



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

CALDARONE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**RULING ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Katya Melliush, 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 Melliush of the Office of Staff Legal Assistance, Nairobi.

1.2 Respondent: The Respondent was represented by Ms. Susan Maddox, of the Administrative Law Unit, Office of Human Resources Management, who participated in the hearing via audio-conference.

2. CASE BACKGROUND

2.1 The Applicant, a staff member of the United Nations International Criminal Tribunal for Rwanda (“ICTR”), filed the present application on 24 September 2009 seeking an Order from this Tribunal to suspend the implementation of an administrative decision of ICTR not to extend his fixed-term appointment beyond 30 September 2009 (the due date of his current contract).

3. EMPLOYMENT HISTORY

3.1 The Applicant joined the United Nations in April 1996 as Chief of External and Internal Relations in the Office of the Prosecutor, ICTR. Since then he has been employed in various functions under a series of fixed-term appointments.

3.2 On 26 March 2003, the Applicant was transferred to the External Relations Strategic Planning Section (ERSPS). In early 2007 the budget for ERSPS for the 2008-9 biennium was finalized and the Applicant's post was identified as borrowed from the Judicial Legal Services Division [JLSD], Defence Counsel Management Section.

3.3 At the date of the contested decision, the Applicant was a Legal Officer in the Immediate Office of the Registrar in Arusha at the P-4 level.

4. SUMMARY OF FACTS

4.1 From the records submitted to the Tribunal by the Applicant and the Respondent (hereinafter collectively referred to as “the Parties”), on 24 September 2009 and 28 September 2009 respectively, the facts of the case are summarized as follows:

4.2 On 3 October 2007, the ICTR published Information Circular No. 77, in which the Staff Retention Criteria were endorsed. Such criteria include competence, to be assessed on the basis of the staff member's e-PAS, multi-functionality, and length of service. During November and December 2008, the Applicant was informed that his post was earmarked for abolition, and that his contract had only been extended until 31 March 2009. On 5 December 2008, the Applicant wrote to the Chief of Administration requesting to be transferred to another position which would enable him to stay on in the ICTR until 31 December 2009. The Applicant's post, however, was not abolished. In January 2009, the Applicant was transferred to the Office of the Deputy Registrar, on the same post and his contract was renewed until 30 September 2009.

4.3 On 4 March 2009, the Applicant received a Letter of Appointment (LOA) with an offer of contract up to 30 September 2009. His actual assumption of duty was 1 April 2009. The Applicant signed the LOA on 5 March 2009. Between 1 April 2009 and 27 April 2009, there was an exchange of emails between the Applicant and ICTR Management in respect to the terms of the LOA.

4.4 On 27 April 2009, the Applicant sent an email to the Registrar of the ICTR requesting reconsideration of a number of issues including the contract end date. The relevant sections of the email are reproduced below:

“Dear Registrar,

On several occasions I have brought to your attention directly, both formally and informally, a number of Administrative decisions that I consider to have materially and negatively impacted my career progression in the UN. Similarly, I have also addressed you through the Chief of DASS and the President of the Staff Association.

To be entirely clear, I am contesting in particular your decision to have put an end to my contract, since the downsizing exercise apparently claimed as a pretext for that action, was not conducted in the transparent fashion required. I also contest the fact that no priority was accorded me, as would have been appropriate under the circumstances, for the post of Chief of the Defense Counsel Management Section.

Accordingly, my request to you at this time is as follows: that I be awarded the grade of P-5, retroactively to 2003, and that my contract be renewed at least up to December, 2009. I hope to receive your favorable response to this request within two weeks. Should this not be forthcoming, I will assume that it has been refused, and in that case I would have no other choice but to take the matter to the JAB for its recommendations...

4.5 Following that email the Registrar sent the Applicant the following email on 28 April 2009:

“...I am in receipt of your message on the subject matter and I would like to inform you that since you have already commenced the process of pursuing your case through the internal justice system, you should await the outcome. Please refer to your the (sic) message of Mr. [...] dated 6th April, 2009, informing you of the appointment of [...] as your counsel and Mr. [...] message to you dated 7th April, 2009, asking for more documentation from you.

In view of this, ICTR Administration will therefore not correspond with you further outside the ongoing process.”

4.6 In a letter dated 29 May 2009, the Applicant’s Counsel at the time, sent a letter to the Secretary General in which, after referring to a series of events, he requested that “that decision be reversed”. The events referred to are the following.

“...For your information, the complete list of matters concerned include [the Applicant’s] fixed-term contract being changed to a Special GTA; instead of being given the possibility of promotion to P5, being superseded by an external

candidate, thereby violating applicable UN internal mobility requirements; being given neither the possibility of promotion nor of making a lateral move to the position of Chief, General Legal Services Section; being denied any opportunity for further professional skills acquisition and improvement, after being overlooked as possible OIC of either the External Relations Section or the Registry, while junior and less experienced candidates were selected instead for both those positions; being denied any opportunity to discuss either his work plan or his performance with his supervisor over the last 2-year period, and having his evaluation suddenly changed from "exceeds performance" to "meets performance" without any professional justification for this being provided; being effectively excluded from budget preparation activities and excluded outright from a critical staff retention exercise; and having his functions changed without benefit of any prior consultatin (sic)..."

4.7 On 30 June 2009, the Applicant received a letter dated 26 June 2009, in which he was informed that his contract would not be renewed after 30 September 2009. No reasons were proffered for the non-renewal of the Applicant's contract. Following the Applicant's recurrent requests for an explanation for the non-renewal, on 15 September 2009 the Applicant was advised that neither his skills nor his services were required at the ICTR. On 7 August 2009, the Applicant discovered that his post had not in fact been abolished but had regular funding until 31 December 2009.

5. THE HEARING

5.1 The Applicant's submissions on his Suspension of Action request were transmitted to the Respondent on 25 September 2009. The Respondent's Reply was received by the UNDT Registry on 29 September 2009. In light of the fact that the Respondent had raised the issue of receivability in its Reply, the Applicant filed further submissions on this issue on the same date.

5.2 The Parties were served a Hearing Notice on 28 September 2009 to inform them that the Tribunal would hold a hearing on Tuesday, 29 September 2009 in Nairobi. The hearing was held on 29 September 2009, at 6.00pm Nairobi time. The Applicant was present in the courtroom with his Counsel. The Respondent participated in the hearing via audio-conference.

6. RESPONDENT'S PRELIMINARY OBJECTION ON RECEIVABILITY

6.1 The Respondent in its Reply dated 28 September 2009 objected to the receivability of the application on the grounds that the Applicant had failed to submit an application for Management Evaluation of the contested decision, and that any such request would be time-barred. In respect to the question of receivability, the Respondent makes the following observations/contentions:

(i) That Article 13.1 of the UNDT Rules of Procedure provides that the Tribunal may make an order to suspend a contested administrative decision that is the subject of an ongoing management evaluation.

(ii) That Staff Rule 11.2(a) provides that a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment should, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(iii) That, contrary to the Applicant's contentions that he filed a request for administrative review on 29 May 2009, this request for administrative review did not request review of the decision not to renew his appointment beyond 30 September 2009, a decision that was conveyed to him almost a month after his request for review.

(iv) That with respect to the contested decision, no management evaluation request has been submitted to the Secretary General in violation of Staff Rule 11.2(a) and that accordingly, the Tribunal does not have jurisdiction under Staff Rule 11.3, Article 2(2) of the Tribunal's Statute or Article 13.1 of the UNDT

Rules of Procedure to consider whether to suspend action of the contested decision.

(v) That provisional Staff Rule 11.2(c) provides that a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

(vi) That in the instant case, the Applicant was advised on 30 June 2009 that his appointment would not be renewed beyond 30 September 2009 and therefore in order to comply with the time provisions set out in the foregoing provisional Staff Rule, the Applicant should have submitted a request for management evaluation of that decision between 1 July 2009 and 30 August 2009. No such application was made. Accordingly, any request for management evaluation now submitted would be time-barred.

7. APPLICANT'S RESPONSE ON RECEIVABILITY

7.1 In response to the Respondent's objection on the issue of receivability, the Applicant filed additional submissions on 29 September 2009. The submissions were transmitted to the Respondent's Counsel on the same date. Counsel for the Applicant also made oral submissions on this issue during the Hearing¹. The Applicant's submissions may be summarised as follows:

(i) That the Applicant is seeking a suspension of action pursuant to Staff Rule 11.3(b) pending a management evaluation which was requested by a letter dated 29 May 2009.

(ii) That on 1 April 2009, the Applicant received a LOA with an expiry date of 30 September 2009. Between 1 April 2009 and 29 May 2009, the Applicant made numerous attempts to challenge the terms of that LOA including the duration.

¹ See pages 2 to 5 of Draft Transcript dated 29 September 2009.

(iii) That on 27 April 2009, the Applicant sent an email to the Registrar of the ICTR requesting reconsideration of a number of issues including the contract end date or non-renewal beyond 30 September 2009.

(iv) That on 28 April 2009, the Applicant received a response to his email which he took to be confirmation or determination by the ICTR Administration that his contract would not be renewed beyond 30 September 2009. As a consequence, the Applicant filed a request for administrative review on 29 May 2009.

(v) That it is the Applicant's contention that the date of the decision is 28 April 2009, that is, the date that the Registrar of the ICTR refused to enter into further discussion on the issue of the duration of the Applicant's contract and that the request for administrative review was filed within 60 days of that date on 29 May 2009.

(vi) That it was an error in the drafting of the Application where it is indicated that the contested administrative decision is dated 26 June 2009 and that this may have caused confusion as to the receivability of the application.

8. APPLICABLE LAW

8.1 Rule 111.2(a) of the old Staff Rules, which was the applicable Rule at the relevant time, (now superseded and replaced by Staff Rule 11.2), provides that:

“A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.”

8.2 Rule 11.2 of the new Staff Rules provides that:

“A staff member wishing to formally contest an administrative decision alleging non compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.”

8.3 Article 2.2 of the UNDT Statute provides that,

“The Dispute Tribunal shall be competent to hear and pass judgment 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.”

8.4 Article 13(1) of the UNDT Rules of Procedure provides that,

“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.”

8.5 Sub-section 1.1 of the Secretary-General’s Bulletin on Transitional measures related to the introduction of the new system of administration of justice, (SGB 2009/11), provides that,

“In the present internal justice system, a staff member wishing to contest an administrative decision alleging its non-compliance with his or her terms of appointment or the contract of employment may address a request to the Secretary-General for an administrative review of the decision within two months

of his or her notification of the decision. This review is conducted in the Secretariat by the Office of Human Resources.”

8.6 Sub-section 1.4 of SGB 2009/11 provides that,

“As of 1 July 2009, the United Nations Dispute Tribunal will be established as the first tier of the formal system of justice. For the purpose of determining the receivability of an application filed with the United Nations Dispute Tribunal, a staff member who has submitted a request for an administrative review of a contested administrative decision prior to 1 July 2009 shall be considered to have satisfied the requirement to submit a request for a management evaluation, as provided in article 8, paragraph 1 (c), of the statute of the United Nations Dispute Tribunal.”

8.7 Article 13(1) of the Rules of Procedure read together with Article 2.2 of the Statute of the Tribunal clearly state that an application may be filed for suspension of action of a disputed administrative decision that is the subject of an ongoing management evaluation. Staff Rule 111.2(a) required a staff member to first request a review of the contested decision. These provisions must be interpreted in such a way as to give effect to the underlying philosophy embodied in them. The Tribunal takes the view that the underlying philosophy of these provisions is to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff member the opportunity to request a suspension of the impugned decision pending an evaluation by management. The provisions cannot be interpreted to mean that management evaluation is optional. It is not.

9. CONCLUSIONS


9.1 The Tribunal noted that the Applicant had indeed addressed a letter dated 29 May 2009 to the Secretary-General requesting him to “reverse that decision”. The Tribunal after perusing the letter concluded that the decision referred to therein could only relate to the matters addressed in the earlier paragraph². A number of issues are raised in that

² See paragraph 4.6 of the present Ruling.

paragraph but no mention is made of non-renewal of the Applicant's contract. Indeed that could not be addressed because it was only on 30 June 2009, by letter dated 26 June 2009, that the Applicant was informed that his contract that is due to run through to 30 September 2009 would not be renewed. The Applicant sought to establish that he had in fact requested a review of the decision as provided for under old Staff Rule 111.2 (a), and referred to the email³ he had sent to the Registrar of the ICTR in which he informed him that he was contesting the decision not to renew his contract. That email is dated 27 April 2009 and does not relate to any specific decision not to renew the contract of the Applicant. At any rate, the procedure for requesting a management evaluation is to submit a request to the Secretary-General and not to the Registrar of the ICTR.

9.2 Having considered the evidence and the submissions of the Parties, both written and oral, the Tribunal finds that the application is not receivable, and therefore dismisses the present application.

Done in Nairobi, this 14th day of October 2009


Judge Vinod Boolell, President

Entered in the Register on 14 October 2009


Jean-Pelé Fomété, Registrar

³ See paragraph of 4.4 of the present Ruling.