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

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.

Case No.

> 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

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