



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/085

Judgment No.: UNDT/2011/188

Date: 4 November 2011

## **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 current fixed-term appointment.

2. The request for management evaluation and the present application for suspension of action were filed on 2 November 2011. The contested decision will go into effect on 4 November 2011.

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 *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, 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 Respondent submits that the English version of the revised instruction was placed on the United Nations Official Document System (“ODS”), iSeek (UN’snt on

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 supervisor informed her that OHRM had confirmed that, upon the expiration of her fixed-term appointment on 4 November 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 2 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;

e. The application of sec. 5.2 of ST/AI/2010/4/Rev.1 to her terms of appointment contravenes the doctrine of *droits acquis* and suggests unjustified discrimination. At the time the Applicant signed her fixed-term appointment, there was no rule or administrative issuance requiring a break in service at its expiration.

*Urgency*

f. The Applicant was informed on 1 November 2011 that she would have to take a 31-day break in service when her fixed-term appointment expired on 4 November 2011;

*Irreparable damage*

g. 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

Tribunal may question why the separation period of 31 days has been chosen, this must be within the discretion of the Administration to decide;

d. 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;

e. The application of sec. 5.2 does not affect the Applicant's acquired rights. An acquired right is a fundamental and essential element of the staff member's terms of appointment such that it could have been a deciding factor in the Applicant's decision to join the Organization or such a change in the terms would cause grave consequences

*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 4 November 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. The Tribunal agrees that the limitation contained in the revised administrative instruction, dated 26 October 2011, affected the terms of the Applicant's fixed-term appointment, which will expire on 4 November 2011.



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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?

23. 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).

24. 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.

25. 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.

26. 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

27. 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).

28. 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 *Villamorán*, but strongly arguable points. The Tribunal concludes that the decision appears *prima facie* to be unlawful.

29. 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 line with the effective functioning of the new system of administration of justice.

30. In the present case the Tribunal accepts that the Applicant must have known of the expiry of her fixed-term contract on 4 November 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 on a temporary appointment without interruption and, arguably, from maintaining her continuous rights to certain benefits, albeit on a temporary basis. It is arguable that notice of less than a working week 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. The issues above will require further examination by the Tribunal in the event the Applicant files an application under art. 2.1 of its Statute.

31. The Tribunal finds that the test of *prima facie*

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).

34. In *Villamorán, Parekh, Helmingner, 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**

35. 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 4<sup>th</sup> day of November 2011

Entered in the Register on this 4<sup>th</sup> day of November 2011

*(Signed)*

Hafida Lahiouel, Registrar, New York