

Case No. UNDT/NBI009/058
Judgment UNDT/2009/035

4. SUMMARY OF FACTS

4.1 From the records submitted to the Tribunal by the Applicant and the Respondent (hereinafter collectively referred to as “the Parties”), on 24 September 2009 and 28 September 2009 respectively, the facts of the case are summarized as follows:

4.2 On 3 October 2007, the ICTR published Information Circular No. 77, in which the Staff Retention Criteria were endorsed. Such criteria include competence, to be assessed on the basis of the staff member's e-PAS, multi-functionality, and length of service. During November and December 2008, the Applicant was informed that his post was earmarked for abolition, and that his contract had only been extended until 31 March 2009. On 5 December 2008, the Applicant wrote to the Chief of Administration requesting to be transferred to another position which would enable him to stay on in the ICTR until 31 December 2009. The Applicant's post, however, was not abolished. In January 2009, the Applicant was transferred to the Office of the Deputy Registrar, on the same post and his contract was renewed until 30 September 2009.

4.3 On 4 March 2009, the Applicant received a Letter of Appointment (LOA) with an offer of contract up to 30 September 2009. His actual assumption of duty was 1 April 2009. The Applicant signed the LOA on 5 March 2009. BetDn(ijrTha)TLOA) wi35the

To be entirely clear, I am contesting in particular your decision to have put an end to my contract, since the downsizing exercise apparently claimed as a pretext for that action, was not conducted in the transparent fashion required. I also contest the fact that no priority was accorded me, as would have been appropriate under the circumstances, for the post of Chief of the Defense Counsel Management Section.

Accordingly, my request to you at this time is as follows: that I be awarded the grade of P-5, retroactively to 2003, and that my contract be renewed at least up to December, 2009. I hope to receive your favorable response to this request within two weeks. Should this not be forthcoming, I will assume that it has been refused, and in that case I would have no

candidate, thereby violating applicable UN internal mobility requirements; being given neither the possibility of promotion nor of making a lateral move to the position of Chief, General Legal Services Section; being denied any opportunity for further professional skills acquisition and improvement, after being overlooked as possible OIC of either the External Relations Section or the Registry, while junior and less experienced candidates were selected instead for both those positions; being denied any opportunity to discuss either his work plan or his performance with his supervisor over the last 2-year period, and having his evaluation suddenly changed from "exceeds performance" to "meets performance" without any professional justification for this being provided; being effectively excluded from budget preparation activities and excluded outright from a critical staff retention exercise; and having his functions changed without benefit of any prior consultatin (sic)..."

4.7 On 30 June 2009, the Applicant received a letter dated 26 June 2009, in which he was informed that his contract would not be renewed after 30 September 2009. No reasons were proffered for the non-renewal of the Applicant's contract. Following the Applicant's recurrent requests for an explanation for the non-renewal, on 15 September 2009 the Applicant was advised that neither his skills nor his services were required at the ICTR. On 7 August 2009, the Applicant discovered that his post had not in fact been abolished but had regular funding until 31 December 2009.

5. THE HEARING

5.1 The Applicant's submissions on his Suspension of Action request were transmitted to the Respondent on 25 September 2009. The Respondent's Reply was received by the UNDT Registry on 29 September 2009. In light of the fact that the Respondent had raised the issue of receivability in its Reply, the Applicant filed further submissions on this issue on the same date.

5.2 The Parties were served a Hearing Notice on 28 September 2009 to inform them that the Tribunal would hold a hearing on Tuesday, 29 September 2009 in Nairobi. The hearing was held on 29 September 2009, at 6.00pm Nairobi time. The Applicant was present in the courtroom with his Counsel. The Respondent participated in the hearing via audio-conference.

6. RESPONDENT'S PRELIMINARY OBJECTION ON RECEIVABILITY

6.1 The Respondent in its Reply dated 28 September 2009 objected to the receivability of the application on the grounds that the Applicant had failed to submit an application for Management Evaluation of the contested decision, and that any such request would be time-barred. In respect to the question of receivability, the Respondent makes the following observations/contentions:

(i) That Article 13.1 of the UNDT Rules of Procedure provides that the Tribunal may make an order to suspend a contested administrative decision that is the subject of an ongoing management evaluation.

(ii) That Staff Rule 11.2(a) provides that a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment should, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(iii) That, contrary to the Applicant's contentions that he filed a request for administrative review on 29 May 2009, this request for administrative review did not request review of the decision not to renew his appointment beyond 30 September 2009, a decision that was conveyed to him almost a month after his request for review.

(iv) That with respect to the contested decision, no management evaluation request has been submitted to the Secretary General in violation of Staff Rule 11.2(a) and that accordingly, the Tribunal does not have jurisdiction under Staff Rule 11.3, Article 2(2) of the Tribunal's Statute or Article 13.1 of the UNDT

Rules of Procedure to consider whether to suspend action of the contested decision.

(v) That provisional Staff Rule 11.2(c) provides that a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

(vi) That in the instant case, the Applicant was advised on 30 June 2009 that his appointment would not be renewed beyond 30 September 2009 and therefore in order to comply with the time provisions set out in the foregoing provisional Staff Rule, the Applicant should have submitted a request for management evaluation of that decision between 1 July 2009 and 30 August 2009. No such application was made. Accordingly, any request for management evaluation now submitted would be time-barred.

7. APPLICANT'S RESPONSE ON RECEIVABILITY

7.1 In response to the Respondent's objection on the issue of receivability, the Applicant filed additional submissions on 29 September 2009. The submissions were transmitted to the Respondent's Counsel on the same date. Counsel for the Applicant also made oral submissions on this issue during the Hearing¹. The Applicant's submissions may be summarised as follows:

(i) That the Applicant is seeking a suspension of action pursuant to Staff Rule 11.3(b) pending a management evaluation which was requested by a letter dated 29 May 2009.

(ii) That on 1 April 2009, the Applicant received a LOA with an expiry date of 30 September 2009. Between 1 April 2009 and 29 May 2009, the Applicant made numerous attempts to challenge the terms of that LOA including the duration.

¹ See pages 2 to 5 of Draft Transcript dated 29 September 2009.

(iii) That on 27 April 2009, the Applicant sent an email to the Registrar of the ICTR requesting reconsideration of a number of issues including the contract end date or non-renewal beyond 30 September 2009.

(iv) That on 28 April 2009, the Applicant received a response to his email which he took to be confirmation or de

“A staff member wishing to formally contest an administrative decision alleging non compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.”

8.3 Article 2.2 of the UNDT Statute provides that,

“The Dispute Tribunal shall be competent to hear and pass judgment 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.”

8.4 Article 13(1) of the UNDT Rules of Procedure provides that,

“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.”

8.5 Sub-section 1.1 of the Secretary-General’s Bulletin on Transitional measures related to the introduction of the new system of administration of justice, (SGB 2009/11), provides that,

“In the present internal justice system, a staff member wishing to contest an administrative decision alleging its non-compliance with his or her terms of appointment or the contract of employment may address a request to the Secretary-General for an administrative review of the decision within two months

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paragraph but no mention is made of non-renewal of the Applicant's contract. Indeed that could not be addressed because it was only on 30 June 2009, by letter dated 26 June 2009, that the Applicant was informed that his contract that is due to run through to 30 September 2009 would not be renewed. The Applicant sought to establish