Case No.:

Series of the UN Staff Rules and Regulations.

4.3 Effective 4 June 2009, the Applicant accepted the above-referred fixed-term appointment and took his functions on the same day.

4.4 In a Handover Note dated 16 June 2009, the Officer-in-Charge (OIC) informed the Chief of Section, PTSS/UNON that he had recruited the Applicant along with another staff on GTA short-term appointments to replace departing staff in the Contracts and Purchasing Units.

4.5 On 25 August 2009, the Chief Purchasing Unit of the PTSS and supervisor of the Applicant wrote to the Chief of PTSS/Division of Administrative Services (DAS) asking for an update on "the status of [the Appellant']s contract".

4.6 On the same day, the Applicant received an email from Human Resources Management Service (HRMS), informing him that his clearance had been sent to the clearing units on the same day and that he was required to take several steps in order to 3(eps)5.1(in)5.9s4snT-14h7rd

4.4 O

Wednesday, 2 September 2009 in Nairobi. By letter dated 31 August 2009, the parties received a hearing notice and confirmed their attendance. By email dated 2 September 2009, the Respondent submitted a reply to the Applicant's brief.

5.2 The hearing was held on 2 September 2009, at 4pm Nairobi time. The Applicant was present in the courtroom, with his Counsel. The Respondent participated in the hearing via audio-conference. The Applicant and a witness called on his behalf (Mr. [...], the then

5.8 While the datelines are unclear, at some point upon her return, the Chief of Section appears to have queried the recruitment process. This led to Mr. [...] being summoned to the Chief of HRMS to explain the recruitment of the Applicant, and to submit a written statement on the same. He submitted his written statement as required and the matter seemed to have ended there[6]. The Applicant testified that this came as a shock to him. Mr. [...] testified that he was himself surprised. Having not heard back from Human Resources after he submitted his written statement he considered the matter closed so that no irregularity was found in the recruitment of the Applicant.

5.9 The Applicant testified that throughout his term at PTSS, he was never acknowledged by the Chief of Section Ms. [...]. As the Section is overstretched, almost every procurement clerk/assistant, including the Applicant, clocks in about 40 hours of overtime work. The Applicant's overtime has, however, never been approved by Ms [...] despite the signature of his immediate supervisor, Mr. [...][7].

6. PROCEDURAL ISSUES

6.1 On 3 September 2009[8], the Respondent filed a *Motion to Submit Additional Evidence.* On the same day, the Applicant submitted a reply to the Respondent's Motion. The Respondent premised the instant Motion on the allegation that of the Administration was not informed in advance of Mr. [...] being called as a witness, as required by Article 16.2 of the Rules.

6.2 The Tribunal's records shows that at the time notices of the hearing were circulated to the Parties, by email dated 31 August and 1 September 2009, the Registry had not received notification of the intention of any of the parties to call witnesses. It was in the evening of 1 September 2009, New York Time and in the early hours of 2 September 2009, Nairobi Time that Counsel for the Applicant (Mr. […] at that time) emailed the Registry to advise of his intention

[6] Draft transcript 2 September 2009 pp. 19-20
[7] Draft transcript 2 September 2009 pp. 7-8.
[8] This Motion was originally submitted as dated 1 September 2009 and later corrected by its author to 3 September 2009, date of effective submission to the UNDT Registry.

to call witnesses. This original message was copied to the Respondent. Immediately upon receipt of the message in Nairobi in the morning of 2 September, the Registry advised the Applicant by an email copied to the Respondent that it had taken note of the Applicant's intention to call witnesses. In addition to Ms. […], Officer-in-charge of the Administrative Law Unit of OHRM and the corporate email account of OHRM, who were recipients of the original email from the Applicant, the Registry in acknowledging receipt of the notice copied its response to Mr. […].

6.3 The Respondent was therefore informed ahead of the hearing of the Applicant's intention to call witnesses. The Tribunal finds the suggestion that the "Registry did not inform in advance" before the hearing of the names of witnesses the same both disingenuous and inappropriate. Further, at no point during the hearing did Counsel for the Respondent object to the calling of Applicant's witness.

6.4 During the course of the Applicant's supervisor's testimony, the Respondent's Counsel objected to evidence being led on the circumstances of the recruitment and the decision not to extend the appointment. Counsel for the Respondent intimated to the Tribunal that he would not be in a position to rebut that evidence as his potential witness was not in attendance. The Tribunal recalls that at the beginning of the hearing the Presiding Judge explained to the parties the procedure he intended to follow. In brief the parties were informed that the Applicant will present his case and call witnesses. The Respondent would be given an opportunity to cross-examine the witnesses. The relevant section of the transcript of the hearing reads:

> Judge Boolell*: "The rules are totally silent on the procedure we should follow in such hearings, so the way I want this present hearing to be proceeded with would be as follows: We'll go back to basic principles, that is, the one who [avers]must prove. So we'll ask the Applicant to make out his case and call witnesses, if any. And if the Applicant does give testimony along with his witnesses, the Respondent may wish to cross-examine both the Applicant and/or his witnesses. And then the Respondent will (…) make out his case and, of course, will have the right to call witnesses and subject again to the rule of cross-examination by the Applicant. And after the submissions after the testimony or whatever submissions the parties may wish to make, if the Tribunal requires any clarifications, the Tribunal will do so and then we can wrap up with*

The Applicant states that when the Section Chief returned from her extended leave, she expressed strong disagreement with the recruitment of two staff members, one of which is himself.

(c) The Section Chief adopted an "unprofessional attitude". According to the Applicant, she "*completely refused to acknowledge [his] presence and pointedly ignored [him] on all occasions. During the three months [he had] been [there], the Section Chief ha[d] not even exchanged a greeting with [him] or with [his] colleague who was recruited under similar circumstances*." This attitude was demotivating to him and also resulted in the migration of many staff members from this particular Section.

(d) The Section Chief had tried to terminate his contract with immediate effect, but this was unsuccessful thanks to the support of the Nairobi Staff Union. However, his colleague recruited under similar circumstances was terminated.

(e) From the above, the Applicant submits that the decision was politically and personally motivated and that he should not be victimized for a personal conflict between the Section Chief and his immediate supervisor.

(f) As to whether the matter is urgent, the Applicant submits that his contract is due to expire on 3 September 2009.

(g) On the issue whether this decision would cause him irreparable harm, the Applicant submits that,

i. The decision was taken on the ground of extraneous factors, and thus it is clearly violating "his due process and basic staff rights".

ii. Thus, if implemented, he would be permanently denied the opportunity of redeeming his due process and fundamental rights that were violated by the improper actions of the Section Chief when formulating the administrative decision at issue.

iii. He would also be permanently denied the opportunity of reclaiming his staff right to have his contract extended as he reasonably expected that it would be so extended.

iv. The impugned decision was arbitrary, prejudicial and a pure act of

abuse of power and authority on the part of the Section Chief.

8. RESPONDENT'S REPLY

8.1 In his *Reply to the Application for Suspension of Action* dated 1 September 2009, the Respondent's Counsel submits as follows:

(a) Pursuant to the Staff Rules 104.12 (b) in effect at the time of the Applicant's contract, a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment. This is true even assuming his performance is appraised as demonstrably efficient or exceptional. [10]

(b) Furthermore, Staff Rule 109.7 provides that fixed-term appointments shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. More importantly, there is no requirement to provide any reasons for the non-renewal of a fixed-term appointment. UNON advised the Applicant that he was recruited to meet temporary needs of the service. The Respondent therefore stresses that the decision not to extend the Applicant's contract is a valid exercise of the Secretary-General's discretionary authority.

(c) The Secretary-General may lawfully decide not to extend a staff member's contract, barring countervailing circumstances to create a reasonable expectancy of renewal.[11] The Applicant has not advanced any facts or adduced any evidence demonstrating that there were circumstances that created a reasonable expectancy for extension of his contract.

(d) The Applicant did not bring any evidence to either clarify what, if any, procedural flaw was occasioned by UNON during his initial recruitment or on what basis he considered this to be spurious, or why he held a reasonable expectancy that his contract would be extended but for the alleged flaw. Likewise the Applicant proffers no evidence beyond his own claim to the UNDT by which to infer victimization. Therefore, the Applicant has

[10] [United Nations Administrative Tribunal (UNAT) Judgments No. 1163, *Seaforth* (2003), No. 440, *Shankar* (1989) and No. 1049, *Handling*

not established that the contested decision not to extend his contract was prima facie illegal.

(e) As to the question of urgency, the Applicant was informed at the end of July 2009 that his contract would not be extended and he re

cumulatively before the Tribunal could issue an interim order. The Applicant contends that each of those elements could stand on its own to warrant a suspension of action, and that requiring that all three elements be met before an order can be granted sets too high a standard. Counsel for the Respondent submitted that the three conditions should be present before the issuance of an order for suspension.

9.1.3 It is trite law that the general rule for the interpretation is that the words used are to be interpreted in their natural and ordinary sense. The interpretation should give full meaning to the words in their literal sense. It is only in cases where the language of the statute or regulation is ambiguous that it becomes necessary to find out what the intention of the framers of the statute or regulation was. The language of

9.2.1 In deciding whether an interim measure should be ordered, courts in most national jurisdictions are guided by the following principles:

(i) There must be a serious issue to be tried and the claim must not be frivolous and vexatious;

(ii) The Tribunal should consider the balance of convenience. This requires the Tribunal to consider the adequacy of damages and whether, if the Applicant were to succeed on the merits of the case, he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the action of the Respondent. If the Tribunal considers that damages would be an adequate remedy and the Respondent is capable of paying such damages then an injunction will not be granted.

9.3 The Hepworth Case

9.3.1 In view of the fact that reference was made to the decision of *Robert Hepworth v. The Secretary General of the United Nations*,[13] the Tribunal considers it necessary to show that the facts in the instant application are distinguishable and a far cry from the situation that obtained in *Hepworth*. The facts in Hepworth were as follows:

9.3.2 Mr. Hepworth joined the United Nations Environment Programme (UNEP) in 2000 as Deputy Director of the Division of Environmental Conventions (DEC). In 2004 when Mr. Hepworth was posted in Nairobi he accepted a transfer to Bonn, Germany to act as Executive Secretary with the Secretariat of the Convention on Migratory Species (CMS). On 24 February 2009 the Executive Director of UNEP verbally offered Mr. Hepworth the position of Special Adviser on biodiversity with the Division of Environmental Policies Implementation (DEPI) in Nairobi. On 26 February 2009 Mr. Hepworth sent a letter to the Executive Director of UNEP

[13] Case No. UNDT/GVA/2009/38.

informing him that he was declining the offer for professional and personal reasons. Mr. Hepworth also asked the Executive Director of UNEP to reconsider the decision.

9.3.3 In a memorandum dated 1 April 2009 the Executive Director of UNEP informed Mr. Hepworth of his decision to reassign him as Special Adviser to Nairobi. Mr. Hepworth indicated that he was not prepared to accept the reassignment in Nairobi. He also indicated that he would not sign a new contract with UNEP in that capacity. On 5 June 2009 Mr. Hepworth submitted to the Secretary General a request to review the decision to reassign him to Nairobi. By a letter dated 15 June 2009 the Executive Director of UNEP informed Mr. Hepworth that,

> *"In view of your decision not to come to Nairobi as instructed, I regret to inform you that UNEP is not in a position to extend your current appointment beyond its expiration on 26 July 2009".*

9.3.4 On 15 July 2009 Mr. Hepworth submitted a request for management evaluation of the decision not to extend his fixed term appointment beyond 26 July 2009. Following this he submitted a motion for the suspension of the contested decision.

9.3.5 In a considered decision the UNDT Geneva found on the specific facts of the case that the decision was not *prima facie* unlawful. The facts of the *Hepworth* case bear no comparison with the facts of the present case. The Applicant unlike Mr. Hepworth did nothing to provoke the non- renewal of his fixed-term appointment. The motivating factor for non renewal in *Hepworth* was the refusal of Mr. Hepworth himself to be redeployed to Nairobi as a Special Adviser on biodiversity at DEPI in Nairobi even though, as explained by the Geneva UNDT, this was meant to strengthen the capacity of biodiversity activities in the Organisation.

9.3.6 The Tribunal unreservedly holds that *Hepworth* cannot be invoked as authority that a suspension of action can never be ordered when a fixed term appointment is not renewed. The Geneva UNDT was cautious on this issue when it observed,

> "*Staff members – like the Applicant-[Hepworth] that are serving under a FTA [Fixed Term Appointment] do not have a right to renewal unless there are countervailing circumstances*".

9.3.7 The Geneva Tribunal referred to a decision of the UN Administrative Tribunal (*Handelsman*, 1998, Judgment No. 885) where that Tribunal explained what countervailing circumstances would amount to. These were set out as follows:

> "*Countervailing circumstances may include (1) abuse of discretion in not extending the appointment; (2) an express promise by the administration that gives the staff member expectancy that his or her appointment will be extended. The Respondent's exercise of his discretionary power in not extending a 200 series contract 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 flaw his decision*".

By the use of the word "may" the UN Administrative Tribunal indicated that it did not intend to set an exhaustive list of countervailing circumstances.

9.4 *Prima Facie* Unlawfulness of the Decision

9.4.1 The Tribunal notes that the Applicant has filed a request for management evaluation in respect of the contested decision, which request is still pending.

9.4.2 With respect to the first element of the test which needs to be met, the Tribunal firstly notes the Applicant's contention that he was given an express promise of renewal. Mr. [...] testified on the same, and in response to a question from the Presiding Judge on whether he was allowed to make such a promise, he stated:

> *The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity.*

The evidence of Mr. [...] established that there was a backlog in the Procurement Unit and existing staff were being paid overtime in order to cope with that situation. It is surprising that in such a situation the Respondent deemed it proper not to renew the appointment of the Applicant

chance to acquire more experience and improve so as to increase the likelihood that he may accede to a better position in his career. The International Labour Organisation Administrative Tribunal (ILOAT) made the following observations in relation to fixed-term appointments:

> *"Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls*