



Judgment No. 2017-UNAT-777



Counsel for Ms. Faust:

Self-represented

JUDGE RICHARD LUSSICK , PRESIDING

THE UNITED NATIONS APPEALS TRIBUNAL

... The Applicant was on annual leave from 1 to 12 January 2014. On 10 January 2014, she was offered a three-month temporary assignment with the Sustainable Development Mechanism ("SDM"), UNFCCC, as an Administrative Assistant (G-5), effective 1 January 2014. This appointment was successively extended on three occasions, until 31 December 2014.

... In July 2014, SDM advertised four posts in its Finance Team. The Applicant applied to the post of Associate Programme Officer (P-2), and was informed on 21 November 2014 that she was not selected for it. The Applicant filed an application against the decision not to select her, which was adjudicated by Judgment *Faust* UNDT/2016/213.^[2]

... During a meeting with the Applicant on 27 November 2014, the Chief, AS, HRU, UNFCCC, confirmed to her that her assignment with SDM would be further extended for two months, until 28 February 2015, with no possibility of a further extension.

... By memorandum of 28 November 2014, the Chief, AS, HRU, UNFCCC, informed the Applicant that her FTA would be terminated effective 28 February 2015, in accordance with the agreement of 22 August 2013. He also advised her that she would be paid a termination indemnity.

... The Applicant requested management evaluation of the decision to terminate her appointment on 18 January 2015, and received a response to her request on 16 March 2015, upholding the contested decision.

... The Applicant separated from service on 28 February 2015 and was paid a termination indemnity.

3. On 6 December 2016, the UNDT issued Judgment No. UNDT/2016/212, dismissing

4. The UNDT held that although, according to the terms of the agreement, the Administration was under no obligation to seek a suitable post for Ms. Faust for which she had not applied, it offered her several temporary positions and made considerable efforts to place her after she had surrendered her lien to the post, and after her assignment with ISGCF had come to an end. However, while the Administration made good faith efforts to place Ms. Faust upon her return from ISGCF, she made it clear that her main aim was to secure a P-2 position, rather than continuing to work at the G-5 level.

5. The UNDT concluded that the termination decision was lawful and that, therefore, any claim for compensation was unwarranted. The UNDT further held that, even if it were not the case, Ms. Faust had not provided the evidence required to support her claim for compensation pursuant to Article 10(5)(b) of the UNDT Statute. Accordingly, the UNDT rejected the application.

Submissions

Ms. Faust's Appeal

6. The UNDT erred in questions of fact and law and failed to exercise its jurisdiction.

7. The UNDT's finding that the case is "comparable to the abolishment of a post ... has no grounds and is factually and legally false".

8. The UNDT failed to acknowledge that she "had absolutely no benefits in releasing [her] post and that the sole beneficiary of this agreement was the [Organization]". She was not even aware that the possibility of releasing a post existed until the Organization put pressure on her.

9. The UNDT failed to acknowledge that the agreement "clearly only regulated the assignment period of the GCF and not any period beyond that, and that no subsequent agreement was provided by the Respondent".

10. The UNDT failed to "acknowledge that the last post [she] was recruited against (with Review Board process) was a P2 level post" which "prevails [over] the G5 level" post.

11. The UNDT refused "to acknowledge that numerous staff members in SDM/Finance team had left the team and their posts were not advertised and refilled".

12. The UNDT refused “to acknowledge that during [her] year at SDM [, she] ended up filling various vacant posts and that [her] assignment kept being extended based on the many vacant posts in the team and a clear need for [her] being there”.

13. The UNDT “accus[ed]” her of having the “audacity to only apply to vacancy announcements that m[e]t [her] qualifications and experience most closely and not to the various G5 posts stated by the [Organization], which did not meet [her] skill set”.

14. The UNDT “accus[ed]” her of not being active in her job search.

15. Ms. Faust requests that the Appeals Tribunal award compensation in the amount of 24 months’ net base salary.

The Secretary-General’s Answer

16. The UNDT correctly upheld the decision to terminate Ms. Faust’s FTA. The UNDT considered the applicable law and the evidence and concluded that the decision was lawfully taken. That conclusion is in accordance with the relevant jurisprudence and the facts of this case.

17. The Appeals Tribunal has consistently held that the burden of proving improper motives rests with the person making the allegation. In the present case, Ms. Faust was unable to adduce any evidence that the decision to terminate her FTA had been influenced by improper motives. The UNDT therefore correctly found that Ms. Faust did not provide evidence showing that the termination decision had been motivated by extraneous factors. On the contrary, the record shows that it was taken pursuant to the agreement signed by Ms. Faust.

18. Ms. Faust has not established any error warranting a reversal of the UNDT’s dismissal of the application. Firstly, contrary to Ms. Faust’s contention, there are grounds for the UNDT’s finding that her case is comparable to the abolishment of a post. As the UNDT noted, “the post for which [her] letter of appointment was issued and that she had encumbered was no longer available [as] it had been filled [by] another staff member”. In any event, the UNDT also found that her case differed from that of a staff member whose post was abolished in that Ms. Faust had “initiat[ed] and then sign[ed] an [A]greement on the release of the lien to the post she had encumbered”.

19. Secondly, contrary to Ms. Faust's contention, she in fact did receive the benefit of the agreement. She "was able to remain on assignment with the ISGCF with an SPA to the P-2 level" and "to continue to gain experience at the professional level and explore career opportunities with the ISGCF with the assura

apply to any of these positions; and that Ms. Faust only applied to three positions at the UNFCCC, none of which were in the General Services category.

24. The Secretary-General requests the Appeals Tribunal to dismiss the appeal in its entirety.

Considerations

25. Ms. Faust appeals the UNDT Judgment which rejected her application contesting the decision to terminate her FTA. She claims that the UNDT erred on questions of fact and law, and failed to exercise jurisdiction vested in it.

26. Her FTA, as Administrative Assistant (G-5), ITS, UNFCCC, on which she retained a lien, was extended from 1 December 2012 to 30 November 2015. However, by e-mail of 14 August 2013, she informed UNFCCC that she wished to release this post, effective immediately. At that time, she held a temporary assignment to the post of Associate Programme Management Officer (P-2) in the ISGCF, for which she was receiving a SPA at the P-2 level.

27. Subsequently, by memorandum dated 22 August 2013, she was requested by the Chief, AS, HRU, UNFCCC, to confirm her understanding of her decision to release the lien of the G-5 post. It was pointed out to her that by releasing the lien she would have no post to return to at the end of her temporary assignment with the ISGCF. She was asked to confirm her agreement that she would therefore pro-actively seek alternative employment opportunities and that, should she not succeed in being selected for a new post with the UNFCCC Secretariat, the UNFCCC Secretariat may terminate her UNFCCC FTA at the end of her temporary assignment to the ISGCF by giving appropriate notice.

28. On 28 August 2013, Ms. Faust signed a clause in the said memorandum whereby she confirmed her decision to release the lien on her post as Programme Administrative Assistant, G-5, with ITS with immediate effect, as well as her agreement with the conditions mentioned in the memorandum.

29. The Appeals Tribunal has held that a memorandum of agreement signed by a staff member will normally be enforced.³

³ *Jemiai v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-137.

30. Staff Regulation 9.3(a) empowers the Secretary-General to terminate the appointment of a staff member who holds temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment. There is a similar provision in Staff Rule 9.6(c).

31. Ms. Faust's terms of appointment were amended by the memorandum already recited. For the reasons which follow, we find that her FTA was lawfully terminated in accordance with the amended terms of her appointment and that her appeal has no merit.

32. Ms. Faust alleged to the UNDT that the decision to terminate her was "motivated by improper motives". The burden thus fell up on her to produce proof of such improper motivation.⁴ This she failed to do. The UNDT found that:⁵

... by first initiating and then signing an agreement on the release of the lien to the post she had encumbered, the Applicant herself created a situation where she had no post to return to. The case file shows no evidence of pressure or coercion over the applicant to relinquish her lien. On the contrary, she was the one who had the initiative to relinquish it and showed no intention whatsoever to come back to it.

35. We find no fault in the UNDT's findings and in its conclusion that "[u]nder all these circumstances, the Administration certainly had no duty to seek a suitable position for the Applicant beyond the extent it did".⁷

36. We agree with the UNDT's findings as to the legal effect of the memorandum signed by Ms. Faust. The UNDT was also correct in its finding that, in the absence of any evidence of bias or improper motivation, the decision to terminate her FTA was lawful.

37. Ms. Faust alleges that the UNDT failed to acknowledge that she had "absolutely no benefits" in releasing her post and that the sole beneficiary was the Organization. There is no

Judgment

40. The appeal is dismissed and Judgment No. UNDT/2016/212 is affirmed.

Original and Authoritative Version: English

Dated this 14th