



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:

Arnold Kreilhuber, UNEP

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, bias 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, *inter alia*, 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 in 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.

Facts

Employment history and relevant administrative decisions

7. The Applicant first joined UNEP in 2000 as Deputy Director of the Division of Environmental Conventions. He was stationed in Nairobi until 2004 when he accepted an appointment as Acting Executive Secretary at the Executive Office of CMS. The CMS office is located in Bonn, Germany, so the Applicant relocated with his family to that city.

8. In 2005, the Applicant successfully applied for the position of Executive Secretary of CMS and was appointed to that function on a fixed-term two-year contract. On 10 July 2007, the Applicant signed a further fixed-term two-year contract for the position of Executive Secretary effective 26 July 2007.

9. On 24 February 2009, the Executive Director **verbally** (emphasis added) offered the Applicant the position of Special Advisor on Biodiversity within the Division of Environmental Policy Implementation (DEPI) based in Nairobi. At the time of the offer, the Applicant was approximately two and a half years short of the mandatory retirement age of 62.

10. By fax dated 26 February 2009, the Applicant wrote to the Executive Director declining the offer to take up the position in Nairobi. He cited personal and professional reasons for declining the offer, including: concerns about disruption to his daughter's education caused by the relocation; concerns about

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** (emphasis added) that the Executive Director had decided to transfer him compulsorily to Nairobi, effective 15 July 2009.

13. By email dated 28 March 2009, the Applicant responded to the then Chef-de-Cabinet requesting that the decision to transfer him to Nairobi be reconsidered and that the parties negotiate on the issue.

14. By memorandum dated 1 April 2009, the Executive Director wrote to the Applicant informing him of his decision to reassign him to Nairobi (Transfer Decision). The memorandum relevantly stated:

Further to our recent discussions and your conversation with Mr. Paul Akiwumi, I am pleased to inform you of my decision to reassign you to Nairobi as Special Advisor on Biodiversity within the Division of Environmental Policy Implementation (DEPI).

15. On 5 June 2009, the Applicant submitted to the Secretary-General a request for review of the Transfer Decision.

16. On 12 June 2009, the Applicant confirmed to the Chief of the Recruitment and Classification Section at HRMS in UNON during a telephone conversation

(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 regret to inform you that UNEP is not in a position to extend your current appointment beyond its expiration on 26 July 2009. I have therefore requested HRMS/UNON to take the necessary steps to start facilitating your separation process from service with UNEP.

18. On 15 July 2009, the Applicant requested a management evaluation of the Non-renewal Decision. At the same time, he advised the Secretary-General that the request for review of the Transfer Decision was now effectively moot and was therefore formally withdrawn, whilst making clear that he considered that the Non-renewal Decision was the direct consequence of the fact that he had refused to accept the Transfer Decision.

19. Also on 15 July 2009, the Applicant filed with the United Nations Dispute Tribunal an application for suspension of action requesting the suspension of the implementation of the Non-renewal Decision. The application for suspension of action was subsequently refused by the Tribunal on 22 July 2009.

20. On 25 August 2009, the Secretary-General issued his decision on the management evaluation and affirmed that the Non-renewal Decision was a reasonable exercise of discretion.

Involvement of the German Government

21. The evidence shows a history of tension between the Applicant and the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (German Environment Ministry or BMU).

22. By letter dated 17 April 2008, the German Environment Ministry wrote to the Applicant raising a number of concerns. These included: dissatisfaction and disagreement with some of the contents of the report of the 32nd meeting of the CMS Standing Committee (which content the Ministry requested be amended); concerns about staffing and the administration in the CMS Secretariat; and concerns about the future direction of CMS and the road-map to COP-9.

23. By letter dated 2 July 2008, received by UNEP on 22 July 2008, the State Secretary at the German Environment Ministry (i.e. the official directly below the German Minister for the Environment) wrote to the Executive Director raising a number of concerns about the Applicant and his management of the CMS Secretariat.

24. The Respondent claimed that the letter was confidential. In this regard, a memorandum from Mr. Akiwumi attaching this letter stated: “I wish to reiterate the confidential and privileged nature of this communication and hope that the UNDT will treat it with due consideration”. It is for the court to determine whether a document or other piece of information is to be adjudged confidential pursuant to art. 18.4 of its Rules of Procedure. A party cannot expect the Tribunal to rule that a document is to be treated as confidential by a mere request. Concrete facts and arguments need to be presented to the Tribunal to enable it to evaluate whether a document or other piece of information should be confidential. The letter in question contained no designation of confidentiality, nor did the Respondent present evidence or argumentation to support such a designation. The Tribunal is therefore not satisfied that the letter is confidential.

25. The letter stated that the matter in issue “jeopardises the accomplishment of [their] common goals” and identifies the Applicant as singularly responsible, rendering him the “only...focal point” between the BMU and the Convention. In the letter it is also alleged that the Applicant had personally embarked upon an “extensive campaign in which he accused Germany/the BMU...of breaking various UN rules...and of violating rules of protocol”. It stated that the (personal) “behaviour of the Executive Secretary [is] absolutely unacceptable” to Germany

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. Maxwell Gomera who at the time was the Special Assistant to the Executive Director. The note refers to the CMS in two paragraphs. The paragraph relevant to this matter stating:

CMS management: Flasbarth referred to the ongoing concerns re CMS and the host country. ED acknowledged the letter from the BMU [the Ministry]; mentioned that he would ask [the Applicant] to set up a meeting with them (BMU) in order to discuss the issues and clear out any misunderstandings ahead of the COP in Rome.

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. Whether the Respondent's decision not to renew the Applicant's appointment was vitiated either by extraneous motivations or some other factor.

Applicant's submissions

29. The Applicant submits that the Non-renewal Decision was not taken in good faith and relies on the following arguments to support this contention:
- a. The political pressure exerted by the German Government and associated embarrassment prompted the Executive Director to: (i) compel him to transfer from Bonn to Nairobi; and (ii) not renew his appointment as Executive Secretary of CMS following his refusal to transfer to Nairobi.
 - b. The offer of the position of Special Advisor was a "subterfuge" to remove him from Bonn as the post of Special Advisor was never intended to exist. There was no "post" of Special Advisor available when the Executive Director notified him of the compulsory transfer and, as such, the decision was *ultra vires* as it fell outside the terms of section 2.4 of ST/AI/2006/3 (Staff selection system).
 - c. His proposed transfer from Bonn to Nairobi was not in the interests of the Organization.
 - d. The Executive Director failed to engage in meaningful consultation with him in relation to the Transfer Decision.

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 needs and was not a “subterfuge” to remove the Applicant from Bonn.

e. The proposed transfer of the Applicant from Bonn to Nairobi was in the interests of the Organization.

f. The Executive Director consulted with the Applicant in relation to the proposed transfer during meetings and in writing on 24 February 2009, 26 February 2009, and 26 March 2009.

Considerations

Did the Applicant have a legitimate expectation that his contract would be renewed?

33. Entering into fixed-term contracts with individuals is a longstanding practice of the Organization. A fixed-term contract is usually granted for a period of between one and five years and may be renewed multiple times. Like most of these contracts, the express terms of the Applicant’s fixed-term contract for the position of Executive Secretary of CMS that he signed on 21 August 2007, explicitly stated that there would be no automatic right of renewal. Sec. 3 relevantly provided that “[a]n intermediate-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations”. The terms of the contract reflected former staff rule 104.12(b)(ii), which governed the Applicant’s fixed-term appointment at the time. That rule provided that a “fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”.¹

34. In light of the Staff Rules and the express terms of the Applicant’s contract, the Respondent submits that a fixed-term contract carries no expectancy of renewal. This is not totally correct and is subject to some qualifications. In an

¹ The Respondent cites different provisions, namely staff regulation 4.5(c) and staff rule 9.4. These are the new rules which would not have applied at the time of the Non-renewal Decision. However, they more or less reproduce the former rule.

Advisory Opinion, the International Court of Justice (ICJ), which is the principal judicial organ of the United Nations (Article 92 of the Charter), ruled:²

In the practice of UNESCO - as well as in the practice of the United Nations and of Specialized agencies - fixed term contracts are not like an ordinary fixed-term contract between a private employer and a private employee. At a crucial period a large number of employees of UNESCO held fixed-term contracts. A similar situation seems to have obtained in the United Nations and in the Specialized Agencies. There is no need here to go into the reasons which have prompted that form of contracts. *The fact is that there has developed in this matter a body of practice to the effect that holders of fixed-term contracts, although not assimilated to holders of permanent or indeterminate contracts, have often been treated as entitled to be considered for continued employment, consistently with the requirements and the general good of the Organization in a manner transcending the strict wording of the contract.* [Emphasis added]

35. After referring to the practices in force at UNESCO at the time, the ICJ added:³

The practice as here surveyed is a relevant factor in the interpretation of the contracts in question. It lends force to the view that there may be circumstances in which the non-renewal of a fixed-term contract provides a legitimate ground for complaint. The practice referred to above should serve as a warning against an interpretation of the contract of employment which, by considering exclusively the literal meaning of its provision relating to duration, would mean that on the expiry of the fixed period a fixed-term contract cannot be relied upon for the purpose of impugning a refusal to renew it. Such an interpretation, moreover, would fail to take into account the nature of renewal as understood in the Staff Regulations to which the contract expressly refers.

36. The ICJ emphasised that “the Court cannot admit that...it is possible to attach exclusive importance to the letter of the contracts in question and, in particular, to the provision according to which, in case of non-renewal, these contracts expire automatically on the date fixed”.⁴

² Advisory Opinion of the International Court of Justice on Judgments of the Administrative Tribunal of the International Labour Organization (ILO), 23 October 1956. p. 91.

³ Ibid, p. 92.

⁴ Ibid, p. 90.

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 (*Kasmani* 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 implied from circumstances or from what is held out to an individual. Limiting the renewal of a fixed-term contract to an express promise could impede the proper working of the Organization and result in unjust decisions for a staff member. In this connection, the Tribunal refers to the following extract from the case of *Perez De Castillo*, ILOAT Judgment 675 (1985):

Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life

⁵ *Ahmed* 2011-UNAT-153.

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 organisation that caused the Tribunal to adopt the principle that a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly.

41. While the decision of UNAT, that in the absence of an express promise a fixed-term contract comes to an automatic end, is of great persuasive authority, the decision of the ICJ on the issue of a fixed-term contract is of equal persuasive authority and cannot lightly be brushed aside. The law enunciated by UNAT should be read together with that of the ICJ. This Tribunal considers that, given the special nature of fixed-term contracts within the Organization and the comments of the ICJ, an expectation of contract renewal may also be based on the surrounding circumstances, including the practices of the Organization. The Tribunal will therefore consider the circumstances surrounding the non-renewal of the contract of the Applicant in the present matter and not limit itself to a conclusion based on the absence or otherwise of an express promise.

Express promise

42. The Applicant relies on two documents to support his contention that a promise that he would be enabled to stay in Bonn until his retirement in 2012 was made to him when he agreed to transfer to Bonn from Nairobi in 2004.

43. First, the Applicant refers to minutes of a meeting held on 15 April 2004 between him and the then Executive Director of UNEP. The minutes were signed by the Applicant and the then Deputy Executive Director on 10 June 2004. The minutes state that the "ED would like to make [the Applicant] Officer in Charge

of CMS” and the “ED will give three or four months as OIC (extendable until ED makes final selection for the post). During the time, [the Applicant] can demonstrate his ability to handle the position”. Further down, the minutes note that “[the Applicant] said that he would give it a try and that he is happy that he will culminate his career in CMS”. In a handwritten note in the margin of the minutes, the Applicant expresses concerns about his job security in UNEP and states that he can “probably accept being OIC until the Galaxy process is complete but...will need a guarantee, in writing, of two years contract extension irrespective of the outcome”.

44. Second, the Applicant relies on an email from the former Deputy Director of UNEP to the Applicant dated 17 August 2009 in which the former Director stated “the then [Executive Director] of UNEP and I had decided in 2005 after your success in the global competition that you will/should be enabled to stay in Bonn at the head of CMS Secretariat until your retirement in 2012”. However, the former Deputy Director did not testify in relation to this email. In the absence of any evidence to corroborate what was said in the email, the Tribunal is not willing to rely on it.

45. The statement in the minutes that the Applicant would “culminate his career” in the CMS is an indication, irrespective of the duration of the renewal (a matter that is discussed below) that a promise of renewal was held out to the Applicant. The Tribunal does not agree with the findings of the Management Evaluation Unit that the comment that the Applicant would “culminate his career” in CMS indicated his “expectation to reach the *peak* of his career at CMS in Bonn”. Rather, it implies that he would end his career in Bonn at retirement.

46. However, an express promise would exist where there is a clear, concrete and positive form of conduct, either orally or in writing, that specifically spells out the promise and its nature. There was no such promise here.

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. *It may 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 abolished 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).

required by Article 101, paragraph 3, of the Charter. This list is not exhaustive but provides some guidance on the types of factors that would constitute valid reasons for not renewing a fixed-term contract where the practice of the Organization had created an expectation of renewal.

The Duration of the renewal

50. Former staff rule 104.1 on appointment did not embody any precision on the length of an appointment. In the absence of any guidance in that former staff rule, the Tribunal considers that the practice of the Organization vis-à-vis the length of an appointment should be resorted to because “[t]he practice of the organization may...in certain circumstances become part of the conditions of employment”.⁷ However the “integration of practice into conditions of employment must be...limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation, as was recognized by the International Court of Justice in its Advisory Opinion on Judgments of the Administrative Tribunal of the ILO (ICJ Reports 1956), p.91.”⁸ For most of his nine-year career with the United Nations, the Applicant’s fixed-term appointment was renewed for terms of two years. The exception to this was a one-year fixed-term appointment in 2004 in his fifth year as Deputy Director of the Division of Environmental Conventions at UNEP before he moved to Bonn. Based on this consistent past practice, the Tribunal finds that it was an implied term of his conditions of employment that the duration of the renewal would be two years.

51. In conclusion, the Tribunal holds that the Applicant had a legitimate expectation that his fixed-term appointment would be renewed for a further two-year term.

⁷ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, (Cambridge University Press, 1994), p. 290.

⁸ *Ibid.*

Did the Respondent consider extraneous (irrelevant) factors in the Non-renewal Decision?

52. The jurisprudence of the former Administrative Tribunal has established that the “exercise of...discretionary power in not extending a...[fixed-term] contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors”.⁹ These principles have been followed by both the Tribunal and UNAT.

53. The requirements that an administrative decision-maker consider all relevant factors and disregard irrelevant ones are foundational to administrative law.¹⁰ The Tribunal will consider whether the Respondent complied with these requirements in the present case.

54. Whilst the Executive Director cited “operational needs” for the Transfer Decision, the reasons (if any) for the Non-renewal Decision are difficult to make out. The Respondent’s Reply does not state the reason(s) for the Non-renewal Decision. In the “Respondent’s Comments on Applicant’s Submission” dated 20 August 2010, the Respondent submits that “he has not given actual reasons for the non-renewal other than the contractual expiration date of the Applicant’s fixed-term appointment and that he is not bound to do so” (para. 15). In support of this contention, the Respondent refers to the Tribunal’s decision in *Larkin* UNDT/2010/108 where the Tribunal held that the Administration is not bound to provide justification for not extending a fixed-term appointment. In the same submission, the Respondent states “nor was the Applicant’s refusal to transfer to Nairobi a reason for the [non-renewal]” (para. 16) and, at para. 22:

[T]he Applicant does not provide any evidence in his latest submission, or any previous submission for that matter, that...the non-renewal of his appointment as Executive Secretary of CMS was based on his refusal to accept to move to Nairobi.

⁹ Judgment No. 885, *Handelsman* (1998).

¹⁰ *Ibid.*

55. On p. 7 of his Final Submission, perhaps as a consequence of evolving jurisprudence on the requirement to provide reasons for a decision, the Respondent states that “[t]he Applicant’s refusal to accept the position constituted a *valid reason* for the Organization not to renew his appointment as Executive Secretary, CMS, in Bonn” (emphasis added). Yet, on the same page, the Respondent states that “[w]hile it is true that there is a direct link between the Applicant’s refusal to be transferred to Nairobi...and the [Non-renewal Decision], this only shows a sequence of events in terms of time, not in terms of causes.”

56. It is difficult for the Tribunal to know what to make of these apparently inconsistent submissions. On the one hand, the Respondent appears to be denying that the Applicant’s refusal to relocate to Nairobi was a reason for the Non-renewal Decision (and goes so far as to say that the Applicant has no evidence that it was) yet on the other hand claims that the Applicant’s refusal *was* a “valid reason” for the decision.

57. The Tribunal will therefore consider what the position is on the assumption (a) that no reasons were provided for the Non-Renewal Decision and (b) that the reason for the Non-Renewal Decision was the Applicant’s refusal to accept the position of Special Adviser. However, the fact of these inconsistencies makes it difficult for the Tribunal to give real weight to the Respondent’s submissions on this point.

Absence of reasons

58. According to *Obdejin* 2012-UNAT-201, the Administration is obliged to state the reasons for a decision that creates adverse effects on a staff member, including a decision not to renew a fixed-term appointment. However, it also said that despite the obligation to provide reasons, an administrative decision not to renew a fixed-term appointment must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal. Instead, a refusal to disclose reasons for the contested decision shifts the burden of proof so that it is for the Administration (Respondent), rather than the Applicant, to

prove that its decision was neither arbitrary nor tainted by improper motives.¹¹ 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 32nd 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 breaking various UN rules...and of violating rules of protocol”. It further provided:

The latest incident, [the Applicant’s] mail of 23 April 2008, which you have also seen, shows the behaviour of the Executive Secretary to be absolutely unacceptable.

...

You will appreciate 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 at least among the Parties to the Convention.

I am turning to you, Executive Director, in order to avert permanent damage to the Convention on the Conservation of Migratory Species of Wild Animals.

...

It is our wish to find a solution to this problem as quickly as possible which is satisfactory and constructive for all concerned.

60. By letter dated 13 August 2008, the Executive Director wrote to the Applicant referring to the letter from BMU and the allegations contained therein. The Executive Director described the letter from BMU as raising “serious

¹¹ *Obdejin* 2012-UNAT-201

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 *Gaskins* 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

Director requested a meeting with the Applicant on 4 September 2008 at UNEP Headquarters in Nairobi. The Applicant was not able to fly to Nairobi for the meeting due to health reasons.

64. On 17 February 2010, the Tribunal requested that the Respondent provide a copy of the response by the Executive Director to the 2 July 2008 letter. UNEP replied to that request stating that after discussions between the Federal Environment Ministry and the Executive Director on 22 August 2008 at UNEP Headquarters, “the necessity for a direct response in writing...became obsolete”. At the hearing of this case, the Executive Director testified that UNEP and the Federal Environment Ministry had agreed to “de-escalate” the matter without a formal response. The proposal was for a meeting to take place between the Applicant, possibly other CMS members, and the Federal Environment Ministry where issues could be addressed openly. The Executive Director testified that if no resolution could be found, he had agreed to respond formally to Germany’s letter. No meeting ever took place between the Applicant and the Federal Environment Ministry, nor was an official response provided to Germany by UNEP.

65. That no formal response was provided to a letter raising serious allegations by a Member State about a UNEP staff member strikes the Tribunal as odd. Even if the matter was resolved informally as the Respondent claims, the Tribunal has seen no evidence that the Applicant had any meaningful involvement in this process.

66. In addition to the letters, the Tribunal had the benefit of the testimony of Mr. Müller-Helmbrecht, former Executive Secretary of the CMS, who performed a small amount of work for the Secretariat in 2008. Mr. Müller-Helmbrecht provided evidence that BMU knew of the Applicant’s departure from Bonn before the Conference of the Parties in 2008. In a memorandum dated 18 May 2010, Mr. Müller-Helmbrecht claimed that he had an informal meeting with a staff member of BMU in Bonn on 10 September 2008. He claimed that the staff member spoke exclusively about the Ministry’s concerns about the Applicant relating to

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; the Applicant’s strong performance reviews as Executive Secretary of the CMS; and the absence of an immediate replacement.

71. The Tribunal concludes on the issue of absence of reasons that the burden resting on the Respondent to establish on a preponderance of probabilities that he was not motivated by extraneous factors in not renewing the contract of the Applicant was not met. Given the tense relationship between BMU and the Applicant, the Respondent should have offered reasons for the Non-renewal Decision in order to allay any concerns about improper motivation.

Reason for the non-renewal: Applicant’s refusal to move to Nairobi

72. Although the Applicant did not press further with challenging the Transfer Decision, the Executive Director did mention to the Applicant that the reason for the Non-renewal Decision was his refusal to transfer. The issue is therefore whether the transfer was validly made. Had the Transfer Decision not been validly made, the Applicant’s refusal to comply with it would have been justified. The sub-questions to the issue of the validity of the Transfer Decision are:

- a. Was the position of Special Advisor commensurate with the position of Executive Secretary of the CMS?
- b. Was the Applicant consulted in good faith prior to the Transfer Decision?
- c. Was the proposed transfer of the Applicant in the best interests of the Organization?

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

73. There is no legal requirement for a staff member to consent to reassignment. However, the staff member must be consulted in good faith about the proposed reassignment, and the position to which the staff member is to be reassigned must correspond with his or her grade and be commensurate with his or her skills, qualifications and experience (*Rees* 2012-UNAT-266). In *Rees*, UNAT held:

[...]An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.

74. The Applicant submits that the position of Special Advisor was a “sham” and was created solely for the purpose of getting him out of Bonn. He described it as a phantom post. He added that the post he was being offered in Nairobi was one that required a biodiversity scientist essentially and that he was neither a biologist nor a scientist but rather a policy director. He could not therefore be an advisor on biodiversity. Further, the Applicant noted that the position did not officially exist at the time it was offered to him.

75. The Applicant observes that despite the fact that the Executive Director claimed that the position needed to be filled “urgently”, the post of Special Adviser was not advertised in *Galaxy* until 8 December 2009, some nine and a half months after the Applicant refused to accept the position. The Executive Director had told him that there was no job description for the post. The Vacancy Announcement for the position of Special Adviser was posted only after the Applicant's application was filed with the Tribunal.

76. When the Vacancy Announcement was eventually posted it required a person with an advanced degree in natural resources management, environmental sciences or a related area. It required fifteen years of progressively responsible

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 Partnership (“GRASP”). From 2004 he was the Executive Secretary of CMS until his separation.

78. The Respondent argues that the position of Special Advisor was created due to “organizational needs”, namely the “upcoming International Year of Biodiversity and the preparation of a new biennial work programme in the field of biodiversity as well as the implementation of UNEP’s Medium Term Strategy (2010 - 2013)”. According to the Respondent’s submissions, the Executive Director chose to reassign the Applicant given his “professional profile and long standing experience in biodiversity matters”.

79. The Applicant was selected as Executive Secretary of CMS in 2005 having served in an acting capacity since 2004 in Bonn. The Vacancy Announcement for the position was issued on 20 May 2004 with the deadline running into 19 July 2004. According to that Vacancy Announcement, the Executive Secretary is the:

chief executive officer of the Secretariat established in accordance with Article IX of the Convention. Successful implementation and further development of the Convention depend upon the willingness and ability of the Parties to fulfil their commitments and of the Secretariat to respond effectively to requests of the COP and subsidiary bodies of the Convention in addition to carrying out the functions articulated in Articles IX (4), VII (3), X (3), XI (3)”.

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 for Agreements under the Convention, and of technical workshops: a) securing and negotiating, in consultation with UNEP, arrangements with host Governments; b) negotiating with other entities, including intergovernmental and non-governmental organisations for the planning and organisation of supporting events and/or technical, logistical or other contributions to meetings; c) preparing, revising, distributing, consulting and approving, documentation for the agenda items of the meetings; d) preparing documentation for and organising meetings for the development and negotiation of Agreements, MOUs, Action and Conservation Plans under the Convention; e) advising on legal and institutional questions of the elaboration and submission of proposals for the listing of species on the CMS Appendices; f) making recommendations and assisting in the nomination of chairpersons for meetings in accordance with the respective Rules of Procedure; g) assisting and supporting chairpersons and bureaux of meetings in the discharge of their functions during meetings; h) advising on procedural rules and requirements in the conduct of such meetings; i) advising on any other legal and procedural matters in the discussion of substantial items of the meetings; j) facilitating negotiations among Parties, regional groups and observers during meetings; k) coordinating and supervising the secretariat's work and organisational task of others during the meetings; l) securing and managing funding to assist participation of developing countries; m) follow-up work after the meetings (e.g. accounts, proceedings). 5. Communicate with UNEP headquarters on administrative, financial and personnel matters and with the Chairmen of the Standing Committee and Scientific Council on substantive matters related to these bodies; and: a) consulting with their representatives on matters being developed or negotiated under the Convention; b) supporting consultations among Parties on issues prior to formal inter-governmental meetings; c) advising on arrangements being made by the Secretariat for carrying out its work programme; d) recommending action by the Parties to implement, or assist in the better implementation of the Convention and related Agreements, MOUs, Action and Conservation Plans, notably attracting relevant institutions of developed countries to establish and maintain partnerships with developing countries for certain purposes related to the implementation of the relevant agreements and COP resolutions; e) maintaining communication with Officers of the Convention bodies, facilitating communication and cooperation among them and assisting them in the discharge of their functions; f) negotiating with the authorities of the host

country, in close consultation with UNEP/UNON, on a headquarters agreement, and on any subsequent questions on the legal status of the Secretariat and its staff members, administrative arrangements for the location of the Secretariat and the co-location of Agreement secretariats; 6. Liaison with non-Parties to encourage them to become Parties to the Convention and relevant Agreements under the Convention; 7. Arranging meetings with high-ranking representatives of non-Party countries to encourage them to take action towards membership of the Convention and related Agreements and MOUs, a) liaising with reputable non-governmental organisations specialised, inter alia, in the conservation and management of migratory species, for the same purpose; b) advising relevant Ministries to develop proposals for their countries ratification/accession to the Convention; c) advising relevant Ministries on the transfer into national legislation of and programming for the implementation of the Convention upon their accession; d) management of financial resources made available for the administration of the Convention, including fund raising for special purposes; e) supervising, and contributing to, the preparation and submission to the COP, after having consulted UNEP/UNON and the CMS StC, of the budget for the administration and implementation on international levels of the Convention, taking account of the respective resolutions and Terms of Reference (TOR) for the administration of the Trust Fund; f) acting as approving officer for decisions with financial outlay; g) securing/managing/reporting on additional voluntary funding, in keeping with the financial rules and regulations of the UN, other instructions and guidelines from UNEP/UNON and the bodies of the Convention, for carrying out work programme issues of the Secretariat and other activities related to the Convention as identified by the Convention's bodies; h) reporting to the StC and the COP on financing the administration and other matters regarding the implementation of the Convention; i) consulting with the Heads of other UN entities and affiliated organisations on the common administration, maintenance and cost sharing of the common UN premises in Bonn; j) liaison with UNEP, other UN entities, biological diversity-related conventions and intergovernmental and non-governmental organisations to further the implementation of the Convention and to seek synergies; k) liaising with UNEP to identify fields of common action in the respective work programmes to gain synergies; l) developing, concluding and implementing memoranda of cooperation with other intergovernmental and non-governmental organisations specialised in the field of nature conservation and management, biological diversity and environment; m) Representation of the Convention; n) representing the Convention at important meetings of UNEP, other UN organisations, other biodiversity-related conventions and organisations; o) representing the Convention at

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 intervention. 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 of the Unit; Contribute and/or oversee the preparation of reports for presentation to inter-governmental bodies such as the Committee of Permanent Representatives, the General Assembly and other policy-making organs. 7. Perform other duties as may be assigned.

82. A comparative analysis of the responsibilities of the position of Executive Secretary of CMS and those of the Special Adviser in the respective Vacancy Announcements establishes clearly that the two posts were poles apart. The Applicant was being moved to a job where he would not have been exercising his skills and experience and where the responsibilities and duties would have been greatly reduced.

83. In the case of *Turner*,¹² the Administration transferred the applicant, a doctor, who practised in a specialised field, to a position of an administrative nature which was manifestly inappropriate to her training and previous record. The European Court of Justice held that this was arbitrary and unlawful.

84. The facts of *Turner* are as follows. The applicant entered the service of the European Atomic Energy Community in 1968 and was later appointed to the Commission's medical branch. She was assigned to the department of preventive medicine where her main functions were carrying out examinations on recruitment and medical check-ups, checking reports on medical examinations, vaccinations, the sick-bay, medical supervision of the crèche and consultations at

¹² Court of Justice of the European Communities, Cases 59 & 129/80 [1981] ECR p.1883.

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 duties 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-social unit” in the medical branch for Brussels staff.

86. The applicant challenged the decision claiming that she was appointed against her will to a post completely unrelated to her training and specialized field which, judging by the particulars contained in the vacancy notice, was open to persons who did not have a full medical training. She further complained about the unjustified nature of the statement of reasons on which the decision to transfer her was based in so far as it purported to be based on the fact that the applicant did not “adapt herself to the new duties assigned to her” previously.

87. The European Court of Justice found in the light of the evidence, that it appeared that in defining the “medico-social” unit the administration had never gone further than using general formulae. Apart from the fact that a number of subsidiary duties were listed, the list of duties submitted to the applicant contained no specific indication of the scope of the concept of “social medicine”. The European Court of Justice also found that after the applicant was removed from the medical branch the administration was not interested in instituting a “medico-social” unit. The administration had no specific knowledge of the work involved after deciding to make the applicant responsible for instituting a “medico-social” unit. In those circumstances the applicant was entitled to refuse duties which she might rightly consider to be lacking in substance.

88. The Tribunal also refers to the case of *Rees* UNDT/2011/156. The facts of the case were the following. The applicant was employed by the Office of the High Commissioner for Human Rights (OHCHR) from November 1998. In 2006, she was laterally assigned by the then High Commissioner for Human Rights to a

newly created unit and was appointed to the position of Coordinator, Women's Rights and Gender Unit, in the Research and Right to Development Branch at OHCHR in Geneva. Her fixed-term contract was renewed in 2008. As at June 2009 she held a fixed-term appointment which was due to expire on 31 March 2010.

89. There were some issues about the applicant's performance and her relationship with the Deputy High Commissioner for Human Rights. In June 2009, the Applicant met with the Director of the Research and Right to Development Branch and two others. She had written asking for her assistance on how to deal with "the intimidation and harassment that [she] was receiving from the [Deputy High Commissioner]". However, the applicant's issues were not discussed in the meeting.

90. The applicant subsequently received a memorandum from the Deputy High Commissioner informing her that she would be reassigned. The applicant requested the Secretary-General to review the decision to reassign her and she submitted a request for suspension of action before the Geneva Joint Appeals Board.

91. On 1 March 2010, the Applicant was given notice that the High Commissioner was not going to renew her fixed-term appointment beyond 31 March 2010. The memorandum referred to the fact that she had indicated that the post offered to her was not acceptable and that she had not applied for any vacancy. It invited her to advise if she were to apply for any vacancy in the future so that "appropriate action" could be taken.

92. The Tribunal in *Rees* UNDT/2011/156 found that:

The plan to reassign the Applicant from her position was implemented before a properly constituted post was available to be offered to her. At the time of the reassignment, on 18 June, there was no post for her to be assigned to, just a name of a position yet to be established. The terms of reference for a position entitled Senior Human Rights Office, Advisor on Sexual Orientation Issues were not judged to be classifiable as P-5 until 10 July. The decision to reassign was made hastily and without proper planning.

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 encumbered as Executive Secretary of CMS were legitimately raised by the Applicant as issues. The Respondent ought to have clarified all these matters instead of rushing abruptly into a decision not to renew the contract on the mere refusal of the Applicant to transfer.

94. In conclusion, the Tribunal finds that the post of Special Advisor was not commensurate with the post of Executive Secretary of CMS.

Was the Applicant consulted in good faith prior to the Transfer Decision?

95. Whilst the Administration has a duty to consult a staff member in good faith prior to reassigning that staff member¹³, consultation “does not necessarily include negotiation and certainly does not guarantee agreement”.¹⁴ Consultation should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined.

96. The Tribunal finds that while the Applicant was consulted about the proposed reassignment, such consultation was not conducted in good faith because the final decision was pre-determined. Put another way, the Tribunal is satisfied that the Applicant would have been transferred to Nairobi, or not have his contract renewed if he had refused, irrespective of the concerns he raised with the Executive Director and others within UNEP.

¹³ *Fernandez de Cordoba Briz* Order No. 186 (NY/2010).

¹⁴ *Rees* UNDT/2011/156.

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. The BMU’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 out”¹⁶. In *Obdeijn*, UNAT rejected the view that reasons for an adverse decision must be 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, *Sehgal* (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 good administration of the Organization and in accordance with the standards of the Charter. These factors are listed in regulation 9.3 of the Staff Regulations as the reasons on which the Secretary-General may terminate the appointment of a staff member. Whilst non-renewal of a fixed-term appointment does not constitute “termination” within the meaning of the Staff Regulations, these factors nonetheless serve as a useful guideline as to the types of considerations that may be relevant to a decision not to renew a fixed-term appointment.

107. The Applicant submits that the most significant relevant consideration which the Respondent failed to take into account was the Applicant’s continuing contribution in Bonn. The Applicant lead 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, if anything, to do with the existing role in question or the staff member's ability to continue to perform the functions associated with that role. The fact that a staff member refuses a transfer to another position does not, *ipso facto*, mean that he or she is no longer suitable for the position currently occupied. A broader inquiry is, as a matter of reasonableness, necessary in deciding whether or not to renew a fixed-term appointment otherwise a non-renewal would appear to be nothing more than retaliation for a staff

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 defer 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 and termination was justified.

113. The Tribunal holds that the personal concerns of the Applicant, though they may have been of a genuine nature, could not by themselves justify a refusal to accept the transfer to Nairobi unless they were such as to amount to hardship that could not be mitigated.

Conclusion

114. The Applicant has successfully shown that the Non-renewal Decision was based on unlawful grounds. The Tribunal is satisfied that he suffered harm to his career in that the Non-renewal Decision deprived him of his livelihood at a time when he was near the mandatory retirement age. The Tribunal therefore orders as follows:

¹⁷ ILOAT Judgment No. 325 (1977).

- a. Since the Applicant was two years from retirement age and had, for most of his time with the Organization, been granted two-year renewals of his fixed-term appointment, the Respondent must pay the Applicant all the Applicant's retirement benefits calculated as if the Applicant had retired from the Organization at the age of 62;
- b. The Respondent must pay the Applicant compensation in the amount of one year's net base salary; and
- c. All other pleas are rejected.

(Signed)

Judge Vinod Boolell

Dated this 29th day of November 2013

Entered in the Register on this 29th day of November 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi