Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

1. APPEARANCES OF PARTIES

1.1 ***Applicant***: The Applicant represented himself, his Counsel, Mr. Duke Danquah, Esq., from the Office of Staff Legal Assistance, having withdrawn from the case.

1.2 ***Respondent***: The Respondent's Counsel, Mr. Steven Dietrich, of the Administrative Law Unit, Office of Human Resources Management (ALU/OHRM) failed to participate in the hearing.

2. THE HEARING

2.1 The Tribunal decided to hold a hearing on 25 August 2009 at 4.00pm Nairobi time in order to obtain some clarifications from both parties. The statutory notice of hearing was sent out to the parties who all confirmed their attendance. The Applicant was available via a telephone link to the courtroom. The Respondent was to be represented by Mr. Steven Dietrich of the ALU/OHRM. Several attempts were made to reach him in New York on the telephone number provided to the Nairobi United Nations Dispute Tribunal (UNDT) by the Administrative Law Unit but there were no response. Unfortunately after several failed attempts to reach the Respondent at the commencement of the hearing, the Tribunal finally contacted the ALU/OHRM and was informed by Ms. Tanja Titre that the Respondent's Counsel misunderstood the time difference between New York and Nairobi and assumed the time for the hearing, 4.00 p.m. Nairobi time would be 11.00 am instead of 9.00a.m New York time. This was the reason given by the ALU/OHRM for the non-availability of the Respondent's Counsel at the time of the hearing. The Tribunal expressed its outrage at this and did not consider that the reason given for the non attendance of Respondent's counsel was a sufficient justification to accede to a request that the Tribunal should wait longer for the Respondent or his representative. Pursuant to Article 17.2 of the Rules of Procedure of the UNDT, the Tribunal proceeded to the hearing in the absence of the Respondent or his representative.

3. CASE BACKGROUND

3.1 The Applicant, a staff member of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), filed the present application seeking the order of this Tribunal to

5. EMPLOYMENT HISTORY

5.1 The Applicant joined the United Nations in 1999 starting with the United Nations Office of

suspension of action on the implementation of that decision communicated to him as aforesaid. As mentioned in paragraph 3.2 above, the application was withdrawn by the Applicant's Counsel after the Applicant's appointment was extended from 16 July 2009 to 02 August 2009.

6.9 On 07 July 2009 and 10 July 2009, the Human Resources, OCHA informed the Applicant of the following with regard to his sick leave:

(a) that a notification had been received from the Medical Services for the Applicant's certified sick leave for the period 13 April 2009 to 28 May 2009;

(b) that the Applicant exhausted his entitlement to certified leave with full pay on 16 April 2009;

(c) that from 17 April 2009, the Applicant started sick leave with half pay;

(d) that as of 2 June 2009, the Applicant exhausted his entitlement to certified sick leave with full pay, and effective 3 June 2009 the Applicant had been placed on certified sick leave with half pay (Annex A12- email of 10 July 2009);

(e) that the Applicant would exhaust all his entitlement to sick leave on 17 July 2009

6.10 The Applicant's appointment was once more extended from 03 August 2009 to 03 September 2009 and the Applicant was told by Human Resources, OCHA on 28 July 2009 that:

> *"….your appointment is being extended only for the purpose of utilizing your sick leave entitlement. To this end, and following notification from the Medical Services that your sick leave was approved and certified until 4 September, we will extend your fixed-term appointment until 3 September only, the date on which you will exhaust your sick leave entitlement*."

6.11 Based on the decision not to renew the Applicant's appointment beyond 3 September 2009, the Applicant filed the present application seeking the suspension of the implementation of the

contested decision not to extend his contract beyond 3 September 2009. He is also seeking the following by way of relief:

(a) the Dispute Tribunal orders the Respondent to grant the Applicant an extension of his appointment until 15 July 2010 to enable the Applicant to effectively maintain his cause of action against the Respondent and some reprieve from the negative consequences of the harassment he has been suffering;

(b) the Dispute Tribunal orders the Respondent to pay immediately, and in a lump sum, all the monies earned by Applicant for which the Respondent has unjustifiably withheld payment;

(c) the Dispute Tribunal orders the R0.007180

recommendations of the Panel on Discrimination and Other Grievances as the report of the PDOG was submitted to the Respondent since 30 June 2009; and

(d) that the Respondent argument of having offered relief to the Applicant is not valid as the contract extensions since July 2009 have been without pay and the current proposed extension through 3 November 2009 is also without pay.

8. LEGAL ISSUES

8.1 The applicable law

8.1.1 The Applicant filed this application pursuant to Article 14.1 of the Rules of Procedure of the United Nations Dispute Tribunal which reads:

"At any time during the proceedings, the Dispute Tribunal may order an interim measures to provide temporary relief, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an orde

"…establish a new, independent, transparent, professionalized, adequately resourced and decentralised system of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike."[2]

8.2.2 Employment gives rise to civil rights and this is recognized by various international legal instruments. This right to work is enshrined in Article 23.1 of the Universal Declaration of Human Rights:

"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."

8.2.3 It is also enshrined in Article 6 the International Covenant on Economic, Social and Cultural Rights, where the right to work emphasizes economic, social and cultural development:

" (1) The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

" (2) The steps to be taken by a State party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

8.2.4 The European Court of Human Rights has ruled that the right to continue in professional practice is a civil right.[3] There is no reason why that principle should not be applicable to all contracts of employment in any civilized society. It follows that disputes arising out of a contract of employment should be dealt with according to fair procedures and the provisions guaranteeing the right to work should be interpreted according to international human rights norms.

[2] General Assembly Resolution A/Res/62/253
[3] *Albert and Le Compte v. Belgium*, European Court of Human Rights, 10 February 1983, A058.

9.1 In deciding whether an interim measure should be ordered, courts in most national jurisdictions are guided by the following principles:

(i) There must be a serious issue to be tried and the claim must not be frivolous and vexatious;

(ii) The Tribunal should consider the balance of convenience. This requires the Tribunal to consider the adequacy of damages and whether, if the Applicant were to succeed on the merits of the case, he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the action of the

10.3 Having regard to the fact that there is no evidence before the Tribunal to prove that the Applicant's appointment has indeed been extended, the Tribunal considers the statement in the Respondent's Reply as speculative. The Tribunal deals with facts and law and not speculations. From the submissions before the Tribunal, it is clear that the Respondent has established a tradition of extending the Applicant's contract for short periods immediately following an application for suspension of action by the Applicant. This conduct by the Respondent is an attempt to continue to postpone the final resolution of the dispute and it qualifies as an administrative decision that this Tribunal is entitled to put a stop to. Therefore, the Tribunal holds the view that it is entitled to entertain the application for suspension of the contested decision.

10.4 By virtue of the provisions of Article 13(1) of the Rules of Procedure of the UNDT the application must satisfy the following requirements before the Tribunal can grant a suspension of the implementation of the contested decision, that is:

(a) where the decision appears *prima facie* to be unlawful;

(b) in cases of particular urgency; and

(c) where the implementation of the decision will cause irreparable damage.

10.5 In addition to the three elements above, the contested administrative decision which is being requested to be suspended must not have been implemented at the time of the Application.

11. PRIMA FACIE UNLAWFULNESS OF THE DECISION

11.1 Given the fact that the proposed non-renewal or termination of the fixed-term appointment appears to be based on the alleged non-performance of the Applicant, the Tribunal notes that the Rebuttal Panel on e-PAS allowed the appeal of the Applicant and recommended that his rating be changed from "*Partially Meets Performance Expectation*" to "*Fully meets Performance Expectation*". There is no evidence produced by the Respondent that this decision has been implemented and if implemented, what effect it will have or have had on the prospect of the continued employment of the Applicant.

11.2 The Tribunal also notes that the Applicant filed a request for management evaluation in respect of the contested decision. The outcome of the evaluation has not yet been released. The Panel on Discrimination and Other Grievances released its decision to the following persons on 30 June 2009: Ms. Catherine Pollard Assistant Secretary General for Human Resources Management; Mr. John Holmes, Under-Secretary-General for Humanitarian Affairs; Ms. Helen Clark,

13.1 The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is 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. The facts giving rise to unfair procedure in this case include the following:

(i) the disregard of the decision of the Rebuttal Panel on the evaluation of the performance;

(ii) the absence of a decision by management following the communication of the report of the Panel on Discrimination and Other Grievances since 30 June 2009; and

(iii) the delay to take the appropriate action in the light of those recommendations.

13.2 The Applicant has stated in his oral submissions in the course of the hearing that the non-renewal of his employment will impact adversely on his professional integrity, his career prospects, and on his health. On the latter, he further mentioned that his state of health has been deteriorating from the consequences and the psychological stress deriving from the discrimination, harassment and victimization that he had suffered from the genesis of this case.

14. CONCLUSION

14.1 The balance of convenience test should generate a solution that will generally cause the least injustice to the parties. Having considered the facts and legal principles applicable the Tribunal concludes that the balance of convenience lies on the side of the Applicant. The Applicant will suffer more than the Respondent if this application is not granted. The Applicant will not have a paid appointment and will suffer psychological stress that will compound his state of health.

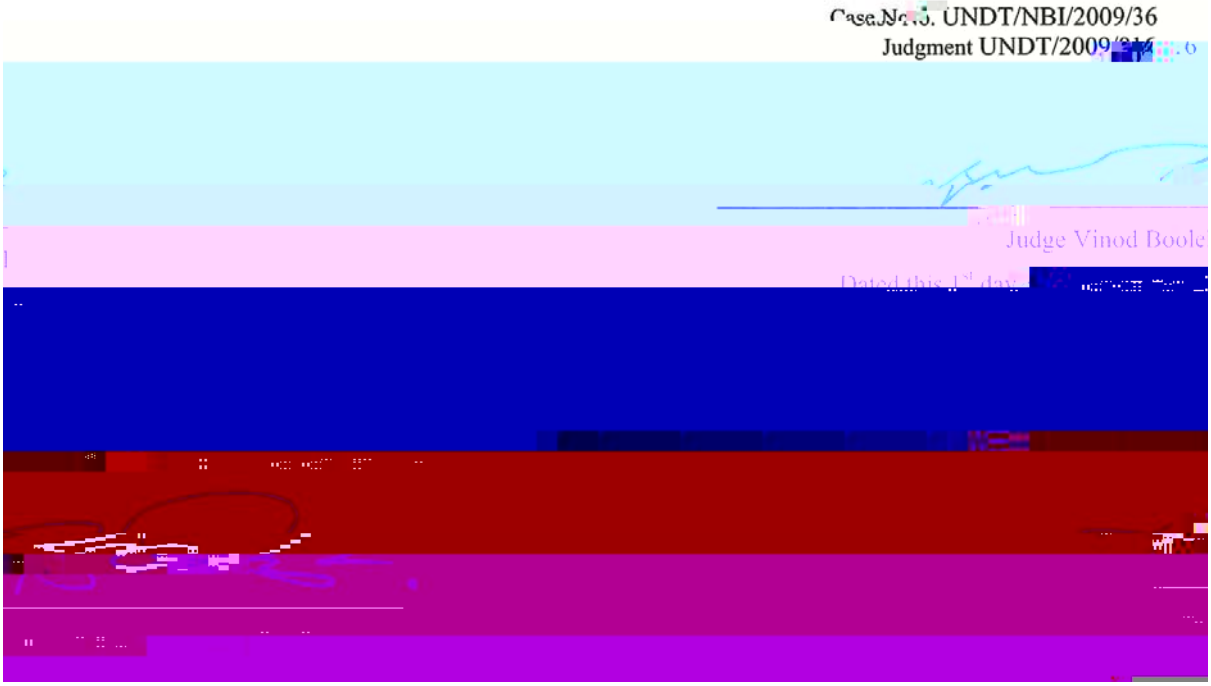
15. ORDER

15.1 Having considered the facts presented in the documents and arguments submitted by both parties to the Tribunal and having regard also to the fact that management evaluation is still pending on the contested decision and after hearing all the clarifications, explanations and submissions of the Applicant during the hearing, the Tribunal, pursuant to article 13.1 of the Rules of Procedure of the United Nations Dispute Tribunal, orders the suspension of the Respondent's decision not to renew the employment at any time from the date of the present Order pending the final determination of the substantive appeal of the Applicant.

15.2 In addition Article 14.1 of the Rules of Procedure empowers the Tribunal to make an interim measure to provide temporary relief to the parties which may include a suspension of the implementation of the administrative decision. This suspension is not linked to a management evaluation as under Article 13 of the Rules of Procedure. However the Tribunal cannot order a suspension of action in cases of appointment, promotion or termination. Terms like *termination*, *non-extension* or *non renewal* may appear in the documents and the facts submitted to the Tribunal. This by itself does not and cannot bind the Tribunal in its sovereign powers to evaluate facts and draw the appropriate legal and factual consequences. After perusing the documents and considering the facts, the Tribunal concludes that the situation gives rise to a non renewal of a contract and not to mere termination of a contract. [6] Therefore in the exercise of its powers under Article 14.1 of the Rules of Procedure, the Tribunal orders temporary relief as follows:

Respondent is ordered to pay and shall pay to the Applicant half his salary from the date of this Order until the final determination of the case.

[6] See Goddard v The Secretary General of the United Nations, Case No. 1184, Judgment No. 1132, 30 September 2003.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