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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/063

Judgment No.: UNDT/2013/112

Date: 4 September 2013

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko, Acting Registrar

EISSA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**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);

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

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 Sinc

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



- e. The post of Spokesperson in UNMISS was tasked with advising the SRSG and explaining to the country the mandate and function

leadership was of the opinion that it needed to get the profile right



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

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

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,

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 filled by a person who would be able to communicate effectively with the media and the public. The MLT was aware that the Applicant was performing the functions of Spokesperson for UNMIS and that he was not aware that the Applicant was performing the functions of Spokesperson for UNMIS.







(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.



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.

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.



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







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

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

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

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



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.

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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





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.

***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



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