

Case No: UNDT/NBI/2009/67

Date: 3 November 2009



**UNITED NATIONS DISPUTE TRIBUNAL**

Before: Judge Vinod Boolell

Registrar: Jean-Pelé Fomété

**MOHAMMED RIZWAN KASMANI**

**v.**

**SECRETARY-GENERAL OF THE UNITED NATIONS**

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**ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION FILED ON  
15 OCTOBER 2009  
and  
DECISION ON APPLICATION FOR INTERPRETATION FILED ON 30 OCTOBER  
2009**

**JUDGMENT UNDT/2009/63**

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**Counsel for the Applicant:**

**Katya Melluish  
Bart Willemsen**

**Counsel for the Respondent:**

**Steven Dietrich  
Joerg Weich**

## **APPEARANCES/LEGAL REPRESENTATION**

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fixed-term appointment beyond 3 September 2009. The renewal of his contract was recommended by Mr. Felix Nartey, who recruited the Applicant, as Officer-in-Charge (OIC) of the Section at the time, and is also his immediate supervisor.

8. On 2 September 2009, UNDT Nairobi heard the matter. The Applicant and a witness called on his behalf (Mr. Felix Nartey) were heard and cross-examined by the Respondent.

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20. The workload within the section, the substantial overtime payments made, seen together with the Applicant's performance in the workplace all lead to the suggestion that the only reasons for his separation in such a manner, are those factors which the court has previously found to be extraneous and countervailing. Not only has no reason been offered by

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30. Article 13(1) of the Rules provides that for an application for suspension of action to succeed, an Applicant must show that the:

- (a) decision appears prima facie to be unlawful;
- (b)

36.



the Applicant's case as stated. In the present application, the Tribunal notes that the Applicant's contentions in respect of the *prima facie* unlawfulness surrounding the Impugned Decision have not been addressed by the Respondent. There is nothing in the Respondent's Reply which rebuts the Applicant's contention that the latter is in fact being victimised for a personal conflict between his first and second reporting supervisors. Given the Tribunal's previous finding on this element, and given the Applicant's submissions that the circumstances surrounding this non-renewal are much the same as those previously adduced, the Tribunal is perplexed by the Respondent's silence on the issues raised.

43. The Tribunal accordingly finds this element of the test to have been satisfied.

### **The Urgency Element**

44. On the question of urgency, the Applicant

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.<sup>2</sup>

46. In dealing with the Applicant's first motion for suspension of action, the Tribunal observed that

The Applicant was on a temporary fixed-term appointment of three months. The evidence given by the Applicant, and unrebutted by the Respondent, shows that he left a well-paid job and accepted that appointment. Of course he knew that there was a risk that his appointment would automatically end. He also was aware that a fixed term appointment does not give rise to an expectation of renewal or recruitment. However, a staff member under a fixed-term appointment is as any other staff member is also entitled to be treated fairly according to due process and rule of law principles. It is not open to dispute that a fixed term appointment dies a natural death at the end of the period of the contract. But there may be circumstances that where the non renewal may be due to factors that adversely affect a staff member to such an extent that monetary compensation is no answer. Whilst management has discretion not to renew, that discretion must be used judiciously and in good faith. That discretion cannot be considered to be an unfettered one in the sense that it would always dispense the decision maker with the need to carefully weigh in the balance the consequences of the decision. The myth of unfettered discretion is inimical to the rule of law principles.<sup>3</sup>

47. The Tribunal endorses the above reasoning for the purposes of the present application.

48. The reasons advanced by the Respondent in respect of the present non-renewal and the manner in which it was to be effected is most unsatisfactory and seem patently averse to the core values of the United Nations. Notwithstanding his performance within the Section, the applicant has been treated in a most humiliating manner and made to feel that he is not by any standard fit to continue in the service of the Organization. To say that damages alone can compensate the applicant who has been so victimised, would in effect be tantamount to allowing such behaviour to stand subject only to a decision on pecuniary compensation which will also be decided upon by the Respondent. Damages cannot compensate the applicant for the loss of the chance provoked in an unfair treatment meted out to him and which would be the basis of the non renewal of his contract.

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<sup>2</sup> *Tadonki v. Secretary-General of the United Nations*, 1 September 2009, Case No. UNDT/NBI/2009/36.

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52. The Tribunal again notes that there is nothing in the Respondent's submissions which challenge the Applicant's case in respect of the irreparable harm which he will suffer should the decision be implemented.

## **CONCLUSION**

Having considered the facts presented in the submissions of both parties to the Tribunal and having regard also to the fact that 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,

**GRANTS** the Applicant's Motion for Suspension of Action;

**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

