Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

OMONDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON NON-RENEWAL OF A TEMPORARY FIXED-TERM APPOINTMENT

Counsel for applicant:
Katya Melluish, Office of Staff Legal Assistance

Counsel for respondent:
Chacha Odera
Joerg Weich

Facts and Procedural History

1. The Applicant commenced employment with the Information and Communication Technology Service (ICTS) of the United Nations Office at Nairobi (UNON) on 24 November 2008 as a Programme Assistant at the G5 level. She was recruited on a six month temporary appointment which was extended for a further five months through to 30 October 2009.

2. The Applicant's recruitment to this temporary appointment was effected following her application for a vacancy at the G6 level bearing the same functional title on *Galaxy* as VA O7-PGM-UNON-415831-R-Nairobi (VA 415831) which had been published on 11 December 2007. She was interviewed and recommended as suitable for the position on 2 September 2008. The vacancy announcement was however cancelled on 28 October 2008 without the interview panel's recommendation having been effected.

3. On 30 October 2008, the officer-in-charge of the Administration Unit of ICTS, Ms. Winnie Kung'u, contacted the Applicant and asked if she would consider being recruited on a temporary basis pending a re-advertisement of the post and completion of the recruitment process. The Applicant agreed and her initial temporary appointment of six months as a Programme Assistant was then effected. The Applicant worked under the direct supervision of Ms. Kung'u, who was her first reporting officer.

4. The Applicant was pregnant at the time of her appointment, and began her maternity leave on 29 April 2009.

5. On 12 August 2009, while still on maternity leave, the Applicant's supervisor informed her by email that an Administrative Assistant post at the G5 level had been advertised on *Galaxy* as 09-ADM-UNON-421846-R-Nairobi (VA 421846) The Applicant applied for the post on 14 August 2009.

6. When she returned from leave on 25 September 2009, the Applicant found her position encumbered by another staff member, one Ms Mwihu, who was also on a temporary appointment, hired to replace the Applicant while she was on maternity leave. The Applicant was not allowed to resume her functions but was asked to fill in for another staff member, who was also on maternity leave, at the ICTS Helpdesk.

7. A list of eligible candidates for VA 421846 was forwarded to Mr. Charles Emer, as Chief of ICTS/UNON in October 2009. At a meeting on 7 October 2009, Mr. Emer informed the Applicant and her replacement that their contracts would be extended until the end of November 2009 so that they could be interviewed for the vacant post.

8. The Applicant was interviewed on 4 November 2009. Ms. Kung'u, who was to be on the interview panel, recused herself. The Panel comprised Mr. Pradeep Sood, Mr. Francis Gichomo and Ms Peninah Ngatia.

9. On 19 November 2009, the Applicant received a letter of appointment dated 6 November 2009 (effective 5 November 2009) renewing her appointment through to 30 November 2009. The functional title for this appointment was that of an Administrative Assistant.

10. On 24 November 2009, the Applicant filed a request for Management Evaluation of the decision not to extend her contract beyond 30 November 2009. On 25 November 2009, the Applicant also filed a motion for suspension of action with the United Nations Dispute Tribunal (UNDT) in Nairobi challenging the same decision.

11. On 26 November 2009, the Applicant was informed that her contract had been extended for a further month. She then withdrew her motion for suspension of action.

12. On 28 December 2009, Counsel for the Applicant contacted the Respondent for information on the status of the Applicant's contract. Counsel was informed that the

Applicant's contract was not going to be renewed. The Applicant had hitherto not been informed of that decision.

13. On 29 December 2009, the Applicant filed a second request for management evaluation and an application for suspension of action on grounds that, notwithstanding the broad discretion of the Administration to make such a decision, this particular decision was motivated on extraneous factors so that it is unlawful.

14. The Tribunal heard and granted the motion for suspension of action on 30 December 2009. In its reasoned ruling of 11 February 2010, the court ordered that the *status quo* be maintained pending the result of management evaluation or the filing and determination of a substantive suit, whichever comes first.

15. At an ICTS staff meeting on 5 February 2010, the Chief of Section commented on the Applicant's case which was pending before the Tribunal. On the same day, the Applicant was advised that the recruitment process for VA 421846 was being revamped and that a new interview panel had been constituted.

16. Three days later, on 8 February 2010, the said Chief of Section told the Applicant who had gone to see him that the upcoming interview process would be more rigorous because all the internal candidates who had applied would have to be considered.

17. On 10 February 2010, the Applicant filed her substantive application to which the Respondent filed a Reply on 12 March 2010.

18. On 11 February 2010, the Tribunal issued its written, reasoned Order on the application for suspension of action that it had granted on 30 December 2009.

19. The Applicant was re-interviewed for VA 421846 on 11 February 2010.

20. Following a case management conference with the parties on 27 April 2010, the case was set down for hearing on Friday, 7 May 2010.

21. On 6 May 2010, counsel for the Applicant was taken ill. The Respondent was informed and, as there was no objection to the hearing being postponed, counsel on both sides were advised to confer and propose a suitable hearing date by 17 May 2010.

22. Taking into account the schedules of counsel for both Parties, the matter was rescheduled for 29 July 2010. A new notice of hearing was issued to this effect on 27 May 2010.

23. On 16 June 2010, Counsel for Respondent requested a further adjournment. The Registry again advised the Parties to confer and provide it with a suitable date after 29 July 2010.

24. On 9 July 2010, Parties were notified that the hearing was now set down for Monday, 2 August 2010.

25. The hearing commenced on 2 August 2010. The Tribunal heard the testimony of the Applicant and one witness. The Chief of ICTS testified for the Respondent. The matter was adjourned to 19 August 2010 for closing submissions.

THE APPLICANT'S CASE

25. The decision not to renew the Applicant's contract of appointment beyond 31 December 2009 was informed by extraneous factors such as bias and prejudice against her flowing from a poor working relationship with her immediate supervisor, and bad faith on the part of the Respondent. Consequently, she contends that notwithstanding the Respondent's discretion not to renew her contract, the administrative decision was unlawful because the discretion was improperly exercised.

26. The Applicant was discriminated against on grounds of her pregnancy and maternity leave. Save for her absence on maternity leave, she would in all likelihood have been recruited for the post of Administrative Assistant advertised as VA 421846.

27. Upon her return from maternity leave, the Applicant was sidelined; her supervisor plainly preferred her maternity replacement.

28. Although the Applicant held a temporary fixed term contract which created no expectancy of renewal, she was entitled to return to her original position after her maternity leave for the remainder of her contract. In preventing her from so doing, the Respondent violated her right to due process. It is a fundamental right of staff members who go on maternity leave that upon return, the posts they initially encumbered must remain available for them to return to.

29 The Applicant was entitled to an extension of her contract until the post she temporarily encumbered as an Administrative Assistant advertised on *Galaxy* as VA 421846 on 12 August 2009 was filled.

30. The Respondent violated the Applicant's procedural right to a full and fair consideration of her application to the post of Administrative Assistant that was advertised on 12 August 2009.

31. Retaliatory measures have been taken against the Applicant for seeking the intervention of the Tribunal by initiating proceedings before it, with particular reference to the Respondent's cancellation of the interview process in which she was deemed to be the best candidate and the initiation of a new interview process.

32. It was the duty of the Respondent to advise the Applicant that her contract would not be renewed beyond 31 December 2009.

33. The Applicant therefore seeks compensation in the sum of one year's net base salary.

THE RESPONDENT'S CASE

34. The only live issue before the Tribunal is the decision not to extend the Applicant's temporary appointment. The only determinations therefore open to the Tribunal to make are (a) whether the Applicant had a legitimate expectation of renewal of her temporary contract and (b) whether the Respondent had a duty to advise the Applicant that her said contract would not be renewed.

35. The Applicant has failed to specify how the decision not to extend the contract beyond December 2009 was unlawful or to specify the breach it is alleged the Respondent committed with respect to that contract.

36. The decision not to extend the Applicant's temporary appointment beyond 31 December 2009 was an appropriate exercise of discretionary authority when it was concluded by the Programme Manager that the Applicant's services were no longer needed.

37. In respect of the allegations of discrimination on the grounds of pregnancy and maternity leave, the same are unproven, given that the Applicant's initial contract of 6 months was extended to cover the period of her maternity leave so that it would not lapse during her confinement. The Respondent made good faith efforts to place the Applicant upon her return from maternity leave on a post that would provide her with a better opportunity to leave work early in exercise of her entitlement as a breastfeeding mother.

38. The initial contract of appointment extended to the Applicant and to which she assented was one that was temporary in nature. The Applicant was aware that she had been temporarily appointed to the post pending the completion of a new selection process. The Applicant was also aware that there was a difference between the functions

she was temporarily recruited to cover in November 2008 and the functions advertised in 2009 in VA 421846 to which she applied on 14 August 2009.

39. The Applicant's claim that there is a fundamental right of staff members who go away on maternity leave to return to a specific post has no merit. The nature of the Applicant's appointment under the applicable rules is not associated with specific posts. Further, the Applicant's letter of appointment did not designate to her any specific duties but merely specified that her duties were to be discharged within UNON offices. Therefore, the Respondent had no obligation to place her exactly where she was prior to her maternity leave.

40. The Chief of the Section had the discretion to make staffing dispositions within his section in the best interests of the unit and in relocating the Applicant to a different post upon her return from maternity leave; he had properly exercised this discretion.

41. The Respondent rebuts the Applicant's contention that he was obliged to advise her on the non-renewal; her contract does not provide for any such notice and the date for expiry of the contract was clearly stipulated therein.

42. With respect to the allegations of breach of the right to a full and fair consideration of her application to VA 421846, the Respondent followed the procedure as posited in ST/AI/2006/3 and denies the Applicant's contention that a strong performance in the interview would likely lead to her selection and recruitment to the post.

43. The interview process for VA 421846 held in November 2009 was cancelled and a new interview panel reconstituted by the Chief of Section in February 2010 because of the allegations of impropriety in the interviewing panel, the resort by Applicant to a request for Management Evaluation and her application for suspension of action heard in December 2009. Other reasons for the cancellation included the rejection of the interview report by the Central Review Panel (CRP) because internal candidates were not considered and the chair of the interview panel had retired.

44 The Applicant and others were evaluated according to established criteria and the Applicant recommended as being suitable for the post, among others. However, an internal candidate was eventually selected for the post.

Confidential Witnesses

45. At the hearing of 29 December 2009, Counsel for the Applicant applied to have a written statement which had been made jointly by some of the Applicant's colleagues admitted into evidence. Counsel also sought to have the names of the authors of the said statement redacted for purposes of the public record of the case because of concerns that they might be adversely affected by having made the statement to the Tribunal. The names of the authors to this statement were however disclosed to counsel for the Respondent on the undertaking that it would be kept confidential for their protection against possible retaliation; counsel had no objection to the admission of the witness statement into evidence.[1] The statement was then so admitted.

46. At the hearing of 19 August 2010, counsel for the Respondent submitted that the statement which had earlier been admitted should only be given the weight attaching to evidence that is untried and untested for veracity by cross-examination before the Tribunal.

47. The Tribunal notes that the statement of the Applicant's work colleagues had been admitted without any objection and in fact with the express consent of the Respondent on 29 December 2009. Counsel for the Respondent, though privy to the identity of the authors of the statement, did not deem it necessary to call any of them for the purposes of cross-examination during the course of these. Such cross-examination could have been conducted *in camera* if Counsel for the Respondent wanted to exercise his right to cross-examination.

[1] UNDT/NBI/O/2010/017, at para 14.

DELIBERATIONS/CONSIDERATIONS

Does the refusal to renew the Applicant's contract of appointment form the only live issue before the Tribunal?

48. At the hearing of 19 August 2010, counsel for the Respondent submitted that the only live issue before the Tribunal is the decision not to extend the Applicant's temporary appointment. According to counsel, this case is limited to determinations on whether, firstly, there was legitimate expectation of contract renewal and secondly, whether the Respondent was obliged to advise the Applicant on whether or not her contract would be renewed. The interview process for VA 421846 and the decision not to award the fixed-term position to the Applicant therefore lie outside the scope of this case.

49 With regard to the jurisdiction of this Tribunal, I recall the principle espoused in *Sanwidi* UNDT/2010/036, as affirmed by the Appeals Tribunal[2]:

> As the first tier of the formal component of the internal justice system of the United Nations, the Tribunal is competent to entertain applications as provided for by the Statute creating it. In entertaining such an application, the Tribunal as a judicial body shall receive evidence that is relevant and evaluate such evidence for a just determination of the case or application. Nothing and no-one shall constrain or limit the Tribunal's power in its judicial functions to grant full equality to the parties in a fair and public hearing…The Tribunal is entitled to examine the *entire case before it*.[emphasis added]

50. In the light of the foregoing principle, this Tribunal is entitled to subject the entire case to keen and thorough scrutiny, so as to render full justice between the parties. Therefore, quite apart from the matter of the non-extension of the Applicant's contract beyond December 2009, the issues of the interview and selection process are not beyond

[2] 2010-UNAT-084

the scope of the consideration of this Tribunal. I find it incumbent upon me to have regard to all relevant aspects of the case in making my final determinations in this matter.

51. It is mention-worthy that a case exists on this court's docket at the instance of the Applicant. The opposing side is at liberty to join issues with an Applicant or even concede the issues. The conduct of a case is totally within the province of counsel. Although a court or Tribunal may request counsel to address it on certain issues which it considers to be relevant, no Tribunal directs counsel as to the conduct of his or her case. It is however prudent for counsel to fully address all the issues that are raised by an opposing party or the Tribunal.

Was there a strained relationship between the Applicant and her immediate supervisor?

52. The Applicant's principal contention is that the decision not to renew her appointment was actuated by bad faith and ill-motive against her because of the poor working relationship between her and her immediate supervisor, Ms. Kung'u. In its assessment of whether the said relationship was a countervailing circumstance leading up to the non-renewal of her contract, the Tribunal has had regard to the oral evidence tendered by witnesses during the hearings as well as the written statement of the Applicant's work colleagues as placed on the record in December 2009.

53. It is abundantly clear that the Applicant and her supervisor had an uneasy, strained relationship. The Applicant testified that she received no induction, training or guidance in her duties from her supervisor. The said supervisor on the other hand told the Tribunal that the Applicant was briefed on her functions when she first reported for duty on 24 November 2008 and was in fact registered for and received training on the Integrated Management Evaluation System (IMIS) and later, trainings on other technical applications. While the IMIS registration form was filed with the Tribunal, I am not persuaded that indeed any formal training on the system took place. The Applicant said she used a handout on the system and taught herself how to use it. Her supervisor, in

reply to a question in cross-examination, said that the Applicant's IMIS training took place while she was away on leave. I have no reason not to believe the Applicant's testimony or the joint witness statement of her colleagues on the matter of her not receiving adequate training and guidance on IMIS and other aspects of her work.

54. In reply to another question in cross-examination, the Applicant's supervisor said that although they had a good working relationship, she felt exasperated when she learned that the Applicant was pregnant. Her exasperation was based on the fact that the recent recruitment of the Applicant which was intended to help alleviate her own heavy work-load would not achieve that result as the new recruit was likely to start maternity leave soon and yet another replacement would have to be found.

55. The Respondent has challenged the contention that the relationship between the Applicant and Ms. Kung'u was not a good one, and proffered the performance evaluation by Ms. Kung'u of the Applicant as evidence of the fact that if nothing else, the working relationship was a professional one. This singular fact, in the view of the Tribunal, does not dispel the allegations of ill-motive and bad faith. It is simplistic to argue that any supervisor who does not like a subordinate must necessarily give the said subordinate a poor rating when appraising their performance. The Performance Appraisal System (PAS) in itself has in-built safeguards that often serve to put the lie to a false evaluation.

56. It is in evidence before the Tribunal, which the Respondent did not seek to rebut, that on three separate instances during an interview in which the Applicant was a candidate, at least one member of the interview panel expressed the view that the Applicant was unsuitable for the post, not on the basis of her credentials, but rather because of her poor working relationship with Ms. Kung'u. The redacted statement of the Applicant's colleagues to the effect that Ms. Kung'u showed a marked dislike for the Applicant, and did not train her for her duties, attests further to the strained relationship between the Applicant and her immediate supervisor.

Did the uneasy working relationship occasion poor treatment of the Applicant and ultimately lead to the non-renewal of her contract?

57. It is not in contention that a fixed term appointment lapses at the end of the period stipulated in the contract. The Applicant, in fact, concedes as much. Equally, it is settled law that the exercise of the Respondent's broad discretionary authority must not be tainted by forms of abuse of power, bad faith, prejudice, arbitrariness or other extraneous factors, the presence of which contribute to a flawed administrative decision.[3] The Tribunal has consistently upheld this principle, and has established that a decision not to renew a fixed-term contract that is informed by prejudice, bias or other extraneous factors has no legal force and shall be vitiated.[4]

58. The Applicant testified that upon her return from leave on 25 September 2009, Ms. Kung'u was shocked to see her and clearly unaware that she was returning to work on that day. Her maternity replacement, Ms. Mwihu, was seated at the Applicant's former desk and was covering her functions at the front office at ICTS.

59. There is testimony to the effect that the Applicant's maternity leave papers were never forwarded to the Human Resources Management Services (HRMS) by the Applicant's supervisor and that she had to do so personally after being notified by a colleague during her leave that HRMS was not aware of the maternity leave. From the records, the Applicant's supervisor had on 9 April 2009, (two months before the Applicant would start her maternity leave) put in a request to start a maternity replacement process for the Applicant. The omission therefore in failing to forward the Applicant's maternity leave papers to HRMS, in the context of all the facts of the case, assumes special significance in light of the allegations of bad faith.

60. It is also in evidence that during her maternity leave, the telephone extension in the Applicant's name had been deleted and given to her maternity replacement. The

[3] United Nations Administrative Tribunal, *Handelsman*, Judgment No. 885 (1998)
[4] *Abdallah*, UNDT/2010/049

Applicant's immediate supervisor had put in a request on 15 June 2009 for the editing of the Applicant's extension number citing the need for correct identification by callers to ICTS and for purposes of telephone billing. The testimony of the Applicant, and of her work colleagues, is that the practice in ICTS is that while one is away on maternity leave, their telephone extension and name plate remains in place. This piece of testimony is unchallenged.

61. At the hearing of 29 December 2009, the Applicant's supervisor attributed the removal of the Applicant's name plate during her maternity leave to the need to ensure that persons seated at the front desk of ICTS were correctly identified by those visiting ICTS.

62. I am, however, not convinced that the different treatment accorded to the Applicant in terms of deletion of her phone extension and removal of her name plate was done for reasons as innocuous as the Respondent suggests. It is noteworthy that when the Applicant returned from leave on 25 September 2009 her name plate had still not been put out more than three months later. Indeed, Ms Kung'u testified on 29 December 2009, that the Applicant's name plate had been made but was stowed away in a stationery cabinet.

63. Considering the totality of the circumstances in this case, it is my judgment that the treatment afforded to the Applicant in this aspect takes on the definite patina of bad faith and discrimination against her. The poor working relationship that developed between the Applicant and her immediate supervisor set the stage for the non-renewal of her contract in December 2009.

The reassignment of the Applicant

64. Staff Regulation 1.2(c) provides that:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.

65. The Applicant contends that she had the fundamental right to encumber the same post she held before going on maternity leave, barring the most exceptional circumstances, such as utter lack of funding or closing down of an office. In that regard, counsel for the Applicant invoked Article 8.2 of the Maternity Protection Convention as persuasive guidance for the Tribunal.

66. The Chief of ICTS in his testimony raised the matter of his discretion to make staffing dispositions within the section, and to reassign and relocate staff members to wherever he deemed fit in the interests of the Organization.

67. The Tribunal agrees that the Chief of Section was so entitled. It is our view that in the circumstances, a proper reassignment by the head of section to other tasks in the office within the Applicant's competence upon her return from maternity leave was in order.

68. There is no merit in the argument that the Applicant had a fundamental right to return to her former position after maternity leave. To the extent that fundamental rights in law are those basic or foundational rights deriving from natural law and defined as inherent and inalienable, the rights attaching to the Applicant under the terms of her employment are not fundamental rights. What we are concerned with here are the rights, express or implied, to which the Applicant is entitled under her contract of employment. The important issue is whether there was ever a proper reassignment of the Applicant by the Chief of section.

69. It is not denied that the Applicant was not allowed to resume her normal duties as a Programme Assistant but was instead moved to the help-desk upon her return from maternity leave. It is also a fact that the Applicant's last contract of appointment was renewed with a new functional title - that of an administrative assistant. The decision to move the Applicant to the Help desk, we are told, followed discussions by the Chief of ICTS and his deputy on the seating arrangements to be made considering that both the

Applicant and her replacement were on board after the Applicant came back from maternity leave. The arrangements were characterised at the material time as being temporary, and the Applicant testified that she understood them as such. However, she never had the opportunity to resume her duties at the front desk as a Programme Assistant, because her maternity replacement continued carrying out the tasks associated with the front desk at ICTS up till December 2009 when the Applicant's last contract was calculated to expire.

70 There is no evidence that indeed, the Applicant was properly reassigned upon her return from maternity leave. At the suspension of action hearing in December 2009, the Respondent's case was that at the time of the Applicant's resumption following her maternity leave, her maternity replacement was in the process of completing certain allocated tasks which necessitated the moving of the Applicant to the Help desk. During the hearing of the substantive application in August 2010, the explanation given by the Chief of section of ICTS was that the move was motivated by considerations that at the ICTS Help desk, the Applicant could avail herself of the half-day entitlement for new mothers for breast-feeding purposes. This explanation is specious in light of the fact that at the material time, the Applicant was both uninformed and unaware of the half-day breastfeeding entitlement and never made use of it.

71. What is evident here is a hasty and informal move of the Applicant away from the position for which she was originally hired. Not only did this exhibit poor leadership and lack of professionalism in the way that it was done, it tended to reinforce the Applicant's fears of alienation and prejudice.

72. Under the circumstances, I find that it was reasonable for the Applicant to expect to return to the position she encumbered before she went on maternity leave. Such an expectation was however not tantamount to a right to return to that position if her Chief of Section properly reassigned her to another post within her competence and in the interests of the Organisation, I make no hesitation in also finding that the Applicant was never properly reassigned and that the explanation of a reassignment in this case was

simply an afterthought meant to cover up the shabby treatment meted out to the Applicant.

Escalation of bad faith and ill motive against the Applicant?

73. It was the testimony of the Respondent's witness that at the time of recruiting the Applicant on General Temporary Assistance (GTA) in November 2008, there was a great need for her to assist with the workload at the front desk of ICTS. It is therefore curious that the Respondent chose not to extend her contract in December 2009 before substantively filling the post whose functions her assistance was deemed as necessary as to warrant her temporary recruitment. Why was this so? Was it because the situation that informed the Applicant's GTA recruitment had ceased to exist? Or was it a ploy to get rid of the Applicant whose relationship with her immediate supervisor had so soon deteriorated?

74. It is also in evidence that on 11 March 2009, the Applicant's immediate supervisor had recommended to the Chief of Section in an email that instead of the Applicant's contract being renewed as requested by HRMS, the original post that was cancelled should be re-advertised. While she was at liberty to make such a recommendation to the Chief of Section, can it be said, in light of prevailing circumstances, that this recommendation was made in good faith?

75. Some of the actions bordering on bad faith as alleged by the Applicant included:

(a) The failure of her immediate supervisor to submit her maternity leave papers, and causing the Applicant to do so herself while on maternity leave;

(b) The withholding of her permanent name plate even up till the time of the filing and hearing of this application;

(c) The transfer of her telephone extension to her maternity replacement contrary to the practice at ICTS;

(d) The non-allocation of functions to the Applicant upon resumption from maternity leave thereby putting her in the uncomfortable and demeaning position of resorting to begging her work colleagues to help them out with their work load:
(e) Her 'banishment' to what was referred to as the intern's desk;
(f) The cancellation and re-initiation of an interview in which she was adjudged the best candidate.

76. The Applicant's immediate supervisor told the Tribunal that she had heard talk in the office about the Applicant's fears concerning her post while on maternity leave. She said that she decided not to address the matter with the Applicant at the time and had held a meeting with the Applicant a few days after her resumption in which these concerns were discussed.

77. In reply to a question from the Tribunal, she said that although the Applicant's temporary name plate had been removed while she was on maternity leave, a permanent one had been prepared but was still lying in the stationery cabinet and had not been put out due to oversight in the office. It is of some interest that after her discussions with the Applicant, and up until this application was filed, and proceedings commenced, the new name plate still remained in the cabinet.

78. The Chief of ICTS both in his witness statement and oral testimony stated that he cancelled the report of an interview, in which the Applicant was said to have scored the highest points and the recommendations emanating from it and then constituted a new interview panel which he chaired. One of the reasons he stated for doing so was that the Central Review Panel (CRP) had rejected the interview report with the recommendations he sent to it and insisted that internal candidates be considered. The alleged communication between the ICTS Chief and the CRP was not placed before the Tribunal. Evidence adduced tends to suggest that the vacancy advertisement on which the interview results said to have been rejected by the CRP was based was never cancelled and re-

issued. Why were internal candidates, who under the Rules[5], ought to have been considered first not so considered as to prompt the CRP to intervene? And why did the Applicant and other external candidates who were earlier interviewed attend another interview in which they would be considered along with internal candidates, again contrary to the Rules?

79. Much as the Respondent's witnesses have striven, mostly unsuccessfully, to rebut some of the Applicant's allegations, I am of the firm view that the presence of bad faith in some of the Respondent's actions concerning the Applicant stand out in bold relief. There is no doubt that the bad blood between the Applicant and her immediate supervisor created a ripple effect and alienated her from the Chief of ICTS.

The selection process, leadership at ICTS and the matter of retaliation

80. It was submitted on behalf of the Respondent that the only live issue for determination before this Tribunal is the singular question of whether there was a legitimate expectation of a renewal of the Applicant's temporary contract. The Respondent's counsel argued that the process that led to the selection of a candidate for a fixed term position that would replace the post on which the Applicant was sitting is entirely outside the scope of this application. I have stated earlier in this judgment that this application is not merely about the legitimacy of the non-extension of a temporary contract.

81. The United Nations Organization is an exemplary employer and demands high standards of its employees who are international civil servants. While the Organization is guided by its Rules and Regulations and other administrative issuances, it is also guided by certain core values. For instance, it is expected that integrity must attend any process carried out within the Organization including selection processes. This Tribunal has a

[5] ST/AI/2006/3 Staff Selection System

clear duty both to uphold the enforcement of these high standards and to hold staff and managers alike accountable where they fail to do so.

82. At the suspension of action hearing of 29 December 2009, counsel for the Respondent stated from the Bar, in answer to a question from the Tribunal, that the recruitment process for VA 421846 was still ongoing. He told the Tribunal that all that remained to complete the selection process was the submission of the recommendations of the interview panel to the Central Review Panel for review before a selection would be made.

83. At the hearing of 2 August 2010, the Tribunal was told that the interview recommendations were eventually cancelled and a new panel reconstituted, new interviews conducted in which more candidates were considered, and the post was filled by an internal candidate.

84. The Chief of ICTS in his oral testimony stated that he cancelled the results of the said interview because:

i) The Applicant had complaints about its propriety;
ii) A member of the panel had retired;
iii) Another member of the panel was a witness before the Tribunal for the Applicant;
iv) The Central Review Panel directed that internal candidates who had applied and had not been interviewed by the panel be considered;
v) The Applicant had applied for management evaluation.

85. A brief examination of the reasons proffered for the said cancellation is pertinent:

Retirement of the chair of the first interview panel:

86. According to the testimony of Francis Gichomo who was a member of the first interview panel, the former Deputy Chief of ICTS who chaired that panel had retired

before he sat on the interview panel. This piece of evidence was not rebutted. How then could the said retirement provide a reason to cancel the interview?

A member of the interview panel was a witness before this Tribunal:

87. With the best of intentions, this reasoning is difficult to understand given that the interview in question took place in November 2009 and the panelist did not appear before this court until December 2009. This in effect meant that appearance before this Tribunal had rendered the said panelist ineligible for the function of sitting on the interview panel in the eyes of the ICTS Chief.

The CRP had directed that internal candidates who applied should be considered:

88. I have observed earlier that the claim by the ICTS Chief that the CRP had rejected the recommendations sent to it because internal candidates were not considered is not supported by any documentation. Even if this was indeed the case, it meant that the ICTS leadership had proceeded to interview external candidates without evaluating the internal ones as it ought to have done under section 7 of ST/AI/2006/3. This serves too to provide an insight into the modus operandi of the section head and the shoddy manner in which this selection process was conducted.

The Applicant had complaints about the propriety of the process and had applied for management evaluation:

89. A request for management evaluation is a condition precedent for a staff member to approach the Tribunal in cases such as the present one.

90. When the reasons given by ICTS leadership for initiating another interview process for a vacancy announcement whose selection process had neared completion are weighed, the simple implication is that it was done as an act of retaliation against the Applicant for bringing this matter to the Tribunal.

91. The Applicant alleged that in an ICTS staff meeting, the Chief of Section commented on her case and told staff that a new selection process would be initiated in which things would be done by the book and that the Rules would no longer be bent to favour anyone.

92. On his part, the Chief testified that he told his staff at that meeting that there was a memo on *iSeek* following some court cases in New York in which some staff members had complained that they were not considered for vacancy advertisements. He added that he had told the Applicant that the new selection process he would initiate would not be as easy for her as the first one because internal candidates would, unlike in the first process, be considered.

93. Retaliation is defined as 'any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct.'[6]

94. There is no gainsaying that appearance before this Tribunal is a protected activity. If Applicants or witnesses are arm-twisted into not appearing to state their case or give their testimony, then the new internal justice system which has been instituted within the United Nations would be frustrated out of existence, and justice with it, in this Organisation. The Tribunal has a duty to protect persons appearing before it from being retaliated against no matter how subtle the retaliation.

95. In *Kasmani,* Order No. UNDT/NBI/O/2010/25 the matter of retaliation against witnesses was addressed thus:

> Witnesses appearing before this court will, almost always, fear for their livelihood; they will fear intimidation and retaliation in the exercise of their functions, and the very

[6] ST/SGB/2005/21-*Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations*, at section 1.4.

> security of their jobs. In these cases, it is not the public that these witnesses will fear; rather, it is the Secretary-General or agents acting in his authority.
>
> It is imperative therefore that staff members can be confident that it is safe for them to testify before the Dispute Tribunal. In the absence of such an assurance, it is most unlikely that witnesses will come forward.

96. The testimony on why and how the recruitment process for VA 421846 had to be overhauled clearly reflects a blatant manipulation of the selection process set out in ST/AI/2006/3; a subversion and clear breach of UN Staff Rules. Why were internal candidates not considered previously and not interviewed by the first panel? How and why did the Applicant and other external candidates participate in the second interview that eventually produced an internal candidate given that the Rules require that internal candidates be first considered and if selected, there would be no need to consider external candidates? Did the ICTS Chief go out of his way to "find" internal candidates with a view to narrowing any chances the Applicant had at selection and thereby exact retaliation against her for daring to complain to this Tribunal? Or did he start out by excluding internal candidates with a view to manipulating the said selection process in favour of an external candidate?

97. Whatever the answers to the questions posed, I find that the Chief of ICTS was being economical with the truth when he told this Tribunal that the Central Review Panel had rejected the recommendations emanating from the first interview exercise which he sent to it on the ground that internal candidates were not considered. Apart from the fact that he has not supported this account with any document, the unrebutted evidence of one of the panelists is that a report did not emerge from the said interviews before the man who had chaired the panel retired. In other words, there was no report that could have been sent to the CRP.

98. I find also that the Chief of Section was peeved that the Applicant would go so far as to drag the Section he headed before this Tribunal for any reason. I have no doubt that

his cancellation of the first interview report was entirely at his own initiative. He then commenced a second interview which he chaired in order to control its outcome. In the course of this second interview, in which he wrongfully considered internal and external candidates together, he ensured the selection of a serving staff member. All these efforts were geared at checking the complaint that he had excluded internal candidates in addition to providing a basis for the non-selection of the Applicant who was an external candidate. I have no doubt that this "clever" manipulation of the selection process was a retaliatory measure against the Applicant who while sitting on a mere GTA post had dared to approach the Tribunal. If this application never came before the Tribunal, the selection process would, contrary to the Rules, have been successfully concluded without internal candidates having been first considered or considered at all.

Management Evaluation

99. On 30 November 2010, the Tribunal through its Registry sought particulars from the parties with respect to the request for management evaluation that had been filed by the Applicant on 29 November 2009, requesting review of the decision not to renew her temporary fixed-term appointment beyond 31 December 2009. It has emerged from documents submitted before the Tribunal that on 15 January 2010 after the grant of a suspension of action application to the Applicant, the Management Evaluation Unit (MEU) had advised her that necessary information was being sought before a review of the decision could be conducted.

100. On 11 February 2010, the Tribunal issued its reasoned ruling on the suspension of action application (UNDT/NBI/O/2010/017). The court stated:

> The management evaluation system is designed to give management a chance to correct an improper decision, or provide acceptable remedies in cases where the decision has been flawed, thereby reducing the number of cases that proceed to formal litigation. It affords the staff member an opportunity to have their grievance addressed internally and objectively.

> In the instant case, the Applicant has in fact filed two requests for Management Evaluation, both of which concern the same set of facts. The Tribunal notes with concern that to date the Applicant has not received a decision from the Management Evaluation Unit even in respect of her request of 24 November 2009. Indeed the Tribunal is only aware of this because on 2 February 2010, the Registry in Nairobi received an email from the Management Evaluation Unit asking when the court will issue its reasoned ruling in the instant matter.
>
> This is a matter of some concern to the Tribunal. The processes at the UNDT and the Management Evaluation Unit are distinct processes, independent of each other, and it is imperative that they be seen as such.

101. In spite of the Tribunal's statement, on 2 March 2010, MEU again wrote to the Applicant and stated that because it had been advised that she had submitted an application on the merits to the Dispute Tribunal, the Management Evaluation Unit was 'no longer seised of the matter.'

102. For the avoidance of doubt, it bears restating that the Management Evaluation system is an administrative process, designed to afford the Secretary-General the opportunity to remedy a situation in which an administrative grievance has been caused. Both the Statute and Rules of the Dispute Tribunal make it mandatory for a staff member to first approach the MEU to have his or her grievance addressed in cases such as the instant one. The timelines in the Rules however also make it necessary for a prudent Applicant to file for injunctive relief, and possibly the substantive application itself, while the MEU considers his or her claim.

103. An Applicant has to seek a suspension of action order *before the* decision complained of is effected, and the court has five days within which to consider the motion. The MEU, on the other hand, is afforded thirty or forty-five days (depending on whether the request emanates from headquarters or other offices).

104. The act of suspending a decision does not resolve the dispute; it merely preserves the *status quo.* It is normally the case that the dispute forming the basis of a motion for suspension of action leads to a substantive application being filed before this court. It is therefore clearly erroneous for the MEU to tell an Applicant that his or her request for management evaluation cannot, or will not, be considered because a substantive application has been filed before the Tribunal. An effective internal justice mechanism envisages a situation in which a favourable decision by the MEU would stem the need for litigation altogether.

Conclusion

105. In light of the foregoing considerations and review, the Tribunal finds that:

a. The Applicant has not made out a case with regard to her allegations of discrimination on the basis of her pregnancy and/or maternity leave;

b. Although the Applicant had a reasonable expectation to return to her original position upon her resumption to work from maternity leave, she was not so entitled as the Respondent had the discretionary authority to reassign her, This authority was however not utilized but only invoked before this Tribunal to explain the unprofessional relegation of the Applicant to an idle desk. This put her in a situation where she had to ask other colleagues for work, and tended to reinforce her feelings of alienation and prejudice;

c. The Respondent's decision not to renew the Applicant's contract beyond 31 December 2009 was informed by a poor working relationship in which there was no love lost between her and her immediate supervisor and was correspondingly based on bad faith and improper motive;

d. The Applicant would be normally entitled to an extension of her temporary fixed-term contract until the post she encumbered as an Administrative Assistant was filled through a competitive process. The Respondent did not lead evidence to show that the situation which informed the urgent recruitment of the Applicant in November 2008 had abated by December 2009 when they still had not recruited a replacement for the post;

e. The Applicant was entitled to a full and fair consideration of her application to the post of Administrative Assistant. However, the re-initiated interview process was tainted by manipulation and retaliatory considerations. In view of these, the Respondent violated the Applicant's right to due process.

Remedies

106. The Applicant moves the court to grant her compensation in the sum of one year's net-base salary for the injuries she has suffered as a result of the bad faith against her and the violation of her due process rights.

107. In light of my finding that the decision not to renew her contract beyond 31 December 2009 was unlawful, tainted as it was by the myriad extraneous factors already described, I find that compensation is indeed due to her.

108. My assessment of what is due to her must however be balanced against the fact that the post for which she was competing, which gap she was initially recruited to fill, was filled in the first quarter of 2010. The Applicant has, since that recruitment, been employed because of the terms of the Order made suspending the decision not to renew her appointment.

109. In computing the compensation due to the Applicant here, I take into account the fact that she stayed in employment for over nine months after the post was filled. I also consider the nature of the Respondent's conduct against her and the retaliation she was

subjected to for having her dispute litigated and therefore order the payment of two months' net-base salary.

(Signed)

Judge Nkemdilim Izuako

Dated this 25th day of January 2011

Entered in the Register on this 25th day of January 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi