



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/084

Judgment No. UNDT/2011/189

Date: 4 November 2011

Original: English

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Before: Judge Coral Shaw

Registry: New York

Registrar:

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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 *Villamorán*, 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 appointment, a staff member shall be eligible for re-employment on a temporary appointment only if the staff member has not been employed on a fixed-term appointment within the last 31 days prior to the date of separation from service.

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 *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 public 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 *na 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 later 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 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 will lead to a sudden loss of employment and affect her pension participation, dental insurance and other entitlements, and cause emotional distress.

## Respondent's submissions

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

*Receivability*

a. A period of separation from, or break, 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 application 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 1-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 official 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 appointment 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 is sub/ 95w 15.605 0 Td [(m)83(799(5 0/8(m)getf5 //5

*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 during the pendency of management appeal 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 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 *Villamorán, Parekh, Helmingier, 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.





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### Third issue

32. The third issue is whether the notice given to the Applicant of the imposition of the 31-day period of ineligibility fore-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, Helming* 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 in *Per* and *Villamorán*, but strongly arguable points. The Tribunal concludes that the decision appears prima facie to be unlawful.

34. In *Villamorán*, 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 view of the effective functioning of the new system of administration of justice.

35. In the present case the Tribunal accepts the Applicant must have known of the expiry of her fixed-term contract on 31 October 2011. 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, and, however, that all of the 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 intelligently 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. *Fadin 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, *Calvan* UNDT/2009/092).

39. In *Villamorán*, *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