
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/148

Judgment No.: UNDT/2016/155

Date: 23 September 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BUZERA

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

8. Following the Secretary-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 the General Assembly, the military force in Bukavu was to be reduced by one battalion and Kinshasa would no longer be an operational base. As a result, LA posts in Kinshasa and Bukavu were abolished. This meant that a budgetary reduction of 80 LA posts in the 2015/2016 budget cycle for MONUSCO was done.

10. The Applicant, who was an LA in Bukavu, was affected by the abolition. A memorandum from the MONUSCO Director of Mission Support (DMS) informed him of this development. He was also informed through a memorandum from the Chief Civilian Personnel Officer (CCPO), Ms. Xaba-Motsa.

11. As at 16 June 2015, the Applicant, along with the other LAs at the Mission whose posts were at the time proposed for abolishment sent a letter to the Special Representative of the Secretary-General (SRSG) for MONUSCO contesting the non-renewal of their fixed-term appointments by reason of abolition of post.

12. On 8 June 2015, Mr. Eric Blanchard Jibikila, who was a member of the Executive Committee of the National Staff Union, sent a request for management evaluation to the Management Evaluation Unit (MEU) in respect of the then

Case No.

the paragraph
3.7 of ST/AI/2013/4.

e. -
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. MON

be abolished and the remaining 92 LA posts be reassigned to different offices within the Mission.

g. um 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 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 hiring the Applicant on an IC contract following the purported abolition of his post, the Organization enjoys the benefit of obtaining exactly the same services from him that he had previously provided to the Organization under his 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

k. Another LA whose post had been abolished was placed against a vacant post in another section and this constitutes unjustifiable and unequal treatment among similarly situated staff members.

Remedies sought

l. Due to his wrongful separation from service, the Applicant has suffered greatly due to lack of job security, loss of the entitlements and benefits he enjoyed as a staff member such as insurance and pension.

m. The Applicant accordingly prays for the base salary for his wrongful separation from the Organization. He also

Respondent's case

17. The

Receivability

a. A decision by the General Assembly to abolish a post is not a contestable administrative decision.

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

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 his 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 his 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 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 had ceased to exist at the time UNOPS offered him the new contract as an IC at the Mission following the abolition of his 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. He also raised the issue of another former LA who was laterally transferred to an Administrative Assistant post. His argument was that he did not receive equal treatment with these staff members following the abolition of his 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 th rega.27(c)44t51(ra-51(re)7Wi)]18.79 38.8boliti76.16 Ti2i n

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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