



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ABDALLAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPEAL AGAINST
NON-RENEWAL OF A FIXED-TERM
APPOINTMENT**

Counsel for Applicant:

Adolph Bishanga

Counsel for Respondent:

Stephen Margetts, ALU/OHRM

1. *The Applicant's employment history*

1.1 The Applicant joined the Organization on 15 July 1997 as a Messenger at the G-1B level pursuant to the terms of a 100 series fixed-term contract. Thereafter, effective February 2000, the Applicant was promoted to the G-2 level as a result of a reclassification exercise that upgraded his post and changed his functional title to Reproduction Clerk. The Applicant's most recent fixed-term appointment began on 30 November 2007 and was to expire on its stated expiry date of 30 January 2008.

2. *Summary of relevant facts*

2.1 By letter dated 23 January 2008, the ICTR Head, Staff Administration Unit, notified the Applicant that his fixed-term appointment had been approved for "final extension through 29 February 2008" and requested the Applicant to contact the Human Resources Section at least one week in advance of that date to complete the formalities associated with separation.

2.2 By memorandum dated 18 February 2008, the President of the ICTR Staff Association sought to appeal to the ICTR Registrar the decision not to renew the Applicant's fixed-term appointment beyond 29 February 2008. In the memorandum, the Staff Association alleged that the Applicant's supervisor showed lack of leadership and judgment by having failed to consider and accept the Applicant's justifications for his absences and by failing to put in place a remedial plan for the Applicant.

2.3 By memorandum dated 25 February 2008, the Applicant's supervisor responded to the Staff Association memorandum dated 18 February 2008. Among other things, the Applicant's supervisor noted:

We have been giving oral and written warning to the staff member. He has been making promises to improve on his attendance record for years, but he has never kept his promises. There is no evidence that a further promise would not be broken....Our decision to recommend the non-renewal of the staff member's contract was not taken on the basis of only one rating of "does not meet performance expectation". The Staff

Association is deliberately misrepresenting the facts and obviously contradicting itself, since it recalled that the staff member had been getting the “Partially meets performance expectations” rating for at least three reporting cycles.

2.4 By memorandum dated 11 March 2008, the Chief, Division of Administrative Support Services, ICTR, responded to the Staff Association’s memorandum as follows:

This allegation is unsubstantiated and utterly false. We have been duly considering and taking into account the staff member's explanations about any absence from work whenever he showed good cause. Given [Applicant's] chronic absenteeism, his contract would have been terminated a couple of years ago if we had not been humanely considering his various explanations... It should be recalled that the assessment of some categories of absences is not within the competence of the first reporting officer. For instance, any sick leave taken in excess of the seven-day uncertified sick leave limit set by the UN Staff Rules and Regulations per calendar year must be approved by the UNICTR medical officer and not the staff member's immediate supervisor. We have never refused to take into account any such sick leave approval from the medical officer concerning [Applicant]. Most of [Applicant's] absences were allegedly due to ill health, which has quite never been confirmed by the UNICTR medical officer.

2.5 By letter dated 10 April 2008 addressed to the Secretary-General, the Applicant sought administrative review and suspension of action of the implementation of the decision not to renew his fixed-term appointment beyond 29 February 2008.

2.6 By letter dated 15 April 2008, the Administrative Law Unit acknowledged receipt of the Applicant’s request for review. By email dated 16 April 2008, the Secretary of the New York Joint Appeals Board informed the Applicant that the remedy of suspension of action was not available to him because his contract had expired at the end of February 2008.

2.7 By letter dated 10 June 2008, the Administrative Law Unit responded to the Applicant’s request for review, attaching a copy of the memorandum dated 11 March

2008 from the Chief, Division of Administrative Support Services. On 11 August 2008, the Applicant filed an appeal with the New York JAB. The Respondent's Reply was filed on 13 October 2008 and on 12 January 2009 the Applicant filed his Observations on the Respondent's Reply.

2.8 This Application was transferred to the Nairobi UNDT in accordance with ST/SGB/2009/11 - *Transitional Measures Related to the Introduction of the New System of Administration of Justice* by Order dated 1 October 2009. The Tribunal held a Hearing on 9 February 2010 and the Parties filed their closing statements on 12 February 2010.

3. *The Applicant's contentions/pleas*

3.1 The Applicant's principal contentions are:

- (i) That his due process rights were violated and his career compromised by virtue of violations in the process surrounding his evaluation, including the fact that he was separated for performance related issues without completion of his final e-PAS.
- (ii) That on the basis of the improper procedures, the refusal to renew his contract was arbitrary, flawed and premature.
- (iii) That the circumstances in which he was compelled to vacate his post prior to finalization of the e-PAS were improper.
- (iv) That the general treatment of the Applicant by ICTR management fell below the minimum required in standards of conduct.
- (v) That ICTR management further abused its authority by failing to respond to the 18 February 2008 communication from the President of the UNICTR Staff Association, thus ignoring the existing mechanism that allows for informal resolution when a staff member believes his/her

rights have been violated or that there has been an individual or systemic abuse of authority.

(vi) That in effecting the contract extensions for the Applicant, the Office of Human Resources and Planning Section (HRPS) unnecessarily exacerbated the stress and abuse alleged by the manner in which they conducted basic administration of the renewals and that this was manifested by compelling the Applicant to sign a two-month contract on 9 January 2008 which expired in less than three weeks, and again compelling him to sign a contract on 14 February 2008, two weeks prior to its expiration, while simultaneously being instructed to complete the formalities of separation.

(vii) That he was informed of his separation and the specific reasons for said separation, while being denied the opportunity to contest those reasons, thus occasioning another denial of due process.

(viii) That the absence of a performance review with a commensurate opportunity for rebuttal violated the Applicant's contractual rights pursuant to Staff Rule 101.3(a).

3.2 In view of the foregoing, the Applicant requests the Tribunal to order the following remedial actions:

(i) That he be retroactively reinstated, allowing for a full and fair appraisal of his performance and completion of a rebuttal process if he so chooses.

(ii) That his contract be extended for at least six months to enable him to complete his e-PAS, as opposed to offering month to month extensions.

(iii) To find that he was abused and denied his basic rights and to order that he be placed in a suitable position either in his former unit or another unit under a different supervisor.

4. *The Respondent's contentions*

4.1 The Respondent's principal contentions are:

(i) That the decision not to renew Applicant's appointment was made in consideration of the Applicant's chronic unexplained absenteeism and consequent failure to meet performance expectations and therefore constituted a proper exercise of the Secretary-General's authority.

(ii) That the Applicant's claim of abuse of authority by the ICTR lacks merit as no evidence is provided in support of such a claim.

(iii) That a review of the record provided by the ICTR demonstrates that the decision not to renew the Applicant's fixed term appointment beyond its expiration date was based on the Applicant's record of chronic uncertified leave which adversely impacted on his performance and ultimately frustrated the ICTR's expectation of adequate performance of the work plan.

(iv) That the decision had a rational basis and constituted a proper exercise of the Secretary-General's authority.

(v) That the ICTR gave due consideration to the various explanations the Applicant offered to explain his absences but found them to be lacking validity because none of his absences were ever supported by a medical certification from either an independent medical professional or the ICTR Medical Service.

5. *Legal Issues*

5.1 The Tribunal considers the following to be the legal issues arising out of this application:

(i) Whether the administrative decision of the ICTR Head, Staff Administration Unit, dated 23 January 2008, not to renew the Applicant's fixed term contract beyond 29 February 2008 due to the Applicant's chronic absenteeism was informed by improper motive.

(ii) Whether the ICTR Head, Staff Administration Unit abused his discretionary authority in his decision not to renew the Applicant's fixed term contract.

(iii) Whether or not the Applicant had any expectancy of renewal of his contract under the terms of his appointment.

(iv) Whether the proper legal procedures for dealing with the Applicant's absenteeism and for appraising his performance were complied with.

6. *Applicable Law*

6.1 Former Staff Rule 101.3 (a) provided that:

Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

6.2 Former Staff Rule 104.12 (b) provided that:

(i) The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of a prescribed duration, including persons

temporarily seconded by national Governments or institutions for service with the United Nations;

(ii) The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment;

(iii) Notwithstanding subparagraph (ii) above, upon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2 and who is under the age of fifty-three years will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.

6.3 Former Staff Rule 105.1 (b) provided that:

(i) Annual leave may be taken in units of days and half-days;

(ii) Leave may be taken only when authorized. If a staff member is absent from work without authorization, payment of salary and allowances shall cease for the period of unauthorized absence. However, if, in the opinion of the Secretary-General, the absence was caused by reasons beyond the staff member's control and the staff member has accrued annual leave, the absence will be charged to that leave;

(iii) All arrangements as to leave shall be subject to the exigencies of service, which may require that leave be taken by a staff member during a period designated by the Secretary-General. The personal circumstances and preferences of the individual staff member shall, as far as possible, be considered.

6.4 Former Staff Rule 106.2 (c) provided that:

A staff member may take uncertified sick leave of not more than three consecutive working days at a time, for up to seven working days in an annual cycle starting 1 April of each year, when incapacitated for the performance of his or her duties by illness or injury. Part or all of this entitlement may be used to attend to family-related emergencies, in which case the limitation of three consecutive working days shall not apply.

6.5 Section 8.3 of ST/AI/2002/3 *Performance Appraisal System* provides that:

As soon as a performance shortcoming is identified, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, such as the development of a performance improvement plan, in consultation with the staff member.

7. Considerations

7.1 The discretion of the Secretary-General not to renew a fixed-term appointment is not limitless and will be vitiated where it is motivated by prejudice, bias, or other extraneous factors. Even though a fixed-term appointment, by its terms, does not create an expectancy of renewal, an examination should be done of all the surrounding circumstances to determine whether an expectancy of renewal was created in the particular case – for example through verbal or written commitments made to the staff member that the appointment would be renewed¹. When the Administration gives reasons for its decision not to renew a fixed-term contract, (as in the present case), the validity and acceptability of these reasons are subject to judicial review².

7.2 The evidence before the Tribunal shows that the Applicant had a documented history of chronic absenteeism from work dating back to 2003. This issue was raised with the Applicant in his performance assessment reports for 2002-2003, 2005-2006 and 2006-2007. The Respondent in his submissions also filed an attendance record for the Applicant for the period January 2006 to January 2008 in this respect.

7.3 It is the Respondent's contention that in light of the nature of the Applicant's performance failing, namely absenteeism, there was no basis for preparing a performance improvement plan, since it was not the Applicant's performance of the tasks that was in issue. The Respondent further submits that the Applicant's First Reporting Officer (FRO) held many meetings with the Applicant to discuss his

¹ See for example United Nations Administrative Tribunal Judgment No. 940, *Debrabata Nag* (1999).

² See for example United Nations Administrative Tribunal Judgment No 1191 *Aertgeerts* (2004).

regular absences from work, to advise him and eventually warn him but that the FRO's actions were to no avail. As a consequence thereof, the Respondent submits that in accordance with section 8.3 of ST/AI/2002/3, all that could be done to remedy the Applicant's absenteeism was done and that therefore a performance improvement plan was not required nor would it have assisted.

7.4 The Applicant contends that the attendance records submitted as evidence by the Respondent cannot be substantiated and that they were created by the Respondent to facilitate the non-renewal of his appointment. The Applicant also contends that there is no evidence tendered by the Respondent as to how any disciplinary action had been taken against him in order to terminate his appointment. The Applicant further contends that there is no evidence to show that his salary had been deducted for his absence from work as was required by the Staff Regulations and Rules. The Applicant finally submits that his e-PAS for the period October 2007 to February 2008 had not been completed at the time of the non-renewal of his appointment and that this amounted to a violation of his due process rights.

7.5 The Tribunal is satisfied by the evidence tendered before it in respect of the Applicant's chronic absences. The Tribunal is not convinced that the reasons proffered by the Applicant to explain his unauthorized absences were beyond his control. The Tribunal considers that the Applicant was given ample opportunity to address this performance shortcoming. The Tribunal is satisfied, in consideration of the requirements of section 8.3 of ST/AI/2002/3, that the ICTR Administration had taken steps to rectify the situation in respect of the Applicant's chronic absenteeism.

7.6 The Tribunal notes with concern the Applicant's contention that the Administration had failed to finalize his e-PAS for the period October 2007 to February 2008 prior to the non-renewal of his appointment. In the light of this failure, the Tribunal would have been minded to grant compensation in this respect but having reviewed all the circumstances of this case, considers that as the Administration had, by the Applicant's own submissions, failed to deduct salary and allowances during the periods of the Applicant's absences as was required by Staff

Rule 105.1 (b) (ii), the Tribunal does not therefore deem the award of compensation to be justified in this particular case. Further, as the Respondent's principal complaint concerns the Applicant's chronic absenteeism, there was nothing placed before the Tribunal by the Applicant to show that he could challenge this particular complaint. Finally, having examined all the surrounding circumstances, the Tribunal does not consider that an expectancy of renewal of contract was created in this particular case.

8. Findings

8.1 In light of the foregoing, the Tribunal makes the following findings:

(i) That the administrative decision of the ICTR Head, Staff Administration Unit, dated 23 January 2008, not to renew the Applicant's fixed term contract beyond 29 February 2008 due to the Applicant's chronic absenteeism was not informed by improper motive.

(ii) That the ICTR Head, Staff Administration Unit did not abuse his discretionary authority in his decision not to renew the Applicant's fixed term contract.

(iii) That the circumstances of this case do not justify the inference that the Applicant had any expectancy of renewal of his contract under the terms of his appointment.

(iv) That the ICTR Administration had taken steps to rectify the situation in respect of the Applicant's chronic absenteeism as required by the relevant Rules.

9. Conclusion

9.1 It is the judgment of the Tribunal that the Applicant's case fails in its entirety and is therefore dismissed.

Case No. UNDT/NBI/2009/063

Judgment No. UNDT/2010/049

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of March 2010

Entered in the Register on this 30th day of March 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi