Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BENCHEBBAK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR RULE 14 INTERIM RELIEF

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM
Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM

Notice: This Order has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 2 February 2010, the Applicant joined the United Nations Mission for the Referendum in Western Sahara (MINURSO) after a competitive test and interview for the post of Fuel Assistant on a fixed-term appointment at the GL-4/6 level. On 28 October 2011, the Applicant filed the present Application on the merits and simultaneously filing an application for interim relief pursuant to art.14 of the Rules of Procedure of the UNDT. The Applicant is contesting the decision not to renew his contract and consequently to separate him from service on 10 October 2011 ("the impugned decision"). The non-renewal decision was premised upon the Applicant's lack of required academic qualifications to hold the position he was selected for.

Facts

2. On 6 May 2009, the post of Fuel Assistant, GL-4 was advertised by MINURSO with a deadline of 23 May 2009. The Applicant submitted his application for the said post on 14 May 2009. The vacancy announcement stated that a high school diploma was an "essential" requirement for the position.

3. On 23 December 2009, the Applicant was invited, along with other short-listed candidates, to participate in an interview on 28 December 2009. Following the interview, the Applicant's recruitment was approved on 4 January 2010 with an offer of appointment transmitted to him on 14 January 2010.

4. On 2 February 2010, the Chief Civilian Personnel Officer (CCPO), Ms. Amina Noordin, confirmed the Applicant's appointment and indicated that the continuation of his appointment with MINURSO was subject to the Applicant providing the relevant evidence of education and experience.

5. On 3 February 2010, the Applicant signed the letter of appointment for one year effective 3 February 2010 expiring on 2 February 2011.

6. On 31 August 2010, a Human Resources Assistant requested the Applicant to provide the Personnel Section with his high school certificate or an "equivalent two years diploma" by close of business 15 September 2010. The Applicant could not produce this within the set deadline.

7. Since then, the Administration has asked, on a number of occasions, the Applicant to provide a high school certificate or "equivalent two years diploma".

8. On 20 September 2010, the Applicant provided the Personnel Section with a document which stated that he joined the Royal Air Force School of Morocco in 1977 and that he holds an Elementary Certificate in Technical Management. The document also indicated that he had attended a training course in Inventory Management. The Applicant was again requested to provide the Personnel Section with a high school certificate.

9. On 29 December 2010, following a meeting with the CCPO on 28 December 2010, the Applicant requested that the certificate awarded by the Moroccan Royal Air Force School and US Air Force Technical Training School be accepted in lieu of a high school certificate.

10. Meanwhile, a request had been sent by MINURSO Human Resources to the Recruitment Verification Unit (RVU) in Brindisi which failed to determine whether or not the Applicant's qualifications were 'equivalent to' a high school diploma or not, and the matter was referred to Field Personnel Division (FPD) of the Office of Human Resources Management (OHRM).

11. On 9 March 2011, the Chief of Mission Support, Nader Darwich, in MINURSO requested the FPD to exceptionally approve the retention of the Applicant's services in MINURSO in light of his findings on the Applicant's skills and performance improvement as well as the difficulties MINURSO faces in finding suitable candidates who possess computing, language and logistics skills.

12. On 23 May 2011, the Applicant was informed by the Chief of Mission Support in reference to a fax from OHRM dated 20 May 2011, that OHRM had completed a review of his education qualifications and concluded that MINURSO "followed established procedures in analysing his case in establishing that he lacked the required qualifications". FPD/OHRM consequently recommended that the Applicant's appointment should be extended to cover 30 calendar days written notice to end his fixed-term appointment. His contract was therefore extended to 22 June 2011.

13. On 25 May 2011, the Applicant filed a request for Management Evaluation of the decision to not renew his contract beyond 22 June 2011. On 27 June 2011, the Management Evaluation Unit (MEU) received confirmation from the Administration and the Applicant that his appointment was being extended for an additional month until 22 July 2011 pending review of additional documentation the Applicant had submitted to the Administration in June 2011. The MEU therefore concluded, in light of his extension, that the matter was moot and proceeded to close his case.

14. On 13 June 2011, the Applicant informed the MINURSO National Staff Committee that "[i]ts [sic] with a great regret that I have to announce that I am resigning from the National Staff Committee as the committee secretary with effect today, for some very personal matters."

15. On 22 July 2011, MINURSO Administration extended the Applicant's appointment for another month through to 22 August 2011 pending the completion of the MEU review. On 6 August 2011, MINURSO further extended the Applicant's appointment for another month through to 22 September 2011.

16. On 23 September 2011, the Officer in Charge (OIC) of Mission Support of MINURSO informed the Applicant that his appointment was further extended and would consequently expire on 22 October 2011 and that he would be separated from service on that date.

17. On 6 October 2011, the Applicant requested management evaluation of the decision to not further extend his appointment beyond 22 October 2011.

18. On 17 October, the Applicant filed an Application for a suspension of the decision not to renew his contract beyond 22 October 2011. The Application was served on the Respondent on the same date.

19. On 19 October 2011, the Tribunal issued Order No. 129 (NBI/2011) scheduling a hearing for 3 November 2011 and suspending the implementation of the decision until 10 November 2011.

20. On 26 October 2011, the MEU completed their review and held that the Administration had acted in accordance with the applicable rules in deciding not to extend the Applicant's appointment beyond 22 October 2011 and that the suspension of action until 10 November 2011 is to allow the filing of the Respondent's comments, the hearing and the determination of the matter.

21. On 27 October 2011, the Respondent requested the Tribunal to discharge Order No. 129 (NBI/2011) in light of the completion of management evaluation on 26 October 2011.

22. On 28 October 2011, the Applicant also informed the Tribunal that he received the response from management evaluation on 27 October 2011.

23. The MEU made the following findings in their response dated 27 October 2011:

a. The Applicant is not entitled to an extension of his appointment beyond 10 November 2011;

b. The expiration date specified in the Applicant's contract is 2 February 2011. Upon expiry of that contract it was not renewed, but merely extended consecutively until 22 October 2011 to give the Applicant opportunity to provide the documentation, to review those submitted and to allow management evaluation of that decision;

c. Accordingly, the Applicant's fixed-term appointment is subject to expiry on 10 November 2011. The Applicant's separation does not involve a termination but is a non-renewal upon expiry;

d. The Administration acted in accordance with the applicable rules in deciding not to extend the Applicant's appointment beyond 22 October 2011, and that the suspension of action until 10 November granted by the UNDT is to allow the filing of the Respondent's comments, the hearing and the determination of the matter. Overall, the Administration has given the Applicant's credentials the utmost consideration.

24. The Secretary-General endorsed the findings and recommendations of the MEU and upheld the contested decision with the determined shift in the date of separation from service of the Applicant.

25. On 31 October 2011, the Applicant filed an Application on the Merits. The Application was served on the Respondent on the same day registering the deadline for the Respondent's Reply on 30 November 2011.

26. On the same day, the Applicant filed an Application for Interim Relief pursuant to art. 14 of the Rules of Procedure.

27. On 31 October 2011, the Tribunal issued Order No. 136 (NBI/2011) rejecting the Respondent's request to have Order No. 129 (NBI/2011) discharged and proceeding with the hearing on 3 November 2011. The Tribunal additionally instructed Counsel to be prepared to address the Tribunal on all legal issues arising in the case during the hearing noting in particular the Motion filed by Applicant on interim relief as per art.14 of the Rules of Procedure.

28. On 3 November 2011, the Tribunal proceeded with the hearing scheduled as per Order No. 136 (NBI/2011) concerning *inter alia*, the Motion for interim relief pursuant to art.14 of the UNDT Rules of Procedure.

The Applicant's case

29. The Applicant's case may be summarized as follows:

30. The Applicant avers that proper consideration was not given in respect of his academic qualifications.

31. The Applicant left the Lycée Allaymoune on 14 April 1977, one year before the high school diploma exams, having been enrolled in the fifth year, scientific core. He then joined the Moroccan armed forces technical school where he pursued and received Elementary and Superior Certificate in Technical Management, a "three years study". He remained in the Moroccan armed forces for 10 years and left as a Staff Sergeant. He then pursued further training in Material Facilities, Management and Inventory Management.

32. The Applicant claims that he repeatedly and expressly asked that his qualifications be accepted in lieu of a high school certificate. He has strong performance evaluations and compelling recommendations, and the Administration ought to have exercised its discretion in his favour in this regard. He further argues that his current supervisor and another work colleague do not have high school certificates, and that such certificates are often not required in similar technical MINURSO posts.

33. The Applicant argues that there is considerable evidence that senior members of MINURSO harbour *animus* towards him which suggests that the Respondent was influenced by other reasons not to renew his contract. The following facts demonstrate such *animus*:

a. The Applicant was the Secretary of the National Staff Committee which held a planned strike and protest on 23 May 2011. On the same day the Applicant was presented with a notice of non-renewal and detained by security, physically searched and a blood test demanded;

b. Several days after the Applicant's MEU request of 6 October 2011, MINURSO CCPO, Ms. Amina Noordin, filed a complaint against the Applicant with the local police bypassing the UN disciplinary process. This complaint was promptly dismissed as unfounded;

c. Despite the fact that the Applicant has never been charged or disciplined by the United Nations, damaging accusations have been made against him and circulated widely within the UN.

34. The impugned decision further demonstrates the unlawfulness on the basis that the only justification given for the Applicant's non-renewal has been his alleged lack of required education qualifications. The Applicant's original job posting called for a high school certificate but the Administration informed him that an equivalent would be acceptable. There has never been a legal requirement within the UN that GS-4 level staff must have a high school certificate.

35. The Applicant's contract is now due to expire on 10 November 2011, as per Order No. 129 (NBI/2011) and is consequently an urgent matter. In the week leading up to 17 October 2011, the Applicant had been arrested, subjected to security escorts on the MINURSO compound and disciplinary questioning. In light of these events the Applicant has acted as promptly as reasonably possible.

36. In respect to the issue of irreparable damage, the Applicant is 54 years old, the sole breadwinner of his family and if separated would face numerous difficulties in meeting his financial obligations. Furthermore, given his age, his job prospects look bleak.

37. The Applicant further avers that the contested decision is one of "non-renewal." It is susceptible to suspension of action, as it does not constitute "promotion", "termination" or a matter of "appointment". The Administration has often taken the position that a non-renewal is not a "termination" and a renewal is not an "appointment". The Applicant seeks, in the alternative to suspension of the impugned decision, an order

for special leave with pay pending final determination of the case, to minimize unrecoverable loss.

The Respondent's case

38. The Respondent's case may be summarized as follows:

39. The Applicant has failed to demonstrate that the impugned decision is *prima facie* unlawful. Moreover, according to the Applicant's letter of appointment "[t]his appointment is offered on the basis, *inter alia*, of your certification of the accuracy of the information provided by you on the personal history form." The Applicant's fixed term appointment was therefore conditional on the provision of a high school certificate.

40. The educational requirement for the subject post, as set out in the vacancy announcement, is a high school certificate. The Applicant could not produce a high school certificate or documentation of education equivalent to a high school certificate.

41. The Applicant was given more than nine months to produce the required education certificates. Despite numerous requests, the Applicant has been unable to provide either a high school certificate or any documentation that his training is equivalent to a high school certificate. The Applicant was also aware from the day he signed his letter of appointment that a high school certificate was required and that his appointment was conditional upon submission of the requisite educational qualifications.

42. The record shows that the Administration followed the correct procedures in assessing the Applicant's credentials. Following a review of the additional documentation submitted by the Applicant, the Administration determined that the Applicant does not meet the educational requirements for the post he currently encumbers. The Applicant was also asked to provide further comments on his credentials before a final decision was taken not to extend his contract.

43. The Applicant's contention that two other staff members in the MINURSO Fuel Unit do not possess a high school certificate is irrelevant to this case.

44. The Applicant's contention that the contested decision was motivated by extraneous factors is without merit. The record shows that MINURSO tried to resolve the matter informally and even requested a review of the equivalency of the Applicant's military and technical training before taking a decision on his contract. Accordingly, the decision not to extend the Applicant's contract was made in accordance with the applicable Staff Rules and Regulations.

45. The Applicant will not suffer any irreparable harm by virtue of the non-renewal of his contract. The Applicant submits that he is 54 years old and the sole breadwinner of his family and would consequently face financial difficulties if his appointment was not extended. Given that the Applicant's sole claim is monetary damage, the Respondent submits that he can be financially compensated in the event he prevails on the merits. The Applicant has therefore failed to establish that he would be irreparably harmed in the event his application for suspension of the implementation of the impugned decision as interim relief is granted.

46. The Applicant further submits that the matter is urgent because his contract is due to expire on 22 October 2011. Given that the Tribunal suspended the implementation of decision until 10 November 2011, which effectively extends the Applicants' contract beyond 22 October 2011, the Application cannot be said to be of a particular urgency.

47. The Respondent submitted in court that the record shows that the Applicant was given numerous occasions to submit the documentation. The Applicant's contentions that the contested decision is *prima facie* unlawful are without merit as the procedures followed by the Respondent cannot be said to be unlawful. There was no personal *animus*, the Applicant's former position as the Secretary of the National Staff Committee is irrelevant.

48. At the hearing of this matter the Respondent also submitted that the Application is not receivable under Article 14 as this is a case of termination and not non-renewal.

Considerations

49. On 17 October the Applicant filed an Application for Suspension of Action under Article 13 of the Rules of Procedure. That Application was granted until 10 November to allow for a hearing. On 26 October 2011, the Management Evaluation Unit produced its evaluation, finding no fault with the decision of the Respondent.

50. On 28 October 2011, the Applicant submitted an Application on the merits and simultaneously filed a Motion for interim relief pursuant to art.14 of the Rules of Procedure of the Tribunal ("RoP of the UNDT") and art. 10.2 of the Statute. Article 14.1 of the RoP of the UNDT states that:

> At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

51. On the basis of the above provision, an application for interim relief will only succeed where the three conditions are met. The Applicant needs to establish a case of *prima facie* unlawfulness, that the case he has made out is of particular urgency and that the implementation of the contested decision would cause irreparable damage. In addition, where such temporary relief sought involves an order to suspend the implementation of the contested decision, this is not permitted in cases of termination, appointment or promotion.

Termination or Non-renewal?

52. Article 14 of the Rules of Procedure provides that at any time during the course of proceedings, the Tribunal may order suspension of action, "except in cases of appointment, promotion or termination." The Tribunal must therefore consider whether

or not a non-renewal of a contract amounts to a termination for the purposes of this article.

53. The Applicant argues that the terminology in art.14 must be construed quite narrowly and *contra proferentem* and therefore contends that in this case, the contested decision did not amount to a termination but rather a non-renewal which does not fall under the exceptions for seeking suspension as interim relief in art. 14. It was argued by the Respondent before the Tribunal that the present case involves a termination within the meaning of this rule, and that art.14 is therefore not applicable in this case.

54. The use of the word 'termination' in the context of UN staff members and their contracts is derived from the Staff Rules and Regulations. Conveniently, Chapter IX of the Staff Rules provides a definition of a 'Termination', under Rule 9.6, which states as follows:

> **"Rule 9.6**
> **Terminations**
> **Definitions**
>
> (a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.
>
> (b) *Separation as a result of* resignation, abandonment of post, *expiration of appointment*, retirement or death *shall not be regarded as a termination within the meaning of the Staff Rules."*[Emphasis added]

55. It is illogical, and some might say, deceptive, to provide a clear definition of a termination in the Staff Rules, and then to argue that its use in the Statute and Rules of the Tribunal is altogether different. The definition of 'termination' was considered in *Zerezghi*, GVA-2011-001, in respect to the exceptions in Article 10.5(a) of the Statute of the Dispute Tribunal. His Honour Judge Laker concluded that there was no reason to believe "that it was intended to give the word "termination" a meaning different from the one it has in the Staff Rules", and the same must be said of the instant case.

56. The facts of the case show that the Applicant's contract expired on 2 February 2011 and was renewed thereafter. It was clearly stated in the MINURSO Memorandum

to the Applicant on 23 May 2011 that "as your present appointment expires on 31 May 2011…"[1] clearly evidencing the nature of his separation on the grounds of expiry and not a mere termination.

57. The MEU also found in their response dated 27 October 2011 that "[the Applicant's] separation does not involve a termination, but it is a non-renewal upon expiry." The Staff Rules and Regulations are quite clear on the cases that will not be regarded as a termination.

58. Furthermore, the Secretary-General does not award termination indemnity under Regulation 9.3 to staff whose contracts expire and are not renewed. It follows that a termination under Article 14 cannot include contracts which are simply not to be renewed on expiry. Put another way, the Respondent cannot have his cake and eat it.

59. Indeed, it was evidently in the mind of the Respondent that the Applicant's separation be treated as a non-renewal rather than a termination, presumably because the latter would be more costly to the organisation than the former. It was stated in an email, Respondent's Annex 9, from OHRM, upon advice from the Administrative Law Section, dated 21 April 2011, that "there would possibly not be a need to address the matter through a termination, but rather it may be possible to address the matter through the non-renewal of his appointment." In light of this, in particular, the submissions of the Respondent seem inappropriate at best.

60. Consequently the Tribunal cannot but find that the contested decision amounted to a non-renewal and not a termination, and the Application is therefore receivable.

Is the Impugned Decision unlawful?

61. It must be noted at the outset that according to the staff rule 4.13 " a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service." The Tribunal affirms the former UN Administrative Tribunal jurisprudence in which it has been found that while the

[1] Annex 10, Applicant Annexes "Notice of non-renewal of appointment".

Administration has wide discretionary authority not to renew a fixed-term appointment such discretion must be "exercised free of prejudice and other extraneous factors."[2]

62. The established test for unlawfulness in the exercise of this discretion requires the Applicant to show that the contested decision was influenced by some improper consideration, 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.[3] The former UN Administrative Tribunal in its *Handlesman* Judgment No. 885 (1998) explained such countervailing circumstances as follows:

> (1) abuse of discretion in not extending the appointment; (2) an express promise by the administration that gives the staff member expectancy that this appointment will be extended. The respondent's exercise of his discretionary power…must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flow from his decision.[4]

63. The Applicant bears the burden of showing that the Respondent did not properly exercise his discretion. However, the Tribunal does not need to resolve any complex issues of disputed fact or law at this stage. All that is required is for a *prima facie* case to be made out by the Applicant.

64. The Respondent is entitled to terminate a contract of employment on the grounds of the discovery of facts anterior to the contract and relevant to the Applicant's suitability, which, had they been known to the Respondent at the time of the appointment, would have precluded it. This is set out clearly in Staff Rule 9.6(c)(v). However, in the present case, when the Respondent became aware of the Applicant's lack of high school certificate, he did not invoke this Rule. Having renewed the Applicant's contract even once – the first time being on 3 February 2011 – when aware of this issue, it is disingenuous for the Respondent to imply that the Applicant's lack of qualification renders him unsuitable for the job. If that were the case, his contract surely would not have been renewed back then.

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[2] Former UN Administrative Tribunal Judgment No. 1177 *Van Eeden* (2004) at para III.
[3] *Villamoran* UNDT/2011/126 at para 28; *Omer* UNDT/2011/188 at para 17; *Jaen* Order no. 29 (NY/2011) at para 24 and *Buckley* UNDT/2011/186 at para 22.
[4] Former UN Administrative Tribunal Judgment No. 885 *Handelsman* (1998) at para III.

65. Indeed, the Respondent continued to employ the Applicant for many months whilst apparently well aware that he was unable to produce a high school certificate. Further, the letter from the Chief of Mission Support of 9 March 2011 clearly indicates that one arm, at least, of the Respondent, was eager for the Applicant to remain in employment notwithstanding his lack of a high school certificate.

66. In the circumstances, it seems at best arbitrary that another arm of the Respondent, OHRM in New York, should advise the mission not to renew the Applicant's contract. Indeed, the evidence on record suggests confusion as to who should exercise the discretion to make the decision as well as what the views of MINURSO were. In an email of 21 April 2011, Mr. Sudo-Rao of OHRM in New York wrote to a colleague, citing advice from the Administrative Law Section as follows:

> While Marie-Anne Martin's email of 24 March 2011 indicates that [the Applicant] would not have been considered suitable [for employment], also on record is his supervisor's request for exceptional approval of his appointment. Therefore, as a preliminary matter, there should be a definitive determination by the administration (DFS/OHRM) that had his lack of qualifications been known, this would have precluded his employment.

67. It seems from the email header that Marie-Anne Martin was Chief of Conduct and Discipline. That she advised as stated above indicates that consideration was being given to misconduct allegations or disciplinary action. Her approach was clearly quite different from that of the Chief of Mission Support who was strongly behind the employment of the Applicant at this time. The Tribunal questions whether it was appropriate to draw a conclusion based on the advice of Ms. Martin when the supervisor's opinion was clear and no disciplinary proceedings had been initiated.

68. Ultimately, the question of whether or not the Applicant's lack of the required qualification rendered him unsuitable for employment was a matter for the discretion of the Respondent. This is clear from the phrasing of Rule 9.6 (c) but also from the fact that the RVU was unable to determine the equivalence of the Applicant's qualifications and referred the 'decision' to UNHQ. The question could, therefore, have been decided either way.

69. OHRM appears to have – at best – misinterpreted the position of MINURSO and advised that the Applicant's contract should be allowed to expire. What happened next is troubling to the Tribunal, and suggests that the non-renewal was not simply arbitrary but may have been improperly motivated. The Applicant testified that on 23 May 2011, there was a strike organised by the National Staff Committee, of which he was the Secretary. He testified that less than half an hour after his attendance at this, he was called to a meeting with Ms. Amina Noordin and informed of the non-renewal of his contract. The Applicant testified that a short while later he was the subject of a search by the Chief of Security, Mr. Yasser El-Sarsawi, on the basis of allegations made against him of drug possession which never became the subject of a disciplinary process. These facts were not disputed in the hearing by the Respondent.

70. The MEU did not consider that there was a nexus between the non-renewal of the Applicant's contract and his membership of the National Staff Committee. This Tribunal disagrees, on the evidence heard so far. The Applicant testified that Ms. Amina Noordin had actually told him at one point that there were "problems with his documents and it was not a good idea to be a member of the committee."

71. The Tribunal has only to find *prima facie* unlawfulness at this stage, when the full facts have not been examined in depth. It seems to the Tribunal that, *prima facie*, the *volte face* on the part of MINURSO is likely to have been motivated by the Applicant's involvement in the strike. If it were not, then it was motivated by the correspondence from UNHQ which advised the mission not to renew the contract. But this latter correspondence was based either on a misunderstanding of the mission's perspective – as set out in the letter of 9 March 2011 – or on the advice of the Chief of Conduct and Discipline, Ms. Martin, and was therefore an arbitrary exercise of administrative discretion.

72. In the circumstances, the Tribunal considers that the element of *prima facie* unlawfulness has been met.

The element of urgency

73. The matter is undoubtedly urgent as the Applicant's contract is due to expire on 10 November 2011 as per Order No. 129 (NBI/2011).

74. The element of urgency is therefore met.

Irreparable damage

75. The Applicant avers that he is 54 years old, the sole source of financial support for his wife and three daughters and that he has limited savings. The result of his separation would cause him great difficulty in supporting his family as well as hampering his job prospects, an especially important consideration for someone of his age. Loss of career prospects associated with non-renewal of contract, particularly in the late stages of one's career, has been recognized to give rise to irreparable harm.

76. In addition, the Applicant has faced enormous stress and a deterioration of his physical and psychological health.

77. The Respondent avers that the Applicant will not suffer any irreparable harm by virtue of the non-renewal of his contract. The Respondent submits that he can be financially compensated in the event that he prevails on the merits. The Applicant has therefore failed to establish that he would be irreparably harmed in the event that his application for interim relief is not granted.

78. It is a well-established principle that mere financial loss is not enough to satisfy the test or irreparable damage. This principle was upheld in *Omer* UNDT/2011/188, *Fradin de Bellabre* UNDT/2009/004 and *Utkina* UNDT/2009/096. 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." The Respondent argues that if the Applicant can be fully compensated by a monetary award, no suspension order should be granted. Indeed, this would constitute an accurate restatement of the general rule for temporary relief.

79. The Tribunal must look at the particular circumstances in each case. The Applicant in this case is 54 years old and has worked diligently and is, as he testified, overqualified for the position he holds. Despite the lack of a high school certificate the Chief of Mission requested that he be exceptionally retained. The Tribunal accepts that the loss of his job would significantly hinder the Applicant's future prospects with the UN and that for him to find work elsewhere in Morocco will be extremely difficult if not impossible. The Tribunal has previously found that in a "number of cases [..] harm to professional reputation and career prospects, or harm to health or sudden loss of employment may constitute irreparable damage."[5]

80. The contemporaneous emotional and psychological effect on the implementation of the contested decision in light of the Tribunal's finding of its *prima facie* unlawfulness is of such a nature "as to justify" a finding of irreparable damage.[6] *Tadonki* laid down the principle as follows:

> [W]here damages can adequately compensate an Applicant, if he is successful on the substantive case, an interim measure should not be granted. 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 to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.[7]

81. The Tribunal is satisfied that in this case monetary compensation alone, in the light of the *prima facie* unlawfulness of the contested decision, would in and of itself not do justice to the Applicant. The evidence before the Tribunal and the jurisprudence lead only to a finding that the implementation of the contested decision would cause the Applicant irreparable harm.

[5] *Omer* UNDT/2011/188 at para 33.
[6] *Villamoran* UNDT/2011/126 at para 42. Also see *Jaen* Order No. 29 (NY/2011).
[7] *Tadonki* UNDT/2009/016 at para 13.1.

Conclusions

82. The Tribunal therefore orders the suspension of the implementation of the contested decision pending the determination of this case on the merits.

(Signed)

Judge Vinod Boolell

Dated this 10th day of November 2011

Entered in the Register on this 10th day of November 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi