



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

OMONDI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON NON-RENEWAL OF A  
TEMPORARY FIXED-TERM  
APPOINTMENT**

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**Counsel for applicant:**

Katya Melliush, Office of Staff Legal Assistance

**Counsel for respondent:**

Chacha Odera

Joerg Weich



6. When she returned from leave on 25 September 2009, the Applicant found her position encumbered by another staff member, one Ms Mwihi, who was also on a temporary appointment, hired to replace the Applicant while she was on maternity leave. The Applicant was not allowed to resume her functions but was asked to fill in for another staff member, who was also on maternity leave, at the ICTS Helpdesk.

7. A list of eligible candidates for VA 421846 was forwarded to Mr. Charles Emer, as Chief of ICTS/UNON in October 2009. At a meeting on 7 October 2009, Mr. Emer informed the Applicant and her replacement that their contracts would be extended until the end of November 2009 so that they could be interviewed for the vacant post.

8. The Applicant was interviewed on 4 November 2009. Ms. Kung'u, who was to be on the interview panel, recused herself. The Panel comprised Mr. Pradeep Sood, Mr. Francis Gichomo and Ms Peninah Ngatia.

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

10. On 24 November 2009, the Applicant filed a request for Management Evaluation of the decision not to extend her contract beyond 30 November 2009. On 25 November 2009, the Applicant also filed a motion for suspension of action with the United Nations Dispute Tribunal (UNDT) in Nairobi challenging the same decision.

11. On 26 November 2009, the Applicant was informed that her contract had been extended for a further month. She then withdrew her motion for suspension of action.

12. On 28 December 2009, Counsel for the Applicant contacted the Respondent for information on the status of the Applicant's contract. Counsel was informed that the

Applicant's contract was not going to be renewed. The Applicant had hitherto not been informed of that decision.

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20. Following a case management conference with the parties on 27 April 2010, the case was set down for hearing on Friday, 7 May 2010.

21. On 6 May 2010, counsel for the Applicant was taken ill. The Respondent was informed and, as there was no objection to the hearing being postponed, counsel on both sides were advised to confer and propose a suitable hearing date by 17 May 2010.

22. Taking into account the schedules of counsel for both Parties, the matter was rescheduled for 29 July 2010. A new notice of hearing was issued to this effect on 27 May 2010.

23. On 16 June 2010, Counsel for Respondent requested a further adjournment. The Registry again advised the Parties to confer and provide it with a suitable date after 29 July 2010.

24. On 9 July 2010, Parties were notified that the hearing was now set down for Monday, 2 August 2010.

25. The hearing commenced on 2 August 2010. The Tribunal heard the testimony of the Applicant and one witness. The Chief of ICTS testified for the Respondent. The matter was adjourned to 19 August 2010 for closing submissions.

### **THE APPLICANT'S CASE**

25. The decision not to renew the Applicant's contract of appointment beyond 31 December 2009 was informed by extraneous f



33. The Applicant therefore seeks compensation in the sum of one year's net base salary.

### **THE RESPONDENT'S CASE**

34. The only live issue before the Tribunal is the decision not to extend the Applicant's temporary appointment. The only determinations therefore open to the Tribunal to make are (a) whether the Applicant had a legitimate expectation of renewal of her temporary contract and (b) whether the Respondent had a duty to advise the Applicant that her said contract would not be renewed.

35. The Applicant has failed to specify how the decision not to extend the contract beyond December 2009 was unlawful or to specify the breach it is alleged the Respondent committed with respect to that contract.

36. The decision not to extend the Applicant's temporary appointment beyond 31 December 2009 was an appropriate exercise of discretionary authority when it was concluded by the Programme Manager that the Applicant's services were no longer needed.

37. In respect of the allegations of discrimination on the grounds of pregnancy and maternity leave, the same are unproven, given that the Applicant's initial contract of 6 months was extended to cover the period of her maternity leave so that it would not lapse during her confinement. The Respondent made good faith efforts to place the Applicant upon her return from maternity leave on a post that would provide her with a better opportunity to leave work early in exercise of her entitlement as a breastfeeding mother.

38. The initial contract of appointment extended to the Applicant and to which she assented was one that was temporary in nature. The Applicant was aware that she had been temporarily appointed to the post pending the completion of a new selection process. The Applicant was also aware that there was a difference between the functions

she was temporarily recruited to cover in November 2008 and the functions advertised in



44 The Applicant and others were evaluated according to established criteria and the Applicant recommended as being suitable for the post, among others. However, an internal candidate was eventually selected for the post.

### **Confidential Witnesses**

45. At the hearing of 29 December 2009, Counsel for the Applicant applied to have a written statement which had been made jointly by some of the Applicant's colleagues admitted into evidence. Counsel also sought to have the names of the authors of the said statement redacted for purposes of the public record of the case because of concerns that they might be adversely affected by having made the statement to the Tribunal. The names of the authors to this statement were however disclosed to counsel for the Respondent on the undertaking that it would be kept confidential for their protection against possible retaliation; counsel had no objection to the admission of the witness statement into evidence.<sup>1</sup> The statement was then so admitted.

46. At the hearing of 19 August 2010, counsel for the Respondent submitted that the statement which had earlier been admitted should only be given the weight attaching to evidence that is untried and untested for veracity by cross-examination before the Tribunal.

47. The Tribunal notes that the statement of the Applicant's work colleagues had been admitted without any objection and in fact with the express consent of the Respondent on 29 December 2009. Counsel for the Respondent, though privy to the identity of the authors of the statement, did not deem it necessary to call any of them for the purposes of cross-examination during the course of these. Such cross-examination could have been conducted in camera if Counsel for the Respondent wanted to exercise his right to cross-examination.

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<sup>1</sup> UNDT/NBI/O/2010/017, at para 14.

**DELIBERATIONS/CONSIDERATIONS**

the scope of the consideration of this Tribunal. I find it incumbent upon me to have regard to all relevant aspects of the case in making my final determinations in this matter.

51. It is mention-worthy that a case exists on this court's docket at the instance of the Applicant. The opposing side is at liberty to join issues with an Applicant or even concede the issues. The conduct of a case is totally within the province of counsel. Although a court or Tribunal may request counsel to address it on certain issues which it considers to be relevant, no Tribunal directs counsel as to the conduct of his or her case. It is however prudent for counsel to fully address all the issues that are raised by an opposing party or the Tribunal.

**Was there a strained relationship between the Applicant and her immediate supervisor?**

52. The Applicant's principal contention is that the decision not to renew her appointment was actuated by bad faith and ill-motive against her because of the poor working relationship between her and her immediate supervisor, Ms. Kung'u. In its assessment of whether the said relationship was a countervailing circumstance leading up to the non-renewal of her contract, the Tribunal has had regard to the oral evidence tendered by witnesses during the hearings as well as the written statement of the Applicant's work colleagues as placed on the record in December 2009.

53. It is abundantly clear that the Applicant and her supervisor had an uneasy, strained relationship. The Applicant testified that she received no induction, training or guidance in her duties from her supervisor. The said supervisor on the other hand told the Tribunal that the Applicant was briefed on her functions when she first reported for duty on 24 November 2008 and was in fact registered for and received training on the Integrated Management Evaluation System (IMIS) and later, trainings on other technical applications. While the IMIS registration form was filed with the Tribunal, I am not persuaded that indeed any formal training on the system took place. The Applicant said she used a handout on the system and taught herself how to use it. Her supervisor, in





Applicant's immediate supervisor had put in a request on 15 June 2009 for the editing of the Applicant's extension number citing the need for correct identification by callers to ICTS and for purposes of telephone billing. The testimony of the Applicant, and of her work colleagues, is that the practice in ICTS is that while one is away on maternity leave, their telephone extension and name plate remains in place. This piece of testimony is unchallenged.

61. At the hearing of 29 December 2009, the Applicant's supervisor attributed the removal of the Applicant's name plate during her maternity leave to the need to ensure that persons seated at the front desk of ICTS were correctly identified by those visiting ICTS.

62. I am, however, not convinced that the different treatment accorded to the Applicant in terms of deletion of her phone extension and removal of her name plate was done for reasons as innocuous as the Respondent suggests. It is noteworthy that when the Applicant returned from leave on 25 September 2009 her name plate had still not been put out more than three months later. Indeed, Ms Kung'u testified on 29 December 2009, that the Applicant's name plate had been made but was stowed away in a stationery cabinet.

63. Considering the totality of the circumstances in this case, it is my judgment that the treatment afforded to the Applicant in this aspect takes on the definite patina of bad faith and discrimination against her. The poor working relationship that developed between the Applicant and her immediate supervisor set the stage for the non-renewal of her contract in December 2009.

### **The reassignment of the Applicant**

64. Staff Regulation 1.2(c) provides that:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.

65. The Applicant contends that she had the fundamental right to encumber the same post she held before going on maternity leave, barring the most exceptional circumstances, such as utter lack of funding or closing down of an office. In that regard, counsel for the Applicant invoked Article 8.2 of the Maternity Protection Convention as persuasive guidance for the Tribunal.

66. The Chief of ICTS in his testimony raised the matter of his discretion to make staffing dispositions within the section, and to reassign and relocate staff members to wherever he deemed fit in the interests of the Organization.

67. The Tribunal agrees that the Chief of Section was so entitled. It is our view that in the circumstances, a proper reassignment by the head of section to other tasks in the office within the Applicant's competence upon her return from maternity leave was in order.

68. There is no merit in the argument that the Applicant had a fundamental right to return to her former position after maternity leave. To the extent that fundamental rights in law are those basic or foundational rights deriving from natural law and defined as inherent and inalienable, the rights attaching to the Applicant under the terms of her employment are not fundamental rights. What we are concerned with here are the rights, express or implied, to which the Applicant is entitled under her contract of employment. The important issue is whether there was ever a proper reassignment of the Applicant by the Chief of section.

69. It is not denied that the Applicant was not allowed to resume her normal duties as a Programme Assistant but was instead moved to the help-desk upon her return from maternity leave. It is also a fact that the Applicant's last contract of appointment was renewed with a new functional title - that of an administrative assistant. The decision to move the Applicant to the Help desk, we are told, followed discussions by the Chief of ICTS and his deputy on the seating arrangements to be made considering that both the

Applicant and her replacement were on board after the Applicant came back from maternity leave. The arrangements were characterised at the material time as being temporary, and the Applicant testified that she understood them as such. However, she never had the opportunity to resume her duties at the front desk as a Programme



simply an afterthought meant to cover up the shabby treatment meted out to the Applicant.

**Escalation of bad faith and ill motive against the Applicant?**

73. It was the testimony of the Respondent's witness that at the time of recruiting the Applicant on General Temporary Assistance (GTA) in November 2008, there was a great need for her to assist with the workload at the front desk of ICTS. It is therefore curious that the Respondent chose not to extend her contract in December 2009 before substantively filling the post whose functions her assistance was deemed as necessary as to warrant her temporary recruitment. Why was this so? Was it because the situation that informed the Applicant's GTA recruitment had ceased to exist? Or was it a ploy to get rid of the Applicant whose relationship with her immediate supervisor had so soon deteriorated?

74. It is also in evidence that on 11 March 2009, the Applicant's immediate supervisor had recommended to the Chief of Section in an email that instead of the Applicant's contract being renewed as requested by HRMS, the original post that was cancelled should be re-advertised. While she was at liberty to make such a recommendation to the Chief of Section, can it be said, in light of prevailing circumstances, that this recommendation was made in good faith?

75. Some of the actions bordering on bad faith as alleged by the Applicant included:  
(a) The failure of her immediate supervisor to submit her maternity leave papers, and causing the Applicant to do so he

(d) The non-allocation of functions to the Applicant upon resumption from maternity leave thereby putting her in the uncomfortable and demeaning position of resorting to begging her work colleagues to help them out with their work load:

(e) Her 'banishment' to what was referred to as the intern's desk;

(f) The cancellation and re-initiation of an interview in which she was adjudged as to h0

issued. Why were internal candidates, who under the Rules<sup>5</sup>, ought to have been considered first not so considered as to prompt the CRP to intervene? And why did the Applicant and other external candidates who were earlier interviewed attend another interview in which they would be considered along with internal

clear duty both to uphold the enforcement of these high standards and to hold staff and managers alike accountable where they fail to do so.

82. At the suspension of action hearing of 29 December 2009, counsel for the Respondent stated from the Bar, in answer to a question from the Tribunal, that the recruitment process for VA 421846 was still ongoing. He told the Tribunal that all that remained to complete the selection process was the submission of the recommendations





security of their jobs. In these cases, it is not the public that these witnesses will fear; rather, it is the Secretary-General or agents acting in his authority.

It is imperative therefore that staff members can be confident that it is safe for them to testify before the Dispute Tribunal. In the absence of such an assurance, it is most unlikely that witnesses will come forward.

96. The testimony on why and how the recruitment process for VA 421846 had to be overhauled clearly reflects a blatant manipulation of the selection process set out in ST/AI/2006/3; a subversion and clear breach of UN Staff Rules. Why were internal candidates not considered previously and not interviewed by the first panel? How and why did the Applicant and other external candidates participate in the second interview that eventually produced an internal candidate given that the Rules require that internal candidates be first considered and if selected, there would be no need to consider external candidates? Did the ICTS Chief go out of his way to “find” internal candidates with a view to narrowing any chances the Applicant had at selection and thereby exact retaliation against her for daring to complain to this Tribunal? Or did he start out by excluding internal candidates with a view to manipulating the said selection process in favour of an external candidate?

97. Whatever the answers to the questions posed, I find that the Chief of ICTS was being economical with the truth when he told this Tribunal that the Central Review Panel had rejected the recommendations emanating from the first interview exercise which he sent to it on the ground that internal candidates were not considered. Apart from the fact that he has not supported this account with any document, the un rebutted evidence of one of the panelists is that a report did not emerge from the said interviews before the man who had chaired the panel retired. In other words, there was no report that could have been sent to the CRP.

98. I find also that the Chief of Section was peeved that the Applicant would go so far as to drag the Section he headed before this Tribunal for any reason. I have no doubt that









d. The Applicant would be normally entitled to an extension of her temporary fixed-term contract until the post she encumbered as an Administrative Assistant was filled through a competitive process. The Respondent did not lead evidence to show that the situation which informed the urgent recruitment of the Applicant in November 2008 had abated by December 2009 when they still had not recruited a replacement for the post;

e. The Applicant was entitled to a full and fair consideration of her application to the post of Administrative Assistant. However, the re-initiated interview process was tainted by manipulation and retaliatory considerations. In view of these, the Respondent violated the Applicant's right to due process.

### **Remedies**

106. The Applicant moves the court to grant her compensation in the sum of one year's net-base salary for the injuries she has suffered as a result of the bad faith against her and the violation of her due process rights.

107. In light of my finding that the decision not to renew her contract beyond 31 December 2009 was unlawful, tainted as it was by the myriad extraneous factors already described, I find that compensation is indeed due to her.

108. My assessment of what is due to her must however be balanced against the fact that the post for which she was competing, which gap she was initially recruited to fill, was filled in the first quarter of 2010. The Applicant has, since that recruitment, been employed because of the terms of the Order made suspending the decision not to renew her appointment.

109. In computing the compensation due to the Applicant here, I take into account the fact that she stayed in employment for over nine months after the post was filled. I also consider the nature of the Respondent's conduct against her and the retaliation she was

subjected to for having had a dispute litigated and therefore order the payment of two months' net-base salary.