



Judgment No. 2017-UNAT-753



Counsel for Appellants: Nicole Washienko, OSLA  
Michael Brazao, OSLA

Counsel for Respondent: Stéphanie Cartier

**J**





**Submissions**

**Appellants' Submissions**

8. The UNDT erred in law and in fact and failed to exercise its discretion by concluding that their applications were not receivable. The Appellants challenged the Secretary-General's non-renewal of their fixed-term appointments, not the General Assembly's decision. The UNDT conducted only a perfunctory review of the merits of the Secretary-General's recommendation to the General Assembly that led to the contested decision.

9. In concluding that the Appellants' claims were non-receivable, the UNDT erred in its reliance upon *Ovcharenko et al.*

12. The Appellants respectfully request that the Appeals Tribunal vacate the impugned Judgments and award compensation or, at the very least, remand their cases for a determination on the merits.

**The Secretary-General's Answer**

13. The Appellants fail to establish any reversible error by the UNDT. The UNDT correctly concluded that it was not competent to review the decision by the General Assembly to abolish the Appellants' posts. It also correctly determined that the Appellants had no standing to challenge their respective non-renewal decisions in so far as they were properly implemented as a consequence of the General Assembly's decision to abolish their posts.

14. Contrary to the Appellants' assertions, the UNDT in reaching its conclusions did examine the merits of their non-renewal decisions. ST/AI/2013/4 was not contravened in this case because, as the UNDT correctly determined based on the provision's express wording, it does not apply when posts are abolished. The UNDT also correctly dismissed the Appellants' claims that there had been unequal treatment in the implementation of MONUSCO's restructuring. As the UNDT noted, the Appellants did not challenge the Secretary-General's explanations in this regard, nor do they do so on appeal.

15. The UNDT also made no error when relying on *Ovcharenko et al.*, and the Appellants' claim that the General Assembly's decision in the present case was improperly implemented—because it had been both proposed and implemented by the Secretary-General—is without merit. The jurisprudence relied upon by the Appellants for the proposition that the Tribunals have the competence to review the General Assembly's decision to abolish their posts is inapposite. By claiming that the Secretary-General's submissions to the General Assembly were incomplete in so far as there was no mention of MONUSCO's intention to outsource services previously performed by staff encumbering posts that would be abolished, the Appellants effectively seek to obtain a ruling on the General Assembly's decision.

16. The Secretary-General respectfully requests that the Appeals Tribunal dismiss the appeals in their entirety.

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... The Appellants specifically contended that the General Assembly lacked information about the IC contracts when it reached its decision to abolish the LA posts. The Appellants have argued that the submission by the Secretary-General to the General Assembly proposing the abolishment of their posts omitted mention of the Administration's intent to rehire LAs on IC contracts in contravention of ST/AI/2013/4. The Appeals Tribunal finds that, in so doing, the Appellants are seeking a review of the General Assembly's decision through the back door. What in effect the Appellants are asking is for the Appeals Tribunal to review and assess the quality of the Secretary-General's submissions presented to the General Assembly. This cannot be done.

... The fact that the Secretary-General is both the proposer and the implementer is in keeping with the structure of the Organization; in any event, the fact remains that the Secretary-General's proposal is an act prefatory to the General Assembly's decision and to the administrative decision at issue.<sup>[14]</sup>

... We note, further, that, in accordance with the above mentioned principles, the UNDT only denied receivability of the Appellants' application against their non-renewal in so far as it was deemed to be a direct challenge against the General Assembly's decision to abolish 80 LA posts. In other aspects, the UNDT regarded the application as receivable and dealt with the merits of the case in stating that: (i) following *Ovcharenko et al.* an administrative decision taken as a result of the General Assembly is lawful and the Secretary-General cannot be held accountable for executing such a decision; (ii) the provisions of Section 3.7(b) of ST/AI/2013/4 were not contravened by the hiring of the Appellants under IC contracts; and, (iii) no unequal treatment occurred in the implementation of the Mission's restructuring which led to the abolition of 80 LA posts in Bukavu and Kinshasa. These findings were not substantially challenged on appeal.

... In order to give guidance to the UNDT and the parties, the Appeals Tribunal points out that the UNDT had no authority to review the decision to offer IC contracts by UNOPS as this is not an administrative decision subject to judicial review. The only administrative decision at issue in the present case is the non-renewal of the Appellants' fixed-term appointments; the rehiring on IC contracts is neither part of this decision nor is its lawfulness of any legal relevance thereto.

... For the reasons above, the Appeals Tribunal dismisses the appeals and upholds the decisions of the UNDT.

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[14] *Ibid.*



**THE UNITED NATIONS APPEALS TRIBUNAL**

Original and Authoritative Version: English

Dated this 14<sup>th</sup> day of July 2017 in Vienna, Austria.

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Thomas-Felix

*(Signed)*

Judge Knierim

Entered in the Register on this 5<sup>th</sup> day of September 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar