UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2009/57
Judgment No.:	UNDT/2009/033
Date:	13 October 2009
Original:	English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

PIUS ONANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

RULING ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for the Applicant: Katya Melluish

Counsel for the Respondent: Stephen Margetts and Josianne Muc

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.

APPEARANCES/LEGAL REPRESENTATION

1. The Applicant was present.

2. Ms. Katya Melluish of the Office of Staff Legal Assistance, Nairobi appeared on behalf of the Applicant.

3. The Respondent was represented by Mr. Stephen Margetts and Ms Josianne Muc, of the Administrative Law Unit, Office of Human Resources Management (OHRM), who participated in the hearing via audio-conference.

THE APPLICATION

4. The Applicant, Pius Onana 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.

5. 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.

PRELIMINARY ISSUE

6. As a preliminary matter, 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.[1] 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.

[1] DT. 29 September 2009, p. 2. (Draft Transcript)

7. 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.

8. 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.

SUMMARY OF FACTS AND SUBMISSIONS

9. The Applicant joined the ICTR in April 1999 as a French court reporter. He worked in that capacity until May 2007 when the Chief of section recommended the non-renewal of his contract.[2] Following internal discussions, however, the Applicant was moved to the Judicial Records and Archives Unit (JRAU) as a lateral assignment in August 2007 while continuing to encumber his post with the French Court Reporters Unit.

10. In order to comply with Security Council Resolutions 1503 and 1534, and to implement the "completion strategy" of the ICTR, the Registrar of the ICTR established an *ad hoc* Staff Retention Task Force on 16 July 2007. The Task Force was mandated to establish criteria that would ensure that the drawdown staffing levels is "done in the most transparent, consultative and objective manner."[3]

11. On 2 April 2008, the Applicant was evaluated by a staff retention committee based on the set of established criteria.[4] Documentation annexed to the Respondent's Response shows that the Applicant was evaluated as a Court Reporter, and was graded last on list of French Court

[2] *See* Annexes 4 and 5 of Application.
[3] Response, p. 2.
[4] Annex 9, Respondent's Response to the Application.

Reporters. As a result, it was recommended that his contract be not renewed beyond 31 December 2008.

12. In June 2008, as a result of an increase in workload at the ICTR, the General Assembly approved the Tribunal's supplementary requests for funds. The effect of this GA approval was that posts which were to be abolished as of December 2008 and June 2009 were "reinstated" on the basis of General Temporary Assistance (GTA) appointments up to 30 September 2009. In June 2009, Programme Managers were asked to undertake an exercise of identifying "critical functions" in order to meet the increased workload and begin the downsizing process towards the completion strategy. Of the three hundred and thirty-nine posts slated to be abolished, two hundred and ninety-seven were identified as critical. The post encumbered by the Applicant, that is, that of a French Court Reporter was one of those posts slated to be abolished as of 31 December 2008.

13. Counsel for the Applicant has submitted that her client was assessed in June 2009 on the basis of his position as a Court Reporter while he was working in the Judicial Records and Archives unit and had so worked for two years. The Respondent's submissions are unclear as to whether the decision not to renew the Applicant's appointment was based on the functions he was performing in the JRAU or the post he was encumbering as a Court Reporter. The Respondent's written submissions show that the Applicant was assessed as a French Court Reporter and included consideration of his EPAS within that section but the witnesses called by the Respondent testified that the Applicant was evaluated in the JRAU.[5]

14. The Respondent argues that the fundamental reason that the Applicant's contract is not being renewed is that the ICTR no longer has the funds. His post was abolished at the end of 2008. The funds made available through special provisions of the General Assembly, in light of the unexpected increase in workload at the ICTR, made it possible to retain those staff whose posts had been abolished and whose contracts would otherwise not have been renewed at the end of 2008. That being the reality of the situation facing the ICTR, the Respondent maintains that the Applicant has not made out a case of *prima facie* unlawfulness.

[5] *See* Respondent's Response to the Application at pp.6-7 *cf.* DT. 29 September 2009, pp. 35, 37.

15. In respect of the second element of the test for suspension of action pending management evaluation, the Applicant submits that the fact that his contract was due to expire on the day following the hearing makes the Application quite obviously urgent. The Respondent contends that this is an application which the Applicant could have brought on 26 of June 2009, but instead he brought on the 22 September 2009. The lateness of the Application creates an urgency that the Applicant himself has caused. There would have been no urgency had he made the application in a timely manner. The Respondent continued that the Applicant had testified that he was aware that the ICTR was embarking upon a completion strategy, and for some time it was understood by him that all trials would be completed by the end of 2008. He also knew that posts were abolished and that at some stage, he would be in the job market.

16. On the subject of irreparable harm, the Applicant testified to the hardship that will be caused should the non-renewal of his contract be allowed to stand. He still has an EPAS rebuttal pending, which EPAS was used to assess his competence in the staff retention system. The Applicant further testified that should he be without a job tomorrow, he will in effect be deprived of meeting his most basic needs ranging from health care to the needs of his family. The Applicant told the Court that the psychological harm and shame that he will suffer, and indeed has suffered since he was informed in June this year of the non-renewal of his contract, is not something that can be compensated in damages.

17. The Respondent maintains that the Applicant has no right to have his contract renewed, to receive a salary or to receive health insurance; those are rights that accrue under the terms of his contract. There is nothing that the Applicant has raised with the Tribunal that could not be compensated by money damages. The Respondent argues that if it is the case that its decision is suspended, effectively, the Respondent will have damages awarded against them, which money could be paid at a later time when the Tribunal has had opportunity to consider the merits of the case and would have decided that what had been done was illegal.

LEGAL ISSUES

18. **Article 13.1 of the Tribunal's Rules of Procedure** provides:

> *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.* [Emphasis added]

19. A suspension of action order therefore effectively serves the same purpose that an interim order of injunction would in a civil jurisdiction. It is a temporary order made with the purpose of regulating the position between the parties to an application pending trial. An order for suspension of action may only be made when certain conditions are present.

20. 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.

21. 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.

***Prima Facie* Unlawfulness**

22. The Tribunal notes that the Applicant has filed a request for Management Evaluation in respect of the impugned decision. Although the record is unclear as to the actual date on which Management Evaluation was requested, a decision of the Management Evaluation Unit is yet to be issued.[6]

23. In seeking to establish that the Respondent's decision not to renew his fixed-term appointment was *prima facie* unlawful, the Applicant calls attention to a document filed by him and referred to as annex 9. The said document is an inter office memo dated 14 August 2009 written by one Georges Kabore, the first witness for the Respondent, in this application and Chief of Human Resources and Planning section at the ICTR and addressed to the Applicant. The said annex 9 mentioned the Applicant's EPAS evaluation of 2006 – 2007 as an issue in arriving at the decision. *"Even though you were reassigned to JRAU as from August 2007, you are still holding a Court Reporter post and that certainly came into play in the retention exercise*" part of the memo stated. Evidence given by Ms Sylvie Van Driessche, the Respondent's second witness and head of the Court Reporters unit was that she had done an assessment on the Applicant according to the Task Force criteria between March and April 2008. The witness stated that the Applicant had not been working in her unit for two years when the assessments of June 2009 were made and that he was not assessed based on his work in that unit. She added that she was not involved in any assessment of the Applicant in June 2009.

24. The third witness for the Respondent, Patrick Enow is the officer-in-charge of the Judicial Records and Archives. He said he headed the section very briefly before the directive of 16 June 2009 from the Registrar came. Since he knew that the Applicant's role in archiving had been assessed, he sent an email to Timothy Godfrey who was in charge of that unit at the time of the assessment. After some communication, Godfrey told him that the Applicant's post was one

[6] DT. 29 September 2009, p. 45.

of the two slated to be abolished. The witness at some stage asked another officer who had worked with Godfrey to put this information in writing. It appears that this assessment was not properly documented.

25. The thrust of the Applicant's case in this application is that the Respondent's evaluation of him on the basis of the criteria established by the Staff Retention Task force was unfairly done. While the Respondent's witnesses testify that the Applicant was assessed based on his duties in the Archives unit, the Respondent's written submissions on the other hand, assert that he was appraised last on a list of French Court Reporters. In his closing submissions to the Court, Counsel for the Respondent stated that the Applicant was not a critical staff member of the ICTR in either the French Court Reporters Unit or in the JRAU.

26. 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."***[7] 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.

27. 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

[7] UNAT Decision 1399, p. 8.

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 Urgency Element

28. The Respondent raises a curious argument in respect of this element of the test. He has 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.

29. 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. I therefore find the element of urgency to be satisfied.

Irreparable Damage

30. In the case of ***Tadonki v. The Secretary General***, 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 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.

31. The Applicant in the instant case was on a fixed-term appointment, qualified because of the circumstances of the ICTR, as general temporary assistance. He knew that the end of his appointment was imminent given the mandate of his employing institution. He also was aware that a fixed term appointment does give rise to an expectation of renewal or recruitment. That said *all* staff members are entitled to be treated fairly and accorded the same due process rights.

32. It is not open to dispute that a fixed term appointment dies a natural death at the end of the period of the contract. While the ICTR appears to have put in place policies and criteria that would allow for a transparent process of downsizing, the Applicant appears to have been subject to both that process and countervailing circumstances. Such circumstances appear to have adversely affected the Applicant in the organisation's evaluation of him. Can the injury or damage suffered by the Applicant if this application is not granted be compensated in monetary terms?

33. 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.

34. Having considered the case made out by the Applicant in this application for a suspension of action under our Rules, and having regard also to the fact that a management evaluation is still

pending on the contested decision, pursuant to **article 13.1 of the Rules of Procedure** of the United Nations Dispute Tribunal, I find that the Application succeeds.

35. This application is hereby granted. An order for the suspension of the Respondent's decision not to renew the Applicant's fixed term appointment is hereby made. The order for suspension of action shall subsist until the Applicant's substantive case on the merits is determined. I further order accelerated hearing of the substantive case.

The Tribunal therefore

GRANTS the Applicant's Prayer;

ORDERS the suspension of the Respondent's decision not to renew the Applicant's appointment until the substantive application is heard and determined; and

ORDERS that the Applicant file his substantive application within 15 days of the service of this reasoned ruling on him.

Given in Nairobi, this 13 October 2009

(Signed)
Judge Nkemdilim Izuako

Entered in the Register on 13 October 2009

(Signed)
Jean-Pele Fomété, Registrar