



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

EISSA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Seth Levine, 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 his fixed-term appointment with the United Nations Mission in Sudan (UNMIS) upon the closure of that mission on the grounds that:

- a. the decision was a breach of the process by which staff members of UNMIS were transferred to the new United Nations Mission in the Republic of South Sudan (UNMISS);
- b. the decision was vitiated by improper motives;
- c. he had a legitimate expectation that his fixed-term appointment would not be terminated; and
- d. the decision was taken without proper delegated authority and was therefore *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 11 May 2009 as Mission Spokesperson/Deputy Chief Public Information Officer on a fixed-term appointment of one year, which was renewed upon its expiration.

4. By 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 withdrawal of all uniformed and civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011.

5. On 1 June 2011, the Applicant received notification by email of his reassignment as Spokesperson to Juba effective 1 July 2011. This relocation was said to be in line with the expiry of the UNMIS mandate and the movement of all International Staff of the Public Information Office (PIO) from the North to South Sudan.

6. On 20 July 2011, the Applicant signed an offer of a fixed-term appointment for the period 1 July 2011 to 30 June 2012 for the position of Spokesperson with UNMIS. The offer was issued by the Chief Civilian Personnel Officer (CCPO), UNMIS on 13 July 2011.

7. Thereafter, on 27 July 2011, the Applicant received a Letter of Separation, signed by the CCPO, UNMIS. The Applicant requested clarification in an email to the CCPO dated 28 July 2011.

8. The Applicant sent an email to the the Special Representative of the Secretary-General (SRSG) of UNMIS on 3 August 2011, requesting clarification on the Letter of Separation.

9. He also sent an email to the Under-Secretary-General for Management on 5 August 2011, who referred his email to the Management Evaluation Unit. On 10 August 2011, the Applicant filed a request for management evaluation of the decision to separate him effective 31 August 2011.

10. On 23 August 2011, the Applicant applied for a suspension of action of the decision to terminate his appointment. The Tribunal refused the said application in its Judgment recorded as UNDT/2011/151. The Applicant was separated from service on 30 September 2011.

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

12. On 22 June 2012, the Applicant filed an application requesting a joinder of his case with two other cases before the UNDT. The Respondent filed objections to the application on 25 June 2012. The Tribunal refused the application by an oral order issued on 26 June 2012.

13. The Tribunal heard this case from 27-28 June 2012 during which time live evidence was received from Mr. Ian Sinclair, former UNMISS Chief of Staff for the Respondent while the Applicant testified for himself.

14. On 24 July 2012, the Applicant sought leave to adduce additional evidence in his case. The evidence that the Applicant wanted admitted were:

- a. An email dated 19 May 2010 from himself to various recipients in Radio Miraya which stated the reporting lines that were to be followed as a result of direct instructions from the SRSG;
- b. An email chain during the period 8 June 2010 to 14 July 2010 (concerning reporting lines) between the Applicant and Mr Claude Cirille, then Chief of Radio at the mission concerning the radio reporting lines.
- c. An email chain beginning on 28 July 2010 from Mr. Bali, UNMIS Public Information Officer (PIO) to various recipients. In the email, Ms Ann Bennet, Country Director of Fondation Hironnelle (FH), a non-governmental organization which had signed a Memorandum of Understanding (MOU) with UNMIS, observed that she was highly dismayed about the requirement that editorial reporting lines indicate United Nations editorial control.

15. 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.

16. The Respondent and the Applicant filed their closing submissions on 31 August 2012.

17. Mr. Eissa's evidence is summarized below.
- a. He joined UNMIS on 11 May 2009 as Deputy Chief Public Information Officer until October 2010 when he became the Referendum Public Campaign Coordinator and Spokesperson of Public Information at the P-5 level.
 - b. During the 2009/2010 performance appraisal ("ePAS") cycle, he had no problems with his reporting officers and they achieved important milestones including overseeing the first major election in Sudan. Their achievement was duly acknowledged by important sectors in the country.
 - c. As Spokesperson, he was the head of the media review unit and was required to keep the Mission's leadership abreast of the news and reports on wide-ranging issues. He was the mouthpiece for the Mission and was responsible for press releases and cleared outgoing news or releases from the United Nations. He attended events and sometimes read the message from the SRSG.
 - d. The only problematic issue was the partnership with FH. He felt that FH was doing much more than they were supposed to be doing. There was also an anomaly brought about by UNMIS' lack of editorial control which was in the hands of FH contrary to United Nations rules. The manifestation of this anomaly was evidenced by the fact that there were instances when the United Nations radio station in Juba was invaded by South Sudanese militia due to certain controversial news items.
 - e. He received a very high rating in his 2009/2010 ePAS with a lot of commendation. He acted as the Chief Public Information Officer (CPIO) during that reporting cycle for 10 months. The CPIO grade was D-1. He had oversight over all the sub-sections of the unit.

- f. There were some systemic problems in recruitment and also the host country was not cooperative in granting visas.
- g. In October 2010, a new Chief of Staff (COS), Mr. David Wimhurst, and a new CPIO, Ms. Hua Jiang, joined the Mission. The new COS completely side-lined him and changed the way that things were done.
- h. A new Chief of Radio was recruited while he was away on leave for one week. Recruitment on average took six weeks. He was not consulted about the recruitment of the Chief of Radio. He did not see any of the other applications for the position of Chief of Radio. He had previously been involved in the recruitment of other senior personnel in the Mission. He had also previously acted as an external assessor in interviews for recruitment to other parts of the Mission.
- i. Editorial control of the United Nations radio station in Sudan, Radio Miraya, was handed back to FH against the instructions of the SRSG.
- j. He was very familiar with the mandate of UNMIS and also that of the new Mission, UNMISS. He was also the longest serving staff member in UNMIS and reported directly to the SRSG.
- k. He was not part of the Comparative Review Panel (CRP). Three months after the CRP exercise, he saw the Temporary Vacancy Announcement (TVA) for a P-5 Spokesperson position for UNMISS which was posted on 10 October 2011. Soon after the new mission UNMISS had started, he saw the name of one Aleem Siddique listed as Spokesperson.
- l. He considered himself suitable to perform all the tasks listed in the TVA as these were tasks he undertook while at UNMIS.

- m. The former SRSG of UNMIS is now the Special Envoy of the United Nations to the whole of the former Sudan including South Sudan, Khartoum and Darfur and his continuation to the new Mission would not have presented any of the problems suggested by the Respondent's witness Mr. Sinclair.
- n. He has applied for 17 other posts in the United Nations. He was contacted regarding a post that he had applied for in Libya and was asked if he knew Ms. Hua Jiang. Within an hour of being contacted, he received an email about some incident and he did not get the job.

18. Upon cross-examination by Counsel for the Respondent, Mr. Eissa further stated:

- a. The MOU with FH stated that editorial control remained with the UNMIS Chief of Radio but the annexes to the MOU gave a lot of leverage to FH. These facts came to the surface when a story by Radio Miraya harmed the UNMIS mandate. The SRSG asked him to investigate what had happened. There was no UNMIS Chief of Radio at the time.
- b. The SRSG did not raise any issues regarding the MOU with the Legal Office when the incident happened.
- c. As the Officer-in-Charge of the Public Information Office, he wanted to bring back editorial control to UNMIS although it was to be a gradual process.
- d. The SRSG gave the instructions during two meetings for UNMIS to take back editorial control and he acted under delegated authority to enforce the instructions. He was the Spokesperson for UNMIS and it is not the case that he misrepresented the SRSG.
- e. He was reassigned to perform other functions in October 2010 when Ms. Jiang arrived at UNMIS.

- f. The SRSG told him that he would be more comfortable sending him to the Referendum Campaign as he saw it as a last and important function for UNMIS. He asked the SRSG to be his FRO and he agreed.
 - g. He was side lined by Mr. Wimhurst during the recruitment process for the CPIO.
 - h. Ms. Jiang sought to remove him from his position as Spokesperson.
 - i. The functions of the Spokesperson post in UNMISS had not been changed. The generic duties and responsibilities were the same. The change in functions was not 30%.
19. Mr. Sinclair's evidence is summarized below.
- a. He is currently the Chief of the Peacekeeping Situation Centre in the Department of Peacekeeping Operations (DPKO) in New York at the D-1 level. He joined UNMISS on 8 July 2011 as interim Chief of Staff.
 - b. Between 8 July 2011 and 15 October 2011, he carried out the functions of Chief of Staff at UNMISS. In that capacity, he was responsible for the efficient functioning of all the units on behalf of the SRSG and for translating the SRSG's vision into action.
 - c. He was the head of the Mission Leadership Team (MLT) during the start-up phase of UNMISS. The MLT comprised of senior managers of UNMISS who had been tasked with taking decisions to guide the work of UNMISS.
 - d. During the early weeks of the Mission, the MLT met to review the filling of posts. This took several weeks. The Spokesperson's post was reviewed by the MLT.

- e. The post of Spokesperson in UNMISS was tasked with advising the SRSG and explaining to the country the mandate and function of UNMISS. The old Mission's (UNMIS) mandate was to ensure a peaceful solution between the Sudanese Government and the opposition. The mandate for UNMISS was to consolidate peace and security in South Sudan and to help establish conditions for the country to build and develop. There were strong human rights and protection of civilian elements in the new Mission.
- f. The critical role for the Spokesperson was to convey and explain to the country that this was not a continuation of the old mission. The change of the functions of the post of Spokesperson related to the mandate of the new mission in South Sudan. UNMIS had been in existence for six years. Politicians and people had formed their perspectives of the mission which in the South of Sudan was not favourable. It was vital from the outset to ensure that there was no confusion between UNMIS and UNMISS so that those perceptions would not be assigned unwittingly to the new Mission. For UNMISS to operate effectively and fulfil its mandate, it was vital that the Government and people of South Sudan understood that it had a completely different mandate and different relationship with South Sudan.
- g. He was not aware that the Applicant was the Spokesperson in UNMIS. The MLT wanted to recruit the best and most appropriate person in light of the new mission's mandate.
- h. The primary function of the MLT was to look at the posts that required new profiling. They recruited a temporary appointee and the Applicant's candidature was considered. The post was re-advertised and a new selection was done.
- i. By 5 July 2011, no discussion had taken place with regard to the profiling of the post of Spokesperson for UNMISS. The UNMISS

leadership was of the opinion that it needed to get the profile right for the Spokesperson. They did not consider the relationships that the Applicant had established with the Government of South Sudan in deciding to profile the new post.

- j. The MLT did not receive information suggesting that the Applicant was a bad fit.
- k. The public face of UNMISS needed to explain the new mandate and new approach. The UNMISS leadership was of the opinion that the Spokesperson role needed new profiling. This would entail a change of approximately more than 30% in the profile for the post. There was a requirement to demonstrate a new message with the new Mission and a new SRSG. Having re-profiled the post, it was open to competition and it was the job of the interview panel to determine the best candidate.

Applicant's case

20. The Applicant's case as distilled from his oral testimony and pleadings is summarized below.

21. The decision to terminate his 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.

22. Had the CRP and the entire transition process been fair, transparent and lawful rather than tainted by animus and dishonesty, he would have been transitioned to UNMISS. In support of this claim, the Applicant testified that he was marginalized as a result of being identified as part of a group that was opposed to the superior position assumed by FH in its relationship with UNMIS' Radio Miraya resulting specifically in his removal from the Spokesperson duties. The said marginalization was evident, according to him, in two instances as follows:

- a. The fact of him being side-lined during the recruitment process for a new Chief of Radio.
- b. The pressure placed on him to relinquish his role as first or second reporting officer to a number of staff members in the Public Information Office.

23. The purported decision to terminate his employment was unlawful. He was under contract until 30 June 2012. A separation from service must follow from either of the causes of separation in Staff Rule 9.1 (i), (iv), (v) or (vi). However, it is evident from the Letter of Separation that the Applicant's separation is a unilateral act, purportedly initiated on behalf of the Secretary-General that is a termination under Staff Rule 9.6(a) although there is no clear statement that the appointment has been terminated.

24. 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 is the sole administrative instruction concerned with the delegation of authority within the United Nations and a careful 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 Assistant Secretary-General, Office of Human Resources Management (ASG/ORHM). Delegation must not be guessed at or presumed.

25. During the course of the application for a suspension of action, Counsel for the Respondent sought to argue that the ASG/OHRM has delegated authority to terminate an appointment. ST/AI/234 limits that authority to (i) a termination of an appointment for health reasons; and (ii) a termination of an appointment of staff members at Headquarters within the purview of a subsidiary panel on its recommendation (in consultation with the Office of Legal Affairs) other than termination of permanent appointments for unsatisfactory service. Thus, it is readily apparent that even if, the ASG/OHRM were the relevant decision maker,

there would be no proper delegated authority to terminate the Applicant's contract in a case such as this.

26. 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 the Field Personnel Division, Department of Field Support (FPD/DFS) wrote to the ASG/OHRM seeking approval for the said termination, which was duly "granted". The Applicant submits that 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.

27. Where a particular authority is the reserve of the Secretary-General and thereafter only delegated to named, specific, senior-personnel, it is so for a reason. In this instance, it is because the unilateral termination of a contract of employment is something that should only be done in exceptional circumstances with the highest authority. The decision to terminate the Applicant's 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.

28. 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*.

29. The decision to terminate his appointment was in breach of UNMIS Information Circulars 218/2011 and 327/2011 and was vitiated by improper motives.

30. The UNMISS staffing table, which was never disseminated to staff of UNMIS, shows that a similar post of "Spokesperson" at the P-5 level existed in UNMISS. Accordingly, the Applicant was entitled to be reassigned to the post based on section 2(a) of UNMIS Information Circular 218/2011.

31. In the Respondent's reply to the Applicant's previous application for a suspension of action, he had stated that the Applicant had failed to adduce sufficient evidence that a Spokesperson post existed in UNMISS. The P-5 Spokesperson post did indeed exist and had since been filled by one Mr. Aleem Siddique even before the publication of a Temporary Vacancy Announcement.

32. In his testimony, the Respondent's witness claimed that the substantive functions of the post of Spokesperson in UNMISS had changed by over 30% when compared to the functions of the post in UNMIS. This claim is nothing more than a ruse to install the preferred candidate in the new Mission in violation of Information Circulars 218/2011 and 327/2011 and in violation of the duty owed the Applicant by the Respondent to act in good faith and to honour the terms of the contract issued on 20 July 2011.

33. The Public Information Office and Radio Miraya were severely understaffed when the Applicant arrived in UNMIS. The Previous CPIO had brought to his attention problems with an MOU governing UNMIS' relationship with FH. As the office gained more staff, he sought to regularize the relationship with FH in conformity with the United Nations Charter, Rules and Regulations as well as with standard operating procedures of the Public Information Office.

34. There was an incident where a story relayed by FH brought UNMIS into conflict with the Government and people of South Sudan. The SRSG thereafter directed the Applicant to put in place reporting lines that prevented any story going out without United Nations personnel clearing it. Mr. Wimhurst resisted this and later reversed the reporting lines to place FH in editorial control.

35. The Respondent sought to portray the Applicant's resistance to editorial control by FH as irrational and unreasonable but the Respondent failed to produce any evidence to show that the MOU was lawful nor could the Respondent rebut the evidence that the SRSG demanded reporting lines to reflect complete United Nations editorial control. The same relationship with FH has continued in UNMISS.

36. The Respondent repeatedly put to him in cross-examination that he had been relieved of his spokesperson duties due to performance failures and he further submitted that this illustrated the paucity of the Respondent's case. The issue of the Applicant's performance was never pleaded in the Respondent's case. The Respondent has consistently asserted that the only reason the Applicant was not transitioned to UNMISS is that the functions of the Spokesperson post were re-profiled by more than 30%. The claim that the post was changed by more than 30% does not bear critical examination of the evidence presented by the Respondent.

37. Mr. Sinclair sought to persuade the Tribunal that the real change of function in the post was the need for a fresh face that represented a break from the old mission to demonstrate to the people of South Sudan that UNMISS was indeed a new mission for a new country. However, 1500 staff members were transitioned from UNMIS to UNMISS.

38. The Applicant oversaw the United Nation's operations for the referendum in the South and if his face was known, it would be as the person who oversaw the Organization's role in the process which led to the country's vote for independence. If the Mission was so concerned about a fresh start in South Sudan then it should have never implemented a transitioning process.

39. Despite applying for every suitable PIO position with the United Nations since being separated, the Applicant has been unsuccessful every time. There is an active bar to his gaining employment with the United Nations. He was approached about a position of Spokesperson in Libya but the recruitment manager, having given an indication that he was minded to hire him, asked him in an email if he knew Ms Jiang. Thereafter no job offer was sent to him.

40. Due to the failure by senior management to follow the proper procedures of the Organization and their considerable bad faith, the Applicant was not transitioned to the new mission. He could have expected to have been awarded a two-year, fixed-term contract.

41. The Applicant has suffered moral damages, namely the orchestrated campaign to prevent him from securing further employment with the Organization.

42. Based on the foregoing, the Applicant seeks an award of two years' net base salary by way of compensation plus an award for moral damages.

Respondent's case

43. The Respondent's case based on his pleadings and evidence is summarized below:

44. The Secretary-General has broad discretion in relation to staffing matters, which extends to assessing the functions required for any post. In anticipation of the expiry of UNMIS' mandate on 9 July 2011, the Administration established a process to transition staff members with the skills and competencies required for the posts in UNMISS as set out under Information Circular Nos. 327/2011 and 334/2011. In establishing this process, the Administration was guided by the proposed mandate of UNMISS, which entailed the creation of a mission with a decentralized, community-based structure with a field-driven vision.

45. After due consideration of the functions required for the post of Spokesperson for UNMISS, the Administration determined that the post should be filled through a regular selection process.

46. In his witness statement, Mr. Sinclair, explained that "the change of the functions of the post of Spokesperson relate to the mandate of the new mission in South Sudan." He further explained that "UNMIS had been in existence for six years; politicians and people had formed their perspectives of the mission, which in the South of Sudan was generally not favourable." Mr. Sinclair also pointed out that "if the new mission (UNMISS) was to operate effectively and fulfil its mandate, it was vital that the Government and people of South Sudan understood that the new mission had a completely different mandate and a different relationship with South Sudan.

47. Mr. Sinclair testified that, as a member of the MLT, he was involved in the start-up phase of UNMISS, which included, amongst others, examining the functions of the senior level posts given the mission's mandate. He said the mandate of both missions were distinct from each other. He testified that UNMISS' mandate had a much stronger human rights element and explained that the MLT was concerned about how to convey the new mandate in order to give the mission the best chance of success. According to him, the mandate of UNMISS was one of the most ambitious with respect to human rights and the protection of civilians in a newly independent nation.

48. He testified further that the new Spokesperson of UNMISS would play a critical role in communicating to the new South Sudanese Government and the people of South Sudan that UNMISS is a new mission, with a new mandate and a new approach. In addition, the new Spokesperson would need to have a good knowledge of South Sudan, its political and communal dynamics, and the South Sudanese media. In this regard, the MLT determined that the terms of reference for the new Spokesperson post would not be the same as the former post in UNMIS.

49. Mr. Sinclair also said that, neither the former Chief of Staff of UNMIS, Mr. Wimhurst nor the Chief of the Public Information Office of UNMIS, Ms. Jiang, were part of the MLT's discussions relating to the senior level posts. He said that he did not know the Applicant personally and that was he not aware that the Applicant was performing the functions of Spokesperson for UNMIS. According to Mr. Sinclair, though the MLT was acutely aware of the aspirations of the incumbents of the senior level posts under its review, the MLT's task, however, was to review the functions of the posts vis-à-vis the new mandate of the mission, rather than the individual staff members encumbering the posts.

50. Under cross-examination, Mr. Sinclair explained that the MLT, as a group, took the collective decision that the Spokesperson post within UNMIS would be re-profiled and advertised. Mr. Sinclair stated that neither he nor the MLT had received any information whatsoever that the Applicant would be a bad fit for the new Spokesperson post in UNMISS. Mr. Sinclair made clear to the Dispute

Tribunal that the Applicant was allowed to apply and compete for the new post of Spokesperson of UNMISS, and re-profiling did not mean that the Applicant could not be considered.

51. The Administration duly determined that the post of Spokesperson in UNMISS should be filled through the regular selection process, in accordance with Information Circular Nos. 327/2011 and 334/2011. Accordingly, the Applicant was not entitled to be automatically reassigned to the post of Spokesperson for UNMISS under section 2A of Information Circular No. 218/2011.

52. The Respondent's Counsel submitted that the Applicant failed to meet his burden of establishing, on the balance of probabilities, that the decision was vitiated due to improper purposes. The determination of the functions required for the post and the need to fill the post through the regular competitive selection process was guided by the mandate of UNMISS.

53. It was further submitted that the procedures undertaken to re-profile the post of Spokesperson for UNMISS were not improperly influenced by extraneous factors, and the consequent decision to terminate the Applicant's appointment was not vitiated by any improper purpose.

54. It was also submitted that the Applicant had failed to present any evidence to substantiate his allegation that the termination decision was based on his professional relationship with senior staff of PIO and other senior staff within UNMIS. There was no evidence to support his contention that he was ostracized, or that Mr. Wimhurst and Ms. Jiang tried to replace him as Spokesperson.

55. The Respondent's Counsel submitted that evidence showed during cross-examination that the Applicant was no longer performing the functions of Spokesperson for UNMIS as of November 2010 because he was reassigned to perform as "[Public Information Officer] Referenda Public Campaign Coordinator" as of 2 November 2011. He continued that the Applicant further stated in cross-examination that the SRSG reassigned him to work as the Public Campaign Coordinator because he felt "comfortable" in the Applicant performing

those functions. This evidence directly contradicts his own claim that he was reassigned as a “compromise” after the Head of Administration, Ms. Heather Landon, intervened.

56. The Respondent submitted too that this contradiction was put to the Applicant in cross-examination and he failed to provide a credible explanation to clarify his prior inconsistent statements. It was pointed out in closing submissions that in his performance appraisal for the 2010/2011 cycle, the Applicant commented that “[Ms. Jiang] also regularly commended my performance both as Spokesperson, campaign coordinator and Deputy CPIO.”

57. It was further submitted that the Applicant did not “remain Mission Spokesperson” as he claimed in his Application and during his direct examination. The submission referred to an email to the UNMIS Public Information Office dated 2 November 2011 in which Ms. Jiang informed staff of the Applicant’s reassignment and that the then Deputy Spokesperson “will act as the Spokesperson until further notice.”

58. Still in closing submissions, it was stated that the Applicant continued to misrepresent his official functions, as UNMIS Spokesperson, to external parties and that this is evident by his email to the Spokesperson for the United Nations Mission in Libya. On 18 July 2011, Mr. S. was temporarily selected as Spokesperson for UNMISS. His temporary appointment was extended until 31 December 2011, pending the completion of the selection process. On 30 September 2011, the Vacancy Announcement for the new Spokesperson post in UNMISS was posted on Galaxy.

59. It was further submitted that the termination decision was not unlawful on the ground of lack of delegated authority Under staff regulation 9.3, staff rule 9.6, and paragraph 4 of Administrative Instruction ST/AI/234/Rev.1, the authority to terminate an appointment on the ground of abolition of post is reserved to the Secretary-General.

60. As a consequence of Security Council resolution 1978 (2011), the mandate of UNMIS expired on 9 July 2011. Further, Security Council resolution 1997

(2011) instructed the Secretary-General, as Chief Administrative Officer, to complete the withdrawal of civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011. 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.

61. OHRM approved the termination of appointments of 62 staff members of UNMIS on the basis of the Security Council resolutions and the Sudanese Government's decision not to extend visas beyond 31 July 2011, except for staff members in the UNMIS liquidation team. The Respondent submits that the decision was therefore not unlawful.

62. The Respondent urged the Tribunal to decline to exercise its discretion to grant any relief to the Applicant. He submitted that the Appeals Tribunal had held that remedies are a discretionary matter and compensation may only be awarded if harm has actually been suffered. As the decision to terminate the Applicant's appointment would have been the same had the Secretary-General himself approved the request of DFS to terminate the appointments of the 62 UNMIS staff members, there is no injustice or prejudice to the Applicant.

63. The Applicant had no legitimate expectation that his fixed-term appointment would not be terminated. Contrary to the Applicant's contention that the issuance of the Reassignment Form, reassigning his post to Juba, created a legitimate expectation that the Respondent intended to honour its terms and that the notice of separation of the appointment, one week after its issuance, indicated that the legitimate expectation was not met, as a consequence of Information Circular No. 334/2011, the Applicant was on notice that his appointment could be terminated if he was not reassigned to UNMISS after the comparative review process was completed.

64. The Respondent submitted that the Applicant cannot claim to have a legitimate expectation that he would be reassigned to UNMISS.

Considerations

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

- a. Did the MLT by itself have any authority to disregard the information circulars published to guide the transition process to UNMISS and to re-profile and recruit for certain posts in the new mission?
- b. Did a new mandate for South Sudan require a re-profiling of the Spokesperson post for UNMISS? Did evidence before the Tribunal sufficiently establish that there was more than a 30% change in the Spokesperson role in the new mission?
- c. Was there animus against the Applicant as a result of his being identified as part of a group that was opposed to a relationship between UNMIS and FH in which FH would have editorial control of UNMIS Radio Miraya?
- d. 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?
- e. A critical need for transparency in the transitioning process of staff from the former UNMIS to the new mission.
- f. Introduction of new evidence by way of closing submissions.

Did the Mission Leadership Team by itself have any authority to disregard the information circulars published to guide the transition process to UNMISS and to re-profile and recruit for certain posts in the new mission?

66. The Respondent's witness, Mr. Sinclair, testified that he was the head of the MLT, which was made up of certain senior managers in UNMISS. According to him, the MLT was tasked with taking decisions to guide the work of UNMISS

and that during the early weeks of the Mission, the MLT met to review the filling of posts and that these meetings and reviews lasted several weeks.

67. He testified that the primary function of the MLT was to look at the posts that required new profiling and that the UNMISS leadership was of the opinion that the Spokesperson role needed new profiling. This entailed a change of approximately more than 30% in the profile for the post. He told the Tribunal while answering a question in cross-examination that he was aware of the process requiring the transferring of staff members from the former UNMIS for P4 and below to the new mission.

68. The Organization's documents which were made for the purpose of governing the transition process of staff and assets from UNMIS to UNMISS included:

- a. Security Council Resolution 1996 (2011);
- b. Security Council Resolution 1997 (2011); and
- c. UNMIS Information Circulars 218/2011, 327/2011 and 334/2011.

69. Security Council Resolution 1978 (2011), *inter alia*, announced the Security Council's intention to establish a mission to succeed UNMIS and authorized UNMIS to utilize its assets to prepare for the establishment of UNMISS, the successor mission.

70. Security Council Resolution 1996 (2011) established UNMISS, as of 9 July 2011 and decided that the new mission would consist of up to 7,000 military personnel, including military liaison officers and staff officers, up to 900 civilian police personnel, including as appropriate formed units, and an appropriate civilian component, including technical human rights investigation expertise.

71. Paragraph 16 of Security Council Resolution 1996 (2011) requested 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.

72. In paragraph 3 of Security Council Resolution 1997 (2011), it was requested that the Secretary-General transfer appropriate staff, equipment, supplies and other assets from UNMIS to UNMISS and the United Nations Interim Security Force for Abyei (UNISFA), together with appropriate staff and logistics necessary for achieving the new scope of functions to be performed. Paragraph 5 underscored the need for a smooth transition from UNMIS to UNISFA and to UNMISS.

73. The purpose of UNMIS Information Circular 218/2011 issued on 1 June 2011 was to inform UNMIS personnel of the transition of international staff to the new mission in South Sudan. The said Information Circular was signed by the Director of Mission Support of UNMIS, Mr. von Ruben. The circular stipulated that the following arrangements would be applied to move internationally recruited staff from UNMIS to the new mission.

- a. In cases 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, staff members currently encumbering those posts in UNMIS would automatically be reassigned to the new mission provided other conditions such as satisfactory performance were met.
- b. In cases where the number of posts in the new mission were lower than the encumbered posts in UNMIS at the same occupational group and level, then a comparative review process would be instituted through a comparative review panel comprised of members from the Field Staff Union (FSU) and UNMIS Administration to conduct the exercise in accordance with FPD guidelines.
- c. In cases where occupational groups (posts) in the new mission do not currently exist in UNMIS, then those posts in the new mission would be advertised and filled through the regular recruitment and selection process.

74. In paragraph 3 of another UNMIS Information Circular 327/2011 dated 26 June 2011, it was stated that the Panel would not review posts, where staffing was equal to or less than the proposed numbers in the new mission. It further stated that the profiles of some of the existing posts may change and would be filled through the regular competitive selection process.

75. Yet a third UNMIS Information Circular 334/2011, issued on 30 June 2011, stated, *inter alia*, as follows:

For those International staff that have not gone through an FCRB process, appointments will be limited to service in the new missions. 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.** (Emphasis added).

76. The purpose of reproducing certain portions of the relevant Resolutions and applicable information circulars above is to examine whether the role envisaged for the MLT was that of re-profiling of posts and recruitment of personnel. The transitioning of staff members to the new mission from UNMIS had started weeks before the arrival of the MLT of the new mission (UNMISS) and the start-up of that mission. It was an exercise carried out jointly by the old UNMIS administration and officials of the Field Personnel Division in New York as could be gleaned from the Information Circulars and the composition of the CRP which was set up for that purpose.

77. While Mr Sinclair told the Tribunal that the transitioning of those on P5 posts and above was not as simple as that of those on P4 and below because the MLT had to decide on those on senior posts, nowhere in any of the relevant Information Circulars was it stated that posts above the P4 level were to be reserved for the MLT of the new mission (UNMISS) to take decisions on the transitioning of staff members. In respect of the transition exercise undertaken by the CRP, the Tribunal takes judicial notice of the fact that certain posts that underwent comparative review, before the UNMISS MLT came on board, had in fact been re-profiled. In the light of these, if the functions of any posts would be

re-profiled and change by more than 30%, was the re-profiling and recruitment for such posts, a function within the competence of the MLT?

78. Mr. Sinclair testified that the MLT had “been tasked with taking decisions to guide the work of UNMISS” and that “the primary function of the MLT was to look at the posts that required new profiling”. He also told the Tribunal that the MLT wanted to recruit “the best and most appropriate person in the light of the new mission’s mandate.” He added that the MLT arrived at its decisions on the basis of “discussions” over several weeks. There was no documentary evidence of these claims. Nothing outside of the oral assertions of Mr. Sinclair supported his claims of meetings and discussions of the MLT, its membership or the reaching of any decisions by it.

79. In the Principles and Guidelines of the United Nations Peacekeeping Operations published in 2008, it is clearly stated that **the core membership of the MLT is comprised of the heads of the major functional components of the mission and that the team is responsible for overseeing the implementation of the mission’s activities**. Mr. Sinclair testified that the decision on the post of Spokesperson was taken after discussions of human resources issues in several meetings. He also stated that there were members of the old mission in the MLT although he did not give their names.

80. The question arises as to how some members of the MLT who were senior management staff in the old mission and whose posts were certainly above the P4 level were themselves transitioned to the new mission to enable them to participate in deciding what other senior management staff would be transitioned or not. Also, did the task of overseeing the implementation of the mission’s activities entitle the said MLT to deal with personnel and staffing issues? Generally, the task of re-profiling of posts is a task reserved for and best suited to the Office of Human Resources Management.

81. In the case of United Nations Peacekeeping Missions, the role of classification and profiling of posts falls under the authority of DFS and

specifically to its arm known as the Field Personnel Specialist Support Service whose stated mission is:

Provides strategic services in the areas of policy implementation guidance, organizational design and classification, self-monitoring, information management, outreach, roster maintenance and succession planning¹.
(Emphasis added)

82. The Tribunal would have expected to see some documentary evidence showing the involvement or the delegation of this role from DFS to the MLT in the light of Mr. Sinclair's testimony. The absence of such documentation coupled with the fact that the MLT kept no minutes of its claimed "several meetings" on the subject, which according to the witness ran into weeks, or the existence of any documentary evidence of how it made its decisions leaves the Tribunal with only one conclusion. It is, that the said MLT did not hold any such meetings, make any such decisions or have any authority to go against the stated criteria for transitioning staff to UNMISS by deciding, as stated by Mr. Sinclair, that senior level posts were theirs to re-profile, fill and recruit. In fact, there is no evidence that the MLT had any delegated authority or business with the transitioning of staff members, which transitioning had taken place in UNMIS before the arrival of the MLT and the start-up of the new mission.

83. It must be borne in mind that Security Council Resolution 1996 (2011) which established the new mission requested at its paragraph 16 that:

the Secretary-General transfer appropriate functions performed by the UN Mission (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.

84. Mr. Sinclair's testimony and the submission of the Respondent's Counsel is that an interim spokesperson was appointed by the MLT on 18 July 2011, only nine days after the start of the new mission. The question is whether the MLT could undertake this interim recruitment at all especially at a time that the Applicant was still encumbering the post of spokesperson based on his assignment

¹ Extracted from the Field Personnel Division UN Intranet website.

in that capacity from UNMIS to Juba as evidenced by Applicant's annex 3 signed by Mr. Ojjero on 25 May 2011?

85. Finally, there is no evidence that the members of the MLT had the expertise to undertake such a specialised task as the classification or profiling of posts. In the absence of clear and convincing evidence showing that the proper legal role of the UNMISS MLT went beyond overseeing the implementation of the mission's activities, the Tribunal is not satisfied that the so called review and re-profiling of posts undertaken by the MLT amounted to anything more than an arbitrary and unlawful exercise of authority.

Did a new mandate for South Sudan require a re-profiling of the Spokesperson post for UNMISS? Did evidence before the Tribunal sufficiently establish that there was a more than 30% change in the Spokesperson role in the new mission?

86. The Mission Spokesperson is one of the key officers within the Public Information Office of a peace-keeping mission.

A public information programme plays a crucial role in explaining the operation's mandate to the local population, local and international media, the donor community, Member States, agencies, funds and programmes of the UN system and non-governmental organizations, keeping them abreast of progress and obstacles in the peace process and building support for the operation's activities.²

87. Other key officers within Public Information Office include the Chief of Public Information and the Chief of Radio. The Spokesperson is described as

the focal point for all media relations, gives press briefings and interviews, issues press releases and provides information to the relevant UN offices. He maintains daily relations with local and international media, liaises with all mission components to have the latest, accurate information on mission activities and priorities, and makes official statements on behalf of the mission...The Spokesperson must work very closely with the Head of Mission to

² Handbook on UN Multidimensional Peacekeeping Operations, 2008, p.45.

accurately reflect mission priorities and objectives and advise him or her on public relations and dealing with the media.³

88. The Respondent's sole witness Mr. Sinclair told the Tribunal that the role of the spokesperson for the new mission in South Sudan had changed by up to 30% because of its mandate. With regard to this claim to a far-reaching change he said:

It was also necessary to communicate to the Government and people of South Sudan that UNMISS was a new mission with a different mandate. The former mission's mandate, essentially, was to support the implementation of the comprehensive peace agreement between the Government of Sudan and the Sudan People's Liberation Movement. The mandate of UNMISS is primarily focused on the consolidation of peace and security in South Sudan, and to help establish conditions for development in South Sudan.

Mr. Sinclair continued:

The Spokesperson and the Public Information Office would need to communicate the very different role, mandate and activities of UNMISS to ensure that the Government and people of South Sudan understood that this was a new mission, with a new mandate and a new approach. In addition, the Spokesperson would need to have a good level of knowledge of South Sudan, its political and communal dynamics, and the South Sudanese media.

89. Mr. Sinclair's claims that the necessity of communicating a new mandate to the South Sudanese Government and peoples so that they understood that UNMISS was a new mission, meant that the post of Spokesperson had to be re-profiled, is not convincing to the Tribunal. If this is to be believed, the MLT's reasoning was that the entire task of communicating a new mandate rested squarely on the shoulders of the Spokesperson alone and that the rest of the Public Information Office of the Mission had no responsibility in that regard.

90. Curiously, even as it was being claimed that the Public Information Office needed to communicate the new mandate, the Chief of Public Information in the old mission was not terminated and the Chief of Radio was transitioned to the new mission. Interestingly also, the UNMIS radio station known as Radio Miraya with

³ Ibid, p.50

its NGO partner Fondation Hironnelle (FH), which according to un rebutted evidence before the Tribunal, had made broadcasts in the old mission that offended the South Sudanese, transitioned to the new mission without as much as changing its name as the said UNMIS radio station continued to be known as Radio Miraya in the new mission (UNMISS).

91. It is not rocket science that the coming into being of a new mission in South Sudan or anywhere else would most certainly involve a new or different mandate from another mission. Clearly, what this required was a shift in ideas, visions, strategies and priorities that were relevant to implementing the mandate of the new mission, not a change in certain faces or names of staff members who had no performance issues. More than 90% of international staff members from the old mission were, as a matter of policy, transitioned to the new. There is evidence that the Applicant had no performance issues and had successfully co-ordinated the UNMIS public information campaign during the Referendum which saw the birthing of the new South Sudan country.

92. Having been Spokesperson for about two years in UNMIS and in addition having successfully co-ordinated the UNMIS public information campaign during a major and historic event such as the Referendum, it is strange that Mr. Sinclair's MLT did not take the Applicant's experience into account when it required a Spokesperson with, according to him, "a good level of knowledge of South Sudan, its political and communal dynamics, and the South Sudanese media." Instead the said MLT settled for Mr. Siddique, a former spokesperson in the United Nations Assistance Mission in Afghanistan, who certainly did not fit the bill, as interim spokesperson for six months, while terminating the Applicant who was evidently more familiar with South Sudan in light of his experience.,

93. The Tribunal has also taken the trouble to compare the Terms of Reference of the Spokesperson post under which the Applicant was recruited in UNMIS in 2009 with that published for the same post in UNMISS in October 2011. There is no significant difference. The competencies of the 2011 vacancy announcement (VA) only differs from the generic and the 2009 VAs for the same post in requiring client orientation as a competency and the ability to establish and

maintain productive partnerships with clients. It is the considered view of the Tribunal that this did not amount to a 30% change in the post.

94. With regard to Mr. Sinclair's testimony that the new mandate had a strong human rights element and protection of civilians' element and that these made it a complex mandate requiring a new spokesperson, it is strange and unconvincing how these elements could have affected the post of the Spokesperson. Human Rights standards, as first enunciated in the Universal Declaration of Human Right in 1948, is the central plank of United Nations operations everywhere in the world. Their awareness and protection are also the concern of every staff member in the United Nations system. Additionally, Human Rights and the protection of civilians are always focal issues and an important part of peacekeeping operations which would usually have a strong Human Rights component with trained officers from varied backgrounds.

Was there animus against the Applicant as a result of being identified as part of a group that was opposed to a relationship between UNMIS and FH in which FH would have editorial control of UNMIS Radio Miraya?

95. The Applicant submitted that he would have been transitioned to UNMISS if the CRP had been fair, transparent and lawful rather than vitiated by animus and dishonesty. He submitted that his marginalization was as a result of being identified as part of a group that was opposed to the relationship between Radio Miraya and FH and that this was illustrated by his side-lining during the recruitment process for a new Chief of Radio and the pressure placed on him to relinquish his role as first or second reporting officer to a number of staff.

96. The Applicant testified that UNMIS' partnership with FH was problematic and that this was brought about by the fact that editorial control which was in the hands of FH contrary to the United Nations rules and that the MOU with FH stated that editorial control remained with the UNMIS Chief of Radio but the annexes to the MOU gave a lot of leverage to FH. This came to the surface during a story that harmed the UNMIS mandate. The SRSG asked him to investigate

what had happened and instructed him to bring back editorial control to the United Nations.

97. The Applicant also testified that Mr. Wimhurst instructed that editorial control of the United Nations radio station, Radio Miraya, should be handed back to FH against the instructions issued by the SRSG.

98. In his response, the Respondent submitted that the Applicant failed to meet his evidentiary burden of establishing, on the balance of probabilities, that the decision was vitiated due to improper purposes. The Respondent further submitted that there is no evidence to support the Applicant's contention that he was ostracized or that Mr. Wimhurst and Ms. Jiang tried to replace him as Spokesperson.

99. The Tribunal has carefully considered the Parties' oral and written submissions as well as the documentary evidence in this case. In a Draft Audit Report referenced as Assignment N. AP2011/632/04, the Office of Internal Oversight Services (OIOS) (which was included in the Applicant's annexes), concluded that:

- a. UNMIS broadcasted its programmes through Radio Miraya. To assist UNMIS in radio broadcasting, it entered into an MOU with FH. The MOU stated that the radio would be operated under the overall authority of the Chief of Radio Unit of UNMIS and under the operational editorial management of an Editor in Chief appointed by FH. However, in practice the editorial function for programmes was primarily controlled by the Deputy Editor-in-Chief in Khartoum and the Editor-in-Chief in Juba, both staff of FH. This was inconsistent with OPPI which required that PIO retain editorial control of all public information materials. The editing of United Nations materials by anyone other than authorized United Nations personnel was unacceptable.
- b. The CPIO stated that editors were working closely and under the supervision of the Chief of the Radio Unit and that the Chief of Radio

Unit had ultimate responsibility for all editorial matters relating to radio programmes. The Chief of Radio Unit was consulted for highly sensitive matters as determined by editors, however, there was no documentation showing that highly sensitive material were systematically referred to the Chief of Radio Unit for approval/action and there were no SOPs developed for identifying sensitive materials and referring such programme materials to the Chief of Radio Unit for approval.

- c. OIOS identified two instances of radio broadcasts which were politically sensitive and criticized by the Government of South Sudan. In the absence of an effective editorial control mechanism, there was an unmitigated risk that radio programmes could be broadcast without proper editorial approval of United Nations personnel.
- d. The provisions of the MOU with FH were not periodically reviewed and updated.
- e. There were some issues that could have been clarified and implemented if formal meetings had been convened including: inconsistencies in the provisions included in the annexes to the MOU to the provisions stated in the body of the MOU; the non-establishment of a joint assessment team for determining resources including radio equipment and staffing requirements; clarification on payment of travel allowances to FH staff while travelling; and clarification on intellectual property issues and supervision of United Nations staff by FH staff.
- f. In accordance with the MOU, FH provided radio equipment and spare parts to UNMIS in order to operate Radio Miraya. These assets became UNMIS property, however, the PIO did not maintain a list of the items and there was no record indicating their location, physical condition and who was assigned responsibility for them. FH stated that they provided 2,376 pieces of equipment and spare parts but no details of the costs were available. There was insufficient evidence that all 2,376 items were handed over physically and accepted by UNMIS as the handover record showed only 374 items.

100. Part of the documentation in this case included an email dated 30 July 2010 from Ms. Anne Bennett, Head of Project for FH in which she expressed dismay in the change of reporting lines to reflect United Nations editorial control of Radio Miraya. The relevant parts of the email are reproduced below:

I was highly dismayed to read of this latest mutation to the editorial reporting lines upon my return to Juba. These two new points run contrary to the spirit and letter of the Memorandum of Understanding between our organizations. On behalf of Fondation Hirondelle leadership, I am formally contesting this new directive and calling for the implementation of the editorial structure set by the MOU. This structure, outlined in Article 2, establishes that the Editor in Chief, appointed by Fondation Hirondelle, is responsible for the operational editorial management of Miraya.

101. The Applicant also filed an email from Ms. Jiang to show that he had been removed as First Reporting Officer for a number of staff members who had previously been reporting to him.

102. The Tribunal observed in UNDT/2013/094 (*Bali*) that

It is a primary and basic rule of pleading that the party replying or answering to a claim or complaint must fully and sufficiently address any “allegations of fact” that go to any “issues” that are raised in the said claim or complaint. In other words, a reply filed by the Respondent before this Tribunal must admit or deny the specific allegations set forth in the application. It is for this reason that an Application or claim is served on the Respondent and a period of 30 days is afforded him to reply.

103. In the instant case and particularly in respect to this issue, the Respondent has neither answered to the allegations of fact pleaded by the Applicant nor addressed the documentary evidence adduced in support of the said facts. The Respondent’s failure to deal with the particular allegations of the Applicant leaves the Tribunal with no other course of action than to accept the Applicant’s version of the events. The Tribunal, therefore, based on pleadings, ample oral and documentary evidence and the fact that these claims are unchallenged, finds that there was animus against the Applicant by the UNMIS Chief of Staff as a result of being identified as part of a group that was opposed to a relationship between UNMIS and FH in which FH would have editorial control of UNMIS Radio Miraya.

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?

104. The Applicant submitted that the CCPO of UNMIS did not have the authority to take the decision to terminate his appointment. He 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.

105. The Respondent submitted that the abolition of the Applicant's post and the termination of his 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.

106. 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.

107. 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). As the Tribunal observed in *Bali*,

While the Security Council called for the withdrawal of all civilian UNMIS personnel who were not required for the mission's liquidation, this should not have been used as an excuse to avoid compliance with the procedures set out in ST/AI/234/Rev.1. A careful reading of the Administrative Instruction reveals that the ASG/OHRM has delegated authority to terminate an appointment only for health-related reasons. The Secretary-General retains the authority in all other cases.

A critical need for transparency in the transitioning process of staff from the former UNMIS to the new mission

108. This case starkly illustrates the lack of transparency that attended the transitioning process of staff from UNMIS to UNMISS. Some illustrative examples include:

- a. Nowhere was it stated in the applicable rules governing the transition process that posts above the P4 level were to be reserved for the MLT of the new mission (UNMISS) to take decisions on the transitioning of staff members.
- b. The MLT arrived at its decisions on the basis of "discussions" over several weeks. No documentary claims were submitted by the Respondent to support the assertion that any meetings or discussions took place.
- c. It is unclear how some members of the MLT who were senior management staffs in the old mission and whose posts were certainly above the P4 level were themselves transitioned to the new mission to enable them to participate in deciding what other senior management staff would be transitioned or not.
- d. there is no evidence that the MLT had any delegated authority or business with the transitioning of staff members, which transitioning had taken place in UNMIS before the arrival of the MLT and the start-up of the new mission.

Introduction of new evidence by way of closing submissions

109. Article 18.1 of the Rules of Procedure empowers the Tribunal to determine the admissibility of any evidence. It is also trite law that a party cannot introduce any new evidence by way of closing submissions as the said submissions must be based on fact and law.

110. At paragraph 7 of his closing submissions, Counsel for the Respondent submitted that:

The terms of reference for the new Spokesperson post (P-5) in UNMISS were prepared by the Field Personnel Division (“FPD”) of the Department of Field Support (“DFS”), the Department of Public Information (“DPI”) and UNMIS.

The claimed role of the DFS in re-profiling and drafting the terms of reference for the Spokesperson post in UNMISS was not part of the oral or documentary evidence before the Tribunal.

Findings

111. The Tribunal’s findings are summarized below:

- a. The Mission Leadership Team did not have any authority to disregard the information circulars published to guide the transition process to UNMISS and to re-profile and recruit for certain posts in the new mission.
- b. Evidence before the Tribunal did not sufficiently establish that there was a more than 30% change in the Spokesperson role in the new Mission.
- c. There was animus against the Applicant by the UNMIS Chief of Staff as a result of being identified as part of a group that was opposed to a relationship between UNMIS and FH in which FH would have editorial control of UNMIS Radio Miraya.

- d. 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).
- e. This case starkly illustrates the lack of transparency that attended the transitioning process of staff from UNMIS to UNMISS.
- f. A party cannot introduce any new evidence by way of closing submissions as the said submissions must be based on fact and law.

Judgment

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

113. 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.

114. The Applicant is also entitled to compensation for the substantive and procedural irregularities occasioned him 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.

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

additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 4th day of September 2013

Entered in the Register on this 4th day of September 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi