UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2009/057
Judgment No.:	UNDT/2010/136
Date:	30 July 2010
Original:	English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ONANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for applicant:
Katya Melluish, OSLA

Counsel for respondent:
Steven Margetts, ALS/OHRM, UN Secretariat

Background and Facts

1. The Applicant joined the International Criminal Tribunal for Rwanda (ICTR) in April 1999 as a French court reporter. He worked in that capacity until May 2007 when the Chief of Section recommended that his contract should not be renewed. After some discussions within the section, the Applicant was moved to the Judicial Records and Archives Unit (JRAU) in August 2007. He however continued to encumber his post with the French Court Reporters Unit even though he now performed functions in JRAU.

2. The ICTR, being an *ad hoc* tribunal with a special mandate, was confronted with Security Council Resolutions 1503 and 1534 and needed to initiate a completion strategy. In this regard, the Registrar of the ICTR established an *ad hoc* Staff Retention Task Force on 16 July 2007. The said Task Force was to establish criteria which would ensure that the down-sizing or draw-down of staffing levels was "done in the most transparent, consultative and objective manner."

3. Evidence before the Tribunal is that on 2 April 2008, the Applicant was evaluated by a Staff Retention Committee using a set of criteria established for that purpose. Evidence also shows that the Applicant was evaluated as a Court Reporter and was graded at the bottom of a list of French Court Reporters. It was therefore recommended that his contract not be renewed beyond 31 December 2008.

4. Following an increase in workload at the ICTR, approval was granted by the General Assembly in June 2008 for supplementary funds. The effect of this approval was that the posts which were slated for abolishment in December 2008 and later in June 2009 as part of the completion strategy of the ICTR were allowed to continue as General Temporary Assistance (GTA) appointments up to September 2009.

5. In June 2009, Programme Managers were requested to undertake an exercise aimed at identifying "critical functions" with a view to meeting the increased workload while beginning the downsizing process. Two hundred and ninety-seven out of the three hundred and thirty-nine positions initially slated for abolition were

10. The Respondent concluded that the functions performed by the Applicant whether as a court reporter or in the archiving unit were adjudged non-critical to the completion of the ICTR's mandate in accordance to the 16 June 2009 memo and was therefore slated for non-renewal.

CONSIDERATIONS

11. In examining the merits of this application, I begin by finding that as agreed on both sides the Applicant had been employed as a court reporter by the ICTR since 1999. The Applicant did not appear to encounter any problems with the renewal of his fixed-term appointment until May 2007 when a decision was made not to recommend the said renewal. Following some discussions between the Applicant and his second reporting officer, he was reassigned to the Judicial Records and Archives Unit. He worked for the next two years as an Archiving Assistant in that unit although he had his contracts renewed from time to time as a Court Reporter.

Why was the May 2007 decision not to renew Applicant's contract made?

12. According to the Applicant's first reporting officer who is also the Head of the French Court Reporters Unit in her oral testimony, the Applicant did not meet the objectives set out in the work plan for the 2006/2007 reporting period. The Applicant was rated as only "partially meeting performance expectations." In the preceding reporting year 2005/2006, the Applicant had been rated as "fully meeting performance expectations." His supervisor told the Tribunal that his performance for the 2006/2007 reporting period was very low and much below the average for the whole team.

13. Her evidence before the Tribunal is that in April 2005, the Court Reporters Unit began to introduce a new system for the production of transcripts known ***as real time***. This was aimed at assisting the Tribunal complete its mandate on time as requested by the Security Council by speeding up the trial proceedings. Using the

undertake one-month training in Paris at the end of 2006. The said leave was granted him in November 2006.

21. The Applicant's second reporting officer in an inter-office memo of 23 May 2007 to the Chief of Human Resources and Planning Section in which he sought a lateral reassignment of the Applicant, summarised the problem when he stated that the Applicant was "no longer in a position to assist t[his] unit reach its goals as defined in the unit's work plan, namely the production of transcripts of the court proceedings (real-time or not)."

22. Although the Applicant in a later memo described the recommendation to assign him away from the court reporting unit as unfair, biased and negligent; it was against this background following his low appraisal for the reporting cycle of April 2006 – March 2007 that the Chief of section took the decision in May 2007 that the Applicant's contract would not be renewed.

23. The Respondent's evidence was that the decision not to renew the Applicant's contract in May 2007 was based mainly on his inability to make a transition to the ***real time*** system of producing transcripts which had been adopted by his unit. This made it difficult for the Applicant to go to court in teams with other Court Reporters. As a result of this inability, the Applicant was rated as not meeting performance expectations, having failed to fulfil the first core task he was expected to perform as a Court Reporter.

Lateral reassignment of the Applicant?

24. Following the inability of the Human Resources section to find a lateral reassignment for the Applicant, discussions for an internal solution were later held between him and the Chief of his section. He was then reassigned within the Court Management section and sent from the French Court Reporters unit to the Judicial Records and Archives unit (JRAU). The Applicant started working in JRAU in August 2007.

The Applicant, though he worked at JRAU for two years verifying files before the developments that led to this action, never sat on a JRAU post but instead continued to encumber a post in his former unit. This state of affairs was fraught with problems and clearly these problems manifested when his former unit in line with the down-sizing exercise at ICTR decided to abolish his post.

Bearing the blame for the Applicant's irregular reassignment and later non-retention.

29. In her closing statement, counsel for the Applicant submitted that the Applicant was not advised that his reassignment would render him incapable of surviving any staff retention analysis. She continued that the Applicant could not have been expected to apply for jobs advertised in JRAU while he was there because he was not aware that his post was slated for abolition. The decision she said, to reassign the Applicant to JRAU resulted from an impugned ePAS which to date has remained the subject of rebuttal proceedings therefore rendering the abolition of his post unlawful.

30. The Respondent's counsel countered that the verification functions carried out by the Applicant in JRAU were such as could be performed by a G-level staff. Management could not maintain an FSL-level post for that purpose especially as the function of verification had been merged with other functions. Accordingly, the post and function being performed against it were determined to be non-critical. Counsel continued that the Applicant did not request management evaluation of the decision to reassign him but rather agreed with his reassignment. Even the rebuttal proceedings he had initiated on his 2006/2007 ePAS was later abandoned or suspended only to be reinstated in 2009 when his post was abolished.

31. In two inter-office memos of 27 June 2007 and 20 July 2008 written by the Applicant, he complained about the decision of 23 May 2007 not to renew his contract, his reservations about a reassignment and describes these decisions as evidence of bias, unfair treatment and psychological harassment. In the July memo,

he requested an investigation of these decisions and that appropriate action be taken to secure his career in the Court Management section where the key skills in court reporting duties he possessed "are permanently needed."

32. One can glean from this memo that the Applicant rightly feared that his employment was jeopardised in the event of a reassignment that did not require his key skills as a Court Reporter. Apart from the said memos, the Applicant took to his reassignment, did not pursue his rebuttal application and settled down in the JRAU.

33. For the two years that he worked in JRAU, all the contract renewals that the Applicant received described his post and functions as those of a Court Reporter. This did not put him on inquiry neither did he make any efforts to tackle the matter of his inability to do real-time transcription in order to meet the standards required of him as

utterly unreasonable and careless regarding his own career prospects and must bear much of the blame for the fall-outs of his reassignment.

Was sufficient effort made to reasonably and adequately rectify the performance shortcomings of the Applicant as required under the Performance Appraisal System?

36. In section 2.1 of ST/AI/2002/3, it is clearly stated that the purpose of the Performance Appraisal System (PAS) is to improve the delivery of the Organization's programmes through optimizing performance at all levels. Subsection (d) of that section requires that one of the means of achieving this purpose lies in addressing under-performance in a fair and equitable manner.

37. Section 2.2 of the same staff rule asserts that the PAS is a management tool which is based on linking individual work plans with those of offices and departments, entailing the setting of goals, planning of work in advance and providing on-going feedback. The system ought to promote two-way communication between the staff member and his supervisor regarding goals to be achieved and the assessment of individual performance.

38. A mid-point performance review in which the supervisor reviews with each staff member how his individual work-plan has been carried out, giving feedback on his performance and guidance for accomplishing the goals set out in his work-plan is provided for under section 8. Both staff members and supervisors are nevertheless encouraged to take the initiative to continue discussing performance throughout the performance cycle.

39. It is also provided that when a performance short-coming is identified, the supervisor should discuss the situation with the staff member and take steps to rectify it by putting a plan for improvement in place in consultation with the staff member.

40. Evidence before the Tribunal shows that transition to real time in the Court Reporters unit started towards the end of 2004 when a grant from the European Union

was used to introduce on-line speed building training sessions to improve speed and accuracy of notes of the Court Reporters. Internal training sessions on the Case Catalyst software where Court Reporters who were certified trainers and had mastered the new software trained their colleagues were organized at weekends.

41. A consultant later came to organize training sessions for the unit. In 2006, the Applicant's supervisor arranged for another certified Court Reporter to train him when he complained to her that he did not remember what was taught. The Applicant additionally got approval for twenty days' special leave with pay to go for training.

42. The Applicant told the Tribunal in his testimony that he took the said leave to upgrade his skills and that the training he under-went was also in connection with ***real time***. He continued that he wanted to start a programme for ***real time*** thinking that both the Grandjean and Case Catalyst systems would continue to be used. He said it was with Grandjean that he got ***real time*** training and that when he returned he asked his second reporting officer to keep one court working with the Grandjean system but this request was refused.

43. The Applicant asserted in evidence and through some of his witnesses and documents that the training given them on ***real time*** based on the Case Catalyst software were both inappropriate and insufficient and that such a training to be effective should be a full-time one for a period of about one year. He testified also that his supervisor who supervised the tests that he refused to take was not competent to do so, not being a trained Court Reporter.

44. In the 2002 judgment of the former United Nations Administrative Tribunal (UNAT) in the matter of *Obiny v Secretary-General*, it was held that urging a staff member to improve his performance and two weeks later recommending his separation from service without giving him time or opportunity to improve showed arbitrariness.

45. Also in UNAT Judgement no. 1290 (2006), the same Tribunal ruled that before a staff member is terminated on grounds of unsatisfactory performance, such performance must be properly evaluated and the staff member must be allowed a chance to improve. In UNAT Judgment no. 1416 (2009); it was held that even where a staff member's performance is found wanting, he is entitled to the protection of the rules and regulations. Management is under an obligation to demonstrate that the performance was properly evaluated and that the staff member received the guidance and care due especially to a new recruit. I am in perfect agreement with these decisions as they amplify the intent, purpose and requirements of the PAS as a management tool.

46. In the context of the instant case, I make the distinction that the Applicant's contract was not terminated following the low rating he had received in the 2006/2007 reporting cycle in spite of being initially told that his contract would not be renewed based on his poor performance. He was rather reassigned to another unit. Such a reassignment however, did not abrogate the duty on the part of his supervisor to make efforts at rectifying the poor performance of the Applicant in the Court Reporting section.

47. It is not in dispute that the matter of the introduction of real-time transcription using the Case Catalyst software in the Court Reporting section had been on-going since 2004 and that in 2005 pilot programmes to cover court proceedings using real-time was launched. It is also not contested that several in-house trainings and an on-line training had been carried out for the Court Reporters on speed-building and on the new software and that a consultant had also been engaged for the same purpose. It is in evidence too that the Applicant's supervisor had recognised his short-comings in his inability to make the transition to ***real time*** as required by the unit's goals and had engaged one of the Applicant's colleagues to coach him on one occasion.

48. It is the evidence that the Applicant applied for and was granted one month special leave with pay to go for training to improve his skills even at a time he had refused or neglected to formulate a personal work-plan that incorporated the core goals of his unit. Much as it was not specifically canvassed in evidence that all of these efforts on the part of the Applicant's supervisors were preceded by any documented evaluation or prior discussions with the Applicant about a remedial plan, it is my finding that they were done in the spirit of compliance with the Performance Appraisal System.

49. I find also that the PAS requires the staff member to co-operate with his supervisors in achieving its purpose; and that in spite of his resistance to improvement, criticism of the merits of the said real-time system and casualness on the part of the Applicant which were apparent even in his testimony before the Tribunal, sufficient effort to improve his skills and remedy his short-comings were made by his supervisors. The Applicant's claim in his testimony that proper training on the ***real time*** system for Court Reporters would require one year of full-time training is both ridiculous in the extreme and irresponsible as the ICTR would have needed to practically shut down the Court Reporters unit and with it many on-going trials in order to be able to achieve a transition to real-time transcription.

50. It is important to make the distinction here that the Appellant's post was not abolished due to his performance shortcomings. While his post was adjudged as non-critical following his reassignment two years before which was directly related to performance issues; it must be borne in mind that its abolition was informed rather by the need to shed a certain number of posts in line with the ICTR completion strategy. Even if the Applicant was never reassigned to the JRAU, it cannot be assumed that

Were the staff retention guidelines complied with in the decision to abolish the post of the Applicant in 2008?

51. It is part of the Applicant's case that the decision not to retain him was taken in flagrant disregard of the Staff Retention Task Force recommendations and that the process was not transparent and consultative. According to him, he was not told of the comparative assessment of all Court Reporters made in 2008.

52. For his part, counsel for the Respondent submitted that when the Applicant was invited to meet the assessment panel on staff retention in March 2009 as one of the staff affected, he did not respond to the invitation. He submitted further that the relevant memorandum from the ICTR Registrar required that Programme Managers indicate the GTA-abolished posts which were critical to the on-going trials and which needed to be extended beyond 30 September 2009 for completion of the trials that were yet to be completed. The post on which the Applicant was sitting was in the Court Reporters unit and was one of those earlier abolished but retained due to the temporary GTA funding. That post was adjudged as not critical to the completion of the trials which were still not completed.

53. In granting the Applicant's motion for a suspension of action, the Tribunal was of the view that the Applicant had made out a prima facie case of lack of fairness and therefore unlawfulness in the way in which he was evaluated for non-retention. Evidence placed before the Tribunal at the time showed that he was assessed and

non-critical posts in the Court Repor

Conclusion

61. Having made the findings above, and having carefully considered the submissions of the Parties, I find, in conclusion, that the Applicant has not made out his case.

62. This Application fails in its entirety and is hereby dismissed.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of July 2010

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

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi