

119th Session

Judgment No. 3410

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. M. against the International Fund for Agricultural Development (IFAD) on 31 October 2012 and corrected on 20 November, the IFAD's reply of 20 March 2013, the complainant's rejoinder dated 16 May 2013 and the Fund's surrejoinder dated 3 July 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The Global Mechanism, of which the complainant was Managing Director as from 2005, was established by the United Nations Convention to Combat Desertification (UNCCD) and was housed by IFAD as from 1998. Staff working for the Global Mechanism were employed by IFAD in accordance with a Memorandum of Understanding (MOU) signed between the Conference of the Parties – which is the supreme body of the Convention – and IFAD on 26 November 1999.

The complainant joined the Global Mechanism under a fixed-term contract which was extended several times. By a letter of 30 March 2011 the Vice-President of IFAD, acting on behalf of the President, confirmed that his contract with the Global Mechanism was extended until 30 November 2011.

On 1 October 2011 the Conference of the Parties decided, in its decision 6/COP.10, that the accountability and legal representation of the Global Mechanism should be transferred from IFAD to the UNCCD secretariat and that the Executive Secretary of the UNCCD should assume overall management responsibility. The Conference of the Parties requested the Executive Secretary to ensure that all accounts and staff managed by the Global Mechanism were under one single administrative regime administered by the United Nations Office at Geneva and managed under the Financial Regulations and Rules of the United Nations (UN). The Conference decided that “the appointment of the Managing Director of the Global Mechanism [should] be done through the recruitment process of the United Nations by the Executive Secretary”.

On 1 November the President of IFAD was officially informed of the adoption of decision 6/COP.10 by the Conference of the Parties, as was the complainant later that month. At the same time the latter was informed that it had been decided that his appointment would be extended until 31 May 2012, and that the terms stated in the letter of 30 March 2011 were to remain unchanged, except that they should be interpreted and applied in accordance with decision 6/COP.10. He was also informed that, by a letter of 21 November 2011, the Executive Secretary of the UNCCD had asked the President of IFAD to forward to him the job description of the Managing Director of the Global Mechanism. The complainant accepted the offer of extension that same day.

In early February 2012 he wrote to IFAD seeking clarification concerning his contract extension. IFAD replied on 14 February that the UNCCD had authorised it to extend his contract with the Global Mechanism up to May 2012, and that the contract extension reflected the need expressed by the UNCCD in the agenda of the forthcoming meeting of the Conference of the Parties to ensure continuity in service delivery to parties. IFAD added that UNCCD would need to authorise any further extension of his contract and that IFAD was not authorised to undertake actions with respect to the financial and human resources management of the Global Mechanism except at

the request and on behalf of the Executive Secretary of the UNCCD or under such authority as had been delegated by the Executive Secretary. Consequently, he should address any concern about this contract extension to the UNCCD. By bulletin 2012/01 of 14 February 2012, the President of IFAD informed all staff of decision 6/COP.10 and its consequences.

The Executive Secretary of the UNCCD wrote to the complainant on 25 May 2012 asking him to ensure that a handover report would be submitted to him and to Mrs B-R, who would be officer-in-charge of the Global Mechanism after his contract had expired on 31 May 2012, pending the appointment of the new Managing Director through the recruitment process of the United Nations. On 28 May IFAD wrote to the complainant advising him of the procedures concerning his separation from service effective 1 June 2012. On 13 July the complainant wrote to the President of IFAD requesting facilitation and contesting the decision not to renew his contract after 31 May 2012. He asked to be reinstated with retroactive effect in his previous position until the end of 2012, which corresponded to the period of time for which the budget had been allocated by the UNCCD, or in the alternative until the transfer of staff required by decision 6/COP.10 had been completed and a new Managing Director had been appointed. IFAD replied on 23 July that the housing arrangement of the Global Mechanism had been reviewed and that, consequently, the relief he sought rested exclusively with the Executive Secretary of the UNCCD to whom the request had been forwarded. On the same day the complainant wrote to the Executive Secretary of the UNCCD and asked him to review his request for facilitation, particularly concerning UNCCD's responsibility for the decision not to renew his contract beyond 31 May 2012. To that end he asked, in accordance with the rules of the United Nations, for a management evaluation of the letter of 25 May. The Executive Secretary replied on 31 July that his request should be submitted to IFAD because he held a contract with that organisation. The complainant therefore lodged an appeal with IFAD's Joint Appeals Board on 23 August.

The Secretary of the Joint Appeals Board informed the complainant on 28 August 2012 that, according to the President's Bulletin 2012/01, IFAD was no longer authorised to undertake action with respect to the human resources management of staff members working for the Global Mechanism, except at the request and on behalf of the Executive Secretary of the UNCCD. She asked him to forward to her any written request made by the Executive Secretary of the UNCCD to IFAD regarding the application of IFAD grievance procedures to staff of the Global Mechanism. On 31 October 2012 the complainant filed a complaint with the Tribunal challenging that decision.

On 21 December 2012 the Executive Secretary of UNCCD wrote to the President of IFAD requesting that IFAD apply the grievance procedure to the complainant's request for facilitation of 13 July 2012, on the ground that the Tribunal in Judgment 2867 had considered that staff of the Global Mechanism were staff of IFAD. On 10 January 2013 IFAD informed the complainant that it had been requested by the Executive Secretary of the UNCCD to finalise all necessary arrangements in order to accommodate his request for access to IFAD's internal recourse mechanism. The complainant replied on 21 January 2013 that, following IFAD's refusal to proceed with his grievance in August 2012, he had filed a complaint with the ILO Administrative Tribunal and that he did not wish to further pursue the internal grievance mechanism unless the Tribunal decided he had to do so.

In the meantime, the Executive Secretary of UNCCD wrote to IFAD on 18 January 2013 indicating that the complainant had filed a complaint with the United Nations Dispute Tribunal and recommending that IFAD suspend any action that it might consider undertaking on behalf of the UNCCD until the UNCCD had received the judgment. The United Nations Dispute Tribunal delivered its judgment on 9 April 2013 concluding that it was not competent *ratione personae* because the complainant was an IFAD staff member. It added that, in principle, he should have access to the ILO Administrative Tribunal given that IFAD had accepted its jurisdiction.

B. The complainant contends that the decision not to extend his appointment was flawed. He alleges that the decision was tainted with abuse of authority insofar as IFAD and UNCCD have interpreted decision 6/COP.10 as meaning that a recruitment process for the position of Managing Director had to be undertaken straightaway. He also alleges that sections 2.26.1(iii) and 10.3.10 of the Human Resources Implementing Procedures were violated, as he was not given three months' notice of the non-renewal of his contract. Indeed, it was only in the letter of 28 May 2012 that it was made clear that his contract would not be renewed upon expiry, at the end of the month; consequently, the letter of 30 November cannot be considered as giving adequate notice of the intention not to renew his contract. He also submits that he was given no reasons as to the non-renewal of his contract, as the letter of 28 May contained only standard information concerning separation from service.

According to the complainant, IFAD breached his legitimate expectation to have his contract renewed. He explains that neither the budget allocated for his post nor his professional abilities have ever been questioned.

He criticises IFAD for having deprived him of the opportunity to avail himself of internal remedies by making, together with UNCCD, contradictory statements as to which body was competent to hear his appeal. It thus acted in breach of the duty of care it owed him and failed to act in good faith.

The complainant asks the Tribunal to quash the non-renewal decision and to order IFAD to reinstate him, with retroactive effect from 1 June 2012, in his previous position until the end of 2013 or until the new Managing Director is appointed following the procedure set out in decision 6/COP.10, whichever is later. He also asks the Tribunal to order the payment of salary and allowances until the date of his reinstatement. He claims moral damages and reimbursement of the legal fees he had to pay with respect to his request for facilitation, management evaluation, his internal appeal and the present proceedings.

C. IFAD submits that the decision of 28 August 2012, which the complainant impugns, is not a final decision and therefore not a decision which may properly form the subject of a complaint. It considers that the complainant is in fact challenging the decision of the UNCCD Executive Secretary not to extend his contract beyond its expiry date of 31 May 2012.

On the merits, it contends that, as from April 2008, the complainant held a contract with the Global Mechanism, not with IFAD, and that pursuant to decision 6/COP.10 IFAD had no authority to take actions with respect to his contract; it was bound to follow the instructions of the UNCCD Executive Secretary because the Global Mechanism became a subsidiary body of the UNCCD.

In its view the UNCCD Executive Secretary properly exercised his discretionary authority in deciding not to renew the complainant's contract. It emphasises that, according to its case law, the Tribunal may interfere with that kind of decision only in specific and limited circumstances. IFAD asserts that the complainant was given adequate notice of the decision not to renew his contract, as he was informed by a letter of 30 November 2011 and also by a memorandum of 14 February 2012 that his contract would expire on 31 May 2012. It draws attention to UNCCD Staff Rule 10.4, which provides that a fixed-term contract expires on the date specified in the letter of appointment. IFAD contends that the complainant was informed of the reasons for the non-renewal decision, given that the letter of 30 November 2011 and the memorandum of 14 February 2012 referred to decision 6/COP.10. Moreover, in his capacity as Managing Director, he was aware that the Conference of the Parties had been extremely critical of the manner in which the Global Mechanism was managed.

According to IFAD, the complainant could not have had any expectations that his contract would be renewed, in particular given that it was specified in the letter of extension of November 2011 (and indeed the previous letter of extension) that it did not carry any expectation of further renewal or conversion to any other type of appointment with the Global Mechanism or IFAD.

IFAD denies having acted in breach of its duty of care or in bad faith. It stresses that it had offered to make its internal grievance procedures available to the complainant, even though he was not an IFAD staff member, and actively sought UNCCD's cooperation in that respect.

D. In his rejoinder the complainant asserts that IFAD had authority on matters relating to the Global Mechanism and that he was an IFAD staff member. He emphasises that his initial letter of appointment was issued by IFAD, and he draws attention to the United Nations Dispute Tribunal's ruling on his case, according to which he was the "holder of an IFAD contract of employment". He adds that the ILO Administrative Tribunal, in Judgment 2867, held that the complainant, who also worked for the Global Mechanism, was a staff member of IFAD. The International Court of Justice, in its advisory opinion of 1 February 2012 concerning Judgment 2867, confirmed this view.

E. In its surrejoinder IFAD states that it was not given a chance to express its views before the United Nations Dispute Tribunal and contests its judgment. It otherwise maintains its position.

CONSIDERATIONS

1. The complainant served as Managing Director of the Global Mechanism under fixed-term contracts from February 2005 to 31 May 2012. Following the adoption of Decision 6/COP.10 in October 2011, on 30 November 2011 the complainant's contract was renewed for a period of six months with the expiry date set as 31 May 2012. The complainant received a memorandum from IFAD, dated 28 May 2012, advising him "of the procedures concerning [his] separation from [Global Mechanism] service, effective 01 June 2012". He responded with a memorandum to the President of IFAD, challenging his separation from the Global Mechanism on the grounds that he was not given three months' notice of the non-renewal of his contract in accordance with the HR Implementing Procedures of IFAD. In a memorandum dated 31 May 2012 from the Acting Head, CSD and Director, HRD,

on behalf of the President of IFAD, the complainant was notified of the following clarifications:

“On 30 March 2011, under the previous MOU entered into between IFAD and the [Conference of the Parties], you were informed that unless a proposal by UNDP was received, your appointment would expire on 30 November 2011.

In October 2011, at the 10th session of the Conference of the Parties [...], the [Conference] decided (decision L.22) that IFAD had no management or financial responsibilities with regards to the [Global Mechanism], its staff and its financial activities. The [Conference] entrusted the Executive Secretary, UNCCD, with the responsibility to ensure that all accounts and staff managed by the [Global Mechanism] are under one administrative regime administered by the UN Office at Geneva and managed under the Financial Regulations and Rules of the UN. More specifically, the [Conference] decided that the appointment of the Managing Director of the [Global Mechanism] would be done by the Executive Secretary through the recruitment process of the UN. In other words, the [Conference’s] decision was unequivocal: IFAD no longer had authority over the [Global Mechanism], its operations, its assets, its staff and the appointment of its Managing Director.

With a view to implementing the [Conference’s] L.22 decision, the Executive Secretary used his discretionary powers to postpone for a final period of six months the expiration date of your appointment. Therefore, on 30 November 2011, you were informed that the expiration date of your appointment as Managing Director of the [Global Mechanism] had been set at 31 May 2012. The contract was clear and very specific in stating that it carried no expectation of a further employment relationship with the Global Mechanism, or the establishment of such a relationship with IFAD. The contract did not say [...] that the expiration date of your contract would be dependent on the transfer of [Global Mechanism] staff administration to UN administration. You read and accepted the terms and conditions of that contract. Therefore, your appointment will expire on 31 May 2012, and you were given notice of this fact six months ago. Since that time, there has been no indication from the Executive Secretary of any intention to further extend your contract.

More recently [...] in a memo dated 14 February 2012, [you were] provided [...] with clarifications regarding the 30 November 2011 extension of your appointment with the [Global Mechanism]. More specifically, [it was] noted that your appointment had not been ‘terminated’ [...] but that it had been extended to an expiration date of 31 May 2012, at the sole discretion of the UNCCD, and that your contract’s expiration date could be extended beyond 31 May 2012 only at the discretion of the UNCCD. In other words, the February 2012 memorandum reiterated what you had been told in your November 2011 contract and which you accepted: in six months (31 May 2012), your contract would expire.”

2. The complainant requested facilitation in accordance with IFAD's policy regarding internal appeals. His request was denied on the grounds that the rules and procedure he invoked did not apply to him and, above all, that the requested relief was not within the powers of the President (or for that matter, any organ or body of IFAD) to grant, but rather rested exclusively with the Executive Secretary of the UNCCD. His request for facilitation was forwarded to the UNCCD Secretariat. The Secretariat informed him in a letter dated 31 July 2012 that essentially, as he held an IFAD letter of appointment, and not a UN letter of appointment, any request for management evaluation should be made to IFAD. The complainant filed an appeal before IFAD's JAB on 23 August 2012. After receiving a letter from the Secretary of the JAB asking him to "forward to the attention of the JAB Secretary any written request by the Executive Secretary of the UNCCD to IFAD regarding the application of IFAD grievance procedures to the [Global Mechanism] Staff", he filed the present complaint directly with the Tribunal on 31 October 2012 stating that "IFAD's decision not to consider the appeal to the JAB confirms its refusal to renew [his] contract [and] is therefore hereby being impugned".

3. The complainant asserts that the decision not to renew his contract is illegal because it constitutes an abuse of discretionary powers and because it violated his legitimate expectation that his contract would be renewed. He also argues that he was not given adequate notice of the non-renewal decision and that IFAD acted in violation of the general principles of law requiring international organizations to act with care and good faith towards their employees and to respect their dignity. He requests the Tribunal to quash the decision not to renew his contract, to order his reinstatement as Managing Director of the Global Mechanism with retroactive effect from 1 June 2012 "until the end of 2013, or until the transfer of staff required by Decision 6/COP 10 has been completed and a new [Managing Director] is in office, whichever is later", to order the payment of his salary and allowances until the date of his reinstatement and to award him moral damages and costs.

4. The last renewal of the complainant's contract, which expired on 31 May 2012, was the renewal of a contract with IFAD, as the transfer of accountability and legal representation of the Global Mechanism from IFAD to the UNCCD was finalized only by the Amendment to the MOU of 1999 which entered into force on 2 April 2012 (see Judgment 3411). Consequently, IFAD's President and the JAB were competent to examine his internal appeal. The JAB was competent to consider not only the lawfulness of the decision not to renew his contract, but also to opine on the appropriateness of IFAD's conduct throughout the process that led to the non-renewal of the complainant's contract. As the JAB did not accept his appeal until after he had filed the present complaint, and the complainant was forced to undergo the uncertainty of being sent back and forth between the two organizations, he is entitled to an award of moral damages.

5. The case must be sent back to IFAD to undergo in an expeditious manner the internal proceedings with the President and if need be the JAB. The complainant is entitled to moral damages in the amount of 3,000 euros. He is also entitled to costs in the amount of 4,000 euros.

DECISION

For the above reasons,

1. The case is sent back to IFAD in accordance with consideration 5 above.
2. IFAD shall pay the complainant 3,000 euros in moral damages.
3. It shall also pay him costs in the amount of 4,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ