UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/056
Judgment No.: UNDT/2011/126
Date: 12 July 2011
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

VILLAMORAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Notice: This Judgement has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 5 July 2011 the Tribunal received an application for suspension of action, in which the Applicant sought suspension of two administrative decisions: (i) the decision to place her on a temporary appointment after the expiration of her fixed-term contract on 7 July 2011; and (ii) the decision to require her to take a break in service of 31 days prior to her placement on temporary appointment.

Note on proceedings

2. The Applicant initially attempted to file the present application on Friday, 1 July 2011, when she sent an email to the New York Registry of the Dispute Tribunal, attaching three documents and stating that she was filing an application for suspension of action. However, the Applicant used the wrong application form, namely the form for substantive applications under art. 2.1 of the Tribunal's Statute. By email of the same day, the Registry instructed the Applicant to re-file her submission by the next working day, 5 July 2011, using the correct form for applications for suspension of action. The Applicant complied with the Registry's instruction by the specified deadline, and on 5 July 2011 the New York Registry transmitted the present application to the Respondent, informing him that he had until 1 p.m., Thursday, 7 July 2011, to submit his reply. In view of the fact that the contested decisions were to be implemented prior to 8 July 2011, the Tribunal held a hearing at 3:30 p.m. on 7 July 2011, which was attended by the Applicant and Counsel for the Respondent. At the hearing, the Applicant gave oral evidence under affirmation.

3. Article 13 (Suspension of action during a management evaluation) of the Tribunal's Rules of Procedure provides that the Tribunal "shall consider an application for interim measures within five working days of the service of the application on the respondent". Therefore, as the application was served on the

Respondent on 5 July 2011, the Tribunal determined that it had until Tuesday, 12 July 2011, to consider the present application.

4. At the hearing, in view of the fact that 7 July 2011 was the last working day before the Applicant's separation, the Tribunal directed, prior to the close of business in New York (i.e., before 5 p.m.), that the implementation of the contested decisions be suspended until further order. Later on the same day, after the hearing, the Tribunal issued Order No. 171 (NY/2011), referring to art. 7.2 of its Statute and art. 19 of its Rules of Procedure (which provides, *inter alia*, that the Tribunal "may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties"), as well as to art. 36.1 of the Rules of Procedure (which provides that "[a]ll matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute"). By this Order, the Tribunal ordered, in furtherance to the direction made at the hearing, the suspension of the implementation of the contested decisions pending the final determination of the present application for suspension of action. Both parties were also ordered to file further submissions.

5. On 11 July 2011 the Tribunal held an additional hearing on the present application, which was also attended in person by the Applicant and Counsel for the Respondent.

Scope of the present application

6. In her application the Applicant requested, *inter alia*, the regularisation of her position following her placement on a roster of candidates approved by the Central Review Board ("CRB") in April 2011. The Respondent submitted at the hearing of 7 July 2011—and this was not seriously contested by the Applicant—that, although this issue may be relevant as factual background, it is outside the scope of the present application for suspension of action. The Tribunal is persuaded by the Respondent's

submission that the present application is limited only to the decisions to place the Applicant on a temporary appointment after the expiration of her fixed-term contract on 7 July 2011 and to require her to take a break in service of 31 days prior to her placement on temporary appointment. Accordingly, the sections below contain facts, submissions, and considerations pertaining to the issues within the scope of the present case.

Facts

7. The Applicant is a P-3 level Human Resources Officer with the Department of Field Support ("DFS"). She joined the Organization on 19 January 2007. According to the Respondent, between January 2007 and July 2011, the Applicant's appointment was extended on 11 separate occasions, with three breaks in service (19–25 December 2007; 26 November–8 December 2008, and 2–7 July 2009). Effective 8 July 2009, the Applicant was placed on a one-year fixed-term contract, which was subsequently extended to 7 July 2011.

8. On 18 January 2011 the Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM"), issued a memorandum on the contractual reform in the United Nations, stating, *inter alia* (emphasis in original):

> **Subject: Temporary Appointment and United Nations Contractual Reform Transitional Measures**
>
> …
>
> 3. … I would like to remind everyone of the transitional measure implemented on 1 July 2009 for staff members, not CRB endorsed, on fixed-term appointment with more than one year of cumulative service with the Organization as of 30 June 2009 (ex-11-monthers). As you will recall, those staff members 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 2 years, during which period they could apply and be selected through the selection system, including review by a central review body.
>
> 4. As of 1 July 2011, the staff members subject to the above transitional measure, who were not successful in securing a post

> through the staff selection system, will start reaching the maximum of two years under fixed-term appointment. Consequently, at the expiration date of their fixed-term appointment, after 1 July 2011, they will be separated from the Organization. They can be re-appointed to a temporary appointment in accordance to the conditions set forth in ST/AI/2010/4. **No exception** to the two-year transitional period will be granted.

9. According to the Applicant's submission, at a town hall meeting held on 25 May 2011, the Applicant and others present were verbally informed by the Administrative Officer of the Field Personnel Division, DFS, that all staff members whose appointments were ending and who had not been regularised through a competitive selection process would be extended under a temporary appointment with no break in service. This applied to the Applicant as well, because although by that time she had applied to several vacancies and was placed on a roster of candidates pre-approved by the CRB (i.e., was "CRB-rostered"), she had not been regularised through a competitive selection process. The Applicant submits that, after the town hall meeting, she received verbal confirmations of the Administrative Officer's response from the managers in her department.

10. By memorandum dated 26 May 2011, the Director of the Field Personnel Division, DFS, requested the Executive Office of DFS and the Department of Peacekeeping Operations ("DPKO") (these two departments share the same Executive Office) to extend the Applicant's appointment from 8 July 2011 to 7 January 2012, without a break in service, under a temporary appointment (emphasis in original):

> [The Applicant] reaches two years of her transitioned fixed-term appointment on 7 July 2012. As her current appointment is expiring on 30 June 2011, we would like to request extension of the transitioned fixed-term appointment, for one week, effective 1 July 2011 through 7 July 2011 and subsequently, to extend this appointment on a temporary basis, effective 8 July 2011 through 7 January 2012. [The Applicant] should continue to be charged against post # 42160, which is blocked for …[,] who is on assignment to higher level functions.

> [The Applicant] is a Desk Officer for the Asia and the Middle East Section (AMES), [Field Personnel Division, DFS]. AMES continues to require the services of a Desk Officer in view of the increasing day-to-day workload … . In addition, AMES lost one Desk Officer a few months ago, who was not replaced due to the unavailability of [funds]. As a result, the workload has been re-distributed among the only 4 remaining Desk Officers in AMES, which currently supports 12 missions, and has a ratio of 3 missions per Desk Officer. We are also pleased to note that [the Applicant's] performance continues to be fully satisfactory.
>
> **RECOMMENDED ACTION**: [The Executive Office] to extend [the Applicant's] transitioned fixed-term appointment, effective 1 July 2011 through 7 July 2011, and subsequently to modify the transitioned fixed-term appointment to a temporary appointment, effective 8 July 2011 through 7 January 2012.

11. On 3 June 2011 the Applicant sent an email to the Senior Human Resources Officer, Executive Office, DPKO/DFS, asking what would happen to her entitlements under the separation and reappointment on a temporary basis with no break in service. The Applicant's email stated:

> [Effective] 08 July 2011, I was advised that my appointment will be converted to a [t]emporary appointment (TA) for six months. I would like to know what would happen to my entitlements, [including]:
>
> 1) home leave (I am due to exercise it on 08 July 2011, given my extension of 6 months, can I still exercise it on 8 July 2011?);
>
> 2) repatriation grant—will it be held in escrow, given the 2 years to submit proof of relocation, until final separation?;
>
> 3) annual balance will be commuted to cash up to a maximum of 60 days;
>
> 4) pension participation to continue with the 6 months TA;
>
> I would appreciate your confirmation and advice.
>
> If I cannot exercise my home leave, can I exercise my separation entitlements under my [fixed-term appointment], which will expire on 07 July 2011, be repatriated to Manila, exercise my unaccompanied shipment/relocation grant (1,000 kgs or lump sum of USD10,000) upon separation and be picked up from Manila to commence my temporary appointment?

12. On 8 June 2011 the Executive Office of DPKO/DFS confirmed to the Applicant that, *inter alia*, she could exercise her home leave given an expectation of an extension of 6 months. The Applicant thereafter arranged her home leave travel to take place from 18 June 2011 to 8 July 2011, including purchasing an airplane ticket. However, on 16 June 2011, two days before her scheduled departure, the Applicant was advised by the Executive Office of DPKO/DFS that, pursuant to advice provided to the Executive Office by OHRM, she would not be able to exercise her home leave and that she would have to take a break in service of 31 days.

13. One day later, on 17 June 2011, the ASG/OHRM issued a memorandum to "All Executive Officers", stating, *inter alia*:

> 2. Staff members who were granted fixed-term appointments subject to the transitional measures, may be considered for temporary appointments under the following conditions:
>
> a. a minimum 31-day break-in-service should be given between the staff members' fixed-term appointment and their new temporary appointment;
>
> b. a new [entry on duty] must be given to the staff member;
>
> c. Staff Rule 4.17 should be cited when signing the new contract.
>
> 3. In line with the above administrative procedures and as specified in Section 3.1 of ST/AI/2010/4, the requirement for the issuance of a Temporary Vacancy Announcement (TVA) must be followed for all anticipated needs of more than three (3) months, but less than one year duration.
>
> …
>
> 5. The above is effective immediately. No exceptions will apply. Your cooperation is appreciated.

The Applicant submitted that she did not receive a copy of the memorandum of 17 June 2011 prior to the commencement of the present proceedings, despite having requested it from her Executive Office. She was able to access this document only as a result of it being included as an annex to the Respondent's reply to her application for suspension of action.

14. By letter dated 21 June 2011, the Executive Officer of DPKO/DFS informed the Applicant as follows:

> By its resolution 63/250, the General Assembly approved a new contractual framework and provided for a new set of Staff Rules effective 1 July 2009. Staff members who served under a [f]ixed-term appointment without selection through a CRB process prior to 1 July 2009 were "transitional" to a new appointment governed by the new staff rules and regulations, and their appointments were limited to a two-year maximum period, beginning on the date of their last reappointment.
>
> This is to advise you that your current transitional [f]ixed-[t]erm [a]ppointment will expire on 7 July 2011, and in line with the Transitional Measures, no further extension can be granted beyond that date.
>
> Also, for your further information, please be informed that staff members, who were granted fixed-term appointments subject to the transitional measures, may be considered for temporary appointments after a minimum 31-day break-in-service.

15. According to the Applicant, she received the letter dated 21 June 2011 on 23 June 2011 and filed a request for management evaluation on the same day.

Applicable law

16. General Assembly resolution 63/250 (Human resources management), adopted on 24 December 2008, states, *inter alia* (emphasis in original):

> *The General Assembly*,
>
> …

I

Human resources management reform

…

2. *Stresses* the importance of a meaningful and constructive dialogue between staff and management, in particular on human resources-related issues, and calls upon both parties to intensify efforts to overcome differences and to resume the consultative process;

…

II

Contractual arrangements and harmonization of conditions of service

1. *Stresses* the need for rationalization of the current United Nations system of contractual arrangements, which lacks transparency and is complex to administer;

2. *Approves* the new contractual arrangements which would comprise three types of appointments (temporary, fixed-term and continuing), under one set of Staff Rules, effective 1 July 2009, as set out in its resolution 62/248 and subject to the provisions of the present resolution;

…

7. *Decides* that temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates;

…

11. *Also decides* that staff on 100-, 200- and 300-series contracts serving in locations other than peacekeeping operations and special political missions for a cumulative period of more than one year who are not performing temporary functions are to be given fixed-term contracts until such time as they have gone through a competitive process subject to the review of a central review body;

…

20. *Stresses* that the fair and equitable implementation of new contractual arrangements will be directly linked to the effective functioning of the new system of administration of justice;

21. *Decides* that there shall be no expectations, legal or otherwise, of renewal or conversion of a fixed-term contract, irrespective of the length of service, and requests the Secretary-General to reflect this provision in the rules and regulations as well as offers and letters of appointment[.]

17. Staff rules 4.12–4.13 (ST/SGB/2011/1) provide (emphasis in original):

Rule 4.12

Temporary appointment

(a) A temporary appointment shall be granted for a period of less than one year to meet seasonal or peak workloads and specific short-term requirements, having an expiration date specified in the letter of appointment.

(b) The appointment of a staff member who has served for the maximum period as described in paragraph (a) above may be extended for up to one year only when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates under circumstances and conditions established by the Secretary-General.

(c) A temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment.

Rule 4.13

Fixed-term appointment

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time, to persons recruited for service of a prescribed duration, including persons temporarily seconded by national Governments or institutions for service with the United Nations, having an expiration date specified in the letter of appointment.

…

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14(b).

18. ST/SGB/2009/4 (Procedures for promulgation of administrative issuances), signed by the Secretary-General on 18 December 2009, states, *inter alia* (emphasis in original):

> **Section 1**
>
> **Categories of administrative issuances**
>
> 1.1 In accordance with the provisions of the present bulletin, the following administrative issuances may be promulgated:
>
> (a) Secretary-General's bulletins;
>
> (b) Administrative instructions.
>
> 1.2 Rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions.
>
> **Section 2**
>
> **Entry into force and effect of administrative issuances**
>
> 2.1 Administrative issuances shall enter into force upon the date specified therein and shall remain in force until superseded or amended by another administrative issuance of the same or higher level and promulgated in accordance with the provisions of the present bulletin.
>
> 2.2 Staff members at all levels shall be responsible for observing the provisions of administrative issuances promulgated in accordance with the present bulletin.
>
> …
>
> **Section 3**
>
> **Secretary-General's bulletins**
>
> 3.1 The following matters shall require the issuance of a Secretary-General's bulletin:
>
> (a) Promulgation of rules for the implementation of regulations, resolutions and decisions adopted by the General Assembly, including:
>
> (i) The Financial Regulations and Rules of the United Nations and the publication of consolidated texts thereof;
>
> (ii) The Staff Regulations and Rules of the United Nations and the publication of consolidated texts thereof;
>
> …

Section 4

Administrative instructions

4.1 Administrative instructions shall prescribe instructions and procedures for the implementation of the Financial Regulations and Rules, the Staff Regulations and Rules or the Secretary-General's bulletins.

4.2 Administrative instructions shall be promulgated and signed by the Under-Secretary-General for Management or by other officials to whom the Secretary-General has delegated specific authority.

4.3 Administrative instructions shall be promulgated in English and French.

19. ST/AI/2010/4 (Administration of temporary appointments), issued on 27 April 2010, states, *inter alia* (emphasis in original):

Administration of temporary appointments

The Under-Secretary-General for Management, pursuant to section 4.2 of Secretary-General's bulletin ST/SGB/2009/4, and for the purpose of establishing terms and conditions pertaining to the use and administration of temporary appointments in accordance with staff rule 4.12, hereby promulgates the following:

…

Section 2

Use and duration of temporary appointments

2.1 Pursuant to staff rule 4.12 (a), a temporary appointment may be granted for a single or cumulative period of less than one year to meet seasonal or peak workloads and specific short-term requirements and shall have an expiration date specified in the letter of appointment.

…

2.3 A temporary appointment shall not be used to fill needs that are expected to last for one year or more.

…

Section 3

Selection process for the granting of a temporary appointment

Temporary vacancy announcement

3.1 When a need for service for more than three months but less than one year is anticipated, a temporary vacancy announcement shall be issued by the programme manager.

3.2 While the decision to issue a temporary vacancy announcement for a temporary appointment of less than three months is made at the discretion of the programme manager, any extension of three months or more shall require the issuance of a temporary vacancy announcement.

…

Section 14

Successive temporary appointments

14.1 Upon reaching the limit of service under one or under several successive temporary appointments within a period of 364 days as set out under section 2 above or, exceptionally, 729 days under section 15 below, the staff member shall be required to have a break in service of a minimum of three months before being eligible for appointment to a new temporary position in the same duty station within entities that apply the United Nations Staff Regulations and Rules, and shall be required to have a break in service of a minimum of 31 days if the new appointment is in a different duty station within entities that apply the United Nations Staff Regulations and Rules.

20. I have decided to set out brief summaries of the parties' submissions, as well as my consideration of the three requirements for suspension of action under art. 2.2 of the Tribunal's Statute in the following order—firstly, whether this case (in whole or in part) is of particular urgency; secondly, whether the implementation of the contested decisions would cause irreparable damage; and, thirdly, whether the decisions appear *prima facie* to be unlawful.

Applicant's submissions

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

Urgency

a. The contested decisions would go into effect on 7 July 2011. The Applicant was informed of them only on 23 June 2011, and her filing of the present application for suspension of action was prompt and timeous;

Prima facie *unlawfulness*

b. With regard to the decision to separate her from service with the requirement that she take a break in service of 31 days, the Applicant submits that, although the ASG/OHRM's memorandum of 18 January 2011 stated that separation would be required, it did not contain any references to a break in service. The 31-day break in service cannot be assumed nor inferred when it is not expressly provided for and has no bases in law and fact;

c. With respect to the decision to place her on a temporary appointment, the Applicant submits, *inter alia*, that her functions are not of a temporary nature, as required by ST/AI/2010/4. Having served on fixed-term appointment since January 2007, the Applicant should not be offered a temporary appointment;

Irreparable damage

d. If the Applicant is separated with a break in service, she will be without a job and without any entitlements and protection for 31 days, which may be of great detriment to her considering that she is an international staff member away from her home country. With the expiration of the Applicant's contract her G-4 visa would be automatically cancelled and she would cease to enjoy the privileges and immunities currently afforded to her. Further, once

her separation is processed, the insurance coverage would also automatically terminate regardless of the length of the break in service. The Applicant may also lose her participation in the United Nations Joint Staff Pension Fund. Her placement on a temporary contract would also result in a loss of many entitlements available to her under a fixed-term appointment.

Respondent's submissions

22. The Respondent's principal contentions may be summarised as follows:

Urgency

a. There is no urgency in this matter. The Applicant has been aware for at least two years that unless she obtained a fixed-term appointment following a competitive selection process conducted under the relevant rules, she would need to separate from service in July 2011;

Prima facie *unlawfulness*

b. The decision to require the Applicant to take a 31-day break in service is not *prima facie* unlawful. The ASG/OHRM's memorandum of 17 June 2011 implements the contractual reforms introduced on 1 July 2009 in accordance with the legal requirements and policy objectives of the Organization. Specifically, the memorandum observes and implements staff rules 4.12–4.13, ST/AI/2010/3 (Staff selection system), ST/AI/2010/4, and *Castelli* UNDT/2009/075 (affirmed in *Castelli* 2010-UNAT-037) and *Gomez* UNDT/2010/042. The memorandum of 17 June 2011 is also in line with the document entitled "Interim Guidelines for implementation of transitional measures for the United Nations contractual reform for currently serving staff members other than those serving in United Nations peacekeeping and political missions" (hereinafter "Interim Guidelines"), approved by the ASG/OHRM on 30 June 2009;

c. Staff members appointed for less than one year may be reappointed only after a break in service. The minimum break in service required for successive appointments of less than one year is 31 days. The break in service must constitute a genuine separation from the Organization. It must be of sufficient duration to constitute a genuine separation and subsequent reappointment to the Organization;

d. To ensure consistency in treatment between staff members on short fixed-term appointments under the former system and those on temporary appointments under the current system, the ASG/OHRM's memorandum of 17 June 2011 stipulated that those transitioning from fixed-term appointments of less than one year under the former system to temporary appointments, must have a 31-day break in service. This break in service is necessary to ensure that the rules on staff selection are observed in the appointment of staff members;

e. OHRM is "the central authority for the monitoring and approval of the recruitment and placement of staff and for the interpretation of the regulations and rules of the Organization and their enforcement" (see para. 2, sec. II, of General Assembly resolution 53/221, adopted on 7 April 1999; secs. 2 and 3 of ST/SGB/2004/8 (Organization of the Office of Human Resources Management)). The requirement of a 31-day break in service is a matter concerning the interpretation of the staff regulations and rules relating to the appointment of staff. The duration of the break in service required was determined taking into account both the legal requirements and the policy implications of the decision. In its capacity as the central authority for human resources management and in accordance with its specific delegated authority, OHRM has authority to determine the duration of the break in service required prior to the reappointment of a staff member to the Organization;

Irreparable damage

f. There is no irreparable harm that may be suffered by the Applicant. Should the Tribunal determine that the contested decisions were unlawful, the Applicant could be fully compensated for any loss suffered. Although the Applicant's medical coverage would not continue for the entire period of the proposed break in service, it does not constitute irreparable harm. It may be compensated should the Applicant succeed in a future claim on the merits;

g. Following separation from service staff members have a grace period to either leave the United States or change their status, including applying for renewal of their visa. Should the Applicant be granted a further appointment she will be given the opportunity to apply for renewal of her visa. The grace period is in or around 30 days. There is no specific time period written in stone. A sufficient period is allowed by the Host Country to allow staff members to organise their departure from the United States, or alternatively, apply for adjustment to another visa status. To the knowledge of Counsel for the Respondent, there are no repercussions if individuals resume duties after 31 or 32 days. In the event that the Applicant was not granted renewal of her visa, she would return to her home country and upon her reappointment, would be returned to New York at the Organization's expense. Taking into account the Organization's responsibility for travel costs and associated entitlements, she would not be out of pocket. Either way, the Applicant will not suffer irreparable harm, or any harm at all, on account of her visa status.

Consideration

23. In accordance with art. 2.2 of its Statute, the Tribunal will consider whether the contested administrative decisions appear *prima facie* to be unlawful, whether the application is of particular urgency, and whether the implementation of the decisions would cause the Applicant irreparable damage. The Tribunal can suspend the

contested decisions only if all of these three requirements of art. 2.2 of its Statute have been met.

Particular urgency

24. Firstly, the Tribunal will consider whether the requirement of particular urgency is satisfied with respect to both contested decisions.

Decision to place the Applicant on temporary appointment

25. With respect to the decision to place the Applicant on a temporary appointment following the expiration of her fixed-term contract, the records provided by both parties demonstrate that the Applicant was aware of the decision as early as 25 May 2011, when the Applicant attended a town hall meeting where she and others present were informed by the Administrative Officer of the Field Personnel Division, *inter alia*, that those staff members whose appointments are expiring would be extended under temporary appointments. On 3 June 2011 the Applicant sent an email to the Executive Office of DPKO/DFS, stating that she had been "advised that [her] appointment will be converted to [t]emporary appointment (TA) for six months" and requesting confirmation of the effect this change would have on her various entitlements. Therefore, at the time, the Applicant was aware of the decision to reappoint her on a temporary contract, but not necessarily of its full repercussions.

26. As the Dispute Tribunal held in *Applicant* Order No. 164 (NY/2010), *Corna* Order No. 90 (GVA/2010), and *Yisma* Order No. 64 (NY/2011), the requirement of particular urgency will not be satisfied if the urgency was caused by the Applicant. The Applicant in this case has known of the decision to place her on temporary appointment since 25 May 2011, but has failed to provide to the Tribunal a satisfactory explanation as to why the delay should not be attributable to her. The urgency with respect to this part of the application is therefore self-created. The Tribunal thus finds that the Applicant has failed to meet the test of particular urgency with regard to her challenge against the decision to place her on a temporary

appointment. Having failed to meet one of the three conditions required for a suspension of action, the Applicant has thus failed to satisfy the overall test for a suspension of action with respect to that decision. For this reason, the Tribunal will not consider whether the implementation of that decision would cause the Applicant irreparable damage. Likewise, no determination will be made as to the *prima facie* unlawfulness of the decision to place the Applicant on a temporary appointment. This does not preclude the Applicant from filing, in due course, an application under art. 2.1 of the Statute with regard to this decision.

Decision to require the Applicant to take a break in service of 31 days

27. The Tribunal will now turn to the decision to require the Applicant to take a break in service of 31 days after the expiration of her fixed-term contract on 7 July 2011 and prior to her temporary appointment. It is indisputable that the decision to impose a break in service following the expiration of the Applicant's fixed-term appointment was notified to her only on 23 June 2011. The Applicant filed her initial submission in this case on 1 July 2011—one week after receiving notification of the decision, albeit using the wrong form—and, pursuant to the Registry's instruction, promptly re-submitted it using the correct application form on 5 July 2011, two days prior to 7 July 2011, when the decision would be implemented. The Tribunal finds that the requirement of urgency is satisfied with respect to the decision to require the Applicant to take a break in service of 31 days after the expiration of her fixed-term contract and prior to her temporary appointment. The Tribunal will therefore consider whether the requirements of *prima facie* unlawfulness and irreparable damage have been met with respect to this decision.

Prima facie *unlawfulness*

28. Given the interim nature of the relief the Tribunal may grant when ordering a suspension of action, an applicant must demonstrate that the decision appears *prima facie* to be unlawful. For the *prima facie* unlawfulness test to be satisfied, it is enough for an 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 obligations to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011)).

Legal hierarchy and general requirements for administrative issuances

29. At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

30. Due to the importance of administrative issuances, the Administration must follow specific steps when promulgating them. For instance, ST/SGB/2009/4 sets out in sec. 5 the mandatory procedures for consultative process with respect to proposals for administrative issuances, which are aimed at ensuring, *inter alia*: that all relevant rules are prepared in consultation with major organisational units concerned; that issuances affecting questions of work and conditions of service are prepared in "consultation with the appropriate staff representative bodies"; and that all relevant rules and instructions are up-to-date. Further, sec. 6 of ST/SGB/2009/4 stipulates the procedures for control and clearance with respect to all proposals for administrative issuances. Each such proposed issuance shall go through a "central registry in the Office of Human Resources Management", in order to ensure: that its position in the hierarchy and the authority for its establishment are identified; that it is not inconsistent with issuances higher in the hierarchy; that it specifies prior issuances that are superseded or amended; that the requirements of sec. 5 of ST/SGB/2009/4 have been met; that it has been cleared by the Office of Legal Affairs in order to ensure compliance with sec. 6 of ST/SGB/2009/4; and that it is concise, clear and appropriately expressed, and complies with the rules and directives on United Nations editorial style. Administrative issuances shall not be submitted for signature without

certification that all the above requirements have been satisfied (sec. 6.3). They shall also be "published and filed in a manner that ensures availability" (sec. 6.4).

31. The reasons for the existence of these requirements are quite obvious. Administrative issuances regulate matters of general application and directly concern the rights and obligations of staff and the Organization. As stated in sec. 1.2 of ST/SGB/2009/4, "[r]ules, policies or procedures intended for general application may *only* be established by duly promulgated Secretary-General's bulletins and administrative instructions" (emphasis added). The detailed consultation and approval scheme envisaged by secs. 5 and 6 of ST/SGB/2009/4 aims to ensure that all staff members and managers are aware of and comply with any changes to the rules affecting conditions of employment (see sec. 2.2 of ST/SGB/2009/4). The elaborate promulgation process also ensures that all those concerned are aware of the legal basis and legal force of any new legal norms and their place in the existing legal hierarchy.

Is the decision to require the Applicant to take a break in service after her fixed-term contract lawful?

32. ST/AI/2010/4 provides that breaks in service exist with respect to consecutive temporary appointments totaling up to 364 days or, in exceptional cases, up to 729 days (sec. 15). A staff member who is offered a temporary appointment at the same duty station as his earlier temporary appointment must take a break in service of at least three months. A staff member recruited for another temporary appointment in a different duty station is required to take a break in service of a minimum of 31 days between the two temporary appointments (sec. 14.1 of ST/AI/2010/4). Following the appropriate break in service, the staff member may receive new temporary appointments up to a total of 364 days without any breaks in service between them.

33. The Respondent has failed to refer the Tribunal to any provision in a General Assembly resolution, staff regulations, staff rules, or other properly promulgated administrative issuances indicating that, in law, there is a requirement for staff

members on fixed-term contracts who are being placed on temporary appointments to take a break in service. Any such requirement is notably absent from staff rules 4.12–4.13, ST/AI/2010/3, and ST/AI/2010/4. In particular, ST/AI/2010/4, which deals specifically with temporary appointments, introduces mandatory breaks in service between such appointments, but does not introduce them with respect to staff members changing from fixed-term contracts to temporary appointments. In fact, the memorandum of 17 June 2011 is the only document provided to the Tribunal that contains a reference to a mandatory 31-day break in service between a fixed-term appointment and a temporary appointment. The Respondent was unable to point out any provision in the Interim Guidelines requiring a 31-day break in service for staff members transitioning from fixed-term contracts to temporary appointments. Further, even if such a provision were contained in the Interim Guidelines, it would not have the effect of overriding properly promulgated administrative issuances, as explained above.

34. The presence in ST/AI/2010/4 of the break in service requirement for consecutive temporary appointments demonstrates that breaks in service constitute part of the overall contractual scheme and, in the language of sec. 1.2 of ST/SGB/2009/4, are a matter "of general application" which "may only be established by duly promulgated Secretary-General's bulletins and administrative instructions". Because breaks in service required in connection with temporary appointments were specifically introduced by an administrative instruction, the absence of any legal requirement in any properly promulgated administrative issuance for a break in service between a fixed-term contract and a temporary appointment means that there is no such legal requirement. Accordingly, it cannot be introduced by a memorandum issued by the ASG/OHRM, particularly considering that it would have the effect of unilaterally varying the terms of employment of affected staff (see *James* UNDT/2009/025 and *Goddard* UNDT/2010/196 on unilateral variations of contracts).

35. The Tribunal notes with particular concern that, as was conceded by Counsel for the Respondent, the ASG/OHRM's memorandum of 17 June 2011, just like the memorandum of 18 January 2011, has not been circulated publicly and is not available to staff members at large. Moreover, the Applicant gave evidence that, although she had asked her Executive Office for copies of these memoranda, they were not provided to her, and she only obtained access to them from the Respondent's filings in this case.

36. Further, the Tribunal finds that there are significant doubts with respect to whether the ASG/OHRM has the delegated authority to impose breaks in service following a two-year fixed-term appointment and prior to a temporary appointment. The memorandum of 17 June 2011 purports, in effect, to amend the existing administrative issuances by adding new additional requirements concerning breaks in service following fixed-term appointments and preceding temporary appointments. However, Secretary-General's bulletins and administrative instructions are promulgated by the Secretary-General and the Under-Secretary-General for Management, respectively, pursuant to secs. 3.3 and 4.2 of ST/SGB/2009/4, and cannot be amended by instruments of lesser legal authority.

37. The Respondent submitted that the 31-day break in service requirement was introduced as a result of *Castelli* UNDT/2009/075 and *Gomez* UNDT/2010/042. This submission is misguided; these judgments do not support the Respondent's position. In *Castelli*, the Administration attempted to impose a *retroactive* break in service on a staff member who served on temporary appointments that—due to the Administration's error—continued for two consecutive years, contrary to the rules in existence at the time. The Tribunal found that the Administration's decision to impose a retroactive break in service was unlawful as it was used as a device to retroactively terminate the Applicant's contract without proper legal basis and with the purpose of depriving him of his accrued benefits. The Tribunal did not say in *Castelli* that the problem with the break in service was that it was of a short duration—the issue was its unlawful retroactive imposition, resulting in unlawful

retroactive termination and loss of lawful entitlements. In *Gomez*, the Tribunal found that the Respondent had failed to provide any evidence of a lawful policy on mandatory breaks in service or to demonstrate a consistent application of this alleged policy. Again, the findings of the Tribunal focused on the overall practice relating to breaks in service, in principle, and not on their duration. (It is necessary to note here that *Gomez* was rendered on 12 March 2010, and, since then, ST/AI/2010/4 went into effect, introducing the break in service requirement between consecutive temporary appointments exceeding 364 days or, in exceptional cases, 729 days.) Therefore, the Tribunal is not persuaded by the Respondent's submission that the 31-day break in service requirement was in any way necessitated by *Castelli* and *Gomez*. To the contrary, in *Castelli* 2010-UNAT-037, the United Nations Appeals Tribunal found that "the administration may not subvert the entitlements of a staff member by abusing its powers, in violation of the provisions of the Staff Regulations and Staff Rules".

38. Accordingly, 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. In light of the documentary and oral evidence provided by the Applicant, and in view of the issues identified above, the Tribunal finds that the contested decision appears *prima facie* to be unlawful.

Irreparable damage

39. The requirement of irreparable damage has been discussed in several rulings of the Tribunal. It is generally accepted that mere financial loss is not enough to satisfy this requirement (*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).

40. In each case, the Tribunal has to look at the particular factual circumstances. For example, in many instances—but not all—the Tribunal will be able to compensate the harm to career prospects should an applicant pursue a substantive appeal and should the Tribunal decide in his or her favour. However, the Dispute Tribunal's ability to remedy a loss is not absolute and, if the only way for the Tribunal to ensure that certain rights are truly respected is to grant interim relief, then the requirement of irreparable damage will be satisfied (see also *Fradin de Bellabre*). The Tribunal's determination in this respect, of course, will depend on the particular circumstances of each case.

41. The Tribunal is persuaded that, if the decision to place the Applicant on a 31-day break in service were to be implemented, it would have significant negative implications with regard to the Applicant's medical insurance, visa situation, pension participation, and various entitlements, further exacerbating her situation. The Applicant may be required to relocate to her home country, which may present a serious obstacle for her re-employment on temporary basis, further adding to the fundamental change in her employment and personal status and causing negative effects of an irreparable nature.

42. Further, it was clear to the Tribunal from both hearings that the Applicant has already suffered from her peculiar contractual situation and that the decision, if implemented, would cause her considerable emotional distress and would negatively affect her personal well-being. The contemporaneous emotional effect of the implementation of the *prima facie* unlawful decision on the Applicant would be of such a nature as to justify a finding of irreparable damage (see *Jaen* Order No. 29 (NY/2011)). The Applicant would have to endure the emotional distress of having to comply with an administrative decision that affects her basic contractual rights and with respect to the lawfulness of which there is serious doubt (see *Igbinedion*

UNDT/2011/110). The Tribunal is satisfied that monetary compensation alone in the face of decision-making found to be *prima facie* unlawful would not do justice to the Applicant. Therefore, for all the above reasons, the Tribunal finds that the implementation of the contested decision would cause the Applicant irreparable damage.

43. In view of the Tribunal's finding that all three requirements of art. 2.2 of the Tribunal's Statute are satisfied, the Tribunal will order that the decision to require the Applicant to take a break in service after the expiration of her fixed-term contract and prior to her temporary appointment be suspended during the pendency of the management evaluation.

Observations

Legislation by means other than properly promulgated administrative issuances

44. General Assembly resolution 63/250 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. It appears that at least some significant issues directly affecting staff members' contractual rights are presently decided in a non-transparent and unilateral manner, for example by way of memoranda, which, as Counsel for the Respondent confirmed at the hearing held on 11 July 2011, are not available publicly. If the matters being dealt with in this manner affect material contractual provisions, this practice contradicts not only the provisions of ST/SGB/2009/4, but also the requirements of good faith and fair dealing, and is detrimental to the basic rights of staff members. The contractual reform is not an internal OHRM matter, but is a system-wide process that affects both the Organization and its staff. Therefore, decisions of general application that affect contractual rights must be issued through properly promulgated administrative issuances.

45. Contrary to the Respondent's submission, the imposition of the requirement of a 31-day break in service on staff members transitioning from fixed-term contracts to temporary contracts is not based on any case law of the Dispute Tribunal. This decision, expressed in the ASG/OHRM's memorandum of 17 June 2011, may have significant negative implications, including with regard to the affected staff members' medical insurance, visa situation, pension participation, and various entitlements. Although it affects the rights of staff members, this policy was not adopted through a properly promulgated administrative issuance, and thus it follows that it did not go through the mandatory consultative, control, and clearance procedures established by ST/SGB/2009/4.

Proscription against exceptions

46. The Tribunal also finds it appropriate to make some general observations regarding the assertion in the ASG/OHRM's memoranda of 18 January 2011 and 17 June 2011 that no exceptions to the decisions introduced by those memoranda may be granted. The Tribunal finds such assertion to be of significant concern. The right to request and to be properly considered for an exception is a contractual right of every staff member and it cannot be unilaterally taken away, despite the language in both memoranda (see *James* UNDT/2009/025 and *Goddard* UNDT/2010/196). Under staff rule 12.3(b), any request for an exception to the Staff Rules—and, by extension, to administrative issuances of lesser authority (see *Hastings* UNDT/2009/030)—*must* be properly considered in order to determine whether the three parts of the test established by staff rule 12.3(b) are satisfied. Failure to do so would result in a violation of the contractual rights of the staff member requesting the exception.

47. This blanket proscription against exceptions in both memoranda further underscores the importance of complying with the requirement of ST/SGB/2009/4 that all rules, policies or procedures intended for general application may only be established through the Secretary-General's bulletins and administrative instructions,

ensuring that all the mandatory consultative, control, and clearance procedures that exist for properly promulgated administrative issuances are followed.

Conduct of parties

48. The Tribunal finds it appropriate to note the professional conduct of both the Applicant and Counsel for the Respondent, both of whom duly complied with the Tribunal's orders and filed helpful submissions under significant time pressure dictated by the nature of this appeal.

Conclusion

49. The Tribunal orders suspension, during the pendency of the management evaluation, of the implementation of the decision requiring the Applicant to take a mandatory break in service after the expiration of her fixed-term contract and prior to any temporary appointment.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 12th day of July 2011

Entered in the Register on this 12th day of July 2011

(*Signed*)

Santiago Villalpando, Registrar, New York