

Case No

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

IGBINEDION

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**DECISION ON AN APPLICATION FOR  
SUSPENSION OF ACTION PURSUANT  
TO ARTICLES 13 AND 14 OF THE UNDT  
RULES OF PROCEDURE**

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**Counsel for applicant:**  
Samson Omweri Nyaberi

**Counsel for respondent:**  
Saidou A. N'Dow, UN-HABITAT

## **Introduction**

1. On 9 May 2011, the United Nations Dispute Tribunal in Nairobi (“the Tribunal”) heard the parties on the matter of the Applicant’s Motion for Suspension of Action. On 12 May 2011, the Tribunal issued Order 33 (NBI/2011) suspending the implementation of the impugned decision until the case is finally determined on its merits.

## **Facts**

2. The Applicant commenced employment with the United Nations Human Settlements Programme (“UN-Habitat”) on a three-month fixed-term appointment on 22 January 2004 as an Editorial Officer in the Information System Service Branch (“ISS”). This appointment was renewed continuously through 21 December 2004.

3. From 4 January 2005 to 11 October 2008, the Applicant held fixed-term appointments for varying periods short of one year, with four mandatory breaks-in-service.

4. From 20 October 2008 through 14 December 2009 (13.5 months), the Applicant’s fixed-term appointment was continuously renewed.

5. Following another break-in-service, on 18 December 2009, the Applicant was given a twelve (12) month fixed-term appointment.

6. On 15 September 2010, the Applicant’s immediate supervisor Mr Chris Mensah, recommended that the Applicant’s contract be extended for another twelve months. The Applicant’s performance for the period 1 April 2008 to 31 March 2009 was rated as ‘excellent.’ On 28 September 2010, the certifying officer signed-off on the recommendation for renewal. The certification process on the system is designed to indicate whether or not there are sufficient post-funds for the continued retention of a staff member.

7. Between October and the end of November 2010, several emails were exchanged between the Applicant and his supervisor on the status of the latter’s recommendation for

extension. Further action/approval was expected from the Director of the Programme Support Division (D/PSD), Mr. Antoine King.

8. Subsequent discussions involving Ms Felista Ondari (Chief, Management Support Section, PSD), Mr Antoine King and Mr Mensah culminated in an email dated 1 December 2010 indicating that the Applicant's contract would not be extended as recommended. Correspondence made available to the Tribunal show that budgetary reasons and the insufficiency of funds were being cited as reasons for this decision.

9. The Applicant's appointment was then renewed from 20 December 2010 to 31 December 2010, and for another four months from 1 January 2011 to 18 April 2011.

10. On 30 December 2010, the Applicant wrote to the Executive Director of UN-Habitat protesting and seeking a review of the decision to renew him for only four months.

11. On 18 March 2011, Mr Mensah wrote to the Applicant to inform5(r)-2( )6( 201cfant )Tj05(r)6T2.25





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4. **The decision of the Dispute Tribunal on such an application shall not be**



32. The following is the Respondent's case:

- a) The Applicant has misunderstood the General Assembly Resolution and the Transitional Measures. Neither of these documents creates an expectancy that a staff member in the Applicant's position will be provided with an extension for a maximum of two-years. This decision was informed by an organisational need and was not motivated by extraneous factors and therefore the Applicant had no expectancy of renewal.
- b) The previous extensions of the Applicant's contract was a show of goodwill on the part of the Organisation. The repeated difficulties that the Applicant had encountered at the time of renewal were due only to the fact that there was no post against which he could be placed. Posts always had to be "borrowed" from different sections within the Organisation to facilitate his extensions.

33. The Tribunal notes that as at 14 December 2009, the Applicant was on a continuous fixed-term appointment for 13.5 months. He was then made to take a mandatory break in service. He was thereafter given a 12 month fixed-term appointment on 18 December 2009, after the issuance of the transitional measures and the new rules governing staff selection and appointments. The Tribunal is curious as to the reason for giving a staff member who is supposed to be on a temporary post a fixed-term appointment after the advent of the new rules.

34. The memo from the Executive Director dated 21 February 2011 clearly states that there will be no recruitment or extension of contracts for *temporary staff*.

35. Given the Respondent's repeated submission that the Applicant had always and continued to be on a temporary post, and had never been competitively recruited for any of his appointments with UN-Habitat, the Tribunal finds it contrary that the Applicant was given a fixed-term rather than a temporary appointment on 18 December 2009.

36. If the contract was that of a fixed-term appointment, as evidenced by the document filed with the application, the Tribunal finds it peculiar that the Respondent would label it a temporary appointment. The Respondent's stand is that the Applicant is not being subjected to the rules governing temporary appointments but that the provision for renewal of up to two years does not create an expectancy of a renewal. At the end of the day, it is clear that at the time the recommendation for a year's extension was made, there was funding available and that no reasonable explanation has been given to the Tribunal as to how this funding evaporated two weeks later. The Tribunal uses two weeks as a gauge to reflect the amount of time that with 19.06 f-0.0/em etem7 ibint Mr Kundiis nas a 206uResnas le exin to hat tas fundihad de lai a Ca



Bench as to why this objection was not made earlier, Counsel told the Tribunal that he was “in communication with the Management Evaluation Unit” on this matter and thought it would be appropriate for MEU to first decide on the matter before the Respondent raised the objection formally.

46. The oral motion was supplemented by written submissions on 11 May 2011. The Respondent submitted that MEU’s finding on the issue of receivability rendered the Applicant’s motion for suspension of action time-barred and moot, and should therefore be dismissed in its entirety.

47. There are therefore two issues before the Tribunal on the question of receivability. The first pertains to whether an application that has been found to be time-barred by MEU is automatically time-barred before the UNDT; the second pertains to the validity of the court’s

51. In an email dated 1 December 2010, two months after the Certifying Officer had processed the Extension of Appointment document, Mr Antoine King wrote the following to Mr Chris Mensah:

After our discussion, I am now confirming that we can extend his contract for another 4 months. This is to take him to just after the GC, (the Governing Council of UN-Habitat) i.e. 19/4/2011 and will help you out as you approach the GC. Please inform him urgently. This should also be in writing afterwards.

52. Much later, on 18 March 2011 Mr Mensah informed the Applicant in an email that his contract will not be renewed after 18 April 2011. This is what Mr Mensah wrote:

Dear Mr. Igbinedion,

With reference to my discussion with you on 14 March 2011 and following the Memo to (sic) the Executive Director of UN Habitat to all Directors dated 21 February, this is to **confirm**, with pain that your post is among those that we will not be renewed (sic) when your contract expires on 18 April 2011. A formal letter to that effect will be coming from the relevant office. (Emphasis added).

53. In an email dated 31 March 2011 Mr. Mensah wrote to the Applicant and stated:

As you may recall from our discussions in December 2010 when the duration of your contract extension arose, you were informed that the organization was only able to extend your contract on an exceptional basis to cover the Governing Council by four months (up to 18 April 2011) with no expectation of further extension.

54. The issue that arises from the above is the date the Applicant was officially informed that his contract would not be renewed. The Respondent cites financial constraints as the principal reason for the decision not to renew his appointment. As at December 2010, when Mr. King decided on a four month extension, the issue of financial constraints had not been mooted. It is only on 21 February 2011, that the Executive Director brought the financial difficulties of the Organisation to the fore.

55. Further, if a final communication had been made to the Applicant in December about the decision of the administration on the fate of his contract for financial reasons why would

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review or decide not to respond at all to the request for management evaluation. This is the conclusion that flows from a reading of Article 8.1(i)(b).

65. MEU, when faced with a request for review, has two options. It may find that the decision was unlawful and take appropriate remedial measures. It may also decide that the administrative decision was lawful notwithstanding a finding by a court that the administrative decision was unlawful. The irony of the situation is that when the staff member challenges the same matter substantively, the Tribunal may again find that the administrative decision was unlawful and make the appropriate consequential orders. In the event of an appeal, one may ask whether the finding of lawfulness of MEU would be an argument for the Respondent and what weight that argument would be accorded.

66. The question arises whether it is consonant with the law that would be accorded.

expressly permits discriminatory treatment as between the sexes but the general principles of law prohibit such discrimination.<sup>11</sup>

68. The Statute of the UNDT gives power to the Tribunal to order a suspension of an administrative action which is *prima facie* unlawful and where the elements of urgency and irreparable damage are met. It is argued by the Respondent that such a suspension cannot extend beyond the date of an MEU decision.

69. That provision would be against the philosophy embodied in the Preamble to Resolution 62/228 on the “Administration of Justice at the United Nations” where the General Assembly reaffirmed its decision

“to establish a new, independent, transparent, professionalised, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process, to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike”.

70. The Tribunal reiterates the view it took, and the concern it expressed in *Kasmani*:<sup>12</sup>

The Appeals Tribunal’s reading of the Rules in effect means that a judicial finding of *prima facie* unlawfulness may be reversed, or in any case come to nought, by a decision of the Management Evaluation Unit of the Department of Management of the Secretariat. It is difficult to see why a court must be seised of an application to suspend when its decision can, in anything from 30 to 45 days, be reversed by a decision of the administration endorsing its own impugned decision. The framers of the new system and drafters of the Statute could not have intended for the new system to be one in which the Secretary General’s review of his own decision would result in a preceding judicial order, on the same set of facts, being rendered empty and therefore useless. If the sanctity of the judicial process and all that it entails is to mean anything at all, such a reading of the Statute and Rules must not be correct.

71. The Tribunal also endorses what was stated in *Abosedra* Order No. 010 (NBI/2011)

Article 2.2 as it stands would be against the general principle of law relating to the independence of the judiciary. By making the Administration the judge of the duration of the management evaluation, the Article is thereby curtailing the power conferred on the Tribunal to decide in its wisdom the duration of the suspension. General principles of law have been applied in a number of cases in spite of the existence of rules when it was

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<sup>11</sup> *Principles of the Institutional Law of International Organisations*, C. F. Amerasinghe, 2<sup>nd</sup> ed. 2005/7 at. p. 295.

<sup>12</sup> Oder No. 75 (NBI/2010).

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purposive approach should be taken when interpreting Article 2.2 so as to give the result it is meant to achieve, respecting therefore the concept of the separation of powers.

### ***The Tribunal's Observations***

75. With regard to the process for management evaluation, there is one matter which the Tribunal must address. The Applicant's request for review to MEU was decided upon, and dismissed as time-barred and therefore not receivable, with exceptional speed. At the hearing of the present Application, Counsel for the Respondent told the Tribunal that the Respondent was in communication with MEU, and sought to move the Tribunal to dismiss the current proceedings on grounds of timeliness.

76. While the Tribunal appreciates the efficiency displayed in this matter, the Tribunal finds it necessary to remind all parties and components of the system, that the process of management evaluation is designed to give the Secretary-General the opportunity to *objectively and impartially* assess the merits of a claim made against his decision-making agent. It necessarily calls for a measure of independence, the exercise of which is critical to the efficient and effective functioning of the system. In the circumstances of the present case, the Tribunal will resist the conclusion that the required levels of impartiality was tampered with.

### **Conclusion**

77. The Respondent's oral Motion to Dismiss on Grounds of Timeliness and Supplementary Filing Following Receipt of Management Evaluation Decision dated 11 May 2011 are dismissed.

78. The impugned decision is suspended until the matter is heard and determined on the merits.

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*(Signed)*

Judge Vinod Boolell

Dated this 24<sup>th</sup> day of June 2011

Entered in the Register on this 24<sup>th</sup> day of June 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi