



**Before:** Judge Coral Shaw  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko, Acting Registrar

SANNOH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Duke Danquah, OSLA

**Counsel for Respondent:**  
Steven Dietrich, ALS/OHRM

## **Introduction**

1. In his challenge to the United Nations Dispute Tribunal (“the Tribunal”), the Applicant contests a decision by the Special Representative of the Secretary-General (SRS)G) of the United Nations Mission in Sudan (UNMIS) to reclassify or re-profile the post of Chief Human Rights Officer UNMIS from D1 to D2 upon the establishment of United Nations Mission in South Sudan (UNMISS).

2. He alleges that: the decision to upgrade the UNMISS post to the D2 level was unfounded whether it was re-profiled or reclassified; the decision to fill the new post at UNMISS through a process of competitive selection was unlawful; and that the Administration breached its obligations to the Applicant in not extending his contract for one year and failing to provide indemnity payments on the abolition of his post.

3. The remedies sought by the Applicant are:

a. Lost salary from his date of separation at the level he held at the time of his separation.

b. Future lost salary from the current date to his mandatory retirement date at the level he held at the time of his separation.

## **Issues**

4. The issues arising from the pleadings in this case are:

a. What is the proper characterization of the change between the UNMIS Chief Human Rights Officer post and the Director of Human Rights post at UNMISS?

b. Did the functions of the post of Chief Human Rights Officer in UNMIS compared with the functions of the Director of Human Rights in UNMISS justify the grading of the post at the D2 level?

- c. Whether the decision to fill the D2 position through a competitive selection process was lawful;
- d. What was the true motivation for the decision to change the grade of the post?
- e. Should the Applicant's contract have been extended for one year and was he entitled to termination payments pursuant to IC/334/2011?
- f. Remedies, if applicable.

### **Facts**

5. At the hearing held on 2, 3, 4, and 11 April 2013, the Applicant gave evidence and called 3 witnesses. The Respondent called two witnesses. One of the Applicant's witnesses requested that her name not be published. In light of this request the Tribunal will not refer to the names of any of the witnesses to the case.

### **Background**

6. By S/RES/1978 (2011), the Security Council extended the mandate of UNMIS until 9 July 2011 and announced its intention to establish a mission in the forthcoming new state of South Sudan to succeed UNMIS. This mission was known as UNMISS.

7. The Integrated Operational Team in the Department of Peacekeeping Operations (DPKO) organized the planning process for the transition from UNMIS to UNMISS. All the functional offices were required to provide an analysis of the type of responsibilities and activities to be conducted in UNMISS. They were also requested to propose the number of posts and their respective levels required to perform those responsibilities.

8. On 18 May 2011, in response to the concerns raised by the Chairperson of the UNMIS Field Staff Union (FSU), the Under Secretary-General for the Department of Field Support (USG/DFS) explained in a letter to the FSU how the transition of staff of UNMIS to the

proposed new mission in South Sudan would be effected.

9. On 1 June 2011, the Director of Mission Support (DMS) of UNMIS issued Information Circular 218/2011 to inform UNMIS personnel of the transition of international staff to the new mission in South Sudan. In summary, it provided, *inter alia*:

a. In cases where the number of posts in the new mission is equal to or higher than the number of posts, under the same occupational group and level, staff-members currently encumbering those posts in UNMIS will automatically be reassigned to the new mission provided other conditions such as satisfactory performance are met.

b. In cases where the number of posts in the new mission is lower than the number of encumbered posts in UNMIS at the same occupational group and level, then a comparative review process will be instituted through a comparative review panel comprised of members of the FSU and UNMIS Administration.

c. In cases where occupational groups (posts) in the new mission do not currently exist in UNMIS, then those posts in the new mission will be advertised and filled through the regular recruitment and selection process.

10. On 30 June 2011, the DMS issued Information Circular No. 334/2011 entitled “Update to UNMIS Staff regarding the UNMIS Draw-down Process”. It dealt with extension of contracts; interim measures to 9 July 2011; transition from UNMIS to the UNMISS in South Sudan and Abyei, and follow-on assignments. The Information Circular stipulated:

Staff with fixed term contracts that are due to expire shortly will have their appointments extended for one year. Should a staff member’s function no longer be required by the mission prior to the expiration of his/her fixed term appointment, a termination indemnity may be payable in accordance with Staff regulation 9.3 and Annex III of the staff rules.

This extension did not apply to staff members with documented performance shortcomings and other criteria, none of which applied to the Applicant.

11. The Information Circular also stipulated that:

Where the staffing table for the new missions reflects new posts or where the functions of a post change by more than 30% the post will be filled through the regular competitive selection process and not through the comparative review process.

...

For those staff members who are not selected or provisionally reassigned to a position, their appointment may be terminated for reasons of reduction in staff or abolishment of posts in accordance with Staff Regulation 9.3 and would be eligible for payment of applicable termination indemnity under Annex III of the Staff Rules.

12. By S/RES/1996 (2011) dated 8 July 2011, the Security Council requested, *inter alia*, that “the Secretary-General transfer appropriate functions performed by UNMIS to UNMISS, together with appropriate staff and logistics necessary for achieving the new scope of functions to be performed, on the date when UNMISS is established, and begin the orderly liquidation of UNMIS.”

13. On 9 July 2011, the new State of South Sudan came into existence and UNMISS was officially established. Along with the other sections of UNMIS, the Human Rights section was transitioned to UNMISS on 9 July 2011.

14. Preparation for senior leadership working sessions to conduct a comparative analysis of S/RES/1996 and address the human rights mandate began on 30 July 2011. The draft UNMISS organigram for the Human Rights section at that time showed the Chief Human Rights Officer as a D-1 post.

15. Following those working sessions, the then Chief of Staff wrote to the staff on 10 August 2011 attaching the UNMISS staffing proposal which showed a D-2 post as head of the UNMISS Human Rights section and not a D-1 post. The Chief of Staff said:

Thank you for all very much for your hard work in developing draft staffing proposals for UNMISS in the last three weeks. The Mission leadership went

through every submission and has considered the overall package in the light of Resolution 1996 (2011), the SRSG's vision and the priorities of the Government, as well as taking account of severe financial pressure coming from New York.

...

Please note that posts will not be final until approved by the General Assembly towards the end of the year and further changes are possible. However you may assume this staffing proposal to be the working assumption until further notice.

16. This proposal was submitted by the Mission's leadership to Headquarters for the senior management's approval and onwards for submission to the General Assembly.

#### **Facts concerning the Applicant**

17. The Applicant joined the United Nations on 17 September 2003 under an appointment of limited duration. He served in different peacekeeping operations before he took up a fixed-term appointment on 1 February 2008 as Senior Human Rights Officer at the P5 level. He was thereafter reassigned for one year on 16 September 2009 as Chief Human Rights Officer at the D-1 level in the Human Rights Section in UMMIS.

18. A Concept of Operations for the Human Rights presence in South Sudan (CONOPS) was formulated in February by a team lead by the Applicant. According to the CONOPS report, the future UNMISS was to have a Human Rights Section with a proposed staff of 119 to be headed by a Human Rights Officer at the D-1 level.

19. On 26 June 2011, UNMIS Information Circular No. 327/2011 announced the formation of a Comparative Review Panel (CRP) to review the transition of international posts in UNMIS, and set out the criteria to be considered and subject to review by the CRP.

20. DPKO initiated efforts to put together a start-up team for the new UNMISS and requested that the Office of the High Commissioner for Human Rights (OHCHR) send their representatives for this team. On 29 June 2011, the Chief of Africa Section I in OHCHR

nominated the Applicant to serve as Chief Human Rights Officer on the start-up team. On the same day, DPKO advised OHCHR that the SRSG Designate had rejected the Applicant's nomination, and had asked to review additional names.

21. On 1 July 2011, the Director of the Africa Branch, OHCHR conveyed its position to DPKO that the Applicant was well suited for the assignment, as he was familiar with the human rights situation and was closely involved in the inter-agency task force that had designed the Mission. In spite of this endorsement the Applicant was not appointed to the CRP.

22. From July 2011, the interim Chief of Staff of UNMISS assisted with the start-up of the new mission. He was part of the Mission Leadership Team (MLT) comprising a group of senior managers which advised on critical administrative and human resources during the start-up phase. It examined the senior level posts required by the new mission including the head of Human Rights. It submitted a number of proposed staffing tables to the United Nations Headquarters (UNHQ), which required a review of the Senior P-5 and above posts. The holder of the post would transition if the functions of the post did not change between missions but not if the functions had significantly changed.

23. On 9 July 2011, when UNMISS was officially established, the SRSG Designate for UNMISS formally took up her post. At that time the post of Chief Human Rights Officer remained at the D-1 level.

24. On 15 July 2011, the USG/DFS sent a fax to the Directors of Mission Support in UNMIS and the United Nations Interim Security Force for Abyei (UNISFA) noting the concern of the Security Council in its resolution 1996 to reduce costs in the staffing of the new mission, to encourage the optimizing of resources and to do more with less.

25. During this time, the 75 staff members in the Human Rights Section were moved to Juba except the Applicant. The Applicant kept enquiring about what was happening but was

told there was a hold up in his transfer.

26. On 27 July 2011, the Chief Civilian Personnel Officer (CCPO) at UNMIS informed the Applicant that “following the completion UNMIS (*sic*) mandate, the human resources post-matching and comparative review exercises regarding transition of international staff from UNMIS”, he could neither be transitioned to UNMISS nor to the United Nations Interim Security Force for Abyei (UNISFA). The letter also served as notice of completion of his appointment with UNMIS and consequently the termination of his appointment effective 31 August 2011.

27. On 28 July 2011, the Applicant sought management evaluation of this decision. On the same day, the CCPO informed him in writing that:

Following completion of the UNMIS mandate, the human resources post-matching and comparative review exercises regarding the transition of the international staff from UNMIS, we are pleased to inform you that you have been identified for reassignment to the UNMISS. Your new duty station will be Juba.

...

Please note that, your post will be subject to review and eventual competitive selection. Your travel will take place no later than 31 July 2011.

28. As this action effectively rescinded the 27 July 2011 administrative decision, the MEU considered his request moot and closed his file. The Administration later described the first letter as a mistake and the second letter as a correction.

29. The Applicant’s Personnel Action (PA), recording the transition of the Applicant to UNMISS, was not finalised until 9 October 2011. It stated that this was a provisional reassignment from UNMIS to UNMISS effective 4 August 2011 as Chief Human Rights Officer at D-1/2 and that the UNMISS “email of 29/9/11 refers”.

30. Email correspondence at this time, shows that the Chief of Staff led a working party at the end of July to analyse the Security Council resolution and to address a number of matters



including Human Rights. During this time, the Applicant was involved with the drafting of texts on the Human Rights Division for budget submissions.

31. The Applicant took up his duties with UNMISS in Juba to perform the functions of Chief Human Rights Officer at the D-1 level on 4 August 2011. He was placed on a temporary post funded through General Temporary Assistance (GTA) Funds/Technical Cooperation for the duration of his assignment. The post was to expire on 15 September 2011.

32. On 19 August 2011, the Applicant was seriously injured and required hospitalization following an arbitrary arrest and assault by South Sudan Police. On 24 August 2011, he was flown to the United States for medical treatment and remained on sick leave until 30 June 2012.

33. On 27 August 2011, the Chief of Staff of UNMISS sent an email to the SRSG stating as follows:

Last night I was called by [...], the Acting Director of the Field Operations and Technical Cooperation Division, OHCHR in Geneva. After discussing the staffing table and budget (they'd heard New York was seeking more cuts), he turned to [the Applicant].

He indicated that [the Applicant] would likely be gone for several weeks for medical attention and leave. In light of this, they were thinking of finding us a temporary replacement. He wanted to know if we would be amenable to that. They didn't have a lot of staff members available for such assignment, so it might be for only "three or four weeks". He also wanted to know if we were still planning on a D 2 Human Rights (*sic*).

34. On 8 September 2011, the vacancy announcement (Number 11-HRI-DFS-425421-R-JUBA) for Director of Human Rights for UNMISS at the D-2 level went out with a deadline for applications on 8 October 2011. The Applicant saw the advertisement on 15 September 2011 while he was on sick leave and applied for the post by the deadline. The selection process was led by OHCHR under the Memorandum of Understanding between OHCHR and

the Administration.

35. His contract at the D-1 level was scheduled to expire on 15 September 2011 but on 3 October 2011 his contract was renewed until 15 January 2012, “pending the recruitment process of the new D-2 Director of the Human Rights Division”.

36. On 24 October 2011, the Applicant requested management evaluation of the decision to “reclassify the post of Chief Human Rights Officer in the Human Rights section of UNMISS at the D-2 level.”

37. On 27 October 2011, the report of the Secretary-General to the General Assembly on the UNMISS budget for the period of 1 July 2011 to 30 June 2012 requested the creation of a D-2 post to head the upgraded Human Rights Division. The Secretary-General noted that the UNMISS Division of Human Rights would be headed by a Director at the D-2 level which was critical to the sensitivity of the issues involved to reflect “the prominence of human rights in the mandate of the [m]ission.” The Secretary-General emphasized the Director’s level of “responsibility of the overall performance and discharge of its human rights mandate, and for overseeing the strategic direction, management and operations of the Division in Juba and at the State and Country level.”

38. On 9 and 10 November 2011, interviews for the D-2 post were conducted. The Applicant was among the five candidates who were interviewed but he was not selected.

39. On 1 December 2011, the MEU concluded that the decision to classify the post at the D-2 level was not taken out of personal animosity towards the Applicant, but rather was based on an objective, operational rationale. It found that the contested decision entailed a legal exercise of discretion.

40. By letter dated 13 December 2011, the Applicant was informed that, as a result of the change in UNMISS staffing effective January 2012, his D-1 post would be abolished effective 31 December 2011 and that he would be retained in service against another post for

administrative purposes only until the expiry of his appointment. UNMISS also informed the Applicant that his details would be submitted to Field Personnel Division (FPD) for further advice, and where possible, reassignment to other missions.

41. His contract was renewed from 15 January to 15 April 2012 then again from 16 April to 30 June 2012. The Chief Medical Officer of Peacekeeping Medical Services Division wrote to the UNMIS Director of Mission Support stating that “all medical documents attached to [the Applicant’s] memo dated 19 June 2012 have been received and reviewed at the Medical Services Division. Based on the information submitted, sick leave has been approved through 30 June 2012. [The Applicant] is fit to return to duty as of ...2 July 2012.”

42. On 15 July 2012, the Applicant was informed by the Chief Civilian Personnel Officer (CCPO) of UNMISS that his post “was abolished as 1 January 2012 (sic) and you were duly informed of the fact, both in January and in my latest email to you dated 3 July 2012. In this connection, the mission is processing your separation from UNMISS effective 30 June 2012 COB.” The Applicant’s contract expired on 30 June 2012 and on that day he was separated.

### **Oral testimony**

43. At the hearing, the Applicant testified that when he was transitioned to UNMISS there was no reference to it being provisional. Although he received a letter telling him that his post was subject to review and eventual competitive selection he did not accept that the letter was correct. When his first term expired on 15 September 2011, he was asked to request an extension of assignment. He signed this reluctantly and endorsed the request form as follows:

This contract has not been discussed with me. Consistent with the new staff rules, my contract should have been extended for 12 months. Hence I am signing with reservation.

44. When his post was abolished on 30 December 2011, the SRSG explained in a letter to him that this was as a result of a change to UNMISS staffing effective January 2012 his contract was extended up to 30 June 2012.

45. The Applicant explained that the Concept of Operations that he had worked on in February 2011 outlined the role and approach for a future UN Mission in South Sudan. In his view it remained the planning document up to the time he arrived in Juba. It provided for a Human Rights Officer at the D1 level and in fact the post remained at the D1 level until 4 August 2011. This evidence was supported by organigrams circulated by a Strategic Planning Officer.

46. The decision to reclassify the post to D-2 was announced on 10 August 2011 but, according to the Applicant, had been made without the Administration conducting any assessment as required by UNMIS Information Circulars to determine if the duties and responsibilities of the Chief Human Rights Officer post had increased by 30%. In his opinion, the administration did not conduct any assessment or review of the challenges, focus and priorities of the Human Rights Division in accordance with Information Circular 334/2011, or consult with or obtain advice from OCHCR. He believes that because the new state of South Sudan had a smaller geographical area and because one unit was moved out of the direct area of responsibility of the Human Rights Director, the level of responsibility of the position could not have increased. He said that, if anything, it had decreased.

47. The Applicant described the circumstances of the assault by the South Sudan police following arrival in Juba on 4 August 2011. He was staying in a hotel where, because of lack of office accommodation, he kept his official United Nations documents as well as computers and laptops. The police came to inspect these items. In the course of that visit he was arrested, assaulted and severely beaten.

48. The Applicant alleged that the SRSG demonstrated extreme prejudice and *animus* against him which was demonstrated by her objection to his selection by OHCHR to serve on the start-up team without offering any cogent reasons; by his being informed abruptly that he would not be transitioned to UNMISS and his services with the United Nations were to be terminated as of 31 August 2011; and by her refusal to meet with him in Juba as the Head of

the Human Rights Component in spite of several requests. Following his hospitalisation after the assault by the South Sudan Police, she did not visit him at the hospital or contact him in any way about his health and well-being, in spite of the incident being job related.

49. The witnesses called by the Applicant testified about the formulation of the concept for CONOPS and their views on the comparative duties and responsibilities between the Chief Human Rights Officer in Sudan and Director of Human Rights of South Sudan. They alleged that OHCHR was not consulted about the assessment of these roles.

50. The Respondent called a Strategic Planning Officer (Ms S) who worked with the Integrated Technical Assessment and Planning Team (ITAPT) from mid-February to the end of March 2011. In her evidence she denied that ITAPT generated staffing tables for the new mission in South Sudan and certainly did not provide for a Human Rights Section to be headed at the D-1 level. She said that the pre-mission planning documents referred to by the Applicant did not reflect the final staffing requirements of UNMISS. These requirements were prepared in New York from April to June 2011. She was aware of the Memorandum of Understanding (MOU) that required OHCHR to be consulted on these matters and said that there was consultation.

51. The process to review the senior level posts at P5 and above did not begin until after the Security Council issued its resolution on 8 July 2011. Ms S agreed that the procedures governing the transition of staff were set out in three Information Circulars (218/2011, 327/2011 and 334/2011) issued by UNMIS. She stressed that the Security Council established UNMISS to support the building of a new nation in which adherence to human rights standards are a cornerstone. The creation of the post at the D-2 level reflected the strengthening of the position compared with that in UNMIS. She explained that the language of the Security Council Resolution 1996 implied high expectations for an active human rights monitoring presence in the context of a new government in South Sudan. She said that there was concern that human rights issues would have to be handled with the new Government of

South Sudan at a very high level.

52. She denied that the Applicant's post was reclassified or re-profiled. The D-2 post was a new post created to meet the concerns of the leadership of the Mission to have a senior level official to head the new Human Rights team. It was not based on geographical area but the necessary level of seniority.

53. In his evidence, the former Chief of Staff, UNMISS (Mr S) outlined the changes to the Human Rights mandate between UNMIS and UNMISS. He described UNMISS as more complex, challenging and politically sensitive. He said that an assessment of the senior roles was done over a number of weekend meetings at which functions and percentages were considered. The staffing table that was produced was the official record of these meetings. In the course of these meetings, the assessment was made that the responsibilities of the Director of Human Rights post at UNMISS increased by 30% over that of the Chief Human Rights Officer in UNMIS. He said that the Strategic Policy Officers supported this assessment.

54. On 10 August he circulated the final UNMISS integrated submission to be sent to New York showing that the Director of the Human Rights component was to be at the D-2 level. He said that OHCHR was not part of the assessment meetings but that he discussed the change from D1 to D2 by telephone with the Chief of Africa Division OHCHR in late August 2011.

55. On 1 September 2011, the justification for the new post was submitted to the Field Budget and Finance Division, DFS, New York for inclusion in the Secretary General's budget UNMISS report. Mr S said that the D-2 post was newly created for the new mission whereas the D-1 post had belonged to UNMIS.

56. The Report of the Secretary General to the General Assembly dated 28 October 2011, A/66/532, set out the Budget for UNMISS for 1 July 2011 to 30 June 2012. In relation to the Director of the Human Rights Division it stated:

This senior level post is critical given the prominence of the issues involved. The Director will liaise at very high levels with senior Government officials to bring actual and potential violations of human rights to the attention of the authorities and assist the authorities in developing strategies to address these appropriately.

57. Mr S told the Tribunal that the SRSG was not solely responsible for the recommendation that the post of Director, Human Rights Division should be created at the D-2 level. He had not observed any personal *animus* against the Applicant by the SRSG who was doing a difficult job in the youngest country in the world. He was aware that the Applicant had sought a meeting with her in Juba and said he had personally explained to the Applicant how busy she was. He knew that she had not visited the Applicant in hospital but said that he had been briefed on the assault and was tasked with liaising about the incident with UNHQ in New York and Geneva.

#### **Applicant's submissions**

58. There is no legal framework for the "re-profiling" of a post. The Staff Rules allow for the abolition and reclassification of posts, not for "re-profiling". The use of this term in response to the Applicant's request for management evaluation was an attempt by Management to screen from review what was essentially a decision of reclassification. The Tribunal is asked to ignore this screen and to review the unfounded reclassification decision.

59. The decision to reclassify his post from D-1 to D-2 is unlawful and unfounded and was motivated by animosity of the SRSG towards him.

60. The administrative procedures for the reclassification of posts found in ST/AI/1998/9, (System for the classification of posts) was not followed.

61. There is no basis for the change of level of the Chief Human Rights Officer from D-1 to D-2 as the responsibilities of the head of UNMISS Human Rights Section decreased and did not increase bearing in mind;

- a. The number of staff reduced from 112 in UNMIS to 98;
- b. The post of Women Protection Advisors have been moved from the human rights sector to the protection of civilians;
- c. Human Rights Officers in the field have been placed under the supervision of the state coordinators as opposed to the Chief of Human Rights Section.

The reduction in staff and responsibilities should have prompted a downgrading of the post to P5 rather than an upgrading to D-2.

62. Noting the letter sent to him on his non-reassignment on 27 July 2011, he should have been directly transitioned and reassigned to UNMISS as per Information Circular 218/2011 as:

- a. The post of Chief Human Rights Officer at UNMISS was initially supposed to be at the D-1 level, like the equivalent post at UNMIS as evidenced in the UNMISS planning and budgeting documents, and;
- b. The Applicant's performance has been satisfactory, as evidenced by his performance appraisals over the past two years and by the fact that he was highly recommended by OHCHR.

63. The decision to fill the new D-2 post through a competitive selection process was unlawful as the Respondent has not proven that the functions of the post changed by more than 30%, unless one counts the reduction of responsibilities.

64. The Administration has breached its obligations under Information Circular 334/2011. His contract should have been extended for a period of one year and, as he was not selected to a post, he should have been eligible for indemnity payments.

65. In conclusion, the Tribunal is asked to find that the decision to upgrade the



Applicant's post from D-1 to D-2 was unfounded and unlawful; the decision to fill this post through a competitive selection process was unjustified and unlawful. The Applicant prays that the Tribunal will rescind both decisions.

### **Respondent's Submissions**

66. The post was not reclassified. Following the closure of UNMIS and the establishment of UNMISS, the post of Director of Human Rights (D-2) was established anew to implement the mandate of UNMISS, which included an expanded human rights component.

67. As the D-2 post did not exist in UNMIS as such, according to Circular 218/2011 "those posts in the new mission will be advertised and filled through the regular recruitment and selection process" The new UNMISS D-2 post was subject to a competitive selection process under ST/AI/2010/3 (Staff selection system). The process undertaken by the Administration in determining the staffing requirements of UNMISS was not based on improper motives or personal *animus* against the Applicant. There is no basis for the Applicant's contention that the decision to fill the D-2 post through a competitive selection process was unlawful.

68. When the Applicant sought management evaluation of the decision to terminate his appointment, the CCPO immediately corrected his previous memorandum by informing the Applicant that he would be reassigned to UNMISS. He was provisionally reassigned to UNMISS at the D-1 level as the Chief Human Rights Officer.

69. The pre-mission planning documents referred to by the Applicant, such as preliminary staffing tables, were not the final staffing requirements of UNMISS. The staffing tables attached to the Application are not evidence that the subject post was earmarked for reclassification.

70. The Applicant was on notice that his provisional reassignment to UNMISS was made on the basis of GTA funds as reflected in his PA form.

71. The Applicant has not challenged the outcome of the selection exercise for the D-2 post. The interview panel consisted of senior officials from both OHCHR and DFS. The Applicant was not selected.

72. The Applicant has the *onus* of establishing, on the balance of probabilities, that the contested decision was improperly motivated or based on personal *animus* (*Asaad*, *Azzouni*, and *Macharia*<sup>1</sup>). The Applicant has not provided any evidence to substantiate his claims that the SRSG held a personal *animus* against him. There is no evidence that the SRSG marginalized him or unilaterally chose to reclassify the post to a D-2 level so that he could not be reassigned to it. The establishment of the Director of Human Rights in UNMISS is not, in and of itself, evidence of personal *animus* against the Applicant. Moreover, the process that led to establishment of all UNMISS posts, including the D-2 post, was not spearheaded by the SRSG.

73. In view of the foregoing, the Respondent respectfully requests the Dispute Tribunal to reject the Application.

### **Considerations**

#### **What is the proper characterization of the change between the UNMIS Chief Human Rights Officer post and the Director of Human Rights post at UNMISS?**

74. The evidence establishes that the Applicant was holding the D-1 post at the time of his reassignment to UNMISS and continued in that post from 4 August 2011 when he began working for UNMISS. Although he was advised that this transition followed the human resources post-matching and comparative review exercises, the Respondent's evidence clarified that in relation to P5 positions and above these exercises did not commence until 30 July after the Applicant had been advised of his transition and were only submitted to UNHQ

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<sup>1</sup> *Asaad* 2010-UNAT-021 para 10, *Azzouni* 2010-UNAT-081 para 34 and *Macharia* 2011-UNAT-128 at para 128.

on 1 September 2011.

75. The proposal of a new D-2 post of Director of Human Rights to head the new Human Rights Division in UNMISS was announced on 10 August. The Applicant's post was abolished on 30 December 2011.

76. The Tribunal finds that the D-2 post was a new post. In the course of the Applicant's second request for management evaluation, the Administration had described the creation of the D-2 post as a re-profiling. The Applicant correctly objected to this label as it is not a process envisaged by the staff rules but whatever it was called by Administration, the fact is that a decision was made at a senior level to create a new post of Chief of Human Rights for UNMISS.

77. Article 101.1 of the United Nations Charter states that the "staff shall be appointed by the Secretary-General under regulations established by the General Assembly." Furthermore, the Secretary-General, "as chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary."<sup>2</sup> The recommendation to abolish a post and create a new one is within the discretion of the Secretary General. These were contained in the Secretary General's Report A/66/532 dated 28 October 2011 that was put before the General Assembly which has the authority to make the ultimate decision. It approved the budget for the new post.

78. Pursuant to ST/AI/1998/9, section 1.1, a request for classification shall be made when, *inter alia*, a post is newly established. Although the Applicant maintained that the classification is open to challenge by the post holder and he should have been able to challenge it, the ST/AI does not provide for this in his situation. Section 4 which deals with implementation of the classification decision provides that:

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<sup>2</sup> Staff Rules and Regulations, ST/SGB/2011/1 "Scope and Purpose"

#### 4.2

The classification of a post shall not negatively affect the existing contractual status, salary or other entitlement of the staff member encumbering the post. Staff members whose posts are classified at a level below their personal grade level will retain their current grade and salary level, on the understanding that every reasonable effort will be made to reassign them to a post at their personal grade level.

#### 4.3

Staff members whose posts are classified at a level above their current personal grade level in the same category may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement, where applicable.

79. This is not a case where an existing post was reclassified but where a new post was created and classified on the abolition of an existing post. The Applicant did not have a right to appeal under section 5 of the ST/AI as he was not the incumbent of the post at the time of its classification.

80. The Applicant's assertion that OHCHR was not consulted in breach of the MOU executed between OHCHR and DPKO and Policy approved by DPKO is not correct. The MOU provides for DPKO to be the lead department and OHCHR to be consulted. The evidence showed that OHCHR was consulted about the composition of the CONOPS and about the decision to create a D-2 post. It was engaged in the recruitment process as required by the MOU. There is no evidence of a breach in this regard.

81. As advised to the Applicant, the new UNMISS D-2 post was subject to competitive selection process under ST/AI/2010/3. The Applicant applied but was not selected. He did not challenge his non-selection.

#### *Conclusion*

82. The post of Director of Human Rights in UNMISS was not a reclassification of the D-1 post held by the Applicant at UNMIS but a new post created to meet the need of UNMISS.

It was classified as D-2. The post held by the Applicant ceased to exist upon its abolition.

**Did the functions of the post of Director of Human Rights in UNMISS as compared with the functions of the Chief Human Rights Officer post in UNMIS justify the grading of the post at the D2 level?**

83. Information Circular 334/2011 contemplated the creation of new posts under the heading either by staffing tables which reflected new posts or where the functions of a post changed by more than 30%. In this case, the evidence is that the new post was both reflected in the staffing tables presented to the General Assembly and, according to the former Chief of Staff, the 30% change in functions was also considered.

84. The Tribunal accepts that the Applicant sincerely believed that there was no basis for the change in level from D-1 to D-2 as the responsibilities of the UNMISS Human Rights Section had not increased but had actually decreased when compared with the Human Rights section in UNMIS. Because he was not included in the considerations that led to the decision to abolish his post and create a new D-2 post, he had no information before him to change this belief.

85. However the evidence before the Tribunal established that a process of review for P-5 and above positions was carried out. On the basis of that review it was decided that, given the importance of the Human Rights function in the new State, a D-2 post was justified. The evidence of the Chief of Staff established that this was done in an objective manner having regard to the Security Council Resolution that governed the transition. The Report of the Secretary General, which set out the rationale for the decision, was adopted by the General Assembly.

**What was the motivation for the decision to change the grade of the post?**

86. Following the adoption of S/RES/1996 (2011), the planning process for the operational, substantive and support requirements for the establishment of UNMISS was

organized by the Integrated Operational Team of DPKO, as well as representatives of DFS and other stakeholders. The staffing requirements for UNMISS were reviewed and approved by the DPKO and DFS senior management.

87. The evidence established that the consideration of the post of the Chief of Human Rights was done in conjunction with all the other changes required by the transition.

88. The Applicant's contention that the decision to fill the post through a process of competitive selection was unlawful because it was motivated by animosity of the SRSG towards him is not supported by an objective evaluation of the evidence. However it is entirely understandable that the Applicant formed that view given the accumulation of events that he perceived as personal slights against him. These included his exclusion from the senior level planning process for UNMISS, the initial mistaken advice that he would not be transitioned and the almost total lack of communication with him by the SRSG both before but especially after the police assault when he had been seriously injured. A more sensitive and humane approach to his situation may have obviated his growing suspicions about personal *animus*.

89. In *Obdeijn*<sup>3</sup> it was held that "a staff member bears the burden of proof of showing that a decision was arbitrary or tainted by improper motives."<sup>4</sup> The Applicant has failed to demonstrate to the required standard that the decisions made about the grade of the post were ill motivated. There was no evidence, other than the Applicant's belief, that the upgrading of the post was to allow the administration to circumvent its obligation to transition him into it.

**Whether the decision to fill the D-2 position through a competitive selection process was lawful**

90. In the letter of 28 July 2011, the Applicant was advised that his post was subject to

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<sup>3</sup> 2012-UNAT-201 at para 38.

<sup>4</sup> See also *Hepworth* 2011-UNAT-178 at para 29.

review and competitive selection process when he was transitioned from UNMIS to UNMISS. This information was in accord with Information Circulars 218/2011 and 334/2011 which had notified all staff members that posts in UNMIS that did not exist in UNMISS would be subject to a competitive selection process.

91. Following the staffing review, the publication of the draft staffing tables for UNMISS on 10 August 2011 made it clear that the D-1 post occupied by the Applicant would cease to exist if the proposal was adopted by the General Assembly. With the creation of a new D-2 post, the administration was obliged to make a vacancy announcement and open the vacancy for a competitive selection process.

92. The Tribunal holds that the decision to fill the D-2 position through a competitive selection process was lawful.

**Should the Applicant's contract have been extended for one year during the transition?**

93. As the Applicant's D-1 post was transitioned to UNMISS after post-matching and comparative review exercises, the Tribunal finds that he was reassigned, albeit provisionally, to the new mission in accordance with the provisions of Information Circular 218/2011 which stated:

In cases where the number of posts in the new mission is equal to or higher than the number of posts, under the same occupational group and level, staff members currently encumbering those posts in UNMIS will automatically be reassigned to the new mission.

94. Information Circular No. 334/2011 regarding the "Update to UNMIS Staff regarding the UNMIS Draw-down Process" was issued to UNMIS staff on 30 June 2011. The circular stated:

This message addresses the extension of appointments of international and national staff transiting to the new missions, follow on assignments and the applicable procedures for the reduction of staff following the expiration of the

UNMIS mandate on 9 July 2011.

95. Under the heading “Extension of Contracts” the circular stated:

Staff with fixed term contracts that are due to expire shortly will have their appointments extended for one year. Should a staff member’s function no longer be required by the mission prior to the expiration of his/her fixed term appointment, a termination indemnity may be payable in accordance with Staff Regulation 9.3 and Annex III of the Staff Rules.

96. The Information Circular does not define “shortly”. In the context of the entire Circular it can be taken to apply to appointments which were due to expire during the transition period of July and August in order to ensure the continuity of appointment of staff members who were to be transitioned to UNMISS. As at 30 June 2011 when this Circular was issued, the Applicant’s fixed term appointment was due to expire on 31 August 2011.

97. Although he was initially given notice of termination on the grounds that he could not be reassigned, that decision was deemed to have been a mistake and two days later the Applicant was reassigned to UNMISS effective 4 August 2011. He continued to function at the D-1 level as the Chief of Human Rights in UNMISS after the expiration of his fixed term appointment on 31 August 2011. His function was still required. At the time of the transition no decision about this had been taken and no comparative analysis had been done. This post was not abolished until 31 December 2011.

98. The Tribunal finds that the Applicant met the conditions of Information Circular 334/2011. As at 30 June 2011, his fixed term appointment was due to expire shortly. As his function was required by the new mission, he was reassigned. In light of this he should have had his appointment extended for one year.

**Was he entitled to termination payments?**

99. Information Circular 334/2011 stated:



Where the staffing table for the new missions reflects new posts or where the functions of a post change by more than 30% the post will be filled through the regular competitive selection process and not through the comparative review process...For those staff members who are not selected or provisionally reassigned to a position, their appointment may be terminated for reasons of reduction in staff or abolishment of posts in accordance with Staff Regulation 9.3 and would be eligible for payment of applicable termination indemnity under Annex III of the Staff Rules.

100. On the facts in this case the Applicant was provisionally reassigned to a D-1 Post in UNMISS which eventually was abolished. He was therefore entitled to a termination indemnity under Annex III of the Staff Rules.

### **Conclusion**

101. The proper characterization of the change between the Chief Human Rights Officer UNMIS to Director of Human Rights UNMISS is that it was a new post.

102. The grading of the post at the D2 level was justified by reason of the staffing tables and by the difference in functions of the post of Director of Human Rights in UNMISS compared with the mandated functions of the Chief Human Rights Officer post in UNMIS. The decision to fill the D2 position through a competitive selection process was lawful.

103. The true motivation for the decision to change the grade of the post was the Security Council mandate which dictated the increased importance of the role.

104. The Applicant's contract should have been extended for one year and he was entitled to termination indemnity payments pursuant to Information Circular 334/2011 on the abolition of his post.

### **Remedies**

105. The Applicant claims for future lost salary from the current date to his mandatory retirement date at his separation scale. There is no basis for that claim as he had no

expectancy of the renewal of his D-1 contract once it had been abolished. However he is entitled to his entitlements pursuant to the Information Circular 334/2011, and the staff rules.

106. In light of the above, the Tribunal makes the following ORDERS:

- a. Extension of the Applicant's contract from 30 June 2012 to 31 August 2012. Where an extension of contract would not be feasible, payment of one month net base salary at the Applicant's level of employment at the time of the contested decision.
- b. Payment of the Applicant's termination indemnity payable and due to him in accordance with Staff Regulation 9.3 and Annex III of the Staff Rules.
- c. The above amounts shall be paid within 60 days of the date that this Judgment becomes executable. Interest will accrue on the above amount from the date of this Judgment at the current US Prime rate until payment. If the above amount is not paid within the 60 days period an additional five per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Coral Shaw

Dated this 2<sup>nd</sup> day of July 2013

Entered in the Register on this 2<sup>nd</sup> day of July 2013

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi