



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NAKASE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

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).
2. On 5 January 2016, he filed an application contesting the decision not to renew his fixed-term appointment and to separate him from service on the grounds of abolition of his post.
3. The Respondent filed a reply on 5 February 2016.
4. The Tribunal has 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 his fixed-term appointment, which ended on 30 June 2015, was not renewed on the grounds of abolition of post.
6. The United Nations Security Council in its Resolution 2147 (2014)¹ 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. On 26 February 2015, the Secretary-General proposed a budget for MONUSCO for the period 1 July 2015 to 30 June 2016². The said budget, among other things, proposed the abolition of 80 General Service (GS) Language Assistant posts. Following the Secretary-General's budget proposal to the General Assembly, MONUSCO issued Information Circulars to its entire staff on 6 and 9

¹ Security Council resolution 2147 (2014) [on the extension of the Mandate of the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)], 28 March.

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).

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.

Applicant's case

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 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 contravenes the provisions of section 3.7(b) of ST/AI/2013/4 (Consultants and individual contractors).

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.

15. The Secretary-General's report of 26 February 2015 to the General Assembly regarding the proposed financing arrangements for MONUSCO for the period 1 July 2015 to 30 June 2016, recommended the abolition of 80 LA posts in MONUSCO for the 2015/2016 budget cycle. The said report did not make any reference to reengaging these LAs as ICs.

16. That report was in turn considered by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) which then issued a report to the General Assembly on 1 May 2015 approving the Secretary-General's recommendation for the abolishment of 80 LA posts. As with the report of the Secretary-General, no reference was made to the fact that these 80 LAs would be reengaged as ICs.

17. On the basis of the General Assembly's endorsement, MONUSCO then proceeded to inform the Applicant of the non-renewal of his fixed-term appointment and separation after 30 June 2015. Shortly thereafter, the Applicant was then offered an IC contract.

The non-renewal of the Applicant's fixed-term appointment and his attendant separation were unlawful because no comparative review was conducted.

18. MONUSCO's approved budget for the period 1 July 2015 to 30 June 2016, foresaw that 80 LAs in MONUSCO's Field Administrative Offices were to be abolished, and the remaining 92 LA posts reassigned to different offices within the Mission.

19. 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 of 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.

20. This apparent lack of a comparative review process further renders the decision not to renew the Applicant's appointment 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.

21. When the Administration decides not to extend a fixed-term appointment of a staff member and to separate him from service, it must provide the staff member with reasons for these decisions and the reasons must be supported by facts. In the present case, the facts provided to the Applicant for his non-renewal and attendant separation are not supported by the facts. This is because: a) the non-renewal and separation were based on the purported abolishment of his post, which was in fact not abolished, but unlawfully converted from a fixed-term appointment into an IC Contract; b) the recommendation of the Secretary-General to the General Assembly that led to the purported abolition of the Applicant's post was made in violation of the United Nation's statutory framework; and c) although the Administration informed the Applicant that he had not been successful in a comparative review process, it appears that no such comparative review process was ever actually conducted.

Remedies sought

22. Due to his wrongful separation from service, the Applicant has suffered greatly because the terms of the IC contract are much less favourable to him than the terms that he had previously received under his fixed-term appointment. The Applicant is no longer a staff member of the United Nations. For five months, the Applicant received contracts on a monthly basis only, lacking any job security and living in constant fear that he would not be renewed the following month. Moreover, the entitlements and benefits offered to the Applicant under all the IC contracts that he has received since July 2015 are significantly less than he received under his fixed term appointment. Finally, if an employment dispute arises during the pendency of the Applicant's IC contract, he cannot avail himself of the United Nation's internal justice system.

23. The Applicant accordingly prays for the award of one year's net base salary and an additional three months' salary as moral damages.

Respondent's case

Receivability

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

25. Pursuant to art. 2.1(a) of its Statute, the Dispute Tribunal lacks jurisdiction to review the matter of the abolition of the post which 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.

26. The only reviewable administrative decision before the Dispute Tribunal is the decision not to renew the Applicant's appointment due to the abolition of his 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.

27. A proposal to restructure a mission that results in loss of employment for staff members falls within the Secretary-General's discretionary authority. The Administration also has a wide, but not unfettered, discretion in implementing *bonae fidei* retrenchment exercises. The Dispute Tribunal's review is limited to whether the restructuring was conducted in accordance with relevant procedures, due process was properly accorded, and it was properly motivated.

28. Where a retrenchment process involves a comparative review of staff, the review must be based on objective criteria, and carried out by a process that is impartial and transparent. Similar to a review of a non-selection decision, the Dispute Tribunal may not substitute its views for those of the Administration in determining the review criteria, the methodology for applying the criteria, or the evaluation of staff based on the criteria.

29. In the present case, the Applicant has adduced no evidence that the decision not to renew his appointment was unlawful. On 25 June 2015, the General Assembly abolished 80 LA posts to meet the operational and budget 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 the mission's military operations as mandated by the Security Council, which the Respondent describes in detail. It was a decision taken within the discretion of the Secretary-General to meet the Mission's mandate and the Applicant has adduced no evidence that it was unlawful.

30. Furthermore, there was no requirement for the Mission to subject the Applicant to a comparative review. The Department of Field Support Downsizing Guidelines provide that "locally recruited staff must be comparative reviewed by duty station." Since it was decided that all LA posts in the Bukavu and Kinshasa

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-General to restructure the Organization or to abolish her post, she may challenge an administrative decision resulting from the restructuring once that decision has been made."

⁵ 2015-UNAT 530. Also, the General Assembly, in its resolution 67/241 (Administration of Justice at the United Nations) reaffirmed that "the resolutions of the General Assembly and the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization".

[...]

(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 abolition of the Applicant's post. It furthermore agrees with the Respondent that the issue as such would not be properly before the Tribunal, which is seised only with the question of not extending the Applicant's appointment.

44. In conclusion, the Tribunal finds and holds that the non-renewal of the Applicant's fixed-term 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