

# 2016-UNAT-705, De Aguirre

## UNAT Held or UNDT Pronouncements

UNAT considered an appeal by the Secretary-General and a cross-appeal by the staff member. On the confidentiality issue, UNAT held that there was no merit in the staff member's claim that some findings of the impugned judgment had not been shared with her. Regarding the delay in the response to the request for management evaluation, UNAT held that the staff member had failed to demonstrate how the alleged delay of response on the part of the Administration had prejudiced her or had violated her due process rights. UNAT held that the staff member had failed to demonstrate any error in the UNDT's finding that the Administration's decision to discontinue the position she was encumbering resulted from a valid exercise of the discretionary power of the Administration and was not tainted by improper motives. On the issue of the termination of the indefinite appointment, UNAT agreed with UNDT's findings that the UNHCR Comparative Review Policy established a two-step process in cases of abolition of posts or reduction of staff. UNAT disagreed with UNDT in its interpretation of the scope of UNHCR's undertaking in paragraph 4 of the UNHCR Comparative Review Policy to verify that there were no staff on temporary appointments "undertaking similar functions" to those of the discontinued position, and whose contract discontinuation would mitigate the need for a comparative review. UNAT held that UNDT had interpreted paragraph 4 of the UNHCR Comparative Review Policy too narrowly, and its interpretation was incompatible with the higher norms set out in Staff Rule 9.6(e) and (f). UNAT held that a staff member on a temporary appointment as Protection Associate in the General Service category at the G-6 level could not be regarded as performing functions like those of the staff member in her position as Associate Legal Officer in the National Professional Officer category at the NOB level. UNAT held that UNHCR had not failed to follow the procedures set out in paragraph 4 of the UNHCR Comparative Review Policy. UNAT, pursuant to Article 4.2 of the UNAT RoP, by majority with Judge John Murphy, Judge Dimitrios Raikos, and Judge Martha Halfeld dissenting, upheld the Secretary-General's appeal. UNAT dismissed the staff member's cross-appeal and vacated the UNDT judgment in its entirety.

## Decision Contested or Judgment/Order Appealed

The Applicant contested the decisions: 1) to abolish the post that funded her position of Associate Legal Officer in the Office of the United Nations High Commissioner for Refugees (UNHCR); 2) to terminate her indefinite appointment. UNDT found that the decision to terminate the Applicant's indefinite appointment was unlawful. Regarding the decision to abolish the post she encumbered and to discontinue the position of Associate Legal Officer, UNDT rejected the contention that the post had been reclassified rather than abolished. UNDT found that UNHCR's reclassification procedures were not invoked. UNDT found that the process leading to the abolition of the post encumbered by the Applicant respected the applicable procedures, and that there was no evidence of improper motives. UNDT found that the decision to terminate the Applicant's indefinite appointment was unlawful due to a fundamental procedural error in implementing UNHCR's Comparative Review Policy for Locally Recruited Staff Members (UNHCR Comparative Review Policy). UNDT found that there were options available to retain the Applicant under paragraph 4 of the UNHCR Comparative Review Policy, which required UNHCR to verify that there were no staff members on temporary appointments undertaking similar functions to those of the discontinued position and whose contract discontinuation would mitigate the need for a comparative review. UNDT ordered the rescission of the decision to terminate the Applicant's indefinite appointment. In lieu of rescission, UNDT ordered the payment of compensation. The Secretary-General appealed and the Applicant cross appealed.

## Legal Principle(s)

UNDT is afforded large discretion in relation to case management matters. UNAT will not lightly interfere with the broad discretion of UNDT in the management of its cases. The UNHCR Comparative Review Policy established a two-step process in cases of abolition of posts or reduction of staff. Before undertaking a comparative review, UNHCR is required to follow the preliminary step set out in paragraph 4 of the Policy. Only after the concerned office has verified that there are "no staff members on temporary appointments or affiliate workforce undertaking similar functions to those of the discontinued position(s) and whose contract discontinuation would mitigate the need for a comparative review" would a comparative review

process be undertaken in accordance with paragraph 5 of the UNHCR Comparative Review Policy. The interpretation of a rule is made within the context of the hierarchy in which the rule appears. A staff member's appointment is subject to the Staff Regulations and Rules, and incorporates the relevant administrative issuances issued by the Organization. In general terms, administrative issuances set out instructions and procedures for the implementation of the Staff Regulations and Rules. Just as a Staff Rule may not conflict with the Staff Regulation under which it is made, an administrative issuance may not conflict with the applicable Staff Regulation or Rule which it implements. Finally, in interpreting the terms of a staff member's appointment, one may also draw upon general principles of law insofar as they apply to the international civil service. The phrase "similar functions" in paragraph 4 of the UNHCR Comparative Review Policy cannot be interpreted in isolation from the Staff Rule that it was designed to implement. The phrase "similar functions" is general in nature and its meaning can only be understood within the context of Staff Rule 9.6(e) and (f).

## Outcome

Appeal granted

## Full judgment

[Full judgment](#)

## Applicants/Appellants

De Aguirre

## Entity

UNHCR

## Case Number(s)

2016-939

## Tribunal

UNAT

## Registry

New York

## Date of Judgement

28 Oct 2016

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Abolition of post

Termination

Jurisdiction / receivability (UNAT)

Appeal

Procedure (first instance and UNAT)

Confidentiality

Standard of review (judicial)

Termination of appointment

## Applicable Law

Other UN issuances (guidelines, policies etc.)

- UNHCR Comparative Review Policy

Staff Regulations

- Regulation 2.1

Staff Rules

- Rule 9.6(e)

- Rule 9.6(f)

#### UNAT Statute

- Article 10.2

#### UNDT RoP

- Article 7.1(b)

#### UNDT Statute

- Article 8.1(d)

## Related Judgments and Orders

UNDT/2016/035

2015-UNAT-587

2010-UNAT-044

2012-UNAT-246