UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/082
Judgment No.: UNDT/2011/185
Date: 31 October 2011
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

HELMINGER

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

Procedural background

2. On 28 October 2011, the Applicant requested, by a document dated 27 October 2011, 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 February 2005 as an Associate Expert in Humanitarian Affairs with the Office for the Coordination of Humanitarian Affairs.

10. On 1 October 2005, the Applicant was appointed as an Associate Expert in Political Affairs, Department of Political Affairs. He held this position until 30 November 2006 when he moved to the Peacebuilding Support Office as an Associate Peacebuilding Officer. On 1 January 2009, the Applicant was selected for a fixed-term position of Peacebuilding Support Officer. On 1 January 2009, the Applicant was appointed on a fixed-term appointment without having been approved by a central review body.

11. On 27 October 2011, the Applicant received an email from the Administrative Management Officer of the Peacebuilding Support Office, informing him as follows:

> OHRM [Office of Human Resources Management] has asked for a mandatory 31 [d]ays break in service between the end of your current contract on 31 October 2011 and the start of your new contract at the temporary level [sic]. Our colleagues in [the] Executive Office will contact you with information on your separation entitlements.
>
> I had hoped for a better outcome due to the absence of any Administrative Instructions (ST/AI) from OHRM. Unfortunately, it was not the case.

Applicant's submissions

12. 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 *Villamoran* 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 a relevant resolution or if it is in contravention of a general principle of law or fairness;

Urgency

b. The Applicant received the email informing him of the 31-day break in service and, consequently, his separation, in the morning of 27 October 2011. 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 (*Villamoran*). Being informed four calendar days prior to the effective date of separation of the break in service amounts to a sudden loss of employment;

d. Implementation of the decision will have significant negative consequences to the Applicant's visa status, pension rights and other entitlements;

e. The Applicant has two school-aged children, the older of which (aged seven years) attends a Special Education School due to his disability. The sudden absence and loss of salaries and entitlements would affect the Applicant's ability, along with that of his wife, to provide the child with the medical and therapeutic support he requires;

f. Unemployment for a month would cause the Applicant serious emotional distress caused by having to abide by an unlawful decision, including harm to his reputation and career prospects in not being able to carry out his functions in a number of projects and assignments which require his input.

Consideration

13. In accordance with art. 2.2 of its Statute, the Tribunal has to consider whether the impugned decision appears to be *prima facie* unlawful, whether the matter is of particular urgency, and whether its implementation will cause the Applicant irreparable harm. The Tribunal must find that all three of these requirements have been met in order to suspend the action (implementation of the decision) in question.

14. 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*

15. 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.

16. In *Villamoran*, 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 *Villamoran* 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.

17. 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 Respondent was given an hour to provide the relevant instruction, admittedly a very tight deadline, but necessary and justifiable in the circumstances.

18. 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.

19. 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.

20. 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.

21. 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 obligation to ensure that is decisions are proper and made in good faith" (see para. 24, *Jaen* Order No. 29 (NY/2011) as relied upon in *Villamoran* at para. 28).

22. The Tribunal has considered the submission of the Respondent which, in essence, states that ST/AI/2010/Rev.1 was promulgated and published in accordance with the relevant provisions of ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances). In response to Order No. 256 (NY/2011), which ordered the Respondent to provide a submission of "when and how" ST/AI/2010/Rev.1 was published, the Respondent's submission states (italics added):

> 4. Subsequent to the clearance of ST/AI/2010/Rev.1 by the Office of Legal Affairs under section 6 of ST/SGB/2009/4, Ms. Kane, the Under-Secretary-General for Management, signed the ST/AI/2010/Rev.1, in accordance with her delegated authority, on 26

23. The Tribunal notes with concern that this submission does not comply fully with Order No. 256 (NY/2011) in that it does not explicitly state the date on which the revised administrative instruction was published or the precise method of publication. The Tribunal is already aware, by the email of the Administrative Management Officer, and the application of the Applicant, that they were unaware of the existence of this revised administrative instruction. The Tribunal notes that there is a record kept by a central registry, as set out in para. 6.4 of ST/SGB/2009/4, which provides that:

> 6.4 Upon signature, the original of administrative issuances shall be deposited with and registered by the central registry. Administrative issuances shall be published and filed in a manner that ensures availability.
>
> 6.5 The central registry shall maintain records of the entire processing of administrative issuances … .

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

24. The Tribunal has also reviewed the comments of Mr. Willemsen, for the Applicant, as received on 31 October 2011, which raises a number of arguable points, including, but not limited to: availability of the ST/AI/2010/4/Rev.1; that it was not available in English and French; that the mere placement of a new administrative issuance on iSeek or other electronic systems. does not meet the requirement of appropriate notice, recalling former Administrative Tribunal Judgment No. 1185, *Van Leeuwen* (2004), sec. III, in which the former Administrative Tribunal held that "the Administration has a duty to … regularly inform its employees concerning the various rules and regulations"; that some staff do not have access to iSeek and other electronic systems; and that administrative decisions cannot be confirmed by *ex post facto* legislation.

25. The Applicant further argues that, notwithstanding ST/AI/2010/4/Rev.1, the rationale for the break in service does not comply with principles of fairness. He provides:

> 19. In other words, if a provision in an administrative instruction or bulletin suggests that its sole rationale was to deprive staff members of rights that would otherwise have accrued in the absence of the provision, without an identifiable operational basis or otherwise evidence that the relevant provision(s) are to ensure the implementation of an identifiable decision and/or instruction of the Member States, this Tribunal is empowered to find that the application of this provision, as materialized in the impugned decision, is unlawful or, for the purposes of the present request for suspension of action *prima facie* unlawful.

The Applicant also argues that the requirement of the break in service does not fall within the "implementation of the Staff Regulations and Rules or Secretary-General's bulletins".

26. The Tribunal is concerned that a provision, which is likely to have a seriously adverse effect on many staff members and their accrued and other rights appears to have been ushered in with unseemly haste, through the back door. This was not a minor revision. 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 *Villamoran*, but strongly arguable points. The Tribunal concludes that the decision appears *prima facie* to be unlawful.

Urgency

27. The Tribunal finds that since the Applicant only became aware, on 27 October 2011, of a decision which would be implemented on 31 October 2011,

and that the Applicant's filing of his application was prompt and timeous, the instant case meets the requirement of urgency.

Irreparable harm

28. Noting in particular paras. 39 and 40 of *Villamoran*, the Tribunal accepts that a mandatory period of one month's unemployment in the circumstances of this case would cause the Applicant irreparable harm. The Tribunal accepts the Applicant's assessment of the potential irreparable harm the implementation of the break in service would cause, particularly in light of the visa implications and his children's educational needs.

Conclusion

29. 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 his fixed-term contract and prior to a temporary appointment.

(*Signed*)

Judge Goolam Meeran

Dated this 31st day of October 2011

Entered in the Register on this 31st day of October 2011

(*Signed*)

Hafida Lahiouel, Registrar, New York