



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/032
Judgement No.: UNDT/2011/122
Date: 7 July 2011
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KWEKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for applicant:

Self-Represented

Counsel for respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS, OHRM

Liza Gall, Nairobi Appeals Unit, ALS, OHRM

The Application

1. On 30 June 2011, the Applicant filed a motion for suspension of action with the United Nations Dispute Tribunal (UNDT) in Nairobi seeking a suspension of the decision by the United Nations International Criminal Tribunal for Rwanda (ICTR) not to extend his appointment beyond the expiry of his current contract on 30 June 2011 (“impugned decision”).
2. The Applicant’s motion was served on the Respondent on the same day with a deadline for any submissions in response to be filed Monday, 4 July 2011.
3. In accordance with the terms of Article 2 of the Statute and Article 13 of the Rules of Procedure of the UNDT, the Tribunal issued Order 068 (NBI/2011) suspending the impugned decision until Thursday, 7 July 2011.

Facts

4. The Applicant joined ICTR in 1997 on a fixed-term appointment as a Labourer in Building Management Services (BMS), which was part of the General Services and Support Section (GSSS) consequently having served with the ICTR for a total of 14 years. The Applicant was placed against a post funded by General Temporary Assistance (GTA) funds. The Applicant’s E-PAS records show that he performed functions related to the upkeep and servicing of courtrooms at the ICTR.
5. On 1 January 2011, the Applicant’s fixed-term appointment at the GL-1A level was extended until 30 June 2011.
6. On 19 May 2011, the Chief, Staff Administration Unit, Human Resources and Planning Section (SAU/HRPS), ICTR, informed the Applicant that his fixed-term appointment would not be extended beyond 30 June 2011. The Applicant’s signature on the memorandum indicates that he had received the notice of the impugned decision on 1 June 2011.

7. On 6 June 2011, the Applicant wrote to the Chief of the Division of Administrative Support Services (DASS), requesting a one-year extension of his appointment to enable him to become eligible to receive additional pension benefits at the 15-year mark of his employment with the ICTR on 30 June 2012.

8. On 23 June 2011, the Applicant was informed by a Memorandum dated 8 June 2011 by the Chief of Staff Administration Unit/Human Resources and Planning Section (SAU/HRPS) that his request for extension of his appointment would not be granted on the basis that his request was not receivable due to the lack of budgetary provisions to allow such an extension and because his services would no longer be required by the Organization.

9. On 30 June 2011, the date of implementation of the impugned decision, the Applicant submitted a request for management evaluation, dated 27 June 2010, to the Management Evaluation Unit (MEU) as well as filing his Application for suspension of action with the Tribunal.

10. On 30 June 2011, the Dispute Tribunal issued Order No. 068 (NBI/2011), suspending the Decision until Thursday, 7 July 2011.

11. This Judgment is rendered following deliberations on the written submissions of the parties.

Deliberations

12. Applications for suspension of action are governed by Article 2 of the Statute and Articles 13 of the Rules of Procedure of the Tribunal. Article 13 provides as follows:

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears **prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.**

2. [...]
3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.
4. **The decision of the Dispute Tribunal on such an application shall not be subject to appeal.** [Emphasis added]

13. The current Application must therefore be adjudicated against the stipulated cumulative test, in that the Applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him irreparable harm.

14. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

15. To grant an application for suspension of action, the Court must be satisfied that there is a serious question to be tried on the merits and whether damages would adequately compensate the applicant in the event that his or her application succeeds at trial.¹ An application for an injunction would therefore normally fail where a court finds that the payment of damages would adequately remedy the injury suffered.

16. Within the present context of the United Nations, a suspension of action application will only succeed where the Applicant is able to establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he has made out is one which the opposing party would be called upon to answer and that it is just,

¹ See *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033; *American Cyanide Co v Ethicon Ltd* (1975) AC396.

convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.

17. A suspension of action application may be brought and considered only where the Applicant has filed a request for management evaluation.

18. The Tribunal must now apply the test described above to the facts of the present case.

19. The Applicant is on a fixed-term appointment. Whereas it is trite law that a fixed-term appointment dies a natural death at the end of the period stipulated in the contract, staff members across contractual types are entitled to expect to be treated fairly and accorded the same due process rights.

20. In other words, the Respondent's exercise of its broad discretionary authority must not be "tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision."²

21. While the burden is on the Applicant to show that the Respondent did not properly exercise his discretion, the Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by the Applicant to show that there is a triable issue here.³

22. There is ample jurisprudence regarding the grounds upon which a decision not to renew a fixed-term appointment may be found unlawful. In *Koumoin* 2011-UNAT-119, the Appeals Tribunal held that, in reviewing a decision not to renew an appointment, the Appeals Tribunal examines "whether the discretion not to renew ... was validly exercised."⁴ Similarly, it has been held at first instance that

² UN Administrative Tribunal Judgment No.885, *Handelsman* (1998).

³ See *Mills-Aryee*, UNDT/2011/051.

⁴ *Koumoin* 2011-UNAT-119.

Even though the staff member does not have a right to the renewal of his or her contract that decision may not be taken for improper motives. The Dispute Tribunal is therefore required to consider whether the motives for the decision were proper.⁵

23. The Tribunal has also examined whether other countervailing circumstances existed, including a legitimate expectancy of renewal of the appointment; abuse of discretion in not extending the appointment; discrimination; or whether the decision was motivated by extraneous factors.⁶

24. The Applicant in this case has alleged no countervailing circumstances. He does not argue that the decision to separate him at the end of June 2011 was made with extraneous motives, in that it was tainted with bad faith or was arbitrary or that a legitimate expectancy of renewal was created and subsequently breached.

25. The Applicant singular contention is that the impugned decision is unlawful because the staff retention process, as applied to him, did not properly take into account his pension eligibility, length of service and seniority, and the on-going need for his services.

26. Pursuant to Security Council resolution 1503(2003), in 2003, the ICTR formalized a Completion Strategy. The Completion Strategy has since been updated so that the current version commits the ICTR to completing its work in 2014; in short, the majority of its current trial workload is to be completed by the end of 2011, with some spillover into the first half of 2012, and appeals to be completed in 2014. To this end, the ICTR developed a set of staff retention criteria in 2007 which is used to identify the posts which are no longer required, and to compare the competence and skills of staff performing similar functions.

27. Whereas his request for review to the Management Evaluation Unit takes his case further and alleges discrimination, victimisation, arbitrariness, and harassment, these allegations have not been made in his Application for Suspension of Action. For the purposes of the present Application, therefore, the Tribunal need examine only

⁵ *Azzouni*, UNDT/2010/005, para. 39.

⁶ See for example, *Kasmani*, UNDT/2009/017; *Abdalla*, UNDT/2010/140.

whether the staff retention exercise was properly carried out in accordance with the set criteria.

28. At the outset, the Tribunal notes that in applying the established criteria, the Applicant was awarded for length of service. Note was also made to indicate that Applicant's lack of flexibility or multi-functionality in terms of his skill-set would impede the Organisation's ability to retain him.

29. The record before the Tribunal makes apparent that, in appraising his performance, the Applicant's first reporting officer for the 2009-2010 and 2010-2011 cycles formally urged him to take advantage of the available training activities to enhance his skill-set. It is unfortunate that the Applicant paid this advice little heed.

30. With regard to the Applicant's arguments on pension eligibility, which criteria he alleges was not properly applied to him, ICTR Information Circular No. 77 of 3 October 2007 lists Competence, Multi-Functionality and Continuity and Length of Service and 'Other Considerations' as the four main criteria on which the need for retention is assessed. 'Other Considerations' are described as criteria, which although relevant, are not as important as the other three. Sub-criteria listed under 'Other Considerations' are therefore scored lower than the primary criteria. A staff member's pension eligibility is one such sub-criterion. The Circular states:


A staff member short of six-months to be eligible for pension could be preferred to another who is farther than six months. Anyway, the length of service criterion would have already designated the staff closer to the pension eligibility. This criterion should be allocated three points.

31. Annex 6 to the Respondent's submissions in reply show that staff members who were due to complete five years of service between July 2011 to December 2011, and those retiring between July 2011 to December 2011 were awarded three marks. As the Applicant fell into neither of these categories, he was afforded no marks under this sub-criterion.

32. The Tribunal finds no impropriety in the Respondent's application of the staff retention criteria in respect of the Applicant. This Application therefore fails on the limb of *prima facie* unlawfulness therefore.

33. Having found that the impugned decision is not unlawful, and given that the test for suspension of action applications is a cumulative one, it is unnecessary for the Tribunal to proceed to assess this Application on the ground of urgency and irreparable harm.

34. The present Application is accordingly dismissed. The Tribunal's Order of 30 June 2011 suspending the decision not to renew the Applicant's contract up till today is therefore discharged.



Judge Nkemdilim Izuako

Dated this 7th day of July 2011

Entered in the Register on this 7th day of July 2011



Jean-Pelé Fomété, Registrar, UNDT, Nairobi