UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/080
Judgment No.: UNDT/2011/198
Date: 21 November 2011
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

CHATTOPADHYAY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Myriam Foucher, UNOG
Rebekka Wiemann, UNOG

Introduction

1. By an application filed on 14 November 2011, the Applicant requests the Tribunal to suspend, during the pendency of the management evaluation, the decision to impose on him a 31-day period of ineligibility for re-employment on a temporary appointment after the expiration of his fixed-term appointment on 30 November 2011, as per section 5.2 of ST/AI/2010/4/Rev.1 (revised administrative instruction on the administration of temporary appointments).

Facts

2. The Applicant joined the Office of the High Commissioner for Human Rights ("OHCHR") in Geneva in August 2005, initially on a short-term appointment subsequently converted to fixed-term.

3. Under the transitional measures implemented on 1 July 2009, staff members who, like the Applicant, held fixed-term appointments not endorsed by a central review body with more than one year of cumulative service were allowed to be given a new fixed-term appointment at the expiration of their appointment after 1 July 2009 for a maximum period of two years, during which they could apply and be selected through the staff selection system. Apparently, the Applicant did so without success. During those two years, he was given a series of "transitional" fixed-term appointments, the duration of which varied from one to three months.

4. On 5 July 2011, the Applicant accepted a transitional fixed-term appointment for a period of two months and three days, until 3 September 2011, in the OHCHR Special Procedures Branch ("SPB").

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 "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 transitional 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. By a memorandum dated 24 August 2011, the Officer-in-Charge of SPB requested the Chief of the OHCHR Programme Support and Management Services to re-appoint the Applicant on a temporary contract, until 31 October 2011, at the expiration of his fixed-term contract on 3 September.

8. After a first application for suspension of action (see *Chattopadhyay* UNDT/2011/153), on 29 August 2011, the Applicant's transitional fixed-term appointment was extended until 30 September 2011.

9. By memorandum dated 21 September 2011, the Applicant's branch, SPB, requested his recruitment on a temporary appointment until 31 December 2011 at the expiration of his fixed-term appointment on 30 September. It was noted that the Applicant was working on several key issues "extremely important for the branch over the next three months". Instead, the Applicant's transitional fixed-term appointment was extended for an additional month only, until 31 October 2011.

10. On 26 October 2011, the Under-Secretary-General for Management promulgated ST/AI/2010/4/Rev.1 (revised administrative instruction on the 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.

11. The English version of the revised instruction was placed on the United Nations Official Document System ("ODS"), iSeek (United Nations's intranet portal), and the online Human Resources Handbook on Friday, 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.

12. On Saturday, 29 October 2011, the Applicant, whose fixed-term contract was expiring on 31 October, was informed of the issuance of the revised administrative instruction.

13. On Monday, 31 October, he filed a second application for suspension of action on the decision requiring him to take a 31-day break in service after the expiration of his appointment on 31 October and prior to his re-appointment on a temporary contract.

14. Later that day, by email of 31 October 2011, HRMS/UNOG informed the Applicant that his transitional fixed-term appointment had been exceptionally extended for one month, until 30 November 2011, after which he would be separated. It further drew the Applicant's attention to section 5.2 of ST/AI/2010/4/Rev. 1, noting that "[t]his section may be applicable to your situation if you are considered for a temporary appointment after separation from your current appointment".

15. In view of the above-mentioned decision, the Applicant withdrew his second application for suspension of action. The Tribunal took note of the withdrawal by Order No. 187 (GVA/2011).

16. 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 the contested decisions to impose breaks in service of 31 days between the applicants' fixed-term appointments and subsequent temporary appointments.

17. On 4 November 2011, this Tribunal issued *Omer* UNDT/2011/188 and *Garcia* UNDT/2011/189, which presented identical circumstances, that is, an imposed 31-day period of ineligibility for a temporary appointment upon the expiration of the applicants' fixed-term appointments on 31 October 2011. On 15 November 2011, the Tribunal further issued *Neskhorozana* UNDT/2011/196 on the same issue.

18. On 11 November 2011, the Applicant requested management evaluation of the HRMS/UNOG decision communicated to him by email of 31 October 2011 to impose on him a 31-day period of ineligibility for re-employment on a temporary appointment after the expiration of his fixed-term appointment on 30 November 2011.

19. On 14 November 2011, he filed the instant and third application for suspension of action with the Tribunal.

20. The Tribunal transmitted the application to the Respondent on 15 November, requesting him to file a reply by the end of the calendar day on 17 November.

21. On 17 November 2011, the Respondent filed his reply and on 21 November, the Applicant filed an additional submission.

Parties' contentions

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

Receivability

a. The application is receivable for reasons stated in *Omer, Garcia* and *Neskorozhana*. Furthermore, mere days prior to the exceptional extension of his transitional fixed-term contract for one month on 31 October, OHCHR informed the Applicant that "UNOG will be taking the necessary action" to implement section 5.2 of ST/AI/2010/4/Rev.1;

Prima facie *unlawfulness*

b. The decision is *prima facie* unlawful for reasons stated in *Parekh*, *Helminger*, *Buckley*, *Omer*, and *Garcia*. The rationale for a break in service as required by section 5.2 of ST/AI/2010/4/Rev.1 does not comport with principles of fairness and due process and has the effect of depriving staff members of certain entitlements that would otherwise flow from continuous service;

c. The limitation contained in ST/AI/2010/4/Rev.1 affects the terms and conditions of the Applicant's fixed-term appointment, which expires on 30 November 2011;

d. The 31-day break in service requirement unilaterally and unfairly alters the Applicant's contractual rights and is detrimental to his acquired rights. Reference is made to UNDT Judgments *Omer* and *Garcia*. The Applicant has certain acquired rights as a long serving staff member, including the right not to have his re-employment rights affected, and continuous pension participation, medical insurance and other entitlements. The impact of ST/AI/2010/4/Rev.1 violates the letter and spirit of 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";

e. The Applicant has the right not to be subjected to additional conditions of employment which have not been properly promulgated, sufficiently justified or shown to be in good faith and in the Organization's best interest. In *Villamoran*, the Tribunal found no legal basis to require staff on fixed-term appointment who are being re-appointed under a temporary appointment to take a break in service prior to their re-appointment. In *Buckley* the Tribunal expressed its concern that a provision which is likely to have a seriously adverse effect on many staff members appears to have been ushered in with unseemly haste;

f. The 31-day break in service requirement is based on an ST/AI that was promulgated without complying with mandatory procedures for consultative process with respect to proposals for administrative issuances as set out in ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), in particular, appropriate staff consultation. The consultation process appears to have been ushered and not undertaken in good faith. The conclusion about the decision appears to have already been reached by management on 19 September 2011 as shown by an email from the Assistant Secretary-General for Human Resources Management to the Vice-President of the Staff Management Coordination Committee;

g. ST/AI/2010/4/Rev.1 also has a discriminatory impact in that it creates a difference in treatment for those similarly situated without providing any rationale for the 31-day break in service, instead of a one or three-day break in service.

Urgency

h. The decision will be implemented on 30 November 2011 when the Applicant's contract will expire and he would be required to comply with a 31-day break in service. The impact of the contested decision is of a continuing nature;

Irreparable damage

i. The 31-day break in service will cause the Applicant irreparable harm as held by the Tribunal in *Villamoran, Parekh, Helminger, Garcia* and *Omer*;

j. Sudden loss of employment would cause the Applicant extreme emotional distress and harm to his health and career prospects; this would in turn also affect the general welfare of his dependent son;

k. His prospect for continued employment and entitlements will be adversely affected by the implementation of the contested decision.

Entitlements he might have accrued during a previous period of service will not be taken into account. Other entitlements such as pension benefits, medical insurance and leave entitlements will depend on the type and length of the re-appointment. Pension participation and the interruption of medical insurance for the Applicant and his son are of particular concern;

l. Since the Applicant is internationally recruited, he risks loosing his *carte de légitimation* as his re-appointment following a 31-day break in service cannot be guaranteed;

m. The break in service can dramatically affect the Applicant's chances of remaining employed for the next 364 days, which would have provided him additional opportunities to be selected for a regular post.

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

Receivability

a. The application is not receivable because the contested decision, namely the decision to impose a 31-day break in service, does not exist. Merely quoting the provision of an administration instruction, as done in the email of 31 October 2011 by HRMS/UNOG, is not the same as actually implementing this provision. This was made clear in the email which stated that the provision "*may* be applicable to [the Applicant's] situation";

b. The Administration would only be in a position to decide whether section 5.2 of ST/AI/2010/4/Rev.1 is applicable to the Applicant if he had been selected for a temporary post, which is clearly not the case. The Applicant does not even submit which temporary post he could potentially be selected for. The wish of the responsible manager to keep the same functions as those currently fulfilled by the Applicant for the next budget year cannot be interpreted as an offer of temporary appointment. The Applicant is not the only one who could fulfil the functions needed by the

branch. He cannot reasonably assume what the outcome of the selection process will be;

c. This case is to be distinguished from *Helminger* and *Parekh*, where it was clear that the applicants were to be employed on a temporary appointment;

d. Only the implementation of an existing decision can be suspended. The line of reasoning in *Neskorozhana*, if upheld, would lead to legal uncertainty to the extent that it allows a staff member to contest a decision before it is actually taken on the ground that staff members would not have the opportunity to contest the implementation of a break in service in any circumstances;

e. The Applicant would be in a position to contest the imposition of a break in service if, for example, he applies and is selected for a temporary post but does not receive an offer before the 31-day period has elapsed in application of section 5.2 of ST/AI/2010/4/Rev.1; or if he is not selected and has concerns that the said section 5.2 might have been the reason for his non-selection;

f. The Applicant does not have an offer for a temporary post. What the Applicant is in fact seeking is a subsequent appointment, in particular in the form of an extension of his current contract;

Prima facie *unlawfulness*

g. If the Tribunal "chooses to construe the application as in fact contesting the non-extension of his non-regular fixed-term contract", it must be recalled that fixed-term appointments carry no expectancy of renewal or conversion to any other type of appointment. In this case, the decision not to extend the Applicant's fixed-term appointment was not improperly motivated. It is based on the fact that he was never recruited through a competitive selection process, that his selection was never approved by a central review body, and that his transitional fixed-term

appointment was meant to come to an end after a maximum period of two years;

h. The Applicant's due process rights were not violated. He was given a one-month notice before the expiration of his current appointment, which gave him ample time to make the necessary arrangements before the end of his appointment. Furthermore, he had known for more than two years that his fixed-term contract was transitional in nature;

i. The Applicant does not loose any acquired rights through the decision not to extend his contract. As is the case with any non-extension case, he will either be able to use his accrued rights (for example, he will be able to receive a pension based on the contributions he has made during the time of his employment), or entitlements will be paid back to him (for example, days of annual leave he has not yet taken).

24. The Respondent made no submissions on the issues of urgency and irreparable damage.

Consideration

25. The Applicant contests the decision to impose on him a 31-day period of ineligibility for re-employment on a temporary appointment after the expiration of his fixed-term appointment on 30 November 2011, as per section 5.2 of ST/AI/2010/4/Rev.1, that is, from 1 to 31 December 2011.

Receivability

26. The Respondent claims that the application is not receivable because the decision to impose a 31-day break in service on the Applicant "does not exist". More specifically, it is the Respondent's case that the Administration would only be in a position to decide whether section 5.2 of ST/AI/2010/4/Rev.1 is applicable to the Applicant if he "had been selected for a temporary post, which is clearly not the case".

27. The Tribunal notes, however, that on 21 September 2011, the Applicant's branch requested his recruitment on a temporary appointment until 31 December 2011 at the expiration of his fixed-term appointment. Therefore, there may be no doubt that there is an opportunity for the Applicant to be employed until the end of the year.

28. In view of the foregoing, it is clear that the decision notified to the Applicant on 31 October 2011, no matter how vaguely it was formulated with regard to his 31-day ineligibility, constitutes an implicit refusal to re-appoint him on a temporary appointment after the expiration of his fixed-term appointment on 30 November. Since no other reason than section 5.2 of ST/AI/2010/4/Rev.1 is provided for the implicit refusal, the Tribunal must assume that the contested decision is based on the 31-day break in service requirement. Therefore, an administrative decision within the meaning of article 2.1 of the Statute has been taken.

29. Accordingly, the Tribunal considers that the application is receivable.

30. Pursuant to article 2.2 of its Statute, the Tribunal may order suspension of action, during the pendency of the management evaluation, on a contested decision where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

Prima facie *unlawfulness*

31. As regards *prima facie* unlawfulness, the Tribunal repeatedly held that this prerequisite does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see *Corcoran* UNDT/2009/071; *Corna* Order No. 90 (GVA/2010); *Berger* UNDT/2011/134).

32. The Respondent's main argument as to *prima facie* unlawfulness is based on the premise that the Applicant is in fact contesting the non-extension of his transitional fixed-term appointment. This is the object of a lengthy development in the Respondent's reply.

33. Contrary to the Respondent's view, however, it is clear from the instant application, but also from the two previous applications for suspension of action filed by the Applicant, that what he contests is nothing but the refusal to re-employ him on a temporary appointment immediately upon the expiration of his transitional fixed-term appointment.

34. This being said, the Tribunal is not convinced by the Applicant's arguments in support of his claim that the contested decision is *prima facie* unlawful.

35. First, he refers to the reasons stated by the Tribunal in *Parekh*, *Helminger* and *Buckley*. However, the circumstances were clearly different in those cases, where the applicants had been notified on 25 and 27 October of the decision to impose a 31-day break in service between the end of their fixed-term appointments *on 31 October 2011* and a new temporary appointment. At the time of the notification, ST/AI/2010/4/Rev.1, which is dated 26 October 2011, had either not yet been issued or at least there were serious and reasonable doubts as to whether it had been promulgated and published in accordance with the relevant provisions of ST/SGB/2009/4 (see for example *Parekh*, paras. 22-24). Furthermore, in those cases, the Tribunal was also concerned that at the time, the Organization had not kept its staff informed of changes in key legislation "with sufficient time for the staff to take steps to find alternative employment, accommodation [and] address their visa status" (see for example *Parekh*, para. 26). It is noteworthy that the Tribunal no longer relied on these arguments in subsequent judgments, namely *Omer*, *Garcia*, and *Neskorozhana*.

36. In the instant case, where the Applicant was notified on 31 October 2011 of the implementation of the contested decision with effect from 1 December 2011, the reasons stated in *Parekh*, *Helminger* and *Buckley* have lost their relevance. The Applicant cannot claim that ST/AI/2010/4/Rev.1 has not been duly brought to his attention, nor that he was not given sufficient time to make alternative arrangements.

37. Second, the Applicant argues that the 31-day break in service requirement is based on an administrative issuance that was promulgated without complying

with mandatory procedures for consultative process with respect to proposals for administrative issuances as set out in ST/SGB/2009/4.

38. Section 5.3 of ST/SGB/2009/4 provides that:

> [P]roposals for administrative issuances affecting questions of staff welfare, including conditions of work, general conditions of life and other human resources policies, shall be sent to the Office of Human Resources Management, which will ensure consultation with the appropriate staff representative bodies in accordance with staff rules 8.1 and 8.2.

39. While the Respondent remained surprisingly silent on this issue, it appears from the documents submitted by the Applicant that consultations did take place with the appropriate staff representative bodies, albeit by email. No rule prescribing the manner in which such consultations should take place or prohibiting the use of email to conduct such consultations could be found. Furthermore, "consultation with the appropriate staff representative bodies" does not mean that for a proposal to enter into force, it must necessarily meet the agreement of the staff representatives.

40. Finally, the Applicant contends that the contested decision is detrimental to his acquired rights. In this respect, the Respondent's submission on the Applicant's "accrued rights" has no relevance.

41. As noted in *Omer*, *Garcia*, and *Neskorozhana*, 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, with the former only giving rise to acquired rights. The concurring opinion in Judgment No. 1253 stated in particular that "the essential character of a condition of service will … depend on *the importance of this condition of service in the decision to join the Organization*" and that "a condition is also essential if its modification entails *extremely grave consequences* for the staff member, more

serious than mere prejudice to his or her financial interests" (emphasis in original).

42. The case law of the International Labour Organization Administrative Tribunal also provides helpful guidance on the concept of acquired rights. In its Judgment No. 2682 (2008), for example, ILOAT stated:

> [A]n acquired right is breached only when … an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on.

43. The right claimed by the Applicant in the present case is the right to be re-employed on a temporary appointment immediately upon the expiration of his transitional fixed-term appointment.

44. The Tribunal considers that the Applicant has failed to present a fairly arguable case that the above-mentioned right constitutes a fundamental term of employment in consideration of which he accepted his initial transitional fixed-term appointment in 2009, or which subsequently induced him to accept, for over two years, the renewal every one to three months of his transitional fixed-term appointment.

45. While this issue, like the previous one, will require further substantive examination by the Tribunal in the event the Applicant files an application under article 2.1 of its Statute, the Tribunal notes that some elements are detrimental to the Applicant's theory that his is an acquired right. First, staff rule 4.17 on re-employment clearly provides that conditions for re-employment are "established by the Secretary-General". Second, there is also the fact that the Applicant is and has been for over two years the holder of a transitional fixed-term appointment, that is, one granted as an *exception* to the Staff Rules. It is difficult to see how an acquired right could have been derived from a situation that was clearly in derogation of the existing Staff Rules and meant to be limited in time.

46. Overall, the Tribunal finds that it was not presented with sufficient evidence that would raise serious and reasonable doubts as to the lawfulness of the contested decision. Therefore, it cannot but conclude that the test of *prima facie* unlawfulness is not satisfied.

Irreparable damage

47. In view of the Tribunal's finding as to *prima facie* unlawfulness, it is not necessary to examine whether the other conditions for suspension of action are met. However, in order to give a full view of the Tribunal's consideration of this case, it is helpful to add remarks on the issue of irreparable damage.

48. Although the Respondent remained unwisely silent on such an important issue, which could be interpreted to mean that he accepts the Applicant's arguments, the Tribunal must point out that it is not persuaded that the test of irreparable damage is met.

49. It is generally accepted that mere financial loss is not enough to satisfy the test of irreparable damage (see for example *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 for example *Corcoran* UNDT/2009/071, *Calvani* UNDT/2009/092, *Osmanli* UNDT/2011/190). It has also found that the particular factual circumstances of each case have to be taken into account (see *Villamoran*).

50. In *Villamoran*, *Parekh*, *Helminger*, *Buckley*, *Omer*, *Garcia* and *Neskorozhana*, the Tribunal found that a mandatory period of one month's unemployment in the circumstances of those cases would cause the applicants irreparable harm. In particular, in those cases, the applicants were informed either shortly before or even after the expiration of their fixed-term appointments of the decision to impose on them a 31-day period of ineligibility for re-employment on a temporary appointment.

51. The circumstances of the present case are however different. The Applicant was informed a full month before the expiration of his fixed-term appointment of the contested decision. He was thus given reasonable time to make alternative arrangements. Considering the long history of the Applicant's contractual situation, certainly the loss of employment will not be "sudden".

52. Furthermore, it is pure speculation to state that the implementation of the contested decision to impose a 31-day break in service could affect the Applicant's health, career prospects and residence permit in Switzerland. As to the loss of entitlements, there is nothing that the Tribunal would not be able to compensate financially should the Applicant file an application under article 2.1 of its Statute.

Conclusion

53. In view of the foregoing, the application for suspension of action is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 21st day of November 2011

Entered in the Register on this 21st day of November 2011

(*Signed*)

Anne Coutin, Officer-in-Charge, Geneva Registry