





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 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 impending abolishment of the 80 LA, including the Applicant's post.

13. MEU replied to the designated focal point for the affected Language Assistants on 2 July 2015 and promised to send its decision by 13 August 2015.

14. Meanwhile, on 24 June 2015 the Applicant received the nt rec334(m)-11ts decision by



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

b. Pursuant to art. 2.1(a) of the Dispute Tribunal's 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 the 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.

of his post by the General Assembly which by itself is akin to a country's constitution, the higher norm, and the supreme organ of the 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 implemented in consequence of the General Assembly's decision to abolish it.

21. In *Ovcharenko et al*<sup>3</sup>, 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 mischluT1 0 secti1 0-169(e)-7(c)4(k2 )-280(t(t )-21vosa)3(t(t m[i]-11k2 )-279(th17 )-61(c)



*(Signed)*

Judge Nkemdilim Izuako

Dated this 23<sup>rd</sup> day of September 2016

Entered in the Register on this 23<sup>rd</sup> day of September 2016

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi