Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

**R.**

***v.***

**Energy Charter Conference**

**137th Session** **Judgment No. 4737**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr U. R. against the Energy Charter Conference ("the organisation") on 28 December 2020, the organisation's reply of 17 May 2021, the complainant's rejoinder of 5 August 2021 and the organisation's surrejoinder of 6 October 2021;

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 may be summed up as follows:

The complainant, who was the Secretary-General of the Energy Charter Secretariat, the secretariat of the organisation, challenges the decision not to launch the procedure for his reappointment as Secretary-General.

The complainant was appointed Secretary-General of the Secretariat as from 1 January 2012. The Conference, which refers to the institution as described in Article 34(1) of the Energy Charter Treaty where the Contracting Parties meet periodically, approved the complainant's reappointment for a second mandate, from 1 January 2017 until 31 December 2021.

In November 2015, the Conference amended its Rules of Procedure. Rules 20.1 to 20.11 under Part XII of the Rules of Procedure set out the rules for the appointment of the Secretary-General applicable as of 1 January 2017. These rules replaced the Procedures to Be Followed in Appointing the Secretary-General. Rule 20.2(d) introduced a limitation to the number of mandates the Secretary-General may apply for by providing that the serving Secretary-General may reapply for the position only once for the term set out in Rule 20.10 (that is to say a maximum period of five years).

In June 2020, the complainant notified the Chairman of the Conference that he had decided to reapply for the position of Secretary-General as of 2022 for three years until the end of 2024. In September 2020, the Chairman of the Conference invited the Conference to consider the matter. One Contracting Party disagreed arguing that the reappointment would breach the Rules of Procedure of the Conference, in particular the rules under Part XII. On 1 October 2020, the Energy Charter Secretariat circulated document 1726/20 to delegations of the Contracting Parties explaining that one Contracting Party had raised objections to the launch of the reappointment procedure for the complainant. Therefore, the Conference did not approve the launch of the reappointment procedure.

The complainant, who was still Secretary-General, filed a complaint directly with the Tribunal on 28 December 2020 impugning the decision of 1 October 2020.

The complainant asks the Tribunal to annul the decision of 1 October 2020 and to order the organisation to provide a written excuse within a reasonable timeframe (estimated at three months following the publication of the judgment). Subsidiarily, he seeks compensation for "damages, lost opportunity, moral damages and costs" in an amount equivalent to one year of "his emoluments in accordance with the salary scale of 2021".

The organisation asks the Tribunal to declare that it lacks jurisdiction and/or that the complaint is irreceivable. Alternatively, it asks the Tribunal to reject all the pleas as unfounded. In any event, the organisation asks the Tribunal to reject the requests for annulment, for

written excuses and for compensation, and to order that the complainant bear his own costs as well as the costs of the organisation.

## CONSIDERATIONS

1. The complainant was appointed to the position of Secretary-General of the Energy Charter Secretariat, the secretariat of the organisation, in January 2012. He was reappointed to the position on 1 June 2016 effective 1 January 2017 and unsuccessfully sought further reappointment in June 2020. Generally, the relevant material background facts are set out earlier in this judgment. Suffice it to note he filed a complaint on 28 December 2020 impugning a decision of the Conference not to launch the reappointment procedure notwithstanding the request he had made in June 2020, effectively, that it do so.

2. The organisation contends that the Tribunal is not competent to hear this complaint for two reasons. The first which should be addressed is the argument that the complainant was not an "official" of the organisation for the purposes of Article II of the Tribunal's Statute. The organisation relies in part on the terms on which it recognised the jurisdiction of the Tribunal as contemplated by Article II, paragraph 5, of the Statute. The terms of recognition can be a relevant consideration in determining the scope of the Tribunal's jurisdiction (see Judgment 2232, consideration 8).

3. In this case the recognition arose by virtue of a decision of the Provisional Energy Charter Conference of 8 July 1997 as communicated to the Director-General of the International Labour Office by letter dated 1 August 1997. That letter read, in relevant parts:

> "The Provisional Energy Charter Conference at its Seventh Meeting held in Brussels on 8 July 1997 authorised me to convey to you its recognition of the jurisdiction of the Administrative Tribunal of the International Labour Organization in accordance with Article II, paragraph 5, of the Statute of the Tribunal in respect of officials of the Energy Charter Secretariat (ECS).
>
> I thus have the honour to inform you that the Provisional Energy Charter Conference recognizes the competence of the Tribunal to hear complaints alleging non-observance, in substance or in form, of the terms of employment

> of ECS staff members and of the provisions of the Staff Regulations and Rules which are applicable to them. The Provisional Energy Charter Conference also accepts the Tribunal's Rules of Procedure."

The first paragraph identifies the class of people in respect of whom the jurisdiction is being recognised. That class is "officials" and not what might potentially be a narrower class, namely "staff". The second paragraph identifies the subject matter in respect of which the jurisdiction is being recognised. It is "complaints alleging" the matters referred to in the letter, picking up the language and expressions found in Article II of the Tribunal's Statute. The recognition of jurisdiction is plainly not conditional upon there having actually been non-observance of the type specified, merely that there is an allegation there had been.

4. The complainant relies, correctly, on the terms of the Energy Charter Treaty which relevantly provides in Article 35(1):

> "In carrying out its duties, the Charter Conference shall have a Secretariat which shall be composed of a Secretary General and such staff as are the minimum consistent with efficient performance."

A clear indicator of the status of the Secretary-General as an official, is that he or she is part of the Secretariat performing duties described in this Article (and elsewhere in the Treaty), namely providing the Charter Conference with all necessary assistance for the performance of its duties and entering "administrative and contractual arrangements".

The organisation relies on other normative legal documents to argue the complainant is not an official. But the relevant legal question is not whether the Secretary-General is an official for the purposes of those rules, but whether he is for the purposes of the Tribunal's Statute. The Tribunal is satisfied he is.

5. The second argument raised by the organisation is that the decision not to launch the reappointment procedure, which was made by the Conference, was a bare political decision that is not open to judicial review. But the Tribunal notes that the decision was not entirely political but indirectly raised the question of the application of the conditions in the rules for appointment of the Secretary-General and had a direct legal adverse effect on the complainant, an international

civil servant. The observations of the Tribunal in Judgment 2232, consideration 10, are apt to apply:

> "[A] decision terminating the appointment of an international civil servant prior to the expiry of his/her term of office is an administrative decision, even if it is based on political considerations. The fact that it emanates from the Organisation's highest decision-making body cannot exempt it from the necessary review applying to all individual decisions which are alleged to be in breach of the terms of an appointment or contract, or of statutory provisions."

6. It is unnecessary to dwell on other preliminary arguments made by the organisation relating to receivability. That is because the complainant's central contention in the present complaint is unfounded, and the complaint should be dismissed.

7. As would be evident from the earlier account of the background, the apparent legal framework in which the complainant's June 2020 request for reappointment was to be assessed, was that established in November 2015 by decision of the Conference, which then adopted amendments to the Rules of Procedure effective 1 January 2017 with the result that he could not apply for a second reappointment. The complainant challenges this premise.

8. Part XII of the Rules of Procedure of the Conference is entitled "RULES FOR APPOINTMENT OF SECRETARY-GENERAL". There are several rules in that part generally addressing the procedure for the appointment of someone to the position of Secretary-General. One is Rule 20.2, addressing the start of the procedure, which contains Rule 20.2(d) that read:

> "(d) The serving Secretary-General may reapply for the position of Secretary-General only once, for the term set out in Rule 20.10."

Rule 20.10(a) makes provision for the Conference to determine the term of reappointment and Rule 20.10(b) declares that the term of reappointment "shall not be longer than five years".

9. The complainant's pleas on the merits are threefold. Firstly, he argues that the amendments made in 2015, effective 1 January 2017, were not intended to apply to him. His second argument is that his initial appointment was subject to the principle of acquired rights and he had an acquired right to seek reappointment thereinafter. The third argument is that the decision not to launch the procedure in order to consider his request for reappointment was based on an error of law (concerning when the amendment creating the limitation would apply) and constituted an abuse of power by the Conference.

10. It is convenient to consider the first and third arguments together as there is a considerable measure of overlap. The question which then arises is what, having regard to the relevant Rules of Procedure objectively construed, was the intended legal interaction between the amendment operating on and from 1 January 2017 limiting the number of times a person occupying the position of Secretary-General could reapply for the position, and an appointment to that position, by way of reappointment, commencing on the same day.

11. The limitation on reapplication was to operate in the future and, in terms, was to operate on the "serving" Secretary-General. Thus, it was, in terms, to apply in the future to anyone with that status. While the complainant acquired that status (by way of reappointment) on the same day the amendment took legal effect, the amendment creating the limitation on reapplying could and would, on its face, apply at the expiration of the term of the complainant's reappointment. It is the combined effect of the historical fact that the complainant had been reappointed once to the position in 2016, effective 1 January 2017, together with his status as Secretary-General after the amendment came into effect, that engaged the amendment.

Moreover, the purpose of the amendment is clear. It was to eliminate the possibility that a serving Secretary-General could, by repeated reappointments flowing from repeated reapplications, remain in the position for a very lengthy period of time. Its purpose was to ensure finite periods of occupation of the position rather than open-ended periods.

12. The Tribunal is satisfied that the amendment creating the limitation on reapplications was intended to apply to the complainant when, by virtue of his reappointment effective 1 January 2017, he continued in the position of Secretary-General. The documents from 2015 relied on by the complainant concerning the intentions of individual participants in working groups are consistent, on one view, with an intention that future amendments would not impact on the reappointment of the complainant effective 1 January 2017 but really say nothing about the complainant's future beyond that. His argument that he was able to reapply one further time after the amendment entered into force fails to give effect to the clear purpose of the amended provision, which was to limit to two the number of terms a person could occupy the post of Secretary-General by way of initial appointment and subsequent reappointment, upon application. The complainant's first and third arguments are unfounded.

13. His second argument is that his initial appointment was subject to the principle of acquired rights and he had an acquired right, flowing from the terms on which he was initially appointed to the position, to seek reappointment thereinafter at the expiration of any given term of appointment. It is true that the terms on which he was initially appointed expressly, in his letter of appointment, recognised his right to have protected any acquired right. But the relevant question is whether a right to repeatedly reapply for the position was an acquired right which could not be altered. The Tribunal's case law recognises that international civil servants' conditions of employment existing at the time of recruitment are not immutable and need not, of necessity, be applied to them throughout their careers (see, for example, Judgment 4465, considerations 5 to 8). The Tribunal is not satisfied that an unconstrained right to reapply for the position of Secretary-General meets the criteria of an acquired right identified in, for example, Judgment 4195, consideration 7.

14. For the preceding reasons, the complaint should be dismissed. Two further matters should be mentioned. The first is that the organisation seeks a costs order against the complainant. However, this complaint

does not have the characteristics which would justify such an order (see, for example, Judgment 4487, consideration 17).

15. The second matter is of some moment. In its brief, seemingly prepared by lawyers, the organisation said in the fifth paragraph of the introduction (and concerning the receivability of the complaint):

> "Finally, the Organisation considers the case to be of wider importance in that hearing the Complainant's case could set an undesirable precedent for the executive heads of other international organisations that might want to challenge the political considerations governing their re-appointments before the Tribunal. Such a precedent might prompt some international organisations to reconsider the jurisdiction conferred to the Tribunal with regard to employees that depend on its jurisdiction for the protection of their rights."

This is repeated later in the brief.

16. Observations recently made by the Tribunal in Judgment 4079 are equally apt to apply to the above submission. The Tribunal said at consideration 17:

> "This is a subtle threat to the Tribunal but a threat nonetheless. As an independent judicial body, the Tribunal is constituted by judges who must act without fear or favour. Such a threat must be ignored. Also, the threat if acted upon would subvert the operation of the rule of law at an international level. That is because dissatisfaction with a judgment lawfully rendered by a judicial body should never ground the rejection of the jurisdiction of that body. This is unacceptable behaviour by an international organization. The disdain the organization shows for the orderly resolution of justiciable disputes subverts the very institutions established to resolve them and the framework within which they operate."

17. The submission quoted above should never have been made.

## DECISION

For the above reasons,

The complaint is dismissed, as is the counterclaim for costs.

In witness of this judgment, adopted on 1 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, Mr Jacques Jaumotte, Judge, Mr Clément Gascon, Judge, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

MICHAEL F. MOORE

HUGH A. RAWLINS

JACQUES JAUMOTTE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER