



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

OMONDI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**REASONED ORDER ON SUSPENSION OF  
ACTION**

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**Counsel for applicant:**

Katya Melliush

**Counsel for respondent:**

Joerg Weich, OHRM/UNON

Notice: The format of this order has been modified for publication purposes in accordance with [a]rticle 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Facts**

1. The Applicant commenced employment with the Information and Communication Technology Service (ICTS) of the United Nations Office in Nairobi (UNON) on 24 November 2008 as a Programme Assistant, at the G5 level, on a 6 month temporary appointment, which appointment was extended for a further 5 months through 30 October 2009.

2. The Applicant's recruitment to this temporary appointment was effected following her application for a position at the G6 level bearing the same functional title on Galaxy (VA 415831) on 11 December 2007, which position she was interviewed and eventually recommended for on 2 September 2008.<sup>1</sup> This vacancy was however cancelled on 28 October 2008 without the panel's recommendation having been effected.

3. The Applicant was contacted on 30 October 2008 by the officer-in-charge of the Administration Unit of ICTS, [WK], and asked if she would consider being recruited on a temporary basis pending a re-advertisement of the post. The Applicant agreed, and her initial temporary appointment of 6 months was then effected. The Applicant worked under the direct supervision of [WK], who was her first reporting officer.

4. The Applicant was pregnant at the time of her appointment. She began maternity leave on 29 April 2009, and returned on 25 September 2009. Upon her return, the Applicant found her position encumbered by another staff member (also on a temporary appointment). Rather than resume her functions, the Applicant was asked to fill in for another staff member, who was also on maternity leave, at the ICTS Helpdesk.

5. On 12 August 2009, while the Applicant was on maternity leave, the post of Administrative Assistant was advertised at the G5 level on Galaxy (VA 421486). [WK] wrote to the Applicant informing her that the Application had been posted. The Applicant applied for the post, albeit incorrectly as it later turned out. The Applicant, upon her return from leave, sought

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<sup>1</sup> See Applicant's Annex A; DT. 30 December 2009, p. 2.

the advise of a Human Resources Assistant in HRMS, who advised her that the defect could be rectified.

6. On 6 October, HRMS forwarded a list of 332 applications for the post to [the] Chief of ICTS/UNON. At a meeting on 7 October 2009, [the Chief] informed the Applicant that her name was not on that list. On 12 October 2009, HRMS forwarded a hard copy of the Applicant's application to the post to ICTS for consideration. The Applicant was informed as much.

7. On 2 November 2009, the Applicant was invited to interview for the post, which interview took place on 4 November 2009. [WK], who was to be on the interview panel, was not. The Panel comprised [...], [...] and [...].

8. On 19 November 2009, the Applicant received a letter of appointment dated 6 November 2009 (effective 5 November 2009) renewing her appointment through 30 November 2009. The functional title for this appointment was that of an Administrative Assistant.

9. On 25 November 2009, the Applicant filed a motion for suspension of action with the United Nations Dispute Tribunal in Nairobi challenging the decision not to renew her appointment beyond 30 November 2009 (a request for Management Evaluation was filed on 24 November 2009). On 26 November 2009, the Applicant was informed that her contract had been extended for a further month through the end of December 2009. The 25 November 2009 motion was therefore withdrawn.

10. On 28 December 2009, Counsel for the Applicant contacted the Respondent for information on the Applicant's contract. Counsel was informed that the Applicant's contract was not going to be further renewed. This was also how the Applicant herself found out that she was going to be separated.

11. On 29 December 2009, the Applicant filed a second request for management evaluation and brought an application for Suspension of Action on grounds that, notwithstanding the broad

discretion of the Administration to make such a decision, the impugned decision was improperly motivated.

12. The UNDT heard the Parties on the application for Suspension of Action on 30 December 2009. The Applicant testified, and the Respondent called the Officer-in-Charge of the Administrative Unit of ICTS/UNON as a witness.

13. The court granted the Applicant's motion. What follows is the Tribunal's reasons for the same.

### **DELIBERATIONS**

14. The present Application is brought pursuant to the provisions of Article 13.1 of the Tribunal's Rules of Procedure, which affords the Tribunal the power to order the suspension 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**. [Emphasis added]

15. 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, convenient and urgent for the Tribunal to intervene, and that unless it so intervenes at that stage, the Respondent's action or decision would irreparably alter the status quo. Of course, the onus of establishing a case for a suspension of action order lies on the Applicant.

16. A Suspension of Action application may be brought and considered only where the Applicant has filed a request for Management Evaluation in respect of the decision which is the subject matter of the suit before the Tribunal.

17. The management evaluation system is designed to give management a chance to correct an improper decision, or provide acceptable remedies in cases where the decision has been flawed, thereby reducing the number of cases that proceed to formal litigation.<sup>2</sup> It affords the staff member an opportunity to have their grievance addressed internally and objectively.

18. In the instant case, the Applicant has in fact filed two requests for Management Evaluation, both of which concern the same set of facts. The Tribunal notes with concern that to-date the Applicant has not received a decision from the Management Evaluation Unit even in respect of her request of 24 November 2009. Indeed the Tribunal is only aware of this because on 2 February 2010, the Registry in Nairobi received an email from the Management Evaluation Unit asking when the court will issue its reasoned ruling in the instant matter.

19. This is a matter of some concern to the Tribunal. The processes at the UNDT and the Management Evaluation Unit are distinct processes, independent of each other, and it is imperative that they be seen as such.

20. The Tribunal will now turn to consider the Parties' submissions against elements of the test for suspension of action.

**Was the decision *prima facie* unlawful?**

21. The applicant was on a temporary fixed-term appointment. Whereas it is not open to dispute that a fixed term appointment dies a natural death at the end of the period of the contract, a staff member under a temporary fixed-term appointment is, as any other staff member, entitled to be treated fairly and accorded the same due process rights.

22. It is settled law that 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

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<sup>2</sup> *A Guide to Resolving Disputes, Administration of Justice at the United Nations*, New York, 2009, p. 4.

decision.”<sup>3</sup> 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 or in other words that there is a triable issue here.

23. The evidence given by the Applicant shows that she was only recruited on a temporary basis because of the exigencies of work within the ICTS; she should otherwise have been on a regular fixed-term appointment at the G6 level, which position she was interviewed and recommended for as an external candidate. The record suggests that her appointment as a temporary staff member was understood to be pending re-advertisement of the post she was previously interviewed for.

24. In assessing whether there were countervailing circumstances in the decision not to renew the Applicant’s contract, the Tribunal has considered the testimony of the Applicant and her supervisor as well as the signed statement tendered in evidence by the Applicant. The Respondent did not object to the unredacted statement, as disclosed to counsel for the Respondent, being admitted and considered.

25. It seems obvious to the Tribunal that the Applicant did not enjoy a good working relationship with her immediate supervisor. The circumstances surrounding the Applicant’s departure on maternity leave, the recruitment of her replacement whose tenure on the post outlasted the maternity leave period, the matter of the non-provision of a permanent name-plate for the Applicant like others had, or as Respondent’s witness explained, a proper name-plate for the Applicant which was made but put away in some locker, and Ms [WK]’s distinct treatment of both the Applicant and her replacement are not indicative of a good working relationship. The written statement of the Applicant’s colleagues attests to this and corroborates the Applicant’s testimony.

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<sup>3</sup> *Handelsman*, Judgement No. 885 (1998).

26. The Respondent maintains that the Applicant was well aware that the post she encumbered was a temporary post, the existence of which was contingent upon the post of Administrative Assistant in the front office of the Chief of ICTS. The testimony of the Applicant and documentary evidence submitted by her, coupled with the testimony of the Respondent's own witness shows that the position espoused by the Respondent is not in fact true.

27. The Respondent's witness contradicted herself in respect of the post encumbered by the Applicant, which contradiction became clear when challenged on cross-examination. In examination-in-chief and at the start of cross examination, the witness maintained that the Applicant was clearly informed that the temporary position she was being recruited to was that of an administrative assistant and entirely unconnected to that for which she was interviewed and recommended. When confronted with the email she wrote to the Applicant, the witness admitted that her testimony is not borne out by the facts. The Applicant's initial letter of appointment corroborates her testimony as to the post she was recruited to and encumbered up until the time she returned from maternity leave.

28. As the Applicant's immediate supervisor, it is hard to believe that she would have had no say at all in whether or not the Applicant returned to her old job; even if the ultimate decision was not [WK]'s, it is curious that she did not think it appropriate to even ask why the Applicant was being reassigned. [WK] has herself testified to the fact that she is involved in the recruitment of staff whose positions she supervises. Once recruited, she is also charged with appraising those under her direct supervision. Indeed, she signed the Applicant's first appraisal which was entered into evidence. The records also show that [WK] had, on 11 March 2009, recommended against the renewal of the Applicant's contract, advising instead that the position of Administrative Assistant be advertised and properly recruited for. I am therefore not persuaded by the Respondent's suggestion (and [WK]'s for that matter) that this was a decision she had nothing to do with. Her influence, it seems to me, is more than simply marginal or perfunctory.

29. The Respondent has submitted that operational exigencies prevented the Applicant's return to her post because of her entitlement to time-off as a new mother. I find the Respondent's suggestion that the Applicant was reassigned to the Helpdesk to allow her to avail herself of the

provisions of ST/AI/2005/2 for the purposes of breastfeeding her newborn child, disingenuous at best; especially considering that the Applicant did not know that such a provision existed, never took advantage of it and found the Help-desk more stressful and demanding!<sup>4</sup>

30. There is evidence that [...] who replaced the Applicant during her maternity leave was recommended to [WK] by her relative, one [...] also of ICTS. [WK] who claimed that she had no knowledge of the said relationship, told the Tribunal that she chose not to be on the panel that interviewed both the Applicant and her maternity replacement [...] for the advertised position of Administrative Assistant, because of rumours in the office that she did not want the Applicant. It is also in evidence that the panel consisted of three members one of whom was [...], the recommender and relative of [...]. In the light of these facts and the opportunity to observe the demeanour of the witnesses, I find [WK]'s explanations as to why the Applicant could not return to her old job after her maternity leave, both evasive and incredible.

31. If the witness was so concerned about rumours in her section regarding a difficult relationship between her and the Applicant, and the alleged favouritism being shown to [...] and therefore found it necessary to not to be part of the recruitment process for the administrative assistant's position, was it appropriate for [...] to be on the interview panel? It goes without saying that [...] could not participate in the process without at least a perception of bias since [...] was her candidate for maternity replacement of the "administrative assistant", which is now advertised for regularised recruitment and for which the same [...] is a contender!

32. It is worth noting that the Applicant had in fact sought to call [...] to testify as to the circumstances during the interview process, particularly in respect of the influences that came to bear. Counsel submitted that the witness had valuable testimony to provide in respect of those influences, and that that evidence is highly relevant to the question of whether or not the Respondent's decision not to renew the Applicant's appointment was properly made. The Respondent objected to the witness testifying.

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<sup>4</sup> ST/AI/2005/2, 6 May 2005 – Family Leave, Maternity Leave and Paternity Leave.



33. Having heard the submissions of the Parties on the issue, I upheld the objection on grounds that it would be inappropriate to receive testimony with regard to an interview process which is ongoing. As the interview process was not itself an issue for the purposes of the suspension of action application, I was not persuaded as to the direct relevance of the evidence to the live issues before me.

34. I am of the firm view that there was an unfortunate manipulation going on within the ICTS, a patent lack of transparency in the recruitment to the position to which the Applicant had applied which tended to breed such rumours that can only do harm in the work-place. This situation ought to have been properly and effectively addressed by the Chief and the Deputy Chief of the section.

35. On the basis of the facts placed before me, I am persuaded that there were countervailing factors at play in the decision not to renew the Applicant. I find on this score that a prima facie case of unlawfulness on the part of the Respondent is established.

### **Urgency**

36. The Respondent concedes that the Application satisfied the requirement of urgency, as stipulated in Rule 13.

### **Irreparable damage**

37. In considering applications under Article 13, the law requires the Applicant to show that irreparable damage will be caused to the Applicant if the impugned administrative decision is effected.

38. I note that the Respondent did not address this element in his written and oral submissions to the Tribunal. The Respondent appeared to take the position that as the impugned administrative decision was not improperly made and is not tainted by countervailing circumstances or extraneous motives, and given that the law requires that the test for suspension of action be met cumulatively before a decision can be suspended, submissions on this final element was not necessary.

39. It is generally held that damage is considered irreparable when it cannot be compensated for monetarily. In *Tadonki v. The Secretary General*<sup>5</sup> the Tribunal held that:

*Where damages can adequately compensate an Applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.*

40. In the instant case, I am disturbed by the fact that the Applicant only came to know of the fact that she was going to be unemployed only two or three days to the termination of her contract when her counsel informed her as such on 28 December 2009. What if Counsel had not had the presence of mind to contact Human Resources and enquire as to the status of the Applicant's contract given that management evaluation was still pending? With the holiday weekend upon us, it seems to me both probable and irresponsible that the Applicant would have received an email circa the 29th or 30th, perhaps even the 31st, asking her to begin with the separation process. Or worse, the Applicant would have come to work on Monday, 4 January 2010, only to find that she was without a job? What remedy would she have had then? While the Rules gives the court 5 days within which to rule on a motion for suspension of action, the Applicant most always has much less time within which to file an application.

41. The difficulties this mother of two, who is also the sole breadwinner of her family, would have faced leaves little to the imagination. Whether damages could compensate her for those difficulties is a valid question only where she has the opportunity to file an action against the decision. Had she come to know any later than she had, and had the decision been implemented, it would in all likelihood have been months before the question of damages became live.

42. Secondly, in the light of my finding that the decision itself was improperly motivated, it is in my judgement entirely likely that the implementation of the impugned decision would have

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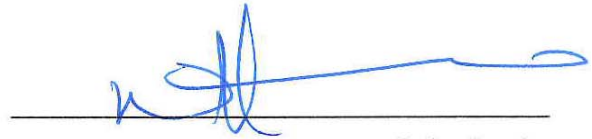
<sup>5</sup> UNDT/NBI/2009/36 *Georges Tadonki v. Secretary-General of the United Nations*, 1 September 2009.

resulted in the Applicant being without remedy in respect of the ongoing recruitment process. While the circumstances pertaining to that recruitment process is not itself in issue, the record before me raises sufficient concern as to the process and the potential impact it might have on the Applicant. Hypothetical as it may be, the worst case scenario arising from the recruitment process is not something for which the Applicant can be compensated for in money terms.

43. Once separation is effected, not only will the Applicant be without income she will also lose out on a possible job opportunity. The loss of an opportunity cannot be adequately compensated for by damages.<sup>6</sup>

The Tribunal therefore

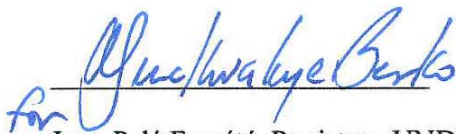
**ORDERS** that the impugned administrative decision be suspended pending the result of management evaluation or the filing and determination of a substantive suit whichever comes first.



Judge Izuako

Dated this 11<sup>th</sup> day of February 2010

Entered in the Register on this 11<sup>th</sup> day of February 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi

<sup>6</sup> See UNDT/2009/007 Rees, UNDT /2009/016 Tadonki, UNDT/2009/008 Osman