



UNITED IN

## **Introduction**

1. By an Application dated 1 April 2010, the Applicant, a staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), is contesting the decision not to revise her recruitment level from FS-4 to FS-5 with effect from 1 June 2006 when she was appointed to the then United Nations Organization Stabilization Mission in the

7. In response to the Applicant's application and techni

13. On 17 May 2006, the Applicant signed a contract offer for a fixed-term

20. Consequently, the Applicant requested access to her personnel file in MONUC and discovered that there were no documents in her file evincing her FS-5 recruitment process. Her file contained a copy of a fax to PMSS, which had been drafted and authorized by the CCPO and signed by the DOA on 9 May 2006, re-confirming Mr Bentz' selection process but quoting an FS-4 instead of FS-5 recruitment level.

21. In a facsimile dated 22 February 2009, Mr. Hany Abdel-Aziz, Director of Mission Support (DMS), MONUC, requested that Mr. Paul Johnson, Chief of Operations FPD/DFS revisit the case based on new evidence that was adduced by the Applicant from archived files of individuals involved in her recruitment process that suggested there was an administrative error in her recruitment.

22. An unsigned facsimile dated 27 February 2009 from FPD/DFS to the DMS/MONUC states that after careful review of the relevant recruitment

### **Procedural history**

27. A request for management evaluation was filed by the Applicant on 29 August 2009. She received a response from MEU on 30 November 2009. Thus, pursuant to the provision of article 8.1(d)(1) of the Tribunal's Statute, she had until 28 February 2010 to submit an application to the UNDT.

28. By an application dated 26 February 2010, the Applicant requested extension of the time limit within which to file her application due to illness. By Order No. 45 (NBI/2010), dated 18 March 2010, she was instructed to submit, by 23 March 2010, a medical certificate or report in support of her request for an extension of the time limit. The Applicant complied with Order No. 45 on 18 March 2010. Pursuant to art. 8.3 of the UNDT Statute, by Order No. 48 on 19 March 2010, the Tribunal granted the Applicant an extension to 1 April 2010 to file her application.

29. An Application was subsequently filed on 1 April 2010 and served on the Respondent on 6 April 2010.

30. The Respondent filed his Reply on 6 May 2010, requesting that the Application be dismissed as not being receivable.

31. By Order No.73 (NBI/2010) dated 7 May 2010, the parties were invited to inform the Tribunal if they were prepared to consider a mediated settlement. As the Respondent did not consider that mediation was a viable option for resolution of this matter, a case management hearing was held on 27 May 2010 pursuant to Order No. 73. The Applicant, her representative, and the Respondent's representative were present at the hearing via audio link.

32. At the case management hearing, and in a subsequent filing dated 24 June 2010, the Respondent maintained his position that the Application was not receivable.

33. After consideration of the documentary and oral evidence, in Order No. 136, the Tribunal concluded that the Application is receivable and requested the Parties to make submissions on the further management of the case.

34.

39. By e-mail dated 22 February 2012, the Tribunal granted the application to submit additional evidence and indicated that upon receipt of the statements and subject to the Respondent's views, the Tribunal would decide whether or not to hold a further hearing for the oral testimony of the witnesses to be heard.

40. On 15 March 2012, the Applicant filed four additional statements which were served on the Respondent.

41. The Respondent filed his response to the additional evidence on 28 March 2012. The Respondent argued that the Applicant had not established the grounds necessary to reopen her case in the manner sought as the new evidence could have been produced at the hearing, the proposed additional evidence was not relevant or probative and the Respondent was prejudiced by the late submission of this evidence. The Tribunal decided not to admit the additional statements into evidence in this case, nor to reopen the case for further hearing. The Tribunal subsequently directed the Parties to submit their closing submissions, which were not to include references to the additional witness statements adduced by the Applicant on 15 March 2012.

42. On 25 July 2012, the Applicant and Respondent both filed their closing submissions which were served the same day.

#### **Applicant's submissions**

43. The Applicant submitted that standard United Nations recruitment procedures were followed to select her for the FS-5 position, which was vacant in the immediate office of Mr. Bentz. Both the Programme Manager, Mr. Bentz, and the Field Office Manager, Mr. Alfred Podritschnig, confirmed this fact. There were interviews, shortlisted candidates, and a fair and transparent recruitment process to select available candidates for a number of posts that were then to be filled.

44. There was no objection to the recruitment procedures or lack thereof or to the selection of the Applicant for the recommended recruitment level. On the contrary the then CCPO, Mr. Djomo, re-confirmed in his official "Recruitment Fax" to PMSS the successful selection process conducted by the Programme



Manager “finding her suitable for the position”. The Applicant added that the original subject title “Recruitment” on the fax of 9 May 2006 signed by the CCPO was correct with the exception of the level of the post, which was unilaterally changed by the same person who later tried to cover up his actions with multiple excuses and evasive actions.

45. Throughout the entire recruitment process the Office of the CCPO not only failed to assist or advise the Programme Manager on the applied procedures, but also failed to adhere to ST/AI/2002/4 (Staff selection system), ANNEX IV, para. 1 (P) which clearly stipulates under “Responsibilities of the Office of Human Resources Management, Executive Offices and local personnel offices” that they are responsible and accountable for “exercising authority under section 11 of this instruction for the placement of staff outside the normal process in consultation with heads of departments/offices and the staff member concerned”. Neither the Programme Manager nor the Applicant was ever contacted by the CCPO’s Office in this regard.

46. There was no policy-based reason preventing the Applicant from being appointed to the FS-5 level, nor a rule in ST/AI/2002/4 that prevented her

**Respondent's submissions**

48. The Respondent submitted that when the Applicant was recruited for MONUC, she was offered and accepted her appointment at the FS-4 level and was therefore bound by the terms of her appointment when she took up the position on

Applicant's appointment in MONUC. Nevertheless, for field service appointments, the policies and practices underlying and expressed in ST/AI/2002/4 were, in many instances, applied by the Administration in order to establish practices for mission appointments.

53. The Administration assisted the Applicant by reassigning her from a downsizing mission. If the Administration had not done so, her appointment



60. The Respondent further submitted that:

[I]n 2006, there was no regulatory framework setting out mandatory procedures for the appointment of staff to field mission posts. As a result, the Administration was required to ensure that

*Valimaki-Erk* UNDT/2012/004, Cousin J held that a policy decision of the Secretary-General requiring an individual to renounce his/her permanent residence in a country prior to being offered a contract in the Organization was unlawful as that was a practice that had no legal basis. The decision in *Valimaki-Erk*<sup>2</sup> was affirmed by the United Nations Appeals Tribunal (UNAT) where the Appellate Judges observed “although the Secretary-General has discretion in the appointment of staff, he has no discretion to impose unwritten regulations and rules that are prejudicial to staff members”.

64. In *In re Léger*<sup>3</sup>, the Administrative Tribunal of the International Labour Organisation (ILOAT) addressed the issue of administrative practices potentially forming part of a staff member’s terms of employment. ILOAT held that:

A statement by the Director of a practice which he intends to follow can under certain conditions create such an obligation. Such statements of practice often relate, as in this case, to the way in which the Director intends to administer a staff rule and thus clarify and amplify it. But just as a staff rule must not conflict with the staff regulation under which it is made, so a statement of practice must not conflict with the rule which it is elaborating.

65. Additionally, the-10.52 mionuu(e)2.1(nce)7unale decis( )JTJWorld Bank( )JTJheld (in)-5. pramoui(t)

the current matter. Nor can ST/AI/2002/4 be made applicable to the Applicant by invoking the best practices rule or argument.

67. In *Manco* UNDT/2012/135, it was held that a policy decision could not be regarded as a legal instrument that formed part of the contract of a staff member unless it was expressly incorporated in a rule, regulation or resolution of the General Assembly. Should the principle be different when, as in the present case, it is contended that the policies are based on what an administrative instruction enunciates? The Tribunal unhesitatingly answers in the negative. There is no indication as to a formal decision being taken by the Secretary-General or someone with the requisite delegated authority to make ST/AI/2002/4 applicable to a staff member who is clearly excluded from its purview.

***Was the Applicant interviewed and selected for the FS-5 position?***

68. In April 2006 there was an FS-5 position available in Mr. Bentz' office. He explained that at the material time he was occupying the position of Regional

request for additional information or documents from either the DOA's office or Personnel.

70. Mr. Bentz added that he was never copied on any recommendation for an FS-4 position and was not asked to prepare a comparative evaluation sheet for an FS-4. Further, he was never told that his recommendation would not be implemented and that the Applicant would be laterally transferred instead.

71. The selection fax for the Applicant from MONUC to PMSS, dated 9 May 2006, indicated that there were no technically cleared candidates in the Nucleus roster for comparison purposes but that once the Mission received the short-list of technically cleared candidates in that occupational group from PMSS, a comparative evaluation would be prepared and forwarded to DPKO. The Mission then requested in the fax that PMSS reassign the Applicant from UNAMSIL to MONUC at the FS-4 level.

72. In response to Mr. Bentz' memorandum of 7 September 2006 seeking rectification of the Applicant's grade level, the MONUC International Staff Recruitment Unit sent him a shortlist of the technically cleared candidates to be evaluated for the post of Administrative Assistant at the FS-5 level in relation to VA 408823 on 26 September. The Applicant was on the shortlist.

73. Then on 27 September 2006, Mr. Mubtakir, also of the MONUC International Staff Recruitment Unit, sent an e-mail to Mr. Bentz advising the following:

In order to regularize [the Applicant's] case as she was interviewed and recommended for the FS-5 level, PMSS has sent us the attached list of candidates. Enclosed please find a copy of the relevant VA and a blank "Comparative Evaluation" form which we would like to request that you kindly arrange to





MONUC decided to go against Mr. Bentz' recommendation when he had the delegated authority to recruit staff up to the FS-5 level.

78. The Tribunal notes the contradictory

by the Programme Manager who was in charge of the recruitment process. This, in the Tribunal's view, created a legitimate expectation in the Applicant that she would be offered what she had been selected for and informed of. Regrettably, she



Entered in the Register on this 28<sup>th</sup> day of January 2014

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi