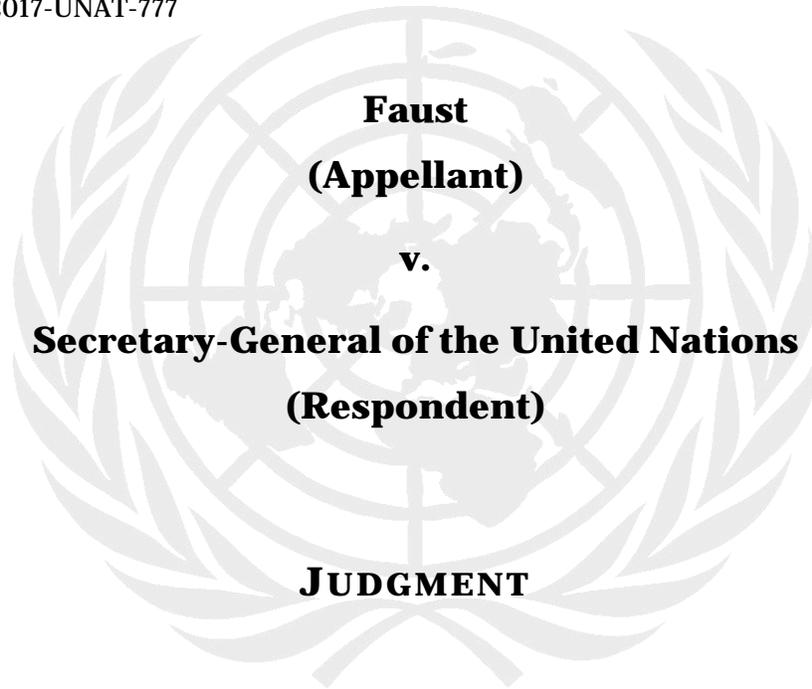




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-777



Before:	Judge Richard Lussick, Presiding Judge Deborah Thomas-Felix Judge Martha Halfeld
Case No.:	2017-1058
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Ms. Faust:	Self-represented
Counsel for Secretary-General:	John Stompor

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/212, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 6 December 2016, in the case of *Faust v. Secretary-General of the United Nations*. Ms. Christin Faust filed the appeal on 2 February 2017, and the Secretary-General filed his answer on 7 April 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant joined the [United Nations Framework Convention on Climate Change (UNFCCC)] on 1 September 2010, as Programme Administrative Assistant (G-5) with the Information Technology Services (“ITS”), under [a fixed-term appointment (FTA)], through 30 November 2012.

... On 8 October 2012, the Applicant was informed that her temporary assignment to the post of Associate Programme Management Officer (P-2), in the Interim Secretariat of the Green Climate Fund (“ISGCF”), UNFCCC, had been accepted for an initial period of six months. The Applicant accepted the temporary assignment on 9 October 2012, and received a special post allowance (“SPA”) at the P-2 level effective 1 November 2012. Subsequently, the Applicant’s FTA against the post of Administrative Assistant (G-5), ITS, UNFCCC, on which she retained a lien, was extended from 1 December 2012 through 30 November 2015.

... The ISGCF was a temporary entity created to provide technical, administrative and logistical support to the Board of the Green Climate Fund, until the establishment of the independent secretariat of the Green Climate Fund (“GCF”).

... By email of 14 August 2013, the Applicant informed the UNFCCC of the following:

Please note that I wish to release my [G-5] post ... in ITS effective immediately with the understanding that:

- The UNFCCC secretariat will make an effort to identify a suitable G-5 post within the secretariat upon completion of my reassignment with the GCF;
- Should no suitable post become available, the [UNFCCC] secretariat may terminate my contract and provide a 9 days (sic) notice period as agreed in the Letter of Appointment;

¹ Impugned Judgment, paras. 3-15.

- The temporary assignment with GCF can be extended, if necessary.

I will pro-actively look for employment opportunities for when the assignment with the GCF Interim Secretariat ends and provide the UNFCCC secretariat with the appropriate notice period.

Kindly acknowledge acceptance of this request and inform me of any administrative steps that need to be taken from my side.

... By memorandum dated 22 August 2013, the Chief, Administrative Services Programme (“AS”), Human Resources Unit (“HRU”), UNFCCC, requested the Applicant to confirm her understanding regarding her decision to release the lien of the G-5 post. It stated the following:

By releasing the lien on your ITS post, you will have no post to return to at the end of your temporary assignment with the Interim Secretariat of the Green Climate Fund, which currently ends on 31 December 2013. It is agreed as follows:

You have expressed your wish to release the lien on your G-5 post in ITS with immediate effect and are aware that as a consequence you will have no post to return to at the end of your temporary assignment with ISGCF. You will therefore pro-actively seek alternative employment opportunities.

Should you not be successful in being selected for a new post within the UNFCCC secretariat, the UNFCCC secretariat may terminate your UNFCCC Fixed-Term appointment at the end of your temporary assignment to the ISGCF by giving appropriate notice.

... The Applicant confirmed the above understanding on 28 August 2013 by signing a clause in the 22 August 2013 memorandum that read as follows:

I hereby confirm my decision to release the lien on my post as Programme Administrative Assistant, G-5, with the Information Technology Services programme with immediate effect, as well as my agreement with the conditions mentioned above. (Annex 5 to application).

... On 1 January 2014, the ISGCF became independent and its headquarters were moved to Incheon, Republic of Korea. The Applicant was offered a three month consultancy contract, which she did not accept. Thus, her assignment with the ISGCF came to an end.

... 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 Ms. Faust’s application in its entirety. The UNDT noted that under the agreement, the post for which the letter of appointment was issued and that she had encumbered had been filled with another staff member and was no longer available. The UNDT considered this situation comparable to a situation where the post encumbered by the contract holder has been abolished. However, unlike post abolition, on which the staff member has no influence, Ms. Faust’s decision to surrender the lien on the post for which she had been recruited was voluntarily taken. Her position was therefore even weaker and needed less protection than that of a staff member whose post was abolished.

² This Judgment is subject to appeal before the Appeals Tribunal as well (Case No. 2017-1059). See *Faust v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-778.

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 assurance that she would be able to receive a termination indemnity from the UNFCCC, if she [were] unsuccessful in obtaining a suitable position".

20. Thirdly, Ms. Faust incorrectly asserts that the agreement "clearly only regulated the assignment period of the [ISGCF] and not any period beyond that". This assertion "is inconsistent with the clear import of the [A]greement" which did not contain any time limitation regarding Ms. Faust's release of her right to return to the G-5 level post and which specifically addressed the situation at the end of her assignment with ISGCF, providing that she could only remain in service with the UNFCCC if she obtained a position for the remaining duration of her FTA.

21. Fourthly, Ms. Faust's contention that the UNDT failed to consider that "the last post [she] was recruited against ... was a P2 level post" and that this "prevails [over] the G5 level" is incorrect. The UNDT did find that she had been given a temporary assignment in October 2012 to a P-2 post in the ISGCF. However, this does not have any relevance to her situation following her return to the UNFCCC Secretariat following the expiration of that temporary assignment. That situation was controlled by the agreement, which required Ms. Faust to be selected for another post with the UNFCCC or face the termination of her FTA.

22. Fifthly, contrary to Ms. Faust's contention, the UNDT found that she had been offered a temporary assignment with SDM, UNFCCC, effective 1 January 2014, when the ISGCF became independent and her assignment there came to an end; that her assignment was extended three times, until 31 December 2014; and that thereafter, the UNFCCC had offered her another temporary assignment until 28 February 2015.

23. Sixthly, while Ms. Faust contends that the UNDT refused "to acknowledge that numerous staff members in the SDM/Finance team had left the team and their posts were not advertised and refilled", the record shows that the UNFCCC advertised nine fixed-term positions at the G-5 level between January 2014 and February 2015; that Ms. Faust failed to

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 *Jemai 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 upon 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.

33. The UNDT held that, under the terms of the agreement, her return to service with the UNFCCC at the end of her assignment with ISGCF was conditional upon her selection to a new post at UNFCCC and that the Administration was under no obligation to seek a suitable post for her for which she had not applied. Nevertheless, the UNDT noted that the Administration made considerable efforts to place her after she had surrendered her lien and after her assignment with ISGCF had come to an end; it offered her a temporary assignment which was extended three times until 31 December 2014, and then offered her another temporary assignment until 28 February 2015.

34. There was evidence before the UNDT that, in 2014, UNFCCC advertised nine G-5 fixed-term positions, and that Ms. Faust did not apply for any of them. The UNDT found that she had made it clear that "her main aim was to secure a P-2 position, rather than continuing to work at the G-5 level".⁶

⁴ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-506; *Wang v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-454.

⁵ Impugned Judgment, para. 26.

⁶ *Ibid.*, para. 30.

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 merit in this submission. We find it incredible that she would want to release the lien on her G-5 post when there was no benefit in doing so. On this point, the Secretary-General submitted to the UNDT that Ms. Faust received the benefit of the agreement in that she was able to remain on assignment with the ISGCF with a special post allowance at the P-2 level and was able to continue to gain experience at the professional level and explore career opportunities with the ISGCF with the assurance that she would be able to receive a termination indemnity from UNFCCC, if she was unsuccessful in obtaining a suitable position. We agree that these are quite obvious benefits.⁸

38. Ms. Faust puts forward a number of other arguments which we have carefully considered and which fail to persuade us that the UNDT fell into any error, whether of fact or of law, in arriving at its Judgment.

39. The appeal has no merit and cannot succeed.

⁷ *Ibid.*, para. 31.

⁸ Impugned Judgment, para. 17 c).

Judgment

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

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar