

Introduction

1. On 7 October 2014 435.6 746.4 Tm [(C)72

appointment at the FS 5 level effective 1 July 2009. Her appointment was subsequently renewed on an annual basis.

4. In January 2010, she was promoted to the only P-4 post of BTO in the mission following a competitive process in respect of VA-09-PUB-UNMIS-423099-R-KHARTOUM.

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

6. On 1 June 2011, Mr. Nic11(n)9c11(n)9c14(l)-240BT /F2 (q)9(u)- 451.44 Tm [(6)] TJ e 0 0 0g

Separation, signed by Mr. Ojjerro, in his capacity as Chief Civilian Personnel Officer (“CCPO”), UNMIS.

9. On 28 July 2011, Mr. Oj

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

14. On 22 June 2012, the Applicant filed an application requesting for a joinder of three UNDT cases including the Applicant's. The Respondent filed objections to the application on 25 June 2012. The Tribunal refused the

- d. A rating table was drawn up to reflect what was agreed. A list of criteria that would add up to 100 points was agreed upon as follows:
 - i. Performance (based on ePAS reports).
 - ii. Performance - Relevant experience/diversity.
 - iii. Performance - Direct relevant experience (based on PHPs).
 - iv. Adherence to core values (based on the core values section of the ePAS).
 - v. Length of service (based on PHPs).
- e. After the methodology and criteria were agreed upon, the Panel broke up into groups to conduct the reviews. All of the groups worked in one large room.
- f. She and another Panel member, the Senior Security Sector Reform Officer of UNMIS, reviewed the Applicant and Mr. Sonam Tobgyal for the one P-

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staffs were always part of the mission. There were back and forth exchanges of correspondence with New York and the FS level staffs were retained in the end.

- i. The allegations that she created a hostile working environment for the Applicant and that she exerted any pressure upon her or harboured any personal animus against her are false.
- j. There was a memorandum of understanding (“the MOU”) between UNMIS and a non-governmental organization, Fondation Hironnelle (“FH”), whereby the UNMIS radio station, Radio Miraya was operated under the overall authority of the Chief of Radio and under the operational editorial management of an Editor-in-Chief appointed by FH. The MOU required that decisions were to be made on a consensual basis.
- k. The lines of authority in terms of the MOU were that the radio section was divided into two: a section dealing with news and another section dealing with programs. The head of the programs section was a P-4 Radio Producer who oversaw both FH and UN staff members. This arrangement applied at both UNMIS and UNMISS. A P-4 level BTO did not fit in this context because they had no business with editorial content but only provided technical support.
- l. When she arrived in UNMIS, there had been a great deal of conflict over editorial control of the Radio Miraya between UNMIS and FH. Her job was to get the relationship back on track. Her efforts to do so were met with considerable resistance from the Applicant. They operated like two radio stations instead of one. UN staff reported to other UN staff and the same was the case with FH staff. The FH staff felt left out and there was a need to rebuild the relationship.

Reporting Officer for a number of staff members including the Applicant.

- s. She was not aware of the numerous complaints about her that the Applicant had raised in an email dated 2 May 2011 to Ms. Jiang. The Applicant had, however, spoken to her about low staff morale

staffing table, was performing the functions of a Broadcast Technology Officer at the P-4 level.

f. He was satisfied at the time that Mr. Tobgyal was performing the functions of a BTO at the P-4 level and that he should be reviewed against the Applicant, the other P-4 Broadcast Technology Officer in UNMIS, for the one P-4 post in UNMIS.

g. Posts had been borrowed during the referendum in South Sudan and some staff members sat on posts other than those reflected as their job titles. The practice of borrowing posts came about because there were instances when more staff members were needed and there were high vacancy rates in other areas. New York agreed that posts could be borrowed from vacancies t7(ts. -11(428 8-11(a)17(t)-20()-133(p

that Mr. Wimhurst had reversed his previous directive. The SRSG insisted that his directive was still applicable and should be followed. When they came out of the meeting, they found Mr. Wimhurst standing in the hallway and he glared at them and nodded.

- e. The SRSG did not discuss the terms of any Memorandum of Understanding between the United Nations and FH with him.
- f. The new Chief of the Public Information Office, Ms. Herman, was recruited in mid-November 2010. She was hostile and abusive to him

26. Her separation was a unilateral act, purportedly initiated on behalf of the Secretary-General, that is, it was a termination under staff r

Whilst employed in UNMIS, Mr Tobgyal was a P-4 Radio Producer assigned to technical functions.

32. The original UMMISS PIO proposed staffing table, drafted on 21 March 2011, envisaged two separate and distinct radio technical posts – one Technical Director and one Broadcast Technology Officer. By 25 June, however, the post of Technical Director for the new mission had been scrapped. This, the Applicant submits, is not surprising, as there was no classified post for a Technical Director in UNMIS. Thus, in accordance with Information Circular 218/2011, the person who should have been transferred to the P-4 Broadcast Technology Officer post was the Applicant, as the sole P-4 Broadcast Technology Officer in UNMIS.

33. She was the only person recruited to the Broadcast Technology Officer position in UNMIS. Any *de facto* change in job title that would allow Mr Tobgyal to suddenly become eligible under the terms of Information Circular 218/2011 is an unlawful attempt to circumvent proper recruitment and classification procedures and to undermine the letter and spirit of IC/218/2011.

34. Had the comparative review process been fair, transparent and lawful rather than vitiated by animus and dishonesty, she would have been transitioned to the new Mission. In support of this claim the Applicant provides the following illustrations:

- a. Her marginalization as a result of being identified as part of a group that was opposed to the relationship between Radio Miraya and Fondation Hirondelle.
- b. The harassment she suffered at the hands of Ms. Quade Herman and others orchestrated by Fondation Hirondelle.

35. She had secured the only P-4 Broadcast Technology Officer post available in UNMIS through a competitive recruitment process. Under the terms of Information Circular No. 218/2011, she was bound to be transitioned to UNMISS. The fact that Mr. Tobgyal was even in a position to be considered for the P-4 UNMISS post is evidence of bad faith or incompetence.

36. The evidence tendered by Ms. Herman of the terms of reference which she drafted is further evidence of bad faith. Pursuant to Information Circular No. 334/2011, the one P-4 BTO post in UNMISS was either a wholly new post or a post whose functions had changed by more than 30% and as such should have been filled through the regular competitive selection process.

37. Prior to Mr. Wimhurst's and Ms. Herman's tenure, there was no evidence that her concerns regarding FH impacted on her professional relationships. The relationship with FH was in contravention of the United Nations Charter, Rules and standard operating procedures.

38. In relation

40. The Applicant further submits that the terms of reference for the P-4 BTO post in UNMISS were drafted by Ms. Herman whose animus towards the Applicant has been well enumerated. The Applicant avers that they were deliberately targeted towards the transmission side of operations to minimize the possibility of the Applicant being awarded the position.

41. The Applicant submits that she is nearing retirement age and that despite her best efforts, she has been unable to secure further employment since being separated and that in the present circumstances where she has suffered significant mistreatment for seeking to uphold the United Nations' rules and regulations, the Tribunal would be justified in exceeding the two year maximum award. The Applicant further submitted that she has suffered significant moral damages as a result of the deliberate manipulation of the Organization's processes.

42. Based on the foregoing, The Applicant seeks a declaration that the decision to terminate her contract was unlawful. She further seeks appropriate remedies by what ()-240(t)-2.,

occupational group and level, the staff members affected would be subject to the comparative review process.

46. The Applicant and Mr. Tobgyal were reviewed together for one P-4 BTO post in the new mission. While Mr. Tobgyal's functional title was Radio Producer, he was reviewed as a Broadcast Technology Officer.

47. At the outset of the comparative review, the Panel decided the principles for determining which staff members should be reviewed against each other, and for which posts. There were a number of cases where a staff member's functional title differed from the functions he or she performed.

48. In his evidence, the CCPO explained that this situation arose due to the practice of "borrowing" vacant posts within UNMIS to meet staffing needs. In such cases, the Panel agreed that candidates whose Post Titles were different from the functions they performed should be reviewed for positions in the occupational group of the functions currently being performed. The Panel decided to compare "apples with apples" and "oranges with oranges", that is, staff members were reviewed against other staff members who were performing the same functions, at the same level. This approach met the operation needs of the new mission, and was also fair for all staff.

49. The Panel accepted the CCPO's advice that Mr. Tobgyal should be reviewed against the Applicant. The CCPO gave evidence that he was satisfied that Mr. Tobgyal was performing the functions of a BTO, not a Radio Producer, at the P-4 level. With responsibility for advising on human resources matters in UNMIS, the CCPO was the appropriate person to advise the Panel on this matter.

50. The CCPO sought guidance from the Chief of the Public Information Office (CPIO), who was not a member of the Panel, on the technical aspects of the functions of a BTO and a Radio Producer. Further, Mr. Tobgyal's performance record (e-PAS) demonstrated that he was not performing the functions of a Radio Producer. Mr Tobgyal had also recorded in his 981013(s)5(t3M10 1 32(1 447.84

Officer". Mr. Tobgyal supervised the Applicant in her role as BTO, and was the Applicant's first reporting officer for the 2009-2010 and 2010-2011 e-PAS cycles.

51. There is no merit in the Applicant's assertions that she was the only person competitively recruited to the P-4 post of BTO, and, as such, she was entitled to be automatically reassigned to the sole P-4 BTO post in UNMISS. The principles that determined which staff members would be reviewed together were agreed by the Panel. The CCPO advised, and the Panel accepted, that Mr. Tobgyal was performing the functions of a BTO at the P-4 level. As noted in the Panel's report, all the staff members reviewed, were competitively recruited.

52. The Applicant has produced no cogent evidence concerning Mr. Tobgyal's recr

the Administration's decision to accept the Panel's recommendation that Mr. Tobgyal be reassigned to UNMISS.

60. The Applicant's contention that the decision was improperly motivated as the Chief of Radio, who was a member of the Panel, did not favour the Applicant and was hostile to her due to the Chief of Radio's allegiance to the Chief of Staff is also incorrect for the following reasons:

- a. The Chief of Radio did not have any input into the evaluation of

- e. In cross-examination, it was suggested to the Chief of Radio that UNMISS was forced to take back two technical staff who were not transitioned to UNMISS to cover the studio operations in Radio

64. The issue of editorial control was addressed in the MOU between UNMIS and FH. The MOU provided that decisions with respect to editorial matters would be made on a consensual basis, with the UNMIS Chief of Radio retaining ultimate decision-making authority. The MOU also provided for editorial lines to be jointly defined by the Chief of Radio and FH's Editor-in-Chief. It appears that there was considerable disagreement between FH staff and some UNMIS staff (including the Applicant) over the implementation of these provisions at the working level.

65. The Applicant's assertions that the MOU appeared to contravene United Nations rules and regulations, are not supported by any evidence. The Office of Internal Oversight Services (OIOS) Audit Report of the public information programme in UNMIS did not identify any such contraventions. Further, OIOS expressed no concern that the editorial reporting lines violated the Staff Regulations and Rules by having United Nations staff report to FH staff.

66. Much was made by the Applicant of the intervention by the SRSG on the issue of editorial control. However, this was before the Chief of Radio joined UNMIS. It is reasonable to infer that the instructions issued by the SRSG in May and August 2010 were simply to ensure that the MOU, which provided that editorial control ultimately remained with the Chief of Radio, was properly implemented by Mr. Eissa and Mr. Bali in their capacities, respectively, as Officer-in-Charge, CPIO and Officer-in-Charge, Chief of Radio.

67. The Chief of Radio's evidence that she encountered considerable resistance from the Applicant to her efforts to put the relationship between FH and UNMIS back on track should be accepted. In this regard, the Applicant has produced no evidence that she raised concerns about the Chief of Radio's approach to editorial control of Radio Miraya directly with her, or with other members of senior management, for example, the CPIO, the Chief of Staff, or the SRSG.

68. The Chief of Radio explained in her evidence that the Applicant did not raise concerns about their working relationship directly with her. The Chief of Radio testified that she was shocked to read the Applicant's complaints contained

in her email to the CPIO of 2 May 2011. In her evidence, the Chief of Radio denied ever calling the Applicant paranoid.

69. The Chief of Radio also denied that she was disparaging during her interactions with the Applicant. She explained the operational decisions she took which were the subject of the Applicant's complaint to the CPIO. She testified that, while the Applicant generally performed well, she had failed to address technical problems with the RSC database. As a consequence, the Chief of Radio was required to intervene. Further, the Chief of Radio's instructions to withhold information about the suspension of the Nilesat Satellite service was a decision that she judged was necessary in the circumstances. The Applicant simply disagreed with this decision. Such disagreements on operational decisions are a normal part of any workplace, and do not by themselves prove hostility in the workplace.

70. The Applicant's contentions that Ms. Herman put pressure on her to become her Second Reporting Officer are without merit. The CPIO gave a written instruction to the Applicant and Mr. Eissa to amend the Applicant's e-PAS to replace Mr. Eissa with the Chief of Radio as the Applicant's Second Reporting Officer. Given her role, the CPIO had the authority and responsibility for determining the reporting lines for staff within the Public Information Office.

71. It is reasonable to infer that the Applicant's perception of her interaction with the Chief of Radio was clouded because she did not accept the recruitment of the Chief of Radio, and, her misplaced belief that the Chief of Radio was pursuing

decision was unlawful on the ground of lack of delegated authority; the Applicant is not entitled to any compensation as she has suffered no consequential damage.

73. The Applicant had no legitimate expectation that her fixed-term appo

79. In view of the foregoing, the Respondent requested the Tribunal to reject the Application.

Considerations

80. Firstly, with respect to the additional evidence that(t)-20(h)9(a)-3(d)22a5t(t)spertvie2a5t(t)s/onat to

- b. The Applicant being the only BTO in UNMIS, The actions of the Chief of Radio to make Mr Tobgyal eligible for the BTO post in the new mission amounted to an unlawful attempt to bypass proper recruitment and re-classification procedures and to defeat the provisions of IC/218/2011.
- c. Under the terms of IC/218/2011, the Applicant was bound to be transitioned to UNMISS having secured the only P-4 BTO post in UNMIS through a competitive process and therefore the transition of Mr. Tobgyal instead of the Applicant is evidence of bad faith or incompetence.
- d. Pursuant to IC/334/2011, the one P4 BTO post for the new mission (UNMISS) whose TOR's Mr Herman had re-written was in effect a wholly new post whose functions had substantially changed and as such should have been filled through e o7efdm bometit1(e)-3()

- a. Although Mr. Tobgyal's functional title was Radio Producer, he

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before the CP sat . Her evidence is that she was asked to do so. Aside of her ipse dixit, there is no documentary evidence or other oral testimony to corroborate this claim. It has been rightly argued on behalf of the Applicant that what Ms. Herman had embarked upon was a re-classification of the P-4 BTO post or even the creation of a new post. This is because the BO post already existed in UNMIS. To attempt to substantially re-write the required responsibilities, competencies and qualifications of the same post amounted to, at the very least, a re-classification.

98. The respondent did not adduce evidence that Ms. Herman had the requisite authority to re2()-112(to9(o)- i)22(s)368(M)-6(s)5(.)-5()-346PHerman n of a new UNM,

108. It is shocking that Mr. Ojjerro in spite of his position and knowledge of human resources policies and practices in the Organization allowed Ms. Herman, who had only come on board about seven months previously, to have her way even when this involved the subverting of

instructed the Secretary-General, as the Chief Administrative Officer, to complete the withdrawal of civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011. The Respondent further submitted that as a consequence of the resolutions, all posts within UNMIS were, necessarily, to be abolished. For the staff members of UNMIS who were not reassigned to UNMISS or selected for another post within the Organization, the termination of their appointments was mandatory and there was no scope for renewal of their appointments.

112. Having reviewed the parties' submissions on this issue, the Tribunal finds that the termination decision was taken without the requisite delegated authority notwithstanding the fact that all posts within UNMIS were necessarily to be abolished as a result of Security Council Resolution 1997 (2011).

Did the Chief of Staff, the Chief of the Public Information Office (CPIO), or the Chief of Radio participate in, or influence the comparative review process to the detriment of the Applicant?

113. The Applicant and her witness have testified that differences had existed between the Applicant and her boss the Chief of Radio before the transition from the mission to a new one arose. Ms. Herman herself in spite of denying that she bore the Applicant any grudges acknowledged these differences which were brought about by misunderstandings over the proper place of one Fondation Hirondelle, an NGO, in some kind of working partnership with the mission in Sudan at the relevant time.

114. There is also evidence that the Chief of Public Information, Ms. Jiang, was aware of the said differences. There is additional documentary evidence in the form of a memorandum which had been sent her by the Applicant in May 2011 complaining about the alleged actions of the Chief of Radio, Ms. Herman including retaliatory acts. Evidently and unfortunately, Ms. Jiang did nothing to address the complaints of the Applicant.

115. What the Tribunal does not possess is sufficient evidence to establish the role of the Chief of Staff, Mr. Wimhurst, if any, in what amounted to the illegal

treatment of the Applicant and the blatant heist of what ought to have been her post in the new mission.

116. The Tribunal is not in any doubt however, that the Chief of Radio had employed her influence within the comparative review panel to successfully work against the Applicant's right to a transition to the new mission.

Accountability of United Nations' Managers

117. In Judgment No. UNDT/2011/192, the Tribunal, in addressing the issue of accountability of United Nations' managers in that case, called the Secretary-General's attention to the conduct of some managers who have through recklessness and their lack of the required managerial skills, engaged in actions in their official capacity that not only embarrass the Organisation but bring about heavy cost-implications in the award of monetary compensation. In that case, the Tribunal further held that:

It is necessary that the Secretary-General calls such managers to

accountability, it cannot do more. Unfortunately, to date, there is no record of any action that has ever been taken by the Secretary-General subsequent to a referral made by the Tribunal.

120. This Tribunal hereby exercises its power of referral under Art. 10.8 of its Statute and refers this case to the Secretary-General for the purpose of considering what action should be taken in respect of the conduct of Ms. Herman in deliberately, recklessly and illegally re-classifying the P-4 BTO post in the new mission by re-writing its terms of reference without authority, and wrongfully subjecting the Applicant to a comparative review process to her detriment.

Judgment

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

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

123. The Applicant is entitled to compensation for the substantive and procedural irregularities occasioned her by the failure by the Administration to follow its own guidelines, rules and procedures and the Tribunal, accordingly:

a.

125. The case is referred to the Secretary-Gen