

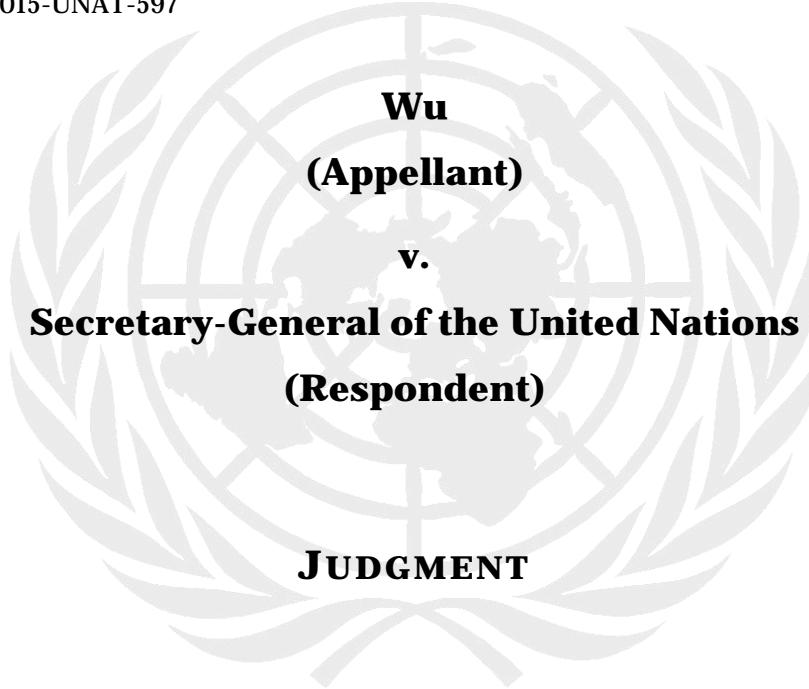


# UNITED NATIONS APPEALS TRIBUNAL

# TRIBUNAL D'APPEL DES NATIONS UNIES

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Judgment No. 2015-UNAT-597



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Before: Judge Luis María Simón, Presiding

Judge Rosalyn Chapman

Judge Mary Faherty

Case No.: 2015-697

Date: 30 October 2015

Registrar: Weicheng Lin

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Counsel for Mr. Wu: Self-represented

Counsel for Secretary-General: Stéphanie Cartier

**JUDGE LUIS MARÍA SIMÓN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/146, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 19 December 2014, in the matter of *Wu v. Secretary-General of the United Nations*. Mr. Ming Wu filed his appeal on 10 February 2015, and the Secretary-General filed his answer on 13 April 2015.

2. On 1 July 2015, by Order No. 225, the Appeals Tribunal denied Mr. Wu's motion of 14 April 2015 to file an additional pleading responding to the Secretary-General's answer.

**Facts and Procedure**

3. Mr. Wu retired from the Organization on 30 June 2011, after 25 years of service upon reaching the mandatory retirement age.

4. In 2011 and 2012, Mr. Wu was re-employed as a Reviser at the R-III level under several temporary appointments with the United Nations Office at Nairobi (UNON), as well as with the Chinese Translation Section (CTS or Section) at the United Nations Office at Geneva (UNOG).

5. In 2013, Mr. Wu was granted another temporary appointment as Reviser at the R-III level with CTS/UNOG, from 1 July to 27 September 2013, which was subsequently extended to 30 November 2013.

6. On 13 November 2013, the Chief of CTS/UNOG updated the Chief of Languages Service on the Section's workload, attaching a list of pending documents. Of a total of 19 documents, eight had already been translated, three were in the process of being completed, and the eight remaining documents were to "be processed by CTS in-house".

7. On 18 November 2013, the Chief of CTS/UNOG informed Mr. Wu that his contract would not be extended beyond 30 November 2013.

8. On 19 November 2013, in response to Mr. Wu's request for "reasons behind the glaring differential treatment" between him and his colleagues, the Chief of CTS/UNOG informed Mr. Wu that "temporary assistance for meetings [...] is arranged in the [sic] light of the Section's projected workload and standing capacity", and further cited the increased

internal emphasis on the use of “contractual translation” in preference to the use of temporary on-board free-lance contracts.

9. On 25 November 2013, Mr. Wu requested management evaluation of the decision not to further extend his appointment and filed a request for suspension of action.

10. On 28 November 2013, by Order No. 188 (GVA/2013), the UNDT rejected the application for suspension of action, finding that it did not meet the criterion of *prima facie* illegality.

11. On 14 January 2014, the Under-Secretary-General for Management informed Mr. Wu that the Secretary-General had accepted the recommendation of the Management Evaluation Unit (MEU) to uphold the contested decision.

12. On 12 April 2014, Mr. Wu filed an application with the UNDT challenging the decision of the Chief of CTS/UNOG of 18 November 2013 not to renew his contract beyond 30 November 2013.

13. On 10 October 2014, the same day the UNDT convoked the parties to an oral hearing to be held on 29 October 2014, Mr. Wu filed a motion to call the Chief of CTS/UNOG as a witness at the oral hearing. The UNDT rejected the motion by Order No. 170 (GVA/2014) of 14 October 2014, finding that “for the time being” it did not consider it necessary to call any witnesses.

14. On 29 October 2014, the Dispute Tribunal held an oral hearing. During the hearing, the Secretary-General was requested to provide additional clarifications, *inter alia*, with respect to the e-mail of 19 November 2013 from the Chief of CTS/UNOG to Mr. Wu, explaining the reduced translation need for December 2013, and the fact that six freelancers, of which four were retirees, were subsequently employed that same month.

15. On 1 December 2014, the Respondent filed the additional explanations, and Mr. Wu filed his observations thereon on 15 December 2014.

16. On 19 December 2014, the UNDT issued its Judgment. The UNDT held that retired language staff members do not have an entitlement or a “right” to be employed for a maximum of 125 work days. Rather, Section 6.1(b) of Administrative Instruction ST/AI/2003/8/Amend.2 (Retention in service beyond the mandatory age of separation and employment of retirees)

prohibits their employment beyond the maximum of 125 work days per year. The UNDT also found that the reasons provided to support the decision contested by Mr. Wu were substantiated by the facts, and the fact that six freelancers were hired in December 2013 did not contradict the explanation given to Mr. Wu by e-mail of 19 November 2013. Further, the UNDT held that Mr. Wu had failed to provide any evidence of his allegations of bias or discrimination, and thus noted it had decided not to call the Chief of CTS/UNOG as a witness, deeming his evidence irrelevant for the adjudication of the case. The UNDT also found no evidence that would have supported Mr. Wu's argument that an express promise had been made to extend his appointment such that he may have had an expectancy of renewal. The UNDT dismissed Mr. Wu's application.

## **Submissions**

### **Mr. Wu's Appeal**

17. The UNDT's misinterpretation of the Appellant's arguments was unreasonable and based on errors of fact and law. By characterizing his claim as seeking an entitlement or a "right" to be employed for a maximum of 125 working days the Judgment distorted his arguments. The Appellant does not seek absolutely equal working days vis-à-vis other "retirees/temporaries", but seeks to expose discrimination in that he had consistently been treated worse than the others in terms of contract duration, timing and substance, and he produced plenty of evidence to prove this.

18. The Dispute Tribunal erred on a question of fact in determining that the contested decision was supported by available evidence, namely the Chief of CTS/UNOG's e-mail of 13 November 2013 indicating the limited workload for December 2013, although the Appellant had refuted this assertion in his observations of 15 December 2014. The Respondent never explained why the services of other retirees continued to be needed while the Appellant's services were not. Further, the Respondent resorted to semantics in trying to explain the terms "regular staff members", "standing capacity" and "CTS in-house" to the UNDT. It is apparent that the facts did not support the Administration's reasons for not renewing his contract.

19. The UNDT erred on a question of fact in determining that three other retirees were also granted less than the maximum of 125 work days, although the Appellant had refuted this assertion in his observations of 15 December 2014. Two of the other retirees had worked the

maximum number of days each year between 2003 and 2012, and they only worked 116 and 123 days, respectively, in 2013 because they did not wish to work more.

20. The Dispute Tribunal erred on a question of procedure in refusing the Appellant's motion to call the Chief of CTS/UNOG as a witness. The UNDT thus deprived the Appellant of a due process right to cross-examine the witness at the hearing. Further, the hearing served no purpose because counsel for the Respondent could not answer the UNDT's question as to the apparent discrepancies between "regular staff" and "standing capacity", as referred to in the Chief of CTS/UNOG's 19 November 2013 e-mail to the Appellant.

21. The Dispute Tribunal committed an error in procedure in making apparently conclusive observations during the oral hearing as to the status of staff members holding temporary appointments, which clearly prejudged the case. Further, the UNDT exceeded its jurisdiction in differentiating between the recruitment standards for staff members holding temporary appointments vis-à-vis other categories of appointments, as *all* staff members have the right to equal treatment and protection from discrimination and should be recruited having regard to "the highest standards of efficiency, competence and integrity".

22. The Dispute Tribunal also erred in refusing to admit the Appellant's further evidence at the oral hearing and through his December 2014 observations on discrimination and retaliation committed against him in 2014. Although arising after the events he contests, they evidenced the continuation, and aggravation, of the Chief's practice of discrimination and hostility towards the Appellant, and the UNDT should have taken that evidence into account in making its decision.

23. The Appellant also alleges misconduct on the part of the Chief of CTS/UNOG, including, but not limited to, abuse of authority, awarding contracts in exchange for receiving gifts and dinner invitations, wasting United Nations resources, discrimination and favouritism in recruitment. He claims that the fact that the Chief was the subject of misconduct investigations and was separated from service in January 2015 corroborates the Appellant's case.

24. The Appellant requests the Appeals Tribunal to reverse the Judgment, order payment of compensation in the amount of one year's salary for violation of his statutory rights, order that the Respondent accord equal treatment to the Appellant, and refer the case to the Secretary-General of the United Nations for possible action to enforce accountability, pursuant to Article 9(5) of the Appeals Tribunal Statute (Statute).

**The Secretary-General's Answer**

25. The UNDT correctly concluded that, in view of the express wording of the rules applicable to the temporary re-employment of retired language staff members, namely Sections 5.1, 6.1(b) and 7 of ST/AI/2003/8 and ST/AI/2003/8/Amend.2, the Appellant had no right to be re-employed beyond 30 November 2013. Further, in accordance with the Appeals Tribunal's jurisprudence, the UNDT correctly found that the Appellant had failed to establish any express promise to extend his temporary appointment beyond 30 November 2013.

26. The UNDT correctly found that the decision not to renew the Appellant's appointment was supported by the facts. As the evidence clearly shows that the decision not to renew the Appellant's temporary appointment was based on the expectation that CTS would have a limited workload for December 2013, the Chief of CTS/UNOG reasonably exercised his discretion in deciding that the workload did not warrant the temporary services of the Appellant in December 2013. The fact that the CTS subsequently needed some more limited, temporary assistance in December 2013 and retained freelancers to meet those needs did not affect the lawfulness of the decision not to retain the Appellant. Both the UNDT and the Appeals Tribunal have recognized that the Administration has broad discretion to organize its work to meet the needs and the objectives of the Organization.

27. The UNDT correctly found that the contested decision was not based on bias, discrimination or other improper motives. Further, the Appellant's claim concerning the investigation of the Chief of CTS/UNOG is misleading and incorrect since the investigation report has not been completed and thus the allegations under investigation have not been substantiated.

28. The Appellant has not established that the UNDT committed any error in declining to address his claims regarding the merits of hiring certain retirees in December 2013, since the Appellant expressly identified the contested decision as the "decision not to renew [his] contract" in his request for a management evaluation and in his UNDT application, and not the decision not to select him for other appointments.

29. The Appellant has not established that the UNDT committed any error of procedure such as to affect the outcome of the present case. First, as the UNDT found that the Appellant had not adduced any persuasive evidence of favouritism against the Section Chief, the UNDT did not exceed its discretion in declining to call the Section Chief to testify. Second, the Appeals Tribunal

is competent to hear and pass judgment on an appeal filed against a “judgement” rendered by the UNDT, and not against the oral statements of the UNDT judge at the oral hearing which do not appear in the Judgment.

30. The Appellant’s claims regarding alleged events that succeeded his request for management evaluation are not receivable as they have not been subjected to management evaluation. Accordingly, they fall outside the scope of the Appeals Tribunal’s judicial review in the present case.

31. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the Judgment.

### **Considerations**

32. The Appellant claims that the UNDT erred in procedure by: firstly, denying his request to call the Chief of CTS/UNOG as a witness; secondly, making allegedly conclusory remarks at the oral hearing; and, thirdly, refusing to admit further evidence on discrimination and retaliation committed against him in 2014. If successful, such grounds would of themselves warrant that the matter be remanded to the Dispute Tribunal for a *de novo* trial.<sup>1</sup>

33. In this regard, the Appeals Tribunal holds that the UNDT did not commit any error of procedure such as to affect the outcome of the present case.

34. Firstly, Article 9(2) of the UNDT Statute and Article 17(6) of the UNDT Rules of Procedure (UNDT Rules) grant the UNDT the discretion to “decide whether the personal appearance of a witness or expert is required at oral proceedings”. Article 18(5) of the UNDT Rules also provides: “The Dispute Tribunal may exclude evidence which it considers irrelevant, frivolous or lacking in probative value. The Dispute Tribunal may also limit oral testimony as it deems appropriate.” Further, Article 19 of the UNDT Rules grants the UNDT broad discretion in relation to case management; pursuant to Article 19, the UNDT may issue any order or give any direction which appears to the judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties. Our jurisprudence has

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<sup>1</sup> *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 33.

consistently held that the Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of its cases.<sup>2</sup>

35. Case management issues, including the question of whether to call a certain person to testify, thus remain within the discretion of the UNDT and do not merit a reversal except in clear cases of denial of due process of law affecting the right to produce evidence.<sup>3</sup> This is not the case in the matter at hand where Mr. Wu does not dispute the essential facts, but rather the legal consequences to be drawn from those facts.

36. In this case, the UNDT rejected Mr. Wu's claims of favouritism on the basis that two of the other retirees whom Mr. Wu claimed had been favoured had also been granted less than the maximum number of work days in the previous years.<sup>4</sup> Consequently, it found that Mr. Wu had failed to provide evidence to support his allegations of bias or discrimination and considered it unnecessary to call the Chief of CTS/UNOG as a witness, finding "his evidence [...] irrelevant for the adjudication of the present case".<sup>5</sup> We see no error in the manner in which the UNDT exercised its discretion, and Mr. Wu has thus not persuaded us that the UNDT committed any error in procedure in declining to call the Chief of CTS/UNOG as a witness.

37. Further, having listened to the record of the oral hearing before the UNDT, we are satisfied that the UNDT did not make improper or prejudicial comments, or reach premature conclusions at the oral hearing. Rather, the UNDT sought to delineate between the different expectations that attach to various categories of contractual appointments. The UNDT simply and reasonably explained the issues of the case to the parties and we can discern no error in this regard.

38. Mr. Wu also claims the UNDT refused to admit evidence he gave at the oral hearing and through his December 2014 observations on discrimination and retaliation committed against him in 2014. As Mr. Wu acknowledges, the evidence relates to events that arose after the decision he contests. Accordingly, the UNDT did not err in not taking them into account in

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<sup>2</sup> *Ibid.*, para. 35 and cites therein.

<sup>3</sup> Cf. *Hunt-Matthes v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-443 (where the UNDT's refusal of the Secretary-General's motion to call a witness violated the Respondent's due process rights); *Kacan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-426 (where the UNDT gave no explanation for declining to call the applicant's proposed witness).

<sup>4</sup> Impugned Judgment, para. 36.

<sup>5</sup> *Ibid.*

assessing the correctness of the decision under its review, namely the decision not to extend Mr. Wu's temporary appointment.

39. With respect to the merits of the case, the Appellant has not persuaded the Appeals Tribunal that the Judgment under appeal is affected by any errors in law or fact such as to warrant its reversal.

40. Although Mr. Wu denies that he seeks to avail himself of the maximum number of work days for retired language services staff, the basis of his claim is that he should nonetheless have been awarded the same because of his efficiency and willingness to work, and that he was discriminated against in comparison to other retirees who received more work days than he although they were less efficient.

41. Despite acknowledging that he is not entitled as of right to work the maximum number of days on his temporary appointment in his appeal brief, the Appellant does not duly appreciate that this applies even if the subsequent workload is such that it can only be addressed by temporarily hiring other retired language services staff up to a maximum of 125 work days. Therefore, it becomes immaterial whether other retired language services staff were granted contracts after that date.

42. Mr. Wu claims that the Chief of CTS/UNOG's e-mail of 13 November 2013 indicating only a limited workload for December 2013 was undermined by the fact that the unit subsequently recruited six freelancers to meet additional needs for the same month. Mr. Wu's submission that the UNDT failed to address this claim is misplaced. The UNDT clearly found that the mid-November 2013 decision not to extend Mr. Wu's appointment was supported by the available evidence at that time, and was not necessarily contradicted by the subsequent recruitment of six freelancers, which arose as a result of the necessity to address the "evolving situation within DGACM".<sup>6</sup> Through this ground Mr. Wu only expresses his disagreement with the Dispute Tribunal's decision. We see no error in the UNDT's reasoning. The Dispute Tribunal also concluded that there was no evidence of discrimination in this regard.

43. In conclusion, regardless of whether the subsequent workload diminished as expected, or increased, or was otherwise affected by any other factors, Mr. Wu did not have the *right* to be granted more work days under his temporary appointment, thus effectively taking him to the

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<sup>6</sup> Impugned Judgment, para. 32.

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maximum of 125 work days, nor did he have a legitimate expectation of being granted more assignments, regardless of how much more efficiently and capably he performed vis-à-vis other revisers. Hence, it is not material to the outcome in this case whether the decision not to further extend Mr. Wu's appointment could be said to be tainted by bias or discrimination.

44. Having reviewed the UNDT Judgment, we cannot discern any error under Article 2(1) of the Appeals Tribunal Statute warranting its reversal.

**Judgment**

45. The appeal is dismissed and Judgment No. UNDT/2014/146 is affirmed.

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Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2015 in New York, United States.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Faherty

Entered in the Register on this 18<sup>th</sup> day of December 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar