

UNDT/2011/126, Villamorán

UNAT Held or UNDT Pronouncements

The Tribunal therefore found that the Applicant failed to satisfy the overall test for a suspension of action with respect to that decision. With respect to the decision to require her to take a break in service prior to her placement on a temporary appointment, the Tribunal found that the three requirements of art. 2.2 of the Tribunal's Statute were satisfied. The Tribunal found that, for staff on fixed-term appointments who are being reappointed under temporary appointments following the expiration of their fixed-term appointments, there is no requirement, in law, to take a break in service—be it 1 day or 31 days—prior to the temporary appointment. The Tribunal ordered that the decision to require the Applicant to take a break in service after the expiration of her fixed-term contract and prior to a temporary appointment be suspended during the pendency of the management evaluation.

Decision Contested or Judgment/Order Appealed

The Applicant filed an application for suspension of action with regard to the decisions to place her on a temporary appointment after the expiration of her fixed-term contract and to require her to take a break in service of 31 days prior to her placement on temporary appointment. With respect to the decision to place the Applicant on a temporary appointment following the expiration of her fixed-term contract, the Tribunal found that the Applicant failed to meet the test of particular urgency with respect to this part of her application.

Legal Principle(s)

Particular urgency: The requirement of particular urgency will not be satisfied if the urgency is caused by the applicant. Prima facie unlawfulness: For the prima facie unlawfulness test to be satisfied, it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper

considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith.

Irreparable damage: It is generally accepted that mere financial loss is not enough to satisfy the requirement of irreparable damage. The Dispute Tribunal's ability to remedy a loss is not absolute and, if the only way for the Tribunal to ensure that certain rights are truly respected is to grant interim relief, then the requirement of irreparable damage will be satisfied. The Tribunal's determination in this respect, of course, will depend on the particular circumstances of each case.

Legal hierarchy: At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

Requirements for promulgation of administrative issuances: Due to the importance of administrative issuances, the Administration must follow specific steps when promulgating them (see secs. 5–6 of ST/SGB/2009/4).

Legislation by means other than properly promulgated administrative issuances: Administrative issuances regulate matters of general application and directly concern the rights and obligations of staff and the Organization. Decisions of general application that affect contractual rights must be issued through properly promulgated administrative issuances (sec. 1.2 of ST/SGB/2009/4).

Breaks in service: ST/AI/2010/4 provides that breaks in service exist with respect to consecutive temporary appointments totaling up to 364 days or, in exceptional cases, up to 729 days. However, it appears that, in law, there is no requirement for staff members on fixed-term contracts who are being placed on temporary appointments to take a break in service. The presence in ST/AI/2010/4 of the break in service requirement for consecutive temporary appointments demonstrates that breaks in service constitute part of the overall contractual scheme and, in the language of sec. 1.2 of ST/AI/2009/4, are a matter "of general application" and "may only be established by duly promulgated Secretary-General's bulletins and administrative instructions". Because breaks in service required in connection with temporary appointments were specifically introduced by an administrative instruction, the absence of any legal requirement in any properly promulgated administrative issuance for a break in service between a fixed-term contract and a temporary appointment means that there is no such legal requirement. Accordingly, it cannot be introduced by a memorandum issued by the ASG/OHRM, particularly considering that it would have the effect of unilaterally

varying the terms of employment of affected staff. Delegation of authority: There are significant doubts with respect to whether the ASG/OHRM has the delegated authority to impose breaks in service following a two-year fixed-term appointment and prior to a temporary appointment. The memorandum of the ASG/OHRM, introducing this requirement, purports, in effect, to amend the existing administrative issuances by adding some new additional requirements concerning breaks in service preceding temporary appointments. However, Secretary-General's bulletins and administrative instructions are promulgated by the Secretary-General and the Under-Secretary-General for Management, respectively, pursuant to secs. 3.3 and 4.2 of ST/SGB/2009/4, and cannot be amended by instruments of lesser legal authority. Proscription against exceptions to staff rules and other administrative issuances: The right to request and to be properly considered for an exception is a contractual right of every staff member and it cannot be unilaterally taken away. Under staff rule 12.3(b), any request for an exception to the Staff Rules—and, by extension, to administrative issuances of lesser authority—must be properly considered in order to determine whether the three parts of the test established by staff rule 12.3(b) are satisfied. Failure to do so would result in a violation of contractual rights of the staff member requesting the exception. Outcome: The Tribunal ordered suspension, during the pendency of the management evaluation, of the implementation of the decision to require the Applicant to take a mandatory break in service after the expiration of her fixed-term contract and prior to any temporary appointment.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Villamorán

Entity

UN Secretariat

Case Number(s)

UNDT/NY/2011/056

Tribunal

UNDT

Registry

New York

Date of Judgement

12 Jul 2011

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Appointment (type)

Fixed-term appointment

Suspension of action / interim measures

Applicable Law

Administrative Instructions

- ST/AI/2010/3
- ST/AI/2010/4

GA Resolutions

- A/RES/63/250

Secretary-General's bulletins

- ST/SGB/2009/4

Staff Rules

- Rule 12.3(b)
- Rule 4.12
- Rule 4.13

UNDT RoP

- Article 13
- Article 19
- Article 36

UNDT Statute

- Article 2.2
- Article 7.2

Related Judgments and Orders

UNDT/2009/004

UNDT/2009/025

UNDT/2009/030

UNDT/2009/071

UNDT/2009/075

UNDT/2009/092

UNDT/2009/096

UNDT/2010/042

UNDT/2010/196

UNDT/2011/040

UNDT/2011/110

2010-UNAT-037

2011-UNAT-109