



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NYASULU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER FOR PROTECTIVE
MEASURES FOR THE APPLICANT'S
WITNESS**

Counsel for the Applicant:

Nicole Washienko, OSLA

Counsel for the Respondent:

Elizabeth Gall, ALS/OHRM

Stephen Margetts, ALS/OHRM

Introduction

1. The Applicant is a former Chief Judicial Affairs Officer at the United Nations Mission in Liberia (UNMIL) in Monrovia, Liberia, who served at the D-1 level.
2. On 7 November 2013, the Applicant filed an Application challenging the decision to abolish his post and not to renew his contract. The Applicant further contests the decision to require him to go through a competitive recruitment process for the position of Principal Rule of Law Officer, UNMIL, at the D-1 level.
3. The Tribunal commenced hearing the Application on 28 October 2014 and, vide Order No. 237 (NBI/2014), adjourned the hearing to 10 November 2014 at the Respondent's request.
4. On 4 November 2011, Counsel for the Applicant filed an *ex parte* "Application for leave to call Additional Witness and Request that the Witness' Testimony be heard *In Camera*".
5. On 5 November 2014, the Tribunal issued Order No. 247 (NBI/2014) in which it, inter alia, granted the Applicant's prayer for leave to call an additional witness. The parties were also informed that all the matters that had been raised in the said application would be canvassed at continuation of the hearing on 10 November.
6. On 10 November 2014, the Applicant's witness (hereinafter referred to as "Witness X") was granted anonymity and testified *in camera*.

Applicant's Submissions

7. In the 4 November application, the Applicant averred that:
 - a. Witness X was labouring under a genuine apprehension that retaliatory measures may be taken against him/her, including potentially the loss of his/her employment with the Respondent, if Witness X's name or any identifying information were released.

- b. Witness X had agreed to testify only if his/her name and identity were not revealed to the Respondent.
- c. Witness X's evidence, if provided orally and *in camera*, would be subject to challenge by the Tribunal itself as well as to cross-examination by Counsel for the Respondent.
- d. The interests of justice weigh in favour of the evidence in question being heard *in camera*.
- e. Counsel for the Respondent should make an undertaking that Counsel will not divulge the name of Witness X or any identifying information such as Witness X's title, level or gender to the Respondent.

Consideration

8. The question of what protection may be afforded to witnesses who fear retaliation for the provision of testimony before the Dispute Tribunal was canvassed in Order No. 25 (NBI/2010) in the case of *Kasmani* UNDT/NBI/2009/067. In the said Order, it was held that whilst the Statute and Rules of Procedure of the Dispute Tribunal are silent on the protective measures which may be ordered for the purposes of witness protection, the Rules do, however, give the court the broad power to at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties¹.

9. It was further held that,

[t]he fears of witnesses testifying before this Tribunal are very different. Witnesses appearing before this court will, most always, fear for their livelihood; they will fear intimidation and retaliation in the exercise of their functions, and to the very security of their jobs. In these cases, it is not the public that these witnesses will fear; rather, it is the Secretary-General or agents acting under his authority. It is imperative therefore that staff members can be confident that it is safe for them to testify before the Dispute

¹ At para. 27.

Tribunal. In the absence of such an assurance, it is most unlikely that witnesses will come forward².

10. Consequently, the Tribunal in that case made appropriate orders for the protection of the Applicant's witnesses from all forms of intimidation or threats. The said orders specifically prohibited any threats to the security of their employment or to the development of their career within the Organization including retaliation in any shape or form as a result of giving testimony before the Tribunal.

11. This Tribunal reaffirms the well-established principle that a staff member has the right to enjoy the protection conferred upon him/her by his/her contract of employment and by the Rules and Regulations that govern the Organization.

12. The Tribunal also re-states the universal truth that reliable evidence which include the testimonies of witnesses are critical to the work of Courts and Tribunals in the dispensation of justice.

13. This Tribunal is fully aware of its grave responsibility to ensure that staff members and others who engage in the protected activity of giving testimony before it are not subjected to any kind of harm or the compromise of their career as a result.

14. The apprehension of Witness X who was granted anonymity in the course of giving testimony in this case is well noted.

IT IS ACCORDINGLY ORDERED:

15. Witness X shall not be subjected to:

- a. intimidation or threats, either physical or verbal, for having testified before the Tribunal;
- b. threats to the security of his/her employment, or development of his/her career, with the United Nations; and

² At paras. 33 and 34.

c. retaliation of any other sort as a result of testifying before the Tribunal.

16. The Parties are reminded of the seriousness of this matter and that any breach of this Order shall constitute contempt of this Tribunal and the judicial process of the internal justice system of the United Nations.

17. In the event of any breach of this order, Witness X shall have direct recourse to the Tribunal, in accordance with its statute and the applicable Rules of Procedure.

(Signed)

Judge Nkemdilim Izuako

Dated this 12th day of November 2014

Entered in the Register on this 12th day of November 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi