

Case No.: UNDT/NBI/2009/01

Judgment No. UNDT/2009/088

Date: 16 December 2009

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-1(D) in the Implementation and Outreach Division of the Secretariat of the Convention on Biological Diversity (SCBD/the Secretariat) in Montreal, Canada. 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 Applicant.
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 2006 and he assumed duty on 31 January 2007.
4. By a memo dated 27 November 2007, the Chief of Human Resources Management Manag TJ ET Q q BT /F1 12 Tf 0 0 nT7cw 117.36 195i Manag TJ ET Q q BT /F1 12 M3i rt-22(

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).

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 and the decision not to extend the Applicant's appointment and that the 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.

retaliation dated 7 December 2007. The decision of the Secretary General was communicated to the Applicant in a letter dated 31 January 2008.

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 removal 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. Joge 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. 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 set out the events in Montreal, which led to the Applicant being reassigned to Nairobi and the events in Nairobi which culminated in the contested 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 (SIIO) 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 2007⁹. This latter memo was forwarded to the Secretary General. On 2 August 2007, the Applicant followed up his complaints with another memo¹⁰.

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.

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

23. The Tribunal notes that Counsel for the Respondent did not cross-examine the witness or make

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 factfinding 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 SCBD. 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 12 October 2008.

The above notwithstanding, the conflict in CBD is limited to Mr. Nogueira, [...]. Mr. Djoghla~~f~~ has already started to take steps to deal with the concerns of the other staff. However, reconciliation with Mr. Nogueira ~~ad~~ 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. Djoghla~~f~~. Operationally, he does not agree with Mr. Djoghla~~f~~'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~~ ~~escalate~~ the conflict and wait for Management's decision on his grievance¹⁹

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 where ~~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 ~~cont~~ational 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 blackma~~il~~ him. He adds that he never showed any form of disrespect or insubordination towards the E 15 never

[...] 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. Djoghla'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. Djoghla and complaining of the attempts to resolve his issues.
- d) 18 June 2007: Memorandum from Mr. Djoghla 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 that:³⁰

[...] the allegation by Mr. Djoghla 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 Report dated 17 July 2008.

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

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

The conclusion reached by the Panel is that ample evidence is available to substantiate the accusations—*inter alia*— harassment, abuse of authority, unfair treatment and violation of privacy by Mr. Djoghla~~f~~. However, some accusations against him have not been corroborated. On the other hand, the allegations by Mr. Djoghla~~f~~ 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 nonrenewal of the Applicant's appointment in Nairobi³¹. 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 renewal of his fixed term appointment in Nairobi.³⁴

45. The parameter 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 201, 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

Pending your reassignment, the ED would expect you to undertake

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

[...]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 had no expectation of Justice or redress: It clearly was a take-or-leave-it situation;

The only bright aspect of this reassignment was [M]'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 secti

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~~^{by} [...] (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~~^{the} ~~term~~^{term} of 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 ⁴⁵ to:

1. Collate, compile and prepare for publication a compendium of all activities with performance and verifiable indicators which UNEP has undertaken in the execution a

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

7. Develop appropriate proposal(s) for funding 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, the 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 failed⁴⁶ to:

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 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

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 ID, 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

Under the overall guidance of the Director of DELC and ~~the~~ ~~with~~ the support of the InterLinkages 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.

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 documents 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.

67. The Applicant replied by an email dated 29 May 2007 as follows:⁶⁴

Dear Bakary,

- 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 (InterLinkages 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 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.

74. The building blocks proposed were⁶²:

- 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 advice, 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 ~~rise~~ good governance at both national and international level.
- Develop strategic framework for national governance and institutional arrangements for environmental legislation and national

HRMS' (Human Resources Management Service) requisites for a D1 position⁶³

76. While conceding that the nei1

78. Notwithstanding his strong reservations the Applicant states that he 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 Office DELC⁶⁹. 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 propoion t1 13 0 1 3at0wc 54on [(e)3(f)-2(f)-22(or Q q BT /F1 12 Tf 0 0 0 rg 0.995T /F134333

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 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 the
Application to Court (under 107(h)-24(i)60-107(o)22(n)-60-y(h)-24(a)60-d (a)60- h

several Divisional Management Meetings as well as during a one day seminar held at the end of May 2007

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 ~~find~~ find 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 ng blocks.t(t)-2(ol)-5(ut)-

Kante wondered whether hie

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

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 put on hold 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? 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 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 provide⁸⁶ that

(a)

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 sntg 1F1 12 T 130(wo)-20(r)3rvi s e mgET C

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 a 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

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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 "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 this 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 disclosure 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 countercontends 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 Nairobi¹²⁴

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

136. It is well established that the Organisation attaches 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 the 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 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 Regulations¹²⁷ are to

[...] 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

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 ~~no~~, independent, transparent, professionalized, adequately

The European Court of Human Rights has ruled that the right to continue in professional practice is a civil right¹³⁵. 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

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 joins the Organisation to promote and encourage respect for human rights. Compliance with the international human rights norms and the interpretation

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 ~~not 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 All t2(f)12(e)()] TJ ET Q q BT /F1 12 Tf 0 0 0 rg 0.82(o

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 ¹⁴⁰ as D1

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, UNEP¹⁴¹. According to the Respondent, the Applicant had confessed that he had never heard about that programme, which they further submit¹⁴² was added proof that it would have been irresponsible to entrust the Applicant with such an important and prominent Programme as the Montevideo Programme.

154. The Applicant contests the statement of Respondent that he had never heard about the Montevideo Programme. He explains that he wa19(p)7 TJ (ut)-2R(m)36(e)oB85T

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

160. As pointed out by ILOAT:

The fundamental considerations which lead to the conclusions that an

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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 ~~truth~~ ~~accuracy~~ of the claims

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 ~~operated~~ by the management of UNEP in the interest of the Executive Secretary of the CBD, Mr. Ahmed Djoghlaf. 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 ~~to his~~ skills and experience.

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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

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)

JeanPelé Fomété, Registrar, UNDT, Nairobi