Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

CORNA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Introduction

1.

relationships which prohibits the employment of both a parent and

subsequently received eight consecutive fixed-term appointments, for periods of

Following extensive consultations on this matter with the Policy Service, OHRM, and in light of the amended SR 4.7 (a), which

the Applicant had a legitimate expectation that her employment would continue for the four years left prior to her retirement date;

b. The Tribunal's dicta in *Boutruche* UNDT/2009/085, paragraphs 37 and 38, support a finding in the instant case that the Applicant had an acquired right as a staff member and could not be separated from service without respecting these acquired rights;

c. The Administration's express promises to the Applicant created a legitimate expectation of renewal of her contract. In 2008, the Applicant did not challenge WHO decision to discontinue the reimbursable loan agreement because she was assured by the then Chief, HRMS/UNOG, that her employment with UNOG would continue. During the past two and a half years, the former Chief, HRMS/UNOG, repeatedly promised her that an exception would be made to the family rule or that some other arrangement would be found. Those promises were made to the Applicant in the presence of other colleagues, including her immediate supervisor. While fixed-term appointments carry no expectancy of renewal, there are countervailing circumstances in the present case, including the Administration's failure to act fairly towards the Applicant who relied in good faith on the Administration's commitments to her and express promises by senior human resources officials of continued employment notwithstanding the family relationship;

d. The Administration should be estopped from invoking staff rule 4.7(a) due to its conduct. In Judgement No. 981, *Masri* (2000), the former Administrative Tribunal held that since the Administration had actual knowledge of the Applicant's family relationship and still hired him and gave him successive appointments, the decision not to renew his contract on this ground was unlawful and concluded that separating him after four years of service due to the family relationship rule was an act of bad faith;

e. The delays and the conduct of the Administration in not resolving the Applicant's situation for over two years is a violation of her due process rights, which renders the contested decision unlawful. Former staff

rule 104.10(a) and now staff rule 4.7(

was also fully aware of her precarious situation and thus cannot claim an acquired right to continuous employment;

c. The Applicant did not substantiate her claim that the Administration had expressly promised her that she would continue to be employed by UNOG. Furthermore, the former Chief, HRMS/UNOG, confirmed that he never promised the

28. As the Tribunal held in *Buckley* UNDT/2009/064 and *Miyazaki* UNDT/2009/076, the combination of the words "appears" and "prima facie" shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt. This was echoed in *Corcoran* UNDT/2009/071, in which the Tribunal held that "since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that prima facie [unlawfulness] in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision". In *Utkina*

> (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member, *unless another person equally well qualified cannot be recruited*.

33. Similarly, former staff rule 104.10 applicable when the Applicant joined UNOG in October 2008 until June 2009 stipulated (emphasis added):

> (a) *Except where another person equally well qualified cannot be recruited*, appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister.

34. The Applicant, who is apparently not aware of the entry into force of a new staff rule 4.7(a), stresses that the Staff Rules allow her appointment if "another person equally well qualified cannot be recruited" and submits that the Administration's failure to explore the possibility of making an exception on that basis renders the decision to separate her unlawful and arbitrary. The Respondent's reply to that is that the Applicant cannot claim the benefit of an exception that is no longer provided for in the more restrictive staff rule 4.7(a), which came into force on 2 September 2010.

35. The Tribunal notes that it took the Respondent almost two years—from November 2008 to October 2010—to decide whether or not to make an exception to the family relationship rule in favour of the Applicant and that he finally decided not to make an exception only one month after the more restrictive rule came into force. No reasons for this delay were given by the Respondent. It is an extraordinary coincidence that, after almost two years of renewing the Applicant's contract on a monthly basis, a decision was finally taken only shortly after a more restrictive rule came into force. This raises the legitimate question as to whether or not the Respondent acted in good faith.

36. Furthermore, the Tribunal notes that in delaying taking a decision until a more restrictive rule came into force, the Respondent deprived the Applicant of the possibility to be considered for an exception on the basis of the former staff rule and to seek judicial review of his decision should it be negative.

37. As far as promises are concerned, the parties have made conflicting submissions and the Tribunal considers that it does not have sufficient information before it to rule out the possibility that indeed promises were made by

persons with appropriate authority which gave the Applicant an expectancy that her appointment would be extended.

38. The above is not to say that the Respondent did act in bad faith or that another person equally well qualified as the Applicant could not have been recruited or even that a promise was made. However, in view of the particular circumstances of this case, it is sufficient for the Tribunal to consider that the prerequisite of prima facie unlawfulness is satisfied.

Irreparable damage

39. The requirement of irreparable damage has been addressed in several judgments of the Tribunal, the general rule being that no damage is irreparable if it can be fully compensated by a monetary award (see *Fradin de Bellabre* UNDT/2009/004, *Tadonki* UNDT/2009/016 and *Utkina* UNDT/2009/096). Such a rule, however, is not unqualified.

40. In *Fradin de Bellabre* UNDT/2009/004, the Tribunal held that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed. In *Tadonki* UNDT/2009/016, the Tribunal further elaborated on the general rule noting that:

> But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order

separation under these circumstances

on suspension will remain effective until his response is communicated in writing to the Applicant.

Conclusion

47.