



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/001

Judgment No.: UNDT/2017/067

Date: 24 August 2017

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NAKASE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant: **Mr. W. M. C. N. B. T. J. J.**

March 2015, 14 April 2015, and 20 April 2015, regarding the proposed budget, the establishment of a Comparative Review Panel (CRP), and the review criteria.

8. Under the proposed new structure for the Mission which was approved by the General Assembly on 25 June 2015, 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 a budgetary reduction of 80 GS/LA posts in the 2015/2016 budget cycle for MONUSCO.

9. On 17 April 2015, the Applicant received a letter from the MONUSCO Director of Mission Support (DMS). This memo informed the Applicant that MONUSCO was in the process of downsizing. Among others, his post had been proposed for abolishment. He was also informed of the same on 22 May 2015 through a memorandum from the Chief Civilian Personnel Officer (CCPO), Ms. Xaba-Motsa.

10. On 24 June 2015, the Applicant received a memorandum from MONUSCO's CCPO stating that his fixed-term appointment would not be renewed beyond 30 June 2015 and that accordingly, his separation from the Organization would take effect at the close of business on that same date.

11. 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.

12. On 23 August 2015, the Applicant filed a Management Evaluation Request contesting the decisions not to renew his fixed-term appointment and to separate him from service on the grounds of purported abolition of his post.

The purported abolition of his post was in fact a conversion of his fixed-term contract into an IC contract.

13. 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.

14. By hiring the Applicant on an IC contract following the purported abolition-

The non-

Remedies sought

22. Due to his

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duty stations would be abolished and would no longer exist in the new mission structure, there was no need for a comparative review of those staff members.

31. Staff members do not have the right to determine the organization of work in their office, even when there is a resulting loss of employment. Nor do they have the right to determine how the Organization meets the mission's mandate.

32. Due to the need for LAs to be more mobile and for more flexibility as to the duration of their engagement, it was agreed to engage LAs through IC agreements to be administered by UNOPS. In the past, military contingents were deployed at static locations from where they would carry out patrols and other military operations within their area of responsibility. The existence of national LA posts in previous budgets has remained static and was based on prior military and police units' strength. This approach, however, was not adequately responsive to surges in troop deployments. The Mission was not able to quickly adjust to a surge because it takes an entire budget cycle to make changes in the staffing table. More importantly, military units are now more mobile. They may now be required to move between different Brigade areas of responsibility and change locations to adhere to the mobile, agile and rapid deployment concept.

33. As a result, it is no longer viable to use national GS 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.

34. Outsourcing is one of the modalities available to the Organization to streamline its work pursuant to General Assembly resolution 59/289, whereby the Secretary-General was requested to continue to consider outsourcing subject to the guidance and goals set by the General Assembly. Outsourcing is not implemented with the sole aim of cutting costs but rather also enables the Organization to achieve efficiencies and concentrate on its core mandate, while providing flexibility that is suitable to dynamic peacekeeping missions.

35. MONUSCO already outsources a number of services and considers that the outsourcing of language services satisfies the military force's 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. In accordance with that guidance, MONUSCO informed staff representatives that language services would be outsourced and the staff representatives had an opportunity to respond.

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

36. 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.

37. 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.

38. 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. 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

Receivability

39. As held by UNAT in *Lee*³, acts prefatory to abolition of post have no direct effect on the conditions of employment. Accordingly, acts such as determination by the Secretary-General on which posts should be submitted for abolition do not constitute decisions reviewable by the UNDT. The applicant may challenge an administrative decision resulting from the restructuring once that

³ *Lee* 2014-UNAT-481.

decision has been made.⁴ The administrative decision under challenge, however, is the decision not to renew the Applicant's fixed-term appointment beyond 30 June 2015. The Tribunal finds that it is a challengeable administrative decision because it has a direct impact on the Applicant's terms and conditions of appointment.

40. On the other hand, as it was held by UNAT in *Ovcharenko et al.*,⁵ an administrative decision taken as a result of the decisions of the General Assembly is lawful and the Secretary-General cannot be held accountable for executing such a decision. Further, decisions of the General Assembly are binding on the Secretary-General and therefore, the administrative decision under challenge must be considered lawful, having been taken by the Secretary-General in accordance with the content of higher norms. Thus, as a practical effect, the control of legality in such cases is limited to ascertaining the identity of the post abolished with the post that an applicant has been encumbering.

41. The uncontested evidence before the Tribunal is that the General Assembly endorsed the Secretary-General's recommendation for the abolishment of 80 LA posts including the one encumbered by the Applicant. The Tribunal finds and holds that the decision not to renew the Applicant's fixed-term appointment was lawful as it was a proper implementation by the Secretary-General of the General Assembly's decision.

Did the Respondent violate any provisions of ST/AI/2013/4?

42. The Applicant claims that the Organization violated section 3.7(b) of ST/AI/2013/4. The said section stipulates,

Contracting of former and retired staff members

3.7 A former or retired staff member may be engaged on an individual contract subject to the following provisions:

⁴ *Lee*, *ibid*, at para. 51: "Although Ms. Lee cannot challenge the discretionary authority of the Secretary-

[...]

(b) The former or retired staff member is not reengaged to perform the functions of the same post from which he or she separated or retired or contracted to encumber the position from which he or she separated or retired;

43. In the light of the General Assembly's decision, the Tribunal considers that the issue of compliance with ST/AI/2013/4 is not relevant for the question of legality of appointment of the Appst. In furthermore agrees with the Respondent that the issue as such would not be properly before the Tribunal, with its duty to quash the appointment.

44. In conclusion, the Tribunal finds and holds that the non-renewal of the App; nt f terna appointment was lawful.

Judgment

45. The application is accordingly dismissed in its entirety.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 24th day of August 2017

Entered in the Register on this 24th day of August 2017

(Signed)

Eric Muli
Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi