



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

FAUST

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. By application filed on 12 June 2015, the Applicant, a former staff member at the United Nations Framework Convention on Climate Change (“UNFCCC”) contests the decision to terminate her fixed-term appointment (“FTA”) with the Secretariat of the UNFCCC.

2. The application was served to the Respondent who filed his reply on 16 July 2015.

## **Facts**

3. The Applicant joined the UNFCCC on 1 September 2010, as Programme Administrative Assistant (G-5) with the Information Technology Services (“ITS”), under an FTA, through 30 November 2012.

4. 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.

5. 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”).

6. 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 secretariat may terminate my contract and provide a 9 days (sic) notice period as agreed in the Letter of Appointment;
- 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.

7. 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.

8. 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).

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

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

#### **Parties' submissions**

16. The Applicant's principal contentions are:

a. The agreement of 22 August 2013 was limited to the period of her assignment to the ISGCF, that is, up to 31 December 2013; this did not imply that UNFCCC was entitled to terminate her contract at any time after that date; therefore, at the time of the termination notice on 28 November 2014, the agreement in question was obsolete;

b. While the agreement stated that the Applicant did not have a legal expectation to return to the specific ITS G-5 post, it did not preclude a temporary assignment against another temporarily vacant post;

c. The correct legal interpretation of the sentence in the memo that she accepted "that there would be no post for [her] to return to" is that she did not have a legal expectation to be placed against the post for which she had been recruited; it does not, however, amend the remaining conditions of the initial contract;

d. Releasing a lien to a post does not equate to the termination of a fixed-term appointment that ran until 30 November 2015; both parties benefitted from the arrangement, including from the Applicant's assignments with SDM; she was successfully placed against a post at SDM/Finance and her contract was not terminated at the end of her assignment with ISGCF;

e. UNFCCC did not make any effort to find a suitable post for her; rather, she was told that she had to find one; it was her who secured the temporary assignment with SDM/Finance, in January 2014; as such, her appointment was not terminated upon her return from ISGCF;

f. She did not decline a three-month appointment in Korea as alleged by the Respondent. What she was offered (and she declined) was a consultancy contract with unclear entitlements (the Board of the ISGCF had not yet approved the Administrative Rules and Regulations of the Fund); she declined it only after she had made arrangements with UNFCCC on how to continue;

g. Her assignment with ISGCF came to an end when it became an independent entity that started operating from its new Headquarters in Korea as of 1 January 2014;

h. Funding was available within SDM and within UNFCCC to cover the cost of her temporary assignment until 30 November 2015;

i. Between 1 March and 13 October 2014, four staff members left the SDM/Finance team. As at 27 November 2014, only one of two advertised G-5 posts at SDM/Finance had been filled and five out of eight posts in the SDM/Finance team were vacant. Hence, there was a continued need for staff and one vacant G-5 post and this is supported by the evidence; at the time of her separation from service, the SDM/Finance team was still understaffed; she was not informed about the limitations of her temporary assignment with SDM;

j. She made the request to work under a different supervisor after the termination notice had been served to her; thus, any argument that she made a reassignment conditional cannot stand;

k. She was active in her job search and applied to a P-2 post at SDM; that recruitment process is subject to a distinct application (cf. Case No. UNDT/GVA/2015/139); she did not apply to one G-4 and two G-5 posts,

since she had an FTA until 30 November 2015 with the understanding that she would be placed against suitable vacant posts; however, from January to December 2014, she applied to a total of thirty-six vacancy announcements, three of which within UNFCCC, and the remaining with other international organizations, including the United Nations; she only applied to posts for which she was qualified;

l. She was not informed that her temporary assignment with SDM/Finance would end on 31 December 2014 or that her FTA would be terminated although suitable vacant posts and funds were available; she was neither informed that her FTA would be terminated if she was not successful in being selected to the P-2 post at SDM/Finance, and if she did not apply to the G-4 and G-5 positions;

m. The Executive Secretary, UNFCCC, has the prerogative to extend temporary assignments beyond twelve months if it is in the best interest of the Organization;

n. While it was stated that the Applicant was no longer needed at SDM, it requested additional support from another programme (Administrative Services Programme) and the Applicant had to cover the work of a P-2 staff member of that programme for two months, while the latter was supporting SDM/Finance; her placement in the Administrative Services Programme for two months prior to her termination on 28 February 2015, despite the need of support in SDM, shows bias against her by the unit's manager;

o. In light of the experience she had acquired at SDM/Finance, she could reasonably assume that she would continue working for it as long as there were vacant posts available in that unit;

p. AG/2014/3 did not apply to her case, since it entered into force only on 1 October 2014; rather, AG/2001/4 applies to her case;

q. She was not given the time and opportunity to look for another solution before being serviced the notice of termination;

r. There are no Rules and Regulations, or guidelines, stipulating the precise terms, limitations and process related to staff members “releasing the lien on their post”;

s. She did not request action by the UNDT on the matter of harassment and abuse of authority, and the Respondent’s reference thereto is thus irrelevant;

t. The decision was motivated by improper motives, and in terminating her appointment, UNFCCC failed to apply due diligence vis-à-vis her;

u. She requests financial compensation in the total amount of two years’ net base salary, covering both material and moral damages.

17. The Respondent’s principal contentions are:

a. According to the agreement of 22 August 2013 between the Applicant and the Organization her appointment would be terminated if she was unsuccessful in obtaining a new post following her return to the UNFCCC; that agreement was lawful and the Applicant and the Organization were bound by it;

b. It was the Applicant who requested the UNFCCC to release the lien against the G-5 post she had encumbered at UNFCCC, since she did not want to hold up the promotion of two colleagues at UNFCCC; the agreement was entered into following that request by the Applicant and clearly sets out the conditions, terms and consequences for the Applicant of releasing the lien on the G-5 post; it particularly stated that in light of lien release, her appointment would be terminated in case she did not obtain a new post at UNFCCC upon her return from ISGCF;

c. The Applicant benefitted from the agreement, in that she was able to continue her assignment to the ISGCF, to receive an SPA to the P-2 level and to obtain experience at that level; she was also offered a temporary appointment with ISGCF once it moved to its new headquarters in the Republic of Korea; that offer was however declined by the Applicant;



d. The Applicant was unsuccessful in obtaining a new post; once she returned to UNFCCC, the latter offered the Applicant an assignment that was extended three times, for a total duration of twelve months, with the aim “to facilitate her to find another job”; at the expiration of that assignment, the Applicant was reassigned to temporary functions for another three months, until 28 February 2015;

e. Her assignments could not be extended indefinitely; pursuant to UNFCCC Administrative guidelines AG/2001/4 (Temporary assignment against vacant or temporarily vacant posts and Special Post allowance), whereby temporary assignments should be used for the “shortest possible period, during which the normal procedures for recruitment or placement and promotion shall be followed”; further, according to AG/2014/3 (UNFCC Contract Modalities for Temporary Placement), reassignments of staff are subject to open competition and a maximum duration of one year;

f. During the period of her temporary assignments, the Applicant was not successful in obtaining a position with UNFCCC; while she applied to a P-2 position within SDM, she was not selected for it; she did not apply to three other positions in the Finance Team, SDM, advertised in July 2014;

g. The contract of the Applicant was properly terminated, in accordance with the agreement of 22 August 2013, to which she had freely consented;

h. The Applicant’s claims of harassment and abuse of authority by a Programme Officer (P-4), SDM, are not receivable *ratione materiae*; the investigation into her complaint was initiated under ST/SGB/2008/5 and ultimately closed;

i. The Applicant’s allegations of extraneous factors are baseless, and she did not provide any evidence in this respect; in any event, the contested termination decision was taken by senior management within UNFCCC, and not by the Programme Officer (P-4), SDM, who allegedly harassed the Applicant;

- j. The Applicant's claims for compensation are without merit and the application should be dismissed.

### **Consideration**

18. The Tribunal has to examine the legality of the decision to terminate the Applicant's fixed-term appointment with UNFCCC effective 28 February 2015, prior to its expiration date on 30 November 2015.

#### *Applicable law*

19. Fixed-term appointments may be terminated under conditions set by the Staff Regulations and Rules.

20. According to staff regulation 9.3(a)(i),

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

21. Staff rule 9.6 provides the following in its relevant parts:

#### **Reasons for termination**

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

(i) Abolition of posts or reduction of staff;

(ii) Unsatisfactory service;

(iii) If the staff member is, for reasons of health, incapacitated for further service;

(iv) Disciplinary reasons in accordance with staff rule 10.2 (a) (viii) and (ix);

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;

(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

### **Termination for abolition of posts and reduction of staff**

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

(i) Staff members holding continuing appointments;

(ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;

(iii) Staff member holding fixed-term appointments.

...

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

22. In the present case, the Applicant's fixed-term appointment was terminated after she had signed an agreement releasing the lien on the G-5 post she had encumbered at UNFCCC. In that agreement, she had further agreed that her appointment would be terminated should she not find any post at the end of her temporary assignment with the IGCS. At the end of that assignment, the Applicant went on a temporary assignment with SDM, UNFCCC, until 28 February 2015, when her appointment was terminated.

*Legal issues*

Does the Applicant's case fall under any of the reasons for termination provided for under the staff rules?

23. The staff rules provide for an exhaustive list of reasons for which the Secretary-General can unilaterally terminate a fixed-term appointment. The Tribunal has to examine whether any of the reasons provided for by the Staff Rules and Regulations apply to the Applicant.

24. As the Appeals Tribunal noted in *Guzman* 2014-UNAT-455 (see its para. 28):

It is clear that the decision being contested was the decision informing Ms. Guzman of her separation from service prior to the expiry of her fixed-term appointment. Staff Rule 9.6 (a) defines termination as a “separation initiated by the Secretary-General” and pursuant to Staff Rule 9.6 (c) (i), one basis for termination may be the “abolition of posts or reduction of staff”.

25. The Applicant held a letter of appointment providing for a fixed-term appointment as Administrative Assistant, ITS, from 1 December 2012 to 30 November 2015. That letter of appointment was still in force after she surrendered the lien on her post, effective 22 August 2013. However, under the agreement she signed on 28 August 2013, the post for which the letter of appointment was issued and that she had encumbered was no longer available; it had been filled with another staff member. In the Tribunal's view, this is comparable to a situation where the post encumbered by the contract holder has been abolished, under staff regulation 9.3(a)(i) and staff rule 9.6(c)(i). However, unlike post abolition, on which the staff member has no influence, the decision to surrender the lien on the post for which she had been recruited was voluntarily taken by the Applicant. Indeed, prior to signing the agreement on 28 August 2013, the Applicant informed the UNFCC Administration, through an email that she wrote at her own initiative on 14 August 2013, that she wished to release the lien on her G-5 post. Further, the Applicant confirmed in a subsequent email that she was “(still not) interested” to return to that post.

26. It is the Tribunal's view that the Applicant's position is even weaker and needs less protection than that of a staff member whose post is abolished. Indeed, 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 imitative to relinquish it and showed no intention whatsoever to come back to it.

27. The Tribunal is of the view that this has to be taken into account when examining the Administration's placement duty vis-à-vis the Applicant, if any, at the expiry of her temporary assignment with ISGCF and thereafter, once she had re-joined SDM, UNFCCC, on temporary assignments, as of 1 January 2014.

28. The Tribunal recalls that under the terms of the agreement signed by the Applicant on 28 August 2013, she recognized and was aware that by releasing the lien to her post, she had no post to return to at the end of her temporary assignment with the ISGCF on 31 December 2013. She also committed to pro-actively seek alternative employment opportunities, and agreed to the following terms: "[s]hould 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".

29. As such, the Applicant's return to service with UNFCCC at the end of her assignment with ISGCF was conditional upon her *selection* to a new post at UNFCCC. According to the terms of that agreement, the Administration was thus under no obligation to seek a suitable post for the Applicant for which she had not applied. The circumstances of this case are thus clearly distinguishable from those in *El-Kholy* UNDT/2016/102 and *Nakhlawi* UNDT/2016/204, which concern the termination of permanent appointment holders who, unlike the Applicant, had not surrendered, voluntarily, the lien to a particular post, by way of an agreement. In these cases, the Tribunal found that the Administration had a duty to consider and place the Applicants for any available suitable post within the Organization, independently from whether they had applied to such posts or not.

30. The Tribunal notes that the Administration offered the Applicant, although under the terms of the agreement it was not obliged to do so, a temporary assignment with SDM, UNFCCC, as Administrative Assistant, effective 1 January 2014, namely when the ISGCF became independent and the Applicant's assignment there came to an end. That temporary assignment was extended three times, until 31 December 2014. Even thereafter, the Administration made an effort to place the Applicant, and offered her another temporary assignment until 28 February 2015. The Administration thus made considerable efforts to place the Applicant after she had surrendered her lien to the post for which she had been recruited at UNFCCC, and after her assignment with ISGCF came to an end. While the Applicant applied to three positions at UNFCCC, including a P-2 position at SDM, she admitted that she did not apply to any of the available G positions at SDM. On the contrary, she had clearly stated in writing that she was not interested to return to the G-5 post for which she had been recruited initially, and which was the subject of the letter of appointment of her fixed-term appointment. She also was not selected for the P-2 position for which she applied. This non-selection is addressed in Judgment *Faust* UNDT/2016/213. While the Administration made good faith efforts to place the Applicant upon her return from ISGCF, the Applicant made it clear that her main aim was to secure a P-2 position, rather than continuing to work at the G-5 level.

31. Under all these circumstances, the Administration certainly had no duty to seek a suitable position for the Applicant beyond the extent it did. The Applicant's argument that the terms of the agreement of 22 August 2013 had become obsolete upon her return from the temporary assignment at ISGCF are correct in that the Administration could, on 1 January 2014, have decided to terminate the Applicant's appointment, since the Applicant had not been selected for any post at the UNFCCC Secretariat at that point in time. By nevertheless offering her (several) temporary assignments, the Administration went beyond its obligations under the agreement. That demonstration of good faith can certainly not be turned against UNFCCC by concluding that an obligation that did not exist on 1 January 2014 come to being so at a later stage.

Was the decision improperly motivated?

32. The Applicant also argues that the decision to terminate her fixed-term appointment was influenced by improper motives.

33. The Appeals Tribunal has consistently held that the termination of a fixed-term appointment for reason of post abolition is legal provided that it is not vitiated by bias or improper motivation (cf. *Ruyooka* 2014-UNAT-487). The Tribunal considers that the Applicant did not provide evidence showing that the termination decision was motivated by extraneous factors. On the contrary, the record shows that it was taken pursuant to the agreement signed by the Applicant.

Compensation

34. Having concluded that the termination decision was lawful, any claim for compensation is unwarranted. Moreover, even if it were not the case, the Applicant did not provide the Tribunal with the evidence required to support such claim pursuant to art. 10.5(b) of its Statute.

**Conclusion**

35. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

*(Signed)*

Judge Teresa Bravo

Dated this 6<sup>th</sup> day of December 2016

Entered in the Register on this 6<sup>th</sup> day of December 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva