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

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

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 *aulhr4Ba 3Auns.*

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

45. Upon the termination of the UNMIS mandate by the Security Council and

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.

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

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

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

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

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

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 Sseons(e)9i

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 R5.3(n)Tte 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