

UNDT/2016/204, Nakhlawi

UNAT Held or UNDT Pronouncements

The Tribunal found that the case was one of termination of mandate, rather than of abolition of post under the relevant rules; hence, the decision to terminate the Applicant's permanent appointment was illegal. It further decided that even if one were to follow the Respondent's argument that it was post abolition, such abolition needed the approval of the Board of UNICRI which had not been obtained. Finally, following the argument that it was post abolition, the Tribunal noted that the Administration clearly failed to comply with its obligation to make reasonable and good faith efforts under staff rules 9.6(e) and 13.1(d) to find the Applicant an alternative post within the UN Secretariat. It ordered the rescission of the contested decision, and reinstatement of the Applicant, or, alternatively, compensation in lieu, plus moral damages. The Tribunal found that there were exceptional circumstances in this case which justified the award of compensation in excess of the two year limitation.

Abolition of post vs. termination of mandate: While the term "abolition of post" is not defined by the Staff Regulations and Rules, staff regulation 9.3(b) and staff rule 9.6(d) define termination "in the interests of the good administration of the Organization" as "a change or termination of a mandate". The plain wording of these provisions does not indicate whether it meant the change or termination of the mandate of a department/mission, or simply the mandate of a particular post. The distinction whether staff regulation 9.3(b) and staff rule 9.6(d) refers to a change or termination of a mission/department, as opposed to a change or termination of the mandate of a particular post, may be relevant in the case of termination of a continuing appointment. It is, however, irrelevant in case of termination of a permanent appointment. Indeed, a permanent appointment cannot be terminated on the grounds of termination of mandate, either of a mission, or of a particular post, unless it is accompanied by a decision to abolish the relevant post. There may be situations where the mandate of a Unit or of a given post is terminated, and a separate decision is taken to abolish (a) post(s). In such a scenario, staff rule 13.1(d), rather than staff rule 13.1(c) would apply to permanent appointees. Where the functions of a post with a finite mandate have been completed, but that did not imply a reduction of the financial contribution provided by the donor for the overall project, the discontinuation of a post cannot be qualified as post abolition, but rather as termination of mandate. As a consequence, the legality of the termination decision has to be assessed under staff rule 13.1(c) rather than under staff rule 13.1(d).

Delegation of authority: Even if a decision to terminate a staff member's permanent appointment was based on post abolition under staff rule 13.1(d), absent any official document delegating such authority from the Board of Trustees to the Director, UNICRI, the Director, in deciding to abolish the Applicant's post, acted *ultra vires*.

Termination of appointment: A termination of a contract of employment by reason of restructuring of the workplace is lawful provided that the Organization discharges fully its duty and obligations towards the displaced staff member in accordance with the applicable law. In the case of termination of a permanent appointment for abolition of post, the applicable law is staff rules 9.6(e) and 13.1(d).

Duty of good faith under staff rules 9.6(e) and 13.1(d): Staff rules 9.6(e) and 13.1(d) clearly set out the Administration's duty and obligation, with an unequivocal commitment, to give priority consideration to retaining the services of staff members holding a permanent appointment, subject to the following conditions or requirements: relative competence, integrity, length of service and the availability of a suitable post in which the staff member's services can be effectively utilized. In exercising that duty, the issue to consider for the Administration is whether there are any vacant posts for which the permanent contract holder could be considered as possibly suited to and in which his/her services could be utilized effectively. If there are such posts, a plain reading of staff rules 9.6(e) and 13.1(d) requires that the Administration has an obligation to consider retaining the services of the affected permanent contract holder in order of first preference, regardless of whether or not she had applied for such post. Accordingly, where a possibly suitable vacant post exists prior to termination, and before proceeding to external recruitment and termination, the Administration has to assess the suitability of the affected unassigned permanent contract holder whose post has been abolished. If a staff

member's permanent appointment is with the UN Secretariat, the duty under staff rules 9.6(e), (g) and 13.1(d) extends to all available suitable positions within the whole UN Secretariat, even if the person, at the time of termination, worked on a temporary assignment with a particular department (in this case: UNICRI). Amount of compensation (10.5(b) of the Tribunal's Statute): If the Tribunal finds that the activating cause of a staff member's loss of employment was principally due to a fault on the Organization to fulfil its obligations under staff rules 9.6(e) and 13.1(d), it may be justified in granting compensation in excess of the two years under art. 10.5(b) of the Tribunal's Statute. Rescission or compensation in lieu, under art. 10.5(a) of the Tribunal's Statute: Failure of management to give individual consideration to each case in which rescission of a termination decision is ordered contradicts the spirit and legislative intent of the General Assembly under art. 10.5. By that article, the General Assembly created an expectation for staff members that in cases where the Tribunal orders rescission, for example, of a termination decision, the Administration will give due consideration to the possibility of reintegration before it considers the payment of the amount of compensation set in lieu of rescission, as determined by the Tribunal. The policy behind the Tribunal's Statute and the system of internal justice is put at risk by the attitude of management to systematically opt for the payment in lieu of rescission under art. 10.5(a). Failure to exercise discretion is in itself illegal and improper. It is for the General Assembly to consider whether the underlying policy objective is being frustrated by what appears to be an unwritten policy operated by senior managers.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to terminate her permanent appointment upon alleged abolition of the post she had temporarily encumbered at UNICRI.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Both financial compensation and specific performance ordered.

Full judgment

[Full judgment](#)

Applicants/Appellants

Nakhlawi

Entity

UNICRI

Case Number(s)

UNDT/GVA/2015/137

Tribunal

UNDT

Registry

Geneva

Date of Judgement

11 Nov 2016

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type
Judgment
Categories/Subcategories
Abolition of post
Compensation
Separation from service
Termination (of appointment)
Applicable Law
Administrative Instructions

- ST/AI/2010/3

GA Resolutions

- A/RES/51/226
- A/RES/51/241
- A/RES/63/250

Laws of other entities (rules, regulations etc.)

- UNICRI Statute

Other UN issuances (guidelines, policies etc.)

- A/55/798/Add.1 (Note by the Secretary-General on the Report of the Joint Inspection Unit on young professionals (...))
- Report of the Preparatory Commission of the United Nations (UN Document PC/20)
- A/53/342 (Secretary-General's report on Human resources management)

Staff Regulations

- Regulation 1.2(c)
- Regulation 9.3(b)

Staff Rules

- Rule 13.1(a)
- Rule 13.1(c)
- Rule 13.1(d)
- Rule 13.1(e)
- Rule 13.1(f)
- Rule 9.6(a)
- Rule 9.6(c)
- Rule 9.6(e)
- Rule 9.6(g)

UNDT Statute

- Article 10.5

Related Judgments and Orders
UNDT/2016/102

UNDT/2016/181
2010-UNAT-097
2013-UNAT-357
2015-UNAT-511
2012-UNAT-276