



re: Judge Coral Shaw
istry: Nairobi
gistrar: Abena Kwakye-Berko, Acting Registrar

SANNOH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

for
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Coun.
Steven .

Introduction

1. In his challenge to the United Nations Dispute Tribunal (“the Tribunal”), the Applicant contests a decision by the Special Representative of the Secretary-General (SRS)G) of the United Nations Mission in Sudan (UNMIS) to reclassify or re-profile the post of Chief Human Rights Officer UNMIS from D1 to D2 upon the establishment of United Nations Mission in South Sudan (UNMISS).

2. He alleges that: the decision to upgrade the UNMISS post to the D2 level was unfounded whether it was re-profiled or reclassified; the decision to fill the new post at UNMISS through a process of competitive selection was unlawful; and that the Administration breached its obligations to the Applicant in not extending his contract for one year and failing to provide indemnity payments on the abolition of his post.

3. The remedies sought by the Applicant are:

a. Lost salary from his date of separation at the level he held at the time of his separation.

b. Future lost salary from the current date to his mandatory retirement date at the level he held at the

c.

proposed new mission in South Sudan would be effected.

9. On 1 June 2011, the Director of Mission Support (DMS) of UNMIS issued Information Circular 218/2011 to inform UNMIS personnel of the transition of international staff to the new mission in South Sudan. In summary, it provided, *inter alia*:

a. In cases where the number of posts in the new mission is equal to or higher than the number of posts, under the same occupational group and level, staff-members currently encumbering those posts in UNMIS will automatically be reassigned to the new mission provided other conditions such as satisfactory performance are met.

b. In cases where the number of posts in the new mission is lower than the number of encumbered posts in UNMIS at the same occupational group and level, then a comparative review process will be instituted through a comparative review panel comprised of members of the FSU and UNMIS Administration.

c. In cases where occupational groups (posts) in the new mission do not currently exist in UNMIS, then those posts in the new mission will be advertised and filled through the regular recruitment and selection process.

10. On 30 June 2011, the DMS issued Information Circular No. 334/2011 entitled “Update to UNMIS Staff regarding the UNMIS Draw-down Process”. It dealt with extension of contracts; interim measures to 9 July 2011; transition from UNMIS to the UNMISS in South Sudan and Abyei, and follow-on assignments. The Information Circular stipulated:

Staff with fixed term contracts that are due to expire shortly will have their appointments extended for one year. Should a staff member’s function no longer be required by the mission prior to the expiration of his/her fixed term appointment, a termination indemnity may be payable in accordance with Staff regulation 9.3 and Annex III of the staff rules.

This extension did not apply to staff members with documented performance shortcomings and other criteria, none of which applied to the Applicant.

11. The Information Circular also stipulated that:

Where the staffing table for the new missions reflects new posts or where the functions of a post change by more than 30% the post will be filled through the regular competitive selection process and not through the comparative review process.

...

For those staff members who are not selected or provisionally reassigned to a position, their appointment may be terminated for reasons of reduction in staff or abolishment of posts in accordance with Staff Regulation 9.3 and would be eligible for payment of applicable termination indemnity under Annex III of the Staff Rules.

12. By S/RES/1996 (2011) dated 8 July 2011, the Security Council requested, *inter alia*, that “the Secretary-General transfer appropriate functions performed by UNMIS to UNMISS, together with appropriate staff and logistics necessary for achieving the new scope of functions to be performed, on the date when UNMISS is established, and begin the orderly liquidation of UNMIS.”

13. On 9 July 2011, the new State of South Sudan came into existence and UNMISS was officially established. Along with the other sections of UNMIS, the Human Rights section was transitioned to UNMISS on 9 July 2011.

14. Preparation for senior leadership working sessions to conduct a comparative analysis of S/RES/1996 and address the human rights mandate began on 30 July 2011. The draft UNMISS organigram for the Human Rights section at that time showed the Chief Human Rights Officer as a D-1 post.

15. Following those working sessions, the then Chief of Staff wrote to the staff on 10 August 2011 attaching the UNMISS staffing proposal which showed a D-2 post as head of the UNMISS Human Rights section and not a D-1 post. The Chief of Staff said:

Thank you for all very much for your hard work in developing draft staffing proposals for UNMISS in the last three weeks. The Mission leadership went

through every submission and has considered the overall package in the light of Resolution 1996 (2011), the SRSG's vision and the priorities of the Government, as well as taking account of severe financial pressure coming from New York.

...

Please note that posts will not be final until approved by the General Assembly towards the end of the year and further changes are possible. However you may assume this staffing proposal to be the working assumption until further notice.

16. This proposal was submitted by the Mission's leadership to Headquarters for the senior management's approval and onwards for submission to the General Assembly.

Facts concerning the Applicant

17. The Applicant joined the United Nations on 17 September 2003 under an appointment of limited duration. He served in different peacekeeping operations before he took up a fixed-term appointment on 1 February 2008 as Senior Human Rights Officer at the P5 level. He was thereafter reassigned for one year on 16 September 2009 as Chief Human Rights Officer at the D-1 level in the Human Rights Section in UMMIS.

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told there was a hold up in his transfer.

26. On 27 July 2011, the Chief Civilian Personnel Officer (CCPO) at UNMIS informed the Applicant that “following the completion UNMIS (*sic*) mandate, the human resources post-matching and comparative review exercises regarding transition of international staff from UNMIS”, he could neither be transitioned to UNMISS nor to the United Nations Interim Security Force for Abyei (UNISFA). The letter also served as notice of completion of his appointment with UNMIS and consequently the termination of his appointment effective 31 August 2011.

27. On 28 July 2011, the Applicant sought management evaluation of this decision. On the

including Human Rights. During this time, the Applicant was involved with the drafting of texts on the Human Rights Division for budget submissions.

31. The Applicant took up his duties with UNMISS in Juba to perform the functions of Chief Human Rights Officer at the D-1 level on 4 August 2011. He was placed on a temporary post funded through General Temporary Assistance (GTA) Funds/Technical Cooperation for the duration of his assignment. The post was to expire on 15 September 2011.

32. On 19 August 2011, the Applicant was seriously injured and required hospitalization following an arbitrary arrest and assault by South Sudan Police. On 24 August 2011, he was flown to the United States for medical treatment and remained on sick leave until 30 June 2012.

33. On 27 August 2011, the Chief of Staff of UNMISS sent an email to the SRSG stating as follows:

Last night I was called by [...], the Acting Director of the Field Operations and Technical Cooperation Division, OHCHR in Geneva. After discussing the staffing table and budget (they'd heard New York was seeking more cuts), he turned to [the Applicant].

He indicated that [the Applicant] would likely be gone for several weeks for medical attention and leave. In light of this, they were thinking of finding us a temporary replacement. He wanted to know if we would be amenable to that. They didn't have a lot of staff members available for such assignment, so it might be for only "three or four weeks". He also wanted to know if we were still planning on a D 2 Human Rights (*sic*).

34. On 8 September 2011, the vacancy announcement (Number 11-HRI-DFS-425421-R-JUBA) for Director of Human Rights for UNMISS at the D-2 level went out with a deadline for applications on 8 October 2011. The Applicant saw the advertisement on 15 September 2011 while he was on sick leave and applied for the post by the deadline. The selection process was led by OHCHR under the Memorandum of Understanding between OHCHR and

the Administration.

35. His contract at the D-1 level was scheduled to expire on 15 September 2011 but on 3 October 2011 his contract was renewed until 15 January 2012, “pending the recruitment process of the new D-2 Director of the Human Rights Division”.

36. On 24 October 2011, the Applicant requested management evaluation of the decision to “reclassify the post of Chief Human Rights Officer in the Human Rights section of UNMISS at the D-2 level.”

37. On 27 October 2011, the report of the Secretary-General to the General Assembly on the UNMISS budget for the period of 1 July 2011 to 30 June 2012 requested the creation of a D-2 post to head the upgraded Human Rights Division. The Secretary-General noted that the UNMISS Division of Human Rights would be headed by a Director at the D-2 level which was critical to the sensitivity of the issues involved to reflect “the prominence of human rights in the mandate of the [m]ission.” The Secretary-General emphasized the Director’s level of “responsibility of the overall performance and discharge of its human rights mandate, and for overseeing the strategic direction, management and operations of the Division in Juba and at the State and Country level.”

38. On 9 and 10 November 2011, interviews for the D-2 post were conducted. The Applicant was among the five candidates who were interviewed but he was not selected.

39. On 1 December 2011, the MEU concluded that the decision to classify the post at the D-2 level was not taken out of personal animosity towards the Applicant, but rather was based on an objective, operational rationale. It found that the contested decision entailed a legal exercise of discretion.

40. By letter dated 13 December 2011, the Applicant was informed that, as a result of the change in UNMISS staffing effective January 2012, his D-1 post would be abolished effective 31 December 2011 and that he would be retained in service against another post for

administrative purposes only until the expiry of his appointment. UNMISS also informed the Applicant that his details would be submitted to Field Personnel Division (FPD) for further advice, and where possible, reassignment to other missions.

41. His contract was renewed from 15 January to 15 April 2012 then again from 16 April to 30 June 2012. The Chief Medical Officer of Peacekeeping Medical Services Division wrote to the UNMIS Director of Mission Support stating that “all medical documents attached to [the Applicant’s] memo dated 19 June 2012 have been received and reviewed at the Medical Services Division. Based on the information submitted, sick leave has been approved through 30 June 2012. [The Applicant] is fit to return to duty as of ...2 July 2012.”

42. On 15 July 2012, the Applicant was informed by the Chief Civilian Personnel Officer (CCPO) of UNMISS that his post “was abolished as 1 January 2012 (sic) and you were duly informed of the fact, both in January and in my latest email to you dated 3 July 2012. In this connection, the mission is processing your separation from UNMISS effective 30 June 2012 COB.” The Applicant’s contract expired on 30 June 2012 and on that day he was separated.

Oral testimony

43. At the hearing, the Applicant testified that when he was transitioned to UNMISS there was no reference to it being provisional. Although he received a letter telling him that his post was subject to review and eventual competitive selection he did not accept that the letter was correct. When his first term expired on 15 September 2011, he was asked to request an extension of assignment. He signed this reluctantly and endorsed the request form as follows:

This contract has not been discussed with me. Consistent with the new staff rules, my contract should have been extended for 12 months. Hence I am signing with reservation.

44. When his post was abolished on 30 December 2011, the SRSG explained in a letter to him that this was as a result of a change to UNMISS staffing effective January 2012 his contract was extended up to 30 June 2012.

the Human Rights Component in spite of several requests. Following his hospitalisation after the assault by the South Sudan Police, she did not visit him at the hospital or contact him in any way about his health and well-being, in spite of the incident being job related.

49. The witnesses called by the Applicant testified about the formulation of the concept for CONOPS and their views on the comparative duties and responsibilities between the Chief Human Rights Officer in Sudan and Director of Human Rights of South Sudan. They alleged that OHCHR was not consulted about the assessment of these roles.

50. The Respondent called a Strategic Planning Officer (Ms S) who worked with the Integrated Technical Assessment and Planning Team (ITAPT) from mid-February to the end of March 2011. In her evidence she denied that ITAPT generated staffing tables for the new mission in South Sudan and certainly did not provide for a Human Rights Section to be headed at the D-1 level. She said that the pre-mission planning documents referred to by the Applicant did not reflect the final staffing requirements of UNMISS. These requirements were prepared in New York from April to June 2011. She was aware of the Memorandum of Understanding (MOU) that required OHCHR to be consulted on these matters and said that there was consultation.

51. The process to review the senior level posts at P5 and above did not begin until after the Security Council issued its resolution on 8 July 2011. Ms S agreed that the procedures governing the transition of staff were set out in three Information Circulars (218/2011, 327/2011 and 334/2011) issued by UNMIS. She stressed that the Security Council established UNMISS to support the building of a new nation in which adherence to human rights standards are a cornerstone. The creation of the post at the D-2 level reflected the strengthening of the position compared with that in UNMIS. She explained that the language of the Security Council Resolution 1996 implied high expectations for an active human rights monitoring presence in the context of a new government in South Sudan. She said that there was concern that human rights issues would have to be handled with the new Government of

South Sudan at a very high level.

52. She denied that the Applicant's post was reclassified or re-profiled. The D-2 post was a new post created to meet the concerns of the leadership of the Mission to have a senior level official to head the new Human Rights team. It was not based on geographical area but the necessary level of seniority.

53. In his evidence, the former Chief of Staff, UNMISS (Mr S) outlined the changes to the Human Rights mandate between UNMIS and UNMISS. He described UNMISS as more complex, challenging and politically sensitive. He said that an assessment of the senior roles was done over a number of weekend meetings at which functions and percentages were considered. The staffing table that was produced was the official record of these meetings. In the course of these meetings, the assessment was made that the responsibilities of the Director of Human Rights post at UNMISS increased by 30% over that of the Chief Human Rights Officer in UNMIS. He said that the Strategic Policy Officers supported this assessment.

54. On 10 August he circulated the final UNMISS integrated submission to be sent to New York showing that the Director of the Human Rights component was to be at the D-2 level. He said that OHCHR was not part of the assessment meetings but that he discussed the change from D1 to D2 by telephone with the Chief of Africa Division OHCHR in late August 2011.

55. On 1 September 2011, the justification for the new post was submitted to the Field Budget and Finance Division, DFS, New York for inclusion in the Secretary General's budget UNMISS report. Mr S said that the D-2 post was newly created for the new mission whereas the D-1 post had belonged to UNMIS.

56. The Report of the Secretary General to the General Assembly dated 28 October 2011, A/66/532, set out the Budget for UNMISS for 1 July 2011 to 30 June 2012. In relation to the Director of the Human Rights Division it stated:

This senior level post is critical given the prominence of the issues involved. The Director will liaise at very high levels with senior Government officials to bring actual and potential violations of human rights to the attention of the authorities and assist the authorities in developing strategies to address these appropriately.

57. Mr S told the Tribunal that the SRSG was not solely responsible for the recommendation that the post of Director, Human Rights Division should be created at the D-2 level. He had not observed any personal *animus* against the Applicant by the SRSG who was doing a difficult job in the youngest country in the world.

- a. The number of staff reduced from 112 in UNMIS to 98;
- b. The post of Women Protection Advisors have been moved from the human rights sector to the protection of civilians;
- c. Human Rights Officers in the field have been placed under the supervision of the state coordinators as opposed to the Chief of Human Rights Section.

The reduction in staff and responsibilities should have prompted a downgrading of the post to P5 rather than an upgrading to D-2.

62. Noting the letter sent to him on his non-reassignment on 27 July 2011, he should have been directly transitioned and reassigned to UNMISS as per Information Circular 218/2011 as:

- a. The post of Chief Human Rights Officer at UNMISS was initially supposed to be at the D-1 level, like the equivalent post at UNMIS as evidenced in the UNMISS planning and budgeting documents, and;
- b. The Applicant's performance has been satisfactory, as evidenced by his performance appraisals over the past two years and by the fact that he was highly recommended by OHCHR.

63. The decision to fill the new D-2 post through a competitive selection process was unlawful as the Respondent has not proven that the functions of the post changed by more than 30%, unless one counts the reduction of responsibilities.

64. The Administration has breached its obligations under Information Circular 334/2011. His contract should have been extended for a period of one year and, as he was not selected to a post, he should have been eligible for indemnity payments.

65. In conclusion, the Tribunal is asked to find that the decision to upgrade the

Applicant's post from D-1 to D-2 was unfounded and unlawful; the decision to fill this post

71. The Applicant has not challenged the outcome of the selection exercise for the D-2 post. The interview panel consisted of senior officials from both OHCHR and DFS. The Applicant was not selected.

72. The Applicant has the *onus* of establishing, on the balance of probabilities, that the contested decision was improperly motivated or based on personal *animus* (*Asaad, Azzouni*

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The classification of a post shall not negatively affect the existing contractual status, salary or other entitlement of the staff member encumbering the post. Staff members whose posts are classified at a level below their personal grade level will retain their current grade and salary level, on the understanding that every reasonable effort will be made to reassign them to a post at their personal grade level.

4.3

Staff members whose posts are classified at a level above their current personal grade level in the same category may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement, where applicable.

79. This is not a case where an existing post was reclassified but where a new post was created and classified on the abolition of an existing post. The Applicant did not have a right to appeal under section 5 of the ST/AI as he was not the incumbent of the post at the time of its classification.

80. The Applicant's assertion that OHCHR was not consulted in breach of the MOU executed between OHCHR and DPKO and Policy approved by DPKO is not correct. The MOU provides for DPKO to be the lead department and OHCHR to be consulted. The evidence showed that OHCHR was consulted about the composition of the CONOPS and about the decision to create a D-2 post. It was engaged in the recruitment process as required by the MOU. There is no evidence of a breach in this regard.

81. As advised to the Applicant, the new UNMISS D-2 post was subject to competitive

It was classified as D-2. The post held by the Applicant ceased to exist upon its abolition.

Did the functions of the post of Director of Human Rights in UNMISS as compared with the functions of the Chief Human Rights Officer post in UNMIS justify the grading of the post at the D2 level?

83. Information Circular 334/2011 contemplated the creation of new posts under the heading either by staffing tables which reflected new posts or where the functions of a post changed by more than 30%. In this case, the evidence is that the new post was both reflected in the staffing tables presented to the General Assembly and, according to the former Chief of Staff, the 30% change in functions was also considered.

84. The Tribunal accepts that the Applicant sincerely believed that there was no basis for the change in level from D-1 to D-2 as the responsibilities of the UNMISS Human Rights Section had not increased but had actually decreased when compared with the Human Rights section in UNMIS. Because he was not included in the considerations that led to the decision to abolish his post and create a new D-2 post, he had no information before him to change this belief.

85. However the evidence before the Tribunal established that a process of review for P-5 and above positions was carried out. On the basis of that review it was decided that, given the importance of the Human Rights function in the new State, a D-2 post was justified. The evidence of the Chief of Staff established that this was done in an objective manner having regard to the Security Council Resolution that governed the transition. The Report of the Secretary General, which set out the rationale for the decision, was adopted by the General Assembly.

What was the motivation for the decision to change the grade of the post?

86. Following the adoption of S/RES/1996 (2011), the planning process for the operational, substantive and support requirements for the establishment of UNMISS was

organized by the Integrated Operational Team of DPKO, as well as representatives of DFS and other stakeholders. The staffing requirements for UNMISS were reviewed and approved by the DPKO and DFS senior management.

87. The evidence established that the consideration of the post of the Chief of Human Rights was done in conjunction with all the other changes required by the transition.

88. The Applicant's contention that the decision to fill the post through a process of competitive selection was unlawful because it was motivated by animosity of the SRSG towards him is not supported by an objective evaluation of the evidence. However it is entirely understandable that the Applicant formed that view given the accumulation of events that he perceived as personal slights against him. These included his exclusion from the senior level planning process for UNMISS, the initial mistaken advice that he would not be transitioned and the almost total lack of communication with him by the SRSG both before but especially after the police assault when he had been seriously injured. A more sensitive and humane approach to his situation may have obviated his growing suspicions about personal *animus*.

89. In *Obdeijn*³ it was held that "a staff member bears the burden of proof of showing that a decision was arbitrary or tainted by improper motives."⁴ The Applicant has failed to demonstrate to the required standard that the decisions made about the grade of the post were ill motivated. There was no evidence, other than the Applicant's belief, that the upgrading of the post was to allow the administration to circumvent its obligation to transition him into it.

Whether the decision to fill the D-2 position through a competitive selection process was lawful

90. In the letter of 28 July 2011, the Applicant was advised that his post was subject to

³ 2012-UNAT-201 at para 38.

⁴ See also *Hepworth* 2011-UNAT-178 at para 29.

review and competitive selection process when he was transitioned from UNMIS to UNMISS. This information was in accord with Information Circulars 218/2011 and 334/2011 which had notified all staff members that posts in UNMIS that did not exist in UNMISS would be subject to a competitive selection process.

91. Following the staffing review, the publication of the draft staffing tables for UNMISS on 10 August 2011 made it clear that the D-1 post occupied by the Applicant would cease to exist if the proposal was adopted by the General Assembly. With the creation of a new D-2 post, the administration was obliged to make a vacancy announcement and open the vacancy for a competitive selection process.

92. The Tribunal holds that the decision to fill the D-2 position through a competitive selection process was lawful.

Should the Applicant's contract have been extended for one year during the transition?

93. As the Applicant's D-1 post was transitioned to UNMISS after post-matching and comparative review exercises, the Tribunal finds that he was reassigned, albeit provisionally, to the new mission in accordance with the provisions of Information Circular 218/2011 which stated:

In cases where the number of posts in the new mission is equal to or higher than the number of posts, under the same occupational group and level, staff members currently encumbering those posts in UNMIS will automatically be reassigned to the new mission.

94. Information Circular No. 334/2011 regarding the "Update to UNMIS Staff regarding the UNMIS Draw-down Process" was issued to UNMIS staff on 30 June 2011. The circular stated:

This message addresses the extension of appointments of international and national staff transiting to the new missions, follow on assignments and the applicable procedures for the reduction of staff following the expiration of the

UNMIS mandate on 9 July 2011.

95. Under the heading “Extension of Contracts” the circular stated:

Staff with fixed term contracts that ar

Where the staffing table for the new missions reflects new posts or where the functions of a post change by more than 30% the post will be filled through the regular competitive selection process and not through the comparative review process...For those staff members who are not selected or provisionally reassigned to a position, their appointment may be terminated for reasons of reduction in staff or abolishment of posts in accordance with Staff Regulation 9.3 and would be eligible for payment of applicable termination indemnity under Annex III of the Staff Rules.

100. On the facts in this case the Applicant was provisionally reassigned to a D-1 Post in UNMISS which eventually was abolished. He was therefore entitled to a termination indemnity under Annex III of the Staff Rules.

Conclusion

101. The proper characterization of the change between the Chief Human Rights Officer UNMIS to Director of Human Rights UNMISS is that it was a new post.

102. The grading of the post at the D2 level was justified by reason of the staffing tables and by the difference in functions of the post of Director of Human Rights in UNMISS compared with the mandated functions of the Chief Human Rights Officer post in UNMIS. The decision to fill the D2 position through a competitive selection process was lawful.

103. The true motivation for the decision to change the grade of the post was the Security Council mandate which dictated the increased importance of the role.

104. The Applicant's contract should have been extended for one year and he was entitled to termination indemnity payments pursuant to Information Circular 334/2011 on the abolition of his post.

Remedies

105. The Applicant claims for future lost salary from the current date to his mandatory retirement date at his separation scale. There is no basis for that claim as he had no

expectancy of the renewal of his D-1 contract once it had been abolished. However he is entitled to his entitlements pursuant to the Information Circular 334/2011, and the staff rules.

106. In light of the above, the Tribunal makes the following ORDERS:

- a. Extension of the Applicant's contract from 30 June 2012 to 31 August 2012. Where an extension of contract would not be feasible, payment of one month net base salary at the Applicant's level of employment at the time of the contested decision.
- b. Payment of the Applicant's termination indemnity payable and due to him in accordance with Staff Regulation 9.3 and Annex III of the Staff Rules.
- c. The above amounts shall be paid within 60 days of the date that this Judgment becomes executable. Interest will accrue on the above amount from the date of this Judgment at the current US Prime rate until payment. If the above amount is not paid within the 60 days period an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Coral Shaw

Dated this 2nd day of July 2013

Entered in the Register on this 2nd day of July 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi