



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

BUCKLEY

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 contests the decision of 25 October 2011 to impose a 31-day break in service between the end of his fixed-term appointment on 31 October 2011 and a new temporary appointment.

Procedural background

2. On 28 October 2011, the Applicant requested a management evaluation of the decision.

3. On 28 October 2011, the Applicant filed an application for suspension of action of the implementation of the decision with the New York Registry of the United Nations Dispute Tribunal.

4. On 28 October 2011, the application was transmitted to the Respondent by the Tribunal.

5. On 28 October 2011, by Order No. 255 (NY/2011), the Respondent was ordered “to produce evidence of the legal basis upon which the requirement of a break in service of 31 days has been imposed, failing which a judgment will be given”.

6. On 28 October 2011, in response to Order No. 255 (NY/2011), the Respondent filed and served a copy of ST/AI/2010/4/Rev.1 (Administration of temporary appointments), dated 26 October 2011.

7. On 28 October 2011, by Order No. 256 (NY/2011), the Respondent was ordered “to file and serve a brief submission explaining when and how ST/AI/2010/4/Rev.1 was published”. By the same Order, the Applicant was ordered to file and serve brief comments to this revised administrative instruction and the Respondent’s submission.

8. On 31 October 2011, the Tribunal received a response from the Respondent and comments from the Applicant.

Background

9. The Applicant joined the Organization in June 2004 as an Associate Human Rights Officer with the United Nations Mission in Kosovo and separated as of January 2005.

10. On 6 June 2005, the Applicant was appointed as a Human Rights Officer with the United Nations Assistance Mission in Afghanistan and separated as of July 2006.

11. On 1 October 2007, the Applicant was appointed as a Reporting/Coordination Officer with the Office of the High Commissioner for Human Rights and separated as of 13 May 2008. The Applicant was reappointed on 18 May 2008 as a Project Management Officer with the United Nations Mine Action Service.

12. On the afternoon of 25 October 2011, the Applicant received an email from the Executive Officer of DPKO/DFS, informing him of his separation effective close-of-business on 31 October 2011.

Applicant's submissions

13. The Applicant's principal contentions may be summarised as follows:

Prima facie unlawfulness

a. The administrative and legislative situation as it existed when the Tribunal issued *Villamorán* UNDT/2011/126 remains and therefore, in line with that Judgment, the impugned decision appears to be *prima facie* unlawful. Even if such law has been promulgated which requires the break in service, this is not necessarily lawful if without support of the law.

Urgency

b. Although his fixed-term appointment had been extended until 31 October 2011 and his appointment carried no expectation of renewal, the Applicant was operating on the reasonable and legitimate assumption that there was no requirement of a 31-day break in service;

Irreparable damage

c. Harm to professional reputation and career prospects, or harm to health, or sudden loss of employment, could constitute irreparable damage although, in each case the Tribunal has to consider the factual circumstances (*Villamorán*

15. Applications for suspension of action are necessarily urgent requests for interim relief pending management evaluation. Under art. 13 of its Rules of Procedure, the Tribunal is required to consider such an application within five days. However, as stated in *Kananura* UNDT/2011/176, there is no obligation to require a response from the Respondent before deciding the request.

Prima facie unlawfulness

16. In this case, the key issue is whether the decision is supported by the necessary administrative instruction published to the staff at large prior to the making of a decision affecting their rights.

17. In *Villamorán*, a judgment on an application for a suspension of action addressing largely the same issue, the Honourable Judge Ebrahim-Carstens provided a detailed analysis of the hierarchy of the relevant issuances starting with the Charter of the United Nation at the apex. This Tribunal could not identify, upon receiving the present application for suspension of action, a basis for departing from the principle enunciated in *Villamorán* that:

38. ... the Tribunal finds 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. ... [T]he Tribunal finds that the contested decision appears *prima facie* to be unlawful.

18. The Tribunal decided that the most expeditious way forward was to require the Respondent to provide the necessary legal basis underpinning the contested decision. Given the fact that the decision being challenged was communicated on 27 October 2011, the request for management evaluation and the application for suspension of action were submitted on 28 October 2011 and there was less than one working day to decide on the application for suspension of action before the decision took effect on 31 October 2011. The Responde

relevant instruction, admittedly a very tight deadline, but necessary and justifiable in the circumstances.

19. It now appears that the Respondent has revised ST/AI/2010/4/Rev.1 to bring in a mandatory requirement of a 31-day break in service for staff members in the Applicant's situation, as follows:

5.2 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. In the case of separation from service on retirement, a former staff member will be ineligible for re-employment for a period of three months following the separation. This equally applies, *mutatis mutandis*, with respect to a former or current staff member who has held or holds an appointment in another entity applying the United Nations Staff Regulations and Rules and who applies for a temporary position with the Secretariat.

20. The Tribunal recalls the Applicant's claim in his application that

... insofar [as] he understands no administrative issuance or Secretary-General's bulletin has been issued that would introduce the requirement of a break in service between a fixed term appointment and a temporary appointment. At the time of the filing of the present motion, the UN Human Resources Handbook did not include an administrative instruction issued posterior to Judgment No. UNDT/2011/126 that would introduce the requirement of a break in service between a fixed-term appointment and a temporary appointment.

21. This claim and a review of the revised administrative instruction persuaded the Tribunal to postpone determination of the suspension of action pending receipt of the date and method of publication from the Respondent and comments from Mr. Bart Willemsen for the Applicant on the information as provided by the Respondent.

22. For the *prima facie*

by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to

The Tribunal is of the view that, despite the existence of a centralised Registry, the Respondent did not provide the information as ordered.

25. The Tribunal has also reviewed the comments of Mr. Willemsen, for the

Conclusion

30. The Tribunal orders suspension, during the pendency of the management evaluation, of the implementation of the decision requiring the Applicant to take a