

UNDT/2016/035, De Aguirre

UNAT Held or UNDT Pronouncements

Scope of judicial review concerning post abolition: it is not for the Tribunal to substitute its own views to that of the Secretary-General on how to organize work and meet operational needs. The Tribunal may only examine and set aside decisions on very limited grounds, where there has been a finding of a breach of the administrative law considerations surrounding a decision. Improper motive: an Applicant has the burden of proof when seeking to demonstrate any improper motive. Comparative Review Policy for Locally Recruited Staff Members – paragraph 4: in the context of an exercise to abolish a post, the intent and purpose of paragraph 4 of UNHCR’s Comparative Review Policy is that the Administration looks for alternative employment for its staff affected in a situation of abolition of posts. The relevant criterion under paragraph 4 of the Comparative Review Policy for Locally Recruited Staff Members is that of the need for the staff member on a temporary appointment to be “undertaking similar functions to those of the discontinued position”. 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. Paragraph 4 of the Comparative Review Policy for Locally Recruited Staff Members only requires to look for “staff members on temporary appointments or affiliate workforce undertaking similar functions to those of the discontinued position”. To fully grasp the reach of this provision, one must read it in connection with staff rule 9.6(e), combined with paragraph 8 of the Comparative Review Policy, which create an obligation for UNHCR to undertake efforts to retain certain staff. 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. Paragraph 4 of the Comparative Review Policy for Locally Recruited Staff Members operates as a precondition before the undertaking of a comparative review process provided for in paragraph 5 of said policy. Management evaluation: lack of a response to a request for management evaluation by the end of the statutory deadline does not constitute a breach of

fundamental rights if the said response is received within the 90-day deadline to seek judicial review.

Decision Contested or Judgment/Order Appealed

The Applicant contested the decisions to discontinue the post she encumbered and to, consequently, terminate her indefinite appointment due to the impossibility to conduct a comparative review. Concerning the first contested decision, the Tribunal found that the discontinuation resulted from the abolition of the post encumbered by the Applicant, and not from its reclassification as she argued, and that the abolition process respected the applicable procedures. Additionally, the Tribunal found that there was no evidence that the abolition decision and/or process was tainted by improper motive. With respect to the second contested decision, the Tribunal found that UNHCR erred in not applying paragraph 4 of its Comparative Review Policy for Locally Recruited Staff Members to the Applicant's case, which would have avoided the termination of her appointment. The Tribunal concluded that this shortcoming constituted a fundamental procedural error in the implementation of said Policy, giving ground for rescinding the decision as well as setting compensation as an alternative to the rescission. Considering the Applicant's type of appointment (indefinite), her length of service and UNHCR's failure in its duty of care towards the Applicant in determining whether her contract should be terminated or not, the Tribunal set said compensation at two years of net base salary.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Only spec. perform. (incl. rescission with \$ alt.)

Full judgment

[Full judgment](#)

Applicants/Appellants

De Aguirre

Entity

UNHCR

Case Number(s)

UNDT/GVA/2014/27

Tribunal

UNDT

Registry

Geneva

Date of Judgement

22 Apr 2016

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Abolition of post

Non-renewal

Arbitrary or improper motive

Reason(s)

Separation from service

Applicable Law

Other UN issuances (guidelines, policies etc.)

- UNHCR IOM/051/2007- FOM/054/2007 (Revised Framework for Resource Allocation and Management)
- UNHCR IOM/049-FOM/050/2012 (Policy and Procedures on Assignments of Locally recruited Staff)
- UNHCR IOM/066/2012-FOM/067/2012 (Comparative Review Policy for Locally Recruited Staff Members)
- UNHCR IOM/FOM/33/2010 (Policy and Procedures on Assignments and Promotions)

Staff Rules

- Rule 9.6(e)

UNDT Statute

- Article 10.5(a)

UNAT Statute

- Article 2.1(a)

Related Judgments and Orders

UNDT/2011/045

2012-UNAT-238

2012-UNAT-236

2010-UNAT-021

2011-UNAT-178