
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/009

Judgment No.: UNDT/2013/151

Date: 29 November 2013

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

HEPWORTH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Miles Hastie, OSLA

Counsel for the Respondent:

Introduction

1. The Applicant is contesting the decision taken by Mr. Achim Steiner, Executive Director of the United Nations Environment Programme (UNEP), not to renew his fixed-term appointment as Executive Secretary of the Convention on Migratory Species (CMS).

2. The Applicant submits that this decision was vitiated by procedural irregularities, prejudice, abuse of power and other ulterior considerations and therefore requests the Tribunal to grant the following relief:

- a. Declare the decision null and void;
- b. Order that he be retro-actively reinstated; and
- c. Order that he be compensated for all violation(s) of his contractual rights.

3. The Respondent submits that the Executive Director's decision not to renew the Applicant's fixed-term appointment was a valid exercise of the Secretary-General's discretionary authority in staff matters as delegated by him to the Executive Director.

Procedural history

4. The Applicant's case was initially heard by the United Nations Dispute Tribunal (Tribunal) in Geneva, which found in favour of the Respondent (*Hepworth* UNDT/2010/193). The Applicant appealed the decision and the United Nations Appeals Tribunal (UNAT) remanded the case to the Dispute Tribunal for a determination of the facts and merits of the application on the basis that the Tribunal committed an error in procedure by not giving the Applicant an opportunity to call witnesses at trial (*Hepworth* 2011-UNAT-178).

5. By order No. 32 (GVA/2012) of 10 February 2012, the Tribunal transferred the case to the Tribunal on the basis that the decision-maker, Counsel for the Respondent, and potential witnesses were located in Nairobi.

6. The Tribunal held a hearing between 19 and 21 March 2013. The Applicant gave evidence and called Mr. Arnulf Müller-Helmbrecht to give evidence on his behalf. The Tribunal, on the motion of the Applicant, called the Executive Director to give evidence. The Respondent did not call any witnesses.

the security and transport situation in Nairobi and the unstable political situation; his view that the Special Advisor role was more suitable for a “P4 or P5 in mid-career” and to a person with a much more technical background; his desire to stay on at the CMS; and the fact that he had just been elected chair of all United Nations agencies in Germany.

11. On 25 March 2009, UNEP submitted the job description for the post of Special Advisor on Biodiversity for classification purposes to the Human Resource Management Services (HRMS) at the United Nations Office at Nairobi (UNON). The post of Special Advisor was advertised in Galaxy some nine and a half months later on 8 December 2009 with a deadline for applications of 6 February 2010.

12. On 26 March 2009, Mr. Paul Akiwumi, then Chef-de-Cabinet, Executive Office, UNEP, informed the Applicant by telephone

(recorded in a file note) that he was not willing to take up the position of Special Advisor in Nairobi or sign a new contract with the Organization in that capacity (emphasis added).

17. By letter dated 15 June 2009, the Executive Director informed the Applicant that his fixed-term appointment as Executive Secretary of the CMS would not be renewed (Non-renewal Decision). The letter stated:

In view of your decision not to come to Nairobi as instructed, I

22. By letter dated 17 April 2008, the German Environment Ministry wrote to the Applicant raising a number of concerns. These included: dissatisfaction and

and that “Germany cannot tolerate the Executive Secretary damaging the international reputation of Germany and the UN city of Bonn, as has repeatedly happened over the past few weeks”. The letter also stated that the BMU was “turning to [the] Executive Director, in order to avert permanent damage” to the CMS and a wish to “find a solution to this problem”.

26. By letter dated 13 August 2008, the Executive Director wrote to the Applicant referring to the letter from the German Environment Ministry and the allegations contained therein. This letter stated that the letter from BMU raised “serious complaints against...your conduct as the Executive Secretary of the CMS and refers to unacceptable insinuations made by yourself”. The Executive Director also asked the Applicant “to refrain from any contact or communication with the Government of Germany in this respect.” He requested a meeting with the Applicant on 4 September 2008 but this meeting never took place. The Executive Director did not provide a formal written response to the German Environment Ministry’s letter of 2 July 2008. However, by letter to the Tribunal dated 23 February 2010, Counsel for the Respondent explained that:

On 22 August 2008, a delegation from the German Government, headed by the Director General for Nature Conservation and Sustainable Use of Nature, visited UNEP Headquarters in Nairobi to discuss several current topics with the Executive Director, among them also Germany’s concerns relating to the management of the CMS. After these discussions, the necessity for a direct response in writing by the Executive Director of UNEP to the letter of 2 July 2008 became obsolete.

27. Neither a transcript of the discussions nor minutes of the meeting is available but an undated “Note to file” of the meeting was prepared by Mr.

No meeting to discuss the issues took place.

Issues

28. The key issues in this case are:

- a. Whether the Applicant had a legitimate expectation that his fixed-term appointment as Executive Secretary of the CMS would be renewed;
and
- b.

30. Further, the Applicant submits that the Respondent failed to consider all relevant matters in the Non-renewal Decision, in particular, the benefits of keeping him in Bonn. As his position was not abolished and there was no recorded lapse in his performance, a reasonable expectation had arisen that his contract would be renewed.

31. Finally, the Applicant submits that countervailing circumstances had created a legitimate expectation of renewal of his appointment as Executive Secretary of CMS. In this regard, he refers particularly to minutes of a meeting held on 15 April 2004 between him and the then Executive Director of UNEP and signed by the then Deputy Executive Director, as well as an email dated 17 August 2009 from that former (now retired) Deputy Executive Director.

Respondent's submissions

32. The Respondent submits as follows:

a. The Applicant had no expectancy of renewal based either on his contract with UNEP or on any countervailing circumstances that would have allowed him to expect a renewal.

b. The Non-renewal Decision was a proper exercise of managerial discretion by the Respondent and not motivated by extraneous considerations. The Applicant asserts a belief that the Non-renewal Decision was prompted by political pressure from the German Government but does not provide evidence to support this conclusion. The Applicant also fails to show any causality between the German Government and the Non-renewal Decision.

c. The Executive Director regularly discusses issues brought to his attention by Member States with the heads of the eight Multilateral Environmental Agreements, including CMS. It was therefore normal for him to discuss issues raised by a Member State concerning the functioning of CMS with the Applicant.

d. The position of Special Advisor was created for organizational

37. Whether or not a staff member's fixed-term contract is to be renewed involves the exercise of discretion on the part of the decision-maker. That discretion must be exercised judiciously and in good faith (*Masrani* UNDT/2009/017).

38. UNAT has held that holders of fixed-term appointments have no expectancy of renewal or conversion to any other type of appointment (see e.g., *Appellee* 2013-UNAT-341; *Syed* 2010-UNAT-061). However, it has also held that.⁵

46. ... if the Administration gives a staff member a legitimate expectancy of renewal of his or her fixed-term appointment, then that may be a good reason for the Tribunal to interfere with the non-renewal decision on the grounds of unfairness and unjust dealing with the staff member. Similarly where a decision of non-renewal does not follow the fair procedure or is based on improper grounds, the Tribunal may intervene.

39. UNAT agreed with the former Administrative Tribunal that:

[U]nless the Administration has made an "express promise ... that gives a staff member an expectancy that his or her appointment will be extended", or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful.

40. UNAT is correct in holding that a legitimate expectation can be created by an express promise on the part of the organization. But a promise can also be

and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for -- and in practice invariably receives -- a decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an

Organizational practice

47. In the case of *Amira*,⁶ the International Labour Organization Administrative Tribunal (ILOAT) held:

[A] fixed-term appointment will automatically cease to have effect upon expiry. But according to the case law a contract of service, even if for a fixed term, creates in law a relationship of employment; that relationship exists in an administrative context and is subject to a set of staff regulations; and there may therefore be requirements or consequences that go beyond the bounds of the contract as such. So the Tribunal may consider ordering the reinstatement even of someone who held a fixed-term appointment provided that the circumstances are exceptional *only do so when an organisation makes a practice of granting fixed-term appointments for the performance of continuing administrative duties.* [Emphasis added]

48. Applying the above principles, the Tribunal takes the view that although the Applicant was on a fixed-term appointment, because his contract with the Organization had been consistently renewed over the preceding nine years, the conditions of the employment relationship went beyond the specific terms of his employment contract. Given that there was a practice of renewing his fixed-term appointment, he was entitled to expect its continued renewal unless there was a legitimate reason for not renewing it. This was particularly the case because the post he was occupying had not been ~~liberated~~ and nothing adverse was raised against him either in relation to his performance or his conduct, subject to the strongly worded letter from the German Environment Ministry, an issue which will be dealt with below.

49. The following may be legitimate reasons for not renewing a fixed-term appointment where a practice of ongoing renewal has established an expectation that a fixed-term appointment will continue to be renewed in the future: the necessities of service require the ~~abolition~~ of the post or reduction of the staff; the services of the staff member prove unsatisfactory; the staff member is, for reasons of health, incapacitated for further ~~service~~; and the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity

⁶ ILOAT Judgment No. 1317 (1994).

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prove that its decision was neither arbitrary nor tainted by improper motivations. On the assumption that no reasons were provided, it is for the Respondent in this case to prove that the Non-renewal Decision was not motivated by extraneous factors.

59. The Applicant alleges unlawful extraneous motivation for the Non-renewal Decision in the form of political pressure from Germany in relation to his role as Executive Secretary of CMS. In this regard the letter from the State Secretary of BMU to the Executive Director dated 2 July 2008 is most telling and revealing. The letter alleged that, following the letter from the Ministry to the Applicant raising concerns about the outcomes of the meeting of the CMS Standing Committee, staff members of the CMS Secretariat were forbidden from communicating with the Ministry. The letter from BMU also accused the Applicant of beginning an “extensive campaign in which he accused Germany/the [Ministry] – and voiced those accusations to other Contracting Parties – of

complaints against...your conduct as the Executive Secretary of the CMS and refers to unacceptable insinuations made by yourself". The Executive Director also asked the Applicant "to refrain from any contact or communication with the Government of Germany in this respect".

61. The strength of the words used in the letter from BMU to the Executive Director of UNEP is striking and the message was couched in no uncertain terms: the German Government was unhappy with the Applicant and clearly expressed the desire to "find a solution to this problem as quickly as possible". Whilst a Member State may express opinions to the United Nations, it is impermissible for the Administration to yield to a demand by a Member State when to do so is not in the interests of economy and efficiency and of the Organization (see *Case No. UNDT/2010/119*). Article 100.1 of the Charter explicitly prohibits United Nations staff from receiving instructions from any government. Allowing a government to influence an internal staffing decision would constitute an improper exercise of discretion and an impermissible extraneous motivation.

62. The question then is whether there is evidence that the Non-renewal Decision was influenced by pressure from the German Government. Just because the German Environment Ministry conveyed a desire for the "problem" of the Applicant to be dealt with does not mean that the Executive Director acted on it. In this connection the Executive Director very candidly explained at the hearing that national governments regularly raise issues and express concerns about situations. According to the Respondent, general concerns about management or direction of environmental entities are frequently expressed.

63. The Applicant testified that he had a tense relationship with BMU but not with the other branches of the German Government. He testified that at the beginning of 2009 he was elected chairman of all United Nations agencies in Germany and that the German Government reacted quite positively to his election, unlike BMU. If at all, the main source of the problem was the tense relationship between BMU and the Applicant and not between him and the German Government. In his letter to the Applicant dated 13 August 2008, the Executive

recruitment of staff for the CMS Secretariat, possible aversion to Germans and the decentralisation of the CMS Secretariat.

67. Mr. Müller-Helmbrecht further claimed that on 8 March 2010 he bumped into a former colleague who was then working for the Ministry. That colleague allegedly informed Mr. Müller-Helmbrecht that his Head of Department had mentioned in an internal routine meeting in November 2008 that the Applicant would be returning to Nairobi to take over another United Nations post. The Applicant claims that this evidence shows that the decision to transfer the Applicant was made, and conveyed to the Ministry, at least three months before it was raised with the Applicant himself.

68. The evidence of Mr. Müller-Helmbrecht on the attitude of the German Government towards the Applicant consists only of hearsay. Evidence of hearsay is not by itself inadmissible before the Tribunal. If this were the case the Tribunal would lose the benefit of crucial relevant and probative evidence. The weight of such evidence should however carefully be considered given its nature. Great care should be exercised before placing any weight on such evidence when the hearsay evidence seeks to establish serious allegations or grave concerns against an individual, an institution or a national government.

69. Bearing the need for cautious treatment of hearsay evidence in mind, the Tribunal finds that Mr. Müller-Helmbrecht's testimony is direct evidence of what he was told by a member of the BMU. Although Mr. Müller-Helmbrecht was uncertain of the specific date of the conversation, he was extremely specific about the event at which it occurred. What Mr. Müller-Helmbrecht was told was also pinpointed relative to a major event. Indeed, it was the very sequence of events that made it memorable to Mr. Müller-Helmbrecht and his interlocutor. The Tribunal has no reason to believe that either Mr. Müller-Helmbrecht or his interlocutor simply fabricated this information. No good reason exists on the state of the evidence for such a conclusion.

70. The lack of reasons for the Non-renewal Decision (and the resulting burden of proof on the Respondent), together with the circumstantial evidence

described above has led the Tribunal to find that the Non-renewal Decision was vitiated by improper motivation, namely a desire to move the Applicant out of Bonn to placate the German Federal Environment Ministry. The circumstantial evidence of particular pertinence is: the personal allegations made by the German Environment Ministry against the Applicant and a clearly expressed desire to deal with the “problem”; the timing around the advertising of the Special Advisor position (see below); the lack of any formal response to the allegations made by Germany in relation to the Applicant; the Applicant’s resistance to the transfer;

Was the position of Special Advisor commensurate with the position of Executive Secretary of the CMS?

experience in natural resources management and/or the environmental field. The competencies for the position included:

Ability to analyze and understand complex ecosystem management, pertaining to biodiversity- both terrestrial and marine - at national, regional and global levels including in conflict and disaster situations, and propose solutions.

77. The competencies also required “ability to provide senior level advice on diverse issues and problems on biodiversity and GRASP within the ecosystem thematic priority of UNEP.” According to his Personnel Record, the Applicant holds a degree in History and Archaeology. He has served as deputy Director of Environmental Conventions at UNEP from 2000 to 2004 and during that time helped establish Great Apes Survival Pa

80. The responsibilities required of the CMS Executive Secretary were varied and detailed. He/she was required to:

provide leadership in this process in close consultation with the Parties of the Convention and to liaise with the respective secretariats of other related conventions, other UN agencies, non-governmental organizations and intergovernmental organisations. He/she has to supervise, direct and work cooperatively with the Deputy Executive Secretary and other officers of the Secretariat in carrying out the following responsibilities: 1. Operation, maintenance and further development of the Secretariat: a) assessing how best to structure and operate the Secretariat in order to fulfil its tasks; b) developing, in consultation with the United Nations Environmental Programme (UNEP)/United Nations Office at Nairobi (UNON) and Parties, proposals for appropriate decisions of the Conference of the Parties (COP), including on co-location and administrative integration of Agreement secretariats; c) recruiting professional and general service staff, Junior Professional Officers (JPOs) and interns; d) recruiting and directing term consultants as required and endorsed by the COP and/or the Standing Committee (StC); e) negotiating with the host Government and co-located UN entities to secure the most favourable conditions possible for the location, maintenance, technical equipment and organisational structuring of the Secretariat, including networking and task sharing with other UN entities; f) overseeing implementation of office systems and procedures, including for information management, filing, library, administrative and personnel management, for the effective functioning of the Secretariat; g) ensuring application of rules and regulations of the UN, UNON/UNEP, the host country as well as the conditions set out in the relevant headquarters and premises agreements; h) reporting on a case-by-case basis to UNEP/UNON, annually to the StC and triennially to the COP on the administration and implementation of the Convention. 2. Organisation and direction of the substantive work of the Secretariat: a) conceptualising, prioritising, planning and overseeing the work required from the Secretariat to prepare policy decisions to give effect to the provisions of the Convention and to achieve its objectives; b) developing for each meeting of the COP and the StC strategic objectives for the implementation and further development of the Convention and related Agreements. 3. Implementation of decisions of the COP and other bodies of the Convention: a) initiating and supervising the work required to achieve specific tasks, including development of and consultation on Agreements, Memoranda of Understanding (MOU), Action and Conservation Plans, the conduct of studies and surveys; b) negotiating with other entities, including intergovernmental,

governmental and non-governmental organisations as appropriate, to implement decisions and to facilitate the implementation of the Convention. 4. Preparation of meetings of the COP, the StC, the Scientific Committee (ScC) and Working Groups or Committees established under the Convention, and of negotiating conferences

country, in close consultation with UNEP/UNON, on a

various events initiated by UN entities in Bonn, such as the German Government, the City of Bonn and embassies of CMS Parties and non-Parties in Germany, Germany-based NGOs, and scientific institutions; p) contributing to seminars, workshops and other meetings on biodiversity-related subjects, including comparison and harmonisation of national and international legislation; q) information for the public; r) contributing to the CMS web site, brochures, the CMS Bulletin and other information material; s) producing and disseminating press communications and giving interviews to the press, radio and TV stations; t) reporting to other intergovernmental and non-governmental organisations in the field of environment, especially nature conservation and management, on activities of the Convention in related fields; u) making presentations, either separately or in conjunction with the other UN entities and affiliated organisations, to visitor groups in the UN premises in Bonn; v) contributing to exhibitions and public events related to the UN in Bonn, nature conservation and other environmental or international policy issues.

81. By contrast, the responsibilities required of the Special Advisor were more limited. The Vacancy Announcement provided:

Under the overall policy guidance of the Director, DEPI and in close coordination with the Deputy Director, the incumbent will perform the following duties: 1. Development and coordination of the Biodiversity Component of the Ecosystem Management Programme; Develop, design and advocate concepts in the implementation of the Programme; Enhance inter-linkages among stakeholders in the implementation of biodiversity related matters; Develop policy advisory services for various decision makers; Analyze the six thematic priority areas of UNEP and coordinate biodiversity projects in light of these areas. 2. Supervise a UNEP, UNESCO biodiversity related World Summit on Sustainable Development on the great apes dubbed Great Apes Survival Partnership (GRASP): Provide leadership and guidance to the conceptualization, formulation and completion of the GRASP project; Enhance the collaboration and partnership between the stakeholders; Promote integrated ecosystem strategies and analyze difficulties in the implementation of these strategies; Negotiate with stakeholders in the conservation initiatives and project planning process for endangered species. 3. Policy and Strategy: Formulate policies, strategies, actions and provide policy advice and recommendations to the Director; Formulate a biodiversity programme of work for DEPI; Design UNEP strategy for the biodiversity ecosystems and contribute to the on-going UNEP reform process; Analyze evidence and provide advice for UNEP's

strategic directions and interventions. 3. Contribute to UNEP's effort in building a science policy interface on biodiversity and ecosystem services. 4. Coordination and liaison: Hold substantive and organizational discussions in the area of biodiversity and GRASP issues; Cooperate with other divisions, clusters and regions within UNEP or provision of expert advice and support in the field of conflicts and disasters. 5. Resource mobilization: Develop and implement projects for funding in support of the GRASP activities; Develop relationships with potential funding sources; Analyze and monitor the trends in international development cooperation on the impacts of their decisions on UNEP's funding-strategies for biodiversity ecosystems activities. 6. Performance management of unit staff and resources: Oversee the management of administrative, budget and personnel operations

the request of staff. In the same period the applicant acted as replacement for the head of the medical branch.

85. In 1980, the applicant was compulsorily transferred to a new post. The applicant had objected to the proposed transfer to two other posts on the grounds that those posts did not comprise ~~or~~ related to the practice of medicine, internal medicine, cardiology or industrial medicine and were thus not related to her own medical specialty. It was intended that she be put in charge of a “medico-

newly created unit and 0() has 0() appointment of 0() Coordinator Women's

93. The Tribunal finds that the Applicant in the present case is in the same situation as applicants Turner and Rees in their respective cases. His concerns about an absence of the proper appellation of the position of Special Advisor; the lack of the precise duties to be encumbered by the Special Advisor; and the incompatibility of the vague duties of the Special Advisor with the duties that he

Was the Transfer Decision in the best interests of the Organization?

97. The discretion to reassign a staff member is not unfettered. Among other requirements, it must be exercised in the best interests of the Organization.¹⁵

98. The Applicant in his testimony expressed concerns about the requirements of the position of Special Adviser in Nairobi at the time of the proposed transfer, details regarding the proposed post were scant. There was no job description at the time of the offer and the Vacancy Announcement for the position was issued in October 2009, around nine and a half months after the Applicant had declined it. The Applicant perceived it to be a P3 or P4 role and claimed that it had “lashed-on” a role concerning GRASP. He submitted that it was a role for a scientist, not a policy person.

99. In his testimony, the Executive Director of UNEP explained that he first mentioned the transfer or reassignment to the Applicant in February 2009 and that the conversation he had with the Applicant was very cordial. He was looking for a senior policy advisor in Nairobi and added that the nature of biodiversity was also focused on policy and not only on technicality. He said that the position was not a technical one but advisory and that UNEP needed someone urgently.

100. The letter from the Executive Secretary informing the Applicant of the decision to reassign him to Nairobi echoes these “needs”. The Executive Director stated: “I am sure you will appreciate the significance of this appointment particularly in light of the 2010 Biodiversity targets, CBD COP 10 as well as the International Year of Biodiversity in 2010. Furthermore, ‘Ecosystem Management’, is one of the six cross-cutting thematic priorities of the UNEP Medium Term Strategy 2010-2013”.

101. Despite the apparent importance of the Special Advisor position in preparing for the events in 2010, the person finally appointed to that position only assumed the role on 4 April 2010. It is understandable that bureaucratic delays may stall the recruitment process but it is nonetheless surprising that a position

¹⁵ Ibid.

which was claimed to be highly significant for the 2010 year was only advertised on 18 December 2009 with a deadline running into 6 February 2010.

102. The Applicant had received strong performance reviews during his time at CMS and a "360 performance review" conducted in 2008 had rated him in the top 20% of staff members at his grade. ~~But~~U's concerns aside, there was nothing to suggest that he would not continue to perform strongly in that role. Moreover, at the time the Applicant was separated from service, there was no one lined up to replace him as Executive Secretary. Again it strikes the Tribunal as odd that even though the Applicant had, by all accounts, been performing well in the role of Executive Secretary, he was not considered for that position after his refusal to transfer to Nairobi even though no replacement had been found and the functions of that role were subsequently performed by an interim appointee acting as officer-in-charge who had been sent from Nairobi.

103. On the evidence before it, the Tribunal finds that the Transfer Decision was not in the best interests of the Organization.

Did the Respondent take into account all relevant considerations?

104. The former Administrative Tribunal stated with respect to a decision not to renew a fixed-term appointment, "[d]ue consideration of renewal of contract would appear to the Tribunal to require at least that the arguments for and against renewal should be objectively weighed and in the event of an adverse decision the reasons for such decision clearly set out¹⁶ with *Obdeijn*, UNAT rejected the view that reasons for an adverse decision must clearly set out (see above) but did not reject the requirement that arguments for and against renewal be objectively weighed. The requirement to weigh the reasons for and against a renewal decision is another way of expressing the requirement that the decision-maker take into account all relevant considerations.

105. Although the relevant decision-maker must comply with the requirement to take into account all relevant considerations, he or she retains broad discretion

¹⁶ Judgment No. 203 *Shagal* (1975), para. VIII, cited with approval in *Obdeijn* 2011-UNDT-032, para. 33.

in deciding whether or not to renew a fixed-term contract, and this discretion is wider than in the case of termination. It should also be emphasised that, as observed in *Riquelme* UNDT/2010/107 it “is not for the Tribunal to substitute its judgment for the reasonably open judgment of the responsible official or officials that has complied with the proprieties of decision-making”.

106. Factors which may be relevant to the renewal decision include, but are not limited to: whether the necessities of service require abolition of the post or reduction of the staff; whether the services of the staff member prove unsatisfactory; whether the staff member is, for reasons of health, incapacitated for further service; whether the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, para. 3, of the Charter; whether facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment; and in the interest of the Respondent which the Respondent failed to take into account was the Applicant’s continuing contribution in Bonn. The Applicant led evidence about the contributions he had made as CMS Executive Secretary to date and the continuing contributions he anticipated making. As noted above, the Applicant had received strong performance reviews during his time at CMS and was rated in the top 20% of staff members at his grade in 2008. The Respondent did not refute this evidence and there is no indication that the Applicant’s contribution, or any aspect of his performance, was considered as part of the Non-renewal Decision. Indeed, the

Tribunal has seen no evidence that anything but the Applicant's refusal to take up the position of Special Advisor in Nairobi was a factor in the Non-renewal Decision.

108. Whether or not the Applicant's performance was a consideration that should have been taken into account is not directly relevant to the validity of the Non-renewal Decision, though one would assume that, organizational constraints aside, a staff member's performance would ordinarily be a relevant factor in a contract renewal decision. The critical point is that a staff member's refusal to accept a transfer cannot be the only relevant factor as this would be arbitrary and would give the non-renewal decision a retaliatory character whether or not it was in fact a true retaliation. Such an outcome would be inconsistent with the Administration's duty to deal in good faith with staff members.

109. As held in *Sehgal*, consideration of contract renewal requires at least that the arguments for and against renewal be objectively weighed. There is no evidence that arguments for renewal (such as, for example, the Applicant's potential continuing contribution to the CMS Secretariat) were considered at all, let alone weighed against other factors.

110. The Tribunal concludes that the Respondent failed to consider all relevant factors in arriving at the Non-renewal Decision. Whether or not a person chooses to accept another position within the Organization may be a relevant consideration in deciding whether to renew a fixed-term appointment. However, for it to be the sole consideration would constitute an abuse of authority or arbitrariness because it has, subject to evidence to the contrary, little sRes3.8(n6(, li)5t7.8(-)6g, to)-ote3(m)(staff to)-4

member's refusal to comply with an order to transfer, whether or not this was in fact the determinant reason.

Personal concerns

111. The Applicant also expressed concerns of a personal nature in regard to security issues in Nairobi in view of the fact that the Kenyan Government had compulsorily acquired a property he held in Nairobi and was delaying the payment of compensation. He also had concerns about the education and schooling of his daughter. UNEP agreed ~~to~~ the date of the transfer and tried to assist the Applicant about the schooling of his daughter. Refusal of a transfer for exclusive personal reasons may not always be justifiable.

112. In the case of *Verdrager*,¹⁷ the applicant refused a transfer, first to Sri Lanka and then to Bangladesh, on the basis that the living conditions in those countries were not suitable for his family. The World Health Organization found his reasons inadequate and upon his repeated refusal to transfer, terminated his employment. The ILOAT held that the refusal on strictly personal grounds to take up posts to which the applicant was assigned by the competent authority constituted a grave breach of duty

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