



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

ANDREYEV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Alexandre Tavadian, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations Mission in Sudan (UNMIS). He was separated from service on 1 October 2011 and filed the present Application on 30 December 2011 contesting his separation on grounds that:

a. His appointment was terminated by the Chief Civilian Personnel Officer (CCPO), UNMIS, who lacked the requisite delegated authority to do so and thus the decision was unlawful and *ultra vires*.

b. He had a legitimate expectation that his appointment would be extended and that he would be transitioned from UNMIS to the United Nations Mission in the Republic of South Sudan (UNMISS); his termination was therefore in breach of this expectation.

c. The impugned decision was arbitrary and taken in breach of the Administration's applicable Information Circulars (IC).

d. The process through which UNMIS personnel was transferred and transitioned to UNMISS was unfair and lacked transparency.

2. A Reply to these claims was filed by the Respondent on 30 January 2012 in which it was contended that:

a. The decision to terminate the Applicant's appointment was lawful and not *ultra vires*.

b. No legitimate expectation was created to the effect that the Applicant's appointment would be extended or that he would be transitioned to UNMISS.

c. The decision to terminate the Applicant's appointment was taken in compliance with the procedures set out in the relevant ICs and was not motivated by improper purposes.

d. The entire decision-making process in the transitioning of staff from UNMIS to UNMISS was transparent.

Facts

3. In January 2007, the Applicant was appointed as the Chief of the Joint Mission Analysis Centre (JMAC) at the P-5 level in UNMIS, Khartoum, Sudan and continued to serve in that position until his separation from service.

4. In his performance appraisal (“e-Pas”) for the years 2008/2009 and 2009/2010, the Applicant was rated as “frequently exceeds performance expectations” while in his 2010/2011 e-Pas, he was rated as “successfully meets performance expectations”.

5. In consideration of the results of the referendum of South Sudan announced on 7 February 2011 during which approximately 99% of the South Sudanese people voted for their independence from Sudan; and following a request by the Government of South Sudan for a continued United Nations presence in South Sudan, on 27 April 2011 the Security Council adopted resolution 1978 (2011) in which it was decided to establish a new mission to succeed UNMIS after the completion of its mandate.

6. By this resolution, the Security Council also decided to extend until 9 July 2011 the mandate of UNMIS. The Security Council also authorized UNMIS to utilize its assets in preparation of the establishment of the new successor mission.

7. Pursuant to resolution 1978, on 17 May 2011 the Secretary-General provided a Special Report on Sudan to the Security Council in which he requested a three month technical rollover of UNMIS from 9 July 2011 to 9 October 2011 whereupon UNMIS would commence the downsizing of its staff in Khartoum.¹

8. On 18 May 2011, Ms. Susana Malcorra, then Under-Secretary-General for Field Support, Department of Field Support (“USG/DFS”) addressed a letter in response to Mr. Michael Munywoki, the Chairperson of the UNMIS Field Staff

¹ S/2011/314. Special report of the Secretary-General on the Sudan.

Union. Mr. Munywoki had earlier written to Ms. Malcorra regarding the job security of UNMIS International Staff Members in light of the impending closure of UNMIS.

9. In her response, Ms. Malcorra explained how the transition of staff from UNMIS to the proposed new mission in South Sudan would be undertaken. Part of her response was that all UNMIS staff would have the opportunity to be considered for retention against posts at the same level, category, occupational group and functional title within the new mission.

10. Where there existed a lesser number of posts than qualified staff in UNMIS, retrenchment would be undertaken and staff affected by downsizing of their mission components would be reviewed alongside their peers in the same level and category. She stated that the process used in the transition process would be transparent and methodical to ensure due process and to safeguard the rights of affected staff.

11. Several ICs were issued by the Mission detailing the processes and procedures by which the transition was to take place.

12. The first of these circulars, IC No. 218/2011, was issued on 1 June 2011 by Mr. Nicholas von Ruben, Director of Mission Support (DMS), UNMIS. This was in regard to the movement of International Staff to South Sudan. It informed staff members that in cases where the number of posts in the new mission was equal to or higher than that in UNMIS under the same occupational group and level, the incumbents of those posts would be automatically transitioned to the new mission provided other conditions such as satisfactory performance were met.

13. The circular also indicated that where the numbers of posts in the new mission were lower than those in UNMIS in the same occupational group and level a comparative review process would be instituted through a comparative review panel to carry out the selection. Lastly, the IC stated that where posts in the new mission did not exist in UNMIS, then those posts in the new mission

would be advertised and filled through a regular recruitment and selection exercise.

14. On 26 June 2011, IC No. 327/2011 was issued by the UNMIS DMS announcing the formation of a comparative review panel to review the international posts in UNMIS where the number of current staff in UNMIS was in excess of the proposed posts in the new mission. The IC also informed staff that the profiles of some of the existing posts may change and that these would be filled through the regular selection process.

15. Following from this, IC No. 334/2011 was issued on 30 June 2011 updating UNMIS Staff on the impending draw-down process. Through this IC:

a. Staff members with fixed-term appointments that were to expire shortly were advised that their appointments would be extended for a further period of one year. Where a staff member's function would no longer be required by the mission prior to the expiration of his or her fixed-term appointment, the circular stated that a termination indemnity would be payable.

b. It was also indicated that where the staffing table for the new missions reflected new posts or where the functions of a post had changed by more than 30%, the post would have to be filled through the regular competitive selection process and not through the comparative review process.

16. On 8 July 2011, the Security Council formally established UNMISS by resolution 1996 (2011)².

17. Following the establishment of UNMISS, the Security Council passed a resolution on 11 July 2011 terminating the mandate of UNMIS and calling upon the Secretary-General to withdraw all UNMIS personnel by 31 August 2011 with the exception of those required for the mission's liquidation.³ It was envisioned that appropriate staff and assets were to be transferred from UNMIS to UNMISS

² Adopted by the Security Council on 8 July 2011.

³ S/RES/1997 (2011).

to ensure the achievement of the functions required of the new mission.⁴ The resolution also reiterated the need for a smooth transition from UNMIS to UNMISS and the United Nations Interim Security Force for Abyei (UNISFA).

18. On 12 July 2011 the Applicant's fixed-term appointment as Chief, JMAC was extended for a period of one year effective 1 July 2011 to 30 June 2012. This letter of appointment was signed by Martin Ojjero, CCPO, UNMIS.

19. Two weeks later, on 27 July 2011, Mr. Ojjero issued the Applicant with another letter effectively terminating him from service. The letter notified the Applicant that the organization was unable to transition him to either UNMISS or UNISFA.

20. On 28 July 2011, the Applicant received another letter from Mr. Ojjero asking him to check-out by 4 August 2011. On the same day, he wrote to Mr. Ojjero and the Under-Secretary-General for the Department of Peacekeeping Operations (USG/DPKO) requesting an explanation as to why he was not being transitioned.

21. He received a response from Mr. Ojjero informing him that since the functions of his post had changed by more than 30%, the post would be subjected to a regular competitive selection process and not through a comparative review process.

22. On 29 July 2011, Mr. Fabrizio Hochschild, Director, Field Personnel Division, Department of Field Support (FPD/DFS) addressed a memo to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resource Management (ASG/OHRM), Department of Management requesting for approval to terminate the appointments of 62 UNMIS international staff members based on the missions retrenchment plan. He forwarded the names of the 62 staff members. The Applicant was one of them. His memo indicated that the request was necessitated by the closure of UNMIS, the Security Council directive for UNMIS to withdraw staff that were not part of the liquidation team and a decision by the

⁴ Security Council resolution 1997 (2011). Adopted by the Security Council on 11 July 2011.

Government of Sudan not to extend visas beyond 31 July 2011 except for staff members who were in the liquidation team.

23. On 1 August 2011, Ms. Pollard responded to the above email from Mr. Hochschild giving him the go ahead to terminate the appointments of the 62 staff members and authorizing the payment of termination indemnities to them.

24. On 8 August 2011, Mr. Ojjerro wrote an email to the Applicant informing him that his termination was as a result of a 30% change in functions of the Chief, JMAC post in Juba. The Applicant wrote back on the same day requesting an explanation of how the 30% change of function criterion was established. He protested that all other incumbent JMAC analysts were transferred to UNMISS thus showing that there was no change in functions.

25. The Applicant forwarded a request for management evaluation of the decision to the Management Evaluation Unit (MEU) on 15 August 2011 after which the decision to separate him was suspended until 29 September 2011 pending the outcome of the MEU review. Subsequently, the Applicant was separated from service on 1 October 2011 and filed an Application on the merits before the Dispute Tribunal on 29 December 2011.

Applicant's case

26. The Applicant's case as deduced from his own oral testimony, the testimonies of his witnesses and pleadings is summarized below.

27. The decision to terminate his contract was taken without proper delegated authority and was thus *ultra vires*. Mr. Ojjerro, in his capacity as CCPO, UNMIS did not have the delegated authority to terminate appointments by reason of abolition of post. Such authority was only vested in the Secretary-General, which in this case was neither exercised by him nor delegated to the CCPO nor to any other official.

28. The Applicant submits that he had a legitimate expectation that he would be transitioned to UNMISS. His appointment was terminated only two weeks after issuing him with a Letter of Appointment (LoA) extending his contract for a

further period of one year. Given that as at 12 July 2011 when the LoA was issued the Administration was aware that UNMIS was closing down, it was reasonable to assume that the Administration had the intention of transitioning him to the new mission, which intention was communicated to the Applicant through the LoA.

29. The decision to terminate his appointment was arbitrary and in breach of the relevant ICs and the process of transitioning staff was opaque and chaotic.

30. The reasons given for the termination of his appointment were false. For instance there was no 30% change in functions of the Chief JMAC post as alluded to by the CCPO and this was only a ruse designed to relieve him of his post.

31. The claim that the Chief, JMAC post in UNMISS represented a 30% change in job description from the post that the Applicant encumbered in UNMIS does not stand up to scrutiny especially because the post was subject to a generic vacancy announcement (VA). Alternatively, even if the post was to be filled through a mission-specific VA, at the time of terminating the Applicant's employment such a VA had not yet been prepared making it impossible for the mission to claim that the Terms of Reference (ToR) had changed by 30% when the ToR themselves were yet to be defined.

32. The 30% rule that was referred to in Mr.Ojerro's email of 8 August 2011 was contained in the IC issued on 30 June 2011 leading to the inference that it was only sometime between 12 July when the Applicant's LoA was issued and 27 July when his appointment was terminated, that the purported 30% change in job specification was decided upon. This shows that the process was not undertaken transparently.

33. The Applicant submits that the contradicting explanations given to him for the termination of his appointment highlight his claim that the process lacked transparency. Initially, in the separation notice of 27 July 2011, he was informed that he would not be transitioned to the new mission as a result of a comparative review process. Subsequently, in the email dated 8 August 2011, the same CCPO gave a totally different explanation that the functions of his post had changed by more than 30% .

Testimony of Mr. Marius Campean for the Applicant

34. Between January 2011 and July 2011, Mr. Campean worked as an Information Analyst for JMAC in Khartoum where the Applicant was his second reporting officer. At the end of July 2011, he was reassigned to JMAC, UNMISS in Juba where he continued to perform the same functions as he did in Khartoum.

35. He stated that he knew the Applicant to have been an efficient and effective staff member, an excellent supervisor and colleague under whose leadership JMAC produced a stream of high quality information products. He was therefore surprised that the Applicant was the only professional United Nations staff member in JMAC who was not transitioned to UNMISS in Juba.

36. Mr. Campean testified that after he started working in UNMISS Juba he realized that there was no tangible difference between the roles of the Chief JMAC in UNMISS and the Chief JMAC in UNMIS which made him even more surprised by the decision not to transition the Applicant. He also testified that he was convinced that the Applicant could assume the functions of Chief JMAC in UNMISS without any difficulty given that he had been doing the same as Chief JMAC in UNMIS any difficulty given that he had been doing the same as Chief JMAC in UNMIS.

Testimony of Mr. Nasser Ahmed for the Applicant

37. Mr. Nasser was the Applicant's deputy in JMAC, UNMIS from 3 April 2008 to 17 May 2009 and later he became an associate information analyst in the same unit where the Applicant was his second reporting officer.

38. He testified that of the three international staff members in JMAC, the Applicant, Mr. Campean and himself, the Applicant was the only one that was not transitioned to UNMISS; and that in fact he was the person in the entire JMAC, UNMIS unit that was not transitioned. He and Mr. Campean were given the transition order from UNMIS to UNMISS on the same day on which the Applicant received his termination letter.

39. Mr. Nasser also testified that the mandate of JMAC in UNMIS and UNMISS were almost similar, and that while there may have been differences in the written TORs of the two posts, in practice, both positions are almost identical as the tasks performed by the Chief JMAC in Juba and Khartoum are similar.

Applicant's testimony

40. The Applicant testified that on comparing the VA filed by the Respondent as R-14 with the VA to which he was selected as chief JMAC in Khartoum, the only notable difference is the amount of details. The new VA merely described the Chief's responsibilities in detail and the only new item in the new VA was the preparation of Results Based Budgeting (RBB) but this alone cannot constitute a change of 30% in job description.

41. The similarity in the two posts is further highlighted by the fact that the responsibilities in the new VA were determined on the basis of the DPKO JMAC Guidelines and his responsibilities as Chief JMAC in Juba were also designed to be in compliance with those same Guidelines. The Guidelines were adopted in 2010 and therefore there are no notable differences between Chief JMAC responsibilities in the various missions.

42. Based on the foregoing, the Applicant seeks a declaration that the decision to terminate his contract was unlawful. He asks also for his reinstatement as the Chief JMAC UNMISS and where this is not feasible, he asks to be awarded appropriate damages.

Respondent's submissions

43. The Respondent put forward his case as follows:

44. The decision to terminate the Applicant's appointment was the lawful and inevitable consequence of the closure of UNMIS. The Applicant's fixed-term appointment was limited to service on his post within UNMIS and it came to an end upon the closure of the mission when the Security Council passed resolution 1997 (2011) terminating the mandate of UNMIS.

45. Upon the termination of the UNMIS mandate by the Security Council and the subsequent closure of the mission, all posts in UNMIS were abolished and as such there were no services for the Applicant to perform under his terms of appointment. Having been the incumbent of the Chief, JMAC post in UNMIS, the Applicant was not entitled to be automatically reassigned to the post of Chief, JMAC in UNMISS and as such his fixed-term appointment was lawfully terminated for abolition of post.

46. There is no evidence to support the Applicant's contention that the decision to terminate his appointment was exercised in an arbitrary manner or to show that those who were involved in the decision-making process bore him personal animus. The record establishes that the decision was made in accordance with the transition process as set out in the published information circulars.

47. While the Respondent acknowledges that the authority to terminate an appointment on the ground of abolition of post is reserved to the Secretary-General and accepts that in this case the Secretary-General did not personally take the decision, it is argued that the decision itself was the inevitable consequence of the closure of UNMIS. The Respondent also asserts that the Secretary-General was intimately involved in the process and that the decision was taken in circumstances where rapid action was required.

48. It is also submitted that following the resolutions of the Security Council, there was no effective discretion to be exercised by the Secretary-General. It was only for OHRM and DFS to implement the resolutions and as such there was no requirement for the Secretary-General to be personally involved in the termination of each of the 62 international staff members who were not transitioned to UNMISS.

49. There is no merit in the Applicant's argument that the decision was in breach of a legitimate expectation that his appointment would not be terminated before its expiry date, or that the decision should be treated as invalid on the basis that the decision maker did not have delegated authority.

50. The Applicant's letter of appointment contained an express term regarding the possibility of termination prior to the expiry of the appointment. Moreover, the Applicant knew that the mandate of UNMIS was going to expire and that staff would be withdrawn from Sudan. Following the issuance of IC No. 334/2011, he was on notice that his appointment would be terminated if he was not provisionally assigned to UNMISS or selected for another post.

51. The Administration acted in good faith by extending the Applicant's appointment when there was no obligation to do so. It had the option of not renewing appointments that were due to expire; had it exercised this option, the Applicant would not have been eligible to receive a termination indemnity. The Administration however decided to renew the affected appointments for the usual one year term as a result of which staff members who were not reassigned received termination indemnities. The Applicant himself received a termination indemnity. By extending the Applicant's appointment for a period of one year, the Administration created a situation where the abolition of the Applicant's post was processed as a termination thus entitling him to a termination indemnity.

52. The transitioning of staff from UNMIS to UNMISS was implemented in a transparent manner and details of the process were regularly communicated to UNMIS staff.

53. The functions of the Chief, JMAC at UNMISS had substantively changed from the functions of the post at UNMIS and therefore the administration determined that it was appropriate to fill the post through the regular competitive selection process. It was because of this that the Applicant was not reassigned to the post in UNMISS.

54. There is no basis for the Applicant's assertion that the claim of a change in functions between the two posts was merely "a ruse" to terminate his contract. The burden lies with the Applicant to prove this allegation and he has not discharged this burden.

Testimony of Mr. Ian Sinclair for the Respondent

55. He was at the material time in this case the Chief of Staff of UNMISS and was part of the Mission Leadership Team (MLT) that was charged with the responsibility of advising on administrative and human resource matters during the transitioning period.

56. Mr. Sinclair testified that two separate processes were conducted for transitioning staff, one for those at the P-5 level and above and another for those at P-4 level and below. In the case of senior level posts, the MLT recommended that some be filled through a regular competitive selection process as a result of a substantial change in the functions of the positions in the new mission. Two posts were affected and included the P-5 position of Chief, JMAC.

57. He also testified that two aspects of the new mission's mandate led him and others in the MLT to conclude that the roles and functions of the Chief, JMAC in the new mission would be substantially different from those performed in the old mission. The first was that for the first time in any mission the new mission was required "to establish and implement a mission-wide early-warning capacity, with an integrated approach to information-gathering...early warning and dissemination". The MLT considered that this requirement placed greater emphasis on JMAC and its Chief than in previous missions such as UNMIS.

58. The second aspect was that the UNMISS mandate included more specific and demanding language related to the protection of civilians as compared to that of UNMIS.

59. Due to these reasons, the mission leadership accepted the MLT's recommendation to fill the Chief, JMAC post through a competitive selection process.

60. In view of the foregoing, the Respondent prays the Tribunal to reject the Application.

Issues

61. The Tribunal finds that the core issues raised in this case can be dealt with under these three questions:

- a. Did the UNMISS MLT take the decision not to transition the Applicant? Was the claimed decision of the MLT in this case legal and competent?
- b. Was there a substantial change between the functions of the Applicant's post in UNMIS and that of Chief, JMAC in the new mission? Was there a re-profiling of the said post?
- c. Was the decision to terminate the Applicant's contract taken with the requisite delegated authority?

Considerations

Did the UNMISS MLT take the decision not to transition the Applicant? Was the claimed decision of the MLT in this case legal and competent?

62. The Respondent's witness, Mr. Sinclair, told the Tribunal that as Chief of Staff of UNMISS, he was part of the MLT which was charged with advising on critical administrative and human resources matters during the start-up phase. He said that it was agreed by the MLT that for posts at the P-5 level and above, the MLT would deal with them and decide on them.

63. According to the witness, the MLT decided during discussions that the Chief, JMAC's functions would change due to the fact that the said MLT "felt" that the functions of JMAC had changed substantially. When he was cross-examined, Mr. Sinclair said that he was aware that the Director of Mission Support deals with civilian human resources matters and that there were no HR personnel in the MLT of UNMISS.

64. The witness said that the MLT decided to fill some senior level positions through a competitive selection process including the post of Chief, JMAC. In cross-examination, he said that he did not know if staff members were informed that there were two separate processes for the transition.

65. When questioned by the Tribunal, the witness stated that the MLT did not keep any minutes of its meetings. He said that the sheer work of starting up missions did not allow documentation or keeping of minutes. When asked by the

Tribunal why it was necessary to transition every former staff of JMAC from the old mission except the head of the unit, the witness said that all the staff below the P-5 level had been transitioned before the MLT came on board.

66. The role of the MLT in any peacekeeping mission is well spelt out. The Special Representative of the Secretary-General/Head of Mission (SRSG/HoM) and his/her deputies form part of the MLT. The core membership of the MLT is comprised of the heads of the major functional components of the mission. The MLT is responsible for overseeing the implementation of the mission's activities.⁵

67. The first concern here is whether the UNMISS MLT actually took any decision to publish a new VA for the Applicant's post instead of transitioning him to the new mission as was done for all the staff who served under the Applicant in the old mission. Mr. Sinclair told the Tribunal that the MLT took the decision but claims that there were no minutes or documentation of any sort to support the MLT decision. This lack of documentation was due, he said, to the sheer volume of work in the start-up of the new mission.

68. It begs belief that the witness who was interim Chief of Staff at UNMISS, among other previous and subsequent high positions held, would actually claim that the leadership of a United Nations peacekeeping mission held meetings at which it took far-reaching decisions in respect of the mission's mandate and personnel but kept no records of its discussions and decisions. Not only is such a claim preposterous, irresponsible and mischievous, it goes to show the extent to which a highly placed officer of the Organization is prepared to go to deceive the Tribunal in order to cover up an inexcusable and arbitrary act.

69. It is a well-known fact that for peacekeeping missions, the role of classification and profiling of posts is the function of the Field Personnel Specialist Support Service under DFS.⁶ There was no evidence that DFS had delegated its authority in this regard to the MLT. It was not within the competence of the MLT of UNMISS to leave its role of implementing the new mission's

⁵ UN Peacekeeping Operations, Principles and Guidelines 2008, Chapter 7.1.

⁶ Extracted from the Field Personnel Division UN Intranet website.

mandate in order to dabble into matters of human resource management and the transitioning and de-transitioning of staff from the old mission to the new.

70. In reviewing the less than credible evidence of Mr. Sinclair, there is no doubt that the person or group of persons who decided that the Applicant was not to be transitioned to the new mission is being shrouded under the bogus claim that the MLT was responsible for the decision. The effort of the witness to assist in this unwholesome cover-up in which he claims that meetings of the UNMISS MLT during its start-up phase were not recorded is regrettable.

71. This Tribunal makes no hesitation in finding and holding that the MLT at UNMISS did not at any time hold meetings where it decided to re-profile the Applicant's post. In making this finding, the Tribunal is mindful of the fact that the new terms of reference for the UNMISS Chief of JMAC post were published in a VA only on 21 February 2012, nearly two months after this Application was filed and three weeks after the Respondent had responded to the said Application.

72. If indeed the UNMISS MLT actually "felt" that the terms of reference for the Chief JMAC post had changed and decided to advertise it at the start-up of the mission in July 2011 and to terminate the Applicant, why were these TORs for the post published only after the filing of this Application?

73. The claimed re-profiling of the post of Chief, JMAC at UNMISS by the MLT or any other person or body in the mission was carried out in bad faith, without authority, illegally and arbitrarily and in exercise of a discretion they did not have. It is clear that whatever the MLT had done in this regard, if it is to be believed that it did, lacked transparency, credibility and good faith.

Was there a substantial change between the functions of the Applicant's post in UNMIS and that of Chief, JMAC in the new mission? Was there a re-profiling in fact of the said post?

74. Transition of staff members from UNMIS to UNMISS, was provided for by the Security Council resolution closing the old mission and establishing the new mission with its headquarters in Juba. This aspect of the Security Council resolution formed the basis for a transitioning policy of staff members to the new

mission. No doubt, Security Council in the circumstances intended to alleviate the hardship of peace-keeping staff that would have to leave their jobs in the old mission following its closure by re-absorbing performing staff members against posts of the same level, category and occupational group in the new mission.

75. The Under-Secretary-General for Field Support had in a letter dated 18 May 2011 to the Chairperson of the UNMIS Field Staff Union, assured that staff would be considered for retention against posts at the same level, category and occupational group. Understandably, this assurance was followed by three information circulars in June 2011 publicizing this policy to staff. Two of the circulars stated that where the functions of a post had changed by more than 30%, the post would be filled through a competitive selection process.

76. The Administration's case on this score is that the functions of the post of Chief, JMAC at UNMISS had substantially changed from the functions of the same post at UNMIS and therefore it was decided that the post be filled through the regular competitive selection process. The Respondent's only witness in fact testified that in his view, the change in roles was up to 30%.

77. The Applicant claimed that the functions and job responsibilities of Chief of JMAC in any peacekeeping mission are described in the DPKO guidelines and are applicable across the board. It was submitted on the Applicant's behalf that the Administration's claim that the JMAC Chief's job function in UNMISS had changed by 30% was only a ruse to terminate the Applicant's contract, in defiance of the relevant and applicable information circulars and in violation of the duty owed him by the Secretary-General to act in good faith.

78. A good starting point in reviewing these opposing views would be to examine the role of JMAC within a peacekeeping mission. A DPKO document published in 2008 explains that JMAC in a mission provides integrated analysis of all sources of information to assess medium and long-term threats to the mandate and to support the Mission Leadership's decision-making.⁷

⁷ UN Peacekeeping Operations, Principles and Guidelines, 2008.

79. According to the same document, while an office known as the Joint Operations Centre (JOC) collates situation reports and operational information from all mission sources to provide current situational awareness, JMAC has the role of analyzing available information to assess any threats that may be posed to the mission's mandate both in the short and long term and to advise the mission's leadership accordingly.

80. The Respondent's lone witness, Mr. Sinclair, testified that two aspects of the new mission's mandate led him and others in the MLT to conclude that the roles and functions of the Chief, JMAC in the new mission would be substantially different from those performed in the old mission. He told the Tribunal that the first aspect was that the new mission was required "to establish and implement a mission-wide early-warning capacity, with an integrated approach to information-gathering...early warning and dissemination." It was the first time, according to him, that such a requirement was included in a mission's mandate.

81. He continued that the second aspect was that the UNMISS mandate included more specific and demanding language related to the protection of civilians compared to that of the old mission. Whereas the old mission was tasked with protecting civilians without prejudice to the responsibility of the government, the new mission was mandated to protect civilians when the government was not providing such security. He also said that the new mission was to deter violence through proactive deployment and patrols in areas of high risk of conflict while the old mission was to support the implementation of a comprehensive peace agreement between the Government and the opposing group. The JMAC in UNMISS therefore must focus on internal threats that impact on the protection of civilians.

82. When cross-examined, the witness said that it was agreed that for P-5 posts and above, the MLT would deal with and make decisions on them and that he did not know if staff members in the old mission were informed that there were two separate processes for transition to the new mission, that is, the transition which was the subject of the information circulars that were published by the

DMS and which took place prior to the start-up of the new mission on the one hand and the transition of P-5 staff by the MLT.

83. He said that during their discussions, the MLT decided that the Chief, JMAC's functions, would change because it "felt" that the functions of JMAC had changed substantially by up to 30% since its focus in UNMISS was going to be different. There are, according to the witness, no specific guidelines as to how to determine the percentage of change with scientific accuracy.

84. In his reply to questions from the Tribunal, the witness said that no minutes of MLT meetings were kept because the sheer volume of work in the start-up of the new mission did not allow for keeping minutes or documentation. He said further that there were only two P-5 posts out of over twenty posts that the MLT felt had substantially changed and had not allowed the transitioning of their incumbents.

85. The Tribunal examined annexes R-12 filed by the Respondent, which are generic VAs for the position of Chief, JMAC published in February 2006 and April 2011. It also examined another draft VA for the same position in UNMISS, Annex R-13, a position denied the Applicant following the transition of staff members from UNMIS to the new UNMISS mission.

86. Significantly, it can be observed that the responsibilities and competencies are the same in the three VAs but under the section on Accountability, the 2012 VA mentioned overseeing the submission of the JMAC RBB; while under "Experience" it is inserted that "experience with early warning and or protection of civilians strategies or operations is required."

87. The DPKO/DFS guidelines on JMACs published in February 2010 at its paragraph 6.d states that "the comparative advantage of the JMAC is its ability to provide advance warning and contextual information enabling the Head of Mission (HoM) and MLT to take timely decisions aimed at identifying opportunities and averting threats to mission mandate implementation". It continued further that "the Chief JMAC must sustain this unique early warning function..."

88. In other words, the DPKO/DFS guidelines make it clear that the provision of early warnings is a principal function of any JMAC in a peacekeeping mission. Also the integrated gathering and analysis of information and intelligence is indispensable in any mission and this is what the JMAC officers, military and civilian, are trained to do. The Tribunal finds therefore that the Respondent's witness' claim that the aspect of the requirement for early warning in the new mission was new is grossly untrue.

89. With regard to Mr. Sinclair's testimony on the impact of the mission's mandate regarding the protection of civilians, the Tribunal found it strange that he would claim that the mandate requiring protection of civilians meant that the role of the Chief, JMAC would change. It is a matter of fact that the Security Council has expressly prioritized the protection of civilians mandate in at least five of the largest peacekeeping missions.⁸

90. In UNMIS where the Applicant had served, protection of civilians "under imminent threat of physical violence" was expressed in the Security Council resolution in the very same language used in the mandate of the new mission to which he was not transitioned.

91. Much as it is not in the place of this Tribunal to determine what competencies a VA should demand, it is within the Tribunal's competence to scrutinize such a VA in order to determine that the advertised competencies are not an afterthought meant to justify inexplicable actions already taken by managers. In the instant case, it is note-worthy that a VA for the UNMISS JMAC Chief was published on 21 February 2012, more than two months after this Application was filed before the Tribunal.

92. Was there in fact a substantial change in the functions of the Chief, JMAC in UNMIS and that of the same post in UNMISS? It is the Applicant's case that there was no substantial difference. He testified that the only new item in the 2012 VA was the preparation of the RBB and that that alone did not constitute a 30% change in functions. Mr. Naser Ahmed was an information analyst with UNMIS

⁸ Protection of Civilians, Coordination Mechanisms in UN Peacekeeping Missions, DPKO/DFS Comparative Study and Toolkit.

JMAC and was transitioned to the new mission. He stated in his testimony that the Applicant was the only staff member of JMAC in UNMIS who was not transitioned to the new mission. He stated also that the Chiefs of JMAC in UNMIS and the new UNMISS mission perform similar tasks.

93. Another witness for the Applicant, Mr. Campean, was also an Information Analyst in the JMAC of UNMIS in Khartoum. He was transitioned to the new mission and told the Tribunal that the Applicant was the only professional staff member who was not transitioned and that that he and others were surprised by the decision. He stated that when he started working in Juba, he realized that there was no tangible difference between the roles of Chief, JMAC in UNMISS and Chief, JMAC in the old mission.

94. The Respondent's Counsel filed annexes R-12 and R-13. Certain parts of both documents represented efforts to compare different vacancy advertisements for the post of Chief, JMAC with a view to showing that the VA for the post in UNMISS was substantially different. The said comparison documents were not introduced into evidence by the Respondent's witness, neither were they part of any witness testimony.

95. While testifying that the new mission leadership "felt" that the role of JMAC Chief had changed, Mr. Sinclair made no mention of different VAs on the issue. One of the VAs filed by the Respondent R-13 is said to be a draft document with no dates or references. It is identical to R-14, which was made after the filing of this case. To the extent that it is an undated and unreferenced draft, it is an entirely fictional document and does not exist in fact. Both the part of R-12, which compared certain VAs and the fictional R-13 are, in accordance with art. 18.1 of the Tribunal's Rules of Procedure, inadmissible and have no probative value in this case.

96. The Respondent's claimed re-profiling of the Chief, JMAC post in UNMISS is clearly unreliable and untrue. In the letter of termination sent to the Applicant on 27 July 2011 by Mr. Ojjerro, it was stated that following the end of the UNMIS mandate and the human resources post-matching and comparative review exercises, he could not be transitioned to UNMISS.

97. In response to an email from the Applicant querying his termination, the same Mr. Ojjerro responded on 8 August 2011 informing the Applicant that he was not transitioned because the functions of the post had changed by 30%. The question is why Mr. Ojjerro in his role of UNMISS CCPO was himself confused as to the reason for the Applicant's termination so much so that the reason given in the termination letter changed when he responded to the email.

98. The Tribunal finds and holds that there was no evidence of a re-profiling of the post of Chief, JMAC in UNMISS. The MLT by itself had no authority to re-profile any posts in the mission. Even with the claim of a re-profiling, there was indeed no substantial difference of up to 30% between the functions of the Chief, JMAC in the old UNMIS and the new mission as to warrant the non-transitioning of the Applicant to UNMISS.

99. The Tribunal finds it unacceptable that it can be claimed that there are no guidelines for determining whether a 30% change had occurred in the functions of a post. The obvious inference is that the determination of whether the 30% threshold had been reached in the case of the Applicant was left to the "feelings" or whims of the MLT or others not disclosed to the Tribunal.

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

100. It was the Applicant's case that the CCPO of UNMIS did not have the delegated authority to take the decision to terminate his contract. He submitted that the authority to terminate appointments by reason of abolition of post is vested only in the Secretary-General who in his case did not exercise it or delegate it to the CCPO to exercise it on his behalf. This, in the Applicant's view, vitiates the decision as being *ultra vires*.

101. On this issue, the Respondent acknowledged that the authority to terminate an appointment on the ground of abolition of post is reserved to the Secretary-General and that in this case the Secretary-General did not personally take the decision. The Respondent, however, submitted that the Secretary-General was intimately involved in the process and that the decision was the inevitable

consequence of the closure of UNMIS. It was also the Respondent's case that there was no requirement for the Secretary-General to be personally involved in the termination of each of the 62 international staff that were not transitioned including the Applicant.

102. Staff Rule 9.6 (c) provides in part that:

The Secretary-General, may, giving the reasons therefor terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds: (i) Abolition of posts or reduction of staff...

103. Under ST/AI/234 Rev.1 (Administration of Staff Regulations and Staff Rules) this authority to terminate appointments by reason of abolition of post vested in the Secretary-General by Staff Rule 9.6 has not been delegated to any other official be it the ASG/OHRM or the Chief Civilian Personnel Officers of missions.

104. In this case, after the CCPO/UNMISS had terminated the Applicant's contract on 27 July 2011, on 29 July FPD/DFS wrote to the ASG/OHRM purporting to request approval to terminate the appointments of 62 UNMIS international staff members, including the Applicant's. Notably, the termination of the Applicant's contract had already been done before this request for approval to terminate was made. The ASG/OHRM granted her 'approval' on 1 August 2011.

105. Clearly, the ASG's approval to terminate the Applicant's appointment was sought after the CCPO had already taken the decision thus rendering the authorization given as no more than a "rubber-stamp" of the CCPO's earlier decision. Even then, the Tribunal found in *Bali*⁹ that ST/AI/234 only delegated authority to the ASG/OHRM to terminate an appointment for health-related reasons only; in all other cases the Secretary-General retains the authority.

106. As this Tribunal found in other similar cases such as *Eissa*¹⁰, *Bali* and *Hersh*¹¹, the fact that all posts in UNMIS were necessarily to be abolished as a

⁹ Judgment No. UNDT/2013/094.

¹⁰ Judgment No. UNDT/2013/112.

result of Security Council resolution 1997 (2011) does not legalize the taking of *ultra vires* decisions and neither does it justify failure to comply with applicable rules. In *Bali* it was observed that:

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.

107. The Applicant in this case also decried that the process of transitioning staff from UNMIS to UNMISS was not undertaken transparently. Having reviewed the entire record of the case, the Tribunal finds that the process was indeed lacking in transparency and this is illustratable by various actions undertaken by the mission leadership.

108. For instance, the applicable rules governing the process did not provide for separate processes for staff above and below the P-4 level. Neither did the governing rules state that the transitioning of posts above the P-4 level was to be reserved for the new mission's MLT. It was clear from the testimonies given during the hearing of this case that staff members including the Applicant who was affected, were not aware of these two separate processes. This point has been deliberated on at length in *Bali*, *Hersh* and *Eissa* and the Tribunal will not belabor it further here. What is evident in the instant case is that indeed the entire process of transitioning staff was markedly lacking in transparency.

Conclusion

109. The Tribunal finds that:

- a. The claimed re-profiling of the post of Chief, JMAC at UNMISS by the mission was carried out in bad faith, without authority, illegally and arbitrarily.
- b. The MLT had no authority to re-profile any posts in the mission and that even with the claimed re-profiling, there was no substantial

¹¹ Judgment No. UNDT/2013/062.

difference of up to 30% between the functions of the Chief, JMAC in UNMIS and UNMISS.

c. The CCPO of UNMISS lacked the requisite delegated authority to terminate the Applicant's appointment and that the retroactive rubber-stamping of the decision by the ASG/OHRM did not cure the lack of authority. The decision was therefore *ultra vires*.

d. The process of transitioning staff lacked transparency, credibility and good faith.

Judgment

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

111. Should the Secretary-General decide not to perform the obligation to reinstate the Applicant, he must in the alternative pay compensation to the Applicant in the sum of two years' net base salary at the rate in effect at the date of Judgment.

112. 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.

113. 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 29th day of November 2013

Entered in the Register on this 29th day of November 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi