UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/084
Judgment No.: UNDT/2011/189
Date: 4 November 2011
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

GARCIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant has filed an application for suspension of action, pending the outcome of management evaluation, of the implementation of the decision to impose on her a 31-day period of ineligibility for re-employment on a temporary appointment after the expiration of her fixed-term appointment.

2. The Applicant's contract expired on 31 October 2011. She submits that she was made aware of the contested decision on 1 November 2011. On the same day, she filed her request for management evaluation and the present application for suspension of action.

3. The application was transmitted to the Respondent on 1 November 2011. The Respondent was required by the Tribunal to file its reply by 5 p.m., 3 November 2011. The Tribunal also issued Order No. 260 (NY/2011), requiring the Applicant to provide additional information regarding the author of the contested decision and a copy of the document, if any, by which the Applicant was notified of it. The Respondent was ordered to advise the Tribunal of the date and method of publication of ST/AI/2010/4/Rev.1 (Revised administrative instruction on temporary vacancies), on which the contested decision is based. The Applicant subsequently sought and was granted leave to submit a brief response to the Respondent's reply. Both parties duly complied with the Tribunal's orders.

Background

4. The Applicant joined the Organization on 2 July 2003 and was a staff member of the Department of Public Information. Her latest fixed-term contract expired on 31 October 2011.

5. On 12 July 2011, the Dispute Tribunal issued *Villamoran* UNDT/2011/126, finding, *inter alia*, that, in the absence of a properly promulgated administrative issuance, "for staff on fixed-term appointments who are being re-appointed 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".

6. Following *Villamoran*, the Administration permitted the extension of staff on fixed-term appointments until 31 October 2011 to allow for preparation and promulgation of a revised administrative instruction on temporary appointments that would include a provision requiring staff on fixed-term appointments to take a break in service prior to their re-appointment on temporary contracts.

7. On 26 October 2011, the Under-Secretary-General for Management promulgated ST/AI/2010/4/Rev.1 (Revised administrative instruction on administration of temporary appointments). Section 5.2 of the revised instruction altered the eligibility of staff members on fixed-term contracts for re-employment on a temporary appointment by introducing the following requirement:

> Upon separation from service, including, but not limited to, expiration or termination of, or resignation from, a fixed-term, continuing or permanent appointment, a former staff member will be ineligible for re-employment on the basis of a temporary appointment for a period of 31 days following the separation.

8. The English version of the revised instruction was placed on the United Nations Official Document System ("ODS"), iSeek (UN's intranet portal) and the online Human Resources Handbook on 28 October 2011. The French version of the revised instruction was placed on ODS on 31 October 2011, and, on 1 November 2011, it was placed on iSeek and the online Human Resources Handbook. The Respondent submits that the draft of the revised instruction was circulated to staff representatives on 14 July 2011, and that some of them provided their comments.

9. On 31 October 2011, the Dispute Tribunal issued *Parekh* UNDT/2011/184, *Helminger* UNDT/2011/185 and *Buckley* UNDT/2011/186, ordering the suspension of action of the contested decisions to impose on the three applicants a break in

service of 31 days between their fixed-term appointments and subsequent temporary appointments.

10. On 1 November 2011, the Applicant's former supervisor informed her that OHRM had confirmed that, from the expiration of her fixed-term appointment on 31 October 2011, she would be required to take a 31-day break in service before re-appointment on a subsequent temporary appointment. The Applicant was further informed that the Tribunal's judgments in *Parekh*, *Helminger* and *Buckley* applied only to those staff members who applied to the Tribunal for a suspension of action.

11. On 1 November 2011, the Applicant filed a request for management evaluation of the contested decision and the present application for suspension of action.

Applicant's submissions

12. The Applicant's principal contentions may be summarized as follows:

Prima facie *unlawfulness*

a. The decision *is prima facie* unlawful for reasons stated in *Parekh*, *Helminger* and *Buckley*. The rationale for the break in service under sec. 5.2 of the revised administrative instruction does not comport with principles of fairness and due process as it appears to have been included for the purpose of depriving staff members of certain entitlements that would otherwise flow from continuous service;

b. Although this Tribunal is not empowered to amend the administrative instruction, it is empowered to determine whether the application of the powers enshrined in it violates the rights of a particular staff member and in this determination this Tribunal is empowered to look at the rationale of the powers relied upon;

c. The requirement of a break in service under sec. 5.2 does not appear to implement a particular financial or staff regulation or rule or Secretary-General's bulletin and is therefore improper and *prima facie* unlawful;

d. The promulgation of an administrative issuance has two critical components: availability and notification. In the absence of proper notification the Applicant was not aware of the existence of ST/AI/2010/4/Rev.1 until 1 November 2011 and unable to take steps to cater for alternative employment for the month of November;

Urgency

e. The Applicant was informed of the contested decision on 1 November 2011, one day after her fixed-term appointment expired. The Applicant concedes that the contested decision has been implemented. However, the implementation of the contested decision is of a continuous nature and it can be suspended at all times to avoid further harm that cannot be repaired (*Amar* UNDT/2011/040). As ST/AI/2010/4/Rev.1 was not published until 28 October 2011, the Applicant was never in a position to file a request for suspension of action prior to the commencement of the implementation of the contested decision;

Irreparable damage

f. The implementation of the contested decision will cause the Applicant harm of an irreparable nature as it would lead to a sudden loss of employment and affect her pension participation, medical insurance and other entitlements, and cause emotional distress.

Respondent's submissions

13. The Respondent's principal contentions may be summarized as follows:

Receivability

a. A period of separation from, or break in, service only applies to those who are to be re-appointed on temporary appointments after the expiry of their fixed-term appointment. No temporary vacancy announcement has been advertised for the Applicant's position nor has she applied or been selected for a temporary appointment. The possibility of her obtaining a temporary appointment is too remote to even consider the issue of a break in service. Therefore, the Applicant seeks the suspension of a decision that does not exist. In fact, she has not been required to take a break in service, her contract simply expired on 31 October 2011;

b. The contested decision has been implemented and therefore cannot be suspended. The Respondent submits that the Applicant's submission that there is a continuing implementation of the contested decision is incorrect; the Applicant seeks to circumvent the plain requirements of the Statute;

Prima facie *unlawfulness*

c. It is the case for the Respondent that the revised administrative instruction provides procedures that give effect to the new system of appointments as outlined in staff rules 4.12–4.18. The Organization has broad discretion in developing policy in its administrative issuances to give effect to staff rules. The requirement to take a 31-day break in service between a fixed-term appointment and temporary appointment is contained in the revised administrative instruction, which was properly promulgated, published, and made available to staff;

d. The rationale for the 31-day separation requirement is lawful. Fixed-term appointments for one year or longer can only be given to staff members following a competitive selection exercise. All appointments of less than one year must be temporary appointments, made in accordance with ST/AI/2010/4/Rev.1. The separation cannot be artificial in nature. While the Tribunal may question why the separation period of 31 days has been chosen, this must be within the discretion of the Administration to decide;

e. The Applicant knew for a period of two years that her contract was to expire. She knew that she would have to separate from service. Furthermore, this is not the first time that the Applicant has had to take a period of separation from service prior to reappointment. She has previously taken such periods of separation prior to reappointment since she commenced employment with the United Nations;

Urgency

f. The Respondent submits that the urgency of this matter has been created by the Applicant's failure to pursue her claim in an expeditious manner. The Applicant concedes that the impugned decision has been implemented, yet submits that its implementation is of a "continuous nature". The contested decision was implemented on 31 October 2011. This decision may have a "continuing effect" of non-employment but this is distinct and separate from implementation which occurred on a specific date—31 October 2011. Moreover, the Applicant was informed well in advance of 31 October 2011 that her contract would expire on that date. Yet, the Applicant waited until the day after her contract expired to file the present application. Thus, the application does not satisfy the requirement of urgency;

Irreparable damage

g. The Applicant has not met the burden of showing how the implementation of the decision not to renew her would cause her irreparable harm. A separation of 31 days would not deprive the Applicant of any entitlements that she would otherwise have received had her service been continuous, nor has the Applicant provided any details of such entitlements. The Applicant did not submit any evidence in support of her submission that she would suffer emotional distress. Further, each of the entitlements referred to by the Applicant, as well as any emotional distress, are capable of being compensated if she succeeds in an application on the merits.

Consideration

14. Article 2.2 of the Statute of the Dispute Tribunal provides that the Tribunal may suspend the implementation of a contested administrative decision action during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

Receivability

15. The Applicant is not contesting the expiration of her contract and her separation from service on 31 October 2011. Instead, she contests the decision to impose on her a 31-day period of ineligibility for re-employment on a temporary appointment after the expiration of her current appointment on the grounds that it is in violation of her contractual rights under her fixed-term contract.

16. In *Villamoran*, *Parekh*, *Helminger*, and *Buckley*, which concerned the same subject matter, the Tribunal did not find the applications to be not receivable, and this Tribunal sees no reason to depart from those rulings.

17. The test for determining whether a decision can be suspended under art. 2.2 of the Statute includes two conditions, both of which must be satisfied:

a. the contested decision must affect the applicant's legal rights;

b. the relief ordered must have the effect of suspending the implementation of the decision.

18. The first question is whether the Applicant's legal rights were affected. Such decisions as non-selection for a post, transfer to another duty station, or non-renewal of a contract, once acted upon, are generally final upon implementation and are unable to be suspended under art. 2.2 of the Statute. The types of relief available in such matters may include rescission, specific performance, or compensation, at the conclusion of the substantive proceedings under art. 2.1 of the Statute.

19. However, there is a group of decisions that may have continuing effect on the applicant's legal rights and with respect to which suspension of action can be ordered even after action on them has been initiated. For instance, decisions to pay reduced salary (a recurring monthly decision), to discontinue the payment of special post allowance (*Jaen* Order No. 29 (NY/2011)), or to place a staff member on special leave without pay (see, e.g., *Calvani* UNDT/2009/092) are capable of being suspended after the starting date of implementation as long as the applicant can demonstrate that her or his actual legal rights continue to be affected.

20. The decision to impose a requirement of a 31-day period of ineligibility for re-appointment on a temporary contract belongs to this second group of decisions. The limitation contained in the revised administrative instruction, dated 26 October 2011 and published when the Applicant was still employed, affected the terms of the Applicant's fixed-term appointment, which expired on 31 October 2011.

b. Would the relief have the effect of suspending the implementation of the decision? It is strongly arguable that the continuing issue is not, as the Respondent submits, one of non-employment. Rather it is the Applicant's continuing inability to

be re-engaged on a temporary contract for 31 days from the expiration of her fixed-term contract. The ongoing implementation of the decision is capable of being suspended.

21. The Tribunal finds that it has jurisdiction pursuant to art. 2.2 of its Statute to consider the present application, that the Applicant has standing to bring it, and that this application is receivable.

Prima facie *unlawfulness*

22. For the *prima facie* unlawfulness test to be satisfied, it is enough for the 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 obligation to ensure that its decisions are proper and made in good faith (see para. 24, *Jaen* Order No. 29 (NY/2011), as relied upon in *Villamoran* at para. 28).

23. The application gives rise to three main issues with regard to the lawfulness of the implementation of the contested decision with respect to the Applicant.

First issue

24. The first issue is whether ST/AI/2010/4/Rev.1 was properly promulgated, published, and made available to the Applicant in compliance with the existing rules and administrative issuances. In light of the parties' submissions, as well as staff rules 4.12–4.18, the Tribunal does not find that this point raises a *prima facie* case of unlawfulness, although ultimately the question remains alive for substantive consideration should the Applicant proceed with a substantive application.

Second issue

25. The second issue was not raised by the Applicant in this case but is considered by the Tribunal to be relevant. It is whether the implementation of the contested

decision would have the prejudicial effect of unilaterally altering the Applicant's contract by introducing a new provision that is detrimental to her acquired rights.

26. The general principle of acquired rights has been incorporated into staff regulation 12.1, which states that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members". Former United Nations Administrative Tribunal Judgment No. 1253 (2005) included a concurring opinion by member Brigitte Stern, which provided a helpful analysis of the concept of acquired rights. It follows the approach taken by the World Bank Administrative Tribunal in its Decision No. 1, *de Merode et al.* (1981) in assessing whether a right is acquired by making the distinction between fundamental or essential and non-fundamental or non-essential elements of the conditions of employment.

27. It is recognised that while the distinction between these two categories must be respected, it is not an easy one to make. The concurring opinion in Judgment No. 1253 identified a number of indicators which, taken together, may be used to determine whether a right is essential and therefore acquired. These indicators include:

a. The nature of the right—is it an individual contractual right or one stemming from general statutory regulation?

b. Is the right one of principle or one of procedure? If the latter, there is no reason to immediately enforce it.

c. What is the importance of the change to the conditions of service in the staff member's decision to join the Organization?

d. Does the modification of the right entail extremely grave consequences for the staff member, more serious to her or him than mere prejudice to her or his financial interests?

28. The concurring opinion then stated that "the essential character should not be assessed solely in … [the abstract] and only from the point of view of the interested party, but should be evaluated in a comparative fashion, looking at it from the standpoint of the interests pursued by the new regulations" (emphasis omitted).

29. The Tribunal finds that the evaluation of whether the imposition of the 31-day break in service is a breach of the acquired rights of the staff member is an important and complex question requiring careful analysis of both the contractual provisions governing the Applicant's service and of the regulatory framework of the United Nations.

30. The answers to any of questions listed above are not at all clear. The rights claimed by the Applicant include, firstly, the right not to have any limitations on re-employment following the completion of the fixed-term appointment, and, secondly, the right to continuous pension participation, medical insurance and other entitlements that, according to the Applicant, would be interrupted as a result of the new limitation. The determination of these questions depends on evidence yet to be considered and more legal analysis than can be given on an urgent application such as this.

31. In particular, the Tribunal is troubled by the Respondent's submission that, although the Tribunal may question why the separation period of 31 days has been chosen, this must be within the discretion of the Administration to decide. This response obscures the serious question of the reasons why the change was made. The exercise of the Administration's discretion is not unfettered. In its reply to the application, the Respondent has not elaborated on its reasons for the amendment to the administrative instruction beyond a reference to General Assembly resolution 63/250, adopted on 24 December 2008. The Tribunal is unable to conclusively determine at this stage whether the unilateral change to the Applicant's contract and the reasons for it were lawful, including whether the change was made in good faith and in the interests of the Organization and its staff members.

Third issue

32. The third issue is whether the notice given to the Applicant of the imposition of the 31-day period of ineligibility for re-appointment was in violation of the principles of due process, good faith and fair dealing, and the Organization's obligation to "regularly inform its employees concerning the various rules and regulations" (see former United Nations Administrative Tribunal Judgment No. 1185, *Van Leeuwen* (2004), sec. III).

33. In *Parekh*, *Helminger* and *Buckley*, which also dealt with this issue in relation to the 31-day break in service, the Tribunal found that the change introduced by sec. 5.2 of the revised administrative instruction "was not a minor revision". In those cases, the Tribunal stated:

> To express it simply, in the absence of some emergency situation, the Organization must keep staff informed of changes in key legislation and with sufficient time for the staff to take steps to find alternative employment, accommodation, address their visa status, particularly where changes will affect so many staff and their families. Many of these staff members, as in the instant case, are staff whom the Organization wishes to keep in its employ. The Tribunal considers that the Applicant has raised not mere "fairly arguable" points as per *Jaen* and *Villamoran*, but strongly arguable points. The Tribunal concludes that the decision appears prima facie to be unlawful.

34. In *Villamoran*, the Tribunal also referred to the General Assembly resolution 63/250 (Human resources management), adopted on 24 December 2008, which stressed "the importance of a meaningful and constructive dialogue between staff and management" and the need for transparency and "fair and equitable implementation of the new contractual arrangements" in line with the effective functioning of the new system of administration of justice.

35. In the present case the Tribunal accepts that the Applicant must have known of the expiry of her fixed-term contract on 31 October 2011. Up until the publication of the revised administrative instruction on 28 October 2011 she was not precluded from continuing her employment with the United Nations without interruption and,

arguably, from maintaining her continuous rights to certain benefits, albeit on a temporary basis. It is arguable that notice of two days of possibly significant changes to the Applicant's situation is not fair and reasonable. The Tribunal finds that on the question of notice to the Applicant there is a fairly arguable case that the contested decision, as it is applied to her, may be unlawful.

36. The Tribunal finds that the test of *prima facie* unlawfulness is satisfied on two of the three issues raised by the Applicant, noting, however, that all of these issues will require further substantive examination by the Tribunal in the event the Applicant files an application under art. 2.1 of its Statute.

Urgency

37. This application is clearly of an urgent nature. The Applicant was informed on 1 November 2011 of changes which would take place, in her case, on 31 October 2011, and which have the effect of precluding her employment on a temporary appointment by the United Nations during the 31-day period (see also sec. 3.2 of ST/AI/2010/4/Rev.1). The Applicant acted diligently in filing her application on 1 November 2011. The alleged prejudicial effects of the implementation of the decision continue on a daily basis. The Tribunal finds that the requirement of particular urgency is satisfied.

Irreparable damage

38. It is generally accepted that mere financial loss is not enough to satisfy the test of irreparable damage (*Fradin de Bellabre* UNDT/2009/004, *Utkina* UNDT/2009/096). The Tribunal has found in a number of cases that harm to professional reputation and career prospects, or harm to health, or sudden loss of employment may constitute irreparable damage (see, e.g., *Corcoran* UNDT/2009/071, *Calvani* UNDT/2009/092).

39. In *Villamoran*, *Parekh*, *Helminger*, and *Buckley* the Tribunal found that a mandatory period of one month's unemployment in the circumstances of those cases

would cause the Applicant irreparable harm. In the present case the Tribunal accepts the Applicant's assessment of the potential irreparable harm the implementation of the contested decision would have on her rights and entitlements.

Conclusion

40. The Tribunal orders suspension, during the pendency of the management evaluation, of the implementation of the decision to impose on the Applicant a 31-day period of ineligibility for re-employment on a temporary appointment after the expiration of her current fixed-term appointment.

(*Signed*)

Judge Coral Shaw

Dated this 4th day of November 2011

Entered in the Register on this 4th day of November 2011

(*Signed*)

Hafida Lahiouel, Registrar, New York