



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/57

Judgment No.: UNDT/2009/033

Date: 13 October 2009

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

PIUS ONANA

v.

SECRETARY-GENERAL

APPEARANCES/LEGAL REPRESENTATION

1. The Applicant was present.
2. Ms. Katya Melluish of the Office of Staff Legal Assistance, Nairobi appeared on behalf of the Applicant.
3. The Respondent was represented by Mr. Stephen Margetts and Ms Josianne Muc, of the Administrative Law Unit, Office of Human Resources Management (OHRM), who participated in the hearing via audio-conference.

THE APPLICATION

7. The Applicant's concerns with regard to the potential conflict of interest on the part of the Registrar were noted. Notwithstanding the Applicant's position that he was not seeking a ruling on the issue, the Tribunal feels it is important that his concerns be formally addressed.

8. While the Registrar's terms of reference require him to provide the Judges with substantive support, I have in the interest of justice determined that he will not be carrying out those duties in the instant case. Let the records reflect that this is a matter that the Court has been mindful of since the filing of this application. To that end, and in the interests of propriety and the exercise of judicial caution, I have taken the necessary steps to excuse the Registrar from his functions in respect of this case so that he has had no substantive involvement in the matter.

SUMMARY OF FACTS AND SUBMISSIONS

9. The Applicant joined the ICTR in April 1999 as a French court reporter. He worked in that capacity until May 2007 when the Chief of section recommended the non-renewal of his contract.² Following internal discussions, however, the Applicant was moved to the Judicial Records and Archives Unit (JRAU) as a lateral assignment in August 2007 while continuing to encumber his post with the French Court Reporters Unit.

10.

Reporters. As a result, it was recommended that his contract be not renewed beyond 31 December 2008.

12. In June 2008, as a result of an increase in workload at the ICTR, the General Assembly approved the Tribunal's supplementary requests for funds. The effect of this GA approval was that posts which were to be abolished as of December 2008 and June 2009 were "reinstated" on the basis of General Temporary Assistance (GTA) appointments up to 30 September 2009. In June 2009, Programme Managers were asked to undertake an exercise of identifying "critical functions" in order to meet the increased workload and begin the downsizing process towards the completion strategy. Of the three hundred and thirty-nine posts slated to be abolished, two hundred and ninety-seven were identified as critical. The post encumbered by the Applicant, that is, that of a French Court Reporter was one of those posts slated to be abolished as of 31 December 2008.

13. Counsel for the Applicant has submitted that her client was assessed in June 2009 on the basis of his position as a Court Reporter while he was working in the Judicial Records and Archives unit and had so worked for two years. The Respondent's submissions are unclear as to whether the decision not to renew the Applicant's appointment was based on the functions he was performing in the JRAU or the post he was encumbering as a Court Reporter. The Respondent's written submissions show that the Applicant was assessed as a French Court Reporter and included consideration of his EPAS within that section but the witnesses called by the Respondent testified that the Applicant was evaluated in the JRAU.⁵

14. The Respondent argues that the fundamental reason that the Applicant's contract is not being renewed is that the ICTR no longer has the funds. His post was abolished at the end of 2008. The funds made available through special provisions of the General Assembly, in light of

15. In respect of the second element of the test for suspension of action pending management evaluation, the Applicant submits that the fact that his contract was due to expire on the day

LEGAL ISSUES

18. **Article 13.1 of the Tribunal's Rules of Procedure** provides:

The Dispute Tribunal shall make an order 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 subject of an ongoing management evaluation, where the decision appears a facie to be unlawful in cases of particular urgency, and where its implementation would cause irreparable damage. [Emphasis added]

19. A suspension of action order therefore effectively serves the same purpose that an interim order of injunction would in a civil jurisdiction. It is a temporary order made with the purpose of regulating the position between the parties to an application pending trial. An order for suspension of action may only be made when certain conditions are present.

20. In the American Cyanide Co v Ethicon Ltd (1975) AC396, Lord Diplock laid down the standards or criteria for the granting of interim injunctive orders. Among these was the requirement that the Court must be satisfied that there is a serious question to be tried on the merits. Another significant factor is the inadequacy of damages as a remedy in the application for interim relief.

21. Similarly, and based on the provisions of Article 13.1 reproduced above, 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. A Suspension of Action application may be brought and considered only where the Applicant has filed a request for Management Evaluation, and during the pendency of the same, in respect of the decision which is the subject matter of his suit before the Tribunal. Of course, the onus of establishing a case for a suspension of action order lies on the Applicant.

Prima Facie Unlawfulness

22. The Tribunal notes that the Applicant has filed a request for Management Evaluation in respect of the impugned decision. Although the record is unclear as to the actual date on which Management Evaluation was requested, a decision of the Management Evaluation Unit is yet to be issued.⁶

of the two slated to be abolished. The witness at some stage asked another officer who had worked with Godfrey to put this information in writing. It appears that this assessment was not properly documented.

25. The thrust of the Applicant's case in this application is that the Respondent's evaluation of him on the basis of the criteria established by the Staff Retention Task force was unfairly done. While the Respondent's witnesses testify that the Applicant was assessed based on his duties in the Archives unit, the Respondent's written submissions on the other hand, assert that he was appraised last on a list of French Court Reporters. In his closing submissions to the Court, Counsel for the Respondent stated that the Applicant was not a critical staff member of the ICTR in either the French Court Reporters Unit or in the JRAU.

26. Much as it is accepted that a fixed term contract does not carry an expectancy of renewal, it is, to my mind, settled law that where "the administration relies upon performance issues in support of its decision not to renew a staff member's contract, the performance evaluation process, including, if necessary, rebuttal proceedings, must be beyond reproach." While the performance evaluation process in respect of the rebuttal proceedings is not itself before me, I am of the view that there must be integrity in the process of evaluating a staff member. Even as the ICTR is faced with the genuine need to downsize its staff, such downsizing must be done in a

decision to stand in spite of it being shown to be unlawful turns the law on its head. It places an onerous burden on the Applicant, and relieves the Respondent of the responsibility of taking the required care when making such administrative decisions.

The Urgency Element

28. The Respondent raises a curious argument in respect of this element of the test. He has submitted that this application must not be seen to be urgent because the Applicant had notice of his non-renewal in June 2009, and took all this time since to file his Application for suspension of action. Urgency, to my mind, is a question of fact. The application was brought in time enough for the Tribunal to hear it. If the Applicant had allowed enough time for the Respondent to present him with a *fait accompli* then clearly jurisdiction becomes an issue and this application would have no chance of being heard. I see no fault here.

29. A situation in which the Applicant faces a loss of his livelihood in the next twenty-four hours, or even two weeks for that matter, or one month, as long as the decision he complains about is likely to take effect before his case is heard on the merits and determined necessarily makes his Application one of “particular urgency” It is the timeline to the date of the implementation of the impugned decision and its foreseeable consequences that make a matter urgent. I therefore find the element of urgency to be satisfied.

Irreparable Damage

30. In the case of Tadonki v. The Secretary General, the Tribunal observed:

The well established principle is 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 decisionmaking process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will

pending on the contested decision, pursuant to **article 13.1 of the Rules of Procedure** of the United Nations Dispute Tribunal, I find that the Application succeeds.

35. This application is hereby granted. An order for the suspension of the Respondent's decision not to renew the