



**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pele Fomété

RAWAT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON AN APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Seth Levine, OSLA

**Counsel for Respondent:**

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

**Notice:** This judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. On 21 June 2011, the Applicant, a staff member of the International Criminal Tribunal for Rwanda (“ICTR”), requested management evaluation and suspension of the decision not to renew his fixed-term appointment beyond 30 June 2011.

2. On 27 June 2011, the Applicant filed an application for suspension of action with the United Nations Dispute Tribunal (“the Tribunal”). On 28 June 2011, the application was served on the Respondent. Their reply was received on the following day.

3. By Order No. 67, dated 30 June 2011, the Tribunal granted the application for suspension of action until 8 July 2011 to allow a hearing in this matter.

4. On 8 July 2011, a hearing was held on the application for suspension of action.

## **Relevant Facts**

5. The Applicant joined the ICTR in September 2007 as a Telecommunications Technician in Kigali, Rwanda. On 31 December 2008, his post was abolished in accordance with the ICTR’s Completion Strategy and, later, reinstated using General Temporary Assistance (“GTA”) funds until 30 June 2011.

6. On 26 May 2011, the Applicant received notification by Memorandum entitled “Separation notice from the ICTR: Non-extension of your fixed-term contract beyond 30 June 2011” informing the Applicant that he would be separated from service at the expiry of his contract.

7. After several exchanges with his supervisors to challenge the decision not to extend his appointment beyond 30 June 2011, the Applicant wrote to the Management Evaluation Unit (“MEU”) on 21 June 2011.

8. The Applicant requested from MEU the review of the administrative decision concerning the non-extension of his contract as well as the denial, by the ICTR Chief of the Division of Administrative Support Services, of his request for an investigation into the circumstances and reasons for his non-extension.

9. On 27 June 2011, the Applicant filed an application for suspension of action of the contested administrative decision with the United Nations Dispute Tribunal in Nairobi (“UNDT”).

### **Applicant’s Submissions**

10. The Applicant frames his case as follows:

a. The Applicant avers that the decision of non-extension of his contract was not based on a fair assessment of his competence, technical capabilities and performance in relevant telecommunications activities.

b. The criteria of non-availability of funds were not transparently and consistently applied to all abolished/GTA funded international posts of other Sections/Units in Kigali. The exercise in evaluation individual technical capabilities, including the notification process, was not fact based as multiple reasons were provided by the concerned programme managers.

c. The Applicant claims that his application meets the three criteria required by the Statute and Rules of Procedure for the granting of a suspension of action. Firstly, he argues that the decision is unlawful because the functions that he performs as Telecommunications Technicians are still needed. He further avers that the criteria used to determine that he should be separated on 30 June 2011 were not clear to the extent that other staff members in similar situations were retained. Finally, there is an element of urgency as he will be separated on 30 June 2011 if the Tribunal does not grant this application.

## Respondent's Submissions

11. It is the Respondent's submission that the application does not meet the three criteria required by article 2 of the Tribunal's Statute. He further asserts that the Applicant bears the burden of proving that all three elements are met for the application to be granted. On this point the Respondent asserts that the Applicant has failed to prove that the decision is unlawful and that it would cause him irreparable damage if implemented.

a. Firstly, the Respondent avers that the decision is not *prima facie* unlawful. He argues that, initially, the Applicant's post was to be abolished at the end of 2009 within the context of ICTR Completion Strategy. However, due to a surge of judicial activity, it was extended through GTA funds and the Applicant had been made aware that his post would be abolished on 30 June 2011.

b. Meanwhile, the Chief of Information Technology Service Section ("ITSS") considered that due to the progress of ICTR to complete its work following the 2009 surge in judicial activity and the completion activity, the functions of the Applicant's post were no longer required. The Respondent argues that the decision was fairly assessed and notes that four other staff members were in a similar situation. Two staff members have remained at the service of ICTR for exceptional circumstances whilst three other staff members' posts were abolished effective 30 June 2011.

c. Secondly, with regards to irreparable harm, the Respondent recalls *Utkina* UNDT/2009/86 arguing that the Applicant will not suffer any irreparable harm should the decision be implemented. He avers that the Applicant's career prospects will not be negatively affected in any way. Further the Applicant has not discharged its burden of proving that the decision can cause him irreparable damage that cannot be compensated monetarily.

d. For the above reasons, the Respondent moves the Tribunal to dismiss this application in its entirety.

## **Consideration**

12. After careful consideration of the submissions of the Applicant, the Tribunal deemed it necessary to hold an oral hearing in this matter in accordance with article 16.1 of its Rules of Procedure. A hearing was held on 8 July 2011, at 10.00 am, Nairobi time, during which the Applicant and two other witnesses from ITSS provided oral evidence.

13. When dealing with applications for suspension of action, the Tribunal is guided by the provisions of article 2 of the Tribunal's Statute and article 13 of the Tribunal's Rules of Procedure. Article 13 (1) provides as follows:

“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 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”.

14. The current application must be therefore reviewed against the three essential prerequisites to a suspension of action application as outlined in articles 2 (2) of the Tribunal's Statute and 13 (1) of its Rules of Procedure.

### **a) Prima facie unlawfulness**

15. In *Abosedra* Order No. 10 (NBI/2011), the Tribunal held that the first requirement is that the administrative decision must be unlawful and “what is unlawful depends obviously on the specific circumstances of each case”. It further stated that “such decision would also be unlawful if it was motivated by countervailing circumstances.”

16. In the present case, the Tribunal considers that the Applicant has satisfied the burden of proving that the decision was indeed prima facie unlawful for the primary reason that the process for staff retention was tainted with discrimination.

17. The ITSS is divided into two parts –the Electronic Data Processing Unit (“EDP”) and the Telecommunications Unit. The Applicant was serving as a Radio Technician at the FS-4 level within the Telecommunications Unit in Kigali at the time he was informed of the Respondent’s decision not to renew his contract. Mr. Clement Kilassa who was the direct supervisor of the Applicant stated in his oral testimony that the staff in the ITSS was a skeleton one. At a retreat held in Arusha, it was decided to downsize the staff of the ITSS and one of the five posts affected was the one held by the Applicant. Though Mr. Clement Kilassa was the direct supervisor of the Applicant and at the material time the officer-in-charge (“OIC”) of ITSS he was never consulted on which post should be retained or abolished. Instead it was Mr. Peter Ng’ang’a, the head of EDP, who attended alone the retreat in Arusha to discuss post retention although he apparently did not have anything to do with the Telecommunications Unit, ITSS.

18. One of the persons affected by the downsizing was Mr. David John Kessy, who was an Asset Manager. When he came to know along with his colleagues that their posts were to be abolished he had a discussion with Mr. Edward Wokabi, who is currently the Chief of ITSS in Arusha, about the status of his post to “defend his case”. Following that discussion, Mr. Wokabi told Mr. Kessy that he would review the decision not to extend him. The end result was that Mr. Kessy’s contract was extended by three months, until 30 September 2011, notwithstanding the lack of funding, which was the reason put forward not to extend the contract of the Applicant. The discussion between Mr. Kessy and the Chief of ITSS was as a matter of fact captured in an email entitled “Request to Amend Staff Separation” (sic ) that the Chief sent to the Chief of the Division of Administrative Support Services on 27 May 2011. In his communication, the Chief of ITSS requested the retention of two staff members whose posts were to be abolished. In the particular case of Mr. Kessy, the Chief wrote:

*“During my visit to Kigali and while meeting with Mr. David Kessy to notify him of the separation, I found out that his current responsibilities the ITSS Asset Manager need some time to wind up. As a result, separating end of June is not practical and would not be to the benefit of the Organization. Therefore, I would like to request you to consider*

*extending David Kessy's contract whose details are listed below to September 30, 2011. I have requested HR in Kigali to hold off giving a letter of separation to David until we get our response on this request."*

19. The Chief further requested the extension of another staff member, Mr. James Nzuna, until the end of December 2011:

*"In addition, in the light of Section Chiefs meetings yesterday where you mentioned that two courts might be operational due to the new arrest, we would like to recommend that the contract of Mr. James Nzuna of Audio Visual Unit be extended to December 30, 2011. We have put the notification of the staff member on hold pending your decision."*

20. Furthermore, the documentation filed by the Respondent shows that the Chief of ITSS also extended a third staff member named Mr. Teye. The latter is an Electronic Data Processing Assistant in the EDP Unit in ITSS in Kigali. According to the Respondent, the Chief of ITSS took that decision because Mr. Teye had proven multifunctional skills which made him conversant with telecommunication services performed in Kigali.

21. Based on the review of the facts submitted by the parties and oral testimonies, the Tribunal finds that the contracts of three staff members initially earmarked for abolition of posts were actually extended on an "exceptional basis" although staff retention is a difficult exercise that needs to be performed using utmost transparency and clear communication channels. According to ICTR Information Circular No. 77, on Submission of Staff Retention Criteria dated 3 October 2007, the process by which ITSS staff members were chosen for non-renewal failed to match the Staff Retention Criteria policy paper which states:

*"The main challenge that the Management must therefore address is the need to ensure that the process for identifying the staff to be retained and those to be given early separation is as fair and transparent as possible and based on objective criteria".*

22. The Tribunal takes the view that the decision of Mr. Wokabi was an ill-advised one. He proceeded to a renewal of the contract of three staff members, Mr. David John Kessy and Mr. James Nzuna whose posts were earmarked for downsizing. One of the main arguments for the abolition of posts was that there was a lack of funds. Yet, the Chief of ITSS extended the contracts of three staff members after a simple discussion with them and that was not explained to the satisfaction of the Tribunal. The Tribunal was not informed whether Mr. Wokabi had the required authority to proceed as he did. But whatever the case may be, his decision amounted to an abuse of authority.

23. There is no evidence that the Chief of ITSS consulted any other colleagues within ITSS on this matter and the way he proceeded in choosing which staff members should be retained created a sense of favouritism vis-à-vis the other staff members affected by the downsizing. The inescapable conclusion is that such action amounted to a selective discrimination in the process of downsizing because, obviously, a legitimate question arises as to why there was no review in the case of the other staff members affected by the downsizing. In short, the criteria used to retain three of the staff members affected by the downsizing were not clearly explained to the Tribunal. Surely it would not have been in the interest of the Organization to downsize the already skeleton staff of the ITSS on the ground of lack of funds and at the same time review the status of other staff members who had been earmarked to be downsized for the same reason and grant them an extension.

24. Each staff member being affected by abolition of posts deserves to be the subject of transparent actions. The reason put forward by the Respondent that there was a lack of funding in the case of the Applicant when the Chief of ITSS was able to review the case of some staff members based on some “exceptional basis” and find funding for this purpose simply does not hold water. Yet, from the beginning, the decisions to retain some staff should have been clear and transparent, based on objective criteria because the Applicant and another staff member were equally affected by the downsizing. In *Chen 2011-UNAT-107* Painter J. writing the opinion of the court stated “Budgetary considerations may not trump the requirement of equal treatment”. The Tribunal reiterates this view



and asserts that budgetary considerations should not hamper the fair and transparent procedure in the staff retention process.

**b) Urgency of the application**

25. With regard to the second element the Tribunal notes that there was no dispute as to the urgency of the application. The application was filed a couple of days before the Applicant's contract was due to expire on 30 June 2011.

**c) Irreparable harm**

26. With regard to the third criteria, the Applicant submitted that the decision if implemented would cause him irreparable harm as he claims to be the sole "breadwinner" for his family. It would deprive them from an income and cause hardship.

27. The Tribunal notes the Applicant's contention with concern. Sympathetic the Tribunal feels in the face of such situation. The Applicant did not present any evidence of how he would suffer irreparable damage except for an assertion that his career prospects would be jeopardized.

**Final considerations**

28. An application for a suspension of action is in the nature of an injunction, the purpose of which is to maintain the *status quo* between parties until the order lapses. Article 10 of the UNDT Statute states in no uncertain terms that there is no appeal against such an order. The United Nations Appeals Tribunal ("UNAT") has opened the door to an appeal against a Suspension of Action ("SOA") decision by stating that the prohibition to a SOA appeal against a decision was an exception. Presumably the UNAT meant thereby that it would be left at the discretion of the UNAT whether an appeal against a SOA decision would be received or not.

29. This opinion of the UNAT is being used by the Office of Legal Affairs ("OLA"), the Department responsible for advising and representing the Secretary-General before the UNAT, to file an appeal against a SOA decision be it the final

judgment or the interim order. This strategy, it would seem, of filing an appeal has been construed as operating a stay of the suspension decision thus putting an end to the *status quo* between parties with the result that the Administration has the full power to implement the much contested decision. This new found trend of the OLA boils down to making a mockery of articles 13 and 14 of the UNDT Rules of Procedure and Article 8 of the UNDT Statute that specifically confers a power on the UNDT to suspend an administrative action if the three conditions namely, unlawfulness, urgency and irreparable damage are satisfied.

30. Two major consequences flow from this. First, the power of the Tribunal to take an interim decision is being undermined and secondly the consequences for the staff member may be catastrophic from the point of view of his or her career. However unpalatable this reason may sound it is the blunt reality that the Tribunal has to face in the light of the new strategy of OLA.

FOR THE FOREGOING REASONS

31. The application is dismissed.

*(Signed)*

Judge Vinod Boolell

Dated this 25<sup>th</sup> day of August 2011

Entered in the Register on this 25<sup>th</sup> day of August 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi