



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-756

Nkashama et al.

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before: Judge Martha Halfeld, Presiding
Judge Deborah Thomas-Felix
Judge John Murphy

Case Nos.: 2016-1029, 2016-1030, 2016-1031, 2016-1032,
2016-1033, 2016-1047 and 2016-1048

Date: 14 July 2017

Registrar: Weicheng Lin

Counsel for Appellants: Nicole Washienko, OSLA
Michael Brazao, OSLA

Counsel for Respondent: Stéphanie Cartier

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it seven individual appeals filed by former staff members (Appellants)¹ of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO or Mission) against the Judgments rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi in their respective cases:

- *Nkashama v. Secretary-General of the United Nations* (Judgment No. UNDT/2016/150);
- *Ntampaka v. Secretary-General of the United Nations* (Judgment No. UNDT/2016/151);
- *Kaningini v. Secretary-General of the United Nations* (Judgment No. UNDT/2016/152);
- *Shalukoma v. Secretary-General of the United Nations* (Judgment No. UNDT/2016/153);
- *Namegabe v. Secretary-General of the United Nations* (Judgment No. UNDT/2016/154);
- *Bishimire v. Secretary-General of the United Nations* (Judgment No. UNDT/2016/136); and,
- *Kishimbi v. Secretary-General of the United Nations* (Judgment No. UNDT/2016/137).

2. The Judgments, as per the list above, were issued on 23 September 2016. The Appellants, as per the list above, filed their respective appeals on 28 November 2016 and were assigned Case Nos. 2016-1029 through 2016-1033 and 2016-1047, respectively. The last Appellant, as per the list above, filed his appeal on 25 November 2016 and was assigned Case No. 2016-1048. The Secretary-General filed his answers on 26 January 2017. The Appellants are all represented by the same counsel.²

3. On 6 June 2017, the Appeals Tribunal issued Order No. 282 (2017)³ pursuant to which it consolidated the appeals, pursuant to Article 10(2) of the Statute of the Appeals Tribunal.

¹ Mr. Robert Nkashama, Mr. Aldau Ntampaka, Ms. Nimonewa Fanina Kaningini, Mr. Salomon Shalukoma, Ms. Rehema Biibi Namegabe, Mr. Cesar Zihahirwa Bishimire, and Mr. Jacques Kishimbi.

² The Appellants' submissions are identical, apart from biographical details. The Secretary-General's answers are similarly identical.

³ Reissued for technical reasons on 12 June 2017.

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 in Bukavu, while one (Mr. Bishimire) served in Kinshasa. All of the Appellants were on one-year fixed-term appointments, with an effective date of 1 July 2014 and an expiration date of 30 June 2015.⁴ When their appointments ended on 30 June 2015, they were not renewed on grounds of the abolition of posts. Their letters of appointment provided, *inter alia*, that “the normal expiration of the appointment at its term does not require the payment of any indemnity” and that “[a] Fixed-Term Appointment, irrespective of the length of service, does not carry any expectancy, legal or otherwise, of renewal or conversion to any other type of appointment in the Secretariat of the United Nations”.

5. The following facts are uncontested, as found by the Dispute Tribunal:⁵

... Before the said abolition, the United Nations Security Council in its Resolution 2147 (2014), 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.

... Thereafter, on 26 February 2015, the Secretary-General proposed a budget for MONUSCO for the period from 1 July 2015 to 30 June 2016. The said budget, among other things, proposed the abolition of 80 General Service (GS) LA posts.

... 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.

... 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.

... The Applicant[s], who [were] ... LA[s] in Bukavu [and Kinshasa], [were] affected by the abolition. A memorandum from the MONUSCO Director of Mission Support (DMS) informed [them] of this development. [They] [were] also informed through a memorandum from the Chief Civilian Personnel Officer (CCPO), Ms. Xaba-Motsa.

⁴ There is no information on record regarding the Appellants’ length of service.

⁵ Impugned Judgments, paras. 6-15 (internal citations omitted).

... 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. It is within the competence of the Tribunals to review challenges to an administrative decision resulting from the abolition of posts, including those taken by the Secretary-General implementing the decision by the General Assembly to abolish the Appellants' posts.

11. The UNDT also erred when it concluded that ST/AI/2013/4 was not applicable on the grounds that it did not apply when a staff member's post was abolished. This assertion by the UNDT has no basis in law or jurisprudence. The Administrative Instructions were clearly meant to prohibit a situation like that which occurred here – where the Appellants' fixed-term appointments were unlawfully converted into IC contracts.

⁷ *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530.

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 Appeals Tribunal agrees with the UNDT's finding of non-receivability of challenges to the abolition of posts made pursuant to decisions of the General Assembly. Neither of the parties takes issue with this ruling.

... The Appeals Tribunal upholds the UNDT's findings that the Appellants lacked the capacity to challenge the non-renewal of their appointments, in so far as their non-renewals were properly implemented, in consequence of the General Assembly's decision to abolish their posts.^[12] Generally speaking, applications against non-renewal decisions are receivable. However, in the present case, the Appellants have intertwined their challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts.^[13]

⁸ *Kagizi et al. v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-750, paras. 18-27 (footnotes in original).

^[9] Staff Rule 4.13(c) provides in part that "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service".

^[10] *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530; *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

^[11] General Assembly resolution A/69/297.

^[12] Impugned Judgments, para. 20.

^[13] *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

... 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 UNOPS as this is not an administrative decision subject to judicial review. The only administrative decision at issue in the present case is the non-renewal of the Appellants' fixed-term appointments; the rehiring on IC contracts is neither part of this decision nor is its lawfulness of any legal relevance thereto.

... For the reasons above, the Appeals Tribunal dismisses the appeals and upholds the decisions of the UNDT.

[14] *Ibid.*

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