



Before: Judge Nkemdilim Izuako
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Registrar

NYASULU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY
AND RELIEF**

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Elizabeth Gall, ALS/OHRM, UN Secretariat
Bérengère Neyroud, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant was a staff member of the United Nations Mission in Liberia (UNMIL) employed as a Chief Judicial Affairs Officer at the D-1 level. He is also a rostered candidate for the D-1 position of Chief, Rule of Law following a vacancy announcement for the position in 2011 for which he competed and was successful.

2. On 28 June 2013, this Tribunal having entertained an application for interim measures which was filed by the Applicant ordered the suspension of an administrative decision not to renew his contract and to separate him from service effective 30 June 2013 pending the outcome of management evaluation.

3. On 9 August 2013, the Under-Secretary-General, Department of Management (USG/DM informed the Applicant of his decision to uphold the decision of non-renewal of his contract. On the same day, the Applicant was immediately separated from UNMIL.

4. The Applicant then brought this Application on the merits on 7 November 2013. The Respondent filed his Reply on 13 December 2013.

Facts

5. The Applicant joined the Organization as a Senior Judicial Affairs Officer at the P-5 level in January 2001 and served in that position in the United Nations Mission in Kosovo until 31 December 2003.

6. He was reappointed to UNMIL on 9 August 2005 as a Senior Legal Adviser at the P-5 level. Subsequently, he was promoted to the position of Chief Judicial Affairs Officer at the D-1 level on 1 July 2008 where he served as the head of the UNMIL Legal and Judicial Systems Support (LJSS) Division until his separation on 9 August 2013.

7. The LJSS Division had 35 staff members and was part of the UNMIL Rule of Law pillar which is headed by the Deputy Special Representative of the Secretary-General Rule of Law (D/SRSG/Rule of Law).

8. In September 2012, the Special Representative of the Secretary-General (SRSG) at UNMIL directed that the Mission undertake a comprehensive review of its civilian staff in line with Security Council resolution 2066 (2012) and General Assembly resolution 66/264 with a view to aligning the Mission's staffing structure to support the requirements of the Mission's mandate. UNMIL's civilian staff members were advised that as a result of the comprehensive review, the structure of the Mission would change and revised staffing levels would be reflected in the 2013/14 budget.

9. The proposed restructuring of the Mission, including the Rule of Law component was reflected in the 2013/14 budget dated 22 February 2013 and submitted by the Secretary-General in his report to the General Assembly.¹ The Secretary-General's report noted that the existing structure of the Rule of Law component would change under the 2013/14 budget.

10. The report particularly proposed the dissolution of the LJSS Division which the Applicant headed. Further, it proposed that the Rule of Law component be restructured along three thematic areas of focus being, access to justice and security, training and mentoring and legal and policy reforms with a view to improving the Mission's working methodologies so as to maximize the impact of UNMIL.

11. As part of this restructuring, the report proposed that the Office of the D/SRSG Rule of Law be strengthened with a Director, Rule of Law at the D-1 level, to be accommodated through the reassignment of the D-1 post from the LJSS Division encumbered by the Applicant. The same report also proposed the reassignment of two P5 posts in LJSS and the re-deployment of 32 others.

¹ Paragraphs 63 and 68 of A/67/755 (Budget for the United Nations Mission in Liberia for the period from 1 July 2013 to 30 June 2014: Report of the Secretary-General).

12. The Advisory Committee on Administrative and Budgetary Questions (ACABQ) endorsed the proposals in the Secretary-General's report to the General Assembly on 30 April 2013. Thereafter, the Mission leadership in anticipation of the General Assembly's approval of the proposals sought to not renew the Applicant's contract and to separate him from service. At the same time it reassigned all the other 34 staff members who worked under the said Applicant in the LJSS Division to the new restructured Rule of Law unit including the staff member who had encumbered one of the two reassigned P-5 posts.

13. On 22 May 2013, the Applicant was served with a memorandum notifying him of the non-renewal of his contract. The memorandum dated 17 May 2013 stated that the Applicant's post would cease to exist as of 30 June 2013 due to "the reassignment of the post (as of 1 July 2013) into a new post ((D-1), Director, Rule of Law in the Office of the D/SRSG Rule of Law."

14. The Mission leadership decided to commence a competitive review process for this new position and to this end prepared a job opening for the said position.

15. The ACABQ report for UNMIL which endorsed the proposals concerning the Mission's restructuring in the 2013/14 budget was approved by the General Assembly on 30 June 2013.²

16. On 20 June 2013, the Applicant filed a request for management evaluation of the decision to not renew his contract and to separate him and on 21 June 2013 he filed an application for suspension of action of the said decision to the United Nations Dispute Tribunal (the Tribunal) pending management evaluation.

17. The Tribunal found that the Applicant had made out a *prima facie* case as required and upheld his suspension of action application on 28 June 2013.

18. On 9 August 2013, the USG/DM conveyed his decision to the Applicant to uphold the non-renewal of his contract and he was immediately separated.

² Paragraphs 37 and 39 of A/67/780/Add.12 (Budget performance for the period from 1 July 2011 to 30 June 2012 and proposed budget for the period from 1 July 2013 to 30 June 2014 of the United Nations Mission in Liberia: Report of the Advisory Committee on Administrative and Budgetary Questions).

Applicant's case

19. The Applicant's case may be summarized under three headings as follows:

(i) *The fact that the Applicant's post was "reassigned" did not mean that its functions ceased to exist.*

a. In its evaluation, the Management Evaluation Unit (MEU) stated that under the new UNMIL Rule of Law structure, the D-1 functions which had been carried out by the Applicant would cease to exist due to its reassignment into a new post in the office of the D/SRSG. The Applicant contends that the Rule of Law office had always existed as LJSS within the office of the D/SRSG. The reasons given by Management for the non-renewal of his contract are therefore both false and without any legal basis.

b. It is Management's position that because the ACABQ report adopted by the General Assembly used the word "reassignment" with respect to the Applicant's post, the functions of the newly "reassigned" post are necessarily unrelated to the functions of the position formerly encumbered by the Applicant.

c. The ACABQ report, later approved by the General Assembly, on which Management relied had clearly proposed that under the Rule of Law component, three posts be reassigned while thirty-two others would be redeployed in the new organizational restructuring.

d. At no point during the 2013/14 budget preparations, in which the Applicant fully participated, was it suggested that the post he encumbered would be abolished or cease to exist. Similarly, the ACABQ report had proposed that the post be reassigned and not abolished. The fact of the restructuring of the LJSS under a new name did not mean that the said post was abolished.

e. UNMIL Management ignored this fact and sent a memorandum to the Applicant on 17 May 2013 advising him that his post would cease to exist as of 30 June 2013 as a result of its reassignment into the new

position of Director, Rule of Law in the office of the D/SRSG Rule of Law.

f. Considering that the Applicant is already a rostered candidate for the position of Chief, Rule of Law at the D-1 level, the second reason regarding the requirement of a new, separate and open competitive recruitment process is also false and without legal basis.

g. These reasons taken together, lead to the conclusion that there are extraneous and/or improper reasons for the decision.

(ii) The reassignment did not entail a substantial change in the functions of the Applicant's post who was also a rostered candidate for the D-1 position of Chief, Rule of Law since 2011 so as to justify the non-renewal of the Applicant's contract and to undertake a competitive selection process.

a. Contrary to the findings made by the MEU in its evaluation, there has not been a substantial change in functions between the post that the Applicant had previously encumbered and the reassigned post.

b. In its response, the MEU stated that the reassigned post involves additional work related to interrelated security and justice priorities and that the Applicant in his role as Chief, LJSSD did not have a role in supervising work related to the security sector.

c. The said response failed to take into account the significant work that the Applicant regularly performed in relation to the security sector which is not reflected in the generic job description reviewed by MEU when it issued its decision.

d. The Applicant's experience with regard to work dealing with the interrelatedness of security and justice is clearly captured in his e-PAS for the 2011/2012 cycle. That performance appraisal indicated that as part of his work in developing and implementing strategies for rule of law, the Applicant co-chaired the Judicial Reform and Rule of Law Sectoral

Working Group of the Justice and Security Pillar of the Poverty Reduction Strategy II.

e. In that capacity, the Applicant held several key meetings which resulted in the submission of Priority Actions to the Liberian government. He also represented the Rule of Law Pillar at the Peace Building Steering Committee where he supported Rule of Law initiatives in the Justice and Security Joint Program. He supervised and guided the participation of the LJSS Division as member of the Technical Advisory Group of the Justice and Security Joint Program.

f. The Applicant regularly served as Officer-in-Charge (OiC) in the absence of the D/SRSG Rule of Law and regularly advised the said D/SRSG. He had assumed duties as OiC on five separate occasions for over 50 days. In that capacity, the Applicant led and designed the implementation of both rule of law and security sector programs and projects which is one of the responsibilities of the reassigned post.

g. Additionally, the reporting lines for the restructured post are the same as for that of Chief, LJSS Division which the Applicant had encumbered. Both posts fall under the overall authority of the Special Representative of the Secretary-General while the direct supervisor is the D/SRSG Rule of Law.

h. A comparison of the Applicant's duties and responsibilities as head of the LJSS Division with the vacancy announcement issued for the new reassigned post shows that there has not been a substantial change of functions. The qualifications required for the two posts are also quite similar with both requiring an advanced university degree in law and a minimum of fifteen years of progressively responsible professional experience in law or related fields.

i. With regard to the restructuring of the Rule of Law pillar, the components of United Nations Police (UNPOL) and Human Rights and Protection Services (HRPS) were unchanged. The LJSS Division was then

restructured from three units (advisory, legal systems monitoring and legal education and training) into three new thematic sections (access to justice, legal and policy reform and training and mentoring). The Corrections Advisory Unit (CAU) was partly integrated into the three units formerly under the LJSS Division.

j. In essence, the Rule of Law pillar with its various components remained largely unchanged after the restructuring in spite of the new names given to the three units which were created from the former LJSS Division.

k. The functions of the three new thematic units are the same as those carried out by the former LJSS Division. During the hearing in the Suspension of Action Application, the Director of Mission Support, Mr. Price, testified on that issue. The Tribunal in its ensuing order found that the witness could not tell which of the new thematic units fell outside of the Applicant's job description as Chief of the LJSS Division.

l. UNMIL had in the circumstances an obligation to examine the possibility of extending the Applicant's fixed-term appointment and if not, to give reasons why. This is especially so considering that out of the thirty-five staff members in the former LJSS Division, the Applicant was the only one that was served a notice of non-renewal of contract and told that his post would cease to exist. All the other LJSS Division staff members were reassigned within the new Rule of Law Office that was proposed to take effect on 1 July 2013.

m. In spite of the Applicant being already a rostered candidate for the position of Chief, Rule of Law at the D-1 level since 2011, UNMIL Management chose to ignore that fact with regard to considering him for the reassigned post.

(iii) *The non-extension of the Applicant's contract constituted an improper exercise of discretion by the Administration considering all the surrounding circumstances. This was also done to avoid transitioning him to the newly reassigned position following the restructuring.*

a. UNMIL Mission leadership improperly exercised its discretion when it decided that the Applicant's post had been abolished and then required him to go through a competitive review exercise for the reassigned post. In taking that decision, the rights and privileges of an incumbent as conferred on the Applicant by ST/AI/2013/1 (Administration of fixed-term appointments) were not only denied him but were irretrievably and irreparably lost to him.

b. The General Assembly had specifically stressed the importance of maintaining experienced staff during the draw-down period of the mission and of expanding the skills of all staff, including national staff. This was not taken into account in the Applicant's case.

c. Considering the facts that out of the 35 staff members that made up the former LJSS Division all were retained after restructuring except the Applicant and that the Applicant not only consistently excelled in his performance evaluation but was also rostered for the generic position with regard to the reassigned post; the bias of the mission leadership against the Applicant can be clearly inferred.

d. The improper motives of the mission leadership are further bolstered by the fact that it provided no evidence that it undertook the requisite procedures for reclassification of posts pursuant to ST/AI/1998/9 (System for the classification of posts).

- (iv) *The Applicant seeks the following remedies:*
- a. A declaration that the decision to abolish his post was unlawful and unjustified as well as the decision to fill the reassigned post through a competitive selection process.
 - b. That he be appointed to the new reassigned post without having to go through a competitive selection process.
 - c. An award of six months net base salary as moral damages resulting from the decision not to renew his appointment.
 - d. In the alternative, a monetary compensation equivalent to two years' net base salary for material damages as a result of the decision not to renew his appointment.

Respondent's case

20. The Respondent's case may be summarized as follows:

- (i) *The decision not to renew the Applicant's appointment was lawful.*
- a. The Applicant has no expectancy of renewal of his appointment since under 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. Therefore the decision not to renew his appointment was lawful.
 - b. A staff member has no right to sit on a particular post. The reason for the non-renewal of the Applicant's appointment was that the position which he encumbered in UNMIL no longer existed. The General Assembly had decided that as from 1 July 2013, the underlying post would no longer fund the LJSS Division post that was encumbered by the Applicant.
 - c. Upon the creation of the reassigned post in UNMIL's Rule of Law component, the Administration decided to initiate a

competitive selection process for the new D-1 Principal, Rule of Law Officer in order to meet the objectives of art. 101.3 of the Charter and the provisions of ST/AI/2010/3 (Staff selection system) with regard to the employment of staff. The decision is rational and prudent and the Administration was entitled to do so.

d. The reassignment of the post is not the same process as a reassignment of a staff member. The reassignment of the post in UNMIL's budget does not create an obligation for the Administration to reassign the Applicant to the new position created by the reassigned post. To this extent the decision was to undergo a competitive selection process was lawful.

(ii) *A greater level of expertise was expected for the newly reassigned D-1 post. It was reasonable that UNMIL Administration filled the lower-level reassigned and redeployed posts in the restructured Rule of Law Pillar without a competitive selection process.*

a. The reassigned D-1 post is now located in the office of the D/SRSG Rule of Law and is the most senior leadership position under the new structure. It has greater coordination and leadership responsibilities with respect to rule of law and provides strategic advice to the D/SRSG Rule of Law on a number of areas falling within his responsibility including rule of law.

b. The Applicant's satisfactory performance in the former D-1 post of Chief, LJSS Division does not create any right or expectation of selection for the new position. Also the Applicant's inclusion in the roster for D-1 positions in rule of law does not give rise to an entitlement to be selected for a specific D-1 position.

c. The Applicant's argument that because the lower-level functions in the rule of law structure were filled without a competitive selection process, his D-1 reassigned post should also have been treated in the same

way is without merit. The lower-level posts are not comparable to the D-1 post in terms of seniority and criticality.

d. The reassigned D-1 level post has the responsibility of directly advising the SRSG and D/SRSG Rule of Law and coordinating and supervising the three sections in the new rule of law structure. The position is critical to the ability of UNMIL to discharge its mandate relating to the rule of law. It is because of the seniority of the reassigned post that a comparative selection process was warranted.

(iii) The non-renewal decision with respect to the Applicant's contract was not motivated by improper motives.

- a. The case which the Applicant seeks to make that the non-renewal of his appointment was motivated by improper motives has no merit. He bears the burden of proving that the decision was biased or was motivated by improper motives. UNMIL Administration did not harbour any bias against the Applicant.
- b. Contrary to the Applicant's assertions, the D/SRSG Rule of Law did not act in a hostile and harassing manner towards him after the issuance of the Order for suspension of action by the Dispute Tribunal. The Applicant had made no such complaint under the Organization's procedures in ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority).
- c. The D/SRSG Rule of Law assigned the Applicant to suitable tasks after he was granted interim relief by way of the suspension of action Order by the Tribunal. The Applicant on his part was reluctant to complete assignments and cooperate with the said D/SRSG.
- d. For instance, the Applicant was assigned the production of a detailed analysis of UNMIL's engagement in rule of law but failed to complete it. It was because of that assignment that the Applicant was not invited to

participate in activities relating to day-to-day matters. He was invited to a mission retreat and subsequent meetings in July 2013.

- e. On some occasions, the Applicant failed to meet with the D/SRSG Rule of Law to discuss his work. On 5 July 2013, the Applicant sent an email to former staff of the LJSS Division attaching a table setting out the assignment of staff under the new structure and a concept of operations paper. Before doing so, he did not consult with the D/SRSG.
- f. The Applicant's assertion that the Administration's failure to follow the procedures in ST/AI/1998/9 for the reclassification of posts showed bias is untenable. UNMIL had followed the consistent practice for the creation of field posts.

iv. Relief sought by the Respondent

- a. The Respondent prays that the Application be dismissed.

Considerations

21. The principal issue for determination in this case is whether, in implementing the new budget and structural adjustments in the Rule of Law pillar approved by the General Assembly for UNMIL in 2013, the administrative decision not to reassign the Applicant with his reassigned post was lawful considering all the surrounding circumstances.

22. In interrogating the above issue for determination, the Tribunal shall address various questions under three headings as follows:

- a. Did the Applicant's former post cease to exist as conveyed to him in the memorandum informing him of the non-renewal of his contract? Was there a substantial change in functions between the newly reassigned position and the Applicant's skills-set? Was the Applicant resistant to the newly proposed changes and reforms to the working methods for the Rule of Law pillar in UNMIL's 2013/2014 budget?

b. Was the process leading to UNMIL's retention of the incumbent of another reassigned post within the former LJSS Division while separating only the Applicant a transparent exercise? Is there any merit in the Respondent's claim that the newly reassigned D-1 position was of such level of seniority and criticality as to warrant a new recruitment?

c. Was the non-retention of the Applicant motivated by bias or other improper motives?

23. The above-stated questions will serve as a guide to reaching a conclusion as to whether the actions and decisions of UNMIL Management in the circumstances of the Applicant's separation were lawful.

Did the Applicant's former post cease to exist as conveyed to him in the memorandum informing him of the non-renewal of his contract? Was there a substantial change in functions between the newly reassigned position and the Applicant's skills-set? Was the Applicant resistant to the newly proposed changes and reforms to the working methods for the Rule of Law pillar in UNMIL's 2013/2014 budget?

24. In an inter-office memorandum dated 17 May 2013 sent by Mr Hubert Price, Director of Mission Support at UNMIL, the Applicant was informed that it was anticipated that his D-1 post of Chief Judicial Affairs Officer in the Office of the D/SRSG Rule of Law would cease to exist as of 30 June 2013. The memo stated that this was as a result of the "reassignment" of the said post into a new D-1 post of Director, Rule of Law in the Office of the D/SRSG Rule of Law.

25. The question as to whether the Applicant's former post at the LJSS Division was abolished or ceased to exist has been vigorously argued by both sides to this Application. During closing submissions, the Respondent submitted that the Applicant's former position no longer existed after 30 June 2013. He submitted that the language in the 17 May inter-office memorandum in which the Applicant was told that his post would cease to exist was imprecise since the post was reassigned while the position he encumbered would no longer exist.

26. While giving testimony at the hearing of this Application, Mr. Price stated that his inter-office memorandum was “not clearly drafted” because he did not make it clear that the post that funded the Applicant’s position would continue to exist in the 2013/2014 budget.

27. The Respondent cited the case of *Gehr*,³ to support his argument that within the Organization, a post is not the same as a position because a post is only a financial authorization given for a position. The said post which is created by the General Assembly may be withdrawn by it and used to fund another position. In the instant case, what happened was that a new position was created which was to be funded by the same post that had been used to fund the Applicant’s former position. This meant that the Applicant’s post continued to exist but not his former position.

28. UNMIL’s Chief of Staff, Ms. Wilman, under cross-examination told the Tribunal that the functions of the Applicant’s former post had ceased to exist after the restructuring whose implementation commenced on 1 July 2013. She said the post that supported the Applicant’s position was used to create a new position with new functions in the Rule of Law office.

29. The Tribunal agrees with the Respondent’s submissions regarding the continued existence of the post used to fund the Applicant’s former position of Chief Judicial Affairs Officer. The evidence shows that the said post did not cease to exist but was reassigned to fund the new D-1 position in the Office of the D/SRSG Rule of Law.

30. As to whether there was a substantial change in functions between the Applicant’s former post and the newly created post, it is the Applicant’s case that there was no substantial change in functions. The crux of the Respondent’s case on the other hand is that there was a substantial change in the functions of the two positions such as to warrant a new recruitment.

31. The D/SRSG Rule of Law, Mr. Tamrat Samuel, testified that the functions of the newly reassigned position of Principal Rule of Law Officer were

³ UNDT/2011/142.

significantly broader than the functions of the position formerly encumbered by the Applicant.

32. Both this witness and Ms. Wilman testified that the incumbent of the new position had the key role of providing strategic advice to both the D/SRSG Rule of Law and the SRSG on Liberia's priorities in the areas of justice and security. They said that in his former position, the Applicant had no responsibilities of such scope as he only gave advice on legal and judicial matters.

33. In comparing the two positions, both Mr. Samuel and Ms. Wilman testified that the incumbent of the new post would liaise with national justice and security institutions in Liberia while the Applicant had only liaised "primarily" with national institutions on legal and judicial matters. According to them, the incumbent of the new post would coordinate and lead the three new thematic units created out of the former LJSS Division and be responsible for ensuring that the three thematic areas work effectively with the other three substantive units in the Rule of Law pillar.

34. They also added that in the Applicant's former position, he provided leadership to the LJSS Division and coordinated its work with the other three substantive units in the Rule of Law pillar. He was not expected to have a command of, or provide strategic and operational guidance and support on matters related to security as was expected of the incumbent of the new position.

35. Mr. Samuel said that the fact that the LJSS Division interacted with the HRPS and UNPOL and participated in discussions that involved security did not mean that the Applicant who was head of the LJSS Division had the expertise, knowledge and close understanding of the operations, functions and challenges of the security institutions of the country.

36. Mr. Samuel stated also that in the professionalism competency for the new position, the incumbent was required to demonstrate competence and knowledge of rule of law, not only of justice, but also of police, corrections and human rights. He would need to also demonstrate experience in leading the design and implementation of Rule of Law and Security Sector programmes.

37. When cross-examined, the witness said he was aware that the Applicant had co-chaired the pre-trial detention Task Force with Liberia's Solicitor-General. In reply to another question, he said he was aware that the Applicant had also chaired the Rule of Law and Human Rights Working Group. He also told the Tribunal in answer to yet another question that he was aware that the Applicant had acted as OiC of the Rule of Law pillar in the absence of the former D/SRSG and had acted in that capacity from mid-December 2012 when the former D/SRSG left and before the witness arrived at the mission as the new D/SRSG in March 2013.

38. Still under cross-examination, Mr. Samuel said that he did not agree with the assertion that the Applicant brought cohesion and integration into the approach of the Rule of Law pillar at UNMIL although as the most senior person he represented the pillar and UNMIL at different coordination forums. His main responsibility, according to the witness, remained running the LJSS Division, which dealt with legal and judicial matters.

39. It was pointed out to the witness during cross-examination that in the Applicant's performance evaluation for 2010/2011, one of the goals stated for him was "to participate in coordination mechanisms at the UN family level." Attention was also drawn to the fact that his predecessor the former D/SRSG had commented in the Applicant's e-PAS for that reporting cycle that there was good cooperation and team work within the Rule of Law sector in the United Nations and that the said Applicant deserved "his share of commendation for the coherence in the delivery of services which has been the result of such cooperation."

40. In response, the witness said that it was only later on, towards the end of the Applicant's tenure in UNMIL that he was made aware of the observation of his predecessor concerning the Applicant's role in coordination within the Rule of Law sector of the United Nations in Liberia.

41. The Tribunal asked Mr. Thomas whether there were other staff members who were senior to the Applicant within the former structure of the Rule of Law pillar. His response was that with the exception of the Police Commissioner who

was a D-2 officer, the Applicant was the most senior. The witness stated further that because Police is a very technical area without knowledge or expertise of justice and judicial issues and because of his personality and skills, the Police Commissioner was not made OiC of the Rule of Law pillar.

42. The Tribunal pointed out that much of the Respondent's case is that the Rule of Law pillar needed greater coordination, coherence and a more integrated approach between its different units in the way it worked. The Tribunal wanted to know why it was difficult to retain the Applicant who had participated in this new vision and the restructuring of the pillar even though every other staff member in the LJSS Division was retained.

43. The witness responded that he needed someone senior who had knowledge and experience that went beyond the responsibility of heading a section. He added that the Applicant with his experience as a lawyer had contributed a lot to the Mission but that what was needed was someone who would sometimes deputize for the D/SRSG and give policy advice and recommendations to both him and the SRSG. He felt therefore that it was a very different role and a different set of skills and profile that was needed. He continued that using the evaluation criteria and job description in the new job opening, these were not met by the Applicant.

44. The witness also said that all the others who were retained were at lower levels of P-5 and below and so were manageable and could make adjustments. He said that leadership could be provided to these lower-level officers by a new Chief of Rule of Law and by himself in order to make the staff members of the former LJSS Division work with a different approach.

45. In his closing arguments, the Respondent's Counsel submitted that the Applicant's assertions that the functions of the new position are similar to those of his former position and the fact that the Applicant was on the D-1 roster for the position of Chief, Rule of Law are irrelevant. He submitted also that the fact of the creation of a new position required an appointment to fill that position under the staff selection system and the Applicant had no right to be appointed to the new position.

46. On his own part, the Applicant told the Tribunal that a comparison of his duties and responsibilities as head of the LJSS Division with the functions enumerated in the vacancy announcement for the D-1 position of Principal, Rule of Law shows that there is no substantial change in functions between the two positions.

47. With regard to the new restructuring which took place in the Rule of Law pillar at UNMIL from August 2012 to April 2013 resulting in the 2013/2014 budget, the Applicant stated that he coordinated the restructuring and preparation of budget for the UNPOL, the LJSS Division, the Corrections Section, the Human Rights Section, the Gender Unit and the Security Sector Response.

48. He told the Tribunal that the recommendations that came up meant that no new staff would be hired but that existing staff would be moved around. The new culture in the pillar was to bring about change in terms of terminology and the relationship between the sections. The functions remained the same but there were some changes in reporting lines, working on common themes and a common representation for the pillar.

49. It was his case that following the restructuring, the components of UNPOL and HRPS remained unchanged while the former LJSS Division which he headed was restructured from its three units into three new thematic units with the Corrections Advisory Unit (CAU) partially integrated into them. He noted that the different components of the Rule of Law pillar remain largely unchanged aside of nomenclature of the three new units created from the units of the former LJSS Division. In the same way, the functions of the three new thematic units remained unchanged.

50. With regard to the claim that he did not have a role in supervising or coordinating work related to the Security Sector, the Applicant said that he had done significant work in relation to the Security Sector which is not reflected in the generic job description of his former position. He pointed out that in his most recent e-PAS, it was shown that as part of his work in developing and implementing strategies for Rule of Law, he had co-chaired the Judicial Reform

and Rule of Law Sectoral Working Group of the Justice and Security Pillar of the Poverty Reduction Strategy II.

51. In that role, he said that he held several key meetings which resulted in the Priority Actions to Liberia's government. He also represented the Rule of Law pillar at the Peace Building Steering Committee where he supported Rule of Law initiatives in the Justice and Security Joint Programme. He had also guided the participation of the LJSS Division as a member of the Technical Advisory Group of the Justice and Security Joint Programme as can be gleaned from his e-PASes including the last one.

52. The Applicant also told the Tribunal that he usually served as OiC in the absence of the D/SRSG Rule of Law and regularly advised him. Between September 2011 and April 2013, he assumed OiC duties on five separate occasions and served as such for more than 50 days. Moreover, the reporting lines are the same for both the Applicant's former position and for the new one with both falling under the overall authority of the SRSG and directly reporting to the D/SRSG Rule of Law.

53. An anonymous witness whom the Tribunal will refer to as X testified for the Applicant. Witness X is an international staff member who worked under the Applicant in the former LJSS Division and continues to work in one of the three newly created thematic units after the restructuring of the Rule of Law pillar.

54. Witness X told the Tribunal that before the restructuring, the LJSS Division was divided into three units which were dissolved during the restructuring to give way to the creation of the three new thematic units. The witness said that although the names of the units changed, the overall functions of the said units remained largely unchanged.

55. Witness X said that she had direct personal knowledge of the functions of the Applicant's former position and the functions of the new position of Principal Rule of Law Officer and that the functions were practically identical.

56. With regard to the Applicant's functions, the witness said that apart from heading the LJSS Division, he was also the Chair of the Rule of Law and Human Rights Working Group which included all those agencies working on rule of law initiatives such as the World Bank. She said that the Applicant and Liberia's Solicitor-General had co-chaired the pre-trial detention task force, which included the Police, the Corrections Bureau and the Justice Sector.

57. The witness added that one of the achievements of the Applicant on that task force was that he drew up a memorandum of understanding between the National Police and the Public Prosecutions Office to ensure that cases were processed quickly and that there were fewer pre-trial detainees.

58. Witness X also testified that the Applicant had represented the Rule of Law pillar at very senior levels including the Justice and Security Joint Programme. X said the Applicant also worked closely with government to develop many Rule of Law programmes to strengthen the justice sector and also co-chaired the Judicial Institute's Strategic Planning with the Chief Justice.

59. The witness continued that the Applicant oversaw the reform of the Police Act in the country. X said that the training unit of the LJSS Division engaged with the Police Academy and trained police officers regularly. X said further that before the restructuring, the LJSS Division was largely responsible for supporting the justice system in Liberia including the Judiciary, the Ministry of Justice, the Bar Association, the Law Reform Commission, the Public Defender and civil society organizations.

60. Witness X testified also that when the idea of a Regional Justice and Security Hubs project comprising all the actors in justice and security which included the Bureau of Immigration and Naturalization, the Police, the Judiciary, Corrections, the Public Defender and the Prosecutor was conceived; it was the Applicant and the LJSS Division that worked on it. The pilot of that project, the witness said, has started to function.

61. With regards to how much things have changed since the departure of the Applicant from UNMIL, X said that since the restructuring was implemented,

nothing major had changed. The work done by the new thematic units is substantively the same that the LJSS Division was doing and the witness has continued to perform the same functions as before.

62. The witness X stated that there were certain unfortunate changes in the way the UNMIL Rule of Law pillar now related with the Liberian government. X said that the government officials have become more careful in the way they relate with the pillar in the absence of the Applicant with whom they were used to doing business and for whom they had almost an open door policy.

63. Their new way of dealing with the pillar, X said, is to insist that any requests for meetings must be done formally by letter. Most recently, two written requests to the Chief Justice for a Video Teleconference (VTC) with the D/SRSG Rule of Law were turned down. This, according to X is the situation in the absence of the Applicant who not only had institutional memory but had also a long-standing relationship with senior Liberian government officials.

64. Under cross-examination, X said that there was interface between the justice and security institutions in Liberia and that the Judiciary attended all the justice and security meetings in the regional hubs. When it was suggested that the priorities of the Ministry of Justice in terms of the support provided by the former LJSS Division was limited to legislative review and prosecution, X said that the same Ministry was also responsible for Police and Corrections and that all the work was and remains cross-cutting.

65. In answer to a suggestion that within the pre-trial detention task force UNPOL had provided advice on substantive policing issues to the Ministry of Justice, the witness said that the LJSS Division worked together with UNPOL because the task-force was a cross-cutting group.

66. In addressing his claim that there was a substantial change in functions between the Applicant's former position and the functions of the newly reassigned one with regard to the Applicant's abilities, the Respondent through his witnesses tried to show that there were certain differences between the functions of the Applicant when he headed the LJSS Division and the functions for the said newly

reassigned position. The witnesses did not address the claim of the Applicant that he was a rostered candidate for the generic position of Chief Rule of Law or that the functions of that position were near identical with those of the position created from the newly reassigned post. The Applicant's claim of being on the said roster was not challenged. Instead, the Respondent's Counsel argued that it was an irrelevant fact.

67. While reviewing and assessing the evidence before it on this issue, the Tribunal had regard to whether the functions of the position created from the newly reassigned post are substantially different to the skills-set of the Applicant. This means that in making the said review, the Tribunal considered the functions of the Applicant's former position as Chief of the LJSS Division together with the functions of the generic position of Chief, Rule of Law and Security Institutions Support Office for which the Applicant was rostered since 2011. In the same vein, the Tribunal examined and compared also functions performed by the Applicant while Chief of the LJSS Division at UNMIL as shown in his performance appraisals.

68. Although, two of the Respondent's witnesses testified that the Applicant as Chief of the former LJSS Division was concerned wholly with legal and judicial matters and did no substantive work and provided no advice relating to security or human rights, there is evidence before the Tribunal that the Applicant had been additionally involved with the security and human rights components of UNMIL's Rule of Law pillar and had often represented the pillar.

69. For instance, it is uncontroverted that the Applicant had co-chaired with Liberia's Chief Justice, the Judicial Reform and Rule of Law Sectoral working group of the Justice and Security pillar of the Poverty Reduction Strategy II. The Applicant also co-chaired the pre-detention task force with the country's Solicitor-General and was chair too of the Rule of Law and Human Rights working group of the United Nations Development Action Framework (UNDAF) in Liberia.

70. Again, while the Respondent's witnesses testified that the Applicant's functions as head of the LJSS Division was more limited than what was expected of the incumbent of the reassigned position, it is obvious as admitted by the

D/SRSG that the performance appraisal of the Applicant was not even considered to see what tasks he had carried out before the decision to separate him was made. The Applicant's latest e-PAS which was for the 2011/2012 cycle showed that one of his goals was to maintain close working relationships with human rights, police, corrections and other sections of the mission. In that e-PAS, his FRO who was the former D/SRSG commended him in the performance of that task.

71. The evidence shows also that the functions of the generic position of Chief Rule of Law and Security Institutions Support Office for which the Applicant is a rostered candidate is near identical with UNMIL's newly reassigned position of Principal Rule of Law Officer. In both positions, an incumbent oversees the work of the Mission in the areas of justice, police, security sector reform and corrections. The said incumbent is expected to ensure coherence in the Mission's overall approach and advice and support the Mission leadership in ensuring a coordinated approach of the United Nations system to rule of law and security sectors.

72. The Tribunal's comparison of the functions of the newly reassigned position of Principal Rule of Law Officer for UNMIL with the functions performed by the Applicant as Chief of the LJSS Division at UNMIL taken together with the functions of the generic position of Chief Rule of Law and Security Institutions Support Office in Peacekeeping missions for which the Applicant was rostered show that there is a great deal of similarity.

73. The emphasis that the Respondent's witnesses laid at a lack of experience and of expertise on the part of the Applicant with regards to liaising with national security institutions has no merit. Similarly, the claim that as Chief of the LJSS Division, the Applicant only had a limited role of leading the Division and coordinating its work while the new position would lead the three new thematic units and coordinate the work of all the units within the pillar rings hollow.

74. The Tribunal also examined the Vacancy Announcement and reviewed the competencies, educational qualifications and experience required for UNMIL's newly reassigned position of Principal Rule of Law Officer. The Tribunal reviewed these with those of the Applicant's former position as head of the LJSS

Division and the position of Chief Rule of Law and Security Institutions Support Office for which the Applicant was rostered.

75. The review showed that the requirements for the newly reassigned position are near identical and fully satisfied by the other two positions. Each of the three positions reviewed and compared requires broad professional knowledge of rule of law issues in post-conflict or peacekeeping settings, an advanced university degree in law, political science or international relations. Each requires also 15 years' professional experience.

76. After a most careful examination of the functions of the newly reassigned position of Principal Rule of Law Officer in UNMIL, the Tribunal is of the firm view that the Respondent's witnesses while labouring to show that the Applicant's prior professional experience was the reason why he could not be reassigned with the new position failed to properly consider his skills-set in relation to the said position. Their attitude of confining the Applicant's abilities to the functions of the position he had encumbered as Chief of the defunct LJSS Division at UNMIL was only an afterthought and was not in the best interest of the Mission or of the said Applicant.

77. The Tribunal also considered the relevance of the evidence provided by the Applicant to the effect that he regularly served as OiC of the Rule of Law pillar in the absence of the D/SRSG and had served in that capacity under different D/SRSGs. Between September 2011 and April 2013, a period of 20 months, he had served in that capacity on five occasions for a total of over 50 days.

78. Within the United Nations system, there is no proper definition of an OiC but the Tribunal takes judicial notice of the practice of appointing an OiC to act for or stand in the shoes of a senior officer in the absence of the said senior officer. In other words, the OiC takes on the responsibilities of an absent senior officer or the functions of a vacant position at a higher level than his own substantive position.

79. There is no gainsaying that being appointed OiC is discretionary and an OiC while not encumbering the substantive position stands in the shoes of the incumbent. This means that the tasks of the office are delegated to him or her and provide useful professional experience at a higher level for the staff member who acts as OiC.

80. The Tribunal finds that the Applicant's experience as OiC of the Rule of Law Pillar was a relevant fact which should have been taken into account with respect to reassigning him to the reassigned post.

81. The next question which the Tribunal will examine here is whether the Applicant exhibited any resistance to the newly proposed changes and reforms to the working methods for the Rule of Law pillar in the Mission. This question is important because the main issue that the Respondent consistently canvassed in this case is that the restructuring of the Rule of Law pillar and the resultant non-reassignment of the Applicant to the new position of Principal Rule of Law Officer were made to achieve greater coordination and coherence in the pillar.

82. During her examination-in-chief, Ms. Wilman stated that a core aspect of the restructuring was to integrate structures to achieve greater coherence, efficiency and impact in cross-cutting or inter-related activity such as justice and security. She also stated that there were problems with internal working methods within and across the Rule of Law pillar because there was no focal point for cross-cutting issues of justice and security and the sections had divergent views on the same issues.

83. The witness said that the previous D/SRSG Rule of Law had told her personally and had also told the new SRSG and the new D/SRSG about long-standing problems with the lack of integration in the pillar and lack of coherence in its work and the resistance in trying to move to greater coherence and integration in dealing with cross-cutting issues. She added that this problem plagued the rule of law work of the Mission and hindered the implementation of the Mission's mandate.

84. She continued that the LJSS Division was considered to work in isolation and to focus only on legal and judicial aspects of issues. She said that some parts of the pillar were more willing to engage and that there was a perception that there was not an enabling environment to work across pillars that was confined particularly to the LJSS Division Chief.

85. Under cross-examination, the witness said she was not singling out the Applicant but that there was no trust, confidence or commitment to engage within the pillar and difficulties in engaging with the LJSS Division. She said she was simply registering what was told her by different people which included that there was a long standing practice that sections engaged with each other only through their chiefs.

86. The Tribunal also asked the witness if the Applicant was sacrificed because he stood in the way of integration within the pillar and whether the D/SRSG ever addressed the perceived lack of coherence and integration but there was no clear answer to that question. The present D/SRSG of the Rule of Law pillar, Mr. Samuel, had given both written and oral testimony but did not confirm that he was told about the lack of integration and coherence problems by a previous D/SRSG. In any case, he took up his new duties at the Mission after the restructuring had already taken place.

87. The Tribunal reviewed the evidence with regard to whether the Applicant had resisted any proposals toward better integration in the work of the pillar. It is well noted that although the UNMIL Chief of Staff had spoken about a lack of coordination within the Rule of Law pillar and a perceived resistance on the part of the LJSS Division headed by the Applicant to work closely with other sections in the pillar, she fell short of blaming the Applicant for the alleged state of affairs. Also, no documents, reports or written communication were tendered to establish that the LJSS Division or the Applicant as its Chief did not want work with other sections or had hindered integration and coherence.

88. The Applicant's performance appraisal for the 2010/2011 cycle which was in evidence was examined. Under the goal of participating in coordination mechanisms at the United Nations family level, the D/SRSG Rule of Law at that

time, Ms. Mensah-Bonsu, who was the Applicant's FRO had commented that there was good cooperation and teamwork within the Rule of Law sector and that the Applicant deserved his share of commendation for the coherence in delivery of services which had been the result of such cooperation.

89. Also in the Applicant's e-PAS for the 2011/2012 cycle, the former D/SRSG Rule of Law, Mr. Aucoin, commented that the Applicant was a strong and committed member of the Rule of Law team and chaired the Legal and Human Rights Working Group of the UNDAF Outcome Group 3 that fostered close collaboration. He also described the Applicant as a good team player who was very cooperative in taking on extra tasks as required by the Mission leadership.

90. It is in evidence that Ms. Wilman took up her position as Chief of Staff at UNMIL on 25 October 2012. From the foregoing comments of the two previous D/SRSGs of the Rule of Law pillar at UNMIL concerning the Applicant's performance with regard to working with others within and across the pillar, it is difficult to understand which unnamed former D/SRSG had complained to Ms. Wilman about the Applicant's and the LJSS Division's resistance to integration and coherence. The Chief of Staff had clearly joined UNMIL at a time when the restructuring of the Rule of Law pillar had commenced.

91. The one and only conclusion that the Tribunal can reach here is that the testimony of the UNMIL Chief of Staff on this score is contradicted by documentary evidence and that neither the Applicant nor the LJSS Division which he headed constituted a problem to any changes and reforms towards greater integration in the Rule of Law pillar.

Was the process leading to UNMIL's retention of the incumbents of other reassigned posts within the former LJSS Division while separating only the Applicant a transparent exercise? Is there any merit in the Respondent's claim that the reassigned D-1 post formerly encumbered by the Applicant was of such level of seniority and criticality as to warrant a new recruitment exercise?

92. Evidence before the Tribunal is that in September 2012, the UNMIL/SRSG directed that the Mission undertake a comprehensive review of its civilian staff in line with the Security Council resolution 2066 of 2012 and General Assembly resolution 66/264. Following this directive, the comprehensive review was done. The Applicant was a member of the committee that undertook the comprehensive review and in fact represented the Rule of Law pillar and prepared its budget.

93. On 22 February 2013, the Secretary-General's report setting out the proposed budget for the Mission from 1 July 2013 to 30 June 2014 was published. The document while also showing the proposed restructuring of the Rule of Law component stated that the purpose of the proposed budget was to 'reflect an integrated approach to security and justice.' The ACABQ in its report of 30 April 2013 endorsed the proposed restructuring.

94. In that endorsement, the report proposed that three posts comprising one D-1 and two P-5 posts be reassigned while 32 other posts were re-deployed. Thereafter, on 22 May 2013, the Applicant received a memorandum dated 17 May 2013 in which he was informed that his contract which was to expire on 30 June 2013 would not be renewed and that the position which would be funded by his post would require a new, separate and open competitive recruitment process.

95. About the same time, the Mission leadership began to reassign and redeploy staff members to the newly restructured Rule of Law unit. The evidence is that out of the 35 staff members in the former LJSS Division, the Applicant was the only one to be separated. At least one of the officers whose P-5 post was also reassigned like that of the Applicant was made to encumber a new P-5 position in one of the new thematic units in the Rule of Law pillar.

96. One of the closing submissions made by the Respondent is that the creation of a new position requires an appointment to fill the said new position under the staff selection system. The Administration therefore decided to initiate a competitive selection process with regard to the new position created with the Applicant's reassigned post. In spite of that submission, it is not in contention that a P-5 officer of the former LJSS Division whose post was also reassigned to create a new position was not made to undergo any selection process but was simply placed on the new P-5 position.

97. With regard to why this was the case, Mr. Thomas testified that while the new position created by the reassignment of the Applicant's post needed a new recruitment, the Applicant's deputy in the former LJSS Division and whose P-5 post was also reassigned was now reassigned to a P-5 position as head of the Access to Justice and Security Section. He said he was involved in that decision because he was advised by Human Resources that while the functions of the new P-5 position given her were broader than those of deputy Chief of the LJSS Division, the difference between the two positions was not high enough to warrant a new recruitment.

98. Still on the same issue, the UNMIL Chief of Staff in her oral testimony told the Tribunal that following the restructuring, there was a discussion about people's experiences and skill mixes and how they would best fit into the structure. She said they intended to meet the objectives of restructuring in the most humane way possible and follow correct procedure and do the right thing. She added that where it was felt that the position had changed significantly, the person whose post was reassigned was not eligible for another position.

99. In answer to a question in cross-examination, the CMS, Mr. Price, said that before staff members of the former LJSS Division whose posts were reassigned were moved into positions in the new structure, there had been a review of capabilities and skillsets and those who were found to match the new positions were placed on them. There was therefore no need to go through a competitive recruitment process for those positions. He added that while this was the case for the P-5 posts, the D-1 position with respect to the Applicant was in a

different category and that after a comparative review, it was found that a new selection process was required.

100. Still under cross-examination, the witness said that the Mission received guidance from the Field Personnel Division (FPD) in New York as to how to determine who could be reabsorbed following a reassignment of their post. He said also that the percentage of change between former functions and new functions of a reassigned post determined whether the staff member in question could be placed on the new position.

101. When asked further how the Mission received the said guidance from FPD, the witness said he would go back and review. He added that he believed the guidance was received by both fax and email. He said that he would find and forward to the Tribunal the documented guidelines from FPD in the form of emails and faxes on which the Mission relied in determining who matched the relevant skillsets for the new positions created from the reassigned posts. However, no such documents were filed by the Respondent at any time.

102. While answering another question, Mr. Price said that the fact that the Applicant was rostered for the post of Chief, Rule of Law was not material to the review of his reassigned post because it was considered that the position he had encumbered in the LJSS Division was different to the new position that was created.

103. The Tribunal has reviewed all the evidence offered by the Respondent's witnesses explaining, supporting and giving reasons for the retention of the incumbent of one of the two reassigned P-5 posts and the non-retention of the Applicant.

104. These reasons and explanations can be summarized thus: (a) Following the re-deployment and reassignment of certain posts within the former LJSS Division to support some newly created positions in the Rule of Law pillar, the Mission leadership conducted a comparative review with a view to matching the skill-mixes of the staff members affected to new positions; (b) The guidelines for this comparative review were provided to the Mission by the FPD office in New York;

and (c) While it was determined that one of the reassigned P-5 posts matched the skills of the Applicant's former deputy in the LJSS Division who was a P-5 officer, it was also determined that the Applicant's skills were not a match for the new D-1 position.

105. It must be noted that the ACABQ's recommendation for the redeployment of 32 posts and the reassignment of three others in UNMIL's Rule of Law pillar to the Fifth Committee of the General Assembly for approval was made on 30 April 2013. About two weeks after the said recommendation and while the General Assembly's approval was being awaited, the DMS' memorandum of 17 May 2013 was sent to the Applicant informing him that in anticipation of the approval of the General Assembly, his contract would not be renewed beyond 30 June 2013.

106. The same hasty treatment was not extended to the incumbent of a reassigned P-5 post. Instead, the P-5 officer who was the Applicant's deputy in the LJSS Division was not separated but was moved to one of the new P-5 positions created in the restructuring. Considering the haste with which the separation notice was sent to the Applicant following ACABQ's recommendation to the Fifth Committee, when then did the agents of the Respondent properly determine that the Applicant could not be reassigned with his reassigned post?

107. In considering the veracity of the claim of the Respondent's witnesses that a comparative review or any review at all was conducted to determine the suitability of the incumbents of the reassigned posts for the new positions, the Tribunal raises the following questions: (a) Were there any criteria set up for the said comparative review?; (b) Were those to be reviewed informed?; (c) Were Personal History Profiles (PHPs) submitted by the affected staff members?; (d) Were performance appraisals (e-Pas) called for, submitted or considered?; (e) Was there a timeframe for this review?; and (f) was the result of the review published anywhere? The Tribunal finds that the answers to all of these questions are squarely and unequivocally in the negative.

108. The only inescapable conclusion here is that no comparative review was conducted because not only have the above questions not been answered; the

Respondent has not tendered any documentary evidence in support of this claim. Surely, if a comparative review had taken place, there would be a record of it.

109. It is noteworthy that even in his Reply to the Application, the Respondent never sought to make a case that his agents had conducted any review of the Applicant with a view to matching his skill-set to the functions of the position created from his reassigned post. Instead, it was his case that upon the creation of the new reassigned posts, the Administration decided to initiate a competitive selection process in order to meet the objectives of art. 101.3 of the Charter and the provisions of ST/AI/2010/3.

110. But while giving testimony, all of the Respondent's witnesses moved away from that pleading and tried to compare the Applicant's former functions to the functions of the reassigned post. The guidelines from FPD that one of the Respondent's witnesses claimed were used to conduct the review were never produced to the Tribunal.

111. As to the question whether the process of placing the incumbent of one of the reassigned P-5 posts on another P-5 position while separating the Applicant was transparent and credible, it is the Tribunal's finding that there was no due process employed and that if indeed there was any exercise, it was entirely arbitrary and completely lacking in transparency and any credibility.

112. In his Reply to the Application, the Respondent had submitted that the reassigned P-5 post which was not filled by a competitive recruitment process was not comparable with the reassigned D-1 position because the said D-1 position was of such seniority and criticality that it required a new recruitment exercise. Again, no records evidencing how that conclusion was reached were produced.

113. Nevertheless, the Tribunal has carefully considered this submission. It is strange that the issue of seniority of the reassigned post was raised by the Respondent. This is because the Applicant had encumbered the same D-1 post since 1 July 2008, five years before its reassignment. Having been on the same level as the newly created position, the Applicant would not be earning a promotion if he was reassigned with his former D-1 post. Therefore the argument

about the seniority of the newly created position with regard to the Applicant is puerile.

114. Testimony offered by the Respondent's witnesses during the hearing that lasted into November 2014 is that the new D-1 position of Principal Rule of Law Officer at UNMIL was still being advertised and not yet filled. The Tribunal was also told that a temporary incumbent had been appointed. The said temporary incumbent stayed on the new position until April 2015. Considering that UNMIL is a mission whose mandate had shifted to its dying days of ensuring the strengthening of national institutions, the fact of not making a permanent recruitment for a critical position two years after its creation begs the question as to whether the position is sufficiently critical.

Was the non-retention of the Applicant motivated by bias or other improper motives?

115. In closing submissions, the Respondent submitted that at the hearing of this case the Applicant did not pursue his claim that his non-retention was improperly motivated or that anyone within UNMIL management was biased against him. On the same issue, it was submitted for the Applicant that the different treatment meted out to him from that of others whose posts were reassigned was evidence of bias. It was further submitted that the total disregard of the fact that he was a rostered candidate and was not invited to an interview was also evidence of bias.

116. The Tribunal having regard to the fact that the Applicant did not pursue the issue of bias at the hearing of this case has not made a determination on that aspect of this Application.

Observations on a fair and objective process and the interests of the Organization in this case.

117. The Tribunal takes judicial notice of the fact that UNMIL was established in 2003 by Security Council Resolution 1509 following a prolonged conflict in Liberia. By its 10th year a drawdown and transition had started at the Mission

pursuant to Security Council Resolution 2066 on 17 September 2012 which reemphasized its mandate of solidifying peace and stability and the protection of civilians. Thereafter, on 16 October 2012, there is evidence that UNMIL's SRSG published a memorandum to all staff of the Mission.

118. The said memorandum informed staff members that in line with transition plans, the Mission's substantive pillars would be restructured to better reflect its main areas of concentration and a comprehensive civilian staffing review was to be undertaken in order to make the best possible use of UNMIL's resources in completing its mandate. It was also stated that since some staff members would be affected by revised staffing levels from 1 July 2013, "UNMIL will put in place a fair and objective process".

119. The Secretary-General's report to the General Assembly on UNMIL's budget for the 2013/2014 year stated that the proposed thematic organizational restructure in the Rule of Law pillar would enable the Mission to realign resources with the priorities outlined in Security Council resolution 2066. It would leverage existing expertise and priorities would be met through existing resources. Further, in its Resolution 67/905 of 28 June 2013 approving the 2013/2014 budget, the General Assembly stressed at paragraph 10 that it was important for UNMIL to maintain experienced staff during its drawdown period and to expand the skills of all staff.

120. The Respondent submitted in closing submissions that the decision to undertake a competitive selection process for the reassigned D-1 post, which is the subject matter of this case, was motivated by the need to ensure the highest standards of efficiency as provided for in art. 101.3 of the United Nations Charter. He submitted further that the Applicant had no right to be reassigned by virtue of his experience and record of performance as Chief of the LJSS Division or his being on the roster of similar D-1 Chief Rule of Law positions. He also submitted that the General Assembly's resolution stressing the importance of maintaining experienced staff during the drawdown period of the mission is irrelevant to the case.

121. On its part, the Secretary-General's report on UNMIL's budget for 2013/2014 stated that the Mission would leverage existing expertise and that priorities would be met through existing resources. It has been noted in the Tribunal's considerations above that in spite of citing the criticality of the position created from the Applicant's reassigned post as a reason for not reassigning the Applicant to it even on a temporary basis, the said position of Principal Rule of Law Officer did not have a permanent incumbent more than two years after it was created.

122. The Secretary-General's report was surely referring to the expertise of existing UNMIL staff and also to its existing human and material resources. In the light of that report that mapped out plans for UNMIL's transition and formed the background to the ACABQ recommendations and the General Assembly's eventual approval of the 2013/2014 budget, the handling of the Applicant's case calls into question the credibility of the submission that the restructuring within the Rule of Law pillar needed a new recruitment in order to ensure the highest standards of efficiency and competency.

123. In Witness X's testimony, she asserted that Liberian government officials trusted the Applicant and had an almost open door policy for him so that it was easier for the pillar to communicate with them. She also testified that since the Applicant left the Mission, it had become more difficult for the Rule of Law pillar to deal with the said Liberian officials. The witness cited the instances of difficulties in arranging a meeting between the Liberian Chief Justice and the D/SRSG Rule of Law with the host country officials ignoring at least two requests for a meeting. This testimony was not challenged.

124. Deductions from the evidence presented to the Tribunal point out in bold relief that the SRSG's promise of a fair and objective process did not avail the Applicant in the process of his non-renewal following the reassignment of his post. Also, Witness X's unchallenged testimony on relations between the Rule of Law pillar and the head of Liberia's judiciary since the departure of the Applicant sends the clear message that UNMIL's bosses did not only put their foot in their mouth in getting rid of the Applicant in the manner they did but have not acted in

the best interests of the Organization by ignoring the Secretary-General's intention to leverage existing expertise and the General Assembly's counsel to maintain experienced staff during the Mission's transition.

125. While the Tribunal is well aware of the Respondent's Counsel's well-practiced mantra that the Tribunal cannot substitute its views for those of the decision-maker, it must be pointed out that decision-makers in the Organization must never act on their own whims or lose sight of their responsibility to act with fairness towards staff members and with the best interests of the Organization in mind at all times. It bears restating here also that any discretion to be exercised by a decision-maker must be exercised judiciously. That was not the case here.

A summary of the findings made by the Tribunal

126. In view of the foregoing, the Tribunal reiterates its findings that:

- a. The Applicant's former post of Chief Judicial Affairs Officer did not cease to exist but was reassigned to fund the new D-1 position in the office of the D/SRSG Rule of Law.
- b. The functions of the newly reassigned position of Principal Rule of Law Officer for UNMIL when compared with the functions performed by the Applicant as Chief of the LJSS Division at UNMIL and taken together with the functions of the generic position of Chief Rule of Law and Security Institutions Support Office in Peacekeeping missions for which the Applicant was rostered show that there is a great deal of similarity.
- c. The Respondent's witnesses while labouring to show that the Applicant's prior professional experience as Chief of the LJSS Division was the reason why he could not be reassigned with the new position failed to properly consider or take into account his skills-set in relation to the said new position.
- d. Neither the Applicant nor the LJSS Division which he headed constituted a problem to any changes and reforms towards greater

integration in the Rule of Law pillar. In fact, evidence shows that the Applicant had actively worked towards integration.

e. No comparative review or any review at all was conducted to determine the suitability of the Applicant or any of the incumbents of the reassigned posts for new positions.

f. The Guidelines from FPD which the Respondent's witness claimed were used to conduct the review were never produced. The Tribunal concludes there were no such guidelines used or in existence.

g. Deductions from the evidence presented to the Tribunal point out in bold relief that the SRSG's promise of a fair and objective process did not avail the Applicant in the process of his non-renewal following the reassignment of his post.

h. There was a lack of transparency and credibility in the non-renewal decision with regards to the Applicant.

i. UNMIL Administration acted contrary to the Secretary-General's report attached to the 2013/2014 budget approved by the General Assembly when it ignored the intention expressed therein to leverage existing expertise and to meet priorities through existing resources and to maintain experienced staff during the transition process.

j. The decision to not reassign the Applicant to the new position created from his reassigned post was unlawful considering all the surrounding circumstances of this case.

Judgment

127. In the present case, the Applicant's fixed-term appointment was not renewed because contrary to its claims, the UNMIL Administration did not follow the proper procedures in determining whether he should be reassigned to the new D-1 position in the office of the D/SRSG Rule of Law.

128. The Applicant was not given full and fair consideration for the new D-1 position in the office of the D/SRSG Rule of Law. The Respondent submitted that the Applicant has fully mitigated the damage arising from his separation on 9 August 2013 because four months after his separation from service, he was appointed to the position of Special Prosecutor in his country Malawi.

129. The Tribunal orders rescission of the contested decision and orders the Respondent to reinstate the Applicant and deploy him to the next similar position as at the time of his separation.

130. Should the Secretary-General decide, in the interest of the Administration, not to perform the obligation to reinstate the Applicant, as an alternative he must pay compensation to the Applicant. The Respondent shall pay the Applicant four months' net base salary at the level he encumbered prior to his separation and, in addition, USD74,559 which represents the difference in pay for eight months between his last salary (a total of approximately USD139,559) and his salary as a Special Prosecutor in Malawi (total of approx. USD65,000).

131. The Applicant is also entitled to compensation for the substantive and procedural irregularities occasioned to him by the failure of UNMIL Administration to conduct a comparative review to determine his suitability for reassignment to a new position and the Tribunal, accordingly:

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

132. If the Secretary-General decides not to perform the obligation to reinstate the Applicant, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 14th day of March 2016

Entered in the Register on this 14th day of March 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi