
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/117

Judgment No.: UNDT/2016/128

Date: 23 September 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BASIZI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Stephen Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

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. This IC contract was for a period of one-month effective 1 July 2015 but was subsequently extended.

Applicant's case

16. The Applicant

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-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-

paragraph

3.7 of ST/AI/2013/4.

e.

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The purported abolition of the Applicant's post was in fact a conversion of her 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 she was offered by UNOPS.

j. By hiring the Applicant on an IC contract following the purported abolition of her post, the Organization enjoys the benefit of obtaining exactly the same services from her that she had previously provided to the Organization under her fixed-term appointment. This state of affairs contravenes the provisions of section 3.7(b) of ST/AI/2013/4 (Consultants and individual contractors).

Unequal treatment of similarly situated staff members

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 that the outsourcing of language services satisfies the military fo current requirements. Information Circular ST/IC/2005/30 (Outsourcing and impact on staff) issued on 15 June 2005, sets out guidance for programme managers when considering outsourcing.

m. In accordance with that guidance, MONUSCO informed staff representatives that language services would be outsourced and the staff

representatives had an opportunity to respond by engaging in discussions with the National Staff Union representatives under the UNOPS contractual modality.

The Respondent did not violate any provisions of ST/AI/2013/4.

n.

of ST/AI/2013/4 is inapposite. Section 1.1 of that Administrative Instruction sets out the scope and procedure under which the United Nations Secretariat may directly engage individual consultants and individual contractors for temporary assistance in order to respond quickly, flexibly and effectively to organizational priorities.

o. MONUSCO did not engage LAs under the framework of ST/AI/2013/4. Rather, the Mission decided to engage individual contractors under agreements administered by UNOPS which are governed by the UNOPS Financial Regulations and Rules.

p. Insofar as the Applicant claims that the award of individual contracts by UNOPS violated any rules, such a violation would not render the non-
was not entitled to be engaged under an individual contract with UNOPS.

q. If indeed the engagement of the Applicant under a UNOPS agreement contravened UNOPS contracting rules as the Applicant claims, the remedy is not monetary compensation for the Applicant, but rather the voiding of the said contract.

Considerations

18. The Tribunal will now consider whether the challenge against the non-renewal decision
other claims.

19. With regard to the issue of the receivability, the Tribunal agrees with the

of her post by a decision of the General Assembly which by itself is akin to a 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 her appointment in so far as it is properly

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 hiring of the Applicant under an IC contract by UNOPS after the abolition of her 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 she previously encumbered as an LA had ceased to exist at the time UNOPS offered her the new contract as an IC at the Mission following the abolition of her post. Even if the Mission by itself had reengaged the Applicant as an IC, the Respondent cannot be said to have breached the provisions of section 3.7(b) of ST/AI/2013/4.

³ 2015-UNAT 530.

26. The Applicant in supplementary pleadings raised the issue of about five other LAs in Bukavu and Kinshasa who continued to enjoy fixed-term contracts after all LA posts in these two duty stations were said to have been abolished. She also raised the issue of another former LA who was laterally transferred to an Administrative Assistant post. Her argument was that she did not receive equal treatment with these staff members following the abolition of her post.

27. The Respondent in reply explained that the five LAs in question had encumbered borrowed posts from other sections at the time of the abolition of the 80 LA posts in Bukavu and Kinshasa and were therefore not affected by the abolitions. One of them although identified as an LA was actually serving as a Supply Assistant. Their fixed term contracts were later extended to 30 June 2016.

28. With regard to the one other LA who was laterally transferred to a vacant post of Administrative Assistant at the Mission at the time of the abolitions, there is evidence that the Mission had published an Information Circular dated 18 May 2015.

to be affected by the abolitions were invited to apply to other vacant posts at the Mission that matched their profiles. The said LA successfully applied and was laterally transferred to the post of Administrative Assistant.

29. These explanations by the Respondent were not challenged. The Tribunal in these circumstances does not find that unequal treatment occurred in the abolition of 80 LA

Conclusions

30. -renewal of her fixed-term appointment is not receivable. Further, her claims regarding her recruitment under an IC contract by UNOPS and lack of equal treatment have no merit. The Application is accordingly refused.

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(Signed)

Judge Nkemdilim Izuako

Dated this 23rd day of September 2016

Entered in the Register on this 23rd day of September 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi