



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

FRECHON (2)

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPEAL AGAINST
NON-RENEWAL OF A FIXED-TERM
APPOINTMENT**

Counsel for applicant:

Antony Bautista
Hugh McCairley

Counsel for respondent:

Emily Langston, ALS/OHRM

1. Employment History

1.1 The Applicant joined the Organization on 4 May 1997 on a contract of limited duration as a translator/interpreter in the Department of Peacekeeping Operations. On 9 June 1998, the Applicant joined the United Nations Observer Mission in Angola (MONUA) on a contract of limited duration as a translator/interpreter. From 1 July 1998, the Applicant was extended on several short-term contracts until 1 March 1999 when she separated from service. On 24 June 2001, the Applicant was re-appointed to a temporary post as translator/interpreter with the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. On 31 July 2007, the Applicant was separated from service due to her inability to resume her professional activities with ICTR in Arusha for medical reasons.

2. Background and Facts

2.1 The facts giving rise to the application before the Tribunal are contained in UNDT Judgment No. 089 (2010). In the said Judgment, the Tribunal, in accordance with Article 20 of the UNDT Rules of Procedure, adjudged the case as follows:

“(i) The Applicant’s case is hereby remanded to the Administration for concurrence on the institution of the correct procedure required under ST/AI/1999/16;

(ii) The Respondent shall, within 14 days of the publication of this judgment, that is, by or before 24 May 2010, inform the Tribunal of the progress made towards such concurrence;

(iii) If the Administration concurs, the correct procedure shall be instituted within three months of the publication of this judgment, that is, by or before 10 August 2010, and the Administration shall notify the Tribunal of the outcome by that date;

(iv) Following the notification to the Tribunal of the outcome at paragraph (iii) above, or if the Administration does not concur on the institution of the correct

procedure required under ST/AI/1999/16 as required under paragraph (ii) above, the Tribunal shall publish a separate judgment on the merits of the case; and

(v) The Administration is ordered to pay the Applicant compensation equivalent to three months' net base salary for the delay in complying with the procedures required under ST/AI/1999/16.”

2.2 On 30 March 2010, the United Nations Appeals Tribunal (UNAT) issued UNAT Judgment Number 2010-UNAT-003. On 13 May 2010, the Respondent filed a “Request for Clarification on Judgment Remanding Case for Institution of the Correct Procedure”, requesting clarification on the effect, if any, of the Appeals Judgment vis-à-vis the Judgment of this Tribunal remanding this case for institution of the correct procedure under ST/AI/1999/16 – “Termination of appointment for reasons of health”. On 17 May 2010, the Tribunal issued an “Order on the Respondent’s Application for Interpretation of Judgment” in which it rejected the Respondent’s request.

2.3 On 20 May 2010, the Respondent filed a request for extension of time to 3 June 2010 to comply with the requirements of paragraph 2.1 (iii) above of UNDT Judgment No. 089 (2010). The Respondent’s request was granted on 24 May 2010. On 3 June 2010, the Respondent filed his submissions on the progress made towards concurrence on the institution of the correct procedure required under ST/AI/1999/16 in the present case (“Submission on Concurrence”).

3. *Respondent’s Submission on Concurrence*

3.1 The Respondent’s submissions on concurrence are summarized below:

(i) In separate proceedings, UNAT issued its Judgment on the Applicant’s appeal against a decision taken by the Standing Committee of the United Nations Joint Staff Pension Board (“UNJSPB Standing Committee”), relating to the same injury as is the subject of the present

proceedings¹. Therein, UNAT rescinded the contested decision of the UNJSPB Standing Committee taken at its meeting on 15 July 2009 to reject the Applicant's request for a disability benefit and remanded the matter to the UNJSPB Standing Committee to review its decision on the basis of the reasons set out in the judgment.

(ii) The Respondent submits that the question as to whether the Applicant is incapacitated within the meaning of article 33 (a) of the UNJSPF Regulations, such as to give rise to her entitlement for a disability benefit remains a live issue as a result of the UNAT Judgment. In particular, the Respondent notes that UNAT opined that it was not in a position to rule on the basis of uncertain and disputed facts, namely whether it is actually possible for the Applicant to perform the duties of a translator in a member organization, or at least duties commensurate with her education and professional qualifications and which are reasonably compatible with her impairment, taking into account the duties actually required of a translator and the technology available to compensate for her inability to use a computer keyboard. As a consequence, UNAT decided to remand the matter to the UNJSPB Standing Committee for review.

(iii) In view of the foregoing reasons, the Respondent informs the Tribunal that it is unable to concur with the institution of the procedures under ST/A1/1999/16 until such time as the UNJSPB Standing Committee has reconsidered the Applicant's request after carrying out the required checks concerning the uncertain and disputed facts with regard to her injury.

¹ Judgment No. 2010-UNAT-003, dated 20 March 2010, issued 26 April 2010.

4. Considerations

4.1 Legal Issues

4.1.1 In UNDT Judgment No. 089 (2010), the Tribunal considered the following to be the legal issues arising out of this application:

(i) Whether the administrative decision of the Under-Secretary-General for Management (“USG/DM”), dated 31 July 2007, not to renew the Applicant’s fixed-term appointment due to the Applicant’s inability to resume her professional activities with ICTR in Arusha was informed by improper motive.

(ii) Whether the USG/DM abused her discretionary authority in her decision not to renew the Applicant’s fixed-term appointment.

(iii) Whether or not the Applicant had any expectancy of renewal of her appointment under the terms of her appointment.

(iv) Whether or not the Applicant’s appointment was terminated.

(v) Whether the proper legal procedures for dealing with the Applicant’s service-incurred disability were complied with.

(vi) Whether the Applicant was entitled to have been placed on continuous special leave with pay during the period 28 March 2007 to 31 July 2007.

(vii) Whether the Applicant was adequately compensated for her loss of employment occasioned by her service-incurred injury.

4.1.2 In the said Judgment, the Tribunal made the following findings:

(i) The Applicant’s fixed term-appointment came to an end as a result of her service-incurred injury.

(ii) The Applicant's fixed-term appointment was in fact improperly terminated and it was disingenuous for the Respondent to argue that "it was allowed to run until the end of the term and was not renewed on medical grounds."

(iii) The administrative decision not to renew the Applicant's fixed-term appointment due to the Applicant's inability to resume her professional activities with ICTR in Arusha was informed by improper motive.

(iv) The applicable procedural rules that should have been followed by the Respondent in this case contained in ST/AI/1999/16 were not complied with.

(v) The Applicant was entitled to be placed on special leave with half pay for the period from 28 March 2007 to 31 July 2007.

4.2 UNAT Judgment Number 2010-UNAT-003

4.2.1 The Tribunal notes that neither the Applicant nor the Respondent informed the Tribunal that the Applicant in the present case had an ongoing application before the UNAT, UNAT Judgment Number 2010-UNAT-003, which raised similar issues to those in the present case. On 30 March 2010, UNAT issued the above-mentioned judgment. In her application before the UNAT, the Applicant was appealing against the decision by the Standing Committee (see paragraph 3.1(i) above) of the at its meeting of 15 July 2009, of which the Applicant was notified by a letter dated 21 July 2009, to reject her request for a disability benefit. The sections of the UNAT judgment that are relevant to the present case are summarized below:

(i) UNAT found that the Applicant has good reason to assert that the decision not to renew her contract beyond 31 July 2007 was taken because of her inability, for health reasons, to resume her duties as a translator.

(ii) Article 33 (a) of the Pension Fund Regulations provides that entitlement to a disability benefit is recognized only when the Board finds a staff member “to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration”.

(iii) It follows from article 33 (a) that the service of which it is necessary to assess the reasonable compatibility with the abilities of a staff member who is suffering from an impairment that is permanent or of long duration and who is requesting disability benefit must be understood as the duties which the staff member could perform, taking into account his or her state of health, in a member organization and which correspond to the duties performed by the staff member on the date of his or her separation, or at least duties commensurate with his or her education and professional qualifications.

(iv) UNAT was not in a position to rule on the basis of uncertain and disputed facts, namely whether it is actually possible for the Applicant to perform the duties of a translator in a member organization, or at least duties commensurate with her education and professional qualifications and which are reasonably compatible with her impairment, taking into account the duties actually required of a translator and the technology available to compensate for her inability to use a computer keyboard and that for this reason, the Standing Committee should reconsider the Applicant’s request after carrying out the required checks, for example finding out from the translation services of member organizations what technology is available that might compensate effectively for the appellant’s impairment and to what extent it would compensate for that impairment in the light of the duties actually required of a translator in those organizations.

(v) UNAT rescinded the decision taken by the Standing Committee at its meeting on 15 July 2009 with regard to the Applicant’s request and remanded

the Applicant's request to the Standing Committee so that it may review its decision on the basis of the afore-mentioned reasons.

4.3 Applicant's Pleas

4.3.1 In her pleas, the Applicant requests the Tribunal to order that:

“a. The Deputy Secretary-General's decision of May 13, 2009 and the Under Secretary-General original decision of July 31, 2007 [...] appealed against be rescinded and replaced by either:

(i) a decision terminating her employment and recognizing her permanent incapacity and her right to termination indemnity pursuant to Chapter IX, Rules 9 and Annex III (b) of the Staff Rules; her right to be paid the salary and allowances she was receiving at the date on which she last attended at duty until the date of the termination of her appointment pursuant to Article 11.1 (a), (b), (c) of Appendix D to Staff Rules without prejudice to entitlements under other provisions of the Staff Regulations and Rules; her right to compensation under Article 11.2 (d) of Appendix D to the Staff Rules in a sum representing two thirds of her final pensionable remuneration, and an additional allowance under Article 11.4 (b) of Appendix D to the Staff Rules to assist in financing the cost of an appropriate course of vocational rehabilitation to be submitted for the approval of the Secretary-General at a later date; or

(ii) on a subsidiary basis, a decision reinstating her in a post she is able to carry out given the disability she suffers, in accordance with the Article 27 of the United Nations Convention on the rights of persons with disabilities,

b. The [Applicant] be paid compensation for physical and mental distress in the sum equivalent to two years salary.

c. She be paid the salary owing to her for the period 28 March to 31 July 2007, having been placed on special leave without pay for that period after her entitlement to special sick leave was wrongfully reduced....”

5. *Judgment*

5.1 The Tribunal recalls paragraph 8.8 of UNDT Judgment No. 089 (2010) where it stated as follows:

“8.8 Having found that the Applicant was incapable of further service to the organization, section 2 of ST/AI/1999/16 becomes operable and the Administration should then have submitted a request to the United Nations Staff Pension Committee (“the Committee”) for the determination of whether the Applicant should be awarded a disability benefit pursuant to section 3.4 of ST/AI/1999/16. **It is only when the Committee has decided to award a disability benefit that a recommendation for the termination of a staff member’s appointment under staff regulation 9.1 (a) or (b) can be made for approval by the Assistant Secretary-General for Human Resources Management on behalf of the Secretary-General.**” (Emphasis added).

The Tribunal is satisfied that UNAT Judgment Number 2010-UNAT-003 ensures that the Administration will now follow the correct procedure in relation to the Applicant’s case.

5.2 In light of its findings above, the Tribunal **rescinds** the decision to terminate the Applicant’s employment which means that the Applicant is hereby deemed to have been in the employment of the Organization from the date of termination of her appointment to the date of issuance of this judgment, and **ORDERS**:

- (i) the Respondent to reinstate the Applicant to a position whose duties she is able to carry out given the impairment she suffers;
- (ii) Orders the Respondent to make good the Applicant’s lost earnings from the date of termination of her fixed-term appointment to the date of her reinstatement with interest at 8% per month for the said period;
- (iii) Orders that the Applicant be paid her entitlement for the period from 28 March 2007 to 31 July 2007 during which period she was entitled to special sick leave;

(iv) fixes the compensation to be paid to the Applicant, should the Secretary-General decide, in the interest of the Administration, not to perform the obligation to reinstate the Applicant, at two years' net base salary at the rate in effect on the date of the Applicant's termination from service, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgment until payment is effected; and

(iv) Rejects all other pleas.

(Signed)

Judge Nkemdilim Izuako

Dated this 14th day of July 2010

Entered in the Register on this 14th day of July 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi