
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/125

Judgment No.: UNDT/2016/189

Date: 17 October 2016

Original: English

Before: Judge Nkemdilim Izuako

Introduction

1. The Applicant is a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). He served at the GS-4 level.

2.

8. Following the Secretary-General's budget proposal to the General Assembly, MONUSCO issued Information Circulars to its entire staff on 6 and 9 March 2015, 14 April 2015, and 20 April 2015, with regard to the proposed budget, the establishment of a Comparative Review Panel (CRP), and the review criteria.

9. Under the proposed new structure for the Mission, which was approved by

15. Shortly thereafter, the Applicant was offered an Individual Contractor (IC) contract by the United Nations Office for Project Services (UNOPS) for the position of LA within MONUSCO. The Applicant declined to accept the IC contract.

Applicant's case

16. The Applicant's case may be summarized as follows:

The recommendation of the Secretary-General to the General Assembly that led to the abolition of the Applicant's post was in violation of the United Nations statutory framework.

- a. The Secretary-General's report of 26 February 2015 to the General Assembly regarding the proposed financing arrangements for MONUSCO for the period from 1 July 2015 to 30 June 2016 recommended the abolition of 80 LA posts in MONUSCO for the 2015/2016 budget cycle. The said report did not make any reference to reengaging these LAs as ICs.
- b. That report was in turn considered by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) which then issued a report to the General Assembly on 1 May 2015 approving the Secretary-General's recommendation for the abolishment of 80 LA posts. As with the report of the Secretary-General, no reference was made to the fact that these 80 LAs would be reengaged as ICs.
- c. On the basis of the General Assembly's endorsement, MONUSCO then proceeded to inform the Applicant of the non-renewal of his fixed-term appointment and separation after 30 June 2015. Shortly thereafter, the Applicant was then offered an IC contract.
- d. The mere fact that MONUSCO decided to engage the LAs under agreements administered by UNOPS, a United Nations Common System entity, as opposed to directly engaging the individual contractors

themselves does not alter the Organization's obligations under paragraph 3.7 of ST/AI/2013/4.

e. Moreover, the decision to essentially convert the Applicant's fixed-term appointment to an IC contract, administered by UNOPS, was taken while the Applicant was still a staff member of the United Nations Secretariat and thus ST/AI/2013/4 applies to the Applicant.

The non-renewal of the Applicant's fixed-term appointment and his attendant separation were unlawful because no comparative review was conducted.

f. MONUSCO's approved budget for the period of 1 July 2015 to 30 June 2016 was that 80 LAs in MONUSCO's Field Administrative Offices be abolished and the remaining 92 LA posts be reassigned to different offices within the Mission.

g. Although the CCPO's memorandum of 22 May 2015 to the Applicant stated that he had been the subject of a comparative review process in which he was not successful, no comparative review was actually undertaken with respect to him. It was never communicated to the Applicant how the purported comparative review with regard to the 172 LA posts was conducted, or where he ranked in the exercise. The Applicant was never asked to provide the Mission with his PHP and recent e-PASes before the purported comparative review process took place.

h. This apparent lack of a comparative review process further renders the decision not to renew the Applicant's contract and to separate him from service unlawful, as he ought to have been given the opportunity to undergo a comparative review process in order to be considered for the remaining LA posts in the Field Administrative Offices of MONUSCO.

The purported abolition of the Applicant's post was in fact a conversion of his fixed-term contract into an IC contract.

- i. The functions of the fixed-term appointment that the Applicant had been encumbering are identical to those of the IC contract that he was offered by UNOPS.
- j. By offering to hire the Applicant on an IC contract following the purported abolition of his post, the Organization enjoys the benefit of

b. Pursuant to art. 2.1(a) of its Statute, the Dispute Tribunal lacks jurisdiction to review the matter of the abolition of the post the Applicant encumbered and the recommendation of the Secretary-General to the General Assembly that led to the abolition of the post. These claims are not receivable and should be rejected.

c. The only reviewable administrative decision before the Dispute Tribunal is the decision not to renew the Applicant's appointment due to the abolition of her post.

Submissions on the Merits

The decision not to renew the Applicant's appointment was lawful as the post he encumbered was subject to a legitimate restructuring of the Mission.

d. A fixed-term appointment does not carry any expectancy of renewal, irrespective of length of service (staff regulation 4.5(c); staff rule 4.13(c)).

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

A comparative review was not required and the outsourcing of the LA functions was proper in the circumstances.

h. There was no requirement for the Mission to subject the Applicant and others similarly placed to a comparative review process. The Department of Field Support Downsizing Guidelines provide that locally recruited staff must be comparatively reviewed by duty station. Since all LA posts in the Bukavu and Kinshasa duty stations were abolished, a comparative review was unnecessary.

i. Due to the need for LAs to be more mobile and to effectively interact and liaise with the local population by providing linguistic support during their engagement, it was agreed to engage LAs through individual contractor agreements to be administered by UNOPS.

j. As a result, it was no longer viable to use national General Service posts to provide for LA positions to a force that is highly mobile, that deploys at short notice, and sometimes requires a surge in its numbers for a limited duration. Additionally, there is no suitable allowance for the travel of national staff.

k. MONUSCO decided to outsource the provision of LA functions in response to the recommendation of the Civilian Staffing Review (CSR) report.

l. MONUSCO already outsources a number of services and considers

of his post by a decision of the General Assembly which by itself is akin to a country's constitution, the higher norm, and the supreme organ of the Organization.

20. By the same token, a decision of the General Assembly is binding on the Secretary-General who has a duty to implement it. The Applicant lacks the capacity to challenge the non-renewal of his appointment in so far as it is properly implemented in consequence of the General Assembly's decision to abolish it.

21. In *Ovcharenko et al*³, it was held that an administrative decision taken as a result of the decisions of the General Assembly is lawful and that the Secretary-General cannot be held accountable for executing such a decision.

22. With regard to the question whether the provisions of section 3.7(b) of ST/AI/2013/4 were contravened by the offer of employment to the Applicant under an IC contract by UNOPS after the abolition of his post to provide language services to the Mission, the Tribunal finds and holds that the said rules were not contravened.

23. This is because section 3.7(b) does not envisage a situation of post abolishment. The said section contemplates a situation where the post formerly encumbered by a former or retired staff member continues to exist and the separated staff member is reengaged as a consultant or IC to continue to perform the same functions.

24. The mischief that that section seeks to avoid is the continued indirect encumbrance of a post under the guise of a consultancy or individual contract by a staff member who by reason of retirement or other form of separation has left the Organization.

25. In the case of this Applicant, the post he previously encumbered as an LA

