



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/029

Judgment No.: UNDT/2013/154

Date: 2 December 2013

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

RUYOOKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Peter Gachuhi, Advocate

Counsel for the Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Bérengère Neyroud, ALS/OHRM, UN Secretariat

Introduction

1. On 4 May 2012, the Applicant filed an Application contesting the decision to terminate his appointment with the United Nations Mission in South Sudan (UNMISS) on 31 December 2011 on the grounds that the decision was “discriminatory, vindictive, selective, inequitable unlawful and lacked transparency. The Application was served on the Respondent on 14 May 2012.

2. The Respondent filed a Reply on 12 July 2012 in which it was argued that:

- a. the decision to terminate the Applicant’s appointment under staff regulation 9.3 was lawful;
- b. the decision was a consequence of the reduction in staffing in UNMISS to meet the concerns of Member States regarding the proposed staffing levels; and
- c. the Applicant was estopped from challenging the contested decision because the Administration had, on an exceptional basis and in good faith, deferred the date of termination of the Applicant’s appointment, at his request, for four months to enable him to acquire a retirement benefit under the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF).

Facts

3. The Applicant joined the Organization in December 2006 on a six-month appointment of limited duration under the 300-series of the former Staff Rules. He was appointed as a Vehicle Technician at the FS-4 level with the United Nations Mission in Sudan (UNMIS). From 2009, the Applicant’s duty station was Rumbek, in Southern Sudan. Following the contractual reforms in 2009, the Applicant was reappointed under a fixed-term appointment, effective from 1 July 2009 to 30 June 2010. His appointment was extended to 30 June 2011, and again to 30 June 2012.

4. By its resolution 1978 (2011) of 27 April 2011, the Security Council extended the mandate of UNMIS up until 9 July 2011 and announced its intention to establish a mission to succeed UNMIS. By resolution 1997 (2011) of 11 July 2011, the Security Council, *inter alia*, decided to withdraw the mission effective 11 July 2011 and 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.

5. By a letter dated 18 May 2011 to the President of the UNMIS Field Staff Union (FSU), the Under-Secretary-General for Field Support ("USG/DFS") addressed the concerns earlier raised by the said President. He explained how the transition process would be undertaken by the Administration with regard to the transitioning of staff members from UNMIS to the proposed new mission in South Sudan.

6. UNMIS Administration published a number of Information Circulars to inform staff members of the policies which had been put in place for the transition process. Essentially, it was clear that there were fewer posts in the new mission than in the mission which was being closed down. This meant that there was to be a system (a comparative review process) to determine those staff members who could be transitioned to the new mission since certain posts would be abolished.

7. One of these Information Circulars, No. 327/2011, was issued on 26 June 2011 by the UNMIS Director of Mission Support (DMS) announcing the formation of a Comparative Review Panel (CRP) which was to review the transition of international posts in UNMIS to the new mission. The same circular also set out the criteria to be considered during the said review by the CRP.

8. On 30 June 2011, Information Circular No. 334/2011 (Update to UNMIS Staff regarding the UNMIS Draw-down process) was issued. The Information Circular noted that, for those staff members who were not selected or provisionally reassigned to a position in the new missions in South Sudan, Abyei or elsewhere in the Organization, their appointments could be terminated for reasons of reduction in staff or abolishment of post in accordance with staff regulation 9.3.

9. In a letter dated 18 July 2011, Mr. Martin Ojjerro, the then Chief Civilian Personnel Officer (CCPO) for UNMIS, informed the Applicant that he had been identified for reassignment to the United Nations Mission in South Sudan (UNMISS) and that he should travel to Yambio duty station no later than 31 July 2011.

10. In subsequent letters to the Applicant on 27 and 28 July 2011, Mr. Ojjerro informed him that they were unable to transition him to UNMISS or UNISFA and that the termination of his appointment would be effective 31 August 2011. He was also informed of the formalities for checking out of the Organization.

11. On 22 August 2011, the Applicant wrote an email to Mr. Roberto Coling, the then Chief of the Transport Section in UNMISS (and copied to other UNMIS staff members) in which he requested for an extension of his appointment until 19 December 2011 on humanitarian grounds, namely, so that he could make it to five years with the United Nations to qualify for certain pension rights.

12. His request was acceded to and, on 16 November 2011, Mr. Ojjerro informed the Applicant that he had been transitioned to UNMISS; Torit duty station until 31 December 2011 based on his request and the DMS' approval so that he could fulfil the eligibility prerequisites for the pension benefits.

13. On 20 December 2011, the Applicant received completion of appointment documents in connection with the completion of his appointment on 31 December 2011.

14. On several dates between 21 to 27 December 2011 and on 6, 27 and 30 January 2012, the Applicant requested for management evaluation of the decision to terminate his appointment.

15. On 15 March 2012, the Management Evaluation Unit (MEU) informed the Applicant that having reviewed his request for management evaluation, it had concluded that the decision of the Administration to terminate his appointment as of 31 December 2011 was in compliance with the legal rules and guidelines of the Organization and that the Secretary-General had decided to endorse the findings and recommendations of MEU.

16. The Applicant filed the present Application on 4 May 2012. The Application was served on the Respondent on 14 May 2012. The Respondent filed a Reply on 12 July 2012 having been granted an extension of time to do so by the Tribunal on 12 June 2012.

17. The Tribunal held a case management hearing on 10 October 2012.

18. On 11 October 2012, the Applicant filed a Motion for production of documents. The document the Applicant wanted to be produced by the Respondent was a letter dated 9 July 2011 transitioning/reassigning him to UNMISS.

19. On 17 October 2012, the Respondent sought and was granted leave to file additional documents, namely:

- a. The Applicant's letter of appointment for the period 1 July 2011 to 30 June 2012.
- b. An extract from the Report of the Secretary-General on the budget for UNMISS for the period 1 July 2011 to 30 June 2012.

20. On 24 October 2012, the Respondent filed a response to the Applicant's Motion for production of a letter dated 9 July 2011 in which Counsel for the Respondent submitted that the said letter does not exist.

21. The Tribunal heard the case on the merits on 15 and 16 January 2013 during which the Applicant testified in person. The Tribunal also received oral evidence via teleconference from Mr. Michael Munywoki, the President of the UNMIS FSU, Mr. Coling and Mr. Ojjerro.

Applicant's witnesses

22. Mr. Munywoki's evidence is summarized below.

- a. There was a need to reduce staffing levels during the transition from UNMIS to UNMISS. There were posts in UNMIS which were not required in UNMISS.

- b. He was a member of the Panel that set up the criteria for the transitioning of staff to UNMISS.
- c. There were staff reductions in the transport section. He could not recall the number of technicians being reduced as they were needed in UNMISS.
- d. The Applicant wrote to him in his capacity as the President of the FSU to complain about being terminated after receiving a letter of offer. He advised the Applicant to go to Juba and see the CCPO who told him that they would extend the Applicant's contract if his supervisor, Mr. Coling, was prepared to do so.
- e. He met with Mr. Coling who told him that he could not extend the Applicant's contract. He then negotiated with Mr Ojjero, the CCPO, for an extension of the Applicant's contract so that he could attain the five year mark for pension purposes.
- f. He noticed that there was a grudge between Mr. Coling and the Applicant.

Respondent's witnesses

- 23. Mr. Coling's evidence is summarized below.
 - a. Prior to his retirement in May 2012, he worked in peacekeeping operations for over 34 years. In his last position, he was Chief of the Transport Section in UNMIS. He joined UNMIS in January 2011 and was based in Khartoum. He moved to Juba, South Sudan, after the closure of UNMIS in July 2011.
 - b. In July 2011, DFS instructed UNMISS to reduce the staffing levels in UNMISS by 10 per cent. He was asked by the Mission's senior management to make recommendations for reducing the staffing levels in the Transport Section. Initially, the Mission recommended to DFS that all of the staff to be downsized be absorbed in the

mission established in Abyei (UNISFA) but the approved budget for UNISFA did not include enough posts for this to happen.

- c. The criteria he used to recommend who to retain in the Transport Section were: all round skills, best performers; levels of competence; and those who had supervisory skills and experience.
- d. In his view, the Applicant did not have the required supervisory skills. The UNMIS transport Section had received many complaints about his supervision of other staff while the Applicant was at Rumbek. The Applicant was also not one of the better performing staff. In June 2011 when he completed the Applicant's contract extension form, he included a comment that the Applicant needed to "demonstrate a more polished and professional manner to his colleagues, staff and clients."
- e. He supported the Applicant's request to change his separation date for pension purposes on humanitarian grounds after the Applicant's daughter had informed him that her mother (Applicant's wife) was ill. The funds for this contract extension were sourced from elsewhere after approval was granted by the Director of Mission Support.
- f. He spoke to Mr. Munywoki about the Applicant's request during a phone call. Mr. Munywoki indicated that he would call back to discuss the matter but he never did so.
- g. After the Mission agreed to change the Applicant's separation date, the Applicant sent him an email dated 27 October 2011 thanking him for his support. The Applicant also asked him for further assistance to extend his contract beyond December 2011. This was not possible due to the downsizing of the Transport Section.
- h. In October 2011, he decided to reassign the Applicant from Rumbek to Torit. This was after threats were made to the Applicant's security by one of the Applicant's supervisees. The

Applicant was reassigned to fill in for a Vehicle Technician in Torit who was away on annual leave.

- i. Contrary to the Applications contentions, he did not swear at him on 3 October 2011.
- j. The Applicant's immediate replacement in Rumbek was one Mr. Araba, a Transport Assistant.
- k. Contrary to Applicant's assertions, he has never refused to speak to the Applicant.
- l. He offered to assist the Applicant get a United Nations Volunteer (UNV) position as an alternative and even called UNV Headquarters in Bonn, Germany on behalf of the Applicant.

24. Mr. Ojjero's evidence is summarized below.

- a. 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 CCPO at UNMIS.
- b. A comparative review process was part of the transition process from UNMIS to UNMISS. The CRP met in Khartoum and had finished its work by 5 July 2011. Only one staff member from the UNMISS Transport Section went through the comparative review process. At that stage, the other staff members were expected to be reassigned to UNMISS as the number of posts in the Transport Section in UNMISS was expected to be the same.
- c. On 15 July 2011, after the Panel had finished its work, DFS instructed UNMISS Administration to reduce the staffing levels in UNMISS by 10 per cent. The decision about which staff would be retained had to be made within two weeks.
- d. The UNMIS Administration believed that the Government of Sudan would not extend visas after July 2011 for staff members

who were not part of the UNMIS liquidation team. Those staff members who would not be retained in UNMISS had to be informed with sufficient time to complete the check-out process and make arrangements to leave Sudan before their visas expired.

- e. It was not possible for the CRP to be reconstituted within the two-week time-frame. Around 200 posts were required to be cut from the UNMISS staffing table and so a second comparative review process was a potentially significant undertaking. It was not possible for his staff to prepare and provide administrative support for another comparative review process in addition to completing the process for reassigning staff from UNMIS to UNMISS.
- f. The Section Chiefs were asked by the UNMISS Administration to make recommendations about reducing the staffing levels in each section in the Mission.
- g. Seven staff members, including the Applicant, left the Mission as a result of the reduction of the staffing level in the UNMISS Transport Section.
- h. The Applicant had a one-year fixed-term appointment as a Vehicle Technician limited to service with UNMIS which was due to expire on 30 June 2012. He informed the Applicant of the termination of his appointment by letter dated 27 July 2011 effective 31 August 2011.
- i. The Applicant requested for the termination of his appointment to be deferred so that he could reach the five-year mark for pension purposes.
- j. The Applicant's separation date was deferred by four months from 31 August 2011 to 31 December 2011. In order for this to happen, the Applicant was provisionally reassigned from Rumbek to Torit in South Sudan in October 2011.

- k. Some mistakes were made by the Human Resources Section in the process of notifying the Applicant of these actions. On 3 November 2011, a letter dated 18 July 2011 was sent to the Applicant which incorrectly recorded his duty station as Yambio.
- l. Later, the Applicant was sent a letter dated 16 November 2011 which informed him that he had been transitioned to UNMISS in Torit duty station. The letter noted that the transition was until 31 December 2011 based on his request and DMS approval to fulfil the eligibility of the benefit of pension.
- m. The Applicant was entitled to an assignment grant upon his reassignment to Torit which was paid to him at the end of January or early February 2012. He has also been paid a termination indemnity and other entitlements upon separation.
- n. Contrary to the Applicant's assertions that there was an increase in staff in the UNMISS Transport Section after 15 July 2011, the two staff members joined UNMISS as Transport Assistants from MINURCAT and UNMIS in November 2010 and January 2010 respectively.

Applicant's case

27. The Applicant's case as deduced from his oral testimony and pleadings is summarized below.

28. He was working as a Vehicle Technician at the FS-4 level in UNMIS since 19 December 2006. On 1 July 2009, he was re-appointed and transitioned to a one-year fixed-term appointment, pursuant to Human Resources reforms in the United Nations, until 1 July 2010. This appointment was twice extended to 30 June 2011 and finally to 30 June 2012.

29. On 27 July 2011, he received a letter from the CCPO of UNMIS to the effect that he had not been transitioned to UNMISS and therefore his appointment with UNMIS was to be terminated on 31 August 2011. He then requested, on 22

August 2011, the UNMISS Administration to retain him in service on humanitarian grounds until 19 December 2011 by which time he would be eligible for pension benefits.

30. Unknown to him while he was pleading for an extension of appointment, he had already been transitioned from UNMIS to UNMISS and that his work station was to be in Rumbek as evidenced in a letter dated 18 July 2011 from the CCPO to him. This fact was never brought to his attention.

31. He did not have a good working relationship with the Chief Transport Officer, Mr. Coling and this is evidenced by the delay in signing his (Applicant's) contract extension form by 33 days and also by the comments made by Mr. Coling in the said form: "He needs to demonstrate a more polished and professional manner to his colleagues, staff and clients." This comment was contrary to those made by his direct supervisors in the performance appraisals ("e-PASS") for 2009/10 and 2010/11.

32. After the transition from UNMIS to UNMISS, Mr. Coling transferred him by verbal order from Rumbek to Torit and later transferred one Mr. Omotayo to replace him in Rumbek.

33. Even after the USG/DFS issued a directive to reduce the number of staff on 15 July 2011, the CCPO issued a letter to him confirming that he had been successfully reassigned to UNMISS and there was no mention of the abolition of his position or of the fact that he was to be affected by the directive to reduce the number of staff. For unknown reasons, the letter dated 9 July 2011 transitioning him was never availed to him.

34. Subsequently, on 27 July 2011, the CCPO issued him with a termination letter. There is no mention in the letter that the termination was due to the request by DFS. The Applicant submits that the reason given by the Respondent for terminating his appointment was only an afterthought because the letter dated 18 July 2011 affirmed that he had already been reassigned to UNMISS even after DFS had issued the directive to reduce the number of staff.

35. It is insincere for the Respondent to indicate that the reason for the termination of the Applicant's appointment was the need to reduce the number of staff as directed by the USG/DFS while in the termination letter dated 27 July 2011, he was informed that the reasons for termination was the inability to transition him to UNMISS after post-matching and the comparative review exercise.

36. In response to the Respondent's submission that the Applicant had earlier agreed to the termination and was therefore estopped from challenging the same, the Applicant submits that at the time he was requesting for extension, the existence of the letters confirming redeployment and assignment to UNMISS had not been brought to his attention.

37. The Respondent has confirmed that there are still vacancies in the Motor Vehicle department in UNMISS as evidenced by vacancy announcements for the said vacancies.

38. Based on the foregoing, the Applicant seeks a declaration that the decision to terminate his contract was unlawful and to order his reinstatement.

Respondent's case

39. The Respondent's case is summarized below.

40. The Applicant's fixed-term appointment with UNMISS was lawfully terminated on the ground of reduction in staff under staff regulation 9.3(a)(i) and staff rule 9.6(c)(i). The contested decision was taken in order to meet the concerns of Member States regarding the proposed staffing levels in UNMISS. The Applicant was one of ten staff members in the Transport Section of UNMISS who were not retained. The UNMISS Administration adopted a procedure to reduce staff that was appropriate in the circumstances, and applied criteria that reflected the operational needs of the Transport Section.

41. The Applicant has waived or is estopped from enforcing his right to challenge the contested decision. At the Applicant's request, the Administration in good faith deferred the effective date of termination of his appointment to enable

him to acquire a pension benefit. The Administration agreed to his request in good faith. As a consequence of the Applicant's request and acceptance of a pension benefit, a benefit to which he was otherwise not entitled, the principles of waiver and estoppel preclude him from enforcing his right to challenge the contested decision.

42. Further, the Applicant is estopped from seeking to challenge the termination decision. In his email to the Chief of Transport of 22 August 2011, the Applicant stated that the extension of his appointment would allow him additional time to look for another job and ensure a proper handover to the staff member who would replace him in Rumbek. The Applicant also stated he was "an obedient staff that will not question the mission's decisions but only seeking your help and support". These statements constitute a clear and unambiguous avowal to the Administration that the Applicant had accepted the termination decision.

43. The Administration relied upon the Applicant's representations in good faith to its detriment. As a consequence of the Applicant's representations in his email of 22 August 2011, the Administration deferred the effective date of the termination of his appointment and paid additional contributions to the Pension Fund, which allowed him to acquire a pension benefit. Accordingly, the Applicant is estopped from challenging the termination decision. To find otherwise would be inequitable.

44. The Applicant has provided no credible evidence in support of his allegation that the procedure followed by the UNMISS Administration in the reduction of staff was unlawful. Nor is there any merit to his contention that the contested decision was motivated by improper purposes.

45. The UNMISS Administration was required to reduce staff in the mission by 10 per cent in order to meet the concerns of Member States of the Security Council regarding the Mission's proposed staffing levels. The UNMISS Administration adopted an appropriate procedure to reduce the staff in the Mission given the timeframe within which the exercise had to be completed. The criteria applied in determining which staff would be retained in the Transport

Section reflected the operational needs of the Section. The application of the criteria to the Applicant was sound.

46. The criteria developed by the Chief of Transport in identifying which staff would be retained in the Transport Section reflected the changes in the transport operations in UNMISS and the principles for reducing the staffing levels specified by the USG/DFS. In his witness statement, the Chief of Transport explained that the criteria he applied were: all-round skills, who were the best performers, levels of competence, and supervisory skills and experience. In his oral evidence, the Chief of Transport further explained that staff members who had performed well were included among those whom he recommended should not be retained. He also testified that he consulted the Deputy Chief of Transport and the Chief, Fleet Repair and Maintenance Operations, regarding his recommendations.

47. After carefully applying the criteria, the Chief of Transport made a genuine assessment that the Applicant should not be retained in the Transport Section. The Applicant was one of ten staff members who were not retained in the Transport Section. In his evidence explaining the application of the criteria to the Applicant, the Chief of Transport stated that the Applicant did not have the required supervisory skills. The Transport Section had received many complaints about the Applicant's supervision of staff in Rumbek.

48. The Chief of Transport considered that the Applicant was not one of the better performing staff members of the Section. The Chief of Transport recalled that he had received complaints from the military and police regarding the Applicant, including, for example, the lack of tyres and inability to repair vehicles at Rumbek. Prior to the reduction in staff in July 2011, the Chief of Transport had informed the Applicant in writing of the need for him to demonstrate a more polished and professional manner to his colleagues, staffs and clients.

49. The Applicant's satisfactory performance ratings in his e-PASes for 2009-2010 and 2010-2011 did not preclude the termination of his appointment. The Chief of Transport was clearly in a position to assess the relative performance of the staff within the Section he managed. His recommendation not to retain the Applicant in the Section is not inconsistent with the Applicant's performance

ratings. Further, as explained in his oral evidence, the Applicant's first and second reporting officers (FRO and SRO) in his e-PASes were not required to be staff members in the Transport Section. Under the Administration's policy, staff members who were in regional offices were assessed by the head of the regional office. In the Chief of Transport's opinion, the FRO and SRO may not have been in a position to make technical assessments of the staff member's performance of his or her transport functions.

50. The Chief of Transport did not recommend that the Applicant be retained in the Section in view of the reduction in staff. The Chief of Transport's recommendation was accepted by the UNMISS Administration. By letter dated 27 July 2011, the CCPO of UNMIS notified the Applicant that his appointment with UNMIS would be terminated, effective 31 August 2011. Following the Administration's decision to defer the effective date of termination for pension purposes, the Applicant was provisionally reassigned to UNMISS retroactively, from 9 July until 31 December 2011.

51. Contrary to the Applicant's contentions, the UNMISS Administration was not required to institute a comparative review process to implement the reduction in staff. The Applicant was not subject to the comparative review process. At the time, the Administration expected that he would be reassigned to UNMISS as the number of posts in the Transport Section in UNMISS for his occupational group and level (Vehicle Technician, FS-4 level) would be the same as in UNMIS.

52. The Panel had finished the comparative review of staff by 5 July 2011. On 15 July 2011, the USG/DFS instructed the UNMISS Administration to reduce the proposed staffing levels in UNMISS by 10 per cent.

53. For operational reasons, it was not possible for the Administration to institute a second comparative review process to implement the USG/DFS' instructions to reduce staff. The UNMISS Administration was required to decide which staff members would be retained in UNMISS and which staff members would have their appointments terminated within about two weeks, that is, by the end of July 2011. Due to concerns that the Government of Sudan would not extend visas for international staff beyond 31 July 2011 (except for those in the

UNMIS liquidation team), the UNMIS staff members in Sudan who were not reassigned to UNMISS had to be informed expeditiously of the termination of their appointments, complete the check-out formalities, and leave Sudan by this date.

54. From an administration standpoint, the two-week period was insufficient time to prepare for and complete a second comparative review process. Approximately 200 posts were required to be cut from the UNMISS staffing table, and the Administration did not have the time or resources to undertake a comparative review process to achieve this task.

55. The contested decision was not motivated by improper purposes. The Applicant asserts that there was no genuine reduction in staff in the Transport Section, and that the Chief of Transport conducted a “witchhunt” against him. The burden is on the Applicant to prove that the contested decision was in fact motivated by improper purposes. The Applicant has not adduced any credible evidence in support of his contentions.

56. The alleged incidents relied upon by Applicant to support his claim of personal animus either did not happen, or were justified for operational reasons. The alleged incidents relied upon include: the Chief of Transport delayed signing the form requesting the renewal of his appointment; the Chief of Transport swore at him at the UNMISS offices in Juba on 3 October 2011; the Chief of Transport refused to meet with him and the President of the UNMIS Field Staff Union to explain the contested decision; and the Chief of Transport suddenly reassigned him from Rumbek to Torit in October 2011. Save for the first allegation, all of these incidents took place after the decision to terminate the Applicant’s appointment, on 27 July 2011.

57. The Chief of Transport denied that he delayed signing the form requesting the renewal of the Applicant’s appointment. His practice was to deal with such matters very quickly. He noted that the Human Resources Section may have delayed sending him the form for his signature. This explanation should be accepted.

58. The Chief of Transport denied that he swore at the Applicant on 3 October 2011, which was not contested during cross-examination. He did in fact meet with the Applicant to explain the contested decision. Further, he did not avoid a meeting with the President of the UNMIS Field Staff Union. The President simply did not contact him to arrange a meeting to discuss the Applicant's case.

59. The Chief of Transport supported the Applicant's request to change the effective date of termination of his appointment for pension purposes. The Chief of Transport also explained that he reassigned the Applicant in view of threats made to the Applicant in Rumbek (which evidence was not contested in cross-examination), and the temporary absence of the Vehicle Technician, who was in Torit.

60. The Applicant wrote to the Chief of Transport to thank him for supporting the Applicant's request to extend his appointment for pension purposes, and his reassignment to Torit. The Chief of Transport also offered to help the Applicant obtain a position as a UNV with the Mission and spoke to one of his contacts in Bonn, the location of the UNV Headquarters, regarding the matter. The Applicant acknowledged this assistance in cross-examination.

61. The Chief of Transport undertook a genuine and considered assessment of the staffing requirements of the Transport Section. The Chief of Transport consulted with two senior staff members in the Section regarding his recommendations.

62. The Applicant was not the only person affected by the Chief of Transport's recommendations. As the CCPO explained in his witness statement, the Applicant was one of 10 staff members who were not retained by the Transport Section. Three staff members, including the Applicant, had their appointments terminated. In his oral evidence, the CCPO clarified that one staff member was later reappointed in another mission. In addition, four Vehicle Technicians were reassigned to the mission established in Abyei (UNIFSA), and three staff members were reassigned to other positions within UNMISS.

65. The instruction from the USG/DFS to reduce the staffing level in UNMISS, with specific references to the staffing levels in the Transport Section, is incontrovertible evidence of a genuine need to reduce staffing levels in the Section. The Applicant's contention that the number of staff in fact increased in the Section is incorrect. While it is true that the post of Vehicle Technician at the FS-4 level in Rumbek was not abolished, the Applicant was terminated due to a reduction in staff in the Transport Section. The evidence demonstrates that the Applicant was not the sole person affected by the reduction in staff.

66. The Applicant's contentions that the UNMISS Administration failed to place him against two positions that became vacant when two staff members in the Transport Section retired are without merit. As the CCPO explained in his witness statement, the retirement of the two staff members identified by the Applicant was part of the reduction in the staffing levels in the Section.

67. The Applicant relied upon the conflicting information he received from the UNMISS Administration regarding the status of his appointment as evidence of bad faith. While the Human Resources Section made mistakes in notifying the Applicant of his provisional reassignment from UNMIS to UNMISS for pension purposes and the location of his duty station, such errors do not form a sufficient foundation for concluding that the contested decision was motivated by bad faith.

68. The Applicant stated in his oral evidence that UNMISS had advertised vacancies for the position of Transport Assistant in August 2012 and that he was told by the CCPO that he did not have the required experience. The decision not to select the Applicant cannot be impugned in these proceedings as it was made after these proceedings commenced. Further, the fact that there were vacant positions in the Transport Section advertised one year after the reduction in staff in July 2011 can form no basis for concluding that there was no genuine reduction in staff at the time.

69. In view of the foregoing, the Respondent respectfully requests that the Application be dismissed.

Considerations

70. Having reviewed the entire case record, the Tribunal finds that the following legal questions arise for consideration:

- a. Was the decision to terminate the Applicant's appointment under staff regulation 9.3 and staff rule 9.6(c)(i) lawful? Was the decision motivated by an improper purpose?
- b. Did the evidence before the Tribunal sufficiently establish the presence of animus against the Applicant by Mr. Coling, the then Chief of the Transport Section?
- c. Is the Applicant barred from enforcing his right to challenge the contested decision under the principles of waiver or estoppel?

Was the decision to terminate the Applicant's appointment under staff regulation 9.3 and staff rule 9.6(c)(i) lawful? Was the decision motivated by an improper purpose?

71. The Applicant argued that on 27 July 2011, he received a letter from the CCPO of UNMIS to the effect that he had not been transitioned to UNMISS and therefore his appointment with UNMIS was to be terminated on 31 August 2011. He then requested, on 22 August 2011, the UNMISS Administration to retain him in service on humanitarian grounds until 19 December 2011 by which time he would be eligible for pension benefits. Further, unknown to him while he was pleading for an extension of appointment, he had already been transitioned from UNMIS to UNMISS and that his work station was to be in Rumbek as evidenced in a letter dated 18 July 2011 from the CCPO to him and that this fact was never brought to his attention.

72. The Applicant also argued that it is insincere for the Respondent to indicate that the reason for the termination of the Applicant's appointment was the need to reduce the number of staff as directed by the USG/DFS while in the termination letter dated 27 July 2011, he was informed that the reasons for

termination was the inability to transition him to UNMISS after post-matching and the comparative review exercise.

73. The Respondent, on the other hand, argued that the Applicant's fixed-term appointment with UNMISS was lawfully terminated on the ground of reduction in staff under staff regulation 9.3(a)(i) and staff rule 9.6(c)(i) and that the contested decision was taken in order to meet the concerns of Member States regarding the proposed staffing levels in UNMISS. According to the Respondent, The Applicant was one of ten staff members in the Transport Section of UNMISS who were not retained after the UNMISS Administration adopted a procedure to reduce staff that was appropriate in the circumstances and applied criteria that reflected the operational needs of the Transport Section.

74. Staff regulation 9.3(a)(i) provides that,

(a) 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 his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

75. Staff rule 9.6(c)(i) provides as follows:

(c) 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 following grounds:

(i) Abolition of posts or reduction of staff;

76. The evidence before the Tribunal is that on 15 July 2011, after the CRP had finished its work, DFS instructed UNMISS Administration to reduce the staffing levels in UNMISS by 10 per cent. The decision about which staff would be retained had to be made within two weeks during which 200 posts were required to be cut from the UNMISS staffing table. The Section Chiefs were asked by the UNMISS Administration to make recommendations about reducing the staffing levels in each section in the Mission.

77. Mr. Coling testified that he was asked by the Mission's senior management to make recommendations for reducing the staffing levels in the Transport Section. Initially, the Mission recommended to DFS that all of the staff to be downsized be absorbed in the mission established in Abyei (UNISFA) but the approved budget for UNISFA did not include enough posts for this to happen. The criteria he used to recommend who to retain in the Transport Section were: all round skills, best performers; levels of competence; and those who had supervisory skills and experience. In his view, the Applicant did not have the required supervisory skills.

78. Mr. Ojjeru testified that some mistakes were made by the Human Resources Section in the process of notifying the Applicant of the deferral, by four months, of his separation from UNMISS and his provisional reassignment from Rumbek to Torit. As a result of these mistakes, on 3 November 2011, a letter dated 18 July 2011 was sent to the Applicant which incorrectly recorded his duty station as Yambio.

79. Part of the documentary record in this case is the letter dated 15 July 2011 from the USG/DFS to several officials including the DMS/UNMIS, the Special Representative of the Secretary-General (SRSG)/UNMISS and the USG, Department of Peacekeeping Operations (DPKO) in which it was stated that the Member States of the Security Council had expressed concerns about the staffing levels in UNMISS. Part of the recommendation in a note attached to the letter was a reduction of the staffing levels in UNMISS by 10 per cent. Paragraph 22 of the said note states, *inter alia*, that,

The preliminary review of staffing tables for both missions [UNMISS and UNISFA] yielded a consensus that Integrated Support Services proposals represent the old thinking that services need to be duplicated at each location where the mission(s) has a presence. This approach is inconsistent with the Security Council mandates for both missions which were informed by the principles of the GFSS. For example, in the case of UNMISS, the proposal for CITS (65 international posts with no UNVs) and Transport (62 internal staff: 21 UNVs and 37 FS) appear to be excessive. Again, the use of UNVs and local staff (bearing in mind the need, particularly in South Sudan not to deplete the resources available to

the nascent Government institutions) should inform a serious reduction of numbers.

80. The Tribunal, having carefully reviewed the applicable rules and the facts of this case finds and holds that the decision to terminate the Applicant's appointment under staff regulation 9.3 and staff rule 9.6(c)(i) was lawful. The decision was motivated by the necessities of service which required the reduction of the number of staff in UNMISS.

Did the evidence before the Tribunal sufficiently establish the presence of animus against the Applicant by Mr. Coling, the then Chief of the Transport Section?

81. Part of the Applicant's case is that he did not have a good working relationship with the Chief Transport Officer, Mr. Coling and that this is evidenced by the delay in signing his (Applicant's) contract extension form by 33 days and also by the comments made by Mr. Coling in the said form. The Applicant also testified that the Chief of Transport swore at him at the UNMISS offices in Juba on 3 October 2011; the Chief of Transport refused to meet with him and the President of the UNMIS Field Staff Union to explain the contested decision; and the Chief of Transport suddenly reassigned him from Rumbek to Torit in October 2011.

82. The Chief of Transport denied that he swore at the Applicant on 3 October 2011, which was not contested during cross-examination and stated that he did in fact meet with the Applicant to explain the contested decision. Further, he did not avoid a meeting with President of the UNMIS Field Staff Union. The President simply did not contact him to arrange a meeting to discuss the Applicant's case.

83. Mr. Coling testified that he supported the Applicant's request to change the effective date of termination of his appointment for pension purposes on humanitarian grounds after the Applicant's daughter had informed him that her mother (Applicant's wife) was ill and that he reassigned the Applicant in view of threats made to the Applicant in Rumbek and the temporary absence of the Vehicle Technician, who was in Torit. He further testified that he undertook a

genuine and considered assessment of the staffing requirements of the Transport Section and consulted with two senior staff members in the Section regarding his recommendations. He also offered to assist the Applicant obtain a UNV position as an alternative and even called UNV Headquarters in Bonn, Germany on behalf of the Applicant.

84. The Tribunal is not convinced of the presence of animus against the Applicant by the then Chief of Transport which may have motivated the decision to terminate the Applicant's appointment.

Is the Applicant barred from enforcing his right to challenge the contested decision under the principles of waiver or estoppel?

85. It was argued on behalf of the Respondent that the Applicant has waived or is estopped from enforcing his right to challenge the contested decision since at the Applicant's request, the Administration in good faith deferred the effective date of termination of his appointment to enable him to acquire a pension benefit. As a consequence of the Applicant's request and acceptance of a pension benefit, a benefit to which he was otherwise not entitled, the principles of waiver and estoppel preclude him from enforcing his right to challenge the contested decision.

86. Counsel for the Respondent submitted that a staff member's conduct may extinguish any claim he or she may have concerning the legality of an administrative decision. A staff member may not approbate and reprobate, that is, "blow hot and cold" and that the principles of waiver and estoppel are well-established principles of international administrative law. A staff member may expressly or impliedly waive his or her right to contest a decision. An implied waiver may arise where the staff member's conduct is inconsistent with the enforcement of his or her right to contest the decision. Counsel further argued that the essential elements of the principle of estoppel are a representation by the representor to the representee, which induces the representee to act in reliance upon the representation to his or her detriment.

87. In response to the Respondent's submission that the Applicant had earlier agreed to the termination and was therefore estopped from challenging the same, the Applicant submits that at the time he was requesting for extension, the existence of the letters confirming redeployment and assignment to UNMISS had not been brought to his attention.

88. The Tribunal, having considered the parties' submissions on this score finds that, given the circumstances of this case, the Applicant had neither waived nor was he estopped from enforcing his rights to challenge the contested decision. The principles of waiver and estoppel will not apply in such a case to deny an Applicant from enforcing his legal rights, if any.

Judgment

89. The Application has no merit and is dismissed in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 2nd day of December 2013

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

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi