



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

KIFLE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Miller Wanjala Bwire

Cecil L. Kuyo

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Mission in the Republic of South Sudan (UNMISS). He filed the current Application on 11 February 2013 challenging the decisions not to: (a) renew his appointment with UNMISS beyond 30 September 2012; and (b) reinstate him to his original post of Strategic Planning Officer (SPO) when he was transitioned from the United Nations Mission in Sudan (UNMIS) to UNMISS on 8 July 2012.

2. The Applicant is seeking to be assigned to a senior planning officer or other similar post in any United Nations peacekeeping operation or to be reinstated as a State Coordinator with UNMISS or any other peacekeeping operation.

Procedural history

3. The Respondent submitted a Reply on 24 June 2013 in which he asserted that the following claims in the Application are not receivable:

- a) The Applicant's challenge against his reassignment of December 2010 and July 2011;
- b) The Applicant's challenge against the selection process for State Coordinator that began in 2011; and
- c) The Applicant's challenge against the termination of his appointment as of 31 December 2011.

4. On 31 October 2013, the Tribunal held a case management hearing, which was attended in person by the Applicant and his Counsel and Counsel for the Respondent. Once again, the Respondent raised the issue of receivability.

5. Pursuant to Order No. 008 (NBI/2014)¹, on 23 January 2014, the Applicant submitted a response on the receivability issues raised by the Respondent in his Reply and at the case management hearing.

6. The Tribunal indicated in Order No. 008 (NBI/2014) that it would specify the issues for determination upon receipt of the Applicant's response on receivability.

Facts

7. The Applicant was appointed to the post of SPO on a fixed-term appointment (FTA) at the P-5 level with UNMIS in Khartoum on 31 August 2009. His FTA was limited to service with UNMIS and was renewed from 1 July to 30 August 2010 and again from 31 August 2010 to 30 August 2011.

8. Effective 4 December 2010, the Applicant was reassigned within UNMIS to the post of State Coordinator in Aweil, South Sudan.

9. On 9 July 2011, UNMISS was established by Security Council resolution 1996 (2011) and on 26 July, the Chief Civilian Personnel Officer (CCPO), informed the Applicant that he was being reassigned from UNMIS² to UNMISS at the Aweil duty station.

10. On 25 August 2011, the Applicant signed an offer of appointment to transition from UNMIS to UNMISS³. His FTA was extended to 30 August 2012.

11. On 26 August 2011, the position of Head of Office/State Coordinator, UNMISS, was advertised. The Applicant applied and was interviewed on 4 October 2011. The Applicant was not selected for the position.

¹ Dated 16 January 2014.

² UNMIS wound up its operations on 9 July 2011 with the completion of its mandate.

³ The Applicant's personnel action (PA) form raised on 9 October 2011 stated that he was provisionally reassigned from UNMIS to UNMISS effective 7 July 2011 as a Senior Planning Officer at the P-5/4 level.

12. By a fax dated 13 December 2011, UNMISS requested authorization from the Office of Human Resources Management (OHRM) to separate the Applicant and eight other staff members from service effective 15 January 2012 due to the abolishment of their posts as of 31 December 2011. The Under-Secretary-General for Management (USG/DM) approved this request on 28 December 2011.

13. On 3 January 2012, the Applicant received a letter dated 29 December 2011 from the Director of Mission Support (DMS), UNMISS, indicating that he had not been transitioned from UNMIS to UNMISS and that his contract would be terminated with effect from 31 December 2011 in accordance with staff rule 9.6.

14. The same day, the UNMISS CCPO informed the Applicant that his contract was in the process of being extended through 30 June 2012.

15. On 6 January 2012, the Applicant wrote to the UNMISS Human Resources Office (UNMISS HRO) to request a review of the termination decision and on 16 January 2012, he wrote to protest the request from the HRO that he commence the check-out process. UNMISS HRO informed him on 24 January 2012 that his contract had been extended to 29 February 2012.

16. On 27 February 2012, the Applicant wrote the UNMISS Chief of Staff (UNMISS COS) to request an extension of his contract to the original expiry date of his contract, 30 August 2012. The same day, the UNMISS COS instructed the CCPO to extend the Applicant's contract until 30 June to allow the Mission time to finalize the recruitment process for the UNMISS State Coordinator post.

17. On 3 March 2012, the Applicant submitted a request for management evaluation of the "termination of contract up to 31 August 2012 to 30 June 2012 [sic]. [...] the termination letter first up to 31 December 2011 has been first extended to 29 February 2012 and subsequently to 30 June 2012 by mgmt". The Applicant asked that the Management Evaluation Unit (MEU) put his request on hold pending his efforts to amicably resolve the issue. Accordingly, MEU did not act on this request.

18. Between 1 January and 18 June 2012, the Applicant performed the duties of the UNMISS State Coordinator pending the completion of the recruitment of the selected candidate. On 19 June 2012, the Applicant assumed the functions of SPO, against the post of Deputy Chief of Staff, in the Office of the UNMISS COS.

19. On 31 August 2012, the UNMISS COS requested the extension of the Applicant's contract from 31 August to 21 September 2012 due to "compelling operational reasons". His contract was subsequently extended to 30 September 2012 at which time he was separated from service.

20. On 29 September 2012, the Applicant submitted a request for management evaluation of the decision to terminate his contract.

21. By a letter dated 30 November 2012, the USG/DM informed the Applicant that the Secretary-General had decided to uphold the decision not to extend his FTA beyond 30 September 2012.

22. The Applicant filed the current Application on 11 February 2013.

Parties' submissions

Respondent's submissions

23. The Respondent submits that the Applicant is precluded from challenging the following decisions because he failed to request management evaluation of them under Chapter XI of the Staff Rules:

- a) His reassignments in December 2010 and July 2011;
- b) The decision to conduct a selection exercise for the position of UNMISS Head of Office/State Coordinator in Aweil; and
- c) His non-selection for the UNMISS Head of Office/State Coordinator post.

24. Further, the Respondent submits that the Applicant's challenge against the termination of his appointment as of 31 December 2011 is not receivable because: (a) he withdrew his request for management evaluation regarding this issue; and (b) the Administration never implemented the decision since his appointment was renewed until 30 September 2012.

Applicant's submissions

25. At the 31 October 2013 case management hearing, the Applicant submitted that the following are the issues for determination by the Tribunal:

- a) Whether his movement from the post of SPO to State Coordinator in UNMISS was lawful;
- b) The status of the SPO post when he was assigned to the post of State Coordinator;
- c) Whether he had a right of return to the SPO post upon the expiry of his tenure and/or the abolition of the UNMIS State Coordinator post;
- d) Whether it was lawful for UNMISS to terminate or fail to renew his contract based on his unsuccessful interview for the State Coordinator post;
- e) Whether it was lawful for UNMISS to advertise the SPO post when he was still engaged as such but was on a provisional/temporary assignment as State Coordinator;
- f) Whether it was lawful for UNMISS to communicate his termination on or about 29 December 2011 without giving him a month's notice prior to termination;
- g) Whether there is a difference in the job description in the post of State Coordinator either at UNMIS or UNMISS;

- h) Whether the post of State Coordinator was in actual fact abolished;
- i) Whether it was lawful for UNMISS to advertise the post of State Coordinator when he was still incumbent;
- j) Whether UNMISS abused its discretion and acted unlawfully in terminating his contract on 31 December 2011; and

26. In his 23 January 2014 response on receivability, the Applicant submitted on one hand that while his December 2010 and July 2011 reassignments were submitted for management evaluation, the reassignments are not the Contested Decisions. This was merely an averment supporting his challenge of the Contested Decision. The issue of his reassignment was pleaded *res gestae* to explain the systematic prejudices he was subjected to. He seeks no redress on this issue. On the other hand, he submits that this issue is a pleaded and relevant issue for determination.

27. The Applicant asserts that his challenge against the selection process for the State Coordinator post was the subject of a management evaluation request and that MEU addressed the issue in its response of 30 November 2012.

28. The Applicant submits that his challenge against the termination of his appointment as of 31 December 2011 is also receivable because he sought management evaluation of this decision in his requests of 3 March 2012 and 29 September 2012. The Applicant submits that “despite the clarity in the application [...], the Management Evaluation dated 30th November 2012 by itself purports to address a different issue so far as the decision is concerned. The Management Evaluation addresses a decision not to extend the Applicant’s engagement beyond 30 September 2012. This was not the decision for which Management Evaluation had been sought”.

Issues

29. The issues for determination in this judgment are the receivability of the Applicant's claims regarding: (a) his reassignment to the State Coordinator post in December 2010 and July 2011; (b) his non-selection for the UNMISS State Coordinator post in June 2012; and (c) the termination of his appointment as of 31 December 2011.

Considerations

Did the Applicant submit a request for management evaluation of the decision to reassign him from the UNMIS SPO post to the position of State Coordinator in December 2010 and July 2011?

30. Under article 8.1(c) of the UNDT Statute, the jurisdiction of the Dispute Tribunal can only be invoked in this matter if the contested administrative decision has been previously submitted for management evaluation. Staff rule 11.2(a) provides in relevant part that a staff member wishing to formally contest an administrative decision is required to submit a written request for management evaluation to the Secretary-General. Such a request is a mandatory first step for an applicant prior to the submission of an application to the Dispute Tribunal and it is not open to the Tribunal to waive this requirement or make any exception to it.⁴

31. Pursuant to staff rule 11.2(c), a request for 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".

32. The record indicates that the Applicant was appointed to the post of SPO with UNMIS in 2009 and that he was reassigned to the post of UNMIS State Coordinator in Aweil, South Sudan, with effect from 4 December 2010. This means that the Applicant should have submitted a request for management evaluation of his

⁴ *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Ajdini* 2011-UNAT-108.

reassignment on or before 18 February 2011 to comply with staff rule 11.2(c) but he did not do so.

33. Further, on 26 July 2011, the UNMISS CCPO informed the Applicant of his provisional reassignment from UNMIS to the UNMISS State Coordinator post and that “depending on the final approval of the structure and funding of your programme, this post may be subject to review and eventual competitive selection”. Consequently, the Applicant had until approximately 24 September 2011 to submit a request for management evaluation of the July 2011 decision to reassign him to UNMISS as the State Coordinator but he did not do so.

34. It was not until 3 March 2012 that the Applicant submitted a request for management evaluation but then he effectively voided the document by requesting that MEU put it on hold indefinitely whilst he tried to amicably resolve the issue. He never requested reinstatement of this request so the Tribunal cannot deem this to be a proper request for management evaluation.

35. Even if the Tribunal was minded to accept the 3 March 2012 document as a request for management evaluation, it is noteworthy that the Applicant only indicated that the Mission’s failure to return him to the SPO post after he was not selected for the State Coordinator post violated his rights as a staff member. The Tribunal cannot stretch this to mean that he was contesting his December 2010 and July 2011 reassignments to the State Coordinator post.

36. On 29 September 2012, the Applicant submitted another request for management evaluation challenging only the decision to terminate his contract. Once again, the Applicant indicated that his right to return to the SPO post had been violated.

37. The Tribunal finds that the Applicant did not request management evaluation of the decisions to reassign him from the UNMIS SPO post to the UNMIS and UNMISS State Coordinator posts, in December 2010 and July 2011 respectively.

Since he failed to comply with staff rule 11.2(a), the Tribunal holds that these claims are not receivable.

Did the Applicant request management evaluation of the decisions to conduct a selection exercise for the position of UNMISS Head of Office/State Coordinator in Aweil and not to select him for this position?

38. As noted earlier, staff rule 11.2(a) provides in relevant part that a staff member wishing to formally contest an administrative decision is required to submit a written request for management evaluation to the Secretary-General.

39. The record shows that the post for the UNMISS Head of Office/State Coordinator was advertised on 26 August 2011. The Applicant applied for the post and was interviewed on 4 October 2011. Between 1 January and 18 June 2012, the Applicant provisionally performed the duties of the UNMISS State Coordinator pending the completion of the recruitment of the selected candidate. He was not the selected candidate thus on 19 June 2012 he was reassigned to the Office of the UNMISS COS as the SPO.

40. The Applicant has not proffered any evidence to the Tribunal that he requested management evaluation of the August 2011 decision to conduct a selection exercise for the position of UNMISS Head of Office/State Coordinator. Additionally, although he submitted a request for management evaluation in September 2012, this request made no mention of his non-selection for the State Coordinator post nor did it purport to challenge any procedural defects in the selection process. The request challenged the termination of his contract and the failure of UNMISS to return him to the SPO post after his unsuccessful bid for the UNMISS State Coordinator post.

41. The Tribunal finds that the Applicant did not request management evaluation of the decisions to conduct a selection exercise for the position of UNMISS Head of Office/State Coordinator in Aweil and not to select him for this position. Since he failed to comply with staff rule 11.2(a), the Tribunal holds that these claims are not receivable.

Is the Applicant's challenge against the decision to terminate his appointment as of 31 December 2011 receivable?

42. Article 2.1 of the Tribunal's Statute states:

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

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

43. The record shows that the Applicant was informed on 3 January 2012 of the termination of his UNMIS contract effective 31 December 2011. However, between 24 January and 27 February 2012, the Applicant's FTA was extended initially until 29 February 2012 and then until 30 June 2012. The Mission subsequently decided to extend his FTA to 30 September for operational reasons.

44. While the Applicant actually filed the 3 March 2012 management evaluation request within the delay prescribed by staff rule 11.2(c), the Tribunal notes that there was no administrative decision within the meaning of article 2.1 of the UNDT Statute outstanding when this request was filed because his FTA had been extended to 30 June 2012.

45. Although the Tribunal interprets the Applicant's rather confusing 3 March 2012 request for management evaluation as challenging the decision to extend his FTA only to 30 June 2012 instead of to 31 August 2012, this does not change the fact that the Mission had reversed its decision to terminate his contract effective 31 December 2011 by renewing his contract. The Tribunal's interpretation of the 3 March 2012 request also does not change the fact that the Applicant's appeal to MEU

to hold its evaluation of the contested decision in abeyance until further notice nullified the request because he did not later seek reinstatement.

46. The Tribunal concludes that the Applicant's challenge against the decision to terminate his appointment as of 31 December 2011 is not receivable because: (a) the contested decision was reversed by the Mission prior to implementation; and bi) the Applicant's management evaluation request was nullified as a result of his failure to reinstate it.

Decision

47. The Tribunal holds that:

- a) The challenge against the decisions to reassign the Applicant from the UNMIS SPO post to the UNMIS and UNMISS State Coordinator posts, in December 2010 and July 2011 respectively are not receivable;
- b) The challenge against the decisions to conduct a selection exercise for the position of UNMISS Head of Office/State Coordinator in Aweil and not to select the Applicant for this position are not receivable; and
- c) The challenge against the decision to terminate the Applicant's FTA as of 31 December 2011 is not receivable.

48. In light of the fact that the Applicant's issues, which have been set out at paragraphs 25(a) and (b) and (d) to (j) above are in effect the same issues that have been decided on in this judgment, these issues are also not receivable.

49. The Tribunal further holds that the only live issues left in this case for determination are:

- a) Whether the decision not to renew the Applicant's fixed-term appointment beyond 30 September 2012 was lawful;

- b) Whether the Applicant had a right to be re-assigned to another position upon expiry of his appointment outside the normal staff selection process; and
- c) Whether the Applicant is entitled to the remedies he is seeking.

(Signed)

Judge Vinod Boolell
Dated this 22nd day of July 2014

Entered in the Register on this 22nd day of July 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi