



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

BUFF

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY  
AND ANONYMITY**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

## **Introduction**

1. On 8 May 2014, the Applicant filed an Application with the UNDT. On her Application form she described the contested decision as “[o]n 19 December 2013, the Registrar denied my request for reconsideration of a decision to extend my contract for only 90 days following its expiry on 31 December 2013”.

2. The Applicant added a submission to the Application form which included the summary of facts of the case, the facts relied on and the grounds for contesting the administrative decision. In the introduction to that submission, the Applicant stated:

I am further noting a subsequent and related decision, dated 13 March 2014, to offer a subsequent 90 day contract with a special condition, namely that the extension was solely for purposes of secondment to MINUSTAH for 90 days and separation procedures (“13 March Decision”, Annex 3). The decision essentially forced me to take a position in a nonfamily duty station, thereby separating me from my young son, or face unemployment. I submitted a request for management evaluation of the 13 March decision on 05 May 2014.

3. Following a lengthy recital of facts and events that occurred during her career with the International Criminal Tribunal for Rwanda (ICTR), the Applicant then stated:

Taking these factors together, it is my submission that the decision to extend my contract only until 31 March 2014, and to then extend it for a limited time with an extremely harmful special condition, was unrelated to the work remaining in my section or the quality of my performance. My supervisors are lawyers and they are all very bright. For that reason, I very much doubt a smoking gun exists that would directly prove retaliation. However, in the absence of a rational basis for the decisions with respect to my contract, coupled with the curious creation of the new legal officer position in the section, I believe the only reasonable inference is that the decisions with respect to my contract were improperly motivated.

4. The Applicant also sought disclosure of a number of documents she believed might support her case and made a request for anonymity.

5. The Applicant requested the following remedies:
- a) The extension of her contract at the ICTR through the period foreseen for the P-4 Legal Officer position;
  - b) Cancellation of the P-4 position if the budget and workload does not allow for both a P-3 and P-4 Legal Officer in the Judicial and Legal Affairs Section (JLAS) into 2015;
  - c) USD10,000 to cover the costs associated with maintaining two households and child care during her months with the United Nations Stabilization Mission in Haiti (MINUSTAH);
  - d) Follow through on her complaints about financial mismanagement and Abuse of Authority in accordance with the relevant provisions of ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), including the creation of investigative panels if necessary;
  - e) The immediate transfer of assets pertaining to acquitted persons out of her name;
  - f) If the Registrar prefers to transfer her to another section in Arusha, or to another office in a family duty station before the start of the next school year, that would probably also be acceptable to her.
  - g) If the UNDT were to find damages appropriate, the relevant sum should go to a well-managed charity of the Secretary-General's choice.
6. On 16 June 2014, the Respondent filed a Reply and a Motion to determine the receivability of the Application as a preliminary issue. The Reply identified the contested decision as the decision to renew the Applicants appointment for a period of 90 days from 31 December 2013. It did not expressly refer to the

Applicant's submissions about the 13 March extension of her contract.

7. The Applicant responded to the submission on receivability on 20 July 2014. She had no objection to receivability being determined as a preliminary issue.

### **Facts**

8. The following facts relevant to the preliminary question of receivability are taken from the Application, the Reply and from the Applicant's response to the Reply.

9. The Applicant began working with ICTR as a P3 Legal officer in the Chambers Section of the ICTR in 2009 and continued in that role until 31 December 2012.

10. By resolution 1966 of 22 December 2010, the Security Council requested that ICTR take all possible measures to expeditiously complete all its remaining work no later than December 2014 and to prepare for its closure.

11. In 2012, the cases for which the Applicant had been responsible came to a close and she understood that there would be no more legal work in Chambers. She applied for and was appointed to the position of P-3 Legal officer in the Defence Counsel and Detention Management Section (DCDMS) of the Judicial and Legal Services Division (JLSD) of ICTR effective 1 November 2012 for a one year term. Her contract was subsequently extended from November 2013 to December 2013.

12. The Applicant maintains that in addition to the job functions of her position she also performed legal tasks for the Registry as requested by the Registrar. In January 2013, the Applicant reported what she believed to be serious irregularities in DCDMS finances. She states that throughout 2013 she drew attention to these financial irregularities.

13. In September 2013, the Applicant advised the Registrar that she would not seek renewal of her contract when it expired in December 2013.

14. On 4 October 2013, ICTR issued a policy on Contracts Extension Beyond 2013, which set out the basis upon which decisions would be made to renew appointments to 2014 and beyond. This included the nature and extent of the remaining workload, the critical nature of the functions performed by the staff member in relation to that workload and the projected time frame for the completion of those functions.

15. On 28 October the Applicant reversed her earlier decision and requested an extension of her contract.

16. The Applicant says that in October 2013 she was asked to take responsibility for managing the day to day care of acquitted persons.

17. According to the Applicant, by November 2013 she was engaged in tense exchanges with her second reporting officer. She alleges that less than three hours after one of these exchanges a Temporary Vacancy Announcement (TVA) for a legal officer post in JLAS was circulated.

18. On 2 December 2013, the Applicant learned from the Chief of Human Resources that her contract would be extended until 31 March 2014. She wrote to the Registrar on 2 December 2013 requesting reconsideration of that decision and asked for an extension of her contract to 30 June 2014. She described the proposed contract as “inadequate, inappropriate and unfair” and “made with the ulterior purpose of disadvantaging me”. The Applicant pointed out that there was funding for her position through December 2014 and that there were sufficient tasks remaining for her to undertake during that time. She reiterated her belief that there was a desire to ensure that she would no longer be working for the Tribunal by the time that an anticipated audit would take place due to the allegations she had previously made. The Registrar met with her to discuss the issue.

19. On 19 December 2013, the Registrar informed her in writing of his decision to maintain the extension of her contract to 31 March 2014 with a

possibility of review if there was a determination that there would be work beyond March 2014. He informed her that he had spoken to both her reporting officers about the foreseeable workload in DCDMS and had been told that there would be insufficient work remaining in the section to justify an extension of her contract past 31 March 2014. He stated:

My view is that we maintain the extension of your contract to 31 March 2014 on the understanding that if it is demonstrated that there is or will be work beyond March 2014 justifying its further extension, the case will be reviewed and a decision taken whether to extend your contract further.

20. On 27 January 2014, the Applicant met with the Registrar and advised him that on 23 January she had received an offer for a temporary P-3 position with a United Nations entity in a non-family duty station. She stressed that she had only two days to decide whether to accept the position, and asked that he extend her contract through 31 July 2014 to enable her to have a real choice. Given the delays in appeals cases and the consequent workload in DCDMS, the Applicant believed that 31 July 2014 was now a more appropriate date than 30 June. She said in her Application that the Registrar was non-committal, and stated that a contract extension would depend on the work remaining in her section.

21. On 30 January 2014, the Applicant requested management evaluation of the 19 December 2013 decision. The request was rejected by the Management Evaluation Unit (MEU) on 13 February 2014 as premature because the 19 December decision was not a final decision.

22. On 11 February 2014, the Applicant accepted an offer of appointment with MINUSTAH in writing. However she continued to request that the Registrar reconsider the decision not to extend her contract with ICTR beyond 31 March 2014.

23. On 14 February 2014, the Applicant filed a complaint of retaliation with the Ethics Office. She was advised that the Ethics Office could not review her case because it did not involve a final administrative decision.

24. In late February 2014, the Applicant learned that her childcare giver was ill. She informed her first reporting officer that she would have to cancel her plans with MINUSTAH and requested that her contract be extended beyond 31 March 2014. She received no response to this request.

25. On 13 March 2014, the Applicant was informed by the Chief of Human Resources, that the ICTR administration had accepted a request from MINUSTAH for a loan agreement.

26. On 18 March 2014, the Applicant's appointment with ICTR was further renewed until 3 July to facilitate her secondment to MINUSTAH from 19 March 2014 to 18 June 2014. The Applicant requested management evaluation of the decision not to renew her appointment with ICTR beyond 3 July 2014.

27. MEU responded to that request on 2 July 2014 stating:

On 2 July 2014 the MEU received confirmation from the ICTR that your appointment had been extended through 3 October 2014. This effectively renders your request for management evaluation moot. Accordingly we are proceeding to close your file.

## **Receivability**

### ***Submissions of the Respondent***

28. The Respondent contends that the Application is not receivable *ratione materiae* as there has been no administrative decision within the meaning of art. 2.1(a) of the Statute of the Dispute Tribunal or staff rule 11.4. Where there is no administrative decision capable of review the reasons behind the contested decision may not be considered by the Dispute Tribunal.

29. A staff member may not contest a decision to extend a contract on a short term basis as such a decision is in the staff member's interest and does not adversely affect his or her terms of appointment.

30. The Respondent submits that there is no expectancy of renewal of a fixed-term appointment.

***Submissions of the Applicant***

31. The Applicant agrees that art. 2.1 of the UNDT Statute and staff rule 11.4 are relevant and that a fixed-term contract does not, in and of itself, carry any expectancy of renewal.

32. She disputes that a staff member may not contest a decision to extend a contract on a short-term basis as it is in the staff member's interest.

33. The Applicant referred to *Applicant* UNDT/2012/110 in which Cousin J. held that a challenge against the renewal of a contract is not receivable and submits that his approach is inconsistent with art. 2.1, which refers to administrative decisions that are in non-compliance with the terms of appointment, including all pertinent regulations and rules and all relevant administrative issuances in force at the time.

34. She submits that all decisions taken by the management of ICTR with regards to her contract from December 2013 onwards were in retaliation for her raising concerns regarding financial mismanagement in DCDMS thereby violating ST/SGB/2005/21 and ST/SGB/2008/5. As such the contested decision and all subsequent decisions produced "direct legal consequences to the legal order".

35. The Applicant submits that the decision caused her "irreparable harm". She describes this harm as being excluded from work in JLAS, duplication of her core tasks by other staff members which hindered her professional prospects and reputation, and the uncertainty about her contractual status before she left for Haiti as well as the emotional impact of the separation from her young son.

36. The Applicant also submits that the decision not to extend her contract for more than a limited time was in violation of the ICTR Policy on Contract Extensions Beyond 2013 which requires consideration of the remaining workload of the staff member, the critical nature of the functions performed by the staff member and the projected time frame for completion.



## *Considerations*

### *Legal principles*

37. The Tribunal has “an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested”.<sup>1</sup>

38. The Applicant clearly stated in her Application that she was contesting the decision of 19 December 2013. However, in the accompanying submission she identified a second decision of 13 March 2014 when her appointment was extended until 3 July 2014 to enable her secondment from ICTR to MINUSTAH. This submission included detailed evidence about the circumstances of that renewal and her letter of appointment to the post. She also requested a remedy for this decision.

39. The Applicant requested management evaluation of the 13 March decision on 6 May 2014.

40. Taking the Application as a whole, the Tribunal finds that in her Application before the Tribunal, the Applicant challenged two decisions to give her short-term appointments and will determine the receivability of both.

41. The United Nations Appeals Tribunal (the Appeals Tribunal) has held in *Tabari* 2010-UNAT-030 that a reviewable administrative decision is “a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order”.

42. The Appeals Tribunal re-stated this principle in *Wasserstrom* 2014-UNAT-457 as follows:

The key characteristic of an administrative decision subject to judicial review is that the decision must “produce[] direct legal consequences” affecting a staff member’s terms or conditions of appointment. “What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the

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<sup>1</sup> *Massabni* 2012-UNAT-238

decision”.

43. In a dissenting judgment in that case, Flaherty J. noted that the procedures set out in ST/SGB/2005/21 are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms and that an individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding.

44. In *Appellee* 2013-UNAT-341, the Appeals Tribunal considered the decision in *Applicant* UNDT/2012/110, referred to by the Applicant in her submissions. In that case, the applicant had filed two separate applications with the UNDT each contesting decisions to extend her fixed-term appointment for periods of one to three months pending the completion of her performance evaluation and rebuttal process. Cousin J. held that decisions to extend an appointment, even for a short period, cannot be regarded as administrative decisions that are likely to infringe on the rights of a staff member deriving from his or her status or previous contract.

45. The Appeals Tribunal held in *Appellee* 2013-UNAT-341 that “[t]he UNDT found that the Appellee had suffered no material harm from the series of renewals for short periods of time since her appointments were renewed and at the time of the Judgment she was still working for the Organization. This Tribunal agrees”.

46. In order for the Applicant’s Application to be receivable the Tribunal must determine if the challenged decisions were final and, if so, whether they had legal and material consequences for the Applicant.

*The 19 December decision*

47. In the Registrar’s memorandum to the Applicant dated 19 December 2013, he reiterated his original decision to extend her contract to 31 March 2014 but added the important rider that this decision would be reviewed and a decision taken then whether to extend her contract further if it was demonstrated that there is or will be work beyond that date justifying its further extension. This was

therefore not a final decision but one dependent on circumstances which were yet to be finally determined.

48. If, contrary to the above findings, this had been a final decision it had no direct legal consequences to the Applicant. The Applicant's appointment had been scheduled to end on 31 December 2013 but the 19 December decision extended this date. Although the new contract was for a shorter period than she would have liked, it continued her employment at ICTR beyond her legal entitlement under her original contract.

49. In accordance with the jurisprudence established by the Appeals Tribunal in *Appellee 2013-UNAT-341* and *Wasserstrom et al*, no legal consequence or material harm arises from an extension of a contract for a short period.

50. Although the Applicant alleges that all decisions taken by the management of ICTR with regards to her contract from December 2013 were retaliatory acts, the fact that she was offered and accepted further extensions of her contract at a time that the ICTR was actively downsizing suggests otherwise and does not support her case that she suffered legal consequences from those decisions.

51. The Tribunal finds that the 19 December decision is not receivable.

*The 13 March decision*

52. This decision was to further extend the Applicant's contract beyond 31 March 2014 in response to her advice that she had received an offer of employment from MINUSTAH. She accepted the secondment and her contract was subsequently extended to 3 October 2014.

53. The Tribunal is conscious that the secondment to MINISTAH caused the Applicant emotional distress and personal inconvenience. However, these are personal rather than legal consequences as contemplated by the Appeals Tribunal. In any event, in spite of these unfortunate consequences, she accepted the appointment and its later extension to October 2014, well beyond the period of extension that she had originally sought.

54. The Tribunal finds that the Applicant's challenge to the decision of 13 March is not receivable because it had no legal consequences which caused her material harm or otherwise adversely affected her terms or conditions of appointment.

### **Request for Disclosure**

55. The Applicant requested disclosure of a number documents which she believed may support her case such as the organizational structure and staffing of ICTR; the status and contractual arrangements of other staff members; and documents relating to the Audit of the ICTR. These documents all relate to the substantive merits of her claim. As her case is not receivable the question of disclosure is moot.

### **Anonymity**

56. The Applicant has made repeated requests for her name to be redacted from any judgment in this matter. Her reasons are that the disputes between her and her supervisors arose solely because she accused them of financial mismanagement and that the principle of transparency is outweighed by the competing interest of encouraging staff to report breaches of rules and regulations.

57. She assumes that within ICTR she is considered to be a rabble rouser and that this reputation will spread beyond the confines of the ICTR to her disadvantage.

58. The Respondent opposes an order of anonymity on the grounds that the Applicant has not shown exceptional circumstances to justify such an order.

59. The requirement for transparency in the work of the Tribunal is based on art. 11 of the UNDT Statute which provides that "the judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal".

60. In Practice Direction No. 6, the Tribunal provided, *inter alia*, that "the work of the Tribunal should be open and transparent, except insofar as the nature

of any information is deemed sensitive”.

61. Anonymity will be granted in cases where an applicant can show that it is necessary to protect his or her personal data or sensitive information. However, as stated in *Pirnea* 2014-UNAT-456<sup>2</sup>, “[t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability”.

62. The Applicant stated that it was known to the persons whom she had accused that she had made allegations of financial irregularities. There is no evidence that her reputation has been damaged outside of ICTR. Indeed she was seconded to work for another organization after she had made the allegations.

63. In balancing the right of the Applicant to have her personal data and sensitive material protected against the principle of transparency the Tribunal notes that the pleadings and associated documents did not reveal any material or information concerning the Applicant that requires protection.

64. The Application for anonymity is declined.

## **JUDGMENT**

65. In view of the foregoing, the Tribunal decides that this Application is not receivable.

*(Signed)*

Judge Coral Shaw

Dated this 17<sup>th</sup> day of June 2015

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<sup>2</sup> See also *Fedorchenko* 2015-UNAT-499; *Ahmed* Order UNAT-2013-132; *Mebtouche* Order UNAT-2013-152.

Entered in the Register on this 17<sup>th</sup> day of June 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi