



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:

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

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Introduction

1. 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. The reasoned judgment in the suspension of action application was subsequently issued on 12 January 2012.

Facts

4. The facts which remain substantially the same as stated in the suspension of action judgment are again re-stated for the records. 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 following two Security Council Resolutions of the United Nations General Assembly in 2003 and 2004. Criteria established by the SRTF were promulgated by the ICTR and circulated among its entire staff by way of the Information Circular no. 77 of 3 October 2007.

5. 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.

6. In November 2007, about 45 posts were earmarked for abolition in the LSS by 31 December 2008. The Applicant's post was among those earmarked for abolition but all the 45 posts continued to be funded under a General Temporary Assistance (GTA) funding until 30 June 2011.

7. 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.

8. 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 would not be renewed beyond 31 December 2011.

9. On 8 December 2011, the Applicant wrote a memorandum, in French, to the ICTR Registrar requesting him to open an investigation into alleged excessive abuse of discretionary powers and other irregularities committed by the Chief of the Language Services Section ("Chief/LSS") as it concerned the work of the Retention Panel.

10. 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 and Planning Section ("Legal Officer/HRPS"). On 19 December 2011, the Applicant provided an English translated version of the memorandum.

11. 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.

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

13. 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.

14. The next day, 24 December 2011, the Applicant filed his Application for suspension of action in which he was not successful. A judgment rejecting the Application was issued on 12 January 2012.

15. A substantive application dated 10 May 2012 challenging the decision not to extend the Applicant's fixed term contract was subsequently filed. The Respondent in turn sought to challenge its receivability. The essence of the receivability motion was that the Applicant's substantive Application was late by one day. While the Applicant claimed that he had first received the Tribunal's confirmation that his Application was received on 11 May 2012, the Respondent submitted that even if that was the case, the Application was still one day over the time limit.

16. Having given thought to the issue of time limits and whether this Application was indeed late by one day, the Tribunal has decided to resolve the matter of receivability by simply taking the Application at face value. The date of the Application is 10 May 2012, the last day on which a filing of the Application can properly be allowed. I accordingly find the Application receivable.

Applicant's case

17. The Applicant's case is hereunder summarized as follows:

- a. The decision to separate him from the Organization was characterized by irregularities, errors and omissions. Relevant facts were not taken into account, discretionary powers were abused by the Respondent's agents who had in the process of downsizing of the mission unjustly engaged in favouritism and other improper considerations.

b. The *Manyara Accord* and other staff retention criteria earlier agreed upon were not properly followed. Instead the Applicant's program manager had resorted to using other criteria not approved by the three major organs of the ICTR.

c. The Respondent did not rebut the allegations made by the Applicant and had offered no explanations or documentary evidence to disprove the Applicant's claims.

18. It falls to this Tribunal to determine whether serious and reasonable doubts are not raised as to the lawfulness of the administrative decision not to renew the Applicant's contract beyond 31 December 2011.

Respondent's case

19. A summary of the Respondent case is that:

a. The Applicant's contention that the impugned decision is unlawful because the comparative review process was irregular and erroneous had no merit.

b. The Applicant bore the burden of proving that the discretion not to renew his contract was not validly exercised.

c. No evidence was tendered by the Applicant to show that the comparative review process was flawed or unfair in any way or constituted an abuse of discretion.

d. Documentary evidence shows rather that the LSS Retention Panel had properly evaluated the Applicant. The Applicant did not tender any evidence to show any form of abuse on the part of the Retention Panel.

e. The Applicant failed to establish that the impugned decision was motivated by any improper motives as to make it unlawful.

Issue

20. The singular question for determination here is whether the decision to abolish the Applicant's post was unlawful.

Hearing of the Application

21. The issues having been joined on both sides, this Application was set down for oral hearing on 18 and 19 September 2012. The Applicant applied however on 17 September 2012 to have the matter determined in his absence citing art. 17(2) of the Rules of Procedure of the Dispute Tribunal. An oral hearing is therefore not feasible and the Tribunal is constrained to resolve this matter purely on the pleadings and documentary evidence before it.

Considerations

22. This Tribunal takes judicial notice of the fact that the ICTR was a special creature of the UN Security Council whose principal mandate was to bring the perpetrators of the 1994 Rwandan genocide to trial and justice. There is a surfeit of evidence before the Tribunal with respect to official directives regarding the gradual winding down of the mandate of the ICTR.

23. This fact which set the stage and provided a background for the administrative decision complained of by the Applicant is not contested by him. His case is that the LSS Retention Panel's decision was flawed and tainted by such extraneous factors as favouritism and discrimination.

24. There is evidence that the Applicant's post was one of 45 posts earmarked in November 2007 for abolition by December 2008. It is not contested that the 45 posts for abolition which included the Applicant's post were extended on GTA funding through June 2011.

25. The Applicant submitted a copy of an evaluation carried out by the LSS Retention Panel. When he was invited on 21 December 2011 to a meeting by the Legal Officer/HRPS, the Applicant declined because he had met the Retention Panel members and they did not understand his explanations. He tendered a copy

of an evaluation by the said Panel in which he was shown to have received the least scores.

26. While he alleged irregularity in the process that saw him leave the ICTR, the Applicant was unable to meet the lower threshold of *prima facie* unlawfulness required to grant his earlier suspension of action application.

27. In the present Application on the merits, the Applicant needs to prove, at least on the balance of probabilities, that the Retention Panel was unfair in its evaluation of him and was discriminatory. Not only did he fail in his earlier suspension of action application to give particulars of the irregularities, errors, omissions and favoritism which he alleged made the decision not to renew his fixed-term contract unlawful, he has not tendered additional evidence in this present Application.

28. As in the previous application, with respect to the personnel ratings which showed the evaluation of certain staff members in which the Applicant obtained the lowest rating, the Applicant has not adduced any additional evidence to establish that his rating ought to be higher than that of his colleagues. As previously stated, the Tribunal is not in a position to award scores towards a proper rating of the Applicant or any of his colleagues as this is the preserve of his supervisors. This does not preclude the Tribunal from examining any evidence which points in the direction of irregularity and lack of fairness.

29. The legal maxim that he who alleges must prove still holds true in this case. A certain level of showing on the part of the Applicant would be certain to shift the onus to the Respondent. It ought to be obvious that an application that did not meet the bare requirement of a mere showing of unlawfulness must fail.

Conclusion

30. This Application fails for the simple fact that it is entirely based on unsubstantiated allegations. There is absolutely no showing of any unlawfulness on the part of the Respondent beyond the mere assertions and allegations of the Applicant.

31. This Application is accordingly rejected in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 19th day of November 2012

Entered in the Register on this 19th day of November 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi