respondent has failed to produce a copy of the advertisement, memorandum decision notes or any witness to prove the assertion that full and fair consideration was given to the Applicant's candidature in order to give effect to the principle that the paramount consideration in the employment of staff is to secure the highest standard of efficiency, competence and integrity. It was not part of the Respondent's case that the Applicant was not eligible for consideration by reason of age, competence or any other material factor. It was apparent that he was interested in continuing in the post. The Respondent did not provide any explanations as to why, notwithstanding his successful record of achievement and the strong support from COP, the Applicant was not offered an extension of appointment beyond 31 December 2005.

25. In compliance with the Tribunal's Order requesting the Respondent to provide evidence in support of the contention that proper procedures were followed, the Respondent produced a letter dated 21 March 2011 from Mr. Amedeo Buonajuti, at the time the Chief of Office of the Executive Director, UNEP, stating that the recruitment process followed established procedures. He explained briefly that a consultative process was followed and that several names were put forward for consideration. He added that the Applicant's contribution was assessed in comparison to the other candidates before a recommendation was made to the Secretary-General.

However, he made it clear that he was prepared to testify in person before the Tribunal.

26. Mr. Buonajuti's untested assertions were of no assistance to the Tribunal. The Respondent was reminded, by Order No. 165 (NY/2011) of 21 July 2011, of the importance of producing one or more witnesses whose evidence could be tested at a hearing before the Tribunal and to produce any contemporaneous document in support of their contentions. The Respondent was unable to produce any witnesses, explaining that this was due to the lapse of time since the events in question and the fact that key individuals were no longer within the control of the Respondent.

27. Whilst it is understandable that the Respondent might well not be able to produce witnesses who are no longer under the control of the Organization, the absence of an audit trail evidencing the procedural steps leading up to the appointment is a matter of surprise and should be of grave concern to the Secretary-General. As a general principle of good governance and administration, it should be obligatory on those involved in decisions on selection for recruitment or promotion to create and maintain proper records in order to give full effect to the commitment of the General Assembly to integrity and transparency at every stage in the decision-making process. Whilst this principle should be regarded as being of general application, it is of particular importance where the Secretary-General has personal responsibility for making the appointment. He must be entitled to accept in good faith that when a recommendation is made to him, all the necessary procedural requirements and safeguards have been complied with. The integrity of the office requires no less.

28. In his letter of 8 December 2004 to the Secretary-General, recommending the successful candidate, the Executive Director of UNEP stated, in effect, that established procedures were followed and the protocols agreed with the COP were observed. He assured the Secretary-General that there had been an "exhaustive review of the strengths and weaknesses of potential candidates". It is a matter of

surprise that, given such an exhaustive ~~view~~, there is no audit trail recording the process.

29. The following sequence of events is revealing:

- a. On 8 December 2004, the Executive ~~Director~~ of UNEP wrote to the Secretary-General advising on behalf ~~of~~ the President of the Bureau of the COP, as well as himself, that M^r Djoghla^f was the candidate being recommended for appointment for a three year term;

four months between this letter from the President and the letter dated 15 July 2005 from the Secretary-General to the Applicant offering him an extension of appointment not for the two-year period, requested by the COP, but for six months to 31 December 2005. It is inconceivable that an important record relating to an apparently controversial appointment should not have been maintained or, if it was, could not be produced to the Tribunal despite the best efforts of Counsel for the Respondent.

31. The Tribunal finds that the following facts in this case are inconsistent with the requirement of due process and transparency in decision-making within the United Nations.

- a. As stated above, the absence of a proper audit trail in relation to this

the COP, it should have been patently obvious to any senior public servant that to write in such a manner seeking the personal views of the President was wholly inappropriate. It must be incontrovertible that the letter following a meeting in Montreal on 22 and 25 December 2004 was the formal position of the Bureau of the COP. In the circumstances, no explanation has been offered to the Tribunal as to why the views expressed in the President's letter of 29 December 2004, and regarding which the Office of the Secretary-General sought clarification, seems to have been brushed aside.

d. The fact that the Applicant had reached retirement age was raised at various stages before the JAB and Respondent's response to the appeal. However, this claim was, in effect, abandoned in the course of proceedings before this Tribunal.

32. The Tribunal finds that a sitting candidate who has a successful record of achievement, who was aware that he was being strongly supported by the COP and who knew that Mr. Töpfer, the Executive Director, UNEP, was obliged under the agreed procedures to consult the COP through its Bureau before making his recommendation to the Secretary-General would reasonably entertain a legitimate expectancy of renewal.

33. The Respondent has failed to satisfy the Tribunal that the unanimous recommendation of the Bureau of the COP was given due consideration and that the Applicant's situation was considered in accordance with the procedures agreed between UNEP and the COP. The Tribunal therefore finds that the Respondent did not follow the established procedure for the appointment of the Executive Secretary, CBD, and failed to give full, fair, and proper consideration to the Applicant's candidacy.

Allegations of improper motivation

34. Whilst the burden of proving improper motivation on the part of the decision-maker rests on the Applicant (*Draker* 2010-UNAT-012, *Hepworth* 2011-UNAT-178, *Jennings* 2011-UNAT-184), it has to be accepted that the question whether or not a decision was tainted by bias or prejudice can usually be decided on the basis of inferences drawn from the primary facts. Clearly no individual is likely to admit bias, unfair prejudice or improper motive. Indeed individuals may not even be aware of the exercise of their own bias or motives, which are sometimes unconscious. Although the Applicant asserted that there was prejudice and bias against him, the Tribunal's primary focus was on the question whether the decision to offer the Applicant an extension of appointment for six months only, instead of two years, was a breach of his rights, rather than on the reasons for the treatment. In the circumstances, the Tribunal did not consider appropriate or necessary to carry out an in-depth analysis of the motives of the Executive Director, UNEP. In any event, such an exercise would have been frustrated by the very fact that the Respondent did not call Mr. Töpfer as a witness in these proceedings.

Compensation

35. As the Appeals Tribunal stated in *Solanki* 2010-UNAT-044 and *Ardisson* 2010-UNAT-052, compensation must be set by the Dispute Tribunal following a principled approach and on a case-by-case basis. Damages may only be awarded to compensate for negative effects of a proven breach and the award should be proportionate to the established harm suffered by the Applicant (*Cichlow* 2010-UNAT-035). The Dispute Tribunal is in the best position to decide on appropriate relief, given its appreciation of the case (*Solanki*).

36. Having considered the parties' submissions on relief and taking into account the totality of circumstances in this case, the Tribunal finds that, had the proper procedures been followed, and had proper and fair consideration been given to the

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41. This case concerns events which occurred more than seven years ago. It would be comforting to the Organization to believe or, at least, to hope that in view of the positive steps that have been taken in recent years to improve managerial accountability and the introduction of a fully independent, professionalised and transparent system of internal justice such examples of maladministration are less likely to recur.

42. In the absence of a rational and credible explanation for the way in which the appointment of the successful candidate affected, the Tribunal concludes that the actions of the Executive Director of UNEP stemmed primarily from the degree of confidence on the part of a public servant in an arbitrary exercise of power without accountability. It could well have been a fair and transparent process giving full effect to art. 101 of the Charter and staff regulations 4.2 and 4.3, stating the suitability of all candidates against objective criteria, would have resulted in the same outcome and it would have been fair and seen to be fair. Above all, such a process would have favoured the Applicant and to the institution itself.

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Orders

44. The Tribunal awards the Applicant the following:

a. USD50,000 as compensation for the breach of the Applicant's right to be properly considered for an appointment beyond 31 December 2005, as recommended by the Bureau of the COP, and any resultant harm, including loss of potential employment, earnings and any associated benefits and entitlements; and

b. USD20,000 as compensation for ~~any~~ and emotional distress.

45. The total sum of compensation as detailed in para. 44 above is to be paid within 60 days from the date this Judgment becomes executable, during which period