



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2019/118,
119, 120, 121, 122,
123, 124, 125, 126,
127, 128, 129 and 130
Judgment No.: UNDT/2020/155
Date: 26 August 2020
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SSEWAGUMA et al.¹

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Christine Graham, AAS/ALD/OHR
Nusrat Chagtai, AAS/ALD/OHR

¹ The other Applicants are: Abubakari, Nsereko, Ssekabira, Tusingwire, Nyanduru, Lodi, Twijukye, Katongole, Tamuzadde, Ssekamate, Salim and Mayanja.

INTRODUCTION

1. On 15 August 2019, 13 former staff members of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) filed identical applications challenging decisions by MONUSCO not to renew their fixed-term appointments (“FTA”) beyond 30 June 2019. By Order No. 027 (NBI/2020) these applications were consolidated for common adjudication (“the application”).
2. The Respondent filed replies on 18 September 2019.

FACTS

3. The Applicants served as Heavy Vehicle Operators (“HVOs”) at the GS-3 level with MONUSCO’s Heavy Transport Unit (“HTU”) in the Centralized/Integrated Warehouse Section in Entebbe, Uganda.²
4. By resolution 2463, dated 29 March 2019, the Security Council underscored the need for MONUSCO to progressively transfer its tasks to the Government of the Democratic Republic of the Congo, the United Nations Country Team and other relevant stakeholders to “enable the responsible and sustainable exit of MONUSCO”.³ The Security Council requested that the Secretary-General, no later than 20 October 2019, conduct and provide it with an independent strategic review of MONUSCO “assessing the continued challenges to peace and security in the DRC and articulating a phased, progressive and comprehensive exit strategy”. This included, *inter alia*, “options for adapting MONUSCO’s future configuration of its civilian, police and military components, including by reducing MONUSCO’s Force and civilian footprint in line with MONUSCO’s priorities during the implementation of the exit strategy and benchmarks and indicators.”⁴

² Respondent’s reply, annex R/4.

³ S/RES/2463 (2019), para. 44.

⁴ *Ibid.*, para. 45.

5. On 29 March 2019, the Secretary-General submitted a final proposed budget for MONUSCO for 2019-2020⁵, which included proposals to abolish 764 posts (120 international staff, 565 national staff and 79 United Nations Volunteers).⁶ Due to the closure of seven field offices and one site on 30 June 2019, the Secretary-General proposed the abolishment of 38 national general service level staff in the Centralized/Integrated Warehouse Section, which included the abolishment of 15 HVO posts.⁷

6. In April 2019, MONUSCO initiated a Comparative Review Process (“CRP”) to identify international and national staff members that would be separated because of post abolition. A CRP had to be conducted in instances where the number of proposed posts within the same occupational group, organizational unit/sub-unit, functional title and level in the new mission structure was less than in the former mission structure.⁸ Posts or functions that were unique and had no comparative post or function in the same organizational unit/sub-unit would be subjected to a dry cut with no comparative review.⁹ The Applicants’ posts were subjected to dry cuts instead of the CRP since all the 15 Heavy Vehicle Operator posts in the Centralized/Integrated Warehouse Section had been proposed for abolition.

7. By memorandum dated 2 April 2019 and entitled “*Advance information: anticipated non-extension of fixed-term appointment*”, the MONUSCO Chief Human Resources Officer (“CHRO”) informed the 13 Applicants that their posts had been proposed for abolition in the 1 July 2019 to 30 June 2020 budget and that the budget was being considered by the General Assembly for implementation effective 1 July 2019. The CHRO further stated that: “In anticipation of the General Assembly’s approval of the mission’s budget, MONUSCO will not extend your fixed-term appointment beyond its expiration on 30 June 2019 in line with Staff Regulation 9.4”.

⁵ A/73/816.

⁶ Ibid., para. 23.

⁷ Ibid., paras. 116 & 117.

⁸ Respondent’s reply, annex R/1, para. 3.

⁹ Ibid., para. 12.

It also informed that the Human Resources Section (“HRS”) would commence their check-out processes in line with the notices.¹⁰

8. On 16 May 2019, the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) recommended in its report that the General Assembly approve the Secretary-General’s proposals for civilian personnel in the 2019-2020 budget¹¹ and recommended that MONUSCO’s financing be reduced by USD464,800 from USD1,023,267,600 to USD1,022,802,800.¹²

9. By memorandum dated 29 May 2019 and entitled “*Notice of non-extension of fixed-term contract upon expiration of appointment with MONUSCO*”, the CHRO informed the 13 Applicants that their posts had been proposed by the Secretary-General for abolition and thus, their FTAs would not be renewed beyond 30 June 2019. Once again, they were informed that HRS would commence their check-out processes in line with the notices.

10. The Applicants filed applications for suspension of the non-renewal decision on 21 June 2019. Since the General Assembly had not approved the MONUSCO budget, the Tribunal stayed implementation of the contested decision pending completion of management evaluation.¹³ Consequently, the Applicants’ FTAs were extended from 1 July to 15 August 2019 pending completion of management evaluation.¹⁴

11. On 3 July 2019, the Fifth Committee recommended that the General Assembly adopt a draft resolution that included an endorsement of the conclusions and

¹⁰ Respondent’s reply, annex R/3.

¹¹ A/73/755/Add.15, para. 33 (Budget Performance for the period from 1 July 2017 to 30 June 2018 and proposed budget for the period from 1 July 2019 to 30 June 2020 of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo: Report of the Advisory Committee on Administrative and Budgetary Questions).

¹² Ibid., para. 49.

¹³ Order No. 083 (NBI/2019), dated 27 June 2019.

¹⁴ Respondent’s response to Order No. 158 (NBI/2019).

recommendations contained in the ACABQ report of 16 May 2019.¹⁵ On the same day, the General Assembly, in its resolution 73/315, endorsed the ACABQ's conclusions and recommendations.

12. On 13 August 2019, the Applicants received the response to their management evaluation requests, which upheld the non-renewal decision.¹⁶ They were separated from service on 16 August 2019.¹⁷

ISSUES

13. The Tribunal will consider the following issues: (i) whether the applications are receivable; and (ii) whether the decision not to renew the Applicants' FTAs was lawful.

Receivability

14. The Respondent submits that the applications are not receivable *ratione materiae* for the following reasons: (i) the Applicants were informed of the contested decision on 5 April 2019, thus the deadline for requesting management evaluation was 4 June 2019 but their applications were filed only on 14 June 2019; (ii) the Applicants make several submissions challenging the management evaluation dated 9 August 2019 whereas said outcome is not a reviewable administrative decision; (iii) the Applicants include a challenge to MONUSCO's decision to outsource HTU services to an independent contractor whereas such a decision is not an administrative decision subject to judicial review.

Timeliness of the Applicants' request for management evaluation

15. In response to the Applicants' applications for suspension of action, which were filed on 21 June 2019, the Tribunal, by its Order No. 083 (NBI/2019), pronounced on the issue of the timeliness of the Applicants' requests for management evaluation as

¹⁵ A/73/929, para. 6 (Financing of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo: Report of the Fifth Committee).

¹⁶ Application, annex 1.

¹⁷ Respondent's reply, annex R/4.

follows:

17. In reviewing the receivability of the applications, the Tribunal finds that the 5 April 2019 notice was a prefatory act that did not rise to the level of a contestable administrative decision. It is well noted that the Secretary-General's proposed 2019-2020 budget, which included the proposal for abolition of the Applicants' posts, had been submitted to the General Assembly only six days before, on 29 March 2019, and was still pending approval.

18. At that point, the mission had no assurance whatsoever that the proposal to abolish all the 15 Heavy Vehicle Operator posts in the Centralized Warehouse Section would be accepted or rejected. In other words, the mission was assuming at this stage that the Applicants' posts would be subjected to dry cuts although the possibility of the posts having to go through the CRP was also quite high.

19. Although the 29 May 2019 notice echoes the language in the 5 April 2019 notice, the Tribunal finds that it is not a reiteration of an earlier decision or the announcement of a prefatory act. This is an administrative decision in that it was informed by the ACABQ's recommendation to the General Assembly to approve the abolition of posts as proposed by the Secretary-General in the 2019-2020 budget and the finalization of the CRP. Further, it was a decision taken in such proximity to the expiry of the Applicants' FTA, that it served as the call to action on the part of the Applicants.

20. The Tribunal notes that the Applicants requested management evaluation of the 29 May 2019 timeously on 14 June 2019.

21. Accordingly, the Tribunal finds the applications to be receivable.

16. This Tribunal wishes to note that the stated motive related to a future event, in this case – the anticipated approval of the MONUSCO budget, is immaterial for the question whether a communication conveys an administrative decision. Rather, the point is whether the communication contains a disposition expressed in categorical and not conditional terms. In this respect, the 5 April notice announces a concluded intent to not extend appointments and the communication itself is not conditional. Its title, however, is confusing in that it announces "anticipated", thus possibly a not yet concluded, decision on non-extension. As such, the Tribunal concedes that the 5 April communication is not unambiguous and the non-extension might have been interpreted as conditioned upon the future General Assembly resolution on the budget. Only the

following communication, dated 29 May 2019, is clearly unconditional, notwithstanding that, at the time, the budget had not yet been approved. In conclusion, this Tribunal will not depart from the conclusion on receivability contained in Order No. 083, albeit for slightly different reasons.

Whether the applications are receivable in light of the Applicants' submissions challenging the MEU response dated 9 August 2019?

17. The United Nations Appeals Tribunal ("UNAT") has consistently deemed as irreceivable cases in which applicants have unambiguously challenged the responses to their management evaluation requests due to the absence of a reviewable administrative decision.¹⁸ However, where an application does not clearly articulate the claim or issues, the Tribunal is vested with the inherent power to: individualize and define the administrative decision being challenged¹⁹; and consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed²⁰.

18. This Tribunal has also previously held that an application must be interpreted *bonae fidei*, in a reasonable effort to give it a sense consistent with the applicant's presumed intention and legal interest. Picking on particular expressions used, especially when originating from an unrepresented applicant, with no regard to the overall context, is not *bonae fidei* interpretation.²¹

19. At section V of their applications, the Applicants have clearly described the contested decision as the non-renewal of their appointments due to a dry cut of their positions. They indicate further that the decision was made on 29 May 2019 by the MONUSCO CHRO. Although the Applicants, who are self-represented, refer to and

¹⁸ *Abu Nqairah* 2018-UNAT-854, para. 22; *Kalashnik* 2017-UNAT-803, paras. 26 & 27 (citing *Kalashnik* 2016-UNAT-661, para. 29); *Auda* 2017-UNAT-740, para. 22 (citing *Nwuke* 2016-UNAT-697, para. 22)

¹⁹ *Massabni* 2012-UNAT-238, para. 26.

²⁰ *Fasanella* 2017-UNAT-765, para. 20.

²¹ *Lahoud* UNDT/2017/009, para. 37.

address some of the findings in the management evaluation response at section VII of their application, the applications are evidently not directed at the MEU response but rather at the decision not to renew their appointments beyond 30 June 2019.

20. Likewise, the Applicants' criticism of MONUSCO's outsourcing decision is clearly offered by way of support for their claim about unreasonableness of the downsizing and the resulting non-extension decision and not as autonomous subject of their application. Therefore, the Respondent's averment that the Applicants are challenging the decision to outsource HTU services perverts the gist of the application.

21. The applications are receivable on this score.

Merits

22. Having found the applications receivable, the Tribunal will now examine whether the decision not to renew the Applicants' appointments beyond 30 June 2019 was lawful.

Applicants' submissions

23. The Applicants do not contest the procedure for the CRP, dry cuts or the Secretary-General's authority to reduce staff.²² Their case is that the decision not to renew their FTAs was flawed and unlawful because although MONUSCO claimed that there was no funding for their posts, it proceeded to outsource their functions to a third party contractor at a cost that is three times higher than the cost of running the HTU.

24. The Applicants contend that the Mission misrepresented the number of containers moved by HTU (440) as opposed to those moved by the third party contractor (220) between January and October 2018. The Applicants also assert that there is no evidence to support the mission's claim that less deliveries were required because there had been a reduction for support services by the military.

²² Application, para. 8, page 5.

Respondent's submissions

25. The Respondent's case is that the contested decisions were the result of a legitimate downsizing exercise. The UNAT recognizes the broad discretion of the Secretary-General to reorganize the Organization's operations to meet changing needs and economic realities and to achieve greater efficiency.²³ When judging the validity of the Secretary-General's exercise of discretion, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct and proportionate. It will not, otherwise, replace the discretionary decision of the Secretary-General with its own judgment.²⁴

26. With respect to the outsourcing of services, General Assembly resolutions 59/289 and 55/232, as well as ST/IC/2005/30, *Outsourcing and impact on staff* ("Outsourcing IC"), requires programme managers to consider the following criteria: cost-effectiveness and efficiency; safety and security; respect for the international character of the Organization; and integrity of procedures and process.

27. The Respondent submits that during 2018, the cost of daily subsistence allowance ("DSA") for HVO trips from Entebbe to locations in the DRC was high. By October 2018, MONUSCO's travel budget to pay DSA for HVOs had been depleted and outsourcing became a necessity. HVO trips were limited to areas serviced by HTU, *i.e.*, locations close to the DRC border. The HVOs were therefore not being fully utilized.²⁵ In contrast, between January and October 2018, the independent contractor completed trips further inland and was more cost-effective when compared to the overall cost of HVO trips.²⁶

28. With the downsizing of MONUSCO's military and civilian personnel, there has been a decreased requirement for support services provided by the Mission Support

²³ *Lee*, 2014-UNAT-481, para. 28. *See also Gehr*, 2012-UNAT-236, para. 25; *Simmons*, 2016-UNAT-624, para. 12; *Hassanin*, 2017-UNAT-759, para. 45; *Afeworki*, 2019-UNAT-903, para. 20.

²⁴ *Kule Kongba*, 2018-UNAT-849, para. 27.

²⁵ Respondent's reply, annex R/5.

²⁶ *Ibid.*, annex R/6.

Division, and by extension, the Supply Chain Management Section. This resulted in the need for less personnel in CWS to fulfil its mandate.²⁷ Given that HTU services had been outsourced and the budget proposed the abolition of the HVO posts, MONUSCO decided not to renew the Applicants' appointments beyond 30 June 2019.

29. In summing up, the Applicants' views regarding the most cost-effective means by which MONUSCO's needs could be met are irrelevant while their allegation of improper motive is unsupported.

Considerations

30. The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. The Administration, however, has a duty to act fairly, justly and transparently in dealing with its staff members²⁸ and any procedure adopted must be in accordance with relevant rules and policies. The decision to not extend the Applicants' appointments absent the General Assembly's approval of post abolition was deemed *prima facie* unlawful in June 2019, where this Tribunal granted suspension of the impugned decision.

31. At present, the situation is substantively different in that the General Assembly approved abolition of the Applicants' posts. This fact is legally decisive, as it effectively removes the matter from the Tribunal's cognisance. It is recalled that the General Assembly confirmed in 2014 that: "[A]ll elements of the system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly" and that "decisions taken by the Dispute Tribunal and the United Nations Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management".²⁹

²⁷ Ibid., annex R/7.

²⁸ *Afeworki* 2019-UNAT-903, para. 20; *Loeber* 2018-UNAT-844, para. 18; *Abdeljalil* 2019-UNAT-960, para. 19.

²⁹ A/RES/68/254 of January 2014 para. 4 and 5.

32. The General Assembly reiterated the same in its 22 December 2018 resolution on the Administration of justice at the United Nations. It said:

[A]ll elements of the system of administration of justice, including the Dispute Tribunal and the Appeals Tribunal, must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly, and emphasizes that the decisions of the Assembly related to human resources management and administrative and budgetary matters are subject to review by the Assembly alone.³⁰

33. Abolition of the Applicants' posts sanctioned by General Assembly resolution 73/315 of 3 July 2019 renders initial reservations irrelevant. There remains, therefore, no basis to dispute the decisions on non-extension and separation.

JUDGMENT

34. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 26th day of August 2020

Entered in the Register on this 26th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

³⁰ A/RES/73/276 adopted on 22 December 2018.