



Judgment No. 2017-UNAT-756



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| Counsel for Appellants: | Nicole Washienko, OSLA Michael Brazao, OSLA |
| Counsel for Respondent | Stéphanie Cartier |

JUDGE MARTHA HALFELD , PRESIDING .

1.

Facts and Procedure

4. The Appellants all served at the GS-3, GS-4 or GS-5 levels as Language Assistants (LA) for MONUSCO. Six of the Appellants were stationed

... As at 16 June 2015, the Applicant[s], 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.

... 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 posts, including the Applicant[s] post[s].

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

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

... Shortly thereafter, the Applicant[s] [were] offered ... Individual Contractor (IC) contract[s] by the United Nations Office for Project Services (UNOPS) [each] for the position of LA within MONUSCO. [These] IC contract[s] [were] for a period of one month effective 1 July 2015 but [were] subsequently extended.

6. On 23 September 2016, the UNDT rendered Judgments in each of the Appellants' cases, pursuant to which it held that: (i) the Appellants' challenges to the abolition of their posts were not receivable on the grounds that staff members lacked standing to challenge a decision taken by the General Assembly; (ii) their challenges to the non-renewal of their appointments were not receivable "in so far as [the non-renewal decisions were] properly implemented in consequence of the General Assembly's decision to abolish [the posts they encumbered]";⁶ (iii) the contested administrative decision taken as a result of the decisions of the General Assembly was lawful; (iv) the provisions of Section 3.7(b) of Administrative Instruction ST/AI/2013/4 (Consultants and individual contractors) were not contravened by their subsequent recruitment under IC contracts; and, (v) no unequal treatment occurred in the implementation of the Mission's restructuring.

7. As noted above, the Appellants filed their respective appeals on 25 and 28 November 2016; the Secretary-General filed his corresponding answers on 26 January 2017; and, the Appeals Tribunal consolidated the appeals by Order No. 282 (2017) issued on 6 June 2017.

⁶ *Ibid.*, para. 20.

Submissions

Appellants' Submissions

8. The UNDT erred in law and in fact and failed to exercise its discretion by concluding that their applications were not receivable. The Appellants challenged the Secretary-General's non-renewal of their fixed-term appointments, not the General Assembly's decision. The UNDT conducted only a perfunctory review of the merits of the Secretary-General's recommendation to the General Assembly that led to the contested decision.

9. In concluding that the Appellants' claims were non-receivable, the UNDT erred in its reliance upon *Ovcharenko et al.*⁷ The non-renewal decisions in the Appellants' cases were based upon the Secretary-General's own recommendation to the General Assembly, not on that of a separate entity, as in *Ovcharenko et al.* Most importantly, when the General Assembly approved in June 2015 the Secretary-General's recommendation to abolish the 80 LA posts, it was not appraised of the plan to subsequently retain the staff members encumbering those posts on IC contracts to perform the same functions – a plan that was memorialized in a “note to file” prepared by the Director of Mission Support, MONUSCO in April 2015. No reference was made to this plan in the submissions to the General Assembly (i.e., the Secretary-General's 26 February 2015 report and the Advisory Committee on Administrative Budgetary Questions' 1 May 2015 report).

10. The UNDT's conclusion is also inconsistent with existing jurisprudence.

12. The Appellants respectfully request that the Appeals Tribunal vacate the impugned Judgments and award compensation or, at the very least, remand their cases for a determination on the merits.

The Secretary-General's Answer

13. The Appellants fail to establish any reversible error by the UNDT. The UNDT correctly concluded that it was not competent to review the decision by the General Assembly to abolish the Appellants' posts. It also correctly determined that the Appellants had no standing to challenge their respective non-renewal decisions in so far as they were properly implemented as a consequence of the General Assembly's decision to abolish their posts.

14. Contrary to the Appellants' assertions, the UNDT in reaching its conclusions did examine the merits of their non-renewal decisions. ST/AI/2013/4 was not contravened in this case because, as the UNDT correctly determined based on the provision's express wording, it does not apply when posts are abolished. The UNDT also correctly dismissed the Appellants' claims that there had been unequal treatment in the implementation of MONUSCO's restructuring. As the UNDT noted, the Appellants did not challenge the Secretary-General's explanations in this regard, nor do they do so on appeal.

15. The UNDT also made no error when relying on *Ovcharenko et al.*, and the Appellants' claim that the General Assembly's decision in the present case was improperly implemented—because it had been both proposed and implemented by the Secretary-General—is without merit. The jurisprudence relied upon by the Appellants for the proposition that the Tribunals have the competence to review the General Assembly's decision to abolish their posts is inapposite. By claiming that the Secretary-General's submissions to the General Assembly were incomplete in so far as there was no mention of MONUSCO's intention to outsource services previously performed by staff encumbering posts that would be abolished, the Appellants effectively seek to obtain a ruling on the General Assembly's decision.

16. The Secretary-General respectfully requests that the Appeals Tribunal dismiss the appeals in their entirety.

Considerations

17. The panel, having reviewed the record before the Dispute Tribunal and the parties' briefs on appeal, find the Appellants have raised neither factual differences nor legal issues different from those canvassed in companion cases and disposed of by the whole Appeals Tribunal in *Kagizi et al. v. Secretary-General of the United Nations*.⁸ Accordingly, we adopt the reasoning of *Kagizi et al.*, as set forth below:

... The administrative decision, which the Appellants contest in their applications before the UNDT, is the decision "not to renew [their] fixed-term appointment[s] and to separate [them] from service on the grounds of purported abolition of [their] post[s]".^[9]

... The General Assembly is the ultimate decision-making organ in the Organization and its decisions are not subject to challenge in the internal justice system.^[10] The Appeals Tribunal notes the procedure of the United Nations which allows for the Secretary-General to make recommendations to the General Assembly, and for the Secretary-General to adopt and implement these recommendations when approved.

... The evidence shows that the Secretary-General, due to both budgetary constraints and changes in strategic direction of the Organization, made recommendations to the General Assembly for the abolition of 80 GS LA posts. The General Assembly approved these recommendations.^[11]

... The Appellants specifically contended that the General Assembly lacked information about the IC contracts when it reached its decision to abolish the LA posts. The Appellants have argued that the submission by the Secretary-General to the General Assembly proposing the abolishment of their posts omitted mention of the Administration's intent to rehire LAs on IC contracts in contravention of ST/AI/2013/4. The Appeals Tribunal finds that, in so doing, the Appellants are seeking a review of the General Assembly's decision through the back door. What in effect the Appellants are asking is for the Appeals Tribunal to review and assess the quality of the Secretary-General's submissions presented to the General Assembly. This cannot be done.

... The fact that the Secretary-General is both the proposer and the implementer is in keeping with the structure of the Organization; in any event, the fact remains that the Secretary-General's proposal is an act prefatory to the General Assembly's decision and to the administrative decision at issue.^[14]

... We note, further, that, in accordance with the above mentioned principles, the UNDT only denied receivability of the Appellants' application against their non-renewal in so far as it was deemed to be a direct challenge against the General Assembly's decision to abolish 80 LA posts. In other aspects, the UNDT regarded the application as receivable and dealt with the merits of the case in stating that: (i) following *Ovcharenko et al.* an administrative decision taken as a result of the General Assembly is lawful and the Secretary-General cannot be held accountable for executing such a decision; (ii) the provisions of Section 3.7(b) of ST/AI/2013/4 were not contravened by the hiring of the Appellants under IC contracts; and, (iii) no unequal treatment occurred in the implementation of the Mission's restructuring which led to the abolition of 80 LA posts in Bukavu and Kinshasa. These findings were not substantially challenged on appeal.

... In order to give guidance to the UNDT and the parties, the Appeals Tribunal points out that the UNDT had no authority to review the decision to offer IC contracts by

Judgment

11. The appeals are dismissed and Judgment Nos. UNDT/2016/150, UNDT/2016/151, UNDT/2016/152, UNDT/2016/153, UNDT/2016/154, UNDT/2016/136 and UNDT/2016/137 are hereby affirmed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Murphy

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar