UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2011/081
Judgment No.:	UNDT/2011/184
Date:	31 October 2011
Original:	English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

PAREKH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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 January 2005 as a Political Affairs Officer with the United Nations Assistance Mission in Afghanistan. He held a fixed-term appointment. He was appointed without review by a central review body.

10. In July 2009, the Applicant relocated to the Peacebuilding Support Office ("PBSO"), Department of Field Support, as a Policy Officer.

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.

Case

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 revise

> 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

> 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

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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.

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