



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/036  
/UNAT/1714  
Judgment No.: UNDT/2012/037  
Date: 26 March 2012  
Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

KAVAKURE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Duke Danquah, OSLA

**Counsel for Respondent:**  
Marcus Joyce, ALS/OHRM

## **Introduction**

1. The Applicant is a former staff member of the United Nations Operation in Burundi (“ONUB”) where he worked as a Personnel Clerk before being reassigned to work as a Reproduction Assistant. On 23 June 2006, he was informed that “for administrative reasons” his contract would not be renewed beyond 30 June 2006 and he challenges that decision in this Application.

## **Facts**

2. The Applicant joined ONUB on 1 November 2004 as a Personnel Assistant in the Personnel Unit at the G-4 level on an Individual Contractor’s Contract and subsequently on a number of Appointments of Limited Duration contracts (“ALD”) under the 300 Series of the Staff Rules.

3. Sometime in March 2006, the United States of America Embassy (“US Embassy”) in Burundi contacted the ONUB Civilian Personnel Section seeking confirmation as to whether one Gaer Mutore, who had submitted a request for a US visa was an ONUB Staff Member. Upon verification, the Administration discovered that Gaer Mutore was not and had never been an ONUB staff member.

4. As a Personnel Assistant, the Applicant’s work included the filing and processing of annual leave requests and *Laissez-Passer* renewals. On 3 April 2006, an incident occurred concerning a leave request (“leave request incident”) made by one Mr. Jean-Claude Nkurunziza. The Applicant had assisted Mr. Nkurunziza, a daily paid worker, to fill out a leave request form over the telephone and had asked him to come to his office to sign it. When Mr. Nkurunziza arrived at the Applicant’s desk, the Applicant went to the filing room where the personnel files of ONUB employees were kept to pick up Mr. Nkurunziza’s file. While he was doing so, Ms. Marie Charles, the Administrative Assistant, intervened and pointed out to the Applicant that Mr. Nkurunziza was wearing a visitor’s badge.

5. Ms. Charles thereafter took Mr. Nkurunziza to her office and it was established that he was not a holder of an ALD contract and hence not entitled to leave days. Ms. Charles then accused the Applicant of forging leave requests for persons not entitled to leave and informed him that she was going to report the matter to the Chief Civilian Personnel Officer (“CCPO”), Ms. Dominique Gagnon.

6. On 10 April 2006, Ms. Gagnon in an interoffice memorandum to the Chief Administrative Officer (“CAO”), Mr. Karsten Herrel, requested the reassignment of the Applicant from the Personnel Unit to another unit “...pending the results of the investigation into the circulation of false ONUB Personnel documentation in possession by non-authorized individuals” and the immediate termination of Mr. Nkurunziza who was a daily paid worker.

7. Thereafter, on 12 April 2006, the Applicant sent an email to Ms. Gagnon and Ms. Charles and other staff members in his unit apologising for his mistake and expressing his regret for the leave request incident involving Mr. Nkurunziza. On the same day he was transferred from the Personnel Unit to the Registry and Archives Unit where he worked as a Reproduction Assistant until the expiry of his contract on 30 June 2006.

8. Both Mr. Herrel and Ms. Gagnon had issued inter-office memoranda to the Chief Security Officer on 12 April 2006 requesting an investigation into the circulation of falsified ONUB Personnel documents so as to find out “(1) how unauthorised individuals obtain ONUB Official documents, and (2) to establish whether any ONUB staff members are involved in providing such documents to outside or unauthorised individuals”.

9. A week prior to the expiry of his contract, the Applicant was informed that his contract was not going to be renewed “for Administrative reasons” and that he would be paid two weeks’ salary in lieu of a notice of non-renewal.

10. On 28 June 2006, two days to the expiration of his contract, the Applicant filed a request for administrative review and suspension of action of the decision not to renew his contract pending investigation which involved him so that he could have the opportunity to respond to the investigative findings. From his said application, it is evident that the Applicant was unaware of the fact that an investigation had already been conducted, completed and a report issued dated 25 May 2006.

11. On 30 June 2006, the Applicant was separated from the Organisation. Not having received a response to his suspension of action application or request for administrative review, the Applicant on 6 October 2006 filed an appeal to the Joint Appeals Board (“JAB”).

#### **Joint Appeals Board Review**

12. The Panel issued a report on 30 July 2007 where it found that the ONUB Administration had engaged in an investigative process that was ultimately unsatisfactory and unfair and that the Applicant’s non-renewal of contract was in fact discipline by stealth. While rejecting other claims, it recommended that the Applicant be compensated:

- a. For the abuse of his due process rights in the amount of six months net salary at the time of his separation and;
- b. For having been a casualty of improper administrative procedures by the ONUB Administration in the amount of six months net salary at the time of his separation.

13. The Secretary-General in part disagreed with the conclusion and recommendations of the JAB. In a decision of 27 August 2007, the then Under-Secretary-General, Department of Management acknowledged that there was a flaw in the procedure to the extent that the Applicant should have been provided with a copy of the investigation report in a timely manner and that this failure violated the Applicant’s right. The Applicant was paid compensation equivalent to one month net salary.

14. On 30 June 2009, the Applicant appealed the said decision of the Secretary-General to the former United Nations Administrative Tribunal (“the former UN Administrative Tribunal”). The case was transferred to the Nairobi Registry of the United Nations Dispute Tribunal (“the Tribunal”) in accordance with the provisions of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice) on 1 January 2010.

### **UNDT Proceedings**

15. Upon review of the parties’ submissions, the Tribunal held a case management hearing. On 4 April 2011, the substantive application was heard.

### **Applicant’s case**

16. The Applicant’s case is that:

- a. He was not given an opportunity to defend himself against the allegations of falsification of documents;
- b. The Administration relied on inconclusive findings of an *ad hoc* nature not to extend his contract;
- c. He was denied his due process rights to have a proper hearing before the JDC given the allegations in issue;
- d. The Administration failed to inform him that his request for suspension of action would not be heard by the JAB;
- e. He was unjustly linked to the previous incidents of falsification of documents without any *prima facie* evidence;
- f. The Administration failed to furnish him with a copy of the investigation report in a timely manner; and

g. He was discriminated against in that Mr. Nkurunziza whose attempts to obtain leave documents to which he was not entitled prompting the administrative decision against the Applicant continued in the service of the Organisation despite the recommendations of the Chief Civilian Personnel Officer and the investigation panel.

### **Respondent's case**

17. The Respondent's case is that:

- a. The Application was time barred;
- b. The Applicant held an ALD contract and therefore had neither the right nor legal expectancy of renewal of his contract;
- c. The mission was downsizing and the Applicant's post was required in the Personnel section;
- d. The investigation was fact-finding in nature and not disciplinary and although the facts established were taken into account, its recommendations were not;
- e. The Applicant admitted to the negligent and unprofessional behaviour on his part; and
- f. The Applicant had been adequately compensated for irregularities in this case.

### **Issues**

18. The Respondent had contended that the Application was time-barred therefore not receivable. However he withdrew this submission before the Tribunal could make a determination on the matter.

19. From the case presented by both parties, the Tribunal finds that the main issues for determination are:

- a. Whether the non-renewal of the Applicant's contract was proper in light of the circumstances surrounding it and;
- b. Whether the admitted violation of the Applicant's due process rights in the non-renewal of his contract was sufficiently compensated.

***Did the investigative findings constitute the basis for the non-renewal of the Applicant's Contract?***

20. After the occurrence of the leave request incident, Mr. Herrel and Ms. Gagnon on 12 April 2006 both sent identical memoranda to the Security Unit requesting an investigation into the falsification of ONUB documents. In the memoranda, they both indicated the concerns raised by the US Embassy regarding the visa request by one Gaer Mutore which request was based on forged ONUB documents and the leave request incident involving Mr. Nkurunziza. As part of the investigation, the Applicant's computer was seized and searched. The investigators issued a report dated 25 May 2006 and found *inter alia* "that no direct evidence were obtained to substantiate a claim that [the Applicant] or any other ONUB staff member was involved in the falsification of documents for Gaer Mutore". They recommended that the Applicant be re-assigned to another section and that Mr. Nkurunziza's services with ONUB be terminated.

21. The Respondent maintained that the investigation conducted was fact-finding in nature and that it was an investigation into the entire circumstances of falsification of ONUB documents and not into the activities of the Applicant.

22. This Tribunal finds this submission very disturbing since the whole investigation and its report revolved around the Applicant and the leave request incident. Furthermore, the Applicant's computer was seized and searched to the extent of recovering deleted documents to find if there was any nexus between him and the falsification of ONUB documents presented to the US Embassy. Throughout the entire

report, there is no mention of any other staff member having been investigated in relation to the matter of falsification of ONUB documents apart from the Applicant. This Tribunal finds it questionable that the investigation conducted was a general fact-finding exercise. It is easy to draw an inference in the circumstances that the Applicant was the sole subject of the investigation.

23. In his submission, Counsel for the Respondent had argued that the recommendations of the report were not taken into account but its facts were and that the Respondent was entitled to take the facts established into account when considering whether or not the Applicant's contract should be renewed.

24. In their testimony, both Ms. Gagnon and Mr. Herrel dissociated themselves from the investigation report. Ms. Gagnon stated that "it was not what I had envisaged" while Mr. Herrel stated that;

"In my view the report as produced by Ms. Lettice Myrie was faulty in several respects. First it did not respond to what I had requested. Furthermore, it over-stepped the scope of the fact-finding investigation in recommending disciplinary action against an individual. Finally, in my view its conclusions were vague and were not supported by sufficient evidence. I therefore did not rely on it in reaching the conclusion that [the Applicant's] contract should not be renewed."

25. It is curious that the Respondent's Counsel would submit that the facts established by the investigation were taken into account in deciding that the Applicant's contract should not be renewed. It must be noted that action had been taken to reassign the Applicant to another section even before the fact-finding investigation was requested. In evidence both the CCPO and CAO told the Tribunal that the investigation was faulty, departed from its terms of reference and unduly recommended disciplinary action against the Applicant.

26. In other words, the CAO who made the administrative decision not to renew the Applicant's contract had in his testimony before the Tribunal, disowned and discredited the findings and recommendations of the investigators, upon which the Respondent's Counsel submits that the said CAO relied to make the impugned decision. There is no



doubt that the fact-finding had played no part and did not influence the administrative decision not to renew the Applicant's contract. The said decision was arbitrary since the CAO evidently relied on his personal view and judgment in making it.

***Were the reasons for the non-renewal of the Applicant's contract valid and lawful?***

27. Mr. Herrel had testified that his decision not to renew the Applicant's contract was predicated on two reasons;

- a. The Applicant had written an email to his supervisors and colleagues following the leave request incident in which he apologised for mistake and lack of professionalism on his part in dealing with the said leave request incident.
- b. The mission was in the process of downsizing and the Applicant's admission of his mistake did not make him a suitable candidate for retention.

**Downsizing of the mission**

28. When a downsizing process is embarked upon by any of the United Nations offices, criteria are generally put in place to ensure accountability and transparency in the process. The establishment of a list of criteria to be used also ensures that staff members are treated in an objective and fair manner. No evidence was led to show that indeed a downsizing exercise was on-going at ONUB at the material time. The onus was on the Respondent through his witnesses, to present relevant evidence of an on-going downsizing exercise, upon which the CAO had relied in not renewing the Applicant's contract.

29. In his testimony before the Tribunal, the Applicant stated that the post he encumbered was filled with a new employee soon after his separation showing that he was deliberately targeted. Both the CAO and the CCPO had testified that the Applicant's post was needed in the Personnel Unit since he was at the time of his separation working in the Registry and Archive Unit. The explanation of management falls flat on its face for the fact that the Applicant who had been working in the Personnel Unit had only been recently and arbitrarily reassigned to the Registry and

Archive Unit with the post he had encumbered in Personnel following as a result of the leave request incident for which he had apologised.

30. To separate him from the Organisation barely ten weeks after moving him out of the Personnel Unit which was said to be unaffected by any downsizing exercise, only served to show that the Applicant was targeted for non-renewal of his contract. In other words, the Applicant was deliberately transferred out of the Personnel Unit in order to make it possible for the downsizing axe to fall on him.

### **Expectancy of renewal**

31. The Respondent's Counsel had also submitted that the Administration had broad discretion in deciding whether or not to renew a contract. He argued that the CAO was entitled to rely upon the Applicant's apology to his supervisors and colleagues with regard to the leave request incident not to renew his contract. Such a position, without more, is untenable especially since no disciplinary process had been instituted against the Applicant. This Tribunal agrees with the views of the JAB that the separation of the Applicant amounted to disciplinary action by stealth and finds that the Applicant had a legitimate expectancy of renewal of contract considering that the Personnel Unit in which he was working was unaffected by any downsizing process.

32. The Appeals Tribunal has on occasions affirmed the position in UNDT Judgments that the Administration's discretionary authority is not unfettered and that the Administration must act in good faith and respect procedural rules and its decisions not based on erroneous, fallacious or improper motivation.<sup>1</sup> The actions of the CAO in this case, leave no one in doubt that his personal judgment of the leave request incident, the outcome of whose fact-finding investigation he had strongly condemned for several shortcomings, had provided the singular basis for the non-renewal of the Applicant's contract.

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<sup>1</sup> See 2011-UNAT-121 *Bertucci*, 2010-UNAT-021 *Assad*.

33. When the matter was before the JAB, the Panel found it puzzling that, the daily paid worker; Mr. Nkurunziza, who had initiated the alleged fake leave request in order to obtain documents to which he was not entitled from ONUB, had actually been retained and even promoted by the Organisation. If as the Respondent's Counsel argued, the Applicant's conduct regarding the leave request incident constituted 'gross negligence,' it indeed defies reason that Mr. Nkurunziza would not only be retained in employment but awarded a promotion.

### **Decision**

34. For the foregoing reasons, the Tribunal finds that the Applicant has made out his case against the Respondent.

35. The Respondent failed to initiate the necessary processes to determine any misconduct on the part of the Applicant but rather relied on his own personal judgment not to renew the Applicant's contract. The explanation by the CAO that the non-renewal was based on 'administrative reasons' or a downsizing exercise are puerile and only intended to justify his arbitrary and unlawful decision.

36. The Respondent admitted the violation of the Applicant's due process rights.

### **Compensation**

37. The Tribunal Orders compensation as follows:

a. For the unlawful and improper non-renewal of the Applicant's contract in the amount of **eight months net base salary** at the time of his separation plus interest at the applicable US Prime Rate until the date of payment.

b. The Respondent admitted the violation of the Applicant's due process rights but rejected the JAB recommendation for an award of six months net base salary for the said violation. Instead the Respondent paid one month net base salary to the Applicant. The Tribunal finds this compensation inadequate and

accordingly awards an additional **two months net base salary** to the Applicant for the said violation.

If payment is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Nkemdilim Izuako.

Dated this 26<sup>th</sup> day of March 2012.

Entered in the Register on this 26<sup>th</sup> day of March 2012.

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi.