



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NYOMERA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant joined the United Nations International Criminal Tribunal for Rwanda (ICTR) on 15 April 1998, as an investigator with the Investigations Section of the Office of the Prosecutor (OTP) in Kigali. As at January 2008, the Applicant had almost 10 years of continuous service and experience as a Senior Investigator. At the time of the non-renewal of his contract on 31 December 2007, the Applicant was holding an appointment at the P3, step 9, level.

2. The Applicant is contesting the decision by the Joint Appeals Board (JAB) in Nairobi to award him six months' net base salary as compensation for the violation of his due process rights on the ground that it was insufficient and inadequate.

Facts

3. The ICTR was established by United Nations Security Council Resolution 955¹ of 8 November 1994 as an *ad hoc* Tribunal for the purpose of prosecuting persons responsible for the genocide and other crimes against humanity. As the Tribunal approached the end of its mandate, so began the downsizing exercise.

4. Security Council Resolution 1503 (2003),² required the ICTR to “take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategy).”

5. In December 2005, the General Assembly considered the budget proposals for the 2006/7 biennium and it was agreed that the level of resources required by the ICTR for the 2008/9 biennium would be significantly lower because of the expected conclusion of some of the trials. In planning its budget submissions for the biennium 2008/9, therefore, the OTP requested less resources based on remaining workload projections.

¹ S/RES/955 (1994) Adopted by the Security Council at its 3453rd meeting on 8 November 1994.

² S/RES/1503 (2003) Adopted by the Security Council at its 4817th meeting, on 28 August 2003.

6. A substantial reduction in the number of posts in the Investigations Section by the end of 2007 was envisaged given the anticipated decrease in the number of trials for 2008

7. On 16 July 2007, the Registrar of the ICTR constituted the Staff Retention Task Force (SRTF) to develop criteria to assess staff performing similar functions across the ICTR. Staff members were notified of the establishment of the SRTF by Information Circular No. 49, dated 16 July 2007. The SRTF's role was to advise management on how to retain staff for critical functions in a fair, objective and transparent manner.

8. By way of Information Circular No. 77, dated 3 October 2007, addressed to all staff members, the Registrar transmitted the final report on the staff retention criteria that would be used by Programme Managers to undertake a comparative review of the staff in their respective sections.

9. Staff were to be assessed for retention on the basis of the following criteria:

- a. Competence to perform the remaining tasks (40 points);
- b. Multi-functionality and continuity (20 points);
- c. Length of service (24 points); and
- d. Other considerations, such as
 - i. Gender (10 points);
 - ii. Geographical distribution (3 points); and
 - iii. Pension eligibility (3 points).

10. The SRTF agreed that certain criteria such as competence and continuity would be given more weight than the other listed criteria. The other criteria, such as length of service, gender, geographical distribution and pension eligibility would come into play in cases of a tie between two staff members in establishing whose appointment to renew.

11. On 10 October 2007, the Chief Prosecutor of ICTR briefed several managers, in a memorandum, with a copy to all Investigators in OTP Kigali and Arusha, including the Applicant, on the staff reduction exercise on the basis of the completion strategy in the Investigations Section. The Investigators were informed then that the Section would be downsized by seven posts.

12. The Applicant was assessed against the SRTF criteria and received a score of 33.5/40, which was among the lower scores within the Investigations Section.

13. On 6 December 2007, the Chief, Division of Administrative Support Services (DSS), informed the Applicant that the post he was encumbering was earmarked for abolishment by 31 December 2007.

14. The Applicant was informed that his fixed-term appointment would be extended through to 31 January 2008 in order to allow him to do the proper handing over and to finalize the necessary administrative formalities.

15. On 18 December 2007, the Applicant applied to the Joint Appeals Board (JAB) for review and suspension of action of the decision to not renew his appointment. On 30 January 2008, the JAB in New York submitted its recommendation rejecting the Applicant's request for a suspension of action. On the same day, the Secretary-General informed the Applicant that he had accepted the JAB's recommendation.

Joint Appeals Board (JAB)

16. The Applicant filed a statement of appeal with the New York JAB on 20 March 2008 (received by the Administrative Law Unit on 10 April 2008). The Respondent replied on 17 June 2008. On 24 July 2008, the Applicant was informed that his case had been transferred to the Joint Appeals Board in Nairobi.

17. The Nairobi JAB Panel met on 16 January 2009. On 17 January 2009, the Panel sought additional information from the Respondent, that is, copies of the ICTR Staff Retention Comparative Analysis score sheets for the Applicant on all the applicable criteria. The requested information was provided on 26 January 2009.

18. The JAB Panel noted that as early as 16 July 2007, ICTR staff members were notified of the establishment of the SRTF by Information Circular No. 49 and that the memorandum, dated 10 October 2007, gave the Applicant and other Investigators advance notice of the staff reduction and completion strategy.

19. The Panel reviewed the Applicant's scores on the ICTR Staff Retention Comparative Analysis and found that:

- a. The [Applicant] had been awarded scores against eight criteria, namely:
 - i. Quality of work (4 points);
 - ii. Integrity (4.5 points);
 - iii. Specific essential knowledge (3.5 points);
 - iv. Timely completion of missions and reporting (4.5 points);
 - v. Punctuality and availability (4.5 points);
 - vi. Confidentiality and discreetness (5 points);
 - vii. Implication and involvement in on-going work (5 points);
 - and
 - viii. Knowledge of multiple tasks or target files (4 points).

20. The Panel also recalled the final selection criteria agreed upon by the SRTF and found that the Respondent had failed to evaluate the Applicant against the agreed set criteria.

21. The Panel found that, contrary to the final selection criteria agreed upon by the SRTF, the Respondent had failed to show how he had evaluated the Applicant on all the applicable criteria. The Panel held that the failure by the Respondent to follow his own established procedures for the retention exercise was a violation of the Applicant's right to due process. The Panel recommended that the Applicant be awarded six (6) months' net base salary as compensation.

22. By a letter dated 1 June 2009, the Applicant was informed that

The Secretary-General has taken note of the findings and conclusions of the JAB. Based on the totality of the available evidence and the fact that the retention exercise lacked transparency, the Secretary-General accepts that your due process rights were violated. In light of the foregoing, the Secretary-General has decided to accept the JAB's recommendation that [the Applicant] be awarded 6 months net base salary at the rate in effect as of the date of your separation from ICTR as compensation.

UNDT Application

23. On 3 September 2009, counsel for the Applicant filed an Application with the United Nations Dispute Tribunal (“the Tribunal”) in Nairobi claiming that the compensation awarded by the JAB was insufficient.

24. Shortly thereafter, on 11 September 2009, Counsel informed the Tribunal that the Applicant had passed away on 29 August 2009. Counsel also sought the Registry’s advice on the procedure applicable to the Applicant’s wife to enter the proceedings as the legal heir to his estate.

25. On 19 April 2010, the late Applicant’s wife Ms Colleen Mudamburi with leave of the Tribunal filed an Application in substitution, pursuant to art.3(c) of the Statute of the UNDT and art. 7.2 of the UNDT Rules of Procedure.

26. The Respondent filed his Reply to the Applicant’s Application of 19 April 2010 on 20 May 2010.

Applicant’s submissions

27. The Applicant contended as follows:

- i. His contract was terminated arbitrarily.
- ii. The Staff Retention Task Force did not adhere to the criteria set out in Circular number 77 of 3 October 2007.
- iii. The staff retention exercise was not transparent; it was tainted with factors such as nepotism and was applied selectively to some investigation teams.
- iv. The office score sheet did not reflect the criteria spelt out in Circular No. 77; key criteria such as length of service and geographical distribution were deliberately left out;
- v. On geographical distribution, the Respondent favoured French speaking West Africans.
- vi. The criteria relating to length of service was improperly applied so that less qualified investigators with less than 5 years’ experience

- were retained over the Applicant who was an investigator with almost 10 years' experience;
- vii. The Respondent failed to apply the criterion of pension eligibility which would have put the Applicant ahead of many other staff members because he was close to completing 10 years of service on 14 April 2008 thereby entitling him to a lump sum pension.
 - viii. The Respondent's exercise of his discretionary power in not extending the Applicant's contract was tainted by abuse of power prejudice, arbitrariness, discrimination and a lack of good faith.

28. The Applicant submitted that his supervisor distorted and then disregarded the established criteria for selecting staff members to be retained, and deliberately applied an arbitrary process that was easily manipulated to help him select those whom he favoured. This violated the Applicant's due process rights and Article 101.3 of the UN Charter which provides that staff members should uphold the highest standards of efficiency, competence and integrity; the concept of integrity, the Applicant submitted, includes but is not limited to probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

29. On 11 February 2011, the Application was re-filed with amended claim for remedies. This filing was made after the present Applicant sought and was granted permission by the Tribunal to make a fresh submission on the remedies sought following an assessment of the claims the deceased Applicant had advanced.

30. The claims brought under the present Application included compensation for (a) breach of contract, (b) violation of due process and (c) the reinstatement of his right to a full pension.

Respondent's submissions

31. The Respondent submitted that the question before this Tribunal was whether the award of six (6) months' net base salary recommended by the JAB,

and accepted by the Secretary-General was sufficient given the circumstances of the present case.

32. The Respondent argued that the compensation awarded was sufficient, as the Applicant had demonstrated that the decision not to renew his contract was tainted by prejudice, bias or other extraneous factors.

33. In sum, the Respondent's submission was that the Applicant had not shown the Tribunal why compensation in the form of six (6) months' net base salary was insufficient.

Deliberations

34. The Tribunal agrees with the Respondent that the issue before the court in the present case is whether or not the JAB award of six (6) months' net base salary for violation of the Applicant's due process rights during the course of the staff retention exercise, which was accepted by the Secretary-General, was sufficient.

35. The Tribunal has carefully reviewed the Applicant's oral and written submissions, and notes that the Applicant had not adduced any arguments to substantiate the claim that the compensation recommended by the JAB was inappropriate, insufficient or improper.

36. The Applicant's amended claims for compensation seeks to persuade the court that an award in excess of six (6) months' net base salary is necessary to properly compensate the Applicant for (a) breach of contract (b) violation of his due process rights and (c) the loss of his lump sum pension.

37. Dealing first with the breach of contract and the violation of due process rights, the Tribunal finds that the spirit and tenets of the Staff Rules and Regulations necessarily imply that the terms of an Applicant's employment with the Organisation is breached if a decision is made against him which is tainted by bad faith, prejudice, extraneous factors or a violation of his/her rights to due process.

38. The JAB made the recommendation for compensation in the form of six (6) months' net base salary on grounds that the staff retention exercise, as applied to the Applicant, violated his due process rights.

39. In respect of the Applicant's pension entitlements, the Tribunal notes that the Respondent had submitted:

[G]iven that Mr. Nyomera was awarded [...] (6) months net base salary, his pension contributions for those additional months would have exceeded the ten (10) year mark and, as such, he would be entitled to a lump sum pension grant.

40. The Tribunal hereby upholds the JAB's award of compensation in the form of six (6) months' net base salary and orders payment of the same to present Applicant, Madame Colleen Mudamburi.

41. The Tribunal also orders that the Respondent ensure that the pension rights of the deceased are restored in a manner compatible with both the Applicant's motion and the Respondent's submission, so that the lump sum pension grant to which the Applicant is entitled is duly paid to Madame Colleen Mudamburi.

(Signed)

Judge Nkemdilim Izuako

Dated this 11th day of April 2012

Entered in the Register on this 11th day of April 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi