



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

DAKAMSEH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Garvin Irwin, OSLA
Seth Levine, OSLA

Counsel for the Respondent:

Stephen Dietrich, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 30 December 2011, the Applicant filed an Application contesting the termination of his fixed-term appointment with the United Nations Mission in Sudan (“UNMIS”) upon the closure of UNMIS.

2. The Respondent filed a Reply on 3 February 2012 asserting that the termination of the Applicant’s contract was not unlawful.

Facts

3. On 4 May 2004, the Applicant was reappointed as a Public Information Officer (“PIO”) at the P-3 level under a fixed-term appointment limited to service in the United Nations Mission in Liberia. In August 2005, he was reassigned to UNMIS.

4. Following the contractual reforms in July 2009, the Applicant was reappointed under a fixed-term appointment, limited in service to UNMIS, effective from 1 July 2009 to 30 June 2010. His appointment was renewed for another year to 30 June 2011.

5. By resolution 1978 (2011) of 27 April 2011, the Security Council extended the mandate of UNMIS until 9 July 2011 and announced its intention to establish a mission to succeed UNMIS.

6. On 17 May 2011, the Secretary-General provided a special report on the Sudan to the Security Council (S/2011/314). He requested the Security Council to “consider a three-month technical rollover of UNMIS from 9 July to 9 October” whereupon UNMIS would “commence the downsizing of its presence in Khartoum”.

7. By letter dated 18 May 2011 to the Chairperson of the UNMIS Field Staff Union (“FSU”), the Under-Secretary-General for Field Support (“USG/DFS”) explained how the transition process would be undertaken by the Administration with regard to staff members who would be affected by the abolition of their respective posts. The USG/DFS advised that, where there were a lesser number of

posts in the new mission than qualified staff in UNMIS, a retrenchment exercise would be undertaken. Those staff affected by the retrenchment exercise would be reviewed alongside peers in the same function, level and category.

8. UNMIS Administration published a number of Information Circulars to inform staff of the transition process, which included the comparative review process. On 26 June 2011, the UNMIS Director of Mission Support (“DMS”) issued Information Circular No. 327/2011, announcing the formation of a Comparative Review Panel (“CRP”) to review the transition of international posts in UNMIS, and set out the criteria to be considered and subject to review by the CRP. On 30 June 2011, the DMS issued Information Circular No. 334/2011, providing an update to UNMIS staff regarding the UNMIS downsizing process.

9. The Applicant’s fixed-term appointment was extended for a year (1 July 2011 to 30 June 2012) under paragraph (a) of Information Circular No. 334/2011 on 4 July 2011.

10. On 8 July 2011, the Security Council established the United Nations Mission in South Sudan (“UNMISS”) and adopted its mandate.

11. On 11 July 2011, through Resolution 1997, the Security Council withdrew the mandate of UNMIS with effect from 11 July 2011 and requested the Secretary-General to transfer appropriate staff, equipment, supplies and other assets from UNMIS to UNMISS or to the United Nations Interim Security Force in Abyei (“UNISFA”), including appropriate staff and logistics necessary for achieving the new scope of functions to be performed.

12. On 27 July 2011, the Applicant was informed by Mr. Ojjero, the Chief Civilian Personnel Officer (“CCPO”), UNMIS, of the termination of his appointment following the completion of the human resources post-matching and comparative review exercise on the transition of international staff from UNMIS to UNMISS.

13. On 21 August 2011, the Applicant requested a management evaluation of the decision to terminate his appointment. On 23 August 2011, the Officer-in-Charge of the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to suspend the implementation of the decision to terminate his appointment.

14. On 6 October 2011, the Applicant received a memorandum in which the Assistant Secretary-General (“ASG”) for Management informed him that the Secretary-General had decided to uphold the decision to terminate his appointment and the Applicant subsequently separated from service effective 10 October 2011.

15. The Applicant filed the present Application on 30 December 2011. The Respondent filed a Reply on 3 February 2012. The Tribunal heard the case on 27 and 28 August 2012 during which time live evidence was received from Ms Sylvia Fletcher and Mr Martin Ojjero for the Respondent while the Applicant testified for himself.

16. Ms. Fletcher’s evidence is summarized below.

17. She is currently the Chief of the Recovery, Reintegration and Peace-Building Section in UNMISS at the D1 level. Prior to joining UNMISS she was the Principal Civil Affairs Officer and Chief of Civil Affairs in the Southern Sudan Regional office in UNMIS.

18. She served as the Co-chairperson on the CRP which reviewed international staff of UNMIS as part of the transition process to UNMISS.

19. The CRP agreed on a methodology for rating staff according to the review criteria. They agreed upon the weighting for each criterion and the points to be awarded. A rating table was drawn up to reflect what was agreed. A list of criteria that would add up to 100 points was agreed upon as follows:

- a. Performance (based on ePAS).
- b. Relevant experience (based on Personal History Profiles (PHPs)).

- c. Direct relevant experience (based on PHPs).
- d. Adherence to core values (based on the core values section of the ePAS).
- e. Length of service (based on PHPs).

20. After the methodology and criteria were agreed upon, the Panel broke up into groups to conduct the reviews. All of the groups worked in one large room.

21. She participated in the Applicant's comparative review. Her own team or group reviewed the Applicant, Ms. Miday and Ms. Waugh for one available P-3 post of Public Information Officer which was in the Outreach Unit of the Public Information Office in UNMISS.

22. After the comparative review process, Ms. Miday received 95 points, the Applicant received 75 points and Ms. Waugh received 67 points. The Panel recommended that Ms. Miday be rolled over to the P-3 Public Information Officer Post in UNMISS. The Panel recommended that the Applicant and Ms. Waugh be included in the pool of available candidates in ranking order if there were found to be more posts with similar functions in UNMISS.

23. Mr. Ojjero's evidence is summarized as follows:

24. He is currently serving as the Chief of Staff Services Cluster at the United Nations Regional Service Centre (RSC) in Entebbe, Uganda. Prior to joining the RSC he was the Chief Civilian Personnel Officer (CCPO) with UNMIS.

25. He was the *ex-officio* member of the CRP at the time of the transition process from UNMIS to UNMISS.

26. At the time of the comparative review process, there was only one available P-3 Public Information Officer post in UNMISS. A second post became available after the comparative review process was completed.

27. The CRP did not review UNMIS staff where the number of posts for the occupational group and level in the two missions matched. In such cases, the UNMIS staff members were provisionally assigned to UNMISS automatically.

28. After the closure of UNMIS, the Organization tried to place UNMIS staff members in new missions but was under no obligation to do so since they had appointments of limited duration.

29. He was not privy to how the recruitment for the second Public Information Officer post in UNMISS was done.

Applicant's case

30. The Applicant's case as per his oral testimony and pleadings is summarized below.

31. The decision to terminate his appointment was taken by the CCPO of UNMIS on 27 July 2011. The said CCPO did not have the authority to take such a decision. Consequently, the decision was *ultra vires* and unlawful.

32. Even if the notification of the CCPO's decision was issued by the ASG for the Office of Human Resources Management, Ms. Catherine Pollard, on 1 August 2011, she did no more than "rubber-stamp" that decision. Whilst an ASG has delegated authority to terminate an appointment, in this instance, such authority was sought after the decision had been taken. Authority cannot be delegated retrospectively.

33. It is the Applicant's case that even assuming that authority was properly delegated and exercised; such delegated authority is limited to termination on grounds of health or on grounds other than unsatisfactory service insofar as staff members at Headquarters only are concerned. Consequently, even for an ASG, there remains no power to terminate in these circumstances and, therefore, the decision was *ultra vires* and unlawful.

34. The Security Council's instruction was to withdraw civilian UNMIS personnel not to terminate their contracts of employment. The dissolution of

UNMIS did not, in and of itself, require the termination of any contract of employment.

35. The competitive review process was either not followed with respect to the Applicant or was flawed. There is no evidence that the Organisation rejected the findings of the CRP in any case other than the Applicant's. In its comments to the Management Evaluation Unit, UNMIS stated that in relation to the Applicant's situation, he and two other staff members, encumbering three PIO posts at the P-3 level in UNMIS, were under consideration.

36. There was, however, only one proposed post in the same occupational group and level in the new mission's structure. According to the assessment by the CRP of all three staff members against the evaluation criteria, the Applicant did not score the highest number of points and, consequently was not recommended for the PIO post.

37. In her Evaluation letter, the ASG for Management stated that the Applicant was reviewed along with two other staff members who encumbered P-3 PIO posts in UNMIS. The report of the CRP shows that, following the assessment of all three staff members against the same evaluation criteria, the Applicant received a total of 75 points, while another staff member, Ms. Waugh, received 67 points, and a third staff member, Ms. Miday had the highest score of 95 points.

38. Ms. Miday was reassigned to UNMISS while the Applicant and Ms. Waugh were pooled in ranking order. However, both Ms. Miday and Ms. Waugh were subsequently reassigned to UNMISS to Public Information Officer positions, which does not sit well with the statement of the Under Secretary-General for Management in her Evaluation Letter that the Applicant was ranked second in the comparative review process.

39. There was more than one P-3 PIO post available at the time of the competitive review process and there are now four P-3 posts within UNMISS. Given that scenario, the Respondent's assertion that there was only one post at the time of the competitive review process is untenable.

40. The CCPO's evidence that a second P-3 PIO post was created months after the conclusion of the competitive review process cannot be correct. The Applicant submits that if it did not exist at the time of the competitive review process then it must have been created days, or possibly weeks after the conclusion of the process. Otherwise, once UNMIS ceased to exist such a post must have been open either to competitive recruitment or the recommendations of the competitive review panel would have been accepted.

41. The Organisation was aware of two facts in September 2011. These were that Ms. Miday was leaving UNMISS for UNFIL having only been appointed a month beforehand pursuant to the CRP. Also, that the Applicant was still a UN employee and was without a post having left the mission on 5 August 2011. There were no on-going efforts to find him a new post in the autumn of 2011.

42. The Applicant submitted that had he been afforded fair and full consideration by the CRP he would have expected to be awarded a two-year, fixed-term contract and he therefore requested the Tribunal to award him compensation of two years' net base salary.

Respondent's case

43. The Respondent's case is summarized below.

44. The Secretary-General has a broad discretion in determining the operational needs of a new field mission based on its mandate. This discretion includes staffing levels and the functions of posts. The Secretary-General's discretion extends to formulating a transition process under which peacekeeping mission staff members whose appointments are terminated may be reassigned to a new mission.

45. It is not for the Dispute Tribunal to substitute its views for those of the Secretary-General with regard to the transition process, or the staffing requirements of a peacekeeping mission. Decisions in this sphere may be set aside only on limited grounds, for example if the Administration breached procedural rules, or if the discretion was exercised in an arbitrary, capricious, or illegal manner.

46. All posts within UNMIS were abolished as a consequence of the Security Council's decisions to extend the mandate of UNMIS for a final time to 9 July 2011, and withdraw UNMIS, effective 11 July 2011.

47. In his evidence before the Dispute Tribunal, the Applicant claimed that there were four P-3 Public Information Officers in UNMIS, and four P-3 Public Information Officer posts available in UNMISS. The Applicant's contention is incorrect and unsupported by the evidence. The Chief Civilian Personnel Officer (CCPO) gave credible and reliable evidence that one Ms. Mategwa was a P-3 Video Producer in UNMIS. There is no evidence to refute this. Ms. Mategwa was automatically reassigned to UNMISS as she was the sole P-3 Video Producer in UNMIS and there was a matching post in UNMISS in the Video Unit.

48. The Applicant's contention that the comparative review for the first available P-3 Public Information Officer post was flawed and without merit.

49. The Applicant alleged that there were four P-3 Public Information Officers in UNMISS and identified four post numbers. His evidence is not reliable and should be given no weight as he refused to disclose the source of the information.

50. The Applicant and the two other P-3 Public Information Officers were subject to an objective and impartial comparative review process. To avoid any potential conflict of interest, the Panel agreed that no Panel member would review a staff member in their occupational group, or with whom they were personally close.

51. The Applicant did not seek management evaluation of the decision to reassign Ms. Waugh to the second post in UNMISS. This claim is a distinct cause of action that, if the Applicant had sought to raise it, should have the subject of his request for management evaluation. As such, this claim is not part of the proceedings and should be rejected.

52. Ms. Waugh was reassigned to the second post as she had been performing the functions of the post in UNMIS for over five years whereas the Applicant ceased to perform the functions of a Public Information Officer since May 2009. Moreover, on cross-examination, the Applicant acknowledged that he has no

experience performing functions in the Print and Web Unit of UNMIS. He also acknowledged on cross-examination that Ms. Waugh was the head of the Print and Web Unit of UNMIS.

53. During the hearings, the Applicant advanced a new claim, namely, that he was entitled to be reassigned to the new vacancy in UNMISS created by the departure of Ms. Miday. This claim had never been raised in any of the pleadings before the Tribunal prior to the hearings. The Applicant did not seek management evaluation of any decision related to the post vacated by Ms. Miday nor did he raise it in his Application.

54. The decision not to reassign the Applicant to the post vacated by Ms. Miday is a separate administrative decision, taken after the decision to terminate his appointment. This claim is a distinct cause of action that, if the Applicant had sought to raise it, should have been the subject of his request for management evaluation. As such, this cause of action is not receivable.

55. Ms. Waugh was reassigned to the second PIO post in UNMISS as she was the head of the Print and Web Unit and had been performing the functions of the post in UNMIS for over 5 years whereas the Applicant ceased to perform the functions of a PIO since May 2009.

56. The Respondent concedes that the Secretary-General did not personally take the decision to terminate his appointment. However, the abolition of the Applicant's post and the termination of his appointment was the inevitable consequence of Security Council resolution 1978 (2011), which extended the mandate of UNMIS for a final time to 9 July 2011. Further, Security Council resolution 1997 (2011) instructed the Secretary-General, as the Chief Administrative Officer, to complete the withdrawal of civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011.

57. As a consequence of the resolutions, all posts within UNMIS were, necessarily, to be abolished. For the staff members of UNMIS who were not reassigned to UNMISS or selected for another post within the Organization, the

termination of their appointments was mandatory. There was no scope for renewal of their appointments.

58. The Secretary-General was intimately involved in the process. He provided the report to the Security Council on 17 May 2011 upon which the Security Council's decision to liquidate UNMIS was based. On 27 July 2011, the Secretary-General notified the Security Council that UNMIS had started its liquidation process. Furthermore, the Decision was taken in circumstances where rapid action was required.

59. Following this resolution, it was anticipated that the Sudanese Government would not extend visas beyond 31 July 2011, except for staff members in the UNMIS liquidation team.

60. The Applicant's appointment with UNMIS was completed under his terms of appointment. Once his post at UNMIS was abolished, his services ended. By extending the Applicant's appointment beyond 30 June 2011 in accordance with the Information Circulars, the Administration created a situation where the abolition of the Applicant's post was processed as a termination under staff rule 9.6. As a consequence, the Applicant has been paid a termination indemnity of USD33,745.83.

61. The Applicant's argument that the personal involvement of the Secretary-General was required in the notification provided to the Applicant is an appeal to form over substance.

62. The Respondent submits that, in these circumstances, it is open to the Tribunal to find that there was no requirement that the Secretary-General be personally involved in the termination of each of the 62 international staff who were not transitioned to UNMISS. The Secretary-General's subordinates in OHRM and DFS were lawfully charged with implementing the recommendation of the Secretary-General and the decision of the Security Council.

63. In view of the foregoing, the Respondent requests the Tribunal to reject the Application.

Considerations

64. Having reviewed the entire case record, the Tribunal finds that the following legal issues arise for consideration in this case:

- a. Was the decision to terminate the Applicant's contract taken with the required authority?
- b. Was the competitive review process followed in respect to the Applicant?
- c. Were there other P3 PIO posts in UNMISS and if so was the Applicant accorded full and fair consideration for these? Were there any procedural irregularities in this regard?

Was the decision to terminate the Applicant's contract taken with the required authority?

65. The Applicant submitted that the CCPO of UNMIS, did not have the authority to take the decision to terminate his appointment. He further submitted that even if notification of the CCPO's decision was issued by the ASG/OHRM, Ms. Catherine Pollard, on 1 August 2011, she did no more than "rubber-stamp" his decision. The ASG's delegated authority to terminate his appointment was therefore sought after the decision had been taken. The Applicant submits that authority cannot be delegated retrospectively and that even for an ASG, there remains no power to terminate in these circumstances and, therefore, the decision was *ultra vires* and unlawful.

66. The Respondent submitted that the abolition of the Applicant's post and the termination of his appointment were the inevitable consequences of Security Council Resolution 1978 (2011), which extended the mandate of UNMIS for a final time to 9 July 2011 and that Security Council Resolution 1997 (2011) instructed the Secretary-General, as the Chief Administrative Officer, to complete the withdrawal of civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011. The Respondent further submitted that as a consequence of the resolutions, all posts within UNMIS were, necessarily, to be abolished. For the staff members of UNMIS who were not reassigned to

UNMISS or selected for another post within the Organization, the termination of their appointments was mandatory and there was no scope for renewal of their appointments.

67. Having reviewed the parties' submissions, the Tribunal finds that the termination decision was taken without the requisite delegated authority notwithstanding the fact that all posts within UNMIS were necessarily to be abolished as a result of Security Council Resolution 1977 (2011). Paragraph one of the said resolution called upon the Secretary-General to complete the withdrawal of all uniformed and civilian UNMIS personnel other than those required for the mission's liquidation by 31 August 2011. The Applicant argued that the resolution called for a withdrawal and not a termination of posts but paragraph two of the same Resolution requested the Secretary-General to transfer appropriate staff, equipment, supplies and other assets from UNMIS to UNMISS and UNISFA together with appropriate staff and logistics necessary for achieving the new scope of functions to be performed.

68. In *Antaki* 2010-UNAT-095, a case relied upon by the Respondent in his arguments, it was held that where the Dispute Tribunal finds no shortcomings in procedural processes, it should not award damages where the subject decision was valid and lawful. Awarding compensation could be characterized as punitive damages. Further, art. 10(7) of the Statute of the Tribunal states that the Dispute Tribunal shall not award exemplary or punitive damages. The Tribunal, therefore, rejects the Applicant's claims under this head.

Was the competitive review process followed in respect to the Applicant?

69. The Applicant's submission on this score is that the competitive review process was either not properly followed in his own review, or that it was flawed and that there is no evidence that the Organisation rejected the findings of the CRP in any case other than his.

70. The Respondent submitted that the Applicant and the two other P-3 Public Information Officers were subject to an objective and impartial comparative review process and that to avoid any potential conflict of interest; the Panel

agreed that no Panel member would review a staff member in their occupational group, or with whom they were personally close.

71. The Tribunal, having examined the documentary evidence adduced by the parties and in view of the evidence tendered by Ms. Fletcher, did not find any procedural flaws in the competitive review process as it was implemented in the Applicant's case. The evidence tendered by the Respondent show that all three candidates for the PIO posts were assessed against the same methodology and criteria adopted by the CRP.

Were there other P3 PIO posts in UNMISS and if so was the Applicant accorded full and fair consideration for these? Were there any procedural irregularities in this regard?

72. Both in his request for Management Evaluation and in his Application to the Tribunal, the Applicant aside of challenging the lawfulness of his termination at the closure of the UNMIS mission had claimed that there was more than one P-3 PIO post available at the time of the competitive review process and that by November 2011 there were four P-3 PIO posts within UNMISS.

73. It is his case that these P-3 PIO positions were all filled with other former UNMIS staff members including Ms. Waugh who scored lower than him before the CRP and a staff member Ms. Shantal Persaud who did not serve in the former UNMIS mission. The said P-3 PIO posts were filled with total disregard to the transitioning policy amply testified to by Ms Fletcher that the Applicant was at the top of a ranking pool from which P-3 PIO candidates were to be selected after the initial rolling over of Ms Miday who had scored the highest points during the CRP exercise.

74. Given that state of affairs, he continued, the Respondent's assertion that there was only one post at the time of the competitive review process is untenable. The Applicant further submitted that the CCPO's evidence that a second P-3 PIO post was created months after the conclusion of the competitive review process cannot be correct.

75. It was also his submission that if the said post did not exist at the time of the competitive review process then it must have been created days, or possibly weeks after the conclusion of the process. Otherwise, once UNMIS ceased to exist, such a post should have been open either to competitive recruitment or the recommendations of the CRP would have been accepted. Neither of this had happened in the process of filling the new P-3 PIO posts.

76. The Respondent submitted that Ms. Waugh was reassigned to the second P-3 PIO post in UNMISS because she was the head of the Print and Web Unit in the former UNMIS mission and had been performing the functions of the post for over 5 years whereas the Applicant ceased to perform the functions of a PIO since May 2009. Unfortunately, this pleading is not backed up by any evidence, oral or documentary.

77. The issue that arises for consideration under this heading is how a candidate who was ranked third during the competitive review exercise ended up in the second PIO post in UNMISS. According to Ms. Fletcher's testimony, during the comparative review process, the Applicant received 75 points and Ms. Waugh received 67 points. The Panel recommended that the Applicant and Ms. Waugh be included in the pool of available candidates in ranking order if there were surplus posts with similar functions in UNMISS.

78. The Respondent did not dispute the existence of a second PIO position in UNMISS. The arguments as to Ms. Waugh's credentials for print and web work and the Applicant having ceased to perform the functions of a PIO since 2009 is not only unsupported by evidence but is also an unfortunate afterthought. The CRP Panel had already reviewed the Applicant, Ms. Miday and Ms. Waugh for the same post using the same criteria and established that the Applicant was a more suitable candidate than Ms Waugh for a P-3 PIO post. The CCPO in his testimony told the Tribunal that he did not know how the selection for the second P-3 PIO post was done.

79. The Respondent had argued that the Applicant did not submit the matter of the selection of the second P-3 PIO post to Management Evaluation and therefore could not canvas the issue before the Tribunal as it is not receivable.

80. This submission is misguided as the Tribunal finds that the Applicant's request for Management Evaluation included both the issue of unfair termination and that of other available P-3 PIO posts in UNMISS for which he was not considered. The fact that the Management Evaluation Unit in addressing his complaints skipped over the issue of the other P-3 PIO posts to which he was excluded is not the fault of the Applicant and it is not in his place to compel the MEU to address every one of his complaints.

81. The Tribunal finds that the Applicant was not accorded full and fair consideration for the second P-3 PIO post in UNMISS contrary to the policy adopted by the CRP, notwithstanding the Respondent's arguments on Ms. Waugh's suitability for the post. In this regard, there were both substantive and procedural irregularities on the part of the Respondent.

Conclusion

82. In view of the foregoing, the Applicant is entitled to compensation for the substantive and procedural irregularities occasioned to him by the failure by the Administration to follow its own procedures and the Tribunal, accordingly:

- a. Awards the Applicant one years' net base salary as compensation for the substantive irregularity.
- b. Awards the Applicant 4 months' net base salary for the procedural irregularity.

83. The total sum of compensation awarded to the Applicant shall be paid within 60 days of the date that this judgment becomes executable. Interest will accrue on the total sum from the date of this judgment at the current US Prime rate until payment. If the total sum is not paid within the 60-day period an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 21st day of December 2012

Entered in the Register on this 21st day of December 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi