



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/067

Judgment No.: UNDT/2013/102

Date: 12 August 2013

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

GALBRAITH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Lyndon Barnes, Osler, Hoskin & Harcourt LLP
Brian Gorlick, OSLA
Anita Saran, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Deputy Special Representative of the Secretary-General (“DSRSG”) for the United Nations Assistance Mission in Afghanistan (“UNAMA”) employed at the Assistant Secretary-General (“ASG”) level, contests the administrative decision to terminate his fixed-term contract in “the interest of the Organization” before its expiry.

Procedural history

2. On 24 April 2010, the Applicant filed the application. On 26 April 2010, the Registry acknowledged its receipt and served it on the Respondent, who was given until 24 May 2010 to provide his reply. The Respondent requested a time extension, and after some correspondence, filed and served his reply on 28 June 2010.

3. Following a case management hearing held on 5 October 2010 by the Judge assigned to the case at the time (Judge Kaman), the Tribunal recorded in Order No. 270 (NY/2010) of 8 October 2010 the parties agreement that the contested decision before the Tribunal is

[t]he 12 October 2009 decision of the Secretary-General to terminate the applicant’s appointment as Assistant Secretary-General (ASG) pursuant to a termination clause in the applicant’s appointment letter stating that the “appointment is ... subject to termination in the interest of the Organization, as determined by the Secretary-General”.

4. Order No. 270 recorded the parties’ contentions as follows:

4. The applicant’s contentions:

a. The 12 October 2009 letter was unlawful because it did not include reasons for the applicant’s termination;

b. Merely stating that the termination was “in the interest of the Organization” was not a sufficient reason for termination and was in violation of the staff rules;

c. The Secretary-General is required to give reasons additional to merely stating that the termination is “in the interest of the Organization” in every termination under an appointment letter similar to the applicant’s;

d. “Cause” grounds for termination could include insubordination, misconduct, fraud, and conduct of a similar nature;

e. “Non-cause” grounds potentially could exist and “policy differences” was one such potential ground;

f. In all events, the reasons for the applicant’s termination were required by the staff rules to be given in this case;

g. The applicant does not know, and did not tender to the Tribunal, any ostensible reason for his termination and thus contends that it must be arbitrary;

h. The applicant disavowed that the matter before the Tribunal concerned an “internal disagreement between a head of mission and his deputy on a major policy matter” (application, para. 10), and that this was a “policy disagreement” between the SRSG and the applicant (application, para. 35);

i. The discretion of the Secretary-General is not unlimited in termination on the grounds of “best interests of the Organization”, where letters of appointment contain such a clause;

j. The Secretary-General could not delegate to the ASG/OHRM the task of terminating the applicant’s employment with the United Nations;

k. The applicant has been defamed and seeks to pursue a defamation claim as an independent cause of action before the Tribunal;

l. The applicant seeks to submit a document production request, asking for documents including the applicant’s employment file, correspondence regarding his termination from employment, and related documentation;

m. The applicant seeks to call witnesses at a hearing on the merits to inquire into the reasons for the termination; the applicant intends to prove that he was “doing a good job” in his ASG position, that the termination was “unexpected”, and that the applicant’s termination was “devastating” to the Mission.

5. The respondent's contentions:

a. Pursuant to the letter of appointment, the Secretary-General was empowered to act on behalf of the Organization in terminating the applicant's contract of employment;

b. The Secretary-General properly exercised his discretion in making the decision to terminate the applicant's appointment;

c. The Secretary-General did not delegate any authority to the ASG/OHRM, who acted within her ambit as an organizational official within OHRM. She was merely communicating in her 12 October 2009 letter to him a decision that was taken by the Secretary-General himself as to whether the applicant's contract of employment should be terminated;

d. The analysis to be undertaken by the Tribunal should be a phased one, with preliminary, legal issues to be addressed first, followed only if necessary by a fact-finding hearing on the merits;

e. The first inquiry for the Tribunal must be whether the statement that the termination was "in the interest of the Organization" was a sufficient reason, in and of itself, for purposes of staff regulation 9.3 and staff rule 9.6(c). The respondent contends it was;

f. The phrase "in the interest of the Organization" is a policy determination that only the Secretary-General has the discretion to make. Therefore, the Tribunal's review of that discretion would be limited as it would be difficult for Tribunal to sit in judgment of that discretion, given the circumstances of this case;

g. Being a policy determination, the applicant does not state a cause of action that can be reviewable by the Tribunal;

h. It is because of the senior level officials involved that the applicant's appointment letter was written containing the "best interest of the Organization" language; such language necessarily recognizes the differences existing between managers at the ASG and USG levels, which are different from staff members.

5. Order No. 270 (NY/2010) further instructed each of the parties to file written submissions. After having been granted time extensions, the Applicant filed and served his submissions on 29 November 2010 and the Respondent on 13 December 2010. On 20 December 2010 the Applicant filed his response to the Respondent's response to Order No. 270.

6. On 31 June 2011, Judge Kaman departed the Tribunal. On 4 June 2012, when the undersigned Judge assumed her functions as the replacement of Judge Kaman, the case was reassigned to her.

7. On 1 August 2012, by Order No. 156 (NY/2012), the Tribunal instructed the parties to meet on or before 5 September 2012 and to file and serve a jointly signed statement on or before 26 September 2012, responding to a range of issues identified by the Tribunal in Order No. 156 (NY/2012). On 15 October 2012, after having been granted a time extension on 26 September 2012, the parties filed a joint submission only responding to some of the issues identified by the Tribunal. With regard to the remaining issues, each party filed and served a separate statement, explaining that they had not been able to agree on these matters. However, the parties agreed that the present case would not require an oral hearing and that it would not benefit from being suspended and transferred to mediation.

8. In light of the parties responses to Order No. 156 (NY/2012), in Order No. 157 (NY/2013) dated 25 June 2013, the Tribunal decided to determine the case on the papers before it, allowing the parties to file and serve written closing statements by 12 July 2013, which the parties did.

Facts

9. On 26 March 2009, the Secretary-General announced his decision to appoint the Applicant as DSRSG for UNAMA. The Applicant assumed the position on 1 June 2009 and arrived in Afghanistan on 2 June 2009.

10. For the duration of his appointment, the Applicant was supervised by the Special Representative of the Secretary-General (“SRSG”). The Respondent further explains that the Applicant’s role was to assist and support the SRSG in the performance of his diplomatic, political and managerial responsibilities in connection with UNAMA.

11. Two different letters of appointment were adduced in evidence by the parties, one dated 28 April 2009 and the other 20 July 2009. However, in their jointly signed response to Order No. 156 (NY/2012), the parties agreed that the version dated 20 July 2009 is the letter of appointment that regulated the Applicant's employment as DSRSG for UNAMA and that this letter of appointment was regulated by the Staff Regulations and Rules that came into effect on 1 July 2009. Explicitly from this letter of appointment follows that:

- a. The Applicant's appointment was a fixed-term appointment subject to the United Nations Staff Regulations and Rules;
- b. The fixed-term appointment was for a period of eleven months, effective 1 July 2009;
- c. The appointment could be terminated prior to its expiration date in accordance with staff regulation 9.3 and the list of reasons provided therein, in which case the Applicant was to be given 30 days' written notice;
- d. The appointment was also subject to termination "in the interest of the Organization, as determined by the Secretary-General", in which case the Applicant was to receive three months' written notice;
- e. The fixed-term appointment carried no expectancy of renewal; and
- f. The 20 July 2009 letter of appointment cancelled and superseded the unexpired portion of the 28 April 2009 letter of appointment.

12. The Applicant disagreed with his supervisor, the SRSG, regarding the elections in Afghanistan in 2009 and UNAMA's role herein. The Applicant's account of facts are reflected below:

... At the time the Applicant was appointed as DSRSG, Afghanistan was preparing for their 2009 elections. The elections were critically important to United Nations objectives in Afghanistan

and the UN coordinated some \$300 million in donor assistance to fund the elections. As part of the appointment, the Applicant was charged with overseeing UNAMA's support to the Afghanistan electoral institutions in the holding of "free, fair, inclusive and transparent" elections. He was often Officer-In-Charge ("OIC"), as the SRSG was away on mission and holiday for a substantial part of the elections period.

... When the Applicant arrived, the elections operation was in chaos. The Applicant devoted much of his time to directing UNAMA's support for the Afghanistan elections, scheduled for 20 August 2009. As there was a high risk of fraud in the elections, the Applicant conscientiously encouraged the Afghanistan Independent Election Commission ["IEC"], the Afghanistan Government, and the international community to take steps to reduce the likelihood of fraud in the elections and to address the fraud once it took place.

...

... [The IEC] was the Afghan body responsible for organizing and supervising the elections. [The incumbent President] appointed all seven members of the IEC. Far from being impartial, the IEC was a partisan body determined to do whatever it took to ensure [the incumbent President] a victory in the first round of elections (a victory required 50 percent of the votes cast plus one).

... The Applicant believed that UNAMA should try to influence the IEC to operate in an impartial and honest manner. The Applicant's concerns about the IEC were shared by UNAMA's entire Political Affairs Division ["PAD"] and by UNDP-Elect, the election professionals providing technical, financial, and logistical support to the IEC.

... The SRSG insisted that the IEC was an honest broker and that its chairman ... was a fair-minded man, and that UNAMA's mandate was to support the IEC regardless of what it did. The Applicant disagreed with the SRSG's approach. This became a continuing source of disagreement within the mission amongst professional staff.

...

... While [some meetings regarding polling centres] were cordial, the Applicant's recommendations were not well received by the IEC or the Ministers. When the SRSG returned from holiday, [the incumbent President's] Government complained about the Applicant's efforts to close the non-existent polling centers. The SRSG ordered the Applicant not to raise the matter of the number

of polling centers again. And, in what the Applicant felt was unprofessional behaviour, the SRSG criticized him behind his back to Afghan Ministers and foreign diplomats.

...

... Although the massive fraud [on Election Day] was obvious, the SRSG insisted that UNAMA do and say nothing about it. He ordered the Applicant not to discuss turnout estimates at the briefings he conducted on the elections for Kabul-based Ambassadors, even though turnout was key to understanding the extent of the fraud.

... The SRSG also instructed the Applicant not to share UNAMA data with the IEC or the Electoral Complaints Commission (“ECC”), the latter being the body charged with reviewing the results for irregularities and fraud. He insisted that the Applicant and others not share their data—or even their personal assessments—with diplomats from the countries that paid for the elections.

...

... On 24 August 2009, the Applicant went to Istanbul to represent UNAMA at a meeting of the Special Representatives which included [United States] Special Envoy ... and his counterparts. The SRSG instructed the Applicant to downplay the fraud and to express support for the Afghan electoral institutions, including the IEC. The Applicant carried out these instructions, although he thought they were wrong.

... On the night of 24 August 2009, the Applicant received two messages from the SRSG. Around midnight in Istanbul (2:30 AM in Kabul), the SRSG sent the Applicant a text message saying he had heard from an Afghan Minister that the Applicant had criticized the SRSG at a meeting the previous day at IEC, as well as made other inappropriate comments. Around the same time, he sent the Applicant an email expressing anger over an article in “The Guardian” dated 24 August 2009 that quoted an unnamed senior UN official as saying there had been fraud and estimating that 20 percent of [the incumbent President’s] votes were fraudulent. Both messages from the SRSG were disturbing to the Applicant and not just because of the time of night they were sent.

...

... In reply to the SRSG’s email, the Applicant sent an email saying he was not the source of the story, did not know the reporter, and thought the quote was inaccurate (because, in the Applicant’s view, twenty percent vastly underestimated the fraud).

...

... On his return from Istanbul, the Applicant went to see the SRSG to report on [the Special Representatives] meeting. The SRSG was agitated and not at all interested in the meeting. Although he had heard from the Applicant about both The Guardian article and the IEC meeting, the SRSG again raised these matters, accusing the Applicant of disloyalty.

... The SRSG's logic behind blaming the Applicant for The Guardian story was bizarre: he explained that his wife was a journalist and that he knew The Guardian would not have quoted a senior UN official unless a senior UN official had made the quote. The Applicant was a senior UN official and had believed fraud had occurred in the elections. Therefore, according to the SRSG, the Applicant must be the source of the story. In the IEC meeting, he insisted that the Applicant must have made the derogatory comments since he heard this information from Afghan ministers who he said would not lie.

... The Applicant found the accusations against him very disturbing. It was clear that the SRSG trusted [the incumbent President] and the Afghan Government more than his own staff, all of whom had told the SRSG that nothing untoward had happened. The Applicant felt that the SRSG's unquestioning trust in Karzai and his government made it easy for the Afghan Government to sow dissension within UNAMA and thus head off any serious international effort to deal with the fraud. The Applicant felt the SRSG's reaction to The Guardian article was grossly unfair to the PAD staff. The newspaper article included no sensitive UNAMA material, involved no criticism of UNAMA or the UN, and there was no evidence that the unnamed UN official was associated with UNAMA.

...

... [Some] incidents led the Applicant to believe that the SRSG put his personal relationship with [the incumbent President] above all other considerations, including the honesty of the elections, the safety of the staff, and fairness to his own staff.

13. On 30 August 2009, the the Applicant sent the SRSG a letter concerning the SRSG's accusations of disloyalty in which he stated that

[he was] offended by [the SRSG's] charge of disloyalty, which [the SRSG] made without any basis for so doing ... [He had] tried to

bring a shared sense of purpose, greater focus, and renewed vigor to the political work of this mission, all of which would be to the benefit of our mission in Afghanistan, the United Nations, and [the SRSG's] standing as head of mission. These accusations are not just personally offensive but also impede the important work we have ahead of us.

14. The event's described by the Applicant's continues as follow:

... The Applicant felt it was his job to give the SRSG his candid assessment and to provide advice that reflected his best judgment as well as that of the PAD. PAD spent weeks debating the situation and the views the Applicant presented to the SRSG were PAD's unanimous judgment and recommendations. The SRSG, however, did not like the assessment he was receiving. In their private meeting on 10 September 2009, the SRSG accused the Applicant of disrupting the mission and was clearly upset that PAD shared the Applicant's views.

...

... Since the SRSG felt that the Applicant's private candor was disruptive, the Applicant felt the best course of action was for him to absent himself temporarily from Kabul. The Applicant proposed to the SRSG that he leave for a week or two so that the SRSG could handle the election as he saw fit. The SRSG agreed ... Aside from the elections and staff security, the Applicant and the SRSG agreed on most matters and the Applicant knew he was making progress on a range of non-election related issues. While the Applicant strongly disagreed with the SRSG's decision to downplay the electoral fraud, he respected the SRSG's right, as chief of mission, to make that decision. Thus, the Applicant's offer to leave Kabul temporarily on 10 September 2009 was made out of respect for the SRSG and in order to preserve a good working relationship.

... [The SRSG] apparently felt the same way. After the 10 September 2009 meeting, [the SRSG] sent the Applicant a text message asking that the Applicant join the SRSG's meetings in New York and Washington scheduled for the end of September. Before departing the Applicant sent a letter to the SRSG explaining the reasons for his departure and also expressing intent to continue working together. When the Applicant left Kabul on 12 September 2009, the relations between the SRSG and him were still good.

... While the Applicant was in transit to his home in Vermont, *The Times of London* published a story dated 15 September 2009

falsely asserting that the SRSG had ordered the Applicant out of Afghanistan because the Applicant wanted to do something about electoral fraud. [The article stated;

The relationship between [the SRSG] and [the Applicant] has completely broken down,” said a diplomat in Kabul. “[The Applicant] has left the country. The official line is that he’s on a three-week mission to New York. But [the SRSG] just turned round to [the Applicant] and said, ‘I want you out’.

[The SRSG] and [the Applicant] insist that they are old friends from serving in the Balkans. Indeed, [the SRSG] introduced [the Applicant] to the Norwegian anthropologist who became his wife. But [the SRSG] is said to have lobbied behind the scenes to block [the Applicant’s] appointment as his deputy in March and their relationship appears to have deteriorated.]

There then followed a series of news articles that were, for the most part, favorable to the Applicant and critical of the SRSG. Both the Applicant and the SRSG agreed to keep their press comments on the matter to a minimum, acknowledging the policy disagreement but stating that the two remained friends and looked forward to working together on the Applicant’s return at the end of September. The Applicant stayed with this press line, noting that he supported the SRSG’s current line on the elections.

15. On 20 September 2009, the Applicant was interviewed for a news article in *Burlington Free Press* in which stated, *inter alia*, that:

[The Applicant] left Afghanistan a week ago after a disagreement with his [United Nations], Norwegian diplomat [the SRSG], over how to address allegations of widespread vote fraud. Incumbent President ... won the most votes in the election, but many of the fraud complaints centered on claims of fake ballots being cast for [the incumbent President].

[The Applicant] said he wanted to take a harsher line on the vote fraud issue than [the SRSG] but disputed reports he was expelled from the [United Nations] mission. [The Applicant] said he plans to return to Afghanistan after meetings with [United Nations] officials this week.

“One reason I was so concerned about the fraud in this election is that it inevitably raised a concern that Vermonters are going to ask, which is: What are we fighting for there?” he said.

“There are important interests for the United States and the world community and for Afghanistan, but it certainly doesn’t help that you have an election where there is such a large amount of fraud. People are right to be concerned”.

16. The event’s described by the Applicant’s continues as follow:

... In late September 2009, the SRSG began to lobby [United Nations] Officials to have the Applicant removed. Unaware of anything amiss, the Applicant continued with his program that included attendance at an Afghanistan conference in [the United Kingdom]. The Applicant arrived in New York on 24 September 2009 for what he thought were planned meetings with the SRSG.

... Instead, [the USG/DPKO] informed the Applicant that he was being recalled from his position as DSRSG in UNAMA. [The Under-Secretary-General] gave the Applicant no reason for this decision except to say the mission should have one policy line. The Applicant agreed, noting that he had only provided candid advice privately.

... Although shocked by what had happened, the Applicant continued with his official duties, including representing UNAMA at the meeting of [Special Representatives] that day.

... In a phone call with the Applicant on 26 September 2009, [the Under-Secretary-General] proposed that the Applicant’s recall be explained publicly as “a disagreement on how to handle electoral fraud”. [The Under-Secretary-General] promised that the United Nations would say nothing else on the matter and that the Secretary-General would instruct the SRSG not to speak to the press about the recall. On the basis of [the Under-Secretary-General’s] proposed statement and promises, the Applicant said he would not speak to the press.

... After speaking with [the Under-Secretary-General] and the Secretary-General’s staff, the Applicant realized that [the United Nations] Headquarters had no appreciation of the extent of the electoral fraud or the SRSG's role in downplaying it.

17. In a private letter dated 28 September 2009 from the Applicant to the Secretary-General, the Applicant stated, *inter alia*:

It is incredible to [the Applicant] that the United Nations would dismiss a senior official for having taken seriously the issue of electoral fraud in a United Nations-supported and funded election, but this is precisely what [the Secretary-General's] senior advisors are recommending [him] to do in Afghanistan.

As [the Secretary-General knows], [the SRSG] and [the Applicant] have had prolonged disagreement as to whether UNAMA should take action to prevent or mitigate fraud in the Afghanistan elections. Given our mandate to support "free, fair, and transparent" elections, [the Applicant] felt UNAMA could not overlook the fraud without compromising our neutrality and becoming complicit in a cover-up. For a long time after the elections, [the SRSG] denied that significant fraud had taken place, even going to the extreme of ordering [United Nations] staff not to discuss the matter. And, at critical stages in the process, he blocked [the Applicant] and other UNAMA professional staff from taking effective action that might have limited the fraud or enabled the Afghan electoral institutions to address it more effectively.

[The SRSG's] approach has compromised UNAMA's reputation for neutrality, at least with the Afghan opposition.

[The SRSG] has many strengths as SRSG. He is articulate, effective in his relations with the international community and enjoys warm relations with the top level of the Afghan Government (but not the opposition). He has an admirable humanitarian streak as evidenced by his persistence in the case of which you are aware. He is, however, a terrible manager as he himself admits.

[The SRSG] is secretive, deeply mistrustful of the staff, arbitrary in his decision-making and rarely follows through. Aside from his special assistants (and on some occasions [the Applicant]), almost no one in the mission knows what he is doing. The staff, who include professionals with many years experience in Afghanistan, do not feel involved on key issues and often have no idea what constitutes [the SRSG's] policy line.

[The Applicant] thank[s] [the Secretary-General] for the trust [he] placed in [him] by choosing [him] as [his] Deputy Special Representative in Afghanistan. [The Applicant] would like to continue the important work that [he] ha[s] begun there but [he] fully

respect [the Secretary-General's] responsibility to make decisions that [he] feel[s] are in the best interests of the United Nations.

18. In the press statement of 30 September 2009, the Secretary-General's spokesperson stated that:

The Secretary-General has decided to recall [the Applicant] from Afghanistan and to end his appointment as the Deputy Special Representative of the Secretary-General for the United Nations Assistance Mission in Afghanistan (UNAMA).

He expresses his thanks to [the Applicant] for his hard work and professional dedication. The Secretary-General recognizes [the Applicant's] important contributions to the work of the mission and throughout his distinguished career as an international civil servant. The Secretary-General has made this decision in the best interest of the mission.

He reaffirms his full support for his Special Representative, [the SRSG].

19. The Respondent's separate account of the same events is set out below.

... On or around 28 August 2009, the Applicant and the SRSG had a meeting during which the SRSG raised issues concerning divisions and disputes with the mission, disparaging remarks that the Applicant had allegedly made about the SRSG and the problem of confidential information being leaked to the press. The SRSG also objected to the Applicant's raising of the issue of constitutional change (that is, the replacement of the Afghan president ...) with ... [his] main rival in the National Elections). A *New York Times* article later cited Western diplomats as confirming that the Applicant had also raised the issue of [the incumbent President's] removal with the American Embassy in Kabul. On 30 August 2009, the Applicant sent the SRSG a letter responding to the issues raised at the meeting.

... On or around 2 September 2009, the Applicant met with the Chief Electoral Officer of [the IEC]. Remarks he made to the IEC were not well received. Following this meeting, [the incumbent President] Government complained that UNAMA, and the Applicant personally, had interfered in the Afghanistan election process. Further, the Afghanistan Permanent Representative threatened to have the Applicant expelled from the country.

... On or around 12 September 2009, the Applicant suggested to the SRSG that he leave Afghanistan temporarily. Before departing, the Applicant sent a letter to the SRSG detailing his reasons for departure, acknowledging that he could no longer usefully contribute to the mission mandate concerning the National Elections, and, that the differences arising between the SRSG and himself had impacted on the mission. However, he affirmed his commitment to working to repair the rift with the SRSG and indicated his intention to focus on areas other than the National Elections upon his return to the mission. On or around 13 September 2009, the Applicant left Afghanistan.

... On 15 September 2009, an article was published in "The Times" titled "UN Chief Peter Galbraith is removed in Afghanistan poll clash", reporting the rift between the Applicant and the SRSG, referring to differing political approaches to electoral fraud and associating these differing approaches with the United States and Europe.

... On or around the middle of September 2009, the Applicant gave a two-hour interview at his home with "the Burlington Free Press" expressing disagreement with the SRSG, and stating that he wished to take a harsher line than the SRSG in regard to vote fraud.

... In or around late September 2009 [the Under-Secretary-General] informed the Applicant that he was being recalled from his position as DSRSG for UNAMA.

... On 28 September 2009 the Applicant sent the Secretary-General a four-page letter outlining his disagreements with the SRSG and indicating that he understood that the termination of his appointment was being considered. The Applicant informed the Secretary-General that while he would like to continue the work he had begun in Afghanistan, he fully respected the Secretary-General's responsibility to make decisions that the Secretary-General considered were "in the best interests of the United Nations".

... On 30 September 2009, the Spokesperson for the Secretary-General announced that the Secretary-General had decided to recall the Applicant and end his appointment as DSRSG for UNAMA. The Spokesperson expressed the Secretary-General's gratitude for the Applicant's hard work and professional dedication, and recognized the Applicant's important contributions to UNAMA.

... From 30 September 2009 to 6 October 2009, the Applicant conducted a number of interviews with multiple major media outlets. On 30 September 2009 excerpts from the confidential letter the Applicant sent to the Secretary-General on 28 September 2009 were published in the New York Times.

... On 8 October 2009, UNAMA issued a statement refuting the Applicant's accusations against the mission. On 11 October 2009, the SRSG, accompanied by members of the diplomatic community, held a press conference during which he rebutted the Applicant's accusations against UNAMA.

... In a letter dated 12 October 2009, the Assistant Secretary General for Human Resources Management notified the Applicant that the Secretary-General had decided to terminate the Applicant's appointment in accordance with the terms of his appointment.

Considerations

Receivability

20. In accordance with *O'Neill* UNDT/2010/203 the Tribunal must verify *ex officio* the receivability of an application.

21. Articles 2 and 3 and 8 of the Dispute Tribunal's Statute establish the conditions that an application has to meet to be considered receivable by the Tribunal.

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

22. In the present case, the Applicant, a former staff member, is appealing the administrative decision to terminate his fixed-term contract in “the interest of the Organization”.

23. On 12 October 2009, the Applicant received a letter from the ASG/OHRM which confirmed the Secretary’s General decision of 30 September 2009 to terminate his fixed-term contract in the interest of the Organization as of the close of business on 12 October 2009. The Applicant was also informed that the Secretary-General had authorized, in lieu of the notice period, payment of compensation equivalent to three months’ salary, including the applicable post-adjustment and allowances.

24. The Applicant requested a management evaluation of this decision on 10 December 2009. On 3 February 2010, the Management Evaluation Unit (“MEU”) informed the Applicant, via email, that “any recourse that he may wish to pursue may be addressed to the United Nations Dispute Tribunal in accordance with provisional Staff Rule 11.4”.

25. The present application was filed on 23 April 2010, within 90 calendar days of the date on which the MEU response, even though none was provided, was due.

26. The application meets all of the requirements of art. 8 of the Dispute Tribunal’s Statute and is receivable.

Issues

27. In accordance with the parties’ submissions, the issues that the Tribunal has to determine are:

- a. Whether the contested decision was taken by the Secretary-General;
- b. Whether reason was provided to the Applicant regarding his termination;
- c. Whether the termination was decided in the interest of the Organization;
- d. Whether the Applicant's due rights were breached.

UNAMA

28. On 28 March 2002, the United Nations Security Council adopted resolution 1401, endorsing the establishment of UNAMA, with the mandate and structure laid out in the Report of the Secretary-General of 18 March 2002 (A/56/875-S/2002/278). The Report of the Secretary-General stated, *inter alia*:

In addition to the SRSG's Office, the mission has two main arms, or pillars (I. political affairs; II. relief, recovery, and reconstruction) and each of the two pillars would be headed by a Deputy Special Representative, at the rank of Assistant Secretary-General, reporting directly to the SRSG.

29. The Report further stated:

E. Pillar I: political affairs

104. Pillar I would be headed by a Deputy Special Representative for Political Affairs. The tasks of the pillar would be as follows:

(a) Monitoring, analysing and reporting on the overall political and human rights situation and status of implementation of the Bonn Agreement, especially as related to the environment for the convening of the emergency loya jirga [Afghani Grand Assembly];

(b) Supporting the work of the Special Independent Commission for the Emergency loya jirga;

(c) Maintaining contact with Afghan leaders, political parties, civil society groups, institutions and representatives of the central authorities;

(d) Maintaining contact with representatives of the international community;

(e) Performing good offices as necessary on behalf of the Special Representative and in support of the efforts of the legitimate Afghan authorities, particularly in the fields of conflict control, confidence-building and reconciliation;

(f) Providing information and guidance on political issues for the benefit of other UNAMA activities;

(g) Investigating human rights violations and, where necessary, recommending corrective action”.

30. The Security Council decided on 28 March 2008 (resolution 1868) to “extend UNAMA’s mandate as defined in its resolutions 1662 (2006), 1746 (2007) and 1806 (2008) until 23 March 2010” and stressed “the central and the impartial role that the UN continues to play in promoting peace and stability in Afghanistan by leading the efforts of the international community, including jointly with the Government of Afghanistan”.

31. The Security Council decided further that UNAMA and the SRSG, within their mandate and guided by the principle of reinforcing Afghan ownership and leadership, will continue to lead international civilian efforts in accordance with their priorities as laid out in para. 4 of its resolution 1806 (2008). The Security Council underscored the importance of the upcoming presidential and provincial elections to Afghanistan’s democratic development, called for all efforts to be made to ensure the credibility, safety and security of the elections. The Security Council recognised the UNAMA’s key role, at the request of the Afghan Government, in supporting the electoral process and called upon members of the international community to provide the necessary assistance to these ends.

32. Taking into consideration the important role of the presence of domestic and international observers in enhancing the integrity and credibility of the electoral

process, UNAMA co-hosted an election observation working group which provided guidance and facilitate international and domestic observation.

Was the decision to terminate the Applicant taken by the Secretary-General?

33. The Applicant claims that the contested decision was made by the ASG/OHRM.

34. The facts in the present case show that the 30 September 2009 statement that the Secretary-General had decided to recall the Applicant from Afghanistan and to end his appointment as the DSRSG was issued by the Secretary-General's spokesperson on his behalf. The role of the ASG/OHRM was solely to confirm in writing, by the powers delegated to her, the Secretary-General's decision to terminate the Applicant's fixed-term appointment in accordance with the termination clause included in the Applicant's letter of appointment, namely that the Applicant was being terminated "in the interest of the Organization" as of the close of the business day 12 October 2009.

35. The Tribunal therefore finds that the decision "to recall and end" the Applicant's appointment as the DSRSG in Afghanistan was taken by the Secretary-General and not by the ASG/OHRM as the Applicant claims.

Applicant's letter of appointment

36. As agreed to by the parties during the proceedings in front of the Tribunal, the Applicant's letter of appointment from 20 July 2009 governed his appointment to UNAMA.

37. More specifically, his letter of appointment mentioned that the appointment "is subject to the extension of mandate and availability of funding" and that the "appointment may be terminated prior to its expiration date in accordance with staff regulation 9.3, in which case you will be given 30 days' written notice. This

appointment is also subject to termination in the interest of the Organization, as determined by the Secretary-General, in which case will be given three months' written notice".

38. In the present case, the Applicant, by signing his letter of appointment, agreed that his appointment could, in addition to the reasons for termination specifically identified by staff regulation 9.3, also be terminated in accordance with the terms and conditions of his appointment subject to the provisions of the Staff Regulations and Rules which, in this case, stated that his appointment could be terminated prior to its expiration in the interest of the Organization as determined by the Secretary-General. His appointment could also be terminated if the funds were no longer available or if the mission's mandate was not extended.

Reasons for separation from service

39. Under the United Nations Staff Regulations and Rules, the Secretary-General may separate a staff member from service for reasons in accordance with the terms of his/her appointment or for any of the reasons specified in staff regulations 9.1–9.3 and staff rules 9.1–9.6 (ST/SGB/2009/7, effective from 1 July 2009 and applicable in the present case).

40. The reasons for separation from service can be organized into five categories:

I) Separation *ope legis*

41. There are certain types of separation from service that do not involve unilateral action from one of party (Organization or staff member) or the parties' consensus. These include:

- a. expiration of the contract in accordance with the terms of appointment (staff rule 9.1(iii) and 9.4);
- b. death of the staff member (staff rule 9.1(vi));

- c. retirement (staff regulation 9.2 and staff rules 9.1(iv) and 9.5).

II) Separation by parties' agreement prior to the expiration of the contract (staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi))

42. According with the general principle of legal symmetry—*mutuus consensus*, *mutuus disensus*—the labor contract, which is a consensual contract, can be terminated by agreement between the parties.

43. All types of appointments (temporary, fixed-term or continuing) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that this action is not contested by the staff member.

44. A termination based on this reason can only take place if the action is not contested by the staff member. In other words such an action can only be legally implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally the offer then is an agreed termination and the parties can come to an agreement orally or in writing.

45. In *Jemai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.

III) Separation initiated by the staff member

46. There are two types of separation which may be initiated by a staff member:

- a. Resignation (staff regulation 9.1 and staff rule 9.2); and
- b. Abandonment of the post (staff rule 9.3).

IV) Separation initiated by the Secretary-General

47. There are five sub-categories in the types of separation which may be initiated by the Secretary-General:

- a. Termination for reasons (grounds) not related to the staff member: abolition of posts or reduction of staff (regulation 9.3(a)(i) and staff rule 9.6(c)(i) and 9.6(e)).
- b. Termination for reasons(grounds) related to the staff member:
 - i. If the staff member is, for reasons of health, incapacitated for further service (staff regulation 9.3(a)(iii) and staff rule 9.6(c)(iii));
 - ii. If the services of the staff member prove unsatisfactory (staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii));
 - iii. If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light and, if they had been known at the time of his/her appointment, should under the standards established in the Charter of United Nations have precluded his or her appointment (staff regulation 9.3(a)(v) and staff rule 9.6(c)(v));
 - iv. If the conduct of the staff member does not meet the highest standards of integrity required by art. 101, para. 3, of the Charter of the United Nations (staff regulation 9.3(a)(iv));
 - v. Disciplinary reasons in accordance with staff rule 10.2(a)(viii)–(ix) (rule 9.6(c)(iv). Rule 10.2(a) states that disciplinary measures can take only one or more of the following forms:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

c. Termination in the interest of good administration of the Organization (staff regulation 9.3(b) and staff rule 9.6(d)):

- i. In addition to the reasons given in the letter of appointment and from staff regulation 9.3(a) “in the case of a staff member holding a continuing appointment, the Secretary General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary General, such action would be in the interest of the good administration of the Organization to be interpreted principally as a change or termination of a mandate and in accordance with the standards of the Charter”.
- ii. This additional reason for termination is distinct from the ones presented above and can be understood as being:
 - (a) Applicable only to a staff member who holds a continuing appointment;

(b) A termination without the consent of the staff member;

(c) A direct result of the Secretary-General's unilateral opinion that the termination is in the interest of the good administration of the Organization; the Secretary-General's authority to determine the interest of good administration of the Organization and his discretionary power to terminate a staff member's contract are provided for by the Staff Regulations and Staff Rules.

d. This termination is to be interpreted principally as a change or termination of a mandate.

e. The written notice is three months.

48. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c) respectively when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text this reason itself can be interpreted in two ways change of the mandate or termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the UN mandate and/or the availability of funds.

49. The Tribunal notes that the Applicant's contract mentions staff regulation 9.3, but this reason was not applicable *ab initio* because his contract was a fixed-term appointment, and this clause refers only to continuing appointments. In the Applicant's letter of appointment a contractual clause similar to this reason was

included, namely that his fixed-term contract was subjected “to extension of mandate and availability of funding”.

V) Termination expressed in the letter of appointment: “in the interest of the Organization as determined by the Secretary-General”

50. The parties agreed that the termination was based on the additional termination clause contained in the Applicant’s terms of appointment “in the interest of the United Nations as determined by the Secretary-General” and the Tribunal considers that:

- a. A termination reason, agreed to by the parties in the letter of appointment, is in addition to the ones outlined by staff regulation 9.3(a).
- b. The authority to determine the interest of the Organization and the discretionary power of the Secretary-General to terminate the contract for this reason is a result of the parties’ agreement on the terms of appointment and has a contractual nature.
- c. It is a separation initiated by the Secretary-General which can be taken with or without the consent of the staff member.
- d. It is applicable to other situations than the ones mentioned in staff regulation 9.3 and staff rule 9.6.
- e. The written notice is three months.

51. According to the Respondent’s submissions, the letters of appointment for USGs and AGSs are the only types of appointments where this additional termination clause is included in the staff member’s terms of appointment. The Applicant’s letter of appointment included the termination reason “in the interest of the Organization as determined by the Secretary-General” prior to the expiration of the contract due to the high level of the position, the role and his mandate as a DSRSG.

52. The Tribunal considers that the determination of the interest of the Organization is the Secretary's General exclusive attribute and the circumstances under which the Secretary-General is to determine "the interest of the Organization" can vary from one case to another. When determining the "interest of the Organization", the Secretary-General may take into consideration the purposes of the United Nations, the implementation of the United Nations mandate in particularly difficult circumstances, together with the uniqueness of its organs and the specificity of the role and activity of each USG and ASG.

Whether reason was provided to the Applicant for his termination

53. From the facts presented by the Applicant results that he was appointed as a DSRSRSG for political affairs in Afghanistan in June 2009. While serving as OiC in the SRSG's absence the Applicant attended several meetings in conjunction with Ambassadors representing the United States, European Union, United Kingdom, North Atlantic Treaty Organization, Canada and the United Nations Development Program-Elect where he urged the Afghan Ministers and the Afghani IEC to remove non-existing polling centers from the electoral rolls. After the SRSG's return, the Afghani government complained about Applicant's efforts to close the non-existing polling centers following which the SRSG ordered the Applicant not to raise this matter again.

54. After the 20 August 2009 elections, the SRSG decided that the Applicant and others not share their data with the IEC and insisted that they not share their data or even their personal assessments with diplomats from the countries that paid for the elections, since UNAMA staff had not personally counted the number of voters at the polling stations and there was no basis to make any actual judgment on the level of turnout.

55. On 24 August 2004, the Applicant travelled to Istanbul to represent UNAMA at a meeting of the special representatives.

56. The relation of trust and cooperation between the SRSG and the DSRSG for political affairs began to become disruptive because the SRSG assumed that the Applicant was the source of an article published in *The Guardian* on 24 August 2009 about electoral fraud in Afghanistan and that he had also criticized the SRSG at a meeting with the IEC. The Applicant sent a letter to the SRSG on 30 August 2009 concerning accusations of disloyalty and he later proposed, and the SRSG agreed, that it would be better if he left Kabul for a week or two.

57. The Applicant was asked to join the SRSG's meetings in New York and Washington scheduled for the end of September and he left Kabul on 12 September 2009. Three days later, *The Times of London* published an article regarding the Applicant's removal in "Afghanistan Poll Crash". On 20 September 2009 the Applicant provided statements to *Burlington Free Press* in regard to his disagreement with the SRSG.

58. From the parties' submissions it results that the Applicant was informed orally on 24 September 2009 by the USG that he was being recalled from his position as DSRSG and the explanation provided was that the mission must only have one policy line. The Applicant agreed following which, on a telephone call on 26 September 2009, the USG proposed that the Applicant's recall be explained publicly "as a disagreement on how to handle electoral fraud", which was already made public on 15 and 20 September 2009.

59. A recall is defined (Webster's New World Law Dictionary) as the removal of a public official from the office to prematurely end his or her term of service. Consequently, as can be seen from the content of the first paragraph of his letter to the Secretary-General dated 28 September 2009, the Applicant understood exactly that in light of the recall his contract was being terminated.

60. After expressing his agreement, but before the termination decision based on the same reason as the recall—in the interest of the mission—was officially

announced and implemented, the Applicant stated that he realized that the United Nations Headquarters had no appreciation of the extent of the fraud or of the SRSG role in downplaying it, and he decided to inform the Secretary-General about his policy disagreement with the SRSG.

61. On 28 September 2009, he sent a letter to the Secretary-General in which he explained his disagreement with the SRSG and also his desire to continue the important work that he had begun undertaking in UNAMA. The Applicant ended the letter by thanking the Secretary-General “for the trust placed in him by choosing [him] as a DSRSG and that he fully respects the Secretary-General’s responsibility to make decisions in the best interest of the United Nations”.

62. The Tribunal considers that, after he expressed his consent to the recall and, consequently, to his termination in the interest of the mission, but before the decision of the Secretary-General was announced and implemented, the Applicant decided to retract his consent. He thanked the Secretary-General for the trust placed in him in choosing him and he expressed his desire to continue his work as DSRSG in UNAMA.

63. Consequently, the Secretary-General’s decision of 30 September 2009 to terminate the Applicant’s appointment was taken without his consent, for the same reason previously presented to him in the interest of the mission. The previously-agreed public explanation for the recall was not included in the public statement because the Applicant retracted his consent for termination.

64. The decision clearly mentioned the reason that it was being based on, namely that it was “in the interest of the mission”. Since UNAMA is part of the Organization, the decision was made in the interest of the Organization.

65. As part of his appeal, the Applicant formulated a request for the “reasons” behind his termination “in the interest of the mission”, claiming that he is entitled to

receive additional explanations for his termination and that the reason itself is not sufficient.

Was the Applicant terminated in the interest of the Organization?

66. The Secretary-General may take action in all situations where such a measure is in the interest of the Organization and his discretionary power to determine the interest of the Organization results from the terms of appointment and/or from the staff regulation and staff rules themselves.

67. In the present case the Secretary-General was responsible both for the implementation of the political and diplomatic mandate of UNAMA and for its good administration. The Secretary-General has the discretionary power to take any administrative decision when the interest of the Organization can be affected by the relations between certain staff members or as a result of the political and diplomatic interaction between the United Nations staff and the local officials in order to maintain the performance, neutrality and impartiality of the mission.

68. One of the basic operating principles underlined in the Secretary-General's report from 18 March 2002, is that UNAMA should be a unified, integrated structure under the authority and leadership of the SRSG for Afghanistan. The planning and conduct of all United Nations activities in Afghanistan and the implementation of the UNAMA mandate must take place under the authority of the SRSG, who is the head of the mission and is direct accountable to the Secretary-General for the implementation of the mandate and for the effective management of the mission.

69. It is only possible for a mission to have and maintain a single policy line if there is a relation of full trust and cooperation between all the staff members, especially between the SRSG and the DSRSGs. A reconciliation between the SRSG and the Applicant was no longer possible as the Applicant himself had stated in several declarations, including in the letter of 28 September 2009.

70. The Secretary-General acted in respect of this principle and his intervention was necessary in order to avoid any negative impact of the disagreement between the SRSG and the Applicant upon UNAMA's mandate at a very important time and consequently upon the relations between the mission, the Afghani government and the international community, so he did not abuse his discretionary power.

71. In the 30 September 2009 statement it was mentioned that the Secretary-General "expresse[s] his thanks to [the Applicant] for his hard work and professional dedication and recognize[d] his important contributions to the work of the mission and through his distinguished career as an international civil servant".

72. It results from this statement that the Secretary-General declared that the Applicant, who has a distinguished international career, acted with professionalism, dedication and his contributions to UNAMA were important, so the Applicant's career and reputation were not affected by the decision.

73. In his 29 June 2010 reply, the Respondent reaffirmed that the reason to terminate the Applicant's contract was the one cited in the 12 October 2009 letter, namely that it was "in the interest of the Organization as determined by the Secretary-General" and this decision was not disciplinary in nature.

74. There was no mention in the public statement issued by the spokesperson for Secretary-General, and there is no evidence from which the Tribunal can conclude, that the Applicant's service was considered unsatisfactory or that his conduct was considered as being against the highest standards of integrity required by art. 101 of the Charter of the United Nations. The Applicant acted in compliance with his duties under the Charter of United Nations and Staff Regulations and Staff Rules as DSRSG for political affairs. He informed the SRSG and the Secretary-General about his conclusions related to the 2009 elections in Afghanistan and his important contributions to the work of the mission were recognized by the Secretary-General, so the termination was not a dismissal.

75. In order to respect the fundamental human rights proclaimed by arts. 3–28 of the Universal Declaration of Human Rights, arts. 6–28 of the International Covenant on Civil and Political Rights, arts. 6–12 and 15.1 of the International Covenant on Economic, Social and Cultural Rights, and arts. 2–18 of the European Convention of Human Rights, the Tribunal observes that an appointment cannot be terminated for reasons related to an employee’s sex, sexual orientation, genetic characteristics, nationality, age, race, color, ethnicity, religion, pregnancy, political opinion, social origin, disability, family situation or responsibility, or union activity or membership. These rights can be subject only to the limitations established by art. 29 of the Universal Declaration of Human Rights. Article 5 of the Termination of Employment Convention 158 (1982) additionally states that “filing a complaint or the participation in proceedings against an employer involving alleged violation of law and regulations or recourse to competent administrative authorities, pregnancy and absence from work during maternity leave” shall not constitute valid reasons for termination.

76. As determined previously, the termination was not based on any reason other than the one mentioned in the decision “in the interest of the Organization” or on reasons such as an employee’s gender, sexual orientation, genetic characteristics, nationality, age, race, color, ethnicity, religion, political opinion, social origin, disability, family situation or responsibility, union activity or membership, filing a complaint or participating in proceedings against an employer involving alleged violation of law and regulations or recourse to competent administrative authorities.

Were the Applicant’s due process rights respected?

77. The preamble of the Charter of the United Nations states that the United Nations was created to “establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained”.

78. The General Assembly reaffirmed in preamble of resolution 63/253 from 7 March 2009 the decision from para. 4 of its resolution 61/251 to establish a new system of justice “consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of the managers and staff members alike”.

79. The Tribunal notes that Termination of Employment Convention adopted by the General Conference of the International Labour Organization on 2 June 1982 states in art. 4 (Justification for termination) that “the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”.

80. Staff regulation 9.3 and staff rule 9.6(c) contain the following provision: “the Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the reasons (grounds) listed”.

81. The Tribunal considers that the above-mentioned legal provisions applicable in the present case reflect the staff member’s right to be informed about the reason and the explanation for it and the Secretary-General correlative obligation to give the reason and the explanation for the termination.

82. In the present case the contract was terminated by the Secretary-General in accordance with the terms of appointment and the termination decision included the contractual reason (ground) in the interest of the Organization as determined by the Secretary-General.

83. During the discussions the Applicant was provided with not only the reason for, but also the explanation as to why, that action was being taken—because

UNAMA must have one policy line. The Applicant also agreed with the proposed public explanation—his disagreement with the SRSG on how to handle alleged electoral fraud, which was already public from 15 and 20 September 2009. The Tribunal considers that the Secretary-General informed, in a clear and sufficient manner, the Applicant of the reason and the explanation to recall and end his contract in the interest of the mission and he respected the requirement of art 4 from ILO Convention 158 and staff regulations and rules applicable in the present case.

84. As it was established in the Tribunal's jurisprudence, if the reason for terminating the contract was not initially presented to the staff member and/or not included in the termination decision—which is an administrative decision—and he/she contests the decision, the Respondent must provide it to the Tribunal and to the Applicant.

85. In *Pirnea* UNDT/2011/059, the Tribunal held that “the main purpose of giving reasons is to enable a staff member to take any action he/she deems appropriate. If no reasons are initially available but are subsequently brought to the knowledge of the staff member either in pleading or an order of the Tribunal or any other form of communications, both the Applicant and the Respondent are in presence of the reasons”.

86. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal stated that an administrative decision can not be deemed unlawful on the sole ground that the decision itself did not articulate any reasons for it but, like any other administrative decisions, it can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members. When a request for reasons is formulated as part of the formal review process, a failure of the Administration to respond to this request would seriously hamper or preclude the staff member from taking the most appropriate actions. The obligation for the Secretary-General to state the reasons behind an administrative decision do not stem from any staff regulation or staff rule, but are inherent to the Tribunal's power

to review the validity of such a decision as part of the functioning of the system of administration of justice.

87. Nevertheless, in *Shook* UNDT/2011/083, where the contested decision was a non-renewal of a former Assistant Secretary-General, which was affirmed by the Appeal Tribunal, it was decided that “where the Secretary-General is entitled to use his discretionary power, the Tribunal’s role is restricted to examining whether this discretion has been abused”.

88. In the present case, the decision under appeal was taken as a result of the Secretary-General’s discretionary power and the Applicant was informed about the reason and explanation for it. Consequently, the Tribunal was able to verify, analyzing the reason and the explanation for the termination, whether or not the Secretary-General abused his discretionary power and/or breached any of the Applicant’s due rights.

89. The onus of proving such ill-motivation or extraneous factors rests with the Applicant (*Parker* 2010-UNAT-012) who has to discharge his burden on a preponderance of evidence (*Azzouni* 2010-UNAT-081).

90. In light of the above considerations, the Applicant’s fundamental human rights were respected because there is no evidence that the Applicant was not terminated in the interest of the mission.

91. The decision was not abusive, arbitrary or the result of some improper motivation. The reason for termination existed when the decision was taken and the termination was in accordance with the Applicant’s letter of appointment. The Secretary-General did not abuse his discretionary power when he determined the interest of the mission. He acted exclusively in the interest of the Organization and he informed the Applicant about the reason and the explanation for it. The purpose of the decision was solely to protect the interest of UNAMA by having a single policy line.

92. The Applicant's rights to be terminated in accordance with his letter of appointment and to be prior informed about the reason and the explanation for his termination were respected.

93. The Applicant's right to appeal was not breached because he knew the reason and the explanation for the Secretary-General's decision. He was able to file the application in an exhaustive manner and the fact that the MEU did not issue a decision did not affect the Applicant's right to appeal since art. 8.1(d)(i)(b) of the Dispute Tribunal's Statute contains a provisions for such cases in order to ensure an effective access to justice, namely that an Applicant has 90 calendar days from the expiry of the relevant response period for the management evaluation, if no response to the request was provided, to submit an appeal to the Tribunal.

Conclusion

94. In light of the foregoing, the Tribunal DECIDES:

95. The application is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of August 2013

Entered in the Register on this 12th day of August 2013

(Signed)

Hafida Lahiouel, Registrar, New York