

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R. (No. 2)

v.

Energy Charter Conference

137th Session

Judgment No. 4738

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr U. R. against the Energy Charter Conference (“the organisation”) on 13 July 2021, the organisation’s reply of 6 October 2021, the complainant’s rejoinder of 4 December 2021, the organisation’s surrejoinder of 17 February 2022, the complainant’s additional submissions of 29 June 2022 and the organisation’s final comments thereon of 7 September 2022;

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 challenges the decision to consider him not eligible for the appointment of Secretary-General of the Energy Charter Secretariat, the secretariat of the organisation, for a mandate starting in January 2022.

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).

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 challenged that decision before the Tribunal in his first complaint filed on 28 December 2020.

In the meantime, in mid-October 2020, the Secretariat informed delegations of the Contracting Parties of the proposed next step for them to submit nominations for the appointment of the Secretary-General.

On 18 March 2021, the Secretariat indicated that two candidates, including the complainant, were nominated by the Contracting Parties. On 9 April 2021, the Secretariat issued the invitation to the extraordinary meeting of the Conference and the provisional agenda, which included two main points for discussion: the complainant's first complaint before the Tribunal and the appointment for the position of the Secretary-General.

The extraordinary meeting of the Conference was held on 14 April 2021. According to the summary record of the same day, the Conference discussed the complainant's first complaint after having invited him to share his views with the delegations of the Contracting Parties on his position that the procedure for the reappointment of the incumbent (him) should have been followed. The Conference then discussed the nomination of the two candidates to the position of Secretary-General without them being present, and agreed on the eligibility of only one candidate, not the complainant. It therefore decided that the procedure

for appointment would continue following Rule 20.6, which provides for a different procedure in the event that there is only one candidate. The Conference added that the interview of eligible candidates foreseen by Rule 20.5, which had been announced on 31 March 2021, was cancelled and that the timeline for the selection process would be modified. On 19 April 2021, the complainant was informed of the Conference's decision of 14 April 2021 not to find him eligible.

The complainant, who was still Secretary-General, filed his second complaint directly with the Tribunal on 13 July 2021 impugning the decision of 14 April 2021.

The complainant asks the Tribunal to annul the decision of 14 April 2021 and to allow him expressly to compete for the position of Secretary-General. He further claims payment of compensation of one-month emoluments for his "moral damages and suffering", 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, if he is not allowed to compete for the position of Secretary-General on equal terms to the other candidate, he asks the Tribunal to order the payment of compensation for "all damages" in an amount equivalent to one year of his emoluments "following 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 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 13 July 2021 impugning a decision of the Conference of 14 April 2021 that only one candidate, not the complainant, was eligible for appointment as Secretary-General and that Rule 20.6 of the Rules of Procedure of the Conference applied.

2. The complainant seeks the joinder of this complaint with his first complaint so that one judgment can be rendered. The organisation makes no comment on this issue. While both complaints concern the same continuum of events, the legal issues are different (see, by way of analogy, Judgment 4712). Moreover, in each of the proceedings, the organisation seeks an order that the complainant pay its costs. Desirably, that issue should be considered separately in each of the proceedings, as one might have the characteristics justifying such an order and the other not. Joinder will not be ordered.

3. In a judgment given this session concerning the complainant (Judgment 4737) the Tribunal addresses the questions, also raised in these proceedings, whether the Tribunal was competent to hear the complaint filed by the complainant and whether the complainant had exhausted internal means of redress. The answer was yes and for the same reasons, it is yes in these proceedings as well.

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

4. Generally, the facts of this case are sufficiently set out earlier in this judgment. The focus of these proceedings is whether the Conference was correct in ultimately proceeding on the basis that there was only one nominated candidate and not treating the complainant as another nominated candidate. This issue raises for consideration the rules concerning the appointment of the Secretary-General. Part XII of the Rules of Procedure of the Conference was 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 read:

- “(a) The Energy Charter Conference shall be invited to decide on the basis of the applicable rules, on whether or not to re-appoint the serving Secretary-General for a second mandate at least twelve months before the expiration of his or her contract.
- (b) Irrespective of the decision under paragraph (a) above, Contracting Parties may propose candidates for the post of Secretary-General more than twelve months before the expiration of the contract of the serving Secretary-General.
- (c) In the case of a decision by the Energy Charter Conference not to re-appoint the serving Secretary-General, or in cases where the serving Secretary-General indicates to the Conference Chair in writing that he or she is not ready to accept a second mandate, the procedure outlined in these Rules shall be applied.
- (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 20.3 provided:

- “(a) Within one month of the date of the decision by the Energy Charter Conference not to reappoint the serving Secretary-General, or of the date on which the Conference Chair receives a written indication from the serving Secretary-General that he or she is not ready to accept a second mandate, or in case one or more Contracting Parties have proposed another candidate(s) as allowed in Rule 20.2 .b, all Contracting Parties and Signatories shall be informed, via a letter to Ministers from the Conference Chair, of the timetable for nominating candidates, or additional candidates, for the post of Secretary-General and the procedure to be followed. This letter shall be sent at least ten months prior to the date of the Energy Charter Conference’s meeting where the appointment is expected to take place and indicate a deadline for the nomination.
- [...]
- (d) The deadline for submission of candidatures shall be at least nine months prior to the date of the Energy Charter Conference’s meeting where the appointment is expected to take place.”

Rule 20.5(a) concerning interviews of candidates provided:

“(a) All eligible candidates shall be interviewed by the Contracting Parties and Signatories. Such interview shall be chaired by the Conference Chairmanship and shall be open to all Contracting Parties and Signatories who wish to attend. If one of the candidates has the nationality of the Chairmanship, the Vice-Chairpersons representing the outgoing and incoming Chairmanships shall chair the interview in that order. In the event that there are also candidates of the nationality of the outgoing and incoming Chairmanships, the delegates attending the interview shall elect two representatives of Contracting Parties present to chair the interview. All candidacies shall be reviewed on an equal and non-discriminatory basis.”

Rule 20.6 provided:

“Rule 20.6: Procedure in case there is only one candidate

The Conference Chair shall submit the name of the single candidate to the Energy Charter Conference. The Conference Chair shall invite the Energy Charter Conference to appoint such candidate, by consensus, as the Secretary-General.”

It is unnecessary to set out their terms, but Rule 20.4 limited the right to nominate to financial Contracting Parties and required a nominee to have the nationality of any Contracting Party, Rule 20.7 provided that in the event of more than one candidate being nominated, a procedure of informal sounding out should take place with a view to identifying a “single preferred candidate” and Rule 20.8 provided for the appointment of the single preferred candidate.

5. The complainant’s pleas on the merits traverse a number of issues. Other than in relation to several subsidiary arguments, they proceed on the basis that a distinction can and should be drawn between a candidacy flowing from nomination and a candidacy, of sorts, flowing from the then serving Secretary-General reapplying for the position. This is his principal plea. At least implicit in this submission is that even if he had been precluded by Rule 20.2(d) from reapplying for the position, the complainant could nonetheless have been nominated as a candidate by one or a number of Contracting Parties, as in fact he had been, and the procedure to be followed thereafter should have been on the footing that there were multiple candidates.

6. Both the language and the structure of Part XII pointed relatively clearly to a process whereby the possible reappointment of the then serving Secretary-General was assessed and determined and quite separately, but in tandem in the initial stages, a process whereby one or a number of candidates may be proposed by the Contracting Parties. Either a decision was made under Rule 20.2 to appoint the serving Secretary-General for a second mandate or a decision was made not to appoint that person. If, the second-mentioned decision was made, or the then serving Secretary-General indicated she or he did not want to accept a second mandate, or a nomination had been made under Rule 20.2(b), Rule 20.3 was enlivened and candidates were to be proposed by the Contracting Parties.

7. In the present case, there was no nomination of any person under Rule 20.2(b). However, some of the Contracting Parties nominated one person as a candidate and other Contracting Parties nominated the complainant as a candidate, and both nominations were made under Rule 20.3. The question that then arises, and is central to the resolution of this complaint, is whether the serving Secretary-General, even if precluded by Rule 20.2(d) from reapplying for the position, could have been nominated as a candidate under Rule 20.3. The answer is no. A clear distinction was drawn in Rule 20.2 between the person who was the serving Secretary-General on the one hand, and a proposed candidate under that rule on the other. It would be entirely inapt to treat the serving Secretary-General as a potential nominee under Rule 20.2(b). Similarly, under Rule 20.3 the same distinction was drawn and candidates were nominated because the then serving Secretary-General would not be appointed either because a decision had been made to that effect or reappointment was not sought. While not said so expressly, a third reason clearly emerging from the scheme created by the Rules for the appointment of the Secretary-General, would be a further term as precluded by Rule 20.2(d). The scheme of the Rules, and the language used, comparatively clearly was intended to create a procedure whereby the fate of the then serving Secretary-General was determined but if she or he did not secure a further mandate, thereafter a process of nomination and, ultimately, the selection of another person took place.

It is improbable that the Rules contemplated that a serving Secretary-General who failed to secure a further mandate under the earlier parts of the Rules could nonetheless be advanced as a candidate for selection by another process in the subsequent parts of the Rules. The complainant's principal plea is unfounded and should be rejected.

8. One of the subsidiary arguments is that there had been an intentional misuse of authority by one of the Contracting Parties "forcing" a vote and pressuring other Contracting Parties to vote in a particular way. This is tantamount to an accusation of bad faith which cannot be presumed and must be proved (see Judgment 4711, consideration 7). The complainant has failed to do so. Another of the subsidiary arguments is that he was not provided with reasons for him being declared "non-eligible". The reasons were, in the circumstances, absolutely clear and required no elucidation. The remainder of the subsidiary arguments are of no substance involving assertions of discrimination against him, a failure to conduct informal soundings and a failure to interview all eligible candidates.

9. 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).

10. The complaint should be dismissed.

DECISION

For the above reasons,

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

In witness of this judgment, adopted on 7 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, 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.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER