



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BALINGE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Notice: This judgment has been corrected in accordance with Article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. At the time of filing the Application, the Applicant was a staff member of the United Nations International Criminal Tribunal for Rwanda (“ICTR”) in Arusha, Tanzania. He worked as an Associate Translator/Interpreter on a fixed-term appointment at the P2 level in the Language Services Section (“LSS”).

2. On 2 November 2011, the Applicant received an interoffice- memorandum from the Chief of Human Resources and Planning Section notifying him that his fixed-term appointment was not going to be renewed beyond 31 December 2011.

3. The Applicant brought an Application for Suspension of Action with the Tribunal on 24 December 2011 and the Respondent filed his reply on 29 December 2011. On 29 December 2011 the Tribunal rejected the Application for Suspension of Action and communicated to the parties that a reasoned judgment would be issued in due course.

Facts

4. The ICTR was established on 8 November 1994 by Security Council Resolution 955. In 2003, the ICTR initiated a completion strategy which inter alia, was geared towards downsizing the organization’s human resources capacity. In this regard, the Registrar of the ICTR established an ad hoc Staff Retention Task Force (SRTF) on 16 July 2007. The SRTF was to develop the criteria which would enable Programme Managers to determine the composition of the staff members they would need during the final phase of the Tribunal’s mandate and to ensure that the downsizing of staff members was done in the most transparent, consultative and objective manner. A Retention Panel was established to conduct standard evaluation of staff members.

5. The Applicant joined the ICTR in April 1998 as a Transcriptions Supervisor in Kigali, Rwanda. In June 2002, he was recruited as an Associate Translator/

Interpreter in Arusha, Tanzania on a fixed-term appointment at the P2 level in the Language Services Section.

6. On 13 October 2011, the Applicant was orally informed by his supervisor that his contract would not be renewed beyond 31 December 2011 because he had scored low marks with the Retention Panel.

7. On 2 November 2011, the Applicant received an inter-office memorandum from the Chief of Human Resources and Planning Section notifying him that his fixed-term appointment will not be renewed beyond 31 December 2011.

8. On 8 December 2011, the Applicant wrote a memorandum, in French, to the ICTR Registrar requesting him to open an investigation into the alleged excessive abuse of discretionary powers and irregularities committed by the Chief of the Language Services Section (“Chief/LSS”) in the work of the Retention Panel.¹ The Registrar did not respond to the Applicant’s memorandum and on 12 December 2011, the Applicant forwarded the same memorandum to the Chief of Staff Administration Unit and the Legal Officer, Human Resources Planning Section (“Legal Officer/HRPS”). On 19 December 2011, the Applicant provided an English translated version of the memorandum.

9. The Applicant was thereafter informed by the Legal Officer/HRPS that the matter would be submitted to the Independent Retention Appeal Panel (“Appeal Panel”). Subsequently, on 20 December 2011, the Applicant submitted a request for review of the Staff Retention Panel’s recommendations and ratings to the Appeal Panel.

10. The Legal Officer/HRPS invited the Applicant to a meeting to be held on 21 December 2011 regarding his complaint about the retention exercise and the Applicant’s personnel ratings. However, the Applicant did not attend the said

¹ 8 December 2011 Memorandum, Application Annex No.A2.

meeting, because according to him, he had met with some of the panelists and was not satisfied with their explanations, and hence wrote to the Appeal Panel.

11. On 23 December 2011, the Applicant filed a request for management evaluation of the decision not to renew his fixed-term appointment beyond 31 December 2011.

12. On 24 December 2011, the Applicant filed this Application with the Tribunal. As 26 December 2011 was a public holiday in Nairobi, the Respondent was served with the Application on 27 December 2011 and required to file a reply by 11:00 am (Nairobi Time) on 29 December 2011, which he did.

Applicant's Submissions

13. The Applicant submitted that:

a. The decision to separate him from the Organization was unlawful and full of irregularities, errors and omissions and was an abuse of discretionary powers aimed at unjustifiable favouritism.

b. The Application was urgent because the decision not to renew his fixed-term contract had caused irreparable harm to him.

c. At the time of this Application, the process of review by the Staff Independent Retention Appeals Panel had not been commenced. His separation from the Organization therefore caused him psychological and mental torture.

Respondent's Submissions

14. The Respondent submitted that:

a. The decision not to renew the Applicant's fixed-term contract was not *prima facie* unlawful as the Applicant had not provided evidence indicating that the Retention Panel exercise was flawed.

b. The requirement for urgency was not met as any urgency in this case was self-created by the Applicant who failed to bring the matter before the Tribunal in a timely manner.

c. The Applicant will not suffer irreparable harm as Applicant failed to show that the implementation of the decision to not renew his fixed-term contract could not be compensated by an award of damages.

Considerations

15. Applications for suspension of action are governed by Article 2 of the Statute of the Tribunal and Article 13 of the Tribunal's Rules of Procedure. Article 13.1 of the Rules provides that:

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.

16. This Application must therefore be reviewed against the three essential prerequisites for an application for suspension of action as outlined above. For an application of suspension of action to succeed, all three requirements must be met.

Prima facie unlawfulness

17. The first prong of Article 13.1 of the Rules and Procedure and Article 2.2 of the Tribunal's Statute that must be satisfied for the grant of an application for a suspension of action is the requirement that the impugned administrative decision must be *prima facie* unlawful. An administrative decision in this Application would

be unlawful if it is in breach of the United Nations Charter or the Rules and Regulations of the Organization or any procedures that govern the management of the Organization.

18. In considering an application for suspension of action, the Tribunal is only required to determine, based on a review of the evidence presented, whether the contested decision “appears” to be *prima facie* unlawful. This means that the Tribunal need not find that the decision is incontrovertibly unlawful as was enunciated in Mills-Aryee UNDT/2011/051.

19. The Applicant contends that the decision not to renew his fixed-term appointment was based on irregularities, errors, omissions and favoritism and that it is discriminatory in nature and in violation of ST/AI/2010/5 (Performance Management and Development System).

20. The Applicant had failed to give particulars of the irregularities, errors, omissions and favoritism which he alleged made the decision not to renew his fixed-term contract unlawful. In the personnel ratings which showed ratings of certain staff members in which the Applicant obtained the lowest rating, the Applicant failed to establish that his rating ought to be higher than that of his colleagues. Additionally, the Tribunal is not in a position to award scores towards a proper rating of the Applicant or any of his colleagues.

Conclusion

21. The Applicant has failed to satisfy the first requirement of a suspension of action which is the *prima facie* unlawfulness of the contested decision. Therefore, the Tribunal will not make a determination on the other two requirements of particular urgency and whether the implementation of the decision will cause the applicant irreparable damage.

22. In view of the foregoing, the Application for suspension of action is rejected.

Case No. UNDT/NBI/2011/084

Judgment No. UNDT/2012/005

(Signed)

Judge Nkemdilim Izuako

Dated this 12th day of January 2012

Entered in the Register on this 12th day of January 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi