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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/118

Judgment No.: UNDT/2016/129

Date: 23 September 2016

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CHENTWALI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Nicole Washienko, OSLA

**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). He served at the GS-3 level.
2. On 11 November 2015, 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 to the Application on 14 December 2015.
4. The Tribunal, with the consent of the Parties 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 grounds of abolition of post.
6. Before the said abolition, the United Nations Security Council in its Resolution 2147 (2014)<sup>1</sup>, had 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. Thereafter, on 26 February 2015, the Secretary-General proposed a budget for MONUSCO for the period from 1 July 2015 to 30 June 2016<sup>2</sup>. The said budget, among other things, proposed the abolition of 80 General Service (GS) LA posts.

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<sup>1</sup> (Democratic Republic of Congo), adopted on 28 March 2014.

<sup>2</sup> 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).

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-Ge

15. 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.

**Applicant's case**

16. The Applicant's case may be summarized as follows:

*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.*

- a. The Secretary-General's report of 26 February 2015 to the General Assembly regarding the proposed financing arrangements for MONUSCO for the period from 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.
- b. 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.
- c. 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.
- d. The mere fact that MONUSCO decided to engage the LAs under agreements administered by UNOPS, a United Nations Common System entity, as opposed to directly engaging the individual contractors





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 q 316.756 Tf1 0 0 132.c4oion of AblET3 d12(dm19(thni3( )4the )I 19(thv 0 1 1 )-11

improper purposes. The Applicant bears the burden of proving that the discretion not to renew his or her appointment was not validly exercised.

*A comparative review was not required and the outsourcing of the LA functions was proper in the circumstances.*

h. There was no requirement for the Mission to subject the Applicant and others similarly placed to a comparative review process. The Department of Field Support Downsizing Guidelines provide that locally recruited staff must be comparatively reviewed by duty station. Since all LA posts in the Bukavu and Kinshasa duty stations were abolished, a comparative review was unnecessary.

i. Due to the need for LAs to be more mobile and to effectively interact and liaise with the local population by providing linguistic support during their engagement, it was agreed to engage LAs through individual contractor agreements to be administered by UNOPS.

j. As a result, it was no longer viable to use national General Service 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. Additionally, there is no suitable allowance for the travel of national staff.

k. MONUSCO decided to outsource the provision of LA functions in response to the recommendation of the Civilian Staffing Review (CSR) report.

l. 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.

m. In accordance with that guidance, MONUSCO informed staff representatives that language services would be outsourced and the staff





of his post by a decision of 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 abolition of post to provid30( )7(lang)12(ua)-5(g)10(e)4( )-sulses to iion, 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 staf member continues to exist and the separated stafmember is reengaged as a consult ant or IC to continue to perform ime functions.

24. The mischief that that section seeks to avoid is the continued indirect encumbrance of a post under the guise of a consultancy or individual contract by a stafmember who by reason of retirement or other form of separation has left the Organization.

25. In case this Applicant, the post he eviously encumbered as a n LA had ceased to exist at the time UNOPS offered him the new contract as an IC at iMission following the abolition of post . ven the Mission, by itself, had reengaged the Applicant as an IC, the Respondent cannot be said to have breached iovisions of section 3.7(b) of ST/AI/2013/4.

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<sup>3</sup> 2015-UNAT 530.



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*(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