



**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

NGENDA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Alexandre Tavadian, OSLA

Daniel Trup, OSLA

**Counsel for the Respondent:**

Camila Nkwenti F. Awa, UNEP

## **The Application and Procedural History**

1. The Applicant joined the Organization on 5 July 2009 at the P-5 level as a Senior Programme Officer in the Regional Office for Africa of the United Nations Environment Programme (UNEP). She was on a fixed-term appointment, with responsibility for Policy and Programme Coordination.
2. On 26 June 2012, the Parties entered into a Settlement and Release Agreement (Agreement) to “settle and resolve all matter arising out of or related to UNEP’s decision, for budgetary reasons, to not renew [the Applicant’s] contract when it expires on 4 July 2012.” As part of the Agreement, UNEP extended the Applicant’s appointment through to 31 December 2012 and agreed to make “good faith efforts [...] to help find [her] a suitable post, either within UNEP or outside UNEP [...] either on or before her contract expires”.
3. The Applicant’s appointment was subsequently extended through to 31 March 2013, but without a renewed or new settlement agreement.
4. On 21 March 2013, the Applicant filed the present Application with the United Nations Dispute Tribunal (UNDT) in Nairobi challenging UNEP’s decision, pursuant to article 2.1(c) of the UNDT Statute and article 7.4 of the Rules of Procedure, to “not comply with the spirit of the settlement agreement”.
5. The Respondent filed his Reply to the Application on 8 May 2013.
6. On 16 January 2014, the Tribunal issued Order No. 007 (NBI/2014), for purposes of case management, directing the Parties to make joint submissions on a number of issues.
7. On 31 January 2014, counsel for the Respondent filed a motion for extension of the deadline stipulated in Order No. 007 (NBI/2014). The Motion was filed by the Respondent on behalf of both Parties on grounds that there had been a change of counsel acting for the Respondent. The Parties requested that the deadline be extended to 17 February 2014.

8. On 3 February 2014, the Tribunal issued Order No. 022 (NBI/2014) granting the extension of time sought by the Parties.
9. On 6 February 2014, Counsel for the Respondent filed a Request to File a Separate and Independent Submission.
10. Counsel stated that as the Applicant's draft (as provided to the Respondent) "did not contain agreed statements of facts of legal issues," the Parties "agreed that [they should inform the Tribunal] should they not agree on the structure and content of the joint submission".
11. Counsel moved the Tribunal to allow the Parties to file separate and independent submissions given the "differences encountered in agreeing on the content of the Joint submission".
12. On 17 February 2014, the Tribunal issued Order No. 029 (NBI/2014) directing the Parties to attend a case management hearing to address the difficulties they were facing in complying with the requirements of Order No. 007 (NBI/2014).
13. At the hearing, the Parties informed the Tribunal that they were in a position to comply with the requirements of Order No. 007 (NBI/2014).
14. In response to the Presiding Judge's query, the Parties also submitted that they were willing to engage in further discussions to have this dispute resolved informally.
15. The Tribunal then issued Order No. 034 (NBI/2014) suspending the proceedings to allow the Parties the time to resolve the dispute *inter partes*. The Parties were directed to advise the Tribunal as to the status of their consultations by 8 April 2014.
16. On 7 April 2014, the Parties filed a joint submission informing the Tribunal that their attempts to resolve the dispute informally had failed. In the same submission, the Parties moved for the matter to be set down for hearing and for them to be given up to 2 May 2014 to comply with the requirements of Order No. 007 (NBI/2014).

17. On 7 April 2014, the Tribunal issued Order No. 070 (NBI/2014) re-listing this matter for hearing, and directed the Parties to file their respective list of witnesses with a summary of anticipated testimony.

18. On 5 May 2014, the Parties filed their joint submissions in compliance with paragraph 6 of Order No. 007 (NBI/2014).

19. On 13 May 2014, the Respondent filed a Motion to introduce additional evidence along with annexes (numbered as Annexes 10-15) containing the evidence he was seeking leave to adduce.

20. Counsel for the Applicant strongly objected to the introduction of Annex 15 which contained communication between counsel. Counsel for the Respondent, for her part, responded saying that she was “in the process of contacting the Tribunal in relation to this fact and with their advise (*sic*) will act accordingly.”

21. On 15 May 2014 the Tribunal issued Order No. 104 (NBI/2014) granting the Respondent’s motion for the submission of additional evidence contained in Annexes 10-14 and ordered that Annex 15 be expunged from the record as being in violation of art.15.7 of the Rules of Procedure of the Tribunal.

22. The Tribunal held a hearing in the case on 20 and 21 May 2014.

## **Facts**

23. The Applicant joined the United Nations Environmental Programme (UNEP) on 5 July 1999 at the P-5 level as Senior Programme Officer. She held a fixed-term appointment. The Applicant’s performance has always been satisfactory.

24. On 13 March 2012, the Regional Director informed the Applicant that her fixed-term appointment expiring on 4 July 2012 would not be renewed because of budgetary constraints.

25. On 3 April 2012, the Applicant received a letter confirming that her appointment would not be renewed.

26. On 5 April 2012, the Applicant's Second Reporting Officer, the Divisional Director, revealed that the non-renewal of her appointment was due to a change in priorities.

27. On 12 April 2012, the Applicant complained to the Executive Director, having received information leading her to believe that her post was being abolished for extraneous reasons.

28. On 3 May 2012, the Applicant attended a first mediation meeting with the Ombudsman and UNEP's Management. The mediation sessions resulted in a Settlement Agreement signed on 26 June 2012.

29. The settlement and release agreement provided for the extension of the Applicant's appointment through to 31 December 2012, during which time the Parties "agree[d] to make good faith efforts...to find her a suitable post, either with UNEP or outside UNEP, for [the Applicant] to transition either on or before her contract expires on 31 December 2012." The settlement agreement further provided that UNEP:

(a). [W]ill make the best efforts to inform [the Applicant] of vacancies at her level within UNEP as or before they are advertised, and to meet with [the Applicant] on a monthly basis to discuss the progress of her job search;

(b). [W]ill make the best efforts to consider [the Applicant] for a lateral move whenever a suitable position becomes vacant;

(c). [O]n an exceptional basis, [through the] Office for Operations, will provide, within 45 days from the date this Agreement comes into effect, [the Applicant] with a letter of reference, briefly detailing her functions, capabilities, and achievements, and explaining that the non-extension of her contract is due to budgetary reasons and the abolition of her post.

30. Since the Agreement,, the Applicant has applied for a number of positions - seven posts within UNEP and five posts outside UNEP. She was not selected for any of the positions she applied for.

31. The Applicant has not appealed her non-selection for alternative posts within UNEP.

32. Between 1 January 2013 and 31 March 2013, although the Settlement Agreement had expired and no extension was negotiated or entered into, UNEP granted a further extension pursuant to the Applicant's request for a special assignment. She was tasked with supporting the

preparation of, and follow up to, the Governing Council/ Global Ministers of Environment Forum and in particular the Major groups and stakeholders forum

### **Testimony of Applicant**

33. The Applicant called no witnesses but gave evidence on her own behalf. She stated under oath that on the expiry of her appointment with UNEP, she was expecting a two year extension. She sought legal advice and was even referred to mediation. She then signed the Settlement and Release Agreement (Agreement).

34. By signing the Agreement she understood that the Administration would take concrete steps to get her another position as she had always been rated as having performed satisfactorily. Part of the Agreement was that she would “actively apply for suitable positions both within UNEP and outside of UNEP”. To that end the Applicant explained she submitted 30 applications for jobs in UNEP, UNDT, UNCTAD and other organisations.

35. The Applicant also had meetings with officials of UNEP to discuss the progress being made to find her a suitable position. She informed Mr. Christian Bouvier, Director of Operations in UNEP, of a job opening in Addis Ababa and the latter told the Applicant he would look into it. She also contacted Mr. Bouvier for a lateral move as there were two vacant positions – Chief of the Terrestrial Ecosystems Unit in the Division for Environmental Policy Implementation and Senior Liaison Officer in Addis Ababa.

36. Mr. Bouvier promised to help. But nothing happened.

### **The Respondent’s Case**

37. The Respondent called the following witnesses: Mr. Michele Candotti, Chef de Cabinet, Office of the Executive Director UNEP; Mr. Christian Bouvier, Director Office of Operations, UNEP; Ms Fatoumata Keita-Ouane, UNEP/Geneva; Mr. Mounkaila Goumandakoye, Regional Director, UNEP Regional Office for Africa (UNEP/ROA) and Ms. Tomoko Nishimoto, Special Adviser to the Executive Director.

38. The witnesses testified that following the abolishment of the Applicant's post, and the signature of the Agreement between her and UNEP, good faith efforts were made to help her secure a position within or outside UNEP. In order to facilitate a solution to the dispute, the Applicant's contract was extended until March 2013 following its expiry in December 2012. Mr. Candotti had frequent meetings with Mr. Bouvier to monitor progress.

39. The option of a lateral transfer for the Applicant was part of the Agreement. Mr. Candotti had frequent meetings with Mr. Steiner, the Executive Director of UNEP, to explore that possibility. Hiring managers had to agree to a lateral transfer. The Executive Director has the ultimate authority on the decision but he consults with hiring managers for an assessment of the competence of the staff member. It is a matter of good practise although the final decision rests with the Executive Director. Mr. Candotti was aware of examples of successful lateral transfers.

40. Transfer of the Applicant to Addis Ababa was therefore subject to the views and approval of the hiring manager. On 24 August 2012, the Applicant informed Mr. Bouvier of the position in Addis Ababa. Mr. Bouvier wrote to Ms. Tomoko Nishimoto asking her to "[p]lease consider that [the Applicant] has applied for this position and based on the ombudsman-brokered agreement with her, I would urge that she be considered/shortlisted for interviews". The position was ultimately subject to a competitive recruitment process. In this connection, Mr. Mounkaila Goumandakoye, Regional Director, UNEP/ROA, added that the Applicant was not found suitable for the post in Addis Ababa.

41. According to Mr. Bouvier various steps were taken to find the Applicant a post within UNEP. When the Applicant sought the opinion of Mr. Bouvier about certain positions he contacted hiring managers to give the Application "special considerations".

Documentary evidence submitted to the Tribunal shows that on 10 October 2012 Mr. Bouvier wrote to Mr. Michael Liley, Director, Office of Human Resources, United Nations Development Programme (UNDP) asking him to give the Applicant due consideration for the positions that she had applied for. Mr. Bouvier told the court that he thought the Applicant appreciated the efforts being made by UNEP to find her a position. She even sent Mr. Bouvier a

thank you note. According to Mr. Bouvier, UNEP deployed significant effort to help the Applicant.

42. With regard to the position of Senior Programme Manager in the Division for Early Warning (DEWA) for which the Applicant applied the witness stated that the position required a candidate who would supervise the section on climatic assessment of the ecosystem, water system, climate, land biodiversity. As the Applicant had no scientific background, though she possessed partnership and organizational skills, she was not shortlisted. The Applicant was not shortlisted for the position of Head of Climate and Clean Air in September 2012. According to Mr. Goumandakoye that particular position required a scientific background which the Applicant did not possess. Her expertise in environment and coordination was not enough. In the same month he informed the Applicant of positions at the P5 and D1 grade in UNEP. In October 2012, he again informed her of job openings. In November 2012, the Applicant did not get the position of Programme Officer Early Warning as she did not attend the written test and interview. The responsibility of Mr. Bouvier was to support the Applicant and she had the responsibility to apply for any position. Mr. Bouvier added that as part of the agreement it was not his responsibility to write to the Applicant formally to inform her of job openings.

### **Deliberations**

43. The issues in this case are: (a) what exact interpretation should be ascribed to the Agreement in its paragraph 7; and (b) whether the Respondent complied with the terms of the Agreement as stipulated in paragraph 7.

### **Paragraph 7 of the Agreement**

44. Paragraph 7 of the Agreement reads:

The parties agree to make good faith efforts, during [the Applicant's] contract extension, to help find a suitable post, either within UNEP or outside of UNEP, for [the Applicant] to transition to either on or before her contract expires on 31



December 2012. In this regard [the Applicant] will actively apply for suitable positions both within UNEP and outside of UNEP. UNEP will make best efforts to inform [the Applicant] of vacancies at her level within UNEP as or before they are advertised, and to meet with [the Applicant] on a monthly basis to discuss the progress of her job search. UNEP will make best efforts to consider [the Applicant] for a lateral move whenever a suitable position becomes vacant. Further, on an exceptional basis, UNEP Office will provide, within 45 days from the date of this Agreement goes into effect, [the Applicant] with a letter of reference, briefly detailing her functions, capabilities, and achievements, and explaining that the non-extension of her contract is due to budgetary reasons and the abolition of her post.

***Responsibilities of the parties under the Agreement***

45. It was incumbent on the Applicant to “actively apply for suitable jobs both within UNEP and outside of UNEP”. The Respondent responsibilities were to: (a) help find the Applicant a suitable post either within or outside of UNEP; (b) inform the Applicant of vacancies at her level both within UNEP and outside of UNEP; (c) meet with the Applicant to monitor progress; (d) endeavour to consider the Applicant for a lateral move; and (e) provide the Applicant with a reference letter.

46. The Tribunal is satisfied on the state of the evidence that while the Applicant applied for several positions she was unfortunately either not shortlisted or not found suitable. The Applicant cannot hold the Respondent responsible for the fact that her applications were not successful.

47. The evidence also shows that the Respondent tried to help the Applicant secure a job within UNEP or outside of UNEP by writing to officials of different organizations to consider her applications. Although the Applicant did not need the Agreement to be made aware of vacancies within the Organization, the evidence shows that she was informed of job openings by Mr. Bouvier on more than one occasion. It is abundantly clear to the Tribunal that both parties were fully aware of the situation facing the Applicant as time went by. Mr. Bouvier also provided the Applicant with a reference letter.

48. If the Applicant was labouring under the belief that pursuant to the Agreement, the Respondent was giving her a guarantee of a new post or that she would be laterally transitioned, that belief was misplaced.

49. Nothing in the Agreement or any evidence before the Tribunal suggests that the Respondent was in a position to simply “give” the Applicant another position within UNEP. Positions in the Organizations are not filled or presumed to be filled according to the will of managers but are subject to the Staff Rules and Regulations. The Applicant was not justified in harbouring a legitimate expectation that the Respondent would bypass existing rules and regulations to offer her a post.

50. Whether the Applicant was well advised to sign the Agreement or not is a matter that is not within the province of the Tribunal to determine. However the Tribunal cannot help noting that Clause 7 of the Agreement might have created the, albeit wrong, impression, that the Applicant would be offered a job by the Respondent.

### **Conclusion**

51. The Application is therefore dismissed in its entirety.

*(signed)*

Judge Vinod Boolell

Dated this 18<sup>th</sup> day of December 2014

Entered in the Register on this 18<sup>th</sup> day of December 2014

*(signed)*

Abena Kwakye-Berko, Registrar, Nairobi