UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/36
Judgment No.: UNDT/200/017
Date: 11 September 2009
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KASMANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

RULING ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Katya Melluish, OSLA.

Counsel for Respondent:
Susan Maddox, ALU/OHRM.

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

1. APPEARANCES/LEGAL REPRESENTATION

1.1 ***Applicant***: The Applicant was represented by Ms. Katya Melluish, of the Office of Staff Legal Assistance (OSLA), Nairobi.

1.2 ***Respondent***: The Respondent was represented by Mr. Steven Dietrich, of the Administrative Law Unit, Office of Human Resources Management (OHRM), who participated in the hearing via audio-conference.

2. CASE BACKGROUND

2.1 The Applicant, Mr. Mohammed Rizwan Kasmani, a staff member of the United Nations Office at Nairobi (UNON) filed the present application on 28 August 2009 seeking the order of this Tribunal to suspend the implementation of an administrative decision of UNON not to extend his fixed-term appointment beyond 3 September 2009 (the due date of his current contract).

3. EMPLOYMENT HISTORY

3.1 The Applicant joined the United Nations on 4 June 2009, as Procurement Assistant, Procurement, Travel and Shipping Section (PTSS) in UNON at the G-4 level, step 1, on a 3-month fixed-term appointment against a General Temporary Assistance (GTA) post.

4. SUMMARY OF FACTS

4.1 From the records submitted to the Tribunal by the Applicant on 28 August 2009 and in the Respondent's reply dated 1 September 2009, the facts of the case are summarized as follows:

4.2 On 5 May 2009, the Applicant received an offer for a three-month fixed-term appointment as Procurement Clerk in the PTSS/UNON at the G-4 level, step 1 under the 100

Series of the UN Staff Rules and Regulations.

4.3 Effective 4 June 2009, the Applicant accepted the above-referred fixed-term appointment and took his functions on the same day.

4.4 In a Handover Note dated 16 June 2009, the Officer-in-Charge (OIC) informed the Chief of Section, PTSS/UNON that he had recruited the Applicant along with another staff on GTA short-term appointments to replace departing staff in the Contracts and Purchasing Units.

4.5 On 25 August 2009, the Chief Purchasing Unit of the PTSS and supervisor of the Applicant wrote to the Chief of PTSS/Division of Administrative Services (DAS) asking for an update on "the status of [the Appellant']s contract".

4.6 On the same day, the Applicant received an email from Human Resources Management Service (HRMS), informing him that his clearance had been sent to the clearing units on the same day and that he was required to take several steps in order to proceed with his separation from service.

4.7 On 28 August 2009, the Applicant sent his request for management evaluation to the Secretary-General, on "*the decision dated 25 August 2009 not to extend his fixed-term appointment beyond 3 September 2009*". On the same day, the Applicant submitted his *Application for Suspension of Action* on the impugned decision before the UNDT, Nairobi.

5. THE HEARING

5.1 On 31 August 2009, the Respondent (the Administrative Law Unit in the Office of Human Resource Management (OHRM), representing the Secretary-General) in New York (NY) was communicated the Applicant's submissions and offered the opportunity to submit a reply by close of business in New York on 1 September 2009. Both the Applicant and the Respondent were informed that the Tribunal will hold a hearing on

Wednesday, 2 September 2009 in Nairobi. By letter dated 31 August 2009, the parties received a hearing notice and confirmed their attendance. By email dated 2 September 2009, the Respondent submitted a reply to the Applicant's brief.

5.2 The hearing was held on 2 September 2009, at 4pm Nairobi time. The Applicant was present in the courtroom, with his Counsel. The Respondent participated in the hearing via audio-conference. The Applicant and a witness called on his behalf (Mr. [...], the then OIC at PTSS and Applicant's supervisor) were heard and cross-examined by the Respondent following which the Tribunal sought some clarifications from them. The Respondent did not call any witnesses.

5.3 At the time of the recruitment, Mr. [...] told the Applicant that he was going to be offered a six-month contract and that subject to good performance and funds being available, there "was absolutely no reason why he would not be extended and be given a chance to apply for the post."[1] In response to a question from the Bench on whether Mr. [...] was allowed to say this, the witness explained that this was the way in which short-term recruitments are routinely processed and staff members on short-term appointments are extended.[2]

5.4 In direct examination, the Applicant's supervisor explained the circumstances leading to the recruitment of the Applicant. The departure of a staff member from the Section at relatively short notice created a vacuum which needed to be filled quickly. Given the demands on the Section, it was necessary that they found somebody who could hit the ground running. According to the witness, there was at the time an urgent need for staff as there was a backlog of work to be serviced or completed. In consultation with other unit heads in the Section, a number of candidates were identified and a request for their recruitment was sent to Human Resources.[3]

[1] Draft transcripts 2 September 2009, p. 23.
[2] *Idem*, p. 23.
[3] *Idem*, p.16

5.5 After the selection process Mr. [...] was informed by the Administration that the Applicant did not qualify to be appointed as a G5. He was asked to consider other suitable candidates from a list of candidates previously interviewed for the post. Mr. [...] undertook the suggested exercise, in consultation with a colleague but did not find a suitable alternative candidate. The recommendation for the recruitment of the Applicant was therefore maintained and eventually effected, especially since he had the required knowledge of and experience with proprietary software in use in the section and would literally hit the ground running. The witness also testified that he had the authority to initiate recruitment actions in his capacity of OIC.[4]

To a question put to him on whether he had the authority to proceed to recruitments in his capacity of OIC. The transcript reads as follows:

> *"Yes [...] I had the power. I cross-checked [...]*
> *I cross- checked with HRMS, [...] and they informed me that, yes, as OIC if I presented the case, they would act on it as if it was the head."*

5.6 In a Handover Note dated 16 June 2009, the Officer-in-Charge (OIC), Mr [...] informed the Chief of Section that he had recruited the Applicant along with another staff on GTA short-term appointments to replace departing staff in the Contracts and Purchasing Units.

5.7 Some time before the expiry of the term of the appointment, Mr. [...] approached the Chief of PTSS and advised her that steps should be taken to extend the appointment of the Applicant, as extensions are normally effected about a month in advance. He made several attempts to follow this up, and each time the Chief of the Section, "kept stalling".[5] The Chief of Section eventually told Mr. [...] that she was not in a position to approve the recommendation as she wanted the case looked into.

[4] Draft transcript 2 September 2009, pp. 16-18; 24-25.
[5] Draft transcript 2 September 2009 p.23

5.8 While the datelines are unclear, at some point upon her return, the Chief of Section appears to have queried the recruitment process. This led to Mr. [...] being summoned to the Chief of HRMS to explain the recruitment of the Applicant, and to submit a written statement on the same. He submitted his written statement as required and the matter seemed to have ended there[6]. The Applicant testified that this came as a shock to him. Mr. [...] testified that he was himself surprised. Having not heard back from Human Resources after he submitted his written statement he considered the matter closed so that no irregularity was found in the recruitment of the Applicant.

5.9 The Applicant testified that throughout his term at PTSS, he was never acknowledged by the Chief of Section Ms. [...]. As the Section is overstretched, almost every procurement clerk/assistant, including the Applicant, clocks in about 40 hours of overtime work. The Applicant's overtime has, however, never been approved by Ms [...] despite the signature of his immediate supervisor, Mr. [...][7].

6. PROCEDURAL ISSUES

6.1 On 3 September 2009[8], the Respondent filed a *Motion to Submit Additional Evidence.* On the same day, the Applicant submitted a reply to the Respondent's Motion. The Respondent premised the instant Motion on the allegation that of the Administration was not informed in advance of Mr. [...] being called as a witness, as required by Article 16.2 of the Rules.

6.2 The Tribunal's records shows that at the time notices of the hearing were circulated to the Parties, by email dated 31 August and 1 September 2009, the Registry had not received notification of the intention of any of the parties to call witnesses. It was in the evening of 1 September 2009, New York Time and in the early hours of 2 September 2009, Nairobi Time that Counsel for the Applicant (Mr. […] at that time) emailed the Registry to advise of his intention

[6] Draft transcript 2 September 2009 pp. 19-20
[7] Draft transcript 2 September 2009 pp. 7-8.
[8] This Motion was originally submitted as dated 1 September 2009 and later corrected by its author to 3 September 2009, date of effective submission to the UNDT Registry.

to call witnesses. This original message was copied to the Respondent. Immediately upon receipt of the message in Nairobi in the morning of 2 September, the Registry advised the Applicant by an email copied to the Respondent that it had taken note of the Applicant's intention to call witnesses. In addition to Ms. […], Officer-in-charge of the Administrative Law Unit of OHRM and the corporate email account of OHRM, who were recipients of the original email from the Applicant, the Registry in acknowledging receipt of the notice copied its response to Mr. […].

6.3 The Respondent was therefore informed ahead of the hearing of the Applicant's intention to call witnesses. The Tribunal finds the suggestion that the "Registry did not inform in advance" before the hearing of the names of witnesses the same both disingenuous and inappropriate. Further, at no point during the hearing did Counsel for the Respondent object to the calling of Applicant's witness.

6.4 During the course of the Applicant's supervisor's testimony, the Respondent's Counsel objected to evidence being led on the circumstances of the recruitment and the decision not to extend the appointment. Counsel for the Respondent intimated to the Tribunal that he would not be in a position to rebut that evidence as his potential witness was not in attendance. The Tribunal recalls that at the beginning of the hearing the Presiding Judge explained to the parties the procedure he intended to follow. In brief the parties were informed that the Applicant will present his case and call witnesses. The Respondent would be given an opportunity to cross-examine the witnesses. The relevant section of the transcript of the hearing reads:

> Judge Boolell*: "The rules are totally silent on the procedure we should follow in such hearings, so the way I want this present hearing to be proceeded with would be as follows: We'll go back to basic principles, that is, the one who [avers]must prove. So we'll ask the Applicant to make out his case and call witnesses, if any. And if the Applicant does give testimony along with his witnesses, the Respondent may wish to cross-examine both the Applicant and/or his witnesses. And then the Respondent will (…) make out his case and, of course, will have the right to call witnesses and subject again to the rule of cross-examination by the Applicant. And after the submissions after the testimony or whatever submissions the parties may wish to make, if the Tribunal requires any clarifications, the Tribunal will do so and then we can wrap up with*

arguments, if any, of parties. Is that clear to everybody?"
Respondent and Applicant both said*: "yes"*

6.5 The procedure was clear and afforded both parties adequate and equal opportunities to state their respective cases and rebut that of the opposing party. As explained by the European Court of Human Rights a party should be given an adequate and proper opportunity to challenge and question a witness against him either at the time the witness was making his statement or at some later stage of the proceedings[9] . Given the clarity with which the procedure was explained and the opportunity afforded to the Parties, it was up to the Respondent to present his case as he saw fit including availing himself of his right to call witnesses to rebut the evidence of the Applicant and his witness. The record reflects that following the testimony of the Applicant's supervisor the Respondent was given full latitude to cross-examine him. The Tribunal further notes that following the testimony of the Supervisor it was open to the Respondent to apply to call his own witness. No such application was made.

6.6 In sum, the Respondent had notice of the Applicant's intention to call a witness and the identity of that witness. It was up to him to prepare his case in response accordingly. The *Motion to Submit Additional Evidence* on the ground that there was no advance notice is therefore without basis, and is accordingly dismissed as inadmissible.

7. APPLICANT'S CONTENTIONS

7.1 By way of the present application, the Applicant moves the Tribunal to suspend the decision not to extend his appointment beyond 3 September 2009. The Applicant submits that:

(a) The non-extension of his current contract has nothing to do with his job performance or budgetary constraints. There is, in fact, a backlog of work in the office and the Section has been drastically understaffed.
(b) According to the Applicant, his contract was not extended beyond 3 September 2009 because of a personality clash between the Section Chief and the Applicant's supervisor.

[9] *Kostovski v. Netherlands* (1989) 12, European Court of Human Rights, 434, para 41.

The Applicant states that when the Section Chief returned from her extended leave, she expressed strong disagreement with the recruitment of two staff members, one of which is himself.

(c) The Section Chief adopted an "unprofessional attitude". According to the Applicant, she "*completely refused to acknowledge [his] presence and pointedly ignored [him] on all occasions. During the three months [he had] been [there], the Section Chief ha[d] not even exchanged a greeting with [him] or with [his] colleague who was recruited under similar circumstances*." This attitude was demotivating to him and also resulted in the migration of many staff members from this particular Section.

(d) The Section Chief had tried to terminate his contract with immediate effect, but this was unsuccessful thanks to the support of the Nairobi Staff Union. However, his colleague recruited under similar circumstances was terminated.

(e) From the above, the Applicant submits that the decision was politically and personally motivated and that he should not be victimized for a personal conflict between the Section Chief and his immediate supervisor.

(f) As to whether the matter is urgent, the Applicant submits that his contract is due to expire on 3 September 2009.

(g) On the issue whether this decision would cause him irreparable harm, the Applicant submits that,

i. The decision was taken on the ground of extraneous factors, and thus it is clearly violating "his due process and basic staff rights".

ii. Thus, if implemented, he would be permanently denied the opportunity of redeeming his due process and fundamental rights that were violated by the improper actions of the Section Chief when formulating the administrative decision at issue.

iii. He would also be permanently denied the opportunity of reclaiming his staff right to have his contract extended as he reasonably expected that it would be so extended.

iv. The impugned decision was arbitrary, prejudicial and a pure act of

abuse of power and authority on the part of the Section Chief.

8. RESPONDENT'S REPLY

8.1 In his *Reply to the Application for Suspension of Action* dated 1 September 2009, the Respondent's Counsel submits as follows:

(a) Pursuant to the Staff Rules 104.12 (b) in effect at the time of the Applicant's contract, a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment. This is true even assuming his performance is appraised as demonstrably efficient or exceptional. [10]

(b) Furthermore, Staff Rule 109.7 provides that fixed-term appointments shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. More importantly, there is no requirement to provide any reasons for the non-renewal of a fixed-term appointment. UNON advised the Applicant that he was recruited to meet temporary needs of the service. The Respondent therefore stresses that the decision not to extend the Applicant's contract is a valid exercise of the Secretary-General's discretionary authority.

(c) The Secretary-General may lawfully decide not to extend a staff member's contract, barring countervailing circumstances to create a reasonable expectancy of renewal.[11] The Applicant has not advanced any facts or adduced any evidence demonstrating that there were circumstances that created a reasonable expectancy for extension of his contract.

(d) The Applicant did not bring any evidence to either clarify what, if any, procedural flaw was occasioned by UNON during his initial recruitment or on what basis he considered this to be spurious, or why he held a reasonable expectancy that his contract would be extended but for the alleged flaw. Likewise the Applicant proffers no evidence beyond his own claim to the UNDT by which to infer victimization. Therefore, the Applicant has

[10] [United Nations Administrative Tribunal (UNAT) Judgments No. 1163, *Seaforth* (2003), No. 440, *Shankar* (1989) and No. 1049, *Handling* (2002)].
[11] UNAT Judgment No. 885, *Handelsman*, (1998).

not established that the contested decision not to extend his contract was prima facie illegal.

(e) As to the question of urgency, the Applicant was informed at the end of July 2009 that his contract would not be extended and he received the corresponding routine administrative documentation on 19 August 2009, but did not lodge a request for suspension of action until 28 August 2009. Insofar as there is no documentation to support this claim, however, the Respondent accepts that the instant application is urgent given that the decision will be implemented on 3 September 2009.

(f) On the issue of irreparable damage, the term has been defined as injury that cannot be adequately compensated in damages.[12] In this case, the Applicant does not explain how the decision, if implemented, would cause irreparable damage to his due process rights, or what rights in particular would be affected.

9. LEGAL ISSUES

9.1 The applicable law

9.1.1 The Applicant did not specify on what article of the Rules of Procedure of the UNDT he was relying. As reference was made to a management evaluation the Tribunal proceeded on the basis that the application was filed pursuant to Article 13.1 of the Rules which reads:

> *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.*

9.1.2 As a preliminary statement on the interpretation of Rule 13.1, it was submitted by Counsel for the Applicant that Article 13.1 did not require that all three requirements, namely *prima facie* unlawfulness of the decision, urgency and irreparable damage be satisfied

[12] International Labour Organization's Administrative Tribunal, Judgment No. 1883, *Roudakov*, (1999).

cumulatively before the Tribunal could issue an interim order. The Applicant contends that each of those elements could stand on its own to warrant a suspension of action, and that requiring that all three elements be met before an order can be granted sets too high a standard. Counsel for the Respondent submitted that the three conditions should be present before the issuance of an order for suspension.

9.1.3 It is trite law that the general rule for the interpretation is that the words used are to be interpreted in their natural and ordinary sense. The interpretation should give full meaning to the words in their literal sense. It is only in cases where the language of the statute or regulation is ambiguous that it becomes necessary to find out what the intention of the framers of the statute or regulation was. The language of Article 13.1 is clear and straightforward. The use of the word "and" at the beginning of the third requirement of irreparable damage clearly indicates that the whole sentence starting with the word "where" and ending with the words "irreparable damage" should be read conjunctively. Any other construction would nullify the intent and purport of that Article.

9.1.4 The Tribunal therefore holds that by virtue of the provisions of Article 13(1) of the Rules an application must satisfy the following requirements before the Tribunal can grant a suspension of the implementation of the contested decision, that is:

(a) where the decision appears *prima facie* to be unlawful;

(b) in cases of particular urgency; and

(c) where the implementation of the decision will cause irreparable damage.

9.1.5 In addition to the three elements above, the contested administrative decision must not have been implemented at the time of the application of suspension.

9.2 Nature of Interim Measure

9.2.1 In deciding whether an interim measure should be ordered, courts in most national jurisdictions are guided by the following principles:

(i) There must be a serious issue to be tried and the claim must not be frivolous and vexatious;

(ii) The Tribunal should consider the balance of convenience. This requires the Tribunal to consider the adequacy of damages and whether, if the Applicant were to succeed on the merits of the case, he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the action of the Respondent. If the Tribunal considers that damages would be an adequate remedy and the Respondent is capable of paying such damages then an injunction will not be granted.

9.3 The Hepworth Case

9.3.1 In view of the fact that reference was made to the decision of *Robert Hepworth v. The Secretary General of the United Nations*,[13] the Tribunal considers it necessary to show that the facts in the instant application are distinguishable and a far cry from the situation that obtained in *Hepworth*. The facts in Hepworth were as follows:

9.3.2 Mr. Hepworth joined the United Nations Environment Programme (UNEP) in 2000 as Deputy Director of the Division of Environmental Conventions (DEC). In 2004 when Mr. Hepworth was posted in Nairobi he accepted a transfer to Bonn, Germany to act as Executive Secretary with the Secretariat of the Convention on Migratory Species (CMS). On 24 February 2009 the Executive Director of UNEP verbally offered Mr. Hepworth the position of Special Adviser on biodiversity with the Division of Environmental Policies Implementation (DEPI) in Nairobi. On 26 February 2009 Mr. Hepworth sent a letter to the Executive Director of UNEP

[13] Case No. UNDT/GVA/2009/38.

informing him that he was declining the offer for professional and personal reasons. Mr. Hepworth also asked the Executive Director of UNEP to reconsider the decision.

9.3.3 In a memorandum dated 1 April 2009 the Executive Director of UNEP informed Mr. Hepworth of his decision to reassign him as Special Adviser to Nairobi. Mr. Hepworth indicated that he was not prepared to accept the reassignment in Nairobi. He also indicated that he would not sign a new contract with UNEP in that capacity. On 5 June 2009 Mr. Hepworth submitted to the Secretary General a request to review the decision to reassign him to Nairobi. By a letter dated 15 June 2009 the Executive Director of UNEP informed Mr. Hepworth that,

> *"In view of your decision not to come to Nairobi as instructed, I regret to inform you that UNEP is not in a position to extend your current appointment beyond its expiration on 26 July 2009".*

9.3.4 On 15 July 2009 Mr. Hepworth submitted a request for management evaluation of the decision not to extend his fixed term appointment beyond 26 July 2009. Following this he submitted a motion for the suspension of the contested decision.

9.3.5 In a considered decision the UNDT Geneva found on the specific facts of the case that the decision was not *prima facie* unlawful. The facts of the *Hepworth* case bear no comparison with the facts of the present case. The Applicant unlike Mr. Hepworth did nothing to provoke the non- renewal of his fixed-term appointment. The motivating factor for non renewal in *Hepworth* was the refusal of Mr. Hepworth himself to be redeployed to Nairobi as a Special Adviser on biodiversity at DEPI in Nairobi even though, as explained by the Geneva UNDT, this was meant to strengthen the capacity of biodiversity activities in the Organisation.

9.3.6 The Tribunal unreservedly holds that *Hepworth* cannot be invoked as authority that a suspension of action can never be ordered when a fixed term appointment is not renewed. The Geneva UNDT was cautious on this issue when it observed,

> "*Staff members – like the Applicant-[Hepworth] that are serving under a FTA [Fixed Term Appointment] do not have a right to renewal unless there are countervailing circumstances*".

9.3.7 The Geneva Tribunal referred to a decision of the UN Administrative Tribunal (*Handelsman*, 1998, Judgment No. 885) where that Tribunal explained what countervailing circumstances would amount to. These were set out as follows:

> "*Countervailing circumstances may include (1) abuse of discretion in not extending the appointment; (2) an express promise by the administration that gives the staff member expectancy that his or her appointment will be extended. The Respondent's exercise of his discretionary power in not extending a 200 series contract 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 decision*".

By the use of the word "may" the UN Administrative Tribunal indicated that it did not intend to set an exhaustive list of countervailing circumstances.

9.4 *Prima Facie* Unlawfulness of the Decision

9.4.1 The Tribunal notes that the Applicant has filed a request for management evaluation in respect of the contested decision, which request is still pending.

9.4.2 With respect to the first element of the test which needs to be met, the Tribunal firstly notes the Applicant's contention that he was given an express promise of renewal. Mr. [...] testified on the same, and in response to a question from the Presiding Judge on whether he was allowed to make such a promise, he stated:

> *Yes [...] this has been the way recruitment has been undertaken in several instances, especially for short term recruitment, people coming for short periods of six months or so and they're subsequently renewed, subject to availability of funds and their performance. This is routine.*[14]

9.4.3 The Tribunal finds that this promise clearly falls within the ambit of "countervailing circumstances" as explained in the case *Handelsman,* 1998, Judgment No. 885. That promise was made by the OIC who had at least ostensible authority to make it, which authority was not rebutted or denied by the Respondent. It is this promise that created a legitimate expectation of renewal.

9.4.4 The Tribunal is guided in its *ratio* by the case of *Banerjee v. The Secretary General.*[15] Mr. Banerjee challenged the decision of the Secretary General not to appoint him to the grade of Assistant Secretary General. The evidence established that a promise was made to Mr. Banerjee to appoint him to such a position but that was not done. The United Nations Administrative Tribunal observed:

> *In a matter of law, the Tribunal notes that while the Secretary General had not made a firm commitment to promote the applicant to the Assistant Secretary General level, the fact remains that there was a promise to proceed with such a promotion as soon as possible.*
>
> *Accordingly, the Secretary General had an obligation to take all adequate and reasonable measures to keep that promise.*

9.4.5 It is important to note that none of the facts as adduced by the Applicant was challenged by the Respondent, so that the Court is entitled to accept the case as stated.

[14] Excerpt from hearing draft transcripts, 2 September 2009, p. 23.
[15] UNAT Judgment No. 344, 1985.

9.4.6 The Tribunal relies on the following propositions to conclude that in the absence of cogent reasons from the Respondent the inference can and should be drawn that the Respondent acted unlawfully.

> *Inherent in the duty to act with procedural fairness there is in some situations a limited implied obligation on administrative bodies to give reasoned decisions.*[16]

> *When an applicant seeks to impugn a decision of an administrative authority by challenging the legality or rationality of the decision a failure by that authority to offer an answer to the allegations may justify an inference that its reasons were bad in law or that it had exercised its powers unlawfully.*[17]

> *The silence of a party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus depending on the circumstances, a prima facie case may become a strong or even an overwhelming case.*[18]

9.4.7 Secondly the decision not to renew the contract of the Applicant appears to be in breach of the Organization's Rules and amounts to an abuse of discretion. The Management is bound to comply with its own Rules. Article 101.3 of the Charter of the United Nations states:

> *The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.*

Regulation 4.2 of the Staff Rules reads:

[16] *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell, 5th edition, paragraph 9-058.
[17] *Idem*, paragraph 9-056
[18] *Ibid.*

> *The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity.*

The evidence of Mr. [...] established that there was a backlog in the Procurement Unit and existing staff were being paid overtime in order to cope with that situation. It is surprising that in such a situation the Respondent deemed it proper not to renew the appointment of the Applicant when nothing adverse was known against him as stated by Mr. [...]. Taking into account the facts as presented, the Tribunal finds the circumstances surrounding the non-renewal to be curious.

> *If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally hold that the power has not been validly exercised.* [19]

The Tribunal therefore finds that the Applicant has made out the case that the Respondent's decision not to renew his appointment was *prima facie* unlawful.

9.5. The Urgency Element

9.5.1 On the question of urgency, the Applicant had been informed that his contract will not be renewed and will be terminated on 3 September 2009. The Respondent, in his oral and written submissions, concedes this element of the test.

9.5.2 Irreparable Damage

9.5.2.1 In the case of *Tadonki v. The Secretary General* [20] 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*

[19] *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell 5th edition paragraph 6-084.
[20] *Georges Tadonki v. Secretary-General of the United Nations*, Order issued on 1 September 2009, Case No. UNDT/NBI/2009/36.

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. 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 lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

9.5.2.2 The Applicant was on a temporary fixed-term appointment of three months. The evidence given by the Applicant, and unrebutted by the Respondent, shows that he left a well-paid job and accepted that appointment. Of course he knew that there was a risk that his appointment would automatically end. He also was aware that a fixed term appointment does not give rise to an expectation of renewal or recruitment. However, a staff member under a fixed-term appointment is as any other staff member is also entitled to be treated fairly according to due process and rule of law principles. It is not open to dispute that a fixed term appointment dies a natural death at the end of the period of the contract. But there may be circumstances that where the non renewal may be due to factors that adversely affect a staff member to such an extent that monetary compensation is no answer. Whilst management has discretion not to renew, that discretion must be used judiciously and in good faith. That discretion cannot be considered to be an unfettered one in the sense that it would always dispense the decision maker with the need to carefully weigh in the balance the consequences of the decision. The myth of unfettered discretion is inimical to the rule of law principles.

9.5.2.3 As a rule, monetary compensation is said to be a remedy in a case like the present one. When the Applicant was recruited and was told that he would be renewed he saw an opening before him, at least initially, the prospect, the opportunity, the challenge and satisfaction to continue in the capacity for which he was recruited. Damages cannot compensate him for the frustration, unhappiness and dissatisfaction that would be caused to him for the loss of the

chance to acquire more experience and improve so as to increase the likelihood that he may accede to a better position in his career. The International Labour Organisation Administrative Tribunal (ILOAT) made the following observations in relation to fixed-term appointments:

> *"Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for -- and in practice invariably receives -- a decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an organisation that caused the Tribunal to adopt the principle that a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly."*[21]

9.5.2.4 The facts do show that the Applicant was recruited at a time when there was a backlog in the section of the organisation where he was assigned. He was promised a renewal of his appointment and this therefore placed on the Respondent a duty to consider whether it was not in the interest of the organisation that the expectation of the renewal of the employment should be fulfilled.

> *"[A] fixed-term appointment will automatically cease to have effect upon expiry. But according to the case law a contract of service, even if for a fixed term, creates in law a relationship of employment; that relationship exists in an administrative context and is*

[21] *Perez de Castillo*, ILOAT Judgment 675, 1985.

subject to a set of staff regulations; and there may therefore be requirements or consequences that go beyond the bounds of the contract as such. So the Tribunal may consider ordering the reinstatement even of someone who held a fixed-term appointment provided that the circumstances are exceptional. It may do so when an organisation makes a practice of granting fixed-term appointments for the performance of continuing administrative duties[22]*."*

9.5.2.5 Applying that principle the Tribunal takes the view that by resorting to the services of the Applicant , albeit on a fixed term, the Respondent was only applying a practice that is inherent in the work of the Organisation and created consequences that went beyond the bounds of the fixed-term appointment. In this regard the Applicant explained that there is more to irreparable damage than that which cannot be compensated by damages. He urged the Tribunal to consider the question of his reputation. There was no flaw in his competence, there was ample work to be done, there is funding to recruit other people and therefore the non-renewable of his contract in the manner in which it was done without any proper explanation or indeed any explanation at all leaves him with a tainted reputation. Losing his job is something that cannot obviously be repaired. He also has a dependent who is not working. Before taking up this short term contract, he was employed elsewhere on a permanent basis at a higher salary and he gave up that position on the promise that at the end of the three months this contract would be renewed. His contention is that there is no question that the damage that will be caused by the loss of his job tomorrow is not something that can be redeemed at some later date. The fact that he could be unemployed, for what could be some considerable time, will cause him irreparable harm.[23]

9.5.2.6 There was therefore in the view of the Tribunal and as the facts do establish the creation of a great expectation of renewal which was dashed by the unilateral decision of the Respondent. That kind of loss cannot be quantified by damages only. On the other hand, it may also be argued that the Respondent is in a situation to make good the damage by

[22] *Amira*, ILOAT Judgment No. 1317, 1994.
[23] Draft transcript 2 September 2009, p. 6.

compensating the Applicant. It would seem that the odds are equally balanced. In such a case, the rule is that the status quo should be preserved on a balance of convenience.

9.5.2.7 Having considered the facts presented in the documents and arguments submitted by both parties to the Tribunal and having regard also to the fact that management evaluation is still pending on the contested decision and after hearing all the clarifications, explanations and submissions of the Parties during the hearing, the Tribunal, pursuant to article 13.1 of the Rules of Procedure of the United Nations Dispute Tribunal,

GRANTS the Applicant's Motion; and

ORDERS the suspension of the Respondent's decision not to renew the Applicant's appointment.

As that the impugned decision is now suspended, the recommendation for renewal must now proceed as if approved by the Chief of PTSS, pending the management evaluation.

Judge Vinod Boolell

Dated this 11th day of September 2009

Entered in the Register on this 11th day of September 2009

Jean-Pelé Fomété, Registrar, UNDT, Nairobi