



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

HERSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Seth Levine, OSLA
Bart Willemsen, OSLA

Counsel for the Respondent:

Stephen Dietrich, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 7 October 2011, the Applicant filed an Application contesting the termination of her fixed-term appointment with the United Nations Mission in Sudan (“UNMIS”) upon the closure of UNMIS on the grounds that:

- a. the decision was a breach of the process by which staff members of UNMIS were transferred to the United Nations Mission in South Sudan (“UNMISS”);
- b. the decision was vitiated by improper motives;
- c. she had a legitimate expectation that her fixed-term appointment would not be terminated; and
- d. the decision was taken without proper delegated authority and was *ultra vires*.

2. The Respondent filed a Reply on 11 November 2011 asserting that:

- a. the Applicant was not recommended for reassignment to UNMISS following the completion of a fair, transparent, impartial and objective comparative review process.
- b. following the termination of the mandate of UNMIS, the necessities of service required the abolition of the Applicant’s post; and that
- c. the termination of the Applicant’s contract was lawful.

Facts

3. The Applicant joined UNMIS on 26 July 2005 as a Broadcast Technology Officer (“BTO”) within the Public Information Office (“PIO”) on an Appointment of Limited Duration under the former 300 series of the Staff Rules. Following contractual reforms in 2009 the Applicant was reappointed under a fixed term

appointment at the FS 5 level effective 1 July 2009. Her appointment was subsequently renewed on an annual basis.

4. In January 2010, she was promoted to the only P-4 post of BTO in the mission following a competitive process in respect of VA-09-PUB-UNMIS-423099-R-KHARTOUM.

5. By its Resolution 1978 (2011) of 27 April 2011, the Security Council extended the mandate of UNMIS until 9 July 2011. By Resolution 1997 (2011) of 11 July 2011, the Security Council, inter alia, decided to withdraw UNMIS effective 11 July 2011 and called upon the Secretary-General to complete the withdrawal of all uniformed and civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011.

6. On 1 June 2011, Mr. Nicholas Von Ruben, Director of Mission Support, UNMIS, issued Information Circular No. 218/2011 (Movement of International Staff to South Sudan). The purpose of the Circular was to inform UNMIS personnel of the transition of international staff to the new mission in South Sudan. The said circular also provided guidelines for the transition to the new mission.

7. Also on 1 June 2011, the Applicant received an email with an attached Reassignment Form stating that she had been reassigned to Juba effective 1 July 2011. The Reassignment Form was signed by Mr. Martin Ojjerro, Officer-in-Charge of the Human Resources Services Section and by Nicholas Von Ruben. The Applicant signed the offer of a fixed-term appointment for the period 1 July 2011 – 30 June 2012 for the position of BTO with UNMIS on 26 July 2011.

8. Meanwhile on 26 June 2011, another Information Circular was issued by UNMIS announcing the formation of a Comparative Review Panel ("CRP") to review international posts in the mission in cases where the number of current staff members exceeded the number of proposed posts in the new mission for particular job categories and post levels. The comparative review took place from 26 June to 5 July 2011. On 27 July 2011, the Applicant received a Letter of

Separation, signed by Mr. Ojjerro, in his capacity as Chief Civilian Personnel Officer (“CCPO”), UNMIS.

9. On 28 July 2011, Mr. Ojjerro and the UNMIS Visa Office advised the Applicant to check out of the Mission and to leave Sudan as soon as possible as Sudanese visas would only be effective and recognized as valid by the Sudanese Government until 7 August 2011. The Applicant left Sudan on 4 August 2011.

10. The Applicant filed a request for management evaluation of the termination decision on 12 August 2011 and, on 23 August 2011; she also filed an application seeking suspension of that decision. The case was heard by the Tribunal on 29 August 2011.

11. The Tribunal issued Judgment No. UNDT/2011/154 and refused the application for suspension of action on 31 August 2011. The Tribunal, however, found that the decision to terminate the Applicant’s contract was *prima facie*, unlawful. The Tribunal further found as follows:

45. It is the finding of this Tribunal that the subject matter of this suit cannot properly be addressed and determined in a suspension of action application. The Application for suspension of action is hereby refused for not having satisfied one of the three conditions required under the Statute and Article 13 of the Tribunal’s Rules of Procedure for its grant.

46. In view of its finding above, the Tribunal, in the interests of justice and in exercise of its inherent powers and the provisions of Articles 19 and 36 of its Rules of Procedure, hereby transfers the instant Application to the general cause list to be heard on the merits.

12. Judgment No. UNDT/2011/154 was appealed to the Appeals Tribunal which issued Judgment No. 2012-UNAT-243 on 29 June 2012. UNAT, *inter alia*, held that in ordering the placing of the application for suspension on the list of cases to be considered on the merits and requesting the parties to file written documents on the merits, the UNDT exceeded the jurisdictional powers conferred on it by its Statute and rescinded the judgment.

13. On 7 October 2011, the Applicant filed the present Application on the merits. The Reply was filed on 11 November 2011.

14. On 22 June 2012, the Applicant filed an application requesting for a joinder of three UNDT cases including the Applicant's. The Respondent filed objections to the application on 25 June 2012. The Tribunal refused the application by oral order issued during the first day of the hearing on 26 June 2012.

15. The Tribunal heard the case from 28 to 29 June 2012 during which time live evidence was received on behalf of the Respondent from: Ms. Sylvia Fletcher who was the Principal Civil Affairs Officer and Chief of Civil Affairs in the Southern Sudan Regional office in UNMIS; Ms. Hua Jiang who was the UNMIS Chief Public Information Officer; Ms. Quade Herman who was the Chief of Radio in UNMIS; and (4) Mr. Martin Ojjero, the then Chief Civilian Personnel Officer in UNMIS. The Applicant and Mr. Neeraj Bali testified for the Applicant.

16. On 24 July 2012, the Applicant sought leave to adduce additional evidence for her case. The evidence that the Applicant wanted admitted was:

- a. a statement from an intern with the Office of Staff Legal Assistance (OSLA) in which he explains how he came to discover a photograph on Ms. Herman's Flickr account showing Mr. Wimhurst with comments by Ms. Herman;
- b. the said photograph and comments;
- c. an email dated 19 May 2010 from Mr. Eissa to various recipients in Radio Miraya which states the reporting lines that were to be followed as a result of direct instructions from the SRSG;
- d. an email chain during the period of 8 June 2010 to 14 July 2010 (concerning reporting lines) between Mr. Eissa who was then Officer – in-Charge/Director, Communications & Public Information, UNMIS and Mr Claude Cirille, then Chief of Radio at the mission.

- e. another email chain beginning on 28 July 2010 from Mr. Bali to various recipients in which the instructions from the SRSG are mentioned.

17. On 30 August 2012, the Respondent also sought leave to file additional evidence. The evidence that the Respondent wanted admitted included:

- a. Two letters from Mr. Ojjerro informing two Broadcast Technology Technicians of their reassignment from UNMIS to the new mission, UNMISS.
- b. An extract from the Secretary-General's report on the budget for UNMISS for the period from 1 July 2011 to 30 June 2012, which identifies the posts in UNMISS's Communications and Public Information Division.

18. On 16 August 2012, the Tribunal informed the parties that the issue of admissibility of the additional evidence would be dealt with in this Judgment.

19. The parties filed their closing submissions on 31 August 2012.

Respondent's witnesses

20. Ms. Fletcher's evidence is summarized below.

- a. She is currently the Chief of the Recovery, Reintegration and Peace-Building Section in UNMISS at the D-1 level. Prior to joining UNMISS; she was the Principal Civil Affairs Officer and Chief of Civil Affairs in the Southern Sudan Regional office in UNMIS.
- b. She served as the co-chairperson on CRP, a panel set up pursuant to Information Circular 327/2011, which reviewed international staff of UNMIS as part of the transition process to UNMISS.
- c. The CRP agreed on a methodology for rating staff according to the review criteria. They agreed upon the weighting for each criterion and the points to be awarded.

- d. A rating table was drawn up to reflect what was agreed. A list of criteria that would add up to 100 points was agreed upon as follows:
 - i. Performance (based on ePAS reports).
 - ii. Performance - Relevant experience/diversity.
 - iii. Performance - Direct relevant experience (based on PHPs).
 - iv. Adherence to core values (based on the core values section of the ePAS).
 - v. Length of service (based on PHPs).
- e. After the methodology and criteria were agreed upon, the Panel broke up into groups to conduct the reviews. All of the groups worked in one large room.
- f. She and another Panel member, the Senior Security Sector Reform Officer of UNMIS, reviewed the Applicant and Mr. Sonam Tobgyal for the one P-4 post of Broadcast Technology Officer in UNMISS.
- g. After the comparative review process, the Applicant received 63 points and Mr. Tobgyal received 74 points. The Panel recommended that Mr. Tobgyal be rolled over to the Broadcast Technology Officer post in UNMISS and that the Applicant be included in the pool of available candidates in the event that there were found to be surplus posts with similar functions in UNMISS.
- h. The Panel did not consider the job done by the Applicant in the old mission. The Panel relied on updated PHPs produced by the Applicant.

21. Ms. Herman's evidence is summarized below.

- a. She is currently the Chief of Radio in UNMISS at the P-5 level. Prior to joining UNMIS she was the Chief of Radio in UNMIS. The Chief of Staff (COS) was in the panel which interviewed her for the position.
- b. She was a member of the CRP but she did not review the Applicant and Mr. Tobgyal.
- c. At the beginning of the CRP, she noticed that Mr. Tobgyal was identified as a Radio Producer in an UNMIS staffing table. Since Mr. Tobgyal performed the functions of a Broadcast Technology Officer, not a Radio Producer, she mentioned to the CCPO of UNMIS, Mr. Ojjero, that Mr. Tobgyal should be reviewed as a Broadcast Technology Officer rather than a Radio Producer.
- d. She was asked to provide the terms of reference for the one P-4 level post of BTO in UNMISS. There was a need to combine two roles of studio and transmission into one. The Applicant was in studio and Mr. Tobgyal oversaw transmission and studio.
- e. The drafting of the terms of reference was not intended to favour Mr. Tobgyal's experience over that of the Applicant. She did not have a personal interest in not seeing the Applicant transitioned to UNMISS.
- f. She knew that Mr. Tobgyal was not a radio producer but she felt that he had sat on a post that did not reflect his functions.
- g. She was aware that only one Broadcast Technology Officer P-4 post existed in UNMIS but in the context of the CRP, it was understood that where there were differences between a staff member's post title and functions, it would be addressed so that the process was fair to everyone.
- h. It is not true that two FS level technical staff members were recruited to cover studio operations after the CRP. The FS level

staffs were always part of the mission. There were back and forth exchanges of correspondence with New York and the FS level staffs were retained in the end.

- i. The allegations that she created a hostile working environment for the Applicant and that she exerted any pressure upon her or harboured any personal animus against her are false.
- j. There was a memorandum of understanding (“the MOU”) between UNMIS and a non-governmental organization, Fondation Hironnelle (“FH”), whereby the UNMIS radio station, Radio Miraya was operated under the overall authority of the Chief of Radio and under the operational editorial management of an Editor-in-Chief appointed by FH. The MOU required that decisions were to be made on a consensual basis.
- k. The lines of authority in terms of the MOU were that the radio section was divided into two: a section dealing with news and another section dealing with programs. The head of the programs section was a P-4 Radio Producer who oversaw both FH and UN staff members. This arrangement applied at both UNMIS and UNMISS. A P-4 level BTO did not fit in this context because they had no business with editorial content but only provided technical support.
- l. When she arrived in UNMIS, there had been a great deal of conflict over editorial control of the Radio Miraya between UNMIS and FH. Her job was to get the relationship back on track. Her efforts to do so were met with considerable resistance from the Applicant. They operated like two radio stations instead of one. UN staff reported to other UN staff and the same was the case with FH staff. The FH staff felt left out and there was a need to rebuild the relationship.

- m. She had heard people mention the SRSG's directive about the working relationship between UNMIS and FH staff but she had seen nothing on paper. She therefore sought guidance from Ms. Jiang, the Chief, and Public Information Office (PIO).
- n. Her role was to focus on the day to day activities to get work on track and not to interpret the MOU. She wanted to get everyone working well together. She had never discussed these issues with Mr. Wimhurst.
- o. Shortly after she arrived in UNMIS, the Applicant went to see her with a copy of the MOU and told her that it was illegal and wrong. The Applicant informed her that she did not like to work with FH staff and would not respond to them. Over time, the Applicant became hostile to her.
- p. She, generally, had no problems with the Applicant's work performance. There was a time when certain software in Juba was not functioning and she asked the Applicant to go and fix the problem but the Applicant declined. Experts were brought in to fix the problem but the Applicant did not grant them access to a database.
- q. When she joined UNMIS, the ePAS issues were a mess. The Chief, PIO instructed that the ePASes should be properly aligned. She was informed by the Human Resources Office that in view of the fact that she had been working in UNMIS for five months, she should be the FRO or additional Reporting Officer.
- r. She did not exert any pressure to become the Applicant's FRO for the 2010-2011 ePAS cycle. As Chief of Radio, she was responsible for ensuring that performance evaluations for all staff in the Radio Unit were duly completed. She was informed by the Human Resources Office that she should be the FRO or Additional

Reporting Officer for a number of staff members including the Applicant.

- s. She was not aware of the numerous complaints about her that the Applicant had raised in an email dated 2 May 2011 to Ms. Jiang. The Applicant had, however, spoken to her about low staff morale as a result of the impending closure of the Mission.
- t. There was never a situation where a professional level staff member reported to national staff members. All media organizations had to work according to an editorial line.

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

- a. He is currently a Human Resources Officer in the United Nations Regional Service Centre ("RSC") in Entebbe, Uganda. Prior to joining RSC, he was the CCPO in UNMIS.
- b. He was the *ex-officio* member of the Comparative Review Panel at the time of the transition process from UNMIS to UNMISS. As an *ex officio* member, his role was to advise the CRP on policy and guidelines but he could not vote. He was the sole adviser assisted by a team from New York's Field Personnel Division.
- c. During the comparative review process, there were deliberations to determine which UNMIS staff should be reviewed against whom. Throughout the Mission, many staff members were placed against posts that did not reflect the functions they actually performed.
- d. In order to ensure a fair process, the CRP decided that staff members should be reviewed against other staff members who were performing the same functions at the same level.
- e. It was brought to his attention that Mr. Tobgyal, who was identified as a Radio Producer at the P-4 level in an UNMIS

staffing table, was performing the functions of a Broadcast Technology Officer at the P-4 level.

- f. He was satisfied at the time that Mr. Tobgyal was performing the functions of a BTO at the P-4 level and that he should be reviewed against the Applicant, the other P-4 Broadcast Technology Officer in UNMIS, for the one P-4 post in UNMIS.
- g. Posts had been borrowed during the referendum in South Sudan and some staff members sat on posts other than those reflected as their job titles. The practice of borrowing posts came about because there were instances when more staff members were needed and there were high vacancy rates in other areas. New York agreed that posts could be borrowed from vacancies to meet the requirements of the Mission. The borrowing of posts was a temporary arrangement.
- h. Mr. Tobgyal's title as recorded on his PHP was Technical Director/Broadcast Technology Officer. Mr. Tobgyal was the Applicant's FRO for the 2009-2010 and 2010-2011 ePAS cycles. A review of his functions, as described in his ePASes and PHP shows that he was not performing the functions of a Radio Producer.
- i. Mr. Tobgyal was recruited at the P-3 level and became a P-4 through the system of borrowing posts.
- j. He was not aware that two roles were identified in a staffing table for UNMISS dated March 2011, that of Technical Director and the other of Broadcast Technology Officer.
- k. He was not familiar with the workings of the BTO in UNMIS. He sought clarifications from those with better understanding or knowledge of the roles within the radio section. He sought

guidance from the head of the relevant section whenever the need arose.

1. Ms. Herman was part of the panel but clarification was mostly sought from Ms. Jiang. No guidance was sought from Ms. Herman.

Applicant's witness

23. Mr. Bali's evidence is summarized below.

- a. There were two meetings with the SRSG on the matter of editorial control and reporting lines with FH. The first meeting was called in May 2010 by the SRSG after a very damaging broadcast had gone on air. The SRSG called all the senior United Nations staff members working in radio. The SRSG was shocked to learn that the offensive broadcast had aired because FH had editorial control. He directed that United Nations staff members must have editorial control and that no United Nations staff member should report to FH personnel.
- b. Pursuant to the SRSG's instructions, Dr. Eissa sent out a communication showing the reporting lines and informing United Nations staff members of the directive. FH staff members raised objections at various meetings and to Dr. Eissa who referred them to the SRSG's directive.
- c. FH persisted in their objections until Mr. Wimhurst joined the United Nations in August 2010. Mr. Wimhurst directed that reporting lines and editorial control would revert to FH and also directed that the SRSG's directive should be ignored. This directive put many staff in a difficult situation.
- d. He, Mr. Tobgyal and the Applicant requested to meet again with the SRSG which they did whilst Dr. Eissa was on leave. Mr. Wimhurst was present at the meeting but the SRSG requested that Mr. Wimhurst should leave the room. They informed the SRSG

that Mr. Wimhurst had reversed his previous directive. The SRSG insisted that his directive was still applicable and should be followed. When they came out of the meeting, they found Mr. Wimhurst standing in the hallway and he glared at them and nodded.

- e. The SRSG did not discuss the terms of any Memorandum of Understanding between the United Nations and FH with him.
- f. The new Chief of the Public Information Office, Ms. Herman, was recruited in mid-November 2010. She was hostile and abusive to him as evidenced by several emails she had sent him. Ms. Herman gave editorial control to FH and told United Nations staff to report to FH staff. He expressed his concerns about FH to Ms. Herman on many occasions which she ignored. This contributed to her hostility against him.
- g. Mr. Wimhurst was very close to FH staff and often said so at staff meetings. He is the one that brought Ms. Herman into the United Nations system.
- h. Ms. Herman was condescending towards the Applicant and would often dismiss her suggestions off-handedly. He witnessed this attitude during senior radio management meetings held weekly.

Applicant's case

24. The Applicant's case as per her oral testimony and pleadings is summarized below.

25. The decision to terminate her appointment was taken by the CCPO of UNMIS on 27 July 2011. The said CCPO did not have the authority to take such a decision. Consequently, the decision was *ultra vires* and unlawful.

26. Her separation was a unilateral act, purportedly initiated on behalf of the Secretary-General, that is, it was a termination under staff rule 9.6(a) although there is no unequivocal statement that the appointment has been terminated.

27. Pursuant to staff rule 9.6(c), termination of an appointment falls within the authority of the Secretary-General. Staff rule 9.6(c) does not provide for a delegation of this authority. ST/AI/234 Rev.1 (Administration of Staff Regulations Staff Rules), is the sole administrative instruction concerned with the delegation of authority within the United Nations and a review of this issuance demonstrates that the authority to terminate an appointment has not been delegated other than to (i) the Heads of UNOG, UNOV, UNEP and UN-HABITAT and (ii) the ASG/ORHM. Delegation must not be guessed at or presumed.

28. The Respondent had stated that the ASG/OHRM authorized the termination of the Applicant's contract. On 27 July, the CCPO issued a notice of termination. On 29 July, the Director of FPD/DFS wrote to the ASG/OHRM seeking approval for the said termination, which was duly granted. Where delegated authority exists, it must be exercised by the person in whom it is vested. Delegation must precede the taking of the decision – a delegated authority is not synonymous with the retrospective rubber stamping of a decision taken by a person without the proper authority.

29. The decision to terminate her employment was taken at the Mission level and was unlawful. Even if the ASG/OHRM had the requisite delegated authority, she could not cure a decision which was *ab initio* unlawful by subsequently authorizing it.

30. Neither staff rule 9.6 nor ST/AI/234 delegates the authority to terminate appointments to the Chief Civilian Personnel Officer of UNMIS, therefore the impugned decision is *ultra vires*.

31. Mr. Tobgyal is in fact, encumbering the P-4 Broadcast Technology Officer post in UNMISS, the precise job that the Applicant encumbered in UNMIS.

Whilst employed in UNMIS, Mr Tobgyal was a P-4 Radio Producer assigned to technical functions.

32. The original UMMISS PIO proposed staffing table, drafted on 21 March 2011, envisaged two separate and distinct radio technical posts – one Technical Director and one Broadcast Technology Officer. By 25 June, however, the post of Technical Director for the new mission had been scrapped. This, the Applicant submits, is not surprising, as there was no classified post for a Technical Director in UNMIS. Thus, in accordance with Information Circular 218/2011, the person who should have been transferred to the P-4 Broadcast Technology Officer post was the Applicant, as the sole P-4 Broadcast Technology Officer in UNMIS.

33. She was the only person recruited to the Broadcast Technology Officer position in UNMIS. Any *de facto* change in job title that would allow Mr Tobgyal to suddenly become eligible under the terms of Information Circular 218/2011 is an unlawful attempt to circumvent proper recruitment and classification procedures and to undermine the letter and spirit of IC/218/2011.

34. Had the comparative review process been fair, transparent and lawful rather than vitiated by animus and dishonesty, she would have been transitioned to the new Mission. In support of this claim the Applicant provides the following illustrations:

- a. Her marginalization as a result of being identified as part of a group that was opposed to the relationship between Radio Miraya and Fondation Hirondelle.
- b. The harassment she suffered at the hands of Ms. Quade Herman and others orchestrated by Fondation Hirondelle.

35. She had secured the only P-4 Broadcast Technology Officer post available in UNMIS through a competitive recruitment process. Under the terms of Information Circular No. 218/2011, she was bound to be transitioned to UNMISS. The fact that Mr. Tobgyal was even in a position to be considered for the P-4 UNMISS post is evidence of bad faith or incompetence.

36. The evidence tendered by Ms. Herman of the terms of reference which she drafted is further evidence of bad faith. Pursuant to Information Circular No. 334/2011, the one P-4 BTO post in UNMISS was either a wholly new post or a post whose functions had changed by more than 30% and as such should have been filled through the regular competitive selection process.

37. Prior to Mr. Wimhurst's and Ms. Herman's tenure, there was no evidence that her concerns regarding FH impacted on her professional relationships. The relationship with FH was in contravention of the United Nations Charter, Rules and standard operating procedures.

38. In relation to the incident referred to by Ms. Herman in her testimony where it was alleged that when certain software in Juba was not functioning and the Applicant was asked to go and fix the problem but declined, the Applicant submits that Ms. Herman had no United Nations experience and was unaware that ST/SGB/2004/15 legislates the class of persons who are to be granted access to official Information Communications and Technology systems and their responsibilities. The Applicant further submitted that contractors are specifically excluded from authorization and staff members who have custody or access to official ICT data have various responsibilities including preventing access to those not authorized.

39. Mr. Tobgyal joined UNMIS in early 2007 against a P-3 Broadcast Technology Officer post concerned solely with transmission. Ms. Herman and Mr. Ojjero testified that at the time of the comparative review process, it was discovered that Mr. Tobgyal was in fact sitting against a P-4 Radio Producer post and that a decision was taken in the interests of fairness to place him against a P-4 Broadcast Technology Officer post in a comparative review with the Applicant. The Applicant submits that Mr. Tobgyal was maneuvered into a borrowed post from a P-3 post and to maintain that he was entitled to be considered a P-4 for transitioning to UNMISS in a process that was a rare exception to the inviolability of competitive recruitment was extraordinary and unconscionable. The purported reclassification of Mr. Tobgyal's P-3 post was illegal.

40. The Applicant further submits that the terms of reference for the P-4 BTO post in UNMISS were drafted by Ms. Herman whose animus towards the Applicant has been well enumerated. The Applicant avers that they were deliberately targeted towards the transmission side of operations to minimize the possibility of the Applicant being awarded the position.

41. The Applicant submits that she is nearing retirement age and that despite her best efforts, she has been unable to secure further employment since being separated and that in the present circumstances where she has suffered significant mistreatment for seeking to uphold the United Nations' rules and regulations, the Tribunal would be justified in exceeding the two year maximum award. The Applicant further submitted that she has suffered significant moral damages as a result of the deliberate manipulation of the Organization's processes.

42. Based on the foregoing, The Applicant seeks a declaration that the decision to terminate her contract was unlawful. She further seeks appropriate remedies by way of specific action and/or damages.

Respondent's case

43. The Respondent's case is summarized below.

44. All posts within UNMIS were abolished as a consequence of the Security Council's decisions to extend the mandate of UNMIS for a final time to 9 July 2011, and withdraw UNMIS, effective 11 July 2011. In accordance with the Security Council's request that the Secretary-General transfer appropriate staff from UNMIS to UNMISS, the Administration established a transition process under which UNMIS staff members had the opportunity to be considered for retention in the new mission in South Sudan, UNMISS.

45. The Administration notified UNMIS staff through Information Circulars No. 218 and 327/2011, that some staff would be subjected to a comparative review process. The Circulars provided that, where the number of posts in the new mission was lower than the current encumbered posts in UNMIS at the same

occupational group and level, the staff members affected would be subject to the comparative review process.

46. The Applicant and Mr. Tobgyal were reviewed together for one P-4 BTO post in the new mission. While Mr. Tobgyal's functional title was Radio Producer, he was reviewed as a Broadcast Technology Officer.

47. At the outset of the comparative review, the Panel decided the principles for determining which staff members should be reviewed against each other, and for which posts. There were a number of cases where a staff member's functional title differed from the functions he or she performed.

48. In his evidence, the CCPO explained that this situation arose due to the practice of "borrowing" vacant posts within UNMIS to meet staffing needs. In such cases, the Panel agreed that candidates whose Post Titles were different from the functions they performed should be reviewed for positions in the occupational group of the functions currently being performed. The Panel decided to compare "apples with apples" and "oranges with oranges", that is, staff members were reviewed against other staff members who were performing the same functions, at the same level. This approach met the operation needs of the new mission, and was also fair for all staff.

49. The Panel accepted the CCPO's advice that Mr. Tobgyal should be reviewed against the Applicant. The CCPO gave evidence that he was satisfied that Mr. Tobgyal was performing the functions of a BTO, not a Radio Producer, at the P-4 level. With responsibility for advising on human resources matters in UNMIS, the CCPO was the appropriate person to advise the Panel on this matter.

50. The CCPO sought guidance from the Chief of the Public Information Office (CPIO), who was not a member of the Panel, on the technical aspects of the functions of a BTO and a Radio Producer. Further, Mr. Tobgyal's performance record (e-PAS) demonstrated that he was not performing the functions of a Radio Producer. Mr. Tobgyal had also recorded in his Personal History Profile (PHP) his title of "Technical Director/Broadcast Technology

Officer". Mr. Tobgyal supervised the Applicant in her role as BTO, and was the Applicant's first reporting officer for the 2009-2010 and 2010-2011 e-PAS cycles.

51. There is no merit in the Applicant's assertions that she was the only person competitively recruited to the P-4 post of BTO, and, as such, she was entitled to be automatically reassigned to the sole P-4 BTO post in UNMISS. The principles that determined which staff members would be reviewed together were agreed by the Panel. The CCPO advised, and the Panel accepted, that Mr. Tobgyal was performing the functions of a BTO at the P-4 level. As noted in the Panel's report, all the staff members reviewed, were competitively recruited.

52. The Applicant has produced no cogent evidence concerning Mr. Tobgyal's recruitment beyond mere speculation. Further, it is indisputable that it would not have been fair to review Mr. Tobgyal against the three P-4 Radio Producers when he was not performing the functions of a Radio Producer. Accordingly, the Panel's decision to review the Applicant against Mr. Tobgyal was correct.

53. The Applicant was evaluated against the review criteria, according to an objective methodology developed by the Panel. The review of the Applicant was impartial. The Panel did not make any errors in evaluating the candidates according to the agreed methodology. There is no evidence that factors that were not part of the agreed methodology were taken into account by the Panel.

54. The Applicant and Mr. Tobgyal were subject to an objective and impartial comparative review process. To avoid any potential conflict of interest, the Panel agreed that no Panel member would review a staff member in their occupational group or with whom they were close. The Applicant and Mr. Tobgyal were reviewed by two Panel members, the Co-Chairperson of the Panel (who was the Principal Civil Affairs Officer and Chief of Civil Affairs in the Southern Sudan Regional Office) and the Senior Security Sector Reform Officer of UNMIS.

55. In her evidence to the Dispute Tribunal, the Co-Chairperson stated that they did not seek or receive any input from anyone regarding the review of the Applicant and Mr. Tobgyal, save for consulting human resources colleagues to obtain technical information regarding the functions of a BTO. She stated that she

did not recall speaking to the Chief of Radio, a fellow Panel member, regarding the review. In her evidence, the Chief of Radio confirmed that she did not discuss the review of the Applicant and Mr. Tobgyal with any member of the Panel.

56. To the extent that the Applicant now contends that the Panel members who carried out the review did not have experience in broadcast technology, the Co-Chairperson explained in her evidence that she and her fellow Panel member consulted colleagues who worked in human resources to gain an understanding of the functions of the BTO in UNMISS, as described in the Terms of Reference (TORs). Further, in order to ensure impartiality, the Panel member with experience of broadcast technology (the Chief of Radio) could not review the Applicant and Mr. Tobgyal.

57. The CRP methodology was not flawed. It was agreed by the Panel and was proposed in view of requirements of fairness, based on their objective observations on the performance appraisal system in the United Nations. The Dispute Tribunal does not substitute its own assessment of the methodology that should have been applied.

58. The Applicant's contention that the termination decision was motivated by improper motives on the part of the Chief of Staff and Chief of Radio is without merit. The Applicant has not discharged her burden of proving that the Chief of Staff or Chief of Radio participated in, or influenced the comparative review process, or that they held any personal animus against her. Nor did the Applicant establish any connection between the differences she had with them and the decision to terminate her appointment.

59. Contrary to the Applicant's assertions that the decision to terminate her appointment was improperly motivated, in part, due to her conflict with the Chief of Staff regarding the running of the radio station, Radio Miraya. The Respondent submits that this contention is without foundation. The Applicant has not adduced any evidence that the Chief of Staff was responsible for the termination decision. He was not a Panel member, nor is there any evidence that he was responsible for

the Administration's decision to accept the Panel's recommendation that Mr. Tobgyal be reassigned to UNMISS.

60. The Applicant's contention that the decision was improperly motivated as the Chief of Radio, who was a member of the Panel, did not favour the Applicant and was hostile to her due to the Chief of Radio's allegiance to the Chief of Staff is also incorrect for the following reasons:

- a. The Chief of Radio did not have any input into the evaluation of the Applicant and Mr. Tobgyal against the review criteria. The Chief of Radio's evidence, corroborated by the Co-Chairperson of the Panel, should be accepted.
- b. The Chief of Radio properly drew to the CCPO's attention that Mr. Tobgyal ought to be reviewed as a P-4 BTO in view of the Panel's agreed approach regarding which staff should be reviewed together. The CCPO advised the Panel that she was correct.
- c. The Chief of Radio did not draft the TORs for the P-4 BTO post in UNMISS with the goal of favouring Mr. Tobgyal. She explained in her testimony that, previously, the UNMISS staffing table included two P-4 BTOs, which reflected the staffing situation in UNMIS, with one officer responsible for studio operations (the Applicant) and the other responsible for transmission operations (Mr. Tobgyal). However, the new staffing table included just one P-4 BTO. Therefore, the TORs for the UNMISS post combined the roles and, by necessity, the duties and responsibilities described in the TORs covered both studio operations and broadcast transmission operations.
- d. In cross-examination, the Chief of Radio denied that any concerns about the Applicant influenced the drafting of the TORs. The Respondent submitted that the Applicant had adduced no evidence that casts any doubt on the testimony that the TORs were not drafted on the operational requirements of UNMISS in mind.

- e. In cross-examination, it was suggested to the Chief of Radio that UNMISS was forced to take back two technical staff who were not transitioned to UNMISS to cover the studio operations in Radio Miraya. The Applicant claimed in her evidence that one staff member, Mr. Sayi, was later reinstated. In her evidence to the Dispute Tribunal, the Chief of Radio explained that this was incorrect. There were two FS (field service) technical staff in UNMIS and they both were transitioned to UNMISS. Initially, there was a proposal to remove the two FS posts from the UNMISS staffing table. These posts were later put back in the staffing table, and the two technical staff members were not separated.
- f. The Chief of Radio was proposed as a Panel member by the Chairperson of the UNMIS FSU, not the Chief of Staff. The Chief of Radio's evidence in this regard is not refuted.

61. The allegations of harassment of the Applicant by the Chief of Radio are without merit. The Applicant has not demonstrated that she was subjected to a hostile work environment and pressure from the Chief of Radio.

62. The Applicant's attempt to impugn the selection of the Chief of Radio is without merit. The contention that the Chief of Radio was the least qualified candidate is made without any factual basis. The Applicant played no part in her recruitment. The Chief of Radio denied that she knew the Chief of Staff before she joined UNMIS, and her evidence should be accepted. The Applicant presented no evidence on who selected the Chief of Radio: the Chief of Staff was just one of the panel members. Nor did the Applicant present evidence concerning the identity of the hiring manager, or the head of department/office that made the selection decision under ST/AI/2010/3 (Staff selection system).

63. There is no credible evidence that the Chief of Radio held any animosity towards the Applicant as the Applicant had raised concerns about the issue of editorial control over Radio Miraya.

64. The issue of editorial control was addressed in the MOU between UNMIS and FH. The MOU provided that decisions with respect to editorial matters would be made on a consensual basis, with the UNMIS Chief of Radio retaining ultimate decision-making authority. The MOU also provided for editorial lines to be jointly defined by the Chief of Radio and FH's Editor-in-Chief. It appears that there was considerable disagreement between FH staff and some UNMIS staff (including the Applicant) over the implementation of these provisions at the working level.

65. The Applicant's assertions that the MOU appeared to contravene United Nations rules and regulations, are not supported by any evidence. The Office of Internal Oversight Services (OIOS) Audit Report of the public information programme in UNMIS did not identify any such contraventions. Further, OIOS expressed no concern that the editorial reporting lines violated the Staff Regulations and Rules by having United Nations staff report to FH staff.

66. Much was made by the Applicant of the intervention by the SRSG on the issue of editorial control. However, this was before the Chief of Radio joined UNMIS. It is reasonable to infer that the instructions issued by the SRSG in May and August 2010 were simply to ensure that the MOU, which provided that editorial control ultimately remained with the Chief of Radio, was properly implemented by Mr. Eissa and Mr. Bali in their capacities, respectively, as Officer-in-Charge, CPIO and Officer-in-Charge, Chief of Radio.

67. The Chief of Radio's evidence that she encountered considerable resistance from the Applicant to her efforts to put the relationship between FH and UNMIS back on track should be accepted. In this regard, the Applicant has produced no evidence that she raised concerns about the Chief of Radio's approach to editorial control of Radio Miraya directly with her, or with other members of senior management, for example, the CPIO, the Chief of Staff, or the SRSG.

68. The Chief of Radio explained in her evidence that the Applicant did not raise concerns about their working relationship directly with her. The Chief of Radio testified that she was shocked to read the Applicant's complaints contained

in her email to the CPIO of 2 May 2011. In her evidence, the Chief of Radio denied ever calling the Applicant paranoid.

69. The Chief of Radio also denied that she was disparaging during her interactions with the Applicant. She explained the operational decisions she took which were the subject of the Applicant's complaint to the CPIO. She testified that, while the Applicant generally performed well, she had failed to address technical problems with the RSC database. As a consequence, the Chief of Radio was required to intervene. Further, the Chief of Radio's instructions to withhold information about the suspension of the Nilesat Satellite service was a decision that she judged was necessary in the circumstances. The Applicant simply disagreed with this decision. Such disagreements on operational decisions are a normal part of any workplace, and do not by themselves prove hostility in the workplace.

70. The Applicant's contentions that Ms. Herman put pressure on her to become her Second Reporting Officer are without merit. The CPIO gave a written instruction to the Applicant and Mr. Eissa to amend the Applicant's e-PAS to replace Mr. Eissa with the Chief of Radio as the Applicant's Second Reporting Officer. Given her role, the CPIO had the authority and responsibility for determining the reporting lines for staff within the Public Information Office.

71. It is reasonable to infer that the Applicant's perception of her interaction with the Chief of Radio was clouded because she did not accept the recruitment of the Chief of Radio, and, her misplaced belief that the Chief of Radio was pursuing an agenda on behalf of the Chief of Staff. The evidence of Mr. Bali, who was unsuccessful in applying for the position of Chief of Radio, should also be assessed in this light. Mr. Bali's evidence regarding the interaction between the Chief of Radio and the Applicant was, necessarily, biased in view of his own perceived difficulties with the Chief of Radio.

72. The termination decision was not unlawful on the ground of lack of delegated authority. Should the Dispute Tribunal find that the termination

decision was unlawful on the ground of lack of delegated authority; the Applicant is not entitled to any compensation as she has suffered no consequential damage.

73. The Applicant had no legitimate expectation that her fixed-term appointment would not be terminated.

74. The Secretary-General has a broad discretion in determining the operational needs of a new field mission based on its mandate. This discretion includes staffing levels and the functions of posts. The Secretary-General's discretion extends to formulating a transition process under which peacekeeping mission staff members whose appointments are terminated may be reassigned to a new mission.

75. It is not for the Dispute Tribunal to substitute its views for those of the Secretary-General with regard to the transition process, or the staffing requirements of a peacekeeping mission. A decision following a comparative review process may only be set aside on limited grounds, for example, breach of procedure during the comparative review, or the review was arbitrary, motivated by improper purposes, relevant factors were ignored or irrelevant factors taken into account.

76. Following the comparative review process, the Panel awarded the Applicant 63 points out of a possible 100 points based on the pre-determined review criteria and methodology. The Applicant's point total resulted in the Applicant being ranked second behind Mr. Tobgyal who received 74 points. The Panel therefore recommended that the first-ranked candidate be reassigned to the only available P-4 BTO post in UNMISS. The Administration accepted the Panel's recommendation.

77. The Applicant has not adduced any evidence or demonstrated to the Dispute Tribunal that the comparative review process was flawed.

78. As no additional posts were established in UNMISS after the comparative review, the Applicant's appointment was terminated. The reason for the termination was the abolition of all UNMIS posts.

79. In view of the foregoing, the Respondent requested the Tribunal to reject the Application.

Considerations

80. Firstly, with respect to the additional evidence that the parties sought to adduce, the Tribunal considers, in accordance with art. 18.5 of its Rules of Procedure, that the additional evidence the parties sought to adduce does not go to the legal issues considered in case.

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

- a. Were the Organization's Rules and the guidelines in Information Circulars 218/2011 and 327/2011 set out for the transition from UNMIS to the new UNMISS followed in respect to the Applicant?
- b. Did the Chief of Staff (COS), the Chief of the Public Information Office (CPIO), or the Chief of Radio (COR) participate in or influence the Comparative Review Process to the detriment of the Applicant?
- c. Was the decision to terminate the Applicant's contract taken with the requisite authority? If indeed delegated authority was retrospectively granted, was it material to the outcomes in this case?

Were the Organization's Rules and the additional guidelines provided in the UNMIS Information Circulars Nos. 218/2011 and 327/2011, which had been made to govern the transition and comparative review process from UNMIS to the new mission (UNMISS), properly followed with respect to the Applicant?

82. The Applicant's submissions on this score are for ease of reference hereunder summarized:

- a. Mr. Tobgyal who has been a P-4 Radio Producer in the old mission was transitioned to encumber the P-4 BTO post in the new mission rather than the Applicant.

- b. The Applicant being the only BTO in UNMIS, The actions of the Chief of Radio to make Mr Tobgyal eligible for the BTO post in the new mission amounted to an unlawful attempt to bypass proper recruitment and re-classification procedures and to defeat the provisions of IC/218/2011.
- c. Under the terms of IC/218/2011, the Applicant was bound to be transitioned to UNMISS having secured the only P-4 BTO post in UNMIS through a competitive process and therefore the transition of Mr. Tobgyal instead of the Applicant is evidence of bad faith or incompetence.
- d. Pursuant to IC/334/2011, the one P4 BTO post for the new mission (UNMISS) whose TOR's Mr Herman had re-written was in effect a wholly new post whose functions had substantially changed and as such should have been filled through the regular competitive process.
- e. Mr. Tobgyal who had only been a BTO at the P-3 level was maneuvered into a borrowed P-4 post in UNMIS and any claims that he was entitled to be considered as a P-4 officer for purposes of transitioning into the new mission violated the competitive recruitment policies of the Organization, was extraordinary and Unconscionable.
- f. Any purported re-classification of Mr. Tobgyal's P-3 post in UNMIS to P-4 was illegal.
- g. The drafting of new terms of reference for the new P-4 BTO post in the new mission by Ms. Herman were deliberately targeted towards the transmission side of operations to minimize the possibility of the Applicant being awarded the position.

83. Also for ease of reference, the Respondents submissions are hereunder summarized:

- a. Although Mr. Tobgyal's functional title was Radio Producer, he was reviewed together with the Applicant for the one P-4 BTO post in the new mission.
- b. The CCPO having been satisfied that Mr Tobgyal was performing the functions of BTO at the P-4 level successfully advised the CRP to review him against the Applicant.
- c. All staff members reviewed by the CRP were competitively recruited and therefore there is no merit in the Applicant's assertions that she was the only person competitively recruited to the P-4 BTO post in UNMIS and should have been automatically reassigned to the sole P-4 BTO post in the new mission.

84. In the Tribunal's review of the issues, it must be re-stated that the legal framework governing the transition from UNMIS to UNMISS is to be found in three Information Circulars issued for that purpose by UNMIS. These are: (1) Information Circular 218/2011 of 1 June 2011 titled 'Movement of International Staff to South Sudan', (2) Information Circular 327/2011 of 26 June 2011 titled "Formation of a Comparative Review Panel to review Transition of International Staff and (3) Information Circular No. 334/2011 of 30 June 2011 titled "Update to UNMIS Staff Regarding the UNMIS Draw-down Process."

85. In Ms. Herman's witness statement dated 22 June 2012, which she adopted during the trial, at para 3 and 4, she stated that at the beginning of the comparative review process, she noticed that Mr. Tobgyal was identified as Radio Producer in an UNMIS staffing table and that Mr. Tobgyal performed the functions of a Broadcast Technology Officer not a Radio Producer, and that he was in fact the Applicant's First Reporting Officer for the 2009-2010 and 2010-2011 ePAS cycles.

86. She further stated that she mentioned to the CCPO of UNMIS, Mr. Martin Ojjerro that she thought that Mr. Tobgyal should not be reviewed as a Radio Producer because he performed the functions of a BTO. She went on to testify

that there were many such cases discovered throughout the Mission in the course of the Review Process.

87. In the Report of the Comparative Review Panel dated 26 June through 5 July 2011, Ms. Herman is listed as a member of the Comparative Review Panel and at paragraphs 12 and 13 of the Report, it is noted that there were discrepancies in matching the posts in the staffing Table and that the CCPO mentioned that the discrepancies would be reflected in the review tables and that candidates whose Post Titles were different from the functions being performed should be reviewed for positions in the occupational group of the functions currently being performed.

88. The mandate of the CRP under Information Circular 218/2011, para 2A was that:

- a. Where the number of posts in the new mission was equal to or higher than the number of posts in UNMIS under the same occupational group and level, then staff members currently encumbering the same posts in UNMIS would be automatically reassigned to the new mission.
- b. Where the number of posts in UNMISS was lower than the current encumbered posts in UNMIS at the same occupational group and level then a comparative review process was to be instituted through a comparative review panel.

89. Upon a careful review of the happenings following the Security Council resolution to close the mission in Sudan, it is easy to see that faced with the prospect of closing down UNMIS, the Organization was careful and thoughtful enough to aim to protect the careers of staff members serving in that mission as much as possible. It therefore sought to transition as many staff members from UNMIS as could be managed to the new UNMISS in order to minimize the pain of terminating too many. To this end, a new staffing table was rightly created for the new mission in South Sudan.

90. Under the new staffing table, only one post of BTO was created for the new mission. It is not in dispute that the Applicant at the material time encumbered the only BTO post in UNMIS.

91. It must be borne in mind that the provisions of paragraph 2A of IC 218/2011 and paragraph 3 of IC 327/2011 enjoined the Respondent not to review posts where staffing was equal to or less than the proposed numbers in the new mission. These guidelines meant that in the absence of performance issues, the Applicant was to automatically walk across into the BTO post in the new mission.

92. The Applicant had evidently performed satisfactorily and had no performance issues. Why then did the Respondent's agents overreach themselves and compromise the Organization's standards for transparency by undertaking a comparative review process in respect of the only P-4 post for a BTO?

93. What had happened is that, according to the testimony of the Chief of Radio, Ms. Herman, who headed the Applicant's unit, she successfully advised the CCPO that Mr. Tobgyal who was encumbering a Radio Producer post at the P-4 level in UNMIS was sitting on a post which did not reflect his functions and that he was actually performing the functions of a BTO at the P-4 level.

94. Although Mr. Ojjerro told the Tribunal that he was not familiar with the work of a BTO, and that he sought clarification mostly from Ms. Jiang, this conflicts with Ms. Herman's testimony that she had brought Mr. Tobgyal's peculiar position to his notice. Nowhere is it shown either in oral or documentary evidence that Ms. Jiang played any role in the transition or review processes that gave rise to this case.

95. It is also in evidence that Ms. Herman had revised the terms of reference (TOR) for the P-4 post in the new mission for the Broadcast Technology Officer. However, pursuant to the provisions of paragraph 3 of IC 327/2011, it was stated that the profiles of the some of the existing posts may change and that such posts would be filled through the regular competitive selection process.

96. It bears noting that the post of P-4 BTO in UNMIS that was to be transitioned to UNMISS had its own TOR and as such could not rightly be the subject of a new competitive selection process. This was a post that had its Vacancy Announcement issued and published in December 2009 complete with its responsibilities, competencies and qualifications.

97. It is in evidence that Ms. Herman drafted new terms of reference (TOR) for the BTO post in UNMISS before the CRP sat. Her evidence is that she was asked to do so. Aside of her ipse dixit, there is no documentary evidence or other oral testimony to corroborate this claim. It has been rightly argued on behalf of the Applicant that what Ms. Herman had embarked upon was a re-classification of the P-4 BTO post or even the creation of a new post. This is because the BTO post already existed in UNMIS. To attempt to substantially re-write the required responsibilities, competencies and qualifications of the same post amounted to, at the very least, a re-classification.

98. The Respondent did not adduce evidence that Ms. Herman had the requisite authority to redraft the TOR for the P-4 BTO post in UNMISS. Rather, in her testimony, Ms. Fletcher told the Tribunal that under the new terms of reference for the P-4 BTO post in UNMISS, the functions of the post were focused on the hardware side of radio operations. According to her, the Applicant and Mr. Tobgyal had starkly different profiles in their PHPs and it was clear that Mr. Tobgyal had more direct relevant experience for the post under consideration.

99. Was it the case that the new mission would need a professional who had competencies in the hardware side of radio? This was possible. However, could the post of BTO whose competencies were well defined and which was already encumbered by the Applicant in UNMIS be simply re-written in a way that would deny the said Applicant an automatic transition to the new mission? Was it within the competence of Ms. Herman to simply re-classify the post of BTO for the purposes of the transition?

100. The re-classification of posts is governed by the provisions of ST/AI/1998/9 of 6 October 1998. Section 2 of that Administrative Instruction

provides for the procedure for a re-classification. Under section 2.1, requests for classification or re-classification shall be made to either the ASG/OHRM or the Chief of the relevant human resources office as the case might be.

101. Such requests shall include:

- a. A complete and up-to-date job description for the post in question, using standardized job descriptions, where applicable;
- b. An up-to-date organizational chart showing the placement of the post in question and of other posts that may be affected by the classification or reclassification requested;
- c. A valid and available post number confirming the existence of a post approved at the appropriate level in the budget, unless the request is submitted for advice prior to a budget submission. When available, the Integrated Management Information System (IMIS) post number must be used.

102. There is no evidence that the procedure for a re-classification of the BTO post encumbered by the Applicant in UNMIS was ever undertaken. As already pointed out, the Chief of Radio took it upon herself to re-write the competencies of the post to which in January 2010, the Applicant had been competitively recruited, perhaps in order to make the Applicant who was encumbering the post, less eligible.

103. She also convinced and misguided the CCPO (who is the Chief of Human Resources in the mission) into accepting that Mr. Tobgyal had been doing the job of BTO at the P-4 level under a borrowed post and ought to undergo a competitive review process with the Applicant. Even if the CCPO was the responsible human resources officer in the mission to whom a request for re-classification of the BTO post could be made, there is still no evidence that a proper re-classification procedure was followed. It does not bear re-emphasizing here that the rules of the Organization including those regarding re-classification ought to be followed as a matter so serious cannot be dealt with on a personal whim.

104. Again, aside of Ms. Herman's claim that such was the case, no evidence was tendered to show that another BTO post other than the one on which the Applicant was sitting existed at the P-4 level in UNMIS and how it came to be encumbered by Mr. Tobgyal under a borrowed post. The Respondent could not show when the post was borrowed and whether Mr Tobgyal was promoted to it as a result of a competitive process from the P-3 BTO post on which he was recruited.

105. The Respondent had submitted that the Applicant had not produced any cogent evidence about Mr. Tobgyal's recruitment beyond mere speculation. The hearing of this case provided ample opportunity for the Respondent's agents to enlighten the Tribunal as to how Mr. Tobgyal came to encumber a borrowed P-4 post from which he performed the functions of a BTO in the old mission and why he was eligible for a comparative review with the Applicant. The said Respondent's agents ought to be the party in possession of all the facts but failed to discharge that onus.

106. UNMIS Information circular No. 327/2011 of 26 June 2011 had announced the formation of a CRP and provided further guidelines on the transition to the new mission. Paragraph 3 re-stated that the Panel would not review posts where staffing was equal to or less than the proposed numbers in the new mission. It also stated that the profiles of some of the existing posts could change and that where that happened, such posts would be filled through the regular competitive selection process.

107. Even if it could be argued that the profile of the BTO P-4 post had changed due to the drafting of new TOR by Ms. Herman, the only viable course of action in the circumstances for the purposes of filling it would have been a regular, competitive selection process and not a comparative review as happened in this case. The so-called comparative review between the Applicant and Mr. Tobgyal for the only post of BTO in the new mission was manifestly fraudulent in the circumstances and amounted to a reckless abuse of power and position on the part of Ms. Herman.

108. It is shocking that Mr. Ojjerro in spite of his position and knowledge of human resources policies and practices in the Organization allowed Ms. Herman, who had only come on board about seven months previously, to have her way even when this involved the subverting of established human resources principles of the Organization. His evidence that Mr. Tobgyal had at some time been the first reporting officer of the Applicant is irrelevant for advancing the case of the Respondent since it is elementary knowledge that being FRO does not qualify a staff member to carry out the functions of his supervisee.

109. The Tribunal is fully satisfied that the transition process to the new mission as it concerned the Applicant was not only unfair but also manipulated, illegal and completely lacking in integrity. The Tribunal finds and holds that there was ample merit in the Applicant's assertions that she was the only person competitively recruited to the BTO P-4 post in UNMIS and ought to have been automatically transitioned to the new mission as provided for in the transition guidelines.

Was the decision to terminate the Applicant's contract taken with the required authority?

110. The Applicant submitted that the CCPO of UNMIS did not have the authority to take the decision to terminate her appointment. She further submitted that even if notification of the CCPO's decision was issued by the ASG/OHRM, Ms. Catherine Pollard, on 1 August 2011, she did no more than "rubber-stamp" his decision. The ASG's delegated authority to terminate her appointment was therefore sought after the decision had been taken. The Applicant submits that authority cannot be delegated retrospectively and that even for an ASG, there remains no power to terminate in these circumstances and, therefore, the decision was ultra vires and unlawful.

111. The Respondent submitted that the abolition of the Applicant's post and the termination of her appointment were the inevitable consequences of Security Council Resolution 1978 (2011), which extended the mandate of UNMIS for a final time to 9 July 2011 and that Security Council Resolution 1997 (2011)

instructed the Secretary-General, as the Chief Administrative Officer, to complete the withdrawal of civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011. The Respondent further submitted that as a consequence of the resolutions, all posts within UNMIS were, necessarily, to be abolished. For the staff members of UNMIS who were not reassigned to UNMISS or selected for another post within the Organization, the termination of their appointments was mandatory and there was no scope for renewal of their appointments.

112. Having reviewed the parties' submissions on this issue, the Tribunal finds that the termination decision was taken without the requisite delegated authority notwithstanding the fact that all posts within UNMIS were necessarily to be abolished as a result of Security Council Resolution 1997 (2011).

Did the Chief of Staff, the Chief of the Public Information Office (CPIO), or the Chief of Radio participate in, or influence the comparative review process to the detriment of the Applicant?

113. The Applicant and her witness have testified that differences had existed between the Applicant and her boss the Chief of Radio before the transition from the mission to a new one arose. Ms. Herman herself in spite of denying that she bore the Applicant any grudges acknowledged these differences which were brought about by misunderstandings over the proper place of one Fondation Hirondelle, an NGO, in some kind of working partnership with the mission in Sudan at the relevant time.

114. There is also evidence that the Chief of Public Information, Ms. Jiang, was aware of the said differences. There is additional documentary evidence in the form of a memorandum which had been sent her by the Applicant in May 2011 complaining about the alleged actions of the Chief of Radio, Ms. Herman including retaliatory acts. Evidently and unfortunately, Ms. Jiang did nothing to address the complaints of the Applicant.

115. What the Tribunal does not possess is sufficient evidence to establish the role of the Chief of Staff, Mr. Wimhurst, if any, in what amounted to the illegal

treatment of the Applicant and the blatant heist of what ought to have been her post in the new mission.

116. The Tribunal is not in any doubt however, that the Chief of Radio had employed her influence within the comparative review panel to successfully work against the Applicant's right to a transition to the new mission.

Accountability of United Nations' Managers

117. In Judgment No. UNDT/2011/192, the Tribunal, in addressing the issue of accountability of United Nations' managers in that case, called the Secretary-General's attention to the conduct of some managers who have through recklessness and their lack of the required managerial skills, engaged in actions in their official capacity that not only embarrass the Organisation but bring about heavy cost-implications in the award of monetary compensation. In that case, the Tribunal further held that:

It is necessary that the Secretary-General calls such managers to account in a way that there are real or tangible consequences for the individual manager. Accountability in the new system of internal justice on the part of managers means that not only are their wrong decisions reversed but that they commit also to respecting the relevant rules and issuances and at all times acting in good faith in the interest of the Organisation. Such commitment on their part will minimise disputes, ensure better work environment and save the resources of the Organisation for the achievement of its substantive mandates.

118. The present case starkly demonstrates that managers can easily have their mistakes and misdeeds buried with the careers of those staff members which have been ruined thereby. This unfair situation is further aided by the provisions of the Tribunal's Statute and Rules of Procedure which allow the Organization to opt for monetary compensation in lieu of specific performance or reinstatement which means that the Tribunal cannot make an Applicant "whole". In other words, the Tribunal cannot adequately redress the injustices suffered by an Applicant.

119. While the Tribunal is empowered by art. 10.8 of its Statute to refer appropriate cases to the Secretary-General or the executive heads of separately administered United Nations funds and programmes for possible action to enforce

accountability, it cannot do more. Unfortunately, to date, there is no record of any action that has ever been taken by the Secretary-General subsequent to a referral made by the Tribunal.

120. This Tribunal hereby exercises its power of referral under Art. 10.8 of its Statute and refers this case to the Secretary-General for the purpose of considering what action should be taken in respect of the conduct of Ms. Herman in deliberately, recklessly and illegally re-classifying the P-4 BTO post in the new mission by re-writing its terms of reference without authority, and wrongfully subjecting the Applicant to a comparative review process to her detriment.

Judgment

121. The Tribunal orders rescission of the administrative decision to separate the Applicant from service and orders the Respondent to reinstate the Applicant.

122. 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 in the sum of two years' net base salary at the rate in effect at the date of Judgment.

123. The Applicant is entitled to compensation for the substantive and procedural irregularities occasioned her by the failure by the Administration to follow its own guidelines, rules and procedures and the Tribunal, accordingly:

- a. Awards the Applicant one years' net base salary as compensation for the substantive irregularity.
- b. Awards the Applicant 4 months' net base salary for the procedural irregularity.

124. 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.

125. The case is referred to the Secretary-General under art. 10.8 of the Statute of the Tribunal for the purpose of considering what action should be taken in respect of the conduct of Ms. Herman in deliberately, recklessly and illegally re-classifying the P-4 Broadcast Technology Officer post in the new mission by re-writing its terms of reference without authority, and wrongfully subjecting the Applicant to the comparative review process to her detriment.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of March 2013

Entered in the Register on this 28th day of March 2013

(Signed)

Abena Kwakye-Berko, Officer-in-Charge, Nairobi Registry