UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/086
Judgment No.: UNDT/2011/196
Date: 15 November 2011
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

NESKOROZHANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. On 9 November 2011, Ms. Dina Neskorozhana, a staff member of the Department of Public Information, 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 fixed-term appointment. Both parties refer to this period of ineligibility as "break in service".

2. The Applicant's fixed-term appointment expired on 31 October 2011. She submits that she was first made aware of the contested decision on 1 November 2011, and that on 8 November 2011 she was also informed that, notwithstanding the Tribunal's recent judgment in *Garcia* UNDT/2011/189, she would not be allowed to be re-employed on a temporary appointment until she completed a break in service of 31 days, calculated from 31 October 2011. She filed a request for management evaluation on 9 November 2011.

Procedural matters

3. On 9 November 2011, the Dispute Tribunal issued Order No. 265 (NY/2011), directing the Respondent to submit a reply to the present application by 12 p.m., 11 November 2011. Both parties were also directed to attend a case management hearing on 10 November 2011.

4. The hearing took place as scheduled, with both Counsel appearing in person. The principle purpose in holding the hearing was to enable the parties to explain whether any issues would be raised that had not already been the subject of a decision by the Tribunal. The Respondent submitted, in effect, that the case raised the new issue that a suspension of action cannot be made unless an offer of a temporary contract is made to a staff member within the 31-day break in service.

5. As further evidence was required by the Tribunal in order to properly consider this point, the Applicant filed, on 11 November 2011, an affidavit detailing the circumstances of her case.

6. By Order No. 269 (NY/2011), on 11 November 2011, the Tribunal granted the Respondent's request for an extension of time to file a reply until Monday, 14 November 2011, in order to consider the Applicant's affidavit in preparing the reply.

Background

7. The Applicant joined the Organization on 2 January 2003. Her latest fixed-term contract expired on 31 October 2011.

8. On 12 July 2011, the Dispute Tribunal issued *Villamoran* UNDT/2011/126, finding, *inter alia*, that, in the absence of a properly promulgated administrative issuance, for staff "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".

9. Following *Villamoran*, 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.

10. 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.

11. The English version of the revised instruction was placed on the United Nations Official Document System ("ODS"), iSeek (UN's intranet portal), and the online Human Resources Handbook on 28 October 2011. The French version of the revised instruction was placed on ODS on 31 October 2011, and, on 1 November 2011, it was placed on iSeek and the online Human Resources Handbook. The Respondent submits that the draft of the revised instruction was circulated to staff representatives on 14 July 2011, and that some of them provided their comments.

12. On 31 October 2011, the Dispute Tribunal issued *Parekh* UNDT/2011/184, *Helminger* UNDT/2011/185 and *Buckley* UNDT/2011/186, ordering the suspension of the contested decisions to impose breaks in service of 31 days between the applicants' fixed-term appointments and subsequent temporary appointments.

13. On 1 November 2011, the Applicant's former supervisor informed her that OHRM had confirmed that, following 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 in *Parekh*, *Helminger* and *Buckley* applied only to those specific staff members who applied to the Tribunal for a suspension of action.

14. On 4 November 2011, this Tribunal issued *Garcia*, which presented identical circumstances, that is, an imposed 31-day period of ineligibility for a temporary appointment upon the expiration of Ms. Garcia's fixed-term appointment on 31 October 2011.

15. The Applicant submits that, also on 4 November 2011, she had a conversation with the Deputy Director of News and Content, News and Media Division, DPI, who confirmed to her that it was clear that after a break in service the Applicant would come back to DPI.

16. On 8 November 2011, the Applicant was informed that, notwithstanding *Garcia*, she would not be allowed to be re-employed on a temporary appointment prior to the completion of a 31-day break in service, calculated from 31 October 2011. The same day, the Applicant was further informed by email by the Administrative Assistant, Executive Office, DPI, that "DPI—due to exigencies of service—will try to ask for your extension on temporary appointments".

17. On 9 November 2011, the Applicant and several of her colleagues received an email from the Chief, Human Resources Management Unit and Information Technology Services, Executive Office, DPI, stating that "the Executive Office is requesting the reappointment based on the office requirements. At this point we have not received any confirmation/authorization from OHRM on this, but will keep you updated".

18. On 9 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

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

a. As the decision to impose on her a 31-day period of ineligibility for reemployment on a temporary contract after the expiration of her fixed-term contract has a continuing effect, the ongoing implementation is capable of being suspended (*Garcia*) even though her fixed-term appointment expired on 31 October 2011;

Prima facie *unlawfulness*

b. The rationale for the break in service provided for in sec. 5.2 of ST/AI/2010/4/Rev.1 does not comport with principles of fairness and suggests an inappropriate use of discretion. The requirement of a break in service is improper and *prima facie* unlawful as it appears to have been included for the exclusive purpose of depriving staff members of certain entitlements that would otherwise flow from continuous service;

c. 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 consider the rationale of the powers relied upon;

d. The *ex post facto* inclusion of a provision in the Applicant's terms of appointment that excludes her from an immediate re-employment on a temporary appointment contravenes the doctrine of acquired rights. At the time the Applicant signed her fixed-term appointment, there was no administrative issuance requiring a break in service at its expiration;

e. The inordinate short notice given for the new limitation contravenes the principles of due process, good faith and fair dealing. The Applicant was informed of the new limitation to her eligibility for re-employment on, at the earliest, 28 October 2011, provided that date is taken as the effective publication of the revised instruction. This was one working day before the expiration of her fixed-term appointment, which cannot be said to amount to sufficient or reasonable notice;

Urgency

f. The Applicant was informed of the contested decision on 1 November 2011, one day after her fixed-term appointment expired. Further, whereas the implementation of the contested decision has continuing legal effect, the Applicant's case meets the requirement of urgency;

g. The Applicant did not file a separate request for suspension of action before 4 November 2011, mindful that there was a pending matter before this Tribunal (*Garcia*), which raised identical issues. The Applicant operated on the reasonable assumption that should Ms. Garcia prevail in her case, the Applicant would be allowed to return to her duties as well. It was not until 8 November 2011 that she learned that, notwithstanding *Garcia*, she would not be allowed to return to service before completing a break in service of 31 days;

Irreparable damage

h. Whereas the implementation of the contested decision has continuing legal effect, the continued implementation will cause her harm of an irreparable nature as it would affect her pension participation, visa status, and other entitlements, as well as cause emotional harm of being subjected to an administrative decision in the application of an administrative issuance that this Tribunal has found to be *prima facie* unlawful.

Respondent's submissions

20. The Respondent limited his reply in light of the decisions in *Omer* UNDT/2011/188 and *Garcia*. The Respondent's principal contentions may be summarised as follows:

Receivability and urgency

a. The Applicant has not been offered a temporary appointment since her fixed-term contract ended. An offer of appointment must comply with certain formal requirements, and the expression of a wish to bring the Applicant back to the department does not satisfy those requirements. Without an offer of appointment on a temporary basis, no administrative decision to impose a 31-day break in service has been made. The Applicant seeks the suspension of an administrative decision that does not exist;

b. On the other hand, the Respondent submits that the period of break in service runs from the expiry of a contract, in this case from 31 October 2011. In view of the formalities required before an offer of appointment can be made to a staff member, it may be that the Applicant will not receive an offer of appointment prior to the expiry of the 31-day period. This may render the application moot;

Prima facie *unlawfulness*

c. Notwithstanding the previous decisions, on the facts of this case, the notice given to the Applicant was adequate. The surrounding context leading up to the promulgation of the revised instruction demonstrates that the Applicant was fully aware of the requirement to take a break in service. Throughout her career the Applicant had taken at least eight breaks in service, none of which she contested.

d. It is premature to make any determination on the issue of acquired rights. This issue was considered in *Garcia* and the Tribunal found that the issue was complex and that it would be best left for determination at the merits of the proceedings. According to the Respondent, "[i]t would appear that the Tribunal for this reason refrained from making a specific finding as to *prima facie* unlawfulness relating to this issue".

e. The Tribunal has previously held that a break in service cannot be artificial in nature (*Castelli* UNDT/2009/075). In order to make a break in service actual, 31 days are required. It is only after 31 days of separation that a staff member's ties to the Organization are finally severed. This is the rationale for the period.

Consideration

21. 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.

22. An application for suspension of action is receivable under art. 2.2 of the Statute if it concerns a contested administrative decision that is the subject of an ongoing management evaluation.

23. The Respondent challenges the application on the basis that the Applicant seeks the suspension of the administrative decision that does not exist.

24. The Tribunal finds that the 31-day break in service exists independently of any offers of appointment received by the staff members after the expiration of the fixed-term contract. In this case, the Applicant is contesting the administrative decision, triggered by the expiration of her fixed-term contract, to impose on her a 31-day period of ineligibility for re-employment on a temporary appointment. She has sought management evaluation.

25. The cases of *Villamoran*, *Parekh*, *Helminger*, *Buckley*, *Omer*, and *Garcia*, concerned similar administrative decisions. The Tribunal found the ongoing implementation of each of those decisions capable of being suspended. These cases

are about the alleged unilateral taking away of a right without proper notice, which is sufficient for them to be receivable.

26. In this case, the decision to impose a requirement of a 31-day period of ineligibility for re-appointment on a temporary contract arguably varied the terms of the Applicant's fixed-term appointment. The new requirement is intrinsically linked to the Applicant's fixed-term contract—in fact, the 31-day period was expected to run immediately after the expiration of the Applicant's fixed-term appointment.

27. Moreover, the Respondent's submission that the Applicant should demonstrate that she has a formal offer of appointment falling within the 31-day period in order to justify bringing a suspension of action is, arguably, without foundation. The imposition of the 31-day break in service renders a staff member ineligible for such re-employment.

28. The Tribunal finds that it has jurisdiction pursuant to art. 2.2 of its Statute to consider the present application, that the Applicant has standing to bring it, and that this application is receivable.

Prima facie *unlawfulness*

29. For the *prima facie* unlawfulness test to be satisfied, it is enough for the 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 its 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).

30. This application gives rise to the same issues as in *Omer* and *Garcia*. The Tribunal was satisfied that the requirement of *prima facie* unlawfulness was met with respect to two of the three issues raised by the applicants in those cases:

a. whether the implementation of the contested decision would have the prejudicial effect of unilaterally altering the Applicant's contract by introducing a new provision that is detrimental to her acquired rights; and

b. 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).

31. The Tribunal finds no reason to depart from its rulings in *Omer* and *Garcia*.

32. The Tribunal notes that, contrary to the Respondent's submission, it did not find in *Garcia* that the issue of acquired rights was too complex to be addressed on a *prima facie* level and "for this reason refrained from making a specific finding as to prima facie unlawfulness relating to this issue". The Tribunal stated in *Garcia* (see para. 36) that the test of *prima facie* unlawfulness was satisfied "on two of the three issues raised by the Applicant", which were identified in *Garcia* as the issue of acquired rights and the issue of proper notice.

33. Further, the Respondent's submission that the 31-day period of ineligibility was necessitated by the Tribunal judgment in *Castelli* is not accepted. The Respondent advanced the same argument in *Villamoran*, and it was firmly rejected. The Tribunal explained in *Villamoran* that:

> 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.

34. The Tribunal finds, for reasons stated in *Omer* and *Garcia*, that the test of *prima facie* unlawfulness is satisfied on the two issues raised by the Applicant and set out in in para. 30 above, noting, however, that these 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

35. This application is of an urgent nature for the same reasons as those in *Garcia*. 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 diligently in filing her application on 9 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

36. In *Villamoran*, *Parekh*, *Helminger*, *Buckley*, *Omer*, and *Garcia* 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 harm the implementation of the contested decision would have on her rights and entitlements, which are virtually identical to the harm alleged in the previous cases.

Conclusion

37. The conditions for a suspension of action have been met in this case.

Order

38. 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 15th day of November 2011

Entered in the Register on this 15th day of November 2011

(*Signed*)

Hafida Lahiouel, Registrar, New York