
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/166

Judgment No.: UNDT/2016/173

Date: 23 September 2016

Original: English

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.

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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 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 award of one year's net base salary for his wrongful separation from the Organization. He 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 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)).

e. The Applicant has adduced no evidence that the decision not to renew his fixed-term appointment was unlawful. On 25 June 2015, the General Assembly abolished 80 LA posts to meet the operational and budgetary needs of the Mission. In conjunction with the MONUSCO military force, the MONUSCO Administration identified the LA posts in Bukavu and Kinshasa as the posts to be abolished. This decision was made in accordance with the change in Mission operations as mandated by the Security Council.

f. A proposal to restructure a mission that results in loss of employment for staff members falls within the Secretary-General's discretionary authority.

g. The exercise of the Secretary-General's discretion may only be challenged and reviewed on the grounds that the staff member had a legitimate expectancy of renewal, that the exercise was attended by procedural irregularity, or that the decision was arbitrary or motivated by

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.

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 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. In that Information Circular published on MONUSCO's intranet only, those 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 implementation of the Mission's restructuring which led to the abolition of 80 LA posts in Bukavu and Kinshasa including the Applicant's post.

Conclusions

30. The Tribunal finds that the Applicant's claim regarding the non-renewal of his fixed-term appointment is not receivable. Further, his claims regarding his recruitment under an IC contract by UNOPS and lack of equal treatment have no merit. The Application is accordingly refused.

(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