

Before: Judge Boolell (Presiding)
Judge Izuako
Judge Meeran

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KASMANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**DECISION ON THE APPLICANT'S
EX PARTE APPLICATION FOR
PROTECTIVE MEASURES FOR
WITNESS**

The Application

1. The present application was filed on 23 December 2009, moving the court for a judicial order of protection pursuant to Article 7 of the Statute of the United Nations Dispute Tribunal (UNDT), and Articles 19 and 36 of the Rules of Procedure.
2. The Applicant is moving the court to order protective measures to ensure that his witnesses are not prejudiced, intimidated or retaliated against for testifying in the present case. It is submitted that *prima facie* there exists a real danger that the witnesses the Applicant intends to call during the trial of this matter will suffer further intimidation, harassment, and obstruction to their career development.

Background

3. The Applicant joined the United Nations on 4 June 2009, as a Procurement Assistant within the Procurement, Travel and Shipping Section in the United Nations Office at Nairobi (UNON) at the G-4 level on a 3-month fixed-term appointment against a General Temporary Assistance (GTA) post.
4. On 28 August 2009, the Applicant moved the Tribunal to suspend the implementation of an administrative decision of the Chief of the Procurement, Travel and Shipping Section (the Section/PTSS), not to renew his fixed-term appointment beyond 3 September 2009. The renewal of his contract was recommended by the staff member's immediate supervisor acting, at the time, as Officer-in-Charge (OiC) of the Section.

5. On 2 September 2009, UNDT Nairobi heard the matter. The Applicant and a witness called on his behalf were heard and cross-examined by the Respondent.
6. At the crux of the matter was the contention by the Applicant that he is being victimised because of a clash of personalities between his immediate supervisor and the Chief of Section. His immediate supervisor testified to the circumstances surrounding the Applicant's non-renewal.
7. On 3 September 2009, Judge Boolell granted the Applicant's motion and suspended the decision not to renew the Applicant. The Tribunal held that the applicant had made out a case of *prima facie* unlawfulness, urgency and irreparable damage as required by Rule 13 of the Rules of Procedure.
8. On 9 October 2009, the Applicant received an interoffice memorandum from the Under-Secretary-General for Management advising him that the Secretary-General has decided to compensate him in the amount of three months' net base salary for having detrimentally relied upon an express promise of renewal.
9. On 15 of October 2009, the Applicant was notified by UNON that he was to be separated from the United Nations as of close of business on 16 October 2009. It is worth noting that 16 October was a Friday, so that close of business in UNON is at 2pm.
10. On the morning of 16 October 2009, the Registry received an urgent application for suspension of action in respect of the administrative decision which was to be effected that afternoon. The Applicant's motion for suspension of action was also copied to the Respondent. Separately, the Applicant filed *ex parte* submissions of evidence in support of his application.

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- d. retaliation of any sort as a result of testifying before the Tribunal, and in particular against prejudice to their career development as a result.

Should a breach of any of these orders be brought to the attention of the Tribunal, the Applicant will oversee an investigation into the issue.

22. The Tribunal is also being moved to order that testifying before the Dispute Tribunal amounts to a ‘protected activity’ within the scope of ST/SGB/2005/21 and that it is therefore within the remit of the Organisation’s Ethics Office to receive complaints of retaliation or threats of retaliation based on a staff member’s proposed or actual testimony before the Dispute Tribunal.

Deliberations

23. The present Application raises a fundamental question of what protection may be afforded to witnesses who fear retaliation for the provision of testimony

25. Having been promulgated in 2005, the Secretary-General's Bulletin (SGB) naturally does not make reference to the Dispute Tribunal; in other words, it expressly covers those who *report* misconduct or *cooperate* with authorized

29. It cannot be disputed that a hearing of a case and all procedural and evidentiary matters must comply with the principles of a fair trial according to international norms. One of the core principles in an oral hearing is that a court of law relies on the testimony of witnesses if and when available.
30. The issue of witness protection has been raised at international level mostly in the context of criminal trials. The European Court of Human Rights has held that it is true that Article 6 of the European Convention on Human Rights does not require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of the Convention. Such interests of witnesses and victims are in principle protected by other substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled.⁶
31. In many national jurisdictions the intimidation or victimisation of witnesses either before or after they have given evidence amounts to a punishable contempt of court. Reference is made to the punishable contempt because it emphasises the importance that witnesses assume in a trial and equally the necessity to enable them to testify freely and fearlessly.
32. The protection being requested in the instant motion is very different from that usually afforded in national jurisdictions, particularly in criminal proceedings. In the latter situation, witnesses fear being identified. There is often a threat to the life or security of the witness, so that anonymity is required if the witness is to testify fearlessly.

⁶ *Doorson v Netherlands*, 1996 22 EHRR 330.

33. The fears of witnesses testifying before this Tribunal are very different.

Witnesses appearing before this court will, most always, fear for their

- b. threats to the security of their employment, or development of their career, with the United Nations; and
- c. retaliation of any other sort as a result of testifying before the Tribunal;

ORDERS that the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations of violation of this Order;

ORDERS that material submitted to the Registry *ex parte* as part of the substantive Application of 28 October 2009 be disclosed by Counsel for the Applicant **UNDER SEAL** to Counsel for the Respondent;

ORDERS that any access to the material so disclosed be stric

