

Introduction

1. The Applicant is a former staff member of the United Nations Mission in the Republic of South Sudan (UNMISS). He filed the current Application on 11 February 2013 challenging the decisions not to: (a) renew his appointment with UNMISS beyond 30 September 2012; and (b) reinstate him to his original post of Senior Planning Officer when he was transitioned from the United Nations Mission in Sudan (UNMIS) to UNMISS on 8 July 2011.

Procedural history

2. The Respondent submitted a Reply on 24 June 2013 in which he asserted that

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11. Consequently, the Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, determined that an oral hearing was not required in this case and relied on the Parties' pleadings, written submissions and the documentary evidence.

Facts

12. The Applicant was appointed to the post of Senior Planning Officer on a fixed-term appointment (FTA) at the P-5 level with UNMIS in Khartoum on 31 August 2009. His FTA was limited to service with UNMIS and was renewed from 1 July to 30 August 2010 and again from 31 August 2010 to 30 August 2011.

13. Effective 4 December 2010, the Applicant was moved within UNMIS to the post of Head of Office/State Coordinator in Aweil (State Coordinator), South Sudan.

14. By Resolution 1997 (2011), the Security Council, *inter alia*, decided to

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Issues

30. The issues for determination in this judgment are:
- a. Whether the decision not to renew the Applicant's fixed-term appointment beyond 30 September 2012 was lawful;
 - b. Whether the Applicant had a right to be re-assigned to another position upon expiry of his appointment outside the normal staff selection process; and
 - c. Whether the Applicant is entitled to the remedies he is seeking.

Was the decision not to renew the Applicant's fixed-term appointment beyond 30 September 2012 lawful?

Parties' submissions

31. The Applicant submits that the decision not to renew his FTA beyond 30 September 2012 was unlawful for the following reasons:
- a. He was transitioned from UNMIS to UNMISS on 8 July 2011 as a Senior Planning Officer but was compelled to continue serving as the State Coordinator in Aweil. Consequently, he should have been reassigned to a Senior Planning Officer post or a similar post when he was transitioned to UNMISS.
 - b. The UNMISS Senior Planning Officer and other senior posts at the P5 level were vacant when he was transitioned but no attempts were made to give him any of these positions.
 - c. Since he was serving on a temporary basis as the UNMIS State Coordinator in Aweil, the Administration should have returned him to his original post of Senior Planning Officer during the transition to UNMISS.

d. He was assigned on a temporary basis, not transferred, to the UNMIS State Coordinator post thus UNMISS was obligated to reabsorb him into its Strategic Planning Unit once the State Coordinator post was abolished.

e. He had a lien on his Senior Planning Officer post in accordance with ST/AI/404 (Assignment to and return from mission detail) that also established his right of return to his original post.

f. He had a legitimate expectancy of renewal of his contract.

32. The Respondent submits that:

a. The Secretary-General lawfully exercised his discretion not to renew the Applicant's appointment beyond 30 September 2012.

b. Following the abolition of his post on 31 December 2011, the Applicant was retained by UNMISS to perform temporary functions initially, for the duration of his FTA until 30 August 2012, and, subsequently, for a further month to allow him to complete his assigned tasks, until 30 September 2012. From 1 January 2012 to 18 July 2012, he temporarily encumbered the position of Head of Office/State Coordinator, Aweil, UNMISS, and from 19 July 2012, he temporarily encumbered the post of Deputy Chief of Staff. The Applicant's appointment was not renewed beyond 30 September because UNMISS' short-term requirement for his services ceased.

c. An FTA does not carry any expectancy of renewal irrespective of length of service.⁵ Where the Administration gives a reason for the exercise of its discretion, it must be supported by the facts. The Secretary-General's discretion not to renew an appointment is not unfettered. The decision may be challenged on the grounds that the staff member had a legitimate expectancy of renewal, procedural irregularity, or the decision was arbitrary or motivated

⁵ Staff regulation 4.5(c); staff rule 4.13(c).

by improper purposes. The Applicant bears the burden of proving that the discretion not to renew the appointment was not validly exercised.

d. Following the expiration of UNMIS' mandate, the Applicant was provisionally reassigned to UNMISS as Head of Office/State Coordinator in Aweil. He was notified that the "post may be subject to review and eventual competitive selection".

e. Following a review of the post, the

operational requirement that existed in the Strategic Planning Unit in Juba. For the duration of his assignment in Juba, he was temporarily encumbering the vacant post of Deputy Chief of Staff. His appointment was subsequently renewed to 30 September 2012 to enable him to complete the task of finalizing the State Offices' work plans.

h. The evidence establishes that the reason for the non-renewal of his appointment was that the Mission's short-term requirement for the Applicant to support the work of the Strategic Planning Unit in Juba had come to an end. The Applicant has failed to discharge his burden to establish that the discretion not to renew his one-month appointment was not validly exercised.

Considerations

33. The events leading to the non-renewal of the Applicant's FTA are as follows:
- a. Effective 31 August 2009, the Applicant encumbered the post of Senior planning Officer in UNMIS in Khartoum on a FTA. The FTA was renewed from 1 July to 30 August 2010 and again from 31 August 2010 to 30 August 2011.
 - b. As from 4 December 2010 the Applicant was, according to the Respondent, "reassigned within UNMIS to the position of Head of Office/State Coordinator in Aweil South Sudan". The reassignment was due to the restructuring of UNMIS and reallocation of staff to support the referendum in southern Sudan.
 - c. Following the expiry of UNMIS' mandate the Applicant was transitioned to UNMISS as the State Coordinator in Aweil, South Sudan and his FTA which, according to the Respondent, was limited to service in UNMISS was renewed for another year to August 2012. According to Respondent, this was a lateral transfer within the Mission.

d. On 31 December 2011, 82 international posts in UNMISS were abolished as these were posts created for the start-up phase of UNMISS for the interim period of 9 July through 31 December 2011.

e. From 1 January to 18 June 2012, the Applicant performed the duties of the UNMISS State Coordinator in Aweil pending the completion of the recruitment of the selected candidate.

f. From 19 June to 30 August 2012, the Applicant was temporarily reassigned from Aweil to Juba as a Senior Planning Officer with UNMISS to provide support to the Strategic Planning Unit. He was placed against the vacant post of Deputy Chief of Staff.

g. On 30 August 2012, the appointment of the Applicant expired but he was given a three week extension to enable him to assist with the Strategic Planning Unit's finalization of State Offices' work plans. He was separated from service on 30 September 2012.

34. The Applicant has provided extensive arguments that he was temporarily assigned, not transferred, to the UNMIS State Coordinator post in Aweil thus UNMISS was obligated to reabsorb him into its Strategic Planning Unit once the State Coordinator post was allegedly abolished. In support of this contention, he submits that the Tribunal should take into consideration ST/AI/404 (Assignment to and return from mission detail), which gave him a legitimate expectation that his Senior Planning Officer post would be blocked for a period of up to two years with a right to return after his service as the State Coordinator.

35. The Applicant further submitted that he had a legitimate expectation of reabsorption because: (i) when he applied for the State Coordinator post in August 2011, he did so in the "knowledge/belief" that he would be re-absorbed in the Strategic Planning Unit in any event, notwithstanding the result of his application and as his new contract clearly indicated he would continue to be engaged as a Senior

Planning Officer under UNMISS; and (ii) his PA indicated that he had been transitioned from UNMIS to UNMISS as a Senior Planning Officer.

36. The Respondent pleads that when the Applicant was initially appointed to UNMIS, he was selected for the Senior Planning Officer post and that his functional title could not be changed without a competitive selection exercise. Accordingly, when the Applicant was reassigned to perform the duties of State Coordinator in Aweil, his functional title of Senior Planning Officer remained the same. Additionally, the Respondent submits that pursuant to section 2.5 of ST/AI/2010/3 (Staff selection system), the Applicant was laterally transferred within the mission and within the delegated authority of the Head of Mission, which allows Heads of Missions, under conditions established by the Department of Field Support, to transfer staff members within the same mission to job openings at the same level

the Applicant would be returned to the Senior Planning Officer post or the Strategic Planning Unit once his assignment in Aweil was over.

44. In the Tribunal's considered view, the absence of important terms in the 19 December 2010 letter regarding the length of the assignment and reabsorption removed the Applicant

provide tangible substantiation, which he did not. The Tribunal finds therefore that the Applicant's claim of a legitimate expectation of renewal is unfounded.

48. In light of the Tribunal's findings that the Applicant was transferred to the State Coordinator post and that he did not have a legitimate expectation of renewal, was the non-renewal decision unlawful?

49. Paragraph 2 of UNMIS Information Circular No. 218/2011 provides as follows with respect to the movement of internationally recruited staff from UNMIS to UNMISS:

- A. In cases where the number of posts in the new mission is equal to or higher than the number of posts in UNMIS 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 are lower than the current 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 from the Field Staff Union (FSU) and UNMIS Administration to conduct this exercise in accordance with the Field Personnel Division's (FPD) guidelines.
- 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.

50. UNMIS Information Circular No. 327/2011 announced the formation of the Comparative Review Panel that was mandated to review the international posts in UNMIS where the number of staff exceeded the number of proposed posts in UNMISS for particular job categories and post levels.

51. Since the Applicant was transferred from the UNMIS Senior Planning Officer

UNMIS State Coordinator post in Aweil, the Tribunal concludes that the Administration correctly transitioned him to the UNMISS State Coordinator post in Aweil in July 2011 in accordance with paragraph 2.A of UNMIS Information

55. According to this document submitted by the Respondent, the vacancy was advertised from 26 August 2011 to 10 September 2011. There was however no duty station indicated on the announcement and the Respondent was unable to provide the Tribunal with evidence that this particular vacancy was advertised through either Galaxy (the former job opening portal of the United Nations) or Inspira (the current job opening portal of the United Nations). This job opening was printed from a database called “Nucleus”, which is not a database that applicants for United Nations job vacancies have access to. Additionally, this was a job opening for a position that was advertised approximately four months before the new Aweil State Coordinator post was allegedly created in January 2012.

56. When the Tribunal sought further clarification on this job opening for the Aweil post⁶, the Respondent submitted that:

This was a position specific job opening but no duty station was specified. The job opening was posted to accommodate the new mission profile based on the new mission mandate. There were 10 of these positions within the mission. The Applicant was considered for selection against this job opening, irrespective of the duty station.

.....

As stated above, job opening No. 425411 was a position specific job opening where no duty station was specified. The Applicant was interviewed against this job opening irrespective of the duty station and was duly interviewed on 4 October 2011. The Applicant, and the other candidates, were not applying for a position in a specific duty station. There were considered for appointment at multiple duty stations.

57. The Applicant submitted the job opening that he applied for through Galaxy. It was for a P-5, Head of Office/State Coordinator post with UNMISS with the same job opening number as that in the Respondent’s submission (JO No. 425411). The vacancy was posted from 26 August 2011 to 10 September 2011. The duty station indicated in this JO is “Juba”. There is no mention of the Applicant’s duty station,

⁶ Order No. 264 (NBI/2014).

Aweil, or of multiple duty stations. The Applicant applied for this post and was interviewed on 4 October 2011 but he was not selected for it.

58. Based on the evidence in the Record, the Tribunal holds that the recruitment exercise for JO No. 42541219(e)3()-70(T)-10(r)-27(i)17(b)19(u)-20(n)19(a)-16(l)17()-9m [(s)8(t)-2s8

63. Although the Respondent relies on the second paragraph of this letter, the Tribunal is convinced that this generalized proviso was applicable only to those posts in UNMISS that did not exist in the old mission, UNMIS, as of the time of the transition in July 2011, such as the Senior Planning Officer post.

64. Thus, since the Aweil State Coordinator post existed in both UNMIS and UNMISS, there was no need for it to be advertised and filled through a recruitment/selection process. The Applicant should have been able to maintain his post in accordance with paragraph 2.A of Information Circular No. 218/2011.

65. In light of the foregoing, the Tribunal is of the considered view that paragraph 2.C of UNMIS Information Circular No. 218/2011 was erroneously applied to the Applicant after he had been successfully transitioned in accordance with paragraph 2.A of the Circular.

66. The Tribunal concludes that the non-renewal decision was unlawful.

Did the Applicant have a right to be re-assigned to another position upon the expiry of his appointment outside the normal staff selection process?

Applicant's submissions

67. The Applicant asserts that the Respondent was responsible for ensuring his employment with the United Nations continued through his reassignment to another position in planning or a similar post either within or outside of UNMISS upon the expiry of his appointment.

Respondent's submissions

68. The Applicant had no right to be reassigned to another position as a Senior Planning Officer within UNMISS or elsewhere in the Organization following the abolition of his post. Having entered into a contract with the Organization, the Applicant cannot seek a benefit that is additional to the rights and entitlements

paragraph 2.A of UNMIS Information Circular No. 218/2011 was not complied with. This issue however becomes moot as the Tribunal has found that the non-renewal of his contract is merged as it were in the decision not to re-assign him to the Aweil post that existed both in UNMIS and UNMISS.

Remedies

74. The Applicant is seeking to be assigned to a senior planning officer or other similar post in any United Nations peacekeeping operation or to be reinstated as a State Coordinator with UNMISS or any other peacekeeping operation.

75. Article 10.5 of the UNDT Statute provides:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional case order the payment of a higher compensation and shall provide the reasons for that decision.

76. Article 10.5 of the UNDT Statute was amended by the General Assembly in December 2014⁹ and the new article reads:

Compensation, for harm, supported by evidence which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases

⁹ General Assembly resolution 69/203.

order the payment of a higher compensation and shall provide the reasons for that decision (emphasis added).

77. UNAT has come out strongly against the retroactive application of rules or regulations even when they would have benefited an applicant.¹⁰

(Signed)

Judge Vinod Boolell

Dated this 24th day of February 2016

Entered in the Register on this 24th day of February 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi