



Case No.: UNDT/GVA/2009/38

Judgment No.: UNDT/2009/003

Date: 22 July 2009

United Nations

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

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

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

6. The Respondent's principal contentions are:

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

2. The matter is not of urgency. The decision to reassign the Applicant is still valid and the Applicant could still assume the position in Nairobi on or before 26 July 2009. The Applicant

CONSIDERATIONS

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

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

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

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

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

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

12. According to Staff Regulation 4.5 (c), a FTA does not carry any expectancy of renewal or conversion to any other type of appointment. Staff Rule 9.4 provides that “a temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment”. Staff members who – like the Applicant – are serving under a FTA do not have a right to renewal, unless there are countervailing circumstances. According to the UN Administrative Tribunal’s jurisprudence

“countervailing circumstances may include (1) abuse of discretion in not extending the appointment, (2) an express promise by the administration that gives the staff member expectancy that his or her appointment will be extended. The Respondent’s exercise of his discretionary power in not extending a 200 series contract must not be tainted by forms of abuse of power such as violation of the principle ofb

1. The Applicant had no reasonable expectancy to renewal of subject appointment. In support of this claim he relies only on minutes of a meeting held on 15 April 2004. According to the clear wording of these minutes no express promise of the Administration can be found. It only states the views of the Applicant saying he is happy that he will culminate his career in CMS. No express or even implied word covers the whole period of time until the retirement of the Applicant, which was no less than some eight years ahead at that time.

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

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

CONCLUSION