
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/150

Judgment No.: UNDT/2016/157

Date: 23 September 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NSIMIRE

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

Introduction

1. The Applicant is a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). She served at the GS-4 level.
2. On 11 November 2015, she filed an Application contesting the decision not to renew her fixed-term appointment and to separate her from service on the grounds of abolition of her post.
3. The Respondent filed a Reply to the Application on 14 December 2015.
4. The Tribunal, with the consent of the Parties decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required in determining this case and that it will rely on the Parties' pleadings and written submissions.

Facts

5. The Applicant had served in Bukavu within MONUSCO as a Language Assistant (LA) until her fixed-term appointment which ended on 30 June 2015 was not renewed on grounds of abolition of post.
6. Before the said abolition, the United Nations Security Council in its Resolution 2147 (2014)¹, had called on MONUSCO to enhance the flexibility, effectiveness and capacity of the operations of the military force in the implementation of the Mission's mandate. It also pointed to the need for a clear exit strategy.
7. Thereafter, on 26 February 2015, the Secretary-General proposed a budget for MONUSCO for the period from 1 July 2015 to 30 June 2016². The said budget, among other things, proposed the abolition of 80 General Service (GS) LA posts.

¹ (Democratic Republic of Congo), adopted on 28 March 2014.

² Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo submitted pursuant to paragraph 39 of Security Council Resolution 2147 (2014).

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 the General Assembly, the military force in Bukavu was to be reduced by one

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'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 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

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

m. The Applicant accordingly prays for the award of one year's net base salary for her wrongful separation from the Organization. She also asks for three months' salary as moral damages.

Respondent's case

17. The Respondent's case is summarized below.

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 recomme

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

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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. The Applicant's claim that the Organization violated section 3.7(b) 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-renewal of the Applicant's appointment unlawful. The Applicant 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 is receivable and whether there is any merit in the Applicant's other claims.

19. With regard to the issue of the receivability, the Tribunal agrees with the Respondent's submission of law that the Applicant cannot challenge the abolition

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(Signed)

Judge Nkemdilim Izuako