



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

CORDOBA RUIZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Daniel Trup, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Chief Departmental Officer in the Regional Coordination Unit (“RCU”) in Fort Liberté, Haiti, at the United Nations Stabilization Mission in Haiti (“MINUSTAH”), contests two decisions. The first contested decision is the decision notified to the Applicant on 29 March 2014 not to include her in the comparative review exercise to determine which of the Civil Affairs Officers at MINUSTAH would retain their posts after a downsizing of the Civil Affairs Section (“CAS”). The second contested decision notified to the Applicant on 13 May 2014 is not to renew her fixed-term appointment (“FTA”) beyond its expiration date on 30 June 2014.

2. The Applicant requests 24 months’ net base salary as compensation for the alleged manifestly unlawful decisions to exclude her from the comparative review process and the resulting non-renewal on the grounds that she had a reasonable expectation that her contract would have been extended for a further period of two years.

Facts

3. The Applicant was recruited in 2005 for MINUSTAH as a P-4 Civil Affairs Officer under a fixed-term appointment, which was since extended several times until 30 June 2014.

4. Following the 12 January 2010 earthquake in Haiti, which resulted in more than 220,000 deaths, the General Assembly approved temporary positions (both national and international) to support the immediate recovery, reconstruction and stability efforts in Haiti. Following the completion of Presidential elections in 2011, MINUSTAH commenced a drawdown of the Mission’s post-earthquake surge capabilities. The process involved the

phasing out of 352 civilian positions (162 international staff, 138 national staff, and 52 United Nations volunteers) by the end of June 2012.

5. The Secretary-General's proposed budget for MINUSTAH for the period of 1 July 2013 to 30 June 2014 was considered by the Advisory Committee for Administrative and Budgetary Questions ("ACABQ") in its report 67/780/Add.5 dated 29 April 2013. Among the proposed staffing changes was the creation of RCU, under the direct supervision of the Office of the Special Representative for the Secretary-General ("SRSG"), to perform regional coordination and management responsibilities. Specifically, the ACABQ noted that 10 posts (five P-5 and five P-4 posts) were being reassigned from CAS to RCU to facilitate cross-mission liaison and monitoring at the local level, confidence-building, conflict resolution and the extension of State Authority.

6. On 1 and 2 May 2013, the Head of CAS held a coordination meeting with the Chiefs of Regional Offices within MINUSTAH, which the Applicant attended. The Head of CAS informed staff concerning the Secretary-General's proposal to downsize CAS and distributed the draft plan of the proposed new mission structure that included Regional and Departmental Offices outside of CAS. The new structure and new positions were discussed and staff were given draft terms of reference ("TORs") for the heads of Regional and Departmental offices. Staff members were informed that the heads of the Regional Offices will represent the SRSG in the regions and that the regional coordinator will have a supporting role to the heads of Regional Offices. Staff members were informed that the new structure, if approved, included Regional and Departmental Offices that were separate from CAS.

7. On 28 June 2013, the General Assembly adopted resolution 67/275 (Financing of the United Nations Stabilization Mission in Haiti), which was published on 19 July 2013 and endorsed the conclusions and recommendations contained in the ACABQ report, including the reassignment of 10 posts (five P-5

and five P-4 posts) from CAS to the newly created RCU and the change in functions to be performed against these posts from Civil Affairs Officers to Chief Departmental Officers. The General Assembly requested that the Secretary-General ensure their full implementation. Once the post encumbered by the Applicant was reassigned to RCU, the Applicant was reassigned to work within RCU with a new functional title of Chief Departmental Officer and with new functions. The Applicant's new duties included new terms of reference that were distinct from her prior work with CAS.

8. On 6 July 2013, the Director of Mission Support ("DMS") in MINUSTAH signed a Letter of Appointment offering the Applicant a one year FTA at the P-4 level as a Civil Affairs Officer from 1 July 2013 until 30 June 2014. The Letter of Appointment indicated that the Applicant's "functional title" was Civil Affairs Officer, mentioned that an FTA did not carry any expectancy, legal or otherwise, of renewal, and that the contract was to expire without prior notice on 30 June 2014. It further stated under a section on "Special Conditions":

Please note that, in accordance with staff regulation 1.2(c), staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In this context, all staff members are required to move periodically to new positions, organizational units, duty stations or occupational groups in accordance with established rules and procedures.

The Letter of Appointment was countersigned by the Applicant on 10 July 2013.

9. On 13 July 2013, a Personnel Action was issued to extend the Applicant's appointment and "Reassign Within Department". Her functional title was listed as Civil Affairs Officer.

10. Following the General Assembly's approval of the new mission structure, on 15 July 2013, the *ad interim* SRSG in MINUSTAH informed all Chiefs of Departmental and Regional Offices of "the decision to transfer the Chiefs of Regional and Departmental Offices to the Office of the SRSG, reporting to

the SRSG through the Regional Coordinator as First Reporting Officer” and provided each Chief with TORs for their offices.

11. On 15 July 2013, the Applicant was informed in writing of the terms of reference for Chiefs of Regional and Departmental Offices, which were effective immediately in a revised format to reflect the decision to transfer the Chiefs of Regional and Departmental Offices to the Office of the SRSG and to reiterate their managerial/supervisory responsibilities. On the same day, the Applicant was reassigned to her new position within RCU.

12. On 28 January 2014, DMS issued Information Circular No. DMS/006/2014 titled “Downsizing/Reduction of Posts in the 2014–2015 Proposed Budget” (“IC DMS/006/2014”) to all MINUSTAH civilian staff noting that the mission would be engaging in a downsizing process as a result of the 2014–2015 proposed budget, which called for a reduction of approximately eight percent of civilian staff. He informed staff that a Comparative Review Panel would identify the staff to be retained. Staff members would be reviewed based on their section, occupational group/functional title, category and level.

13. On 25 March 2014, the Chief Human Resources Officer (“CHRO”) in MINUSTAH sent an email to colleagues concerning the retrenchment exercise in the Civil Affairs Section, asking them to provide an updated personal history profile, their last two electronic performance appraisal system (“e-PAS”) reports, and confirmation that their references had been verified. The email was forwarded to the Applicant by a colleague on 28 March 2014.

14. On 27 March 2014, DMS issued Information Circular No. DMS/010/2014 titled “Downsizing/Reduction of Posts in the 2014–2015 Proposed Budget: Establishment of the Comparative Review Panel and review criteria” (“IC DMS/010/2014”) to all MINUSTAH staff providing information on the Comparative Review Panel and annexing the terms of reference of the panel.

15. The downsizing exercise for RCU for the year 2014 involved the abolition of all five P-4 Chief Departmental Officer posts. The staff members from this section were not required to go through the comparative review exercise as it was not applied to RCU because the number of established P-4 posts in the 2013–2014 budget was equal to the number of positions to be abolished in the proposed budget cycle for 2014–2015.

16. The downsizing exercise for CAS for the year 2014 included the abolition of seven posts within the professional category (one P-2, three P-3, and three P-4 posts). Staff members were required to go through a comparative review exercise because the number of posts within CAS was less than the number of currently serving staff members. Specifically, three of the five P-4 posts within the Civil Affairs Section were abolished and the five affected staff members serving within CAS had to compete for the two remaining P-4 posts.

17. On 29 March 2014, the Applicant wrote to CHRO asking when P-4 staff members would receive an email like that sent on 25 March 2014 to other staff. The same day, CHRO responded that the communication was targeting staff members in CAS, stating that the Applicant encumbered a post that was not part of CAS, and that if a staff member did not receive such an email then they would not be part of the comparative review process.

18. On 29 April 2014, the Applicant submitted a request for management evaluation of the decision to deny her the opportunity to participate in the comparative review process.

19. On 13 May 2014, the Applicant was informed by DMS that, as a result of the downsizing of posts in the 2014–2015 budget proposal, her FTA with MINUSTAH would not be extended beyond its expiration date of 30 June 2014 and that she would be separated from service on that date.

20. On 16 June 2014, the Applicant submitted a request for management evaluation of the decision not to renew her FTA and to separate her from service.

21. On 11 July 2014, the Under-Secretary-General for Management responded to the Applicant's requests for management evaluation, noting that the Secretary-General had endorsed the finding of the Management Evaluation Unit ("MEU") that the first request for management evaluation was not receivable and its recommendation to uphold the decision not to renew the Applicant's FTA.

22. On 18 July 2014, the Applicant filed an application before the Tribunal and, on 20 August 2014, the Respondent filed his reply.

Applicant's submissions

23. The Applicant's principal contentions may be summarized as follows:

a. The MEU considered that the determination of the comparative review body was not an administrative decision which permitted legal challenge. The Applicant does not seek to contest the decision of the comparative review body, but rather the administrative decision which led to her exclusion from this process. The result of the decision to exclude the applicant from any comparative review effectively rendered her ineligible to compete for the remaining civil affairs posts and as a result led to her non-renewal.

b. The Administration had a duty to inform the Applicant at the time of her reassignment, or shortly thereafter, that the change would have an impact on her job category as Civil Affairs Officer and failed to use a fair and transparent procedure to inform her that she was no longer considered a Civil Affairs Officer. This resulted in her not being entitled to compete for the remaining Civil Affairs positions after the retrenchment process.

c. The Applicant had a legitimate belief, expectation and understanding that her work was in the field of civil affairs. The position of Chief Departmental Officer maintained many of the job specifications as that of Civil Affairs Officer and the revised budget for 1 July 2014 to 30 June 2015 indicated that the functions of the Applicant's post would be carried out by an existing Civil Affairs Officer.

d. The manifest failure of the Administration to inform the Applicant of the change of her post impacted directly on her inability to apply for civil affairs posts in the comparative review and the non-renewal of the Applicant's FTA should be considered unlawful.

e. The Applicant also states that the Administration did not respect the general obligation to find alternative posts for staff members whose posts are abolished as provided by the Staff Rules because she was not considered for the remaining positions in CAS.

Respondent's submissions

24. The Respondent's principal contentions may be summarized as follows:

a. In keeping with the standard procedures for downsizing missions, a review process was conducted to identify which positions were to be retained. Staff members were informed of the comparative review process and its terms of reference. Specifically, they were informed that they would either be included or not included in the comparative review process based on whether or not the section and occupational group within the section they were assigned to was required to downsize.

b. The downsizing exercise for RCU for the year 2014 involved the abolition of all five P-4 Chief Departmental Officer posts. The comparative review exercise did not apply to RCU for the reason that

the established P-4 posts in the budget 2013–2014 was equal to the number of positions to be abolished in the proposed budget cycle for 2014–2015.

c. The downsizing exercise for CAS for the year 2014 included the abolition of seven posts within the professional category (one P-2, three P-3, and three P-4 posts). Staff members were required to go through a comparative review exercise because the number of posts within the Section was less than the number of currently serving staff members. Specifically, three of the five posts within CAS were abolished and five affected P-4 staff members serving within CAS had to compete for the two remaining P-4 posts. The Applicant was not engaged as a Civil Affairs Officer and had no right to compete for the remaining Civil Affairs Officer positions when the comparative review process began in March 2014. The Applicant's FTA expired; it was not terminated, thus the Applicant has no right to insist that the Administration find her an alternative position. The FTA carried no expectancy of renewal and was not renewed because the General Assembly abolished the post the Applicant encumbered and the reason for non-renewal was a lack of funding for the position held by the Applicant. The Applicant has failed to show that the non-renewal was unlawful.

Relevant applicable law

25. Articles 2.1(a) and 8 (insofar as relevant) of the Dispute Tribunal's Statute provide:

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance;

...

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;

26. Article 7.1(a) of the Dispute Tribunal’s Rules of Procedure provides:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

27. Staff Regulation 9.3(a)(i) provides:

Regulation 9.3

(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;

28. The Staff Rules provide:

Rule 9.1

Definition of separation

Any of the following shall constitute separation from service:

- (i) Resignation;
- (ii) Abandonment of post;
- (iii) Expiration of appointment;
- (iv) Retirement;
- (v) Termination of appointment;
- (vi) Death.

...

Rule 9.4

Expiration of appointments

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

...

Rule 9.6

Termination

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Reasons for termination

(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;

...

Termination for abolition of posts and reduction of staff

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

(g) Staff members specifically recruited for service with the United Nations Secretariat or with any programme, fund or subsidiary organ of the United Nations that enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under this rule for consideration for posts outside the organ for which they were recruited.

...

Rule 9.7

Notice of termination

...

(b) A staff member whose fixed-term appointment is to be terminated shall be given not less than 30 calendar days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

...

Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

...

Rule 11.4

United Nations Dispute Tribunal

(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2(d), whichever is earlier.

29. ST/AI/2013/1 (Administration of fixed-term appointments), as corrected by ST/AI/2013/1/Corr.1, provides:

Section 1

General

1.1 The purpose of the fixed-term appointment is to enable the assignment and appointment of staff in accordance with the regular and changing needs of the Organization.

1.2 In accordance with staff regulation 4.5 (c) and staff rule 4.13 (c), a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14 (b).

...

Section 3

Appointment and re-employment

3.1 With the exception of the staff referenced in sections 3.2, 3.3 and 3.4 below, the initial fixed-term appointment granted shall be for a period of one year, including the first appointment of a staff member after having served as an Associate Expert, and on secondment or loan from other entities of the United Nations common system.

...

Section 4

Renewal and extension of fixed-term appointments

4.1 Subject to the needs of the Organization, a fixed-term appointment may be renewed for any period up to five years under the conditions described in paragraphs 4.2 and 4.3 below.

...

Section 7

Expiration of appointment and termination

7.1 A fixed-term appointment expires on the expiration date specified in the letter of appointment.

30. Information Circular No. DMS/006/2014, dated 28 January 2014 and titled “Downsizing/Reduction of Posts in the 2014–2015 Proposed Budget”, stated, insofar as it is material to this case (emphasis in original):

2. Based on the strategic priorities MINUSTAH received for the 2014/2015 budget submission, the Mission proposed budget

cuts to align mandate implementation with expected resource allocation.

...

5. In order to prepare for the proposed reduction, MINUSTAH undertook a review of its current staffing strength to identify within each Section or standalone Unit, occupational group, category and level, positions to be retained; established; abolished and/or nationalized in the new Mission staffing structure.

6. The following principles will be applied when reviewing the existing staffing with the proposed staffing in the 2014–2015 budget:

- If the number of posts by Section, occupational group/functional title, category and level in the new Mission structure is **equal to** the number of **currently serving staff** in the same occupation group/functional title, category and level, there would be no effect on the incumbent's current appointment;
- If the number of posts by Section, occupational group/functional title, category and level in the new Mission structure is **greater than** the number of **currently serving staff** in the same occupation group/functional title, category and level, there would be no effect on the incumbent's current appointment.
- If the number of posts by Section, occupational group/functional title, category and level in the new Mission structure is **less than** the number of **currently serving staff** in the same Section, occupation group/functional title, category and level, those affected staff will go through a downsizing review process.

7. Staff members will be reviewed based on their Section, occupational group/functional title, category and level. Staff who might be affected by the retrenchment process will be informed by the end of the month of March 2014.

8. The downsizing review process that is used to identify staff to be retained in the new Mission Structure will be conducted by the Comparative Review Panel (CRP) comprised of representatives nominated by Management and the Staff Unions. The Chief Human Resources Officer (CHRO) nominates an *ex officio* representative.

9. The comparative review is guided by Article 101, paragraph 3, of the United Nations Charter and is conducted on the

basis of the staff member's professional competence and their ability to perform the functions in the new Mission structure. This determination will be made in accordance with the evaluation pre-approved criteria by the CRP and a documented record of satisfactory performance and conduct.

10. Please note that unlike in last year's exercise, to expedite the review process, the present e-Performance cycle will not be taken into consideration. Therefore, in addition to updating their Personal History Profiles (PHP) all staff members are requested to ensure that their e-PER for the 2011/2012 and 2012/2013 cycles are completed and submitted to the Human Resources Section email address no later than 28 February 2014, as follows: minustah-careers@un.org.

31. Information Circular No. DMS/010/2014, dated 27 March 2014 and titled "Downsizing/Reduction of Posts in the 2014–2015 Proposed Budget: Establishment of the Comparative Review Panel and review criteria", stated insofar as it is material to this case:

Purpose:

1. The purpose of this information circular is to announce the establishment of the Comparative Review Panel (CRP) which is the body responsible for recommending which national and international Staff Members shall be retained in service through the downsizing process. The CRP will conduct a comparative review of Staff's employment history and competences based on the TORs contained in the attached annex.

...

Terms and definitions:

3. For the purposes of the CRP:
- An occupational group represents occupations and sub-occupations grouped into categories of work on the basis of similarity of functions within a specific Section (for example the occupation group of Administration contains the sub-occupational group of Administrative Officers).
 - The functional title is determined upon appointment or redeployment. In case the functional title does not match the functions actually performed, the functions truly exercised will be taken into consideration in the review

process (for example, an Administrative Assistant performing his/her functions on a post of Legal Assistant).

...

4. The CRP will not review posts where staffing by Section, occupational group/functional title, category and level are equal to or less than the proposed numbers in the revised Mission structure.

...

10. International and National Staff were required to send their completed PHPs and e-PER to minustah-careers@un.org by 28 February 2014. Staff members who did not comply with the established deadline are required to immediately submit their documents no later than 05 April 2014.

11. The following personnel are not subject to review by the Comparative Review Panel:

- Staff members on Temporary Assignment/Secondment from a parent duty station or HQ;
- Staff members on Temporary Appointment;
- Staff members retained in service beyond the mandatory age of retirement or reaching that age by 31 December 2014 (the later will be placed against surplus vacant posts until the retirement date.
- Staff members holding permanent appointments.

32. The annex to IC DMS/010/2014, titled “Annex—Terms of Reference of the CRP”, states:

CRP Organization of Work

4. The CRP will be guided by Article 101 of the UN Charter to ensure that the staff members under review meet the highest standards of efficiency, competency and integrity. Article 101 states “...The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency competence and integrity...”

5. The CRP will review lists of posts and staff members—provided by the Human Resources Section—where staffing by Section, occupational group/functional title, category and level is greater than the proposed number of posts in the revised Mission structure.

...

Documentation

10. In order to guide the review process, the MINUSTAH Human Resources Section will provide the CRP review group members with the following documents:

- The official lists of posts where staffing by Section, occupational group/functional title, category and level is greater than the proposed number of posts in the revised Mission structure.
- CRP Terms of Reference;
- Individual Staff Members' E-PER reports for 2011–2012 and 2012–2013;
- Individual Staff Members' Personal History Profile (PHP);
- Job descriptions/post requirements;
- Individual staff member's employment page, as confirmed by the staff member under review
- A scoring matrix for the CRP members to complete and sign.

At the end of the review process, the CRP review groups will return all background documentation to the Human Resources Section in order to assure the confidentiality of CRP proceedings.

Consideration

Receivability framework

33. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073; *O'Neill* 2011-UNAT-182; *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.

34. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and art. 7.1–7.3 of the Rules of Procedure.

35. In order to be receivable by the Dispute Tribunal, an application must fulfill all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

36. The application in respect of two contested decisions was filed by a former MINUSTAH staff member and is receivable *ratione personae*. The Tribunal will therefore consider receivability *ratione temporis* and *ratione materiae*.

Receivability ratione temporis

37. The Applicant was notified of the contested decision to exclude her from participation in the comparative review process for Civil Affairs Officers on 29 March 2014 and filed a request for management evaluation on 29 April 2014. She was notified of the decision not to renew her FTA on 13 May 2014 and filed a request for management evaluation on 16 June 2014. The MEU response was notified to the Applicant on 11 July 2014.

38. As results from the mandatory provisions of art. 8.1(d)(i)(a)–(b) of the Tribunal’s Statute and art. 7 of the Rules of Procedure, as well as staff rules 11.2(d) and 11.4(a), an application before the Tribunal must (“shall”) be filed within 90 days either from the date of notification of the outcome of management evaluation or the date of expiry of the 45-day deadline for management evaluation (for staff stationed outside of New York), whichever is earlier.

39. The Applicant complied with art. 7.1(a) of the Dispute Tribunal’s Rules of Procedure, filing her application on 18 July 2014, within 90 days of the 11 July 2014 response to her requests for management evaluation. Therefore the Tribunal finds the application is receivable *ratione temporis* in respect of both contested decisions.

Receivability ratione materiae

40. The Applicant was notified of the contested decision to exclude her from participation in the comparative review process for the Civil Affairs Officers on 29 March 2014 and she filed a request for management evaluation of this decision on 29 April 2014. She was notified of the decision not to renew her FTA on 13 May 2014 and the request for management evaluation of this decision was filed on 16 June 2014. Both requests for management evaluation were filed within sixty days of notification of the contested decisions, in accordance with staff rule 11.2(c).

41. As results from the management evaluation response, the MEU considered the decision to exclude the Applicant from participating in the comparative review process not to be in itself an administrative decision, because the comparative review was conducted within CAS to ascertain which staff members in that section would continue to encumber the residual posts and this comparative review was not relevant for the Applicant's contract because it would lead to certain administrative decisions such as renewal or non-renewal of appointments only for the staff members in CAS.

42. The Applicant states that the application is receivable *ratione materiae* in relation to both decisions, because the decision to exclude her from the comparative review process effectively rendered her ineligible to compete for the remaining Civil Affairs posts, affecting her rights and obligations. As results from the reply to the application and the closing submissions, the Respondent did not argue further before the Tribunal that the first contested decision is not an administrative decision. Therefore, in the light of staff rule 9.6(e), the Tribunal concludes that the decision that the Applicant was not eligible to participate in the comparative review had a direct effect on her contractual rights and is an administrative decision. The non-renewal decision is also an administrative decision and therefore the application is receivable *ratione materiae* in respect of both contested decisions.

The decision not to include the Applicant in the comparative review exercise

The Applicant's contractual status

43. As results from the uncontested facts presented by the parties and supported by the evidence on the record, the Applicant's FTA as a P-4 Civil Affairs Officer in CAS was extended for one year from 1 July 2013 until 30 June 2014. The Letter of Appointment signed by the Applicant on 10 July 2013 included, *inter alia*, the following contractual clauses (emphasis in original):

3. Tenure of appointment

This appointment is for a fixed term of 1 year from the effective date of appointment shown above [1 July 2013]. It therefore expires without prior notice on 30th day of June 2014.

...

5. Special conditions

Please note that, in accordance with staff regulation 1.2 (c), staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In this context, all staff members are required to move periodically to new positions, organizational units, duty stations or occupational groups in accordance with established rules and procedures.

This appointment is limited to service with the mission specified in Part 1. Functional title as per Offer of Appointment.

44. On 1 and 2 May 2013, the Head of CAS held a coordination meeting with the Chiefs of Regional Offices during which the participants, including the Applicant, were informed of the proposed new mission structure that included Regional and Departmental Offices outside of CAS. On 28 June 2013, the General Assembly approved the Secretary-General's proposal to downsize CAS and to create RCU.

45. As results from the terms of reference of MINUSTAH Chief Departmental Officer, which became part of the Applicant's contract on 15 July 2013 since they were effective immediately, the following elements of her contract were changed: the section (from CAS to RCU), the functional title (from Civil Affairs Officer to Chief of Departmental Officer), the functions (as indicated in the TORs), and the reporting line. The terms of reference clearly indicated that MINUSTAH would be represented in Haiti's ten administrative departments by five newly created regional offices.

46. Starting from 1 July 2013, five posts from CAS were reassigned to RCU and the Applicant was officially informed in writing on 15 July 2013 that her new

functional title was Chief Departmental Officer in RCU, which was distinct from CAS, with new functions and direct reporting lines to the SRSG. It results that the modification of the Applicant's contract became effective as indicated in the part of the public document "Terms of Reference Minustah Chief of Regional and Departmental Offices" and the terms of reference for MINUSTAH Chief Departmental Officer became part of her contract.

47. Consequently, from 15 July 2013 until 30 June 2014, the Applicant was the Chief of the North-East Departmental Office/Fort-Liberté in RCU and she was no longer part of CAS. The terms of reference indicated that Chief Regional and Departmental Officers reported to the SRSG through the Regional Coordinator, who was also Chief of CAS, so the only staff member with responsibilities related both to CAS and RCU.

48. The Tribunal notes that in the comments received by MEU from the Administration and included in the management evaluation response, MINUSTAH explained that "there is no functional title of [Chief Departmental Officer] available in the Integrated Management Information System ("IMIS") and that 'Civil Affairs Officer' was the closest available title". The Tribunal is of the view that the fact that IMIS was not adapted to reflect the new positions created in MINUSTAH starting from 1 July 2013 cannot affect the legal validity of the Applicant's contractual changes made to implement the General Assembly resolution 67/275 on financing the MINUSTAH new Regional Coordination Units.

49. The Tribunal concludes that the Organization respected its obligation to promptly inform the Applicant in writing of her new position and responsibilities in RCU and it cannot be reasonably argued by the Applicant that she was not aware about these important changes in her contractual status and that she continued to believe that she was part of the Civil Affairs Section.

Downsizing exercise

50. The Tribunal underlines that IC DMS/006/2014 stated in paras. 3–9 that the scope and the principles that applied to the downsizing process in MINUSTAH were as follows:

3. While the proposed budget will not be finalized by the General Assembly until mid-2014, the current proposal, in line with Headquarters directives, calls for a reduction of approximately eight (8) percent of civilian staffing in the next budget cycle.

4. In consultation with Field Personnel Division (FPD), the Mission prepared a draft Framework on retrenchment describing each aspect of the process as it will be handled for the 2014–2015 budget year. Once finalized and endorsed by the SRSG, the Framework will be disseminated to all staff.

5. In order to prepare for the proposed reduction, MINUSTAH undertook a review of its current staffing strength to identify within each Section or standalone Unit occupational group, category and level, positions to be retained; established; abolished and/or nationalized **in the new Mission staffing structure.**

6. The following principles will be applied when reviewing the existing staffing with the proposed staffing in the 2014–2015 budget:

- If the number of posts by Section, occupational group/functional title, category and level in the new Mission structure is **equal** to the number of **currently serving staff** in the same occupational group/functional title, category and level, there would be no effect on the incumbent's current appointment;
- If the number of posts by Section, occupational group/functional title, category and level in the new Mission structure is **greater than** the number of **currently serving staff** in the some occupational group/functional title, category and level, there would be no effect on the incumbent's current appointment;
- If the number of posts by Section, occupational group/functional title, category and level in the new Mission structure is **less than** the number of **currently serving staff** in the same Section, occupational group/functional title, category

and level, those affected staff will go through a downsizing review process;

7. Staff members will be reviewed based on their Section, occupational group/functional title, category and level. Staff who might be affected by the retrenchment process will be informed by the end of the month of March 2014.

8. **The downsizing review process that is used to identify staff to be retained in this new Mission structure will be conducted by the Comparative Review Panel (CRP)** comprised of representatives nominated by Management and the Staff Unions. The Chief Human Resources Officer (CHRO) nominates an ex officio representative.

9. The comparative review is guided by Article 101, paragraph 3 of the United Nations Charter and is conducted on the basis of the staff member's professional competence and their ability to perform the functions in the new Mission structure. This determination will be made in accordance with evaluation pre-approved criteria by the CRP and a documented record of satisfactory performance and conduct.

10. International and National Staff were required to send their completed PHPs and e-PER [performance appraisal reports] to **minustah-careers@un.org** by 28 February 2014. Staff members who did not comply with the established deadline, are required to immediately submit their documents, but **no later than 05 April 2014**.

51. As clearly stated in paras. 6, 7, and 8 of IC DMS/006/2014, if the number of posts by section, occupational group/functional title, category and level in the new structure was less than the number of current serving staff in the same section, occupational group/functional title, category and level, it was mandatory (as shown by the use of the word "will" in these provisions) that affected staff would be (i) informed by the end of March 2014; and (ii) reviewed as part of a downsizing review process conducted by the CRP in order to identify staff to be retained in the new mission structure.

52. Paragraph 10 of IC DMS/006/2014 included the requirement for all staff members to ensure that their performance appraisal reports for the 2011–2012 and

2012–2013 cycles are completed and submitted to the Human Resources Section’s email address no later than 28 February 2014.

53. IC DMS/010/2014, sent by DMS to “all Minustah Staff” stated in section “General” (paras. 10 and 11):

10. International and national Staff were required to send their completed PH’s and e-PER to minustah-career@un.org by 28 February 2014. Staff members who did not comply with the established deadline, are required to immediately submit their documents, but no later than 5 April 2014.

11. The following personnel are not subject to review by the Comparative Review Panel:

- Staff members on temporary assignment/secondment from a parent duty station or HQ;
- Staff members on temporary appointment;
- Staff members retained in service beyond the mandatory age of retirement or reaching that age by 31 December 2014 (the later will be placed against surplus vacant posts until the retirement date);
- Staff members holding permanent appointments.

54. The terms of reference for the CRP indicated in section “CRP Organization of work”, para. 5, that “the CRP will *review lists of posts and staff members* provided by Human Resources Section where staffing by section, occupational group/functional title, category and level is greater than the proposed number of posts in the revised Missions structure”.

55. From this document which was available to all the staff members, including the Applicant, it was clear that all staff on FTAs were subject to review by the CRP and they were requested, if not done yet, to submit their PHPs and performance appraisal reports no later than 5 April 2014.

56. In her application, the Applicant stated that (emphasis in original):

14. In late March 2014, the Applicant became aware that the Administration had sent out emails to all Civil Affairs Officers, informing them of the Comparative Review Exercise and requesting them to submit various documentation including their PHP's.

15. On 29 March 2014, as the Applicant had not received such an e-mail, she contacted ... Chief of Human Resources Office [CHRO], MINUSTAH, requesting an update on when she would be formally notified of the Comparative Review Exercise and the necessity to submit documentation. On the same day, [CHRO] responded by e-mail stating that *“Your post which you are encumbering is not part of the Civil Affairs Section. It belongs to the Regional Coordination Unit which falls under the SRSG. If SM did not receive any email from me then he/she will not be part of the CPR [Comparative Review] review”*. ...

16. As noted above, this came as a complete surprise to the Applicant as she was never aware or indeed informed that she was not considered a Civil Affairs Officer.

17. On 3 April 2014, the Applicant contacted ... Director of Mission Support [DMS], highlighting her concerns and stating that in her understanding she retained her position within Civil Affairs and therefore requesting a review of the decision. ...

18. On 4 April 2014, [DMS] replied to the Applicant referencing the need for the process to be transparent and fair. However, no mention was made to the Applicant and the concerns that she raised. ...

19. On 5 April 2014, the Applicant again sent an e-mail to [DMS], informing him that she was well aware of the requirements of the Competitive Review Exercise but stressing the fact that she would not be able to compete for the Civil Affairs posts. On the same day, the Applicant received a response to her comments from ... , Chief of Border Management [CBM]. In his response, [CBM] stated that *“the mission org. chart does not reflect your position under Civil Affairs but under SRSG”*. ...

57. It results that the Applicant received the general information, but she did not receive a similar email sent to the staff members from CAS regarding the required documents for the retrenchment exercise and on 29 March 2014 she was informed of this. Instead, following directly the instructions from the IC, she

contacted DMS and she was informed that the Mission charter reflected her position under SRSG and not under CAS.

58. The Respondent indicated in his reply that the downsizing exercise for RCU for the year 2014 involved the abolition of all five P-4 Chief Departmental Officer posts and the downsizing exercise for CAS for year 2014 included the abolition of seven posts within the Professional category (one P-2, three P-3, and three P-4 posts). CAS staff members were required to go through a comparative review exercise because the number of posts within the Section was less than the number of currently serving staff members. The comparative review exercise did not apply to RCU because the number of established P-4 posts in the 2013–2014 budget cycle was equal to the number of positions to be abolished in the proposed budget cycle for 2014–2015.

59. The Tribunal concludes that both RCU and CAS were affected by the retrenchment process since the number of posts in the new structure was less than the number of serving staff members. In RCU, the number of proposed posts in the new structure was zero (all the P-4 posts were to be abolished) whereas in CAS the number of proposed posts in the new structure was decreased by seven posts (one P-2, three P-3, and three P-4 posts), less than the current number of staff members in CAS. Therefore, it was mandatory that all the staff members in both of these sections were informed about the retrenchment exercise by the end of March 2014 and be reviewed by the CRP.

60. In the present case, the Applicant, as a P-4 staff member serving in RCU (which was affected by the retrenchment exercise), was to be informed about the retrenchment exercise by the end of March 2014. The Applicant was clearly informed on 27 March 2014 about the establishment of the panel and the review criteria. The Tribunal concludes that MINUSTAH respected this first mandatory obligation to inform the Applicant, respectively the Applicant's correlative right

to be informed about the retrenchment exercise, the establishment of the panel and the review criteria.

61. On 29 March 2014, the Applicant was informed by CHRO that the post she was encumbering “is not part of CAS. It belongs to RCU, which falls under the direct authority of the SRSG. If the [staff member] did not receive any e-mail from [her] then he/she will not be part of the CRP review”.

62. Regarding the second obligation of MINUSTAH to have all the staff members affected by the retrenchment process reviewed by the CRP, the Tribunal concludes that it was not respected, since it was wrongly decided against the terms of reference included in IC DMS/010/2014 that the CRP review will include only the staff of CAS and not the five P-4 staff members of RCU, a unit under the SRSG where all P-4 posts were to be abolished entirely. Consequently, the right of the Applicant to be reviewed by the CRP was not respected. The Tribunal underlines that the scope of the downsizing process was to identify staff to be retained in the entire new mission structure and not only in one of its sections, CAS. Consequently, the first contested decision not to include the Applicant in the comparative review exercise is unlawful, because this decision had the legal effect of limiting the CRP mandate only to CAS. This breached the Applicant’s right to be reviewed by the CRP with respect to all the remaining posts in the new mission structure.

Non-renewal of the Applicant’s FTA: expiration of appointment versus termination of appointment for abolition of post and reduction of staff

63. The Tribunal notes that staff rules 9.1 and 9.4 state that the expiration of appointment constitutes a separation from service and that a temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. Staff rules 9.6(a) and (b) state that a termination is a separation from service initiated by the Secretary-General and that separation as a result of expiration of appointment shall not be

regarded as termination. According to staff rule 9.6(c)(i), the abolition of posts or reduction of staff are reasons for termination. It results that an expiration of a fixed-term appointment is a reason for an *ope legis* separation based on the limited duration of the contract agreed by both the employee and the employer, while an abolition of post and reduction of staff is a reason for a termination decision initiated unilaterally by the employer.

64. Further, the Tribunal notes that in case of termination for abolition of posts and reduction of staff, according to staff rule 9.6(e), if the necessities of service require that appointments of staff members be terminated as a result of abolition of post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length in service, staff members *shall* be retained in the following order of preference: (i) staff members holding continuing appointments; (ii) staff members recruited through competitive examination for a career appointment serving on a two-year FTA; and (iii) staff members holding fixed-term appointments.

65. All these provisions mentioned above are mandatory and must be respected by the Organization.

66. As results from the uncontested facts, the Applicant has been recruited in 2005 for MINUSTAH as a Civil Affairs Officer on an FTA, which was extended on 1 July 2013 until 30 June 2014. Between 1 and 14 July 2013, the Applicant continued to work as a Civil Affairs Officer and, on 15 July 2013, she started to work as a Chief Departmental Officer in a new section—Regional Coordination Unit. On 28 January 2014, the Applicant was informed that all the P-4 posts in RCU would be abolished. On 13 May 2014, she received the non-renewal decision stating in relevant parts:

In line with MINUSTAH's 2014–15 budget proposal, the mission has completed the review of the sections affected by

the downsizing exercise, intended to effectively address evolving operational requirements.

As a result of the downsizing of posts in the 2014–2015 budget proposal, I regret to inform you that your fixed-term appointment with MINUSTAH which is expiring on 30 June 2014 will not be extended any further. In this regard, your separation from the Organization will be initiated and Human Resources Section will forward you the necessary separation package and instructions in due course.

Kindly note that the Field Personnel Division (FPD) in the Department of Field Support (DFS) at UN Headquarters and MINUSTAH will continue to explore possibilities for the reassignment of staff members who wish to continue their services with the United Nations either through (a) selection from the Field Central Review Body (FCRB) roster; or (b) internal placement within MINUSTAH considering that staff have gone through the standardized selection process. Therefore, in the event that you are selected through the FCRB roster or internally reassigned to a position within MINUSTAH by *COB 30 June 2014*, your separation from the Organization will no longer be processed.

If you are not yet on the FCRB roster, you are strongly encouraged to apply to the generic job openings posted on Galaxy or Inspire for which you are qualified. You are also strongly encouraged to apply to positions in other UN entities, in HQ or in the field which match your profile.

67. The Tribunal notes that as results from the Applicant's Letter of Appointment, her appointment for a fixed-term of one year was to expire on 30 June 2014. Moreover, all the P-4 posts in RCU, including the Applicant's post, were to be abolished from 1 July 2014 and in these circumstances MINUSTAH had two legal options: to separate the Applicant as a result of the expiration of her FTA or to terminate the Applicant's contract based on the fact that the post was to be abolished.

68. The non-renewal decision issued by MINUSTAH on 13 May 2014 constitutes a separation decision based on the expiration of the contract and not a termination decision, as confirmed by the Respondent in his reply. The fact that the date of expiration of the Applicant's contract—30 June 2014—agreed by

the parties on 1 July 2013, was to coincide with the abolition of the post as a consequence of the restricted budget for MINUSTAH approved by the General Assembly, cannot change the legal nature of the contested decision. The Applicant was well aware both that her contract was to expire on 30 June 2014 and that the post was to be abolished next day. Following the notification of the contested decision on 13 May 2014 she was also well aware that MINUSTAH had decided to let her contract expire.

69. The Tribunal concludes that the separation decision is lawful since a fixed-term appointment does not carry any expectancy for renewal and it was not possible to extend the Applicant's contract for a post which was to be abolished at the expiration of her FTA. The provisions of secs. 1 and 4.1 of ST/AI/2013/1 were correctly applied in the present case.

70. In *Hersh* 2014-UNAT-433-Corr.1, the Appeals Tribunal stated:

Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization have held that it is well settled jurisprudence that "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff". [Footnote: *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281, para. 22]

71. The downsizing process in MINUSTAH was effective, real, and genuine, affecting all the P-4 posts from RCU and other posts in CAS. The Applicant was not personally targeted by this process.

Relief

72. The Applicant requested 24 months' net base salary as compensation for the manifestly unlawful decision to exclude her from the comparative review exercise and the resulting non-renewal of her contract.

73. The Applicant in the present case was holding a one-year FTA and, as established above, she had the right to participate in the comparative review process, which was not respected by MINUSTAH. The Tribunal will further analyze the legal implications of this unlawful decision, including whether the Applicant is entitled to compensation.

74. The Tribunal considers that, as results from paras. 8 and 9 of IC DMS/006/2014, the staff members affected by the downsizing process in MINUSTAH had the right to be reviewed by the CRP based on the criteria in art. 101, para. 3 of the United Nations Charter. However, these staff members had no right to be recommended/selected for retention on another available post in the new structure of the Mission following the mandatory order of preference from staff rule 9.6(e) after 1 July 2014 or for this recommendation to be automatically approved by FPD/DFS. The CRP had a similar function with the function of an assessment panel established in accordance with ST/AI/2010/3 and the jurisprudence of both Tribunals established that a staff member has the right to be fully and fairly considered for a post, but has no right to be recommended by the panel and/or selected for the post. In the present case, the Applicant had only the right to be included in the review and to be assessed by the CRP, but she had no right to be recommended to be retained and/or to be retained for another post.

75. Consequently, even if the Applicant would have been reviewed by the CRP, the panel had full discretion to recommend the staff members to be retained in the new structure and the Applicant had no right to be recommended to be retained on a different post in the new structure starting from 1 July 2014 or for such a recommendation to be approved by the Field Personnel Division.

76. Moreover, the provisions of rule 9.6(c) are applicable only when the following cumulative conditions are fulfilled: (i) the staff member's contract is terminated for abolition of posts and reduction of staff; and (ii) when suitable

posts in which the staff member(s) services can be effectively utilized are available. These provisions cannot be extended and/or invoked in other cases of separation as in the present case (expiration of an FTA).

77. The unlawful decision not to include the Applicant in the comparative review process was not followed by a termination decision. The Tribunal concluded that the Applicant's contract expired and it was not terminated. Therefore staff rule 9.6(c) was not applicable in the Applicant's case.

78. Section 4.1 of ST/AI/2013/1 states that a renewal of appointment may be for service in the same position or upon selection for a different position.

79. Regarding the first option, renewal of an appointment is possible only on the same position. In the present case, it was not possible since the Applicant's post was to be abolished from 1 July 2014 and thus she could not be renewed on the same post.

80. Regarding the second option, the Respondent informed the Tribunal that the Applicant applied and was considered for three positions. She was not selected for two P-4 positions, she was deemed ineligible for the P-5 position, and her appointment was limited to service with the Mission as she was not cleared by the Field Central Review Body. The Tribunal notes that these non-selection decisions were not contested by the Applicant.

81. The Appeals Tribunal has stated in *Antaki* 2010-UNAT-095 that "not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages". In the present case, the Tribunal concludes that the unlawful decision not to include the Applicant in the comparative review process had no legal effects on her contractual status since the contract expired and was not terminated. Taking into consideration the particular circumstances of the case, no prejudice was caused by the decision not to include the Applicant in

the comparative review, and the Applicant had no expectancy of renewal of her fixed-term appointment.

Conclusion

82. In the light of the above the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 7th day of January 2016

Entered in the Register on this 7th day of January 2016

(Signed)

Hafida Lahiouel, Registrar, New York