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".

6. Following *Villamoran*, the Administration permitted the extension of staff on transitional 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.

7. By a memorandum dated 24 August 2011, the Officer-in-Charge of SPB requested the Chief of the OHCHR Programme Support and Management Services to re-appoint the Applicant on a temporary contract, until 31 October 2011, at the expiration of his fixed-term contract on 3 September.

8. After a first application for suspension of action (see

> 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 (United Nations's intranet portal), and the online Human Resources Handbook on Friday, 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

Prima facie *unlawfulness*

b. The decision is *prima facie* unlawful for reasons stated in *Parekh*, *Helminger*, *Buckley*, *Omer*, and *Garcia*. The rationale for a break in service as required by section 5.2 of ST/AI/2010/4/Rev.1 does not comport with principles of fairness and due process and has the effect of depriving staff members of certain entitlements that would otherwise flow from continuous service;

c. The limitation contained in ST/AI/2010/4/Rev.1 affects the terms and conditions of the Applicant's fixed-term appointment, which expires on 30 November 2011;

d. The 31-day break in service requirement unilaterally and unfairly alters the Applicant's contractual rights and is detrimental to his acquired rights. Reference is made to UNDT Judgments *Omer* and *Garcia*. The Applicant has certain acquired rights as a long serving staff member, including the right not to have his re-employment rights affected, and continuous pension participation, medical insurance and other entitlements. The impact of ST/AI/2010/4/Rev.1 violates the letter and spirit of staff regulation 12.1 which states that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members";

e. The Applicant has the right not to be subjected to additional conditions of employment which have not been properly promulgated, sufficiently justified or shown to be in good faith and in the Organization's best interest. In *Villamoran*, the Tribunal found no legal basis to require staff on fixed-term appointment who are being re-appointed under a temporary appointment to take a break in service prior to their re-appointment. In *Buckley* the Tribunal expressed its concern that a provision which is likely to have a seriously adverse effect on many staff members appears to have been ushered in with unseemly haste;

Entitlements he might have accrued during a previous period of service will not be taken into account. Other entitlements such as pension benefits, medical insurance and leave entitlements will depend on the type and length of the re-appointment. Pension participation and the interruption of medical insurance for the Applicant and his son are of particular concern;

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branch. He cannot reasonably assume what the outcome of the selection process will be;

c. This case is to be distinguished from *Helminger* and *Parekh*, where

appointment was meant to come to an end after a maximum period of two years;

h. The Applicant's due process rights were not violated. He was given a one-month notice before the expiration of his current appointment, which gave him ample time to make the necessary arrangements before the end of his appointment. Furthermore, he had known for more than two years that his fixed-term contract was transitional in nature;

i. The Applicant does not loose any acquired rights through the decision not to extend his contract. As is the case with any non-extension case, he will either be able to use his accrued rights (for example, he will be able to receive a pension based on the contributions he has made during the time of his employment), or entitlements will be paid back to him (for example, days of annual leave he has not yet taken).

24. The Respondent made no submissions on the issues of urgency and irreparable damage.

Consideration

25. The Applicant contests th006 Tc.0801 e5(t)(i)-9.8empospoo(i)-9.8em yoo

27. The Tribunal notes, however, that on 21 September 2011, the Applicant's branch requested his recruitment on a temporary appointment until 31 December 2011 at the expiration of his fixed-term appointment. Therefore, there may be no doubt that there is an opportunity for the Applicant to be employed until the end of the year.

28. In view of the foregoing, it is clear that the decision notified to the Applicant on 31 October 2011, no matter how vaguely it was formulated with regard to his 31-day ineligibility, constitutes an implicit refusal to re-appoint him on a temporary appointment after the expiration of his fixed-term appointment on 30 November. Since no other reason than section 5.2 of ST/AI/2010/4/Rev.1 is provided for the implicit refusal, the Tribunal must assume that the contested decision is based on the 31-day break in service requirement. Therefore, an administrative decision within the meaning of article 2.1 of the Statute has been taken.

29. Accordingly, the Tribunal considers that the application is receivable.

30. Pursuant to article 2.2 of its Statute, the Tribunal may order suspension of action, during the pendency of the management eva16.7(a1.67pyna)6.9atin,(o)4.6(n)4.6n aca16.7((o)4
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33. Contrary to the Respondent's view, however, it is clear from the instant application, but also from the two previous applications for suspension of action filed by the Applicant, that what he contests is nothing but the refusal to re-employ him on a temporary appointment immediately upon the expiration of his transitional fixed-term appointment.

34. This being said, the Tribunal is not convinced by the Applicant's arguments in support of his claim that the contested decision is *prima facie* unlawful.

35. First, he refers to the reasons stated by the Tribunal in *Parekh*, *Helminger* and *Buckley*. However, the circumstances were clearly different in those cases, where the applicants had been notified on 25 and 27 October of the decision to impose a 31-day break in service between the end of their fixed-term appointments *on 31 October 2011* and a new temporary appointment. At the time of the notification, ST/AI/2010/4/Rev.1, which is dated 26 October 2011, had either not yet been issued or at least there were serious and reasonable doubts as to whether it had been promulgated and published in accordance with the relevant provisions of ST/SGB/2009/4 (see for example *Parekh*, paras. 22-24). Furthermore, in those cases, the Tribunal was also concerned that at the time, the Organization had not kept its staff informed of changes in key legislation "with sufficient time for the staff to take steps to find alternative employment, accommodation [and] address their visa status" (see for example *Parekh*, para. 26). It is noteworthy that the Tribunal no longer relied on these arguments in subsequent judgments, namely *Omer*, *Garcia*, and *Neskorozhana*.

36. In the instant case, where the Applicant was notified on 31 October 2011 of the implementation of the contested decision with effect from 1 December 2011, the reasons stated in *Parekh*, *Helminger* and *Buckley* have lost their relevance. The Applicant cannot claim that ST/AI/2010/4/Rev.1 has not been duly brought to his attention, nor that he was not given sufficient time to make alternative arrangements.

37. Second, the Applicant argues that the 31-day break in service requirement is based on an administrative issuance that was promulgated without complying

46. Overall, the Tribunal finds that it was not presented with sufficient evidence that would raise serious and reasonable doubts as to the lawfulness of the contested decision. Therefore, it cannot but conclude that the test of *prima facie* unlawfulness is not satisfied.

Irreparable damage

47. In view of the Tribunal's finding as to *prima facie* unlawfulness, it is not necessary to examine whether the other conditions for suspension of action are met. However, in order to give a full view of the Tribunal's consideration of this case, it is helpful to add remarks on the issue of irreparable damage.

48. Although the Respondent remained unwisely silent on such an important issue, which could be interpreted to mean that he accepts the Applicant's arguments, the Tribunal must point out that it is not persuaded that the test of irreparable damage is met.

49. It is generally accepted that mere financial loss is not enough to satisfy the test of irreparable damage (see for example *Fradin de Bellabre* UNDT/2009/004, *Utkina* UNDT/2009/096). The Tribunal has found in a number of cases that harm to professional reputation and career prospects, or harm to health, or sudden loss of employment may constitute irreparable damage (see for example *Corcoran* UNDT/2009/071, *Calvani* UNDT/2009/092, *Osmanli* UNDT/2011/190). It has also found that the particular factual circumstances of each case have to be taken into account (see *Villamoran*).

50. In *Villamoran*, *Parekh*, *Helminger*, *Buckley*, *Omer*, *Garcia* and *Neskorozhana*, the Tribunal found that a mandatory period of one month's unemployment in the circumstances of those cases would cause the applicants irreparable harm. In particular, in those cases, the applicants were informed either shortly before or even after the expiration of their fixed-term appointments of the decision to impose on them a 31-day period of ineligibility for re-employment on a temporary appointment.

51. The circumstances of the present case are however different. The Applicant was informed a full month before the expiration of his fixed-term appointment of the contested decision. He was thus given reasonable time to make alternative arrangements. Considering the long history of the Applicant's contractual situation, certainly the loss of employment will not be "sudden".

52. Furthermore, it is pure speculation to state that the implementation of the contested decision to impose a 31-day break in service could affect the Applicant's health, career prospects and residence permit in Switzerland. As to the loss of entitlements, there is nothing that the Tribunal would not be able to compensate financially should the Applicant file an application under article 2.1 of its Statute.

Conclusion

53. In view of the foregoing, the application for suspension of action is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 21st day of November 2011

Entered in the Register on this 21st day of November 2011

(*Signed*)

Anne Coutin, Officer-in-Charge, Geneva Registry