



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/022

Judgment No.: UNDT/2016/012

Date: 24 February 2016

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KIFLE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Miller Wanjala Bwire

Cecil L. Kuyo

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Mission in the Republic of South Sudan (UNMISS). He filed the current Application on 11 February 2013 challenging the decisions not to: (a) renew his appointment with UNMISS beyond 30 September 2012; and (b) reinstate him to his original post of Senior Planning Officer when he was transitioned from the United Nations Mission in Sudan (UNMIS) to UNMISS on 8 July 2011.

Procedural history

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

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

3. On 23 January 2014, the Applicant submitted a response on the receivability issues in accordance with Order No. 008 (NBI/2014)¹.

4. On 22 July 2014, the Tribunal issued its ruling on the receivability of the Applicant's claims in Judgment No. UNDT/2014/103. The following issues were deemed receivable:

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

¹ Dated 16 January 2014.

b) Whether the Applicant had a right to be re-assigned to another position upon expiry of his appointment outside the normal staff selection process.

5. The Tribunal informed the parties by way of Order No. 228 (NBI/2014), dated 16 October 2014, that it would not hold an oral hearing in this matter. Consequently, they were allowed to provide additional submissions and evidence to supplement their existing submissions.

6. The Tribunal held a case management discussion on 2 December 2014 to clarify the Parties' additional submissions. The Parties were then granted additional time to file submissions in accordance with Order No. 264 (NBI/2014) dated 5 December 2014. The Parties filed their submissions on 15 and 28 January 2015.

7. The Tribunal held another case management discussion on 29 January 2015 to explore the possibility of informal settlement of the dispute by the parties. Since the parties were amenable, the Tribunal granted a stay of proceedings until 3 March 2015 to allow time for informal discussion of the matter.²

8. At a case management discussion held on 4 March 2015, the parties moved the Tribunal to grant them additional time to continue their informal settlement consultations. The Tribunal granted the parties' Motion and suspended the proceedings until 2 April 2015.³

9. On 7 and 13 April 2015, the Respondent and Applicant, respectively, informed the Tribunal of the failure of the informal settlement discussions.

10. The Tribunal carefully reviewed the record and decided that the issues for determination had been clearly defined in the Parties' submissions and that the documentary evidence provided adequately addressed the issues raised.

² Order No. 033 (NBI/2015) dated 29 January 2015.

³ Order No. 068 (NBI/2015) dated 4 March 2015.

11. Consequently, the Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, determined that an oral hearing was not required in this case and relied on the Parties' pleadings, written submissions and the documentary evidence.

Facts

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

13. Effective 4 December 2010, the Applicant was moved within UNMIS to the post of Head of Office/State Coordinator in Aweil (State Coordinator), South Sudan.

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

15. On 1 June 2011, the Director of Mission Support, UNMIS, issued Information Circular No. 218/2011 (Movement of International Staff to South Sudan). The purpose of the Circular was to inform UNMIS personnel of the procedure for the transition of international staff to the new mission in South Sudan.

16. On 26 June 2011, UNMIS Information Circular No. 327/2011 (Formation of a Comparative Review Panel to review transition of international staff) was issued to announce the formation of a Comparative Review Panel to review international posts in the mission in cases where the number of staff members exceeded the number of proposed posts in the new mission for particular job categories and post levels.

17. On 9 July 2011, UNMISS was established by Security Council resolution 1996 (2011) and on 26 July, the Chief Civilian Personnel Officer (CCPO), informed

the Applicant that he was being reassigned from UNMIS⁴ to UNMISS still at the Aweil duty station.

18. On 25 August 2011, the Applicant signed an offer of appointment to transition from UNMIS to UNMISS. The Applicant's personnel action (PA) form, which was raised on 9 October 2011, stated that he was provisionally reassigned from UNMIS to UNMISS effective 7 July 2011 as a Senior Planning Officer at the P-5/4 level. His FTA was extended to 30 August 2012.

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

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

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

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

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

⁴ UNMIS wound up its operations on 9 July 2011 with the completion of its mandate.

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

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

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

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

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

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

Issues

30. The issues for determination in this judgment are:
- a. Whether the decision not to renew the Applicant's fixed-term appointment beyond 30 September 2012 was lawful;
 - b. Whether the Applicant had a right to be re-assigned to another position upon expiry of his appointment outside the normal staff selection process; and
 - c. Whether the Applicant is entitled to the remedies he is seeking.

Was the decision not to renew the Applicant's fixed-term appointment beyond 30 September 2012 lawful?

Parties' submissions

31. The Applicant submits that the decision not to renew his FTA beyond 30 September 2012 was unlawful for the following reasons:
- a. He was transitioned from UNMIS to UNMISS on 8 July 2011 as a Senior Planning Officer but was compelled to continue serving as the State Coordinator in Aweil. Consequently, he should have been reassigned to a Senior Planning Officer post or a similar post when he was transitioned to UNMISS.
 - b. The UNMISS Senior Planning Officer and other senior posts at the P5 level were vacant when he was transitioned but no attempts were made to give him any of these positions.
 - c. Since he was serving on a temporary basis as the UNMIS State Coordinator in Aweil, the Administration should have returned him to his original post of Senior Planning Officer during the transition to UNMISS.

d. He was assigned on a temporary basis, not transferred, to the UNMIS State Coordinator post thus UNMISS was obligated to reabsorb him into its Strategic Planning Unit once the State Coordinator post was abolished.

e. He had a lien on his Senior Planning Officer post in accordance with ST/AI/404 (Assignment to and return from mission detail) that also established his right of return to his original post.

f. He had a legitimate expectancy of renewal of his contract.

32. The Respondent submits that:

a. The Secretary-General lawfully exercised his discretion not to renew the Applicant's appointment beyond 30 September 2012.

b. Following the abolition of his post on 31 December 2011, the Applicant was retained by UNMISS to perform temporary functions initially, for the duration of his FTA until 30 August 2012, and, subsequently, for a further month to allow him to complete his assigned tasks, until 30 September 2012. From 1 January 2012 to 18 July 2012, he temporarily encumbered the position of Head of Office/State Coordinator, Aweil, UNMISS, and from 19 July 2012, he temporarily encumbered the post of Deputy Chief of Staff. The Applicant's appointment was not renewed beyond 30 September because UNMISS' short-term requirement for his services ceased.

c. An FTA does not carry any expectancy of renewal irrespective of length of service.⁵ Where the Administration gives a reason for the exercise of its discretion, it must be supported by the facts. The Secretary-General's discretion not to renew an appointment is not unfettered. The decision may be challenged on the grounds that the staff member had a legitimate expectancy of renewal, procedural irregularity, or the decision was arbitrary or motivated

⁵ Staff regulation 4.5(c); staff rule 4.13(c).

by improper purposes. The Applicant bears the burden of proving that the discretion not to renew the appointment was not validly exercised.

d. Following the expiration of UNMIS' mandate, the Applicant was provisionally reassigned to UNMISS as Head of Office/State Coordinator in Aweil. He was notified that the "post may be subject to review and eventual competitive selection".

e. Following a review of the post, the UNMISS Administration decided to conduct a competitive selection process for the position of Head of Office/State Coordinator, Aweil, UNMISS. The Applicant was not selected for the position. The Applicant did not appeal the decision to conduct a competitive selection exercise or his non-selection under the procedures set out in Chapter XI of the Staff Rules.

f. On 29 December 2011, the Applicant was informed of the termination of his FTA under staff rule 9.6, effective 31 December 2011. The post of Head of Office/State Coordinator in Aweil in UNMISS was one of 82 international posts included in the UNMISS budget for its start-up phase, which were abolished on 31 December 2011. A new post of Head of Office/State Coordinator, Aweil, which came into effect on 1 January 2012, was created in the UNMISS 2011/2012 budget. The candidate selected after the competitive recruitment exercise was placed against this post.

g. The Applicant immediately requested that he be retained past 31 December 2011. Upon the identification of temporary duties for the Applicant to perform, UNMISS agreed to retain him for the duration of his FTA until 30 August 2012. Initially, the Applicant was assigned to the functions of Head of Office/State Coordinator, Aweil, pending the completion of the selection process and effective 19 July 2012 he was reassigned to Juba as a Senior Planning Officer under section 2.5 of ST/AI/2010/3. The Applicant was reassigned in order to meet a short-term

operational requirement that existed in the Strategic Planning Unit in Juba. For the duration of his assignment in Juba, he was temporarily encumbering the vacant post of Deputy Chief of Staff. His appointment was subsequently renewed to 30 September 2012 to enable him to complete the task of finalizing the State Offices' work plans.

h. The evidence establishes that the reason for the non-renewal of his appointment was that the Mission's short-term requirement for the Applicant to support the work of the Strategic Planning Unit in Juba had come to an end. The Applicant has failed to discharge his burden to establish that the discretion not to renew his one-month appointment was not validly exercised.

Considerations

33. The events leading to the non-renewal of the Applicant's FTA are as follows:
- a. Effective 31 August 2009, the Applicant encumbered the post of Senior planning Officer in UNMIS in Khartoum on a FTA. The FTA was renewed from 1 July to 30 August 2010 and again from 31 August 2010 to 30 August 2011.
 - b. As from 4 December 2010 the Applicant was, according to the Respondent, "reassigned within UNMIS to the position of Head of Office/State Coordinator in Aweil South Sudan". The reassignment was due to the restructuring of UNMIS and reallocation of staff to support the referendum in southern Sudan.
 - c. Following the expiry of UNMIS' mandate the Applicant was transitioned to UNMISS as the State Coordinator in Aweil, South Sudan and his FTA which, according to the Respondent, was limited to service in UNMISS was renewed for another year to August 2012. According to Respondent, this was a lateral transfer within the Mission.

d. On 31 December 2011, 82 international posts in UNMISS were abolished as these were posts created for the start-up phase of UNMISS for the interim period of 9 July through 31 December 2011.

e. From 1 January to 18 June 2012, the Applicant performed the duties of the UNMISS State Coordinator in Aweil pending the completion of the recruitment of the selected candidate.

f. From 19 June to 30 August 2012, the Applicant was temporarily reassigned from Aweil to Juba as a Senior Planning Officer with UNMISS to provide support to the Strategic Planning Unit. He was placed against the vacant post of Deputy Chief of Staff.

g. On 30 August 2012, the appointment of the Applicant expired but he was given a three week extension to enable him to assist with the Strategic Planning Unit's finalization of State Offices' work plans. He was separated from service on 30 September 2012.

34. The Applicant has provided extensive arguments that he was temporarily assigned, not transferred, to the UNMIS State Coordinator post in Aweil thus UNMISS was obligated to reabsorb him into its Strategic Planning Unit once the State Coordinator post was allegedly abolished. In support of this contention, he submits that the Tribunal should take into consideration ST/AI/404 (Assignment to and return from mission detail), which gave him a legitimate expectation that his Senior Planning Officer post would be blocked for a period of up to two years with a right to return after his service as the State Coordinator.

35. The Applicant further submitted that he had a legitimate expectation of reabsorption because: (i) when he applied for the State Coordinator post in August 2011, he did so in the "knowledge/belief" that he would be re-absorbed in the Strategic Planning Unit in any event, notwithstanding the result of his application and as his new contract clearly indicated he would continue to be engaged as a Senior

Planning Officer under UNMISS; and (ii) his PA indicated that he had been transitioned from UNMIS to UNMISS as a Senior Planning Officer.

36. The Respondent pleads that when the Applicant was initially appointed to UNMIS, he was selected for the Senior Planning Officer post and that his functional title could not be changed without a competitive selection exercise. Accordingly, when the Applicant was reassigned to perform the duties of State Coordinator in Aweil, his functional title of Senior Planning Officer remained the same. Additionally, the Respondent submits that pursuant to section 2.5 of ST/AI/2010/3 (Staff selection system), the Applicant was laterally transferred within the mission and within the delegated authority of the Head of Mission, which allows Heads of Missions, under conditions established by the Department of Field Support, to transfer staff members within the same mission to job openings at the same level without advertisement of the job opening or further review by a central review body.

37. Is the Applicant's contention that he was merely assigned on a temporary basis to the Aweil State Coordinator post in December 2010 with a right of return to the Senior Planning Officer post correct? The Applicant relies on a memorandum from the Division of Personnel Administration, Office of Personnel Services of the United Nations dated 7 November 1975 entitled "Proper use of terminology as regards movement of staff" to define an "assignment" and a "transfer".

38. The Respondent submitted that the memorandum of 7 November 1975 had been superseded by a memorandum dated 29 December 1992 from the Staff Administration and Monitoring Service of the Office of Human Resources Management (OHRM). This memorandum is entitled "Terminology for movements of staff" and defines *inter alia* five basic types of intra-organization movement such as assignment, reassignment, transfer, detail and loan.

39. According to this 1992 memorandum, an assignment is defined as:

A staff movement to a department or office or to an established mission, with or without a change of duty station, for a limited period

of time, during which the releasing department or office remains responsible for reabsorbing the staff member. A staff member may be assigned, for a period of more than one year (rule 200.1(a)(iii), from a 100 series post to a 200 series post, implying that the assignment is temporary and the staff member does not relinquish his/her 100 series appointment and accrued entitlements.

40. A transfer is defined as:

A staff movement for an indefinite period, with or without a change of duty station, with no right of reabsorption in the releasing department or office. A staff member who transfers from a 100 series to a 200 series post relinquishes his/her 100 series appointment, but UN service is considered continuous from the EOD dated of the 100 series appointment, and unused accruals of annual leave, sick leave (up to 200 series maximum), repatriation and repatriation grant are carried into the new appointment.

41. A reassignment is “a movement for an indefinite period, normally to a different post or function, within a department or office with or without a change of duty station”.

42. The available evidence shows that while the Applicant was still encumbering the position of Senior Planning Officer, UNMIS, he was appointed to the post of State Coordinator in Aweil with UNMIS, a decision to which he acquiesced in 2010. The 19 December 2010 letter from the Acting CCPO entitled “Reassignment Letter” stated *inter alia*:

Dear [Applicant],

You have been reassigned from Strategic Planning Unit – O/COS to Head of Office Aweil as State Coordinator effective 04 December 2010. In this respect, please note that you have accepted an Appointment with the United Nations Mission in Sudan (UNMIS) with the expectation that you may be deployed anywhere within the mission area to undertake responsibilities as may be assigned.

43. The CCPO’s letter did not specify the period of time that the Applicant would be serving as the State Coordinator in Aweil and it did not indicate in any way that

the Applicant would be returned to the Senior Planning Officer post or the Strategic Planning Unit once his assignment in Aweil was over.

44. In the Tribunal's considered view, the absence of important terms in the 19 December 2010 letter regarding the length of the assignment and reabsorption removed the Applicant's movement to the State Coordinator post from the haven of an assignment. And the fact that the Applicant did not question the absence of these provisions in 2010 if it was truly his belief that he would be reabsorbed is troubling.

45. Even though the 19 December 2010 missive was confusingly entitled "reassignment letter" and the Applicant's PA still labelled him as a Senior Planning Officer, the Tribunal holds that the Applicant was in fact laterally transferred in accordance with section 2.5 of ST/AI/2010/3 from the Senior Planning Officer post to the State Coordinator post in Aweil with no right of return to the Senior Planning Officer post or the Strategic Planning Unit. Notably, it was not until September 2012, when the Applicant was about to be separated from UNMISS, that he brought up the issue of being returned to an UNMISS Senior Planning Officer post.

46. The Tribunal now turns to the Applicant's claim of a legitimate expectation of renewal. In *Hepworth* 2015-UNAT-503, the United Nations Appeals Tribunal (UNAT) pronounced on the issue of legitimate expectation of renewal as follows:

Although a staff member may challenge the non-renewal of an appointment on the ground that the Administration made an *express* promise that gave rise to a legitimate expectation of renewal, there is no legal authority for the proposition that an implied promise of renewal stems from the past renewals of an appointment (emphasis in original).

47. While the facts in the *Hepworth* case are different from the facts in the current case, the underlying principle that an express promise must underpin a successful claim of legitimate expectation is relevant. It is not enough for the Applicant to claim that he merely believed that he would be reassigned to a Senior Planning Officer post in the face of an unsuccessful bid for the UNMISS State Coordinator post. He must

provide tangible substantiation, which he did not. The Tribunal finds therefore that the Applicant's claim of a legitimate expectation of renewal is unfounded.

48. In light of the Tribunal's findings that the Applicant was transferred to the State Coordinator post and that he did not have a legitimate expectation of renewal, was the non-renewal decision unlawful?

49. Paragraph 2 of UNMIS Information Circular No. 218/2011 provides as follows with respect to the movement of internationally recruited staff from UNMIS to UNMISS:

- A. In cases where the number of posts in the new mission is 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 will automatically be reassigned to the new mission provided other conditions such as satisfactory performance are met.
- B. In cases where the number of posts in the new mission are lower than the current encumbered posts in UNMIS at the same occupational group and level, then a comparative review process will be instituted through a comparative review panel comprised of members from the Field Staff Union (FSU) and UNMIS Administration to conduct this exercise in accordance with the Field Personnel Division's (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 will be advertised and filled through the regular recruitment and selection process.

50. UNMIS Information Circular No. 327/2011 announced the formation of the Comparative Review Panel that was mandated to review the international posts in UNMIS where the number of staff exceeded the number of proposed posts in UNMISS for particular job categories and post levels.

51. Since the Applicant was transferred from the UNMIS Senior Planning Officer post to the UNMIS State Coordinator post in December 2010 and there was only one

UNMIS State Coordinator post in Aweil, the Tribunal concludes that the Administration correctly transitioned him to the UNMISS State Coordinator post in Aweil in July 2011 in accordance with paragraph 2.A of UNMIS Information Circular No. 218/2011. The Applicant was informed by the UNMIS CCPO that “depending on the final approval of the structure and funding of your programme, **this post** may be subject to review and eventual competitive selection” (emphasis added). The inference from this letter is that the UNMISS State Coordinator post in Aweil, specifically, could conceivably become the subject of a competitive selection exercise sometime in the future.

52. By a letter dated 29 December 2011, the UNMISS Director of Mission Support informed the Applicant that: “Following the liquidation of the United Nations Mission in Sudan (UNMIS) and the start-up of the United Nations Mission in South Sudan (UNMISS), I regret to inform you that we were unable to transition you to UNMISS effective 1 January 2012”.

53. The Tribunal notes that this 29 December 2011 letter contradicts the 26 July 2011 letter from the UNMIS CCPO which informed the Applicant that he had been identified for reassignment to UNMISS “at his current duty station Aweil” following “completion of the UNMIS mandate, the human resources post-matching and comparative review exercises regarding the transition of international staff from UNMIS”.

54. The Respondent submitted in his Reply of 24 June 2013 that following a review of the post, the UNMISS Administration decided to conduct a competitive selection process for the position of Head of Office/State Coordinator, Aweil. In support of this contention, the Respondent submitted a Job Opening for a P-5, Head of Office/State Coordinator post with UNMISS (JO No. 425411) with his Reply of 24 June 2013 and asserted that this JO was “for the position of Head of Office/State Coordinator, UNMISS, in Aweil”.

55. According to this document submitted by the Respondent, the vacancy was advertised from 26 August 2011 to 10 September 2011. There was however no duty station indicated on the announcement and the Respondent was unable to provide the Tribunal with evidence that this particular vacancy was advertised through either Galaxy (the former job opening portal of the United Nations) or Inspira (the current job opening portal of the United Nations). This job opening was printed from a database called “Nucleus”, which is not a database that applicants for United Nations job vacancies have access to. Additionally, this was a job opening for a position that was advertised approximately four months before the new Aweil State Coordinator post was allegedly created in January 2012.

56. When the Tribunal sought further clarification on this job opening for the Aweil post⁶, the Respondent submitted that:

This was a position specific job opening but no duty station was specified. The job opening was posted to accommodate the new mission profile based on the new mission mandate. There were 10 of these positions within the mission. The Applicant was considered for selection against this job opening, irrespective of the duty station.

.....

As stated above, job opening No. 425411 was a position specific job opening where no duty station was specified. The Applicant was interviewed against this job opening irrespective of the duty station and was duly interviewed on 4 October 2011. The Applicant, and the other candidates, were not applying for a position in a specific duty station. There were considered for appointment at multiple duty stations.

57. The Applicant submitted the job opening that he applied for through Galaxy. It was for a P-5, Head of Office/State Coordinator post with UNMISS with the same job opening number as that in the Respondent’s submission (JO No. 425411). The vacancy was posted from 26 August 2011 to 10 September 2011. The duty station indicated in this JO is “Juba”. There is no mention of the Applicant’s duty station,

⁶ Order No. 264 (NBI/2014).

Aweil, or of multiple duty stations. The Applicant applied for this post and was interviewed on 4 October 2011 but he was not selected for it.

58. Based on the evidence in the Record, the Tribunal holds that the recruitment exercise for JO No. 425411 was for a State Coordinator post in Juba, which had nothing to do with the Applicant's State Coordinator post in Aweil. Thus, his successful or unsuccessful competition for JO No. 425411 should have had no bearing on the renewal or non-renewal of his FTA. The Respondent did not place any evidence before the Tribunal to prove his contention that UNMISS advertised a job opening for the State Coordinator post in Aweil as the Applicant was advised in the UNMIS CCPO's letter of 26 July 2011.

59. The Tribunal will now examine the other reason proffered by the Respondent for the non-renewal decision. The Respondent explained in his Reply that the UNMISS State Coordinator post in Aweil was one of 82 international posts included in the UNMISS budget for its start-up phase. These posts, including the Applicant's, were all abolished on 31 December 2011. A new State Coordinator post in Aweil was created in the UNMISS 2011/2012 budget, which came into effect on 1 January 2012. The Respondent submitted that "the candidate selected for the position of Head of Office/State Coordinator, Aweil was to be placed against the new post". The Tribunal has already concluded that the post that was advertised by JO No. 425411 was for a post in Juba so it is unclear how the successful candidate in the Juba selection exercise replaced the Applicant in Aweil.

60. When the Tribunal questioned the Respondent's submission in his Reply regarding the abolishment of the UNMISS State Coordinator post on 31 December 2011 and re-establishment on 1 January 2012⁷, the Respondent responded in a submission dated 15 January 2015 that "the post was not abolished on 31 December

⁷ Order No. 264 (NBI/2014).

2011. The State Coordinator, Aweil post in the new mission was created in July 2011 and continued thereafter”.⁸

61. In the Tribunal’s humble view, the Respondent’s 15 January 2015 submission explains why the Administration was unable to produce a JO for the Aweil post – the post was not abolished thus there was no need to create and then advertise it. The Respondent further explained that the only UNMISS Senior Planning Officer post in Juba was created after the mission’s inception with new terms of reference. This submission led the Tribunal to conclude that the UNMISS Administration inadvertently terminated the Applicant’s FTA because his functional title was still “Senior Planning Officer” even though he was actually transitioned as a State Coordinator.

62. Paragraph 2.C of UNMIS Information Circular No. 218/2011 states that “[i]n cases where occupational groups (posts) in the new mission do not currently exist in UNMIS, then those posts in the new mission will be advertised and filled through the regular recruitment and selection process”. The record shows clearly that the State Coordinator post existed in UNMIS and that the Applicant was transferred from the UNMIS post to the same post in UNMISS. To this end, the Tribunal takes note of the letter from the CCPO to the Applicant dated 26 July 2011, which stated that:

Following the completion of the UNMIS mandate, the human resources post-matching and comparative review exercises regarding the transition of international staff from UNMIS, we are pleased to inform you that you have been identified for reassignment to the United Nations Mission in South Sudan (UNMISS) at your current duty station **Aweil** (emphasis in original).

Please note, depending on the final approval of the structure and funding of your programme, this post may be subject to review and eventual competitive selection (emphasis in original).

I take this opportunity to thank you for your valuable contribution to this mission and I wish you much success in your new assignment with UNMISS.

⁸ Respondent’s submissions pursuant to Order No. 264 (NBI/2014), paragraph 8.

63. Although the Respondent relies on the second paragraph of this letter, the Tribunal is convinced that this generalized proviso was applicable only to those posts in UNMISS that did not exist in the old mission, UNMIS, as of the time of the transition in July 2011, such as the Senior Planning Officer post.

64. Thus, since the Aweil State Coordinator post existed in both UNMIS and UNMISS, there was no need for it to be advertised and filled through a recruitment/selection process. The Applicant should have been able to maintain his post in accordance with paragraph 2.A of Information Circular No. 218/2011.

65. In light of the foregoing, the Tribunal is of the considered view that paragraph 2.C of UNMIS Information Circular No. 218/2011 was erroneously applied to the Applicant after he had been successfully transitioned in accordance with paragraph 2.A of the Circular.

66. The Tribunal concludes that the non-renewal decision was unlawful.

Did the Applicant have a right to be re-assigned to another position upon the expiry of his appointment outside the normal staff selection process?

Applicant's submissions

67. The Applicant asserts that the Respondent was responsible for ensuring his employment with the United Nations continued through his reassignment to another position in planning or a similar post either within or outside of UNMISS upon the expiry of his appointment.

Respondent's submissions

68. The Applicant had no right to be reassigned to another position as a Senior Planning Officer within UNMISS or elsewhere in the Organization following the abolition of his post. Having entered into a contract with the Organization, the Applicant cannot seek a benefit that is additional to the rights and entitlements

conferred by the contract. Reassignment can only take place under the legal framework established by the Staff Regulations and Rules.

69. It is for the Organization to determine whether a reassignment of a staff member is in its interests. A staff member does not have any right or expectation of continuing to encumber a position falling in a particular occupational group. The existence of the Secretary-General's authority to reassign a staff member under staff regulation 1.2(c) does not confer a right on the Applicant to be reassigned to any position.

70. The Applicant had no right to be placed or transferred to a position outside the normal staff selection process under section 11 of ST/AI/2010/3. Additionally, the Applicant does not fall within the categories of staff in section 11.1 of ST/AI/2010/3 who may be placed in a suitable position by the Assistant Secretary-General for Human Resources Management. The Applicant does not meet the conditions for transfer by the Under-Secretary-General for Field Support (USG/DFS) under section 11.2 of ST/AI/2010/3, as his appointment was limited in service to UNMISS.

Considerations

71. Given the uncontested decision to reassign him, can the Applicant now claim that he should have been transferred to the corresponding post of Senior Planning Officer in UNMISS from UNMIS?

72. The Tribunal has found that "since the Aweil State Coordinator post existed in both UNMIS and UNMISS, there was no need for it to be advertised and filled through a recruitment/selection process. The Applicant should have been able to maintain his post in accordance with paragraph 2.A of Information Circular No. 218/2011. (Para. 62)".

73. The Applicant is not requesting to be placed or transferred to a position outside the normal staff selection process under section 11 of ST/AI/2010/3 as alleged by the Respondent. The Tribunal holds that he is only submitting that

paragraph 2.A of UNMIS Information Circular No. 218/2011 was not complied with. This issue however becomes moot as the Tribunal has found that the non-renewal of his contract is merged as it were in the decision not to re-assign him to the Aweil post that existed both in UNMIS and UNMISS.

Remedies

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

75. Article 10.5 of the UNDT Statute provides:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional case order the payment of a higher compensation and shall provide the reasons for that decision.

76. Article 10.5 of the UNDT Statute was amended by the General Assembly in December 2014⁹ and the new article reads:

Compensation, for harm, supported by evidence which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases

⁹ General Assembly resolution 69/203.

order the payment of a higher compensation and shall provide the reasons for that decision (emphasis added).

77. UNAT has come out strongly against the retroactive application of rules or regulations even when they would have benefited an applicant.¹⁰ Accordingly, the Tribunal concludes that the General Assembly's 2014 amendment to art. 10.5 of the UNDT Statute does not apply in the current case, which was filed in February 2013.

Judgment

78. In the present case the Applicant's FTA was not renewed because the Administration failed to follow the proper procedure in respect of his transition from UNMISS to UNMIS on the ground that his post was abolished. To that extent he has suffered prejudice for which he deserves compensation.

79. The Tribunal notes that the Applicant served the Organization from July 2009 to 30 September 2012 under successive fixed-term appointments, with each appointment being for a period of one year. In light of the foregoing, the Tribunal concludes that the erroneous decision not to renew the Applicant's FTA prevented him from being granted another appointment for one year.

80. Accordingly, the Respondent is ordered to pay the Applicant compensation in the amount of one year's net base salary based on the post of State Coordinator, Aweil, that he was occupying in UNMISS until his separation from service on 30 September 2012.

81. 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.

¹⁰ *Robineau* 2014-UNAT-396 and *Hunt-Matthes* 2014-UNAT-483.

(Signed)

Judge Vinod Boolell

Dated this 24th day of February 2016

Entered in the Register on this 24th day of February 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi