

# UNDT/2009/033, Onana

## UNAT Held or UNDT Pronouncements

The Applicant's counsel registered his concerns about a potential conflict of interest, given that the Registrar of this Tribunal was involved, at least in part, in the decision making processes which form the substance of the present application. Counsel for the Applicant stated that he simply wished for his concerns to be recorded, but that he was not seeking a ruling on the issue. The Applicant's concerns with regard to the potential conflict of interest on the part of the Registrar were noted. Notwithstanding the Applicant's position that he was not seeking a ruling on the issue, the Tribunal feels it is important that his concerns be formally addressed. While the Registrar's terms of reference require him to provide the Judges with substantive support, I have in the interest of justice determined that he will not be carrying out those duties in the instant case. Let the records reflect that this is a matter that the Court has been mindful of since the filing of this application. To that end, and in the interests of propriety and the exercise of judicial caution, I have taken the necessary steps to excuse the Registrar from his functions in respect of this case so that he has had no substantive involvement in the matter. In the *American Cyanide Co v Ethicon Ltd* (1975) AC396, Lord Diplock laid down the standards or criteria for the granting of interim injunctive orders. Among these was the requirement that the Court must be satisfied that there is a serious question to be tried on the merits. Another significant factor is the inadequacy of damages as a remedy in the application for interim relief. Similarly, and based on the provisions of Article 13.1 reproduced above, a suspension of action application will only succeed where the Applicant is able to establish a prima facie case on a claim of right, or where he can show that prima facie, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and that unless it so intervenes at that stage, the Respondent's action or decision would irreparably alter the status quo. A Suspension of Action application may be brought and considered only where the Applicant has filed a request for Management Evaluation, and during the pendency of the same, in respect of the decision which is the subject matter of his suit before the Tribunal. Of course, the

onus of establishing a case for a suspension of action order lies on the Applicant. Much as it is accepted that a fixed term contract does not carry an expectancy of renewal, it is, to my mind, settled law that where "the administration relies upon performance issues in support of its decision not to renew a staff member's contract, the performance evaluation process, including, if necessary, rebuttal proceedings, must be beyond reproach." While the performance evaluation process in respect of the rebuttal proceedings is not itself before me, I am of the view that there must be integrity in the process of evaluating a staff member. Even as the ICTR is faced with the genuine need to downsize its staff, such downsizing must be done in a transparent and fair manner. Let me state here that in ruling on this application, the Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is that a prima facie case has been made out by the Applicant or in other words that there is a triable issue here. Based on the testimony and written submissions before me, I am not persuaded that the process undertaken in respect of the Applicant was in fact fair. Where a decision has been shown to be prima facie unlawful, it is clear that a right exists and the Applicant seeks to prevent its violation in bringing this application. The Rules as they currently stand require that the Tribunal do consider two further elements before granting the Applicant with the interim relief that he seeks. I am of the view that illegality is so fundamental a factor that it ought to be sufficient for the impugned decision to be suspended. To allow a decision to stand in spite of it being shown to be unlawful turns the law on its head. It places an onerous burden on the Applicant, and relieves the Respondent of the responsibility of taking the required care when making such administrative decisions. The Respondent submitted that this application must not be seen to be urgent because the Applicant had notice of his non-renewal in June 2009, and took all this time since to file his Application for suspension of action. Urgency, to my mind, is a question of fact. The application was brought in time enough for the Tribunal to hear it. If the Applicant had allowed enough time for the Respondent to present him with a fait accompli, then clearly jurisdiction becomes an issue and this application would have no chance of being heard. I see no fault here. A situation in which the Applicant faces a loss of his livelihood in the next twenty-four hours, or even two weeks for that matter, or one month, as long as the decision he complains about is likely to take effect before his case is heard on the merits and determined necessarily makes his Application one of "particular urgency." It is the timeline to the date of the implementation of the impugned decision and its foreseeable consequences that make a matter urgent. For the purposes of the present application and the temporary relief it seeks, the

Tribunal finds that the psychological effect of the non-renewal on the Applicant, coupled with the shame and suffering he testified to, cannot be quantified in monetary terms. Where the Tribunal finds that irreparable harm will be done to an Applicant by not granting a suspension of action application, it clearly has a duty to minimize harm or provide interim relief from such harm. I do not see that psychological harm to the Applicant can be cured by damages. At Common law, it is well settled that damages may be inadequate in certain situations such as where the damage is non-pecuniary or would be difficult to assess. I find that the award of monetary compensation here would be inadequate.

## Decision Contested or Judgment/Order Appealed

The Applicant is a staff member of the United Nations International Criminal Tribunal for Rwanda (ICTR). On 26 June 2009, he was notified that his current fixed-term appointment will not be renewed beyond 30 September 2009. The Applicant filed a request for Management Evaluation on 28 August 2009. The present application was filed on 22 September 2009, pursuant to Article 13 of the Rules of Procedure of the United Nations Dispute Tribunal (the Rules), to move this Tribunal to suspend the implementation of the said administrative decision of the ICTR of 26 June 2009 not to renew the Applicant's appointment beyond 30 September 2009.

## Legal Principle(s)

N/A

## Outcome

Judgment entered for Applicant in full or in part

## Outcome Extra Text

UNDT ordered the suspension of the Respondent's decision not to renew the Applicant's appointment until the substantive application is heard and determined; and ordered that the Applicant file his substantive application within 15 days of the service of this reasoned ruling on him.

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Onana

## Entity

ICTR

## Case Number(s)

UNDT/NBI/2009/57

## Tribunal

UNDT

## Registry

Nairobi

## Date of Judgement

13 Oct 2009

## Duty Judge

Judge Izuako

## Language of Judgment

English

French

## Issuance Type

Judgment

## Categories/Subcategories

Suspension of action / interim measures  
Irreparable damage

## Applicable Law

UNDT RoP

- Article 13.1