UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2017/094
Order No.:	219 (NY/2017)
Date:	6 October 2017
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

KHATTEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On Friday, 29 September 2017, the Applicant, an Administrative Assistant at the FS-5 level, step 11, in the United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed an application under art. 2.2 of the Dispute Tribunal's Statute as read with art. 13 of the Rules of Procedure, for the suspension pending management evaluation, of the decision "not to grant one year fixed-term appointment on recruitment and decision to separate by non-renewal".

2. The same date (29 September 2017), the Registry acknowledged receipt and, at the instruction of the undersigned Judge requested the Respondent to file a reply by 9:00 a.m., on Wednesday, 4 October 2017.

3. The Respondent filed his reply, shortly before close of business day on 3 October 2017, submitting that the application is not receivable *ratione temporis* and that, in any event, it is without merit.

Background

4. In the application, the Applicant presents the facts as follows, as reflected also by the documentation on record:

> … The Applicant is a UN staff member who has been in continuous UN employment since 2009. The Applicant held a fixed term appointment with [United Nations Integrated Peacebuilding Office in Guinea-Bissau, "UNIOGBIS"] which was due to expire on 30 June 2017 [reference to annex omitted].
>
> … From 3 September 2016 to 9 September 2016 MINUSTAH advertised a vacancy announcement for recruitment from roster of an FS5 Administrative Assistant at the FS 5 level on fixed term appointment [Job Opening No. "16-ADM-MINUSTAH-66317-F-PORT-AU-PRINCE (M)"], [reference to annex omitted].
>
> … The Applicant applied for the post and on 3 November 2017 [sic] the Applicant was informed that she had been selected for

the post [reference to annex omitted]. The email did not contain a formal offer of appointment but only a short letter indicting her selection and a request for release [reference to annex omitted]. The Applicant queried the absence of an offer of appointment and was informed that she should sign and return the letter indicating her selection as formal confirmation of an acceptance of the offer.

… The Applicant completed medical checks and travelled to the mission beginning work on 6 December 2016 [reference to annex omitted].

… The Applicant was issued with a security badge expiring on 5 December 2017 [reference to annex omitted] and was payed Relocation Grant and [daily subsistence allowance] portion of her Settling in Grant consistent with a one year fixed term appointment. The Applicant received no letter of appointment memorialising her new appointment with MINUSTAH.

… On 15 April 2017 MINUSTAH's mandate was extended until only 15 October 2017.

… On 1 August 2017 the Applicant was informed that her contract would not be renewed beyond 15 October 2017 [reference to annex omitted]. This was the first time the Applicant had been informed she had a contract expiring on that date.

… On 19 August 2017 the Applicant was provided with a letter of appointment that indicated grant from 1 July 2017 for a period of only three months and 15 days [reference to annex omitted]. The Applicant now understands that this purported extension from 1 July 2017 to 15 October 2017 was processed on 10 July 2017 [reference to annex omitted]. Neither the PA [assumedly, the personnel action form] nor the "extension" decision were communicated to her prior to 19 August 2017.

… On 14 September 2017 the Applicant sought management evaluation [reference to annex omitted] without legal representation. In her management evaluation request she identified the issue to be resolved as whether she was entitled to a fixed-term appointment expiring on 5 December 2017 instead of 15 October 2017 and sought as a remedy the extension of her fixed-term appointment until 5 December 2017. Her request was acknowledged on 18 September 2017 [reference to annex omitted].

… On 29 September 2017 the Applicant filed supplementary submissions with the Management Evaluation Unit ["MEU", reference to annex omitted].

5. While not appearing to contest the Applicant's presentation of the factual background (see more below), the Respondent adds that:

> … The Applicant held a fixed-term appointment with [UNIOGBIS], which expired on 30 June 2017.
>
> … The Applicant applied for, was selected, and began a new assignment with MINUSTAH on 6 December 2016.
>
> … On 13 April 2017, by Security Council Resolution 2350 (2017), MINUSTAH's mandate was extended until 15 October 2017 [reference to annex omitted].
>
> … On 1 August 2017, the Applicant was notified that her new fixed term letter of appointment ["LOA"] would run concurrent with MINUSTAH's mandate and end of 15 October 2017.
>
> … On 19 August 2017, the Applicant signed the LOA, dated from 1 July 2017 to 15 October 2017, coinciding with MINUSTAH's mandate.
>
> … On 14 September 2017, the Applicant sought management evaluation of the decision to not grant her a one year appointment upon her assignment to MINUSTAH. [footnote omitted]
>
> … On 29 September 2017, the Applicant filed supplementary submissions to [the MEU], requesting management evaluation of the decision not to renew her appointment beyond 15 October 2017. [footnote omitted]

Applicant's submissions

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

Prima facie *unlawfulness*

a. Referring to staff rules 4.1, 4.2, 4.13 and ST/AI/2010/3 (Staff selection system and ST/AI/2010/4/Rev.1 (Administration of temporary appointments), the Applicant's move to MINUSTAH required the grant of a new appointment from 6 December 2016 and, following staff rule 4.13(a), a new appointment is for a minimum of one year;

b. Duty station and employing entity are crucial contractual terms. These changed on moving to MINUSTAH requiring grant of a new letter of appointment, and the Administration cannot argue that the Applicant continued to be appointed on the letter of appointment issued by UNIOGBIS after her move to MINUSTAH. The two entities are entirely separate, have different budgets and locations;

c. Date of appointment is calculated from the date of entering into official travel and/or assumption of duties. The Applicant's travel to Haiti and assumption of different functions are indicative of a new appointment from 6 December 2016;

d. The vacancy announcement against which the Applicant was recruited was not a temporary vacancy announcement. Recruitment from roster is only possible pursuant to ST/AI/2010/3. There is no provision for recruitment from roster in ST/AI/2010/4/Rev.1;

e. The vacancy announcement expressly refers to a "position" defined in ST/AI/2010/3 as an "established post" with "funding for at least one year". Recruitment pursuant to ST/AI/2010/3 therefore required the grant of a new one year fixed-term appointment;

f. Had MINUSTAH required a staff member for a period of less than a year they were required to recruit against a temporary vacancy announcement. Failure to grant a fixed-term appointment of one year represents a procedural error and by extension the decision to separate her by way of non-renewal also represents a procedural error;

g. Further, or in the alternative, the Applicant's recruitment pursuant to ST/AI/2010/3 and MINUSTAH's representation that she was recruited to a "position" as defined in those rules provided the Applicant with a legitimate expectation that such recruitment would lead to the grant of a new one year fixed-term appointment;

h. The Applicant was granted benefits and entitlements consistent with grant of a one year fixed-term appointment and was provided with a security pass with expiry date consistent with grant of a one year fixed-term appointment. Security passes are generally provided for the contractual term. That her security pass expiry date in no way corresponds to the contractual term MINUSTAH now allege suggests the possibility that she was initially granted a new appointment and that this has subsequently been varied;

i. All the actions of MINUSTAH indicated grant of a one year fixed-term appointment. The Applicant understood the same;

j. No contractual document indicating otherwise was provided. If MINUSTAH's intention was to not grant the Applicant a new appointment, it was incumbent on them to provide an offer of appointment and/or contractual document indicating the same;

k. Had MINUSTAH indicated they were recruiting for a period less than one year the Applicant would not have taken the post. Recruitment by temporary vacancy would have allowed the Applicant to seek a lien on her former post. The lack of clarity has caused a long serving member of staff, enormous prejudice and now risks prematurely ending of her career;

Urgency

l. Without correction of the decision challenged the Applicant will be unlawfully separated in two weeks. This is sufficient to fulfil the urgency criteria;

m. The Applicant filed for management evaluation of the decision well within the sixty-day time limit and sought suspension from the MEU. Two weeks later the suspension request has not been addressed. The Management Evaluation Unit indicate they will respond regarding suspension by the date of

separation. This would be too late for any Dispute Tribunal application if they decline;

n. In *Farhadi* Order No. 131 (GVA/2017), the Tribunal considered jurisprudence regarding self-created urgency. The Tribunal considered the relevant consideration whether delay on the part of the Applicant had prevented the Tribunal from having sufficient time to examine the matter and the Respondent sufficient time to respond;

o. In the instant case, the Tribunal has two full weeks to make a determination and the Respondent has been on notice of the Applicant's request for suspension for more than two weeks prior to the filing of this Application. In such circumstances it is submitted that the urgency of the case cannot be attributed to the Applicant;

Irreparable damage

p. The Applicant is due to be separated by non-renewal on 15 October 2017. Successful challenge will render such separation unlawful. Any separation should be by termination;

q. The Respondent may argue no irreparable damage is caused since separation by termination remains available and any loss is purely financial. This is not accepted;

r. Termination under staff rule 9.6 requires notice not provided to the Applicant. It triggers a requirement that a staff members' services be retained against suitable posts;

s. In the case of *Nakhlawi* UNDT/2016/204, the obligation to consider retaining a staff member's service against a suitable post was found to extend Secretariat wide;

t. Because the Applicant's separation is currently by non-renewal important protections that might secure her ongoing employment have not been applied;

u. It is of note that while MINUSTAH is closing as of 15 October 2017, a new mission will then open containing a post that corresponds to that currently occupied by the Applicant;

v. It has been established in *Kasmani* 2009-UNDT-017, *Osman* 2009-UNDT-008, *Rasul* Order No. 23 (UNDT/NBI/O/2010/023), *Villamoran* 2011-UNDT-126, *Igbinedion* 2011-UNDT-110, *Kananura* 2011-UNDT-176 and *Diop* 2012-UNDT-029, but see *Karl* Order No. 110 (NBI/2010), that monetary compensation is insufficient to compensate the frustration, unhappiness and loss of chance of career development associated with the non-renewal of a fixed-term contract;

w. It was ruled in *Khambatta* 2012-UNDT-058 that loss of United Nations employment is not merely viewed in terms of financial loss but also in terms of the loss of career opportunities;

x. The Applicant has been in continuous employment with the United Nations since 2009. Her separation by non-renewal, without applying appropriate protections will cause her irreparable damage.

Respondent's submissions

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

Receivability

a. The Application is not receivable *ratione temporis*. The Applicant has not requested management evaluation of the contested decisions within the time limit set out in staff rule 11.2(a);

b. Staff rule 11.2(a) states that staff members that wish to contest an administrative decision must request management evaluation of that decision. In accordance with staff rule 11.2(c), a request for management evaluation is not receivable unless it is filed with 60 calendar days. The deadline for requesting management evaluation cannot be waived (*Costa* 2010-UNAT-036; *Rosca* 2011-UNAT-133; *Ajdini* et al 2011-UNAT-108; *Dzuverovic* 2013-UNAT-338; *Wu* 2013-UNAT-306/Corr. 1);

c. The time for challenging an administrative decision commences with the notification of that decision (*Rahman* 2012-UNAT-260; *Chahrour* 2014-UNAT-406; *O'Donnell* UNDT/2014/63). In the absence of formal notification, the Dispute Tribunal can infer notification from the facts and circumstances of the case (*von der Schulenberg* UNDT/2014/041);

d. The Applicant was aware of the fact that she had not received a new letter of appointment when her prior UNIOGBIS LOA expired on 30 June 2017. Accordingly, she should have requested management evaluation of the decision not to grant her a one year fixed-term appointment by 29 August 2017. She did not do so;

e. The Applicant's challenge to the non-renewal of her appointment is predicated on the fact that she did not receive a one-year appointment upon her assignment to MINUSTAH. Accordingly, she may not challenge that decision;

Prima facie *unlawfulness*

f. The Applicant has not demonstrated that the contested decisions are *prima facie* unlawful. The Applicant has no right to have her appointment renewed. A fixed-term appointment does not carry any expectancy of renewal;

g. There is no grant of new fixed-term with administrative reassignment. Staff rule 4.13(a) requires that a fixed-term appointee receive an appointment of a minimum of one year on initial appointment. A staff member receives a letter of appointment, appointing them to the Secretariat, not to a particular mission or office. Once a staff member has been appointed, they remain appointed until separated;

h. Staff rule 4.13(b) provides that a fixed-term appointment can be renewed for any period up to five years. However, a staff member is not granted a new appointment. The Organization does not issue new letters of appointment when a staff member is transferred or assigned. The Applicant has not identified any rule that requires it to do so. The Applicant's assertion that a new letter of appointment is required when a staff member moves to a new duty station is incorrect. If that were the case, whenever a staff member moves to a new duty station, even within the same mission, a new letter of appointment with a duration of one year would be required. That is incorrect;

i. Contrary to the Applicant's claim, her reassignment to MINUSTAH did not require the Organization to grant her a new one year appointment. If the Applicant's move to MINUSTAH was a new appointment, then logically she must have been separated from her previous appointment. That would have entailed, *inter alia*, the payout of her annual leave entitlement. Additionally, pursuant to staff rule 3.4(a), the Applicant would not have retained her step in grade. Instead, the Applicant was reassigned to MINUSTAH on the terms of her subsisting appointment;

j. There is no expectancy of renewal of a fixed-term appointment. In accordance with staff rule 4.13(c) and sec. 4.2 of the ST/AI/2013/1, the Applicant has no right to renewal of appointment beyond 15 October 2017. The Administration created no legitimate expectancy of renewal beyond that date. An expectation of renewal requires an express promise that the appointment will be renewed. No such promise was made. On

the contrary, since at least 13 April 2017, the Applicant has known or should have known that MINUSTAH's mandate, and her appointment, would end on 15 October 2017;

k. The decision not to renew an appointment may be challenged on the grounds that the staff member had a legitimate expectancy of renewal, procedural irregularity, or the decision was arbitrary or motivated by improper purposes. The Applicant has provided no evidence for such a challenge.

Urgency

l. The Applicant has known or should have known since at least 13 April 2017 that her fixed-term appointment would not be extended beyond 15 October 2017, as MINUSTAH's mandate was only extended until 15 October 2017. Additionally, at that time, the Applicant had an appointment expiring on 30 June 2017. The Organization's needs for service and commitment to her employment was completed on that date. There was no further obligation created at the time of her reassignment. Further, the Applicant executed her MINUSTAH LOA on 19 August 2017, which stated a contract expiry date of 15 October 2017. Each of these dates were well within the requirement of filing a request for management evaluation and receiving a response within 45 days from the MEU before the end of the Applicant's contract. Yet, the Applicant waited until 14 September 2017 (initial request) and 29 September 2017 (revised supplemental request) to seek management evaluation and suspension of the implementation of the contested decisions. Any alleged urgency has been created by the Applicant. Self-created urgency does not satisfy the requirements for suspension of an administrative decision;

Irreparable damage

m. The Applicant has not established irreparable harm. A fixed-term appointment carries no expectancy of renewal. The Applicant's separation presents no more harm to her than the eventual separation of any MINUSTAH staff member whose fixed-term appointment is due to expire. In addition, any harm the Applicant might suffer can be adequately compensated through a monetary award.

Consideration

Legal framework

8. Article 2.2 of the Statute of the Dispute Tribunal provides:

> … The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

9. Article 13.1 of the Tribunal's Rules of Procedure states:

> … The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

10. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause

irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

11. Under art. 2.2 of the Statute, a suspension of action order is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of the contested decision.

12. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects, and be succinctly and precisely pleaded, bearing in mind that the matter is not at the merits stage at this point of the proceedings, and that the luxury of time is unavailable.

Receivability

13. As a preliminary matter, the Respondent contends that the application is time-barred because the Applicant did not file her request for management evaluation timeously pursuant to staff rule 11.2(a).

14. The Tribunal notes that the time limit for filling a management evaluation, which is mandatory in this case, is set out in staff rule 11.2(c) that provides that "[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".

15. The Respondent argues that, by not receiving a new letter of appointment, the Applicant "was aware" already on 30 June 2017 "when her prior UNOGBIS LOA expired" and therefore should have requested management evaluation of "the decision not to grant her a one year fixed term appointment" by 29 August 2017". Simultaneously, the Respondent indicates in the outline of facts that

(emphasis added), "[o]n 1 August 2017, the Applicant was *notified* that her new fixed term letter of appointment would run concurrent with MINUSTAH's mandate and end of 15 October 2017".

16. The Appeals Tribunal has held that "time limits only start[s] to run as of the moment where all relevant facts for a particular decision were known, or should have reasonably been known" (*Krioutchkov* 2016-UNAT-691, para. 21). In *Manco* 2013-UNAT-342, the Appeals Tribunal also stated that (reference to footnotes omitted):

> 19. This Tribunal reaffirms that unless the decision is notified in writing to the staff member, the limit of sixty calendar days for requesting management evaluation of that decision does not start.
>
> 20. Without receiving a notification of a decision in writing, it is not possible to determine when the period of sixty calendar days for appealing the decision under Staff Rule 11.2(c) starts. Therefore, a written decision is necessary if the time limits are to be correctly, and strictly, calculated.2 Where the Administration chooses not to provide a written decision, it cannot lightly argue receivability, *ratione temporis*.

17. In addition, a staff member's knowledge of a decision is not necessarily the same thing as a staff member receiving notification of a decision (see *Bernadel* 2011-UNAT-180). One of the most important circumstances a reviewing tribunal must consider is the nature of the administrative decision, including the language used in the communications and not simply the parties' characterization of the communications (see *Babiker* 2016-UNAT-672). Furthermore, "an administrative decision not to renew a staff member's fixed term appointment is perhaps the most significant administrative decision affecting a staff member and is not a decision casually communicated" and non-renewal decisions "must be given in writing and must be given with some degree of gravitas" (*Babiker*, paras. 22 and 35, respectively). Even though it is alleged the Applicant's contract expired on 30 June 2017, she received no status notification prior to that date or even in the month thereafter. The Respondent clearly states that the Applicant was only notified in writing of the non-renewal decision (and an attempted retroactive start date of a new

short-term contract of three months and 15 days) on 1 August 2017. From the context of the present case (the Applicant, having moved to MINUSTAH in December 2016, apparently saw no contractual documentation until August 2017), it is abundantly clear that not all relevant facts were known, or should have reasonably been known, before then. Under staff rule 11.2(c), the Applicant's time limit for filing her request(s) for management evaluation was therefore rightly 60 days from 1 August and her request was filed timeously. Consequently, the Respondent's claim of non-receivability is rejected.

Prima facie *unlawfulness*

18. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (see, for instance, *Jaen* Order No. 29 (NY/2011) and *Villamoran* UNDT/2011/126).

19. The Dispute Tribunal may define the issue(s) of the case based on the entire application and not just the description of the administrative decision(s) (see, for instance, *Chaaban* 2016-UNAT-611). The Applicant challenges the failure of the Administration to grant her a one-year appointment with MINUSTAH and her separation by non-renewal of contract. Essentially, the issue in the present case therefore boils down to whether, upon the Applicant's arrival in MINUSTAH on 6 December 2016, she was or should have been granted a one-year fixed-term appointment considering the circumstances surrounding her recruitment as a roster candidate against Job Opening No. "16-ADM-MINUSTAH-66317-F-PORT-AU-PRINCE (M)".

20. The Applicant argues, *inter alia*, that she could not continue to be appointed on the letter issued by UNIOGBIS after her move to MINUSTAH—the two entities

are separate with different budgets and locations and, particularly, the job opening against which the Applicant was recruited was not a temporary one but was a recruitment from the roster which is possible only pursuant to ST/AI/2010/3. The job opening expressly refers to a "position" which is defined in the Administrative Instruction as an "established post" with "funding for at least one year". If MINUSTAH required a new staff member for less than a year, they were required to recruit against a temporary job opening. The Applicant further submits that she would not have taken a temporary position for less than a year and certainly would have been constrained to request a lien on her former post. Furthermore, the Applicant was provided with a security pass with an expiry date consistent with a year's appointment and all benefits and entitlements consistent with such appointment. The Respondent, on the other hand, contends that the Applicant was reassigned to MINUSTAH on the terms of her then subsisting fixed-term appointment under the letter of appointment provided to her by UNOGBIS.

21. ST/AI/2010/3, as revised by subsequent administrative issuances, in sec. 9.5 under the heading "Selection decision"— described as part of the regular process for a competitive selection—sets out the process and criteria for recommending a roster candidate for selection for a given job opening, as apparently occurred in the present case, as follows in relevant part:

> 9.5 Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment […] Should an eligible roster candidate be suitable for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.]

22. The staff selection system of ST/AI/2010/3 solely applies to "all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer". In line herewith, ST/AI/2013/1 (Administration of fixed-term appointments) sets out the condition upon which a staff member is to be appointed following a competitive selection process as follows:

> 3.3 Individuals selected through a competitive examination […] shall be granted a fixed-term appointment for a period of one year or more as specified in their letter of appointment.

23. On the effective date of appointment, staff rule 4.2 states as follows:

> The appointment of a staff member shall take effect from the date on which he or she enters into official travel status to assume his or her duties or, if no official travel is involved, from the date on which the staff member reports for duty.

24. The Tribunal notes that ST/AI/2010/3 does not apply to temporary appointments (see its art. 3.2(b)). The Tribunal further notes that, under ST/AI/2010/4/Rev.1 (Administration of temporary appointments), sec. 1.1, unlike what appeared to be the situation in the present case, the purpose of a temporary appointment is:

> … to enable the Organization to effectively and expeditiously manage its short-term staffing needs. As stated in General Assembly resolution 63/250, "temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates"

25. Also, according to ST/AI/2010/4/Rev.1, secs. 3.1 and 3.2, unlike what occurred in the present case, selection for a temporary position would have required the issuance of a temporary job opening.

26. The Tribunal further notes that the Respondent does not appear to contest the primary facts set out in the application. The Respondent's reply instead contains a bare denial at paragraph 26 under the heading "Identify any facts or matters in the Application that are disputed by the Respondent", where the Respondent simply states, "Any allegations that are not specifically admitted in this Reply, are denied".

27. From the Applicant's presentation of the facts, after being recommended pursuant to art. 9.5 of the revised ST/AI/2010/3, it would appear that, as a roster candidate, the Applicant was recruited to the position of Administrative Assistant at

the FS-5 level with MINUSTAH against Job Opening No. "16-ADM-MINUSTAH-66317-F-PORT-AU-PRINCE (M)". In ST/AI/2010/3, a vacant position is defined as a "position approved for one year or longer" (sec. 1(z)); whilst a roster is defined as the "pool of assessed candidates who are available for selection against a vacant position" (sec. 1(w)).

28. It would therefore appear that, as a roster candidate, the Applicant was selected through a competitive examination under sec. 3.3 of ST/AI/2013/1 and that she was entitled to a fixed-term appointment for a period of, at minimum, one year. In accordance with staff rule 4.2, her appointment in MINUSTAH started on 6 December 206, the date when she apparently reported for duty in her new office.

29. The fact that her recruitment is framed as a "reassignment" (and indeed other varied descriptions as illustrated below), in many of documents regarding her recruitment, would therefore appear at best to be an error, just as it would seem to be erroneous that, on 1 August 2017, she was presented with a new fixed-term letter of appointment, backdated to 1 July 2017, to run concurrent with MINUSTAH's mandate and end of 15 October 2017. Moreover, the Tribunal notes that the language describing or alluding to the Applicant's contractual status is inconsistently and interchangeably used in several documents: the vacancy announcement refers to a "position"; the email dated 7 November 2016 to her refers to an "offer of appointment;" the statement of emoluments dated 31 October 2016 pertains to a "temporary appointment"; the 29 October 2016 internal request for release is headed "reassignment", but states that the Applicant has been selected for a "'position" and requests for release on "transfer". Still yet, on the Personnel Action dated 6 December 2016, which document the Applicant was promised on the assumption of her new functions but did not apparently see until 19 August 2017, her status is described as "regular assignment", start date as 6 December 2016 and the assignment type as a permanent movement.

30. The record therefore does not indicate any clear and unambiguous timely communication to the Applicant of her precise contractual status at any time until

August 2017. The Applicant was not given the required notice if indeed her fixed-term contract was expiring on 30 June 2017, only an attempt to retroactively notify her of her alleged new fixed term on 1 August 2017. It may even be argued that there was a tacit renewal of her fixed term contract post 30 June 2017, if indeed she had been reassigned for the remainder of her term.

31. In all the above circumstances, the contested decisions were apparently defective and, consequently, on a *prima facie* basis, the Tribunal therefore finds that the contested decisions are unlawful.

Urgency

32. According to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

33. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (see, for instance, *Villamoran* UNDT/2011/126, *Dougherty* UNDT/2011/133 and *Jitsamruay* UNDT/2011/206).

34. The Tribunal takes note of the following uncontested facts:

a. The Applicant was notified of the contested decisions on 1 August and, as stated above, on 14 September 2017, filed a request for management evaluation within the statutory time limit of 60 days; a filing which she submitted without legal representation;

b. The MEU acknowledged receipt of the Applicant's request for management evaluation on 18 September 2017, making reference to the Applicant's "correspondence dated 14 and 18 September 2107 and addressed to [the MEU], requesting a management evaluation and suspension of action concerning the determination of the expiration date of your fixed-term appointment". The status of the Applicant's request for suspension of action with the MEU is not clear, just as the Applicant's 18 September 2017 submission to the MEU has not been submitted in evidence;

c. On 18 September 2017, the Applicant also retained the services of her current Counsel according to the legal authorization form appended to the application;

d. On 29 September 2017, Applicant's Counsel filed a supplementary submission with the MEU;

e. On the same date (29 September 2017), Counsel for the Applicant filed the present application.

35. In the circumstances and on the papers before it, as the contested decisions are impending and the urgency cannot be regarded as self-inflicted, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

36. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (see, for instance, *Adundo et al.* UNDT/2012/077 and *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

37. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013) and *Finniss* Order No. 116 (GVA/2016)).

38. The Applicant submits that she has been employed with the Organization since 2009 and appears to indicate that the contested decisions would cause her frustration, unhappiness and loss of chance of career development, as she had a legitimate expectation to at least continue until end December 2017, unless properly terminated. The Applicant submits that whilst proper termination measures should have been taken, she has also alluded to a corresponding post in the new Mission that she could encumber; this has not been challenged by the Respondent.

39. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

Conclusion

40. In light of the foregoing, the Tribunal ORDERS:

> The application for suspension of action is granted and the contested decisions are suspended pending management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 6th day of October 2017