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- 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.

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;

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

The Respondent's case

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.

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 discre

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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

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

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