



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

Judgment No. 2016-UNAT-705

De Aguirre
(Respondent/Appellant on Cross-Appeal)

v.

Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)



Date: 28 October 2016

Registrar: Weicheng Lin

Counsel for Ms. de Aguirre: Self-represented

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2016/035, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 22 April 2016, in the case of *De Aguirre v. Secretary-General of the United Nations*.

2. On 21 June 2016, the Secretary-General filed his appeal and on 18 August 2016, Ms. Aintzane Maria de Aguirre filed her answer to the appeal and a cross-appeal. In accordance with Order No. 270 (2016), the Secretary-General filed his answer to the cross-appeal on 7 October 2016.

3. The Appeals Tribunal is of the view that the appeal and cross-appeal raise significant questions of law. Consequently, they have been refer tho bly38oss-ap63(ti6(-3()3446801

level. From 24 February 2002, until her separation on 31 May 2014, the Applicant held an indefinite appointment.

... By memorandum dated 15 March 2005, the then Regional Representative for Western Europe in Brussels (“Brussels Representative”), UNHCR, informed the Applicant that her post had been proposed for reclassification from G-7 to National Officer B level (“NOB”), as she felt that “the functions and responsibilities of [the] post ... correspond[ed] more to a position at the National Officer level”. As a result, the Applicant was appointed to position No. 10011149 (Post No. 426032), NOB, Associate Legal Officer, Legal Unit, Brussels RRWE, UNHCR, in March 2007.

... From 16 November 2009 to 15 November 2010, the Applicant was on Special Leave Without Pay (“SLWOP”).

... By email of 22 April 2013, the Brussels Representative informed her staff of changes in the regional representation structure. As for the “Protection” functions, she mentioned:

In this context and for purposes of a) reinforcing our action viz the region to which we are providing support and b) separately strengthening our approach to Belgium and Luxembourg, [F.] will continue to head the Regional Protection Unit composed of [the Applicant] and they will focus their action on RRWE regional support. [P.] will continue to report to [F.] and will service the needs of all staff in Protection section. [V.] will continue to focus on Belgium and Luxembourg, reporting directly to [P.] and with the help of one (possibly) UNOPS [staff member] to assist her specifically on Lux.

... On 23 September 2013, the Applicant met with her supervisor, the [Senior Regional Legal Officer], and expressed her concern that she did not consider it “normal to feel as if she needed another year of SLWOP”, due to the unequal distribution of workload and tensions among colleagues in the Legal Unit, Brussels RRWE.

... By confidential memorandum of the same day addressed to the Director, Regional Bureau for Europe, UNHCR, the Brussels Representative proposed changes in the structure of the Representation for 2014, which included a recommendation to “downgrade” two NOB Associate Legal Officers positions, one of which was encumbered by the Applicant.

... As of 4 November 2013, the Legal Unit, Brussels RRWE, was reinforced by recruiting a Legal Associate, G-6 level, under a temporary appointment. No vacancy announcement for this position was posted.

... By letter dated 18 November 2013, which she received on 20 November 2013, the Applicant was informed that the position she was encumbering would be discontinued as of 1 June 2014, “in line with a regional review of existing capacities” and “in accordance with relevant stipulations of IOM/051/2007-FOM/054/2007”.

... By email and memorandum of 14 January 2014, the Applicant requested management evaluation of the decision communicated to her by letter of 18 November 2013.

... By email of 28 February 2014, the Office of the Deputy High Commissioner, UNHCR, informed the Applicant that her request for management evaluation was under consideration.

... On 26 March 2014, a Human Resources Associate, Brussels RRWE, sent the Applicant an email attaching a memorandum, dated 3 March 2014, providing details on her separation formalities.

... On 4 April 2014, the Brussels Representative sent the Applicant an email advising that the separation memorandum of 3 March 2014 had been officially withdrawn.

... Further to a request from Brussels Representative dated 8 April 2014, on 10 April 2014, the Regional Assignments Committee ("RAC"), UNHCR, issued its report confirming the "non-suitability of positions for a Comparative Review in the

appointment who held a temporary position as Protection Associate at the G-6 level (General Service category).

8. The Dispute Tribunal ordered the rescission of the decision to terminate Ms. de Aguirre's indefinite appointment. In lieu of rescission, the Dispute Tribunal ordered the payment of compensation of two years' net base salary, plus interest.

Submissions

The Secretary-General's Appeal

9. The Secretary-General argues that the Dispute Tribunal erred in interpreting and applying Staff Rule 9.6(e), which governs the termination of appointments as a result of abolition of posts. Staff Rule 9.6(e) provides for a two-step process. First, the Administration must determine "the availability of suitable posts". Second, if such "suitable posts" are identified, then the Administration is required to engage in a comparative exercise to retain affected staff members, taking into account various factors.

10. The Dispute Tribunal erred by finding that the only relevant criterion for determining "the availability of suitable posts" under Staff Rule 9.6(e) and the UNHCR Comparative Review Policy was whether there was a staff member on a temporary appointment undertaking similar functions to those of the discontinued position. This finding is contrary to a plain reading of Staff Rule 9.6(e). The discontinuation of the temporary appointment of the staff member holding the temporary position of Protection Associate at the G-6 level would not have vacated a suitable post for Ms. de Aguirre. The G-6 post was in a different category than the NOB post that Ms. de Aguirre encumbered, and three grades lower. Furthermore, the staff member who held the temporary position of Protection Associate was performing different functions.

G5.tre. TfTTj/TT4 1 Tf2.44012.918 0 0007 Tc.23[((Gener)9 Tw[(Th) Secretary-Ge63.2(mb5.5(g)-5.1(udscat))-5

12. The Secretary-General requests that the Appeals Tribunal vacate the Judgment except with respect to the Dispute Tribunal's finding that the decision to abolish the post encumbered by Ms. de Aguirre was lawful.

Ms. de Aguirre's Answer

13. Ms. de Aguirre contends that the Dispute Tribunal correctly found that the decision to terminate her indefinite appointment was unlawful. She discharged her burden of proof and provided evidence regarding the professional nature of the functions of the Protection Associate positions at the G-6 level in the Brussels RRWE.

14. Ms. de Aguirre argues that the Dispute Tribunal failed to find additional procedural errors in connection with the meeting of the RAC held on 10 April 2014. The procedural irregularities included missing documents, RAC's composition, and its competence to review her case in accordance with UNHCR's Policy and Procedures on Assignments of Locally Recruited Staff and the UNHCR Comparative Review Policy.

15. Ms. de Aguirre requests the Appeals Tribunal to dismiss the appeal.

Ms. de Aguirre's Cross-Appeal

16. Ms. de Aguirre argues that the Dispute Tribunal failed to exercise jurisdiction over the issue of abuse of authority in connection with the decision to abolish the post she encumbered. First, Ms. de Aguirre contends that the Dispute Tribunal failed to address the practice whereby staff members are carrying out duties and responsibilities that do not correspond with the classification of the posts that they encumber. The UNDT Judgment "thus allows managers to discontinue and create positions without due regard for the nature of the duties and responsibilities required, contrary to [Staff] Regulation 2.1". The Administration did not provide evidence that the two new Protection Associate positions at the G-6 level in the Brussels RRWE had been classified. Second, Ms. de Aguirre submits that the reasons given by the Administration for the restructuring of the Brussels Regional Office, as set out in the memorandum dated 23 September 2013, were not genuine.

17. Ms. de Aguirre contends that the Dispute Tribunal failed to meet the required standards of due process. First, the Dispute Tribunal made findings of fact based on a memorandum of 23 September 2013 regarding the restructuring process, which was filed

by the Secretary-General on a confidential basis. Only paragraphs 12 and 13 of the memorandum were shared with her and the co

21. The Secretary-General submits that Ms. de Aguirre has failed to demonstrate that the Dispute Tribunal committed an error of procedure such as to affect the decision of the case. By Order No. 107 (GVA/2014), the Dispute Tribunal ordered that the Secretary-General produce to Ms. de Aguirre all documents filed *ex parte*, as redacted by the Dispute Tribunal, in accordance with Article 18 of the Dispute Tribunal's Rules of Procedure (UNDT Rules). The record demonstrates that the Dispute Tribunal actively and appropriately managed Ms. de Aguirre's case.

22. The Secretary-General argues that Ms. de Aguirre has not established that the Dispute Tribunal erred in declining to award her compensation for moral harm. Ms. de Aguirre did not adduce any evidence in support of her claim of moral harm. Under the Statutes of the Dispute Tribunal and Appeals Tribunal, an award of compensation for harm must be supported by evidence.

23. The Secretary-General requests that the Appeals Tribunal dismiss the cross-appeal in its entirety.

Considerations

24. The issues to be determined in this appeal and cross-appeal are, as contended by the parties, (i) whether the UNDT erred in finding that the discontinuation of the position encumbered by Ms. de Aguirre, effective 1 June 2014, was lawful and (ii) whether the UNDT erred in holding that the termination of Ms. de Aguirre's indefinite appointment, effective 31 May 2014, was unlawful.

25. The Appeals Tribunal first addresses the issue of procedural irregularities raised by Ms. de Aguirre in her cross-appeal, and then examines the issues of the legality of both the discontinuation of the position Ms. de Aguirre encumbered and of the decision to terminate Ms. de Aguirre's indefinite appointment.

Alleged procedural errors by the UNDT

i. The confidentiality issue

26. At the outset, we note the large discretion afforded to the UNDT in relation to case management matters. Our jurisprudence has consistently held that the Appeals Tribunal will

35. The Secretary-General may terminate the appointment of a staff member on a number of grounds, including abolition of posts or reduction of staff (Staff Rule 9.6(c)(i)). In such cases, the Organization must follow the requirements set out in Staff Rule 9.6(e) and (f), as follows:

- (e) Except as otherwise expressly provided in paragraph (f) below and

fixed-term appointments not expiring on or before the effective date of the abolition of the relevant position, will be matched against suitable posts according to a set of criteria relating to the staff members' suitability for such posts. *The "suitable posts" are interpreted, for the purpose of the comparative review, as posts at the staff member's duty station and at the staff member's grade level and within the same functional group as per the position title* (Annex I lists the different functional groups and for the purposes of this policy,

40. In interpreting the phrase “similar functions” in paragraph 4 of the UNHCR Comparative Review Policy, the Dispute Tribunal contrasted the different wording used in paragraphs 4 and 5. In paragraph 5, the comparative review involved the matching of staff members against “suitable posts”, which are defined “as posts at the staff member’s duty station and at the staff member’s grade level and within the same functional group as per the position title”. The Dispute Tribunal noted that there was no condition in paragraph 4 as to the grade of the temporary position, nor was there any reference to “suitable posts” and/or “functional groups”. Further, the inclusion of these concepts in paragraph 5 would make paragraph 4 redundant. The only requirement in paragraph 4 was to search for staff members on temporary appointments who were undertaking “similar functions” to the functions of the discontinued position.⁸

41. The Dispute Tribunal went on to examine the functions of the staff member on a temporary appointment who held the temporary position of Protection Associate at the G-6

THE UNITED NATIONS APPEALS TRIBUNAL

consideration for “suitable posts” available within their parent organization at their duty station.

46. The phrase “similar functions” in para

system.¹⁵ The ICSC's functions include the establishment of job classification standards for categories of staff.¹⁶

51. For posts in the Professional category, the ICSC has explained that professional work is “analytical, evaluative, conceptual, interpretive and/or creative and thus requires the application of the basic principles of an organized body of theoretical knowledge”. Further, “[p]rofessional work require[s] the understanding of an organized body of theoretical

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Knierim

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Raikos' and Judge Halfeld's Joint Dissenting Opinion

1. We respectfully dissent. We would dismiss the Secretary-General's appeal.
- 2.

THE UNITED NATIONS

can only be rendered meaningful if it is to make possible the appointment in his or her instead of the staff member concerned by the abolition to such temporary post, should they so agree. Relevantly, there is no condition as to the grade of the temporary position or to the type of post being encumbered, that is regular or temporary. The relevant criterion under this provision is that of the need for the staff member on a temporary appointment to be “undertaking similar functions to those of the discontinued position”.

... To ascertain whether “functions” are “similar”, one should have recourse to the practicalities of the position, that is, what is actually the work being undertaken and not refer exclusively to the job description, as such job descriptions invariably are the

9. Based on the previous considerations, we hold that, contrary to the Secretary-General's contention, the phrase "prior to undertaking" in the aforementioned paragraph 4 is clear and therefore, must be interpreted by its literal meaning, without further investigation. Moreover, nothing in the language of the said paragraph suggests that for the purpose of its application any other criterion than the discontinuation of a staff member on a temporary appointment undertaking similar functions to those of the discontinued position has to be met. In addition, under the applicable UNHCR Comparative Review Policy, the UNDT correctly concluded that there is no condition as to the grade of the temporary position or to the type of post being encumbered, that is regular or temporary.

10. Further, with regard to the issue of the similar functions undertaken by the staff member on a temporary appointment, the UNDT rightly opined:²³

... To ascertain whether "functions" are "similar", one should have recourse to the practicalities of the position, that is, what is actually the work being undertaken and not refer exclusively to the job description, as such job descriptions invariably are the subject of informal variation to meet needs, as in this case has been admitted by the Respondent, who submitted that the G-6 TA position holder undertook other work while awaiting the appointment of an incumbent to the P-3 post.

... Furthermore, the Tribunal notes that as early as 24 September 2013,^[24] it was anticipated to create the new G-6 and new P-3 positions, between which the functions

14. The UNDT may award compensation for actual pecuniary or economic loss, including

the present case to award compensation in lieu of rescission in an amount equal to two years' net base salary, based on the Applicant's salary on the date of her separation from service."²⁸

18. In view of the foregoing and the large discretion afforded to the UNDT in matters related to compensation, we are satisfied that in its assessment of compensation in lieu of reinstatement, the UNDT was mindful of Ms. de Aguirre's claims for harm, in the form of neglect and emotional stress, as well as adverse effects on her professional development and career progression, including loss of job security, and nonetheless considered that

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

(Signed)

Judge Raikos

Judge Halfeld

Entered in the Register on this 20th day of December 2016 in New York, United States.

Judge Murphy's Dissenting Opinion

1. I have had the pleasure of reading the majority Judgment in this matter prepared by

be separated. The object of the exercise is simple and laudable. It is to avoid terminating redundant staff by giving them suitable vacant

expense of a temporary staff member. But the fair and objective selection criterion applied has advanced the policy of the Rule.

8. The Judgment of the majority in this appeal, in my respectful opinion, fails to give adequate effect to the purpose of the Staff Rule and the intention of the policy. Instead, it imposes a strict interpretation of “suitable posts” as would apply in an equal pay dispute. We are not here concerned with equal pay issues. The UNHCR Comparative Review Policy is aimed at mitigating the effects of retrenchment on non-temporary staff members. The

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Murphy

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar