

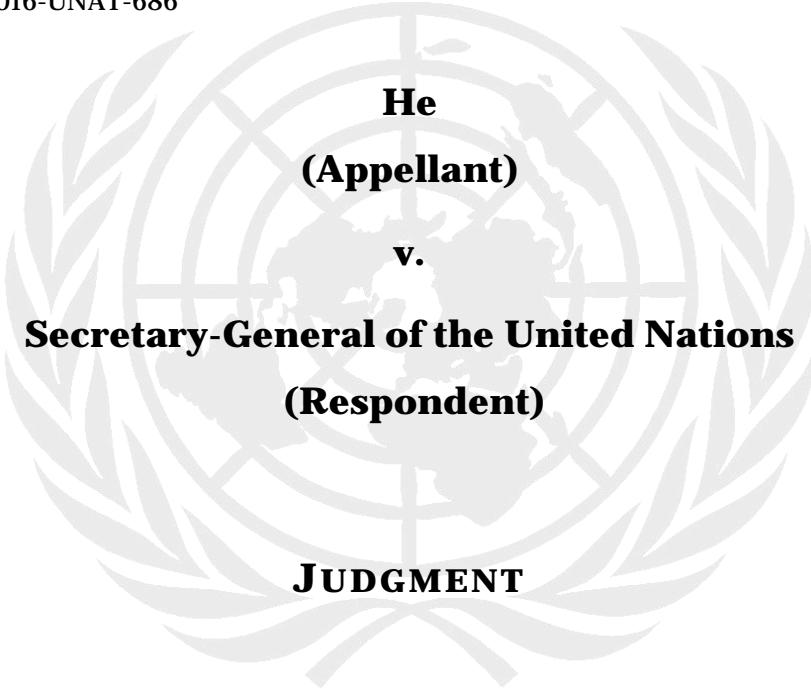


# UNITED NATIONS APPEALS TRIBUNAL

# TRIBUNAL D'APPEL DES NATIONS UNIES

---

Judgment No. 2016-UNAT-686



---

Before: Judge John Murphy, Presiding

Judge Deborah Thomas-Felix

Judge Martha Halfeld

Case No.: 2016-908

Date: 28 October 2016

Registrar: Weicheng Lin

---

Counsel for Ms. He: Jia-Xiang Wang

Counsel for Secretary-General: Stéphanie Cartier

**JUDGE JOHN MURPHY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/007, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 28 January 2016, in the case of *He v. Secretary-General of the United Nations*. Ms. Rui He filed the appeal on 22 March 2016, and the Secretary-General filed an answer on 31 May 2016.

**Facts**

2. The Appellant was employed as a Text Processing Clerk (G-3 level) at the Chinese Text Processing Unit (CTPU), United Nations Office at Geneva (UNOG) for almost 10 years from 6 June 2005, first, on short-term contracts and, subsequently, on temporary appointments. Her temporary appointment was retroactively converted into a fixed-term appointment with effect from 11 January 2010 limited to the Division of Conference Management (DCM).

3. In June 2012, two temporary Chinese Text Processing Clerk posts (six months) at the G-3 level within CTPU were advertised by Vacancy Announcement (VA) No. 12/GS/INT and EXT/27. The Appellant applied for one of the two positions.

4. On 6 November 2012, the Chief, Languages Service (LS) addressed an e-mail to the Chiefs, Text Processing Units (TPUs) requesting them to review the staffing tables of their respective units within the framework of the 2014-2015 budget preparation, and noted that “post cancellations and post reclassifications would be considered favourably by the Executive Office”. A few weeks later, in December 2012, the VA for which the Appellant had applied was cancelled.

5. On 7 January 2013, the Assistant Secretary-General, Department for General Assembly and Conference Management (ASG/DGACM), by e-mail, advised the Director, DCM/UNOG, that DCM should—like DGACM—schedule a ratio of one text processor for three translators and that, as a result, DCM should “be pegging about 66 text processors (rather than the 116 still shown) [in its budget]”.

6. The Appellant requested management evaluation of the decision to cancel VA No. 12/GS/INT and EXT/27 on 6 February 2013.

7. A month later, on 6 March 2013, the Appellant filed a complaint of harassment and abuse of authority against the Chief, CTPU, with the Assistant Secretary-General for Human Resources Management. The complaint forms part of the record of appeal. It makes several allegations of unfair treatment by the Chief, CTPU in relation to her evaluation and alleged frustration of her efforts to obtain promotion. She in particular regarded the cancellation of the VAs as discrimination and retaliation and this added to a bad atmosphere and strained working relationship. But at the core of her grievance was the insecurity of her tenure. Despite having worked at the Organization for more than five years, the Appellant was made to sign 14 contracts in the 20-month period from January 2011 to September 2012, varying in duration from one to three months. From October 2011 to May 2012, she was obliged every month to sign a new contract of one-month duration. The Appellant essentially alleged in her complaint that the continual unjustified poor evaluation of her performance by the Chief, CTPU in her e-PAS, together with the practice of re-employing her on short-term contracts, constituted an abuse of authority against her by the Chief, CTPU, whom she accused of using his authority to improperly influence her career and employment conditions, including her performance evaluation and contract renewal. The conduct of the Chief, CTPU, she maintained, fell within the parameters of “abuse of authority” proscribed by paragraph 1.4 of Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority).

8. The Appellant experienced the cancellation of the VAs as the last straw and appears to have attributed the cancellation to bad faith on the part of the Chief, CTPU. It is not clear if she was aware of the e-mail from the Chief of LS/DCM of 6 November 2012 inviting post cancellations or the e-mail of the ASG/DGACM in January 2013 recommending a ratio of one text processor for three translators. Even if she was, she clearly was of the view that she had been singled out by the Chief, CTPU for unfair treatment frustrating her efforts for career advancement. The Management Evaluation Unit (MEU) advised the Appellant, by letter dated 28 March 2013, that the decision to cancel VA No. 12/GS/INT and EXT/27 had been upheld. The Appellant did not contest this decision before the UNDT. It is not clear from the record what happened to the Appellant’s complaint of abuse of authority of 6 March 2013.

9. Some nine months later, the Chief, LS/DCM, by an e-mail dated 30 December 2013, informed his colleagues at DCM that DCM’s budget proposal for 2014-2015 included a reduction of USD 5,657,100 “to its base budget for temporary assistance for meetings (TAM),

general temporary assistance (GTA) and overtime". He further noted that while no DCM posts had been proposed for abolishment, DGACM had proposed the abolishment, *inter alia*, of 21 General Service posts from text processing "to establish a ratio of 1:3 between the number of text processors to the number of translators". In this respect, he also confirmed that this abolishment had been approved by the relevant structures with authority and that, as a consequence, effective 1 January 2014, DGACM would have 21 fewer text processing posts. He stressed that LS/DCM would begin the new biennium with further pressure to use contractual translation and text-processing and advised that the expectation that the 1:3 ratio would begin to be implemented across the remaining three conference servicing duty stations. He added that while the LS/DCM's current ratio was closer to 2:3, it was clear that LS/DCM had to take action immediately if it was to achieve the desired ratio through attrition, retraining and redeployment.

10. The Chief, LS/DCM also noted in his e-mail that, as a consequence, some steps had to be taken, *inter alia*, auditing of TPUs during the first quarter of 2014 and reducing the need to transcribe dictation by requiring all freelance translators to input their own translations using either a keyboard or voice recognition, as from 1 January 2014. He underlined that a freeze on the recruitment of entry-level fixed-term staff in the TPUs would be effective as from 1 January 2014, and that pending the outcome of the above workload evaluation, fixed-term contracts in the TPUs would be extended only through 30 June 2014. The Chief, LS/DCM encouraged TPUs' staff to make full use of the training opportunities available to prepare them for a changing work environment and to apply for other posts in the Secretariat.

11. On the same day, the Chief, CTPU wrote to the Chief, LS/DCM and proposed that the Appellant's contract, as well as that of another CTPU staff member, be extended until 30 June 2014 in light of the new DGACM budget for 2014-2015 and "pending the outcome of the workload evaluation in the TPUs". The Chief, LS/DCM approved the request on the same day.

12. On 3 February 2014, the Appellant and two of her colleagues submitted to the Acting Director-General, UNOG, a second complaint against her direct supervisor, the Chief, CTPU, alleging that he had engaged in prohibited conduct under the Secretary-General's Bulletin ST/SGB/2008/5 with respect to her and other members of the CTPU team. The complainants further alleged that the Chief, Chinese Translation Service (CTS), their second reporting officer, had connived with the Chief, CTPU, and shielded him. This complaint contains several allegations of abuse and public humiliation, and raises various grievances arising out of what appears to have been a difficult personal relationship between the Appellant and her supervisor.

The Acting Director-General, UNOG, replied to the second complaint in a memorandum on 27 May 2014. In it he informed her that he had decided to take managerial action against the alleged offender, but not to further investigate the allegations.

13. On the same day, 27 May 2014, the Chief, CTPU, addressed with the Deputy Chief, LS/DCM, referred to the forthcoming expiration, on 30 June 2014, of the Appellant's contract and that of one of her colleagues. He noted that in light of complaints of allegations of harassment made against him he was "no longer in a position to make recommendations which may affect the complainants". This notwithstanding, in his capacity "as the line manager", the Chief, CTPU, reported on the work situation of CTPU noting, *inter alia*, that all previous document backlog had been cleared, that the backlog of bitext alignment would be completed by mid-June 2014, and that in light of the decision of the General Assembly with respect to the documentation of the human rights treaty bodies, the workload of CTPU would be reduced as of January 2015. The relevant General Assembly resolution 68/268 of 9 April 2014 was aimed at strengthening the effective functioning of human rights bodies and decided, *inter alia*, "to allocate a maximum of three official working languages for the work of the human rights treaty bodies", thus making it "extremely unlikely" for Chinese to become one of the working languages of those bodies.

14. By e-mail of the same day, the Deputy Chief, LS/DCM, informed a Senior Human Resources Officer, Human Resources Management Service (HRMS), UNOG, that in light of the information received from the Chief, CTPU, he would recommend that the contract of the Appellant and that of one other staff member of CTPU, equally at the G-3 level, not be renewed upon their expiration on 30 June 2014. The very next day, 28 May 2014, the Senior Human Resources Officer, HRMS/UNOG, informed the Appellant that her fixed-term appointment would not be renewed beyond its expiration date, i.e., 30 June 2014, and stated that this decision was "based on the reduction of work within the Chinese Text Processing Unit and the on-going workforce planning done by the Language Services".

15. It is important to note that the Appellant was informed that her services would be terminated one day after her complaint of abuse of authority was disposed of on the basis that managerial action would be taken against the Chief, CTPU without any further investigation.

16. According to the evidence placed before the UNDT by the Respondent, at the time of the contested decision, the CTPU was composed of 12 staff members with regular fixed-term or permanent appointments from G-4 to G-7. The posts of the Appellant and her colleague dismissed with her were the only posts that might have been financed through the TAM – though this fact is disputed. It is not entirely clear from the record whether the Appellant was in service longer than the other employees or what criteria were applied in selecting her for non-renewal.

17. The Appellant requested management evaluation of the non-renewal decision on 6 June 2014. Her subsequent application for suspension of action was rejected by the UNDT. She was separated from the service of the Organization on 30 June 2014, after 10 years of service. The Under-Secretary-General for Management informed the Appellant on 21 July 2014 that the Secretary-General had decided to accept the recommendation of the MEU to uphold the contested decision.

### **The proceedings before the UNDT**

18. The Appellant appealed to the UNDT against the administrative decision not to renew her fixed-term appointment. The application does not form part of the record on appeal. It is thus not possible to comment accurately on its terms. The Judgment of the UNDT, however, usefully sets out the Appellant's main contentions. First and foremost, the Appellant alleged that the decision constituted retaliation since it was taken after she had reported the behaviour of her supervisors to the Administration. The Judgment does not deal with the allegations forming the basis of the second complaint of 3 February 2014 filed by the Appellant and her two colleagues. This Tribunal has no means of assessing the seriousness with which it was received and dealt with by the Administration and thus its possible relevance to the allegation of retaliation. The Appellant also alleged that the decision was discriminatory because only she and one of her colleagues who had also signed the second complaint were subject to non-renewal, whereas staff of the other TPUs, including overstaffed TPUs, were not affected. Moreover, one of the principal authors of the decision, the Chief, CTS, whose alleged abuse of authority was reported and investigated, was compelled to resign in January 2015. These allegations indicate clearly that the Appellant's primary challenge to the decision not to renew her contract after 10 years of service was that the decision was an unreasonable, discriminatory and unfair act of retaliation because she had exercised her right to seek redress against an alleged abuse of authority by her superior.

19. In support of her contention that unfair, subjective and discriminatory criteria had been applied in selecting her for retrenchment or non-renewal, the Appellant submitted documentary evidence showing that there had been no reduction in the workload of the CTPU after her separation from service. The work of bitext alignment done in the TPUs was required as part of an upgrade in software introduced in recent years to assist with information search. Original United Nations documents and their translations into other official languages are stored in the database in "bitext" language pairs aligned segment by segment. Correct alignment of bitexts is a prerequisite for using the software. The alignment cannot be fully automated especially in the case of English and Chinese, and requires human checking and correction to ensure that each segment is properly aligned. In his letter of 27 May 2014 to the Chief, LS/DCM, anticipating a reduction of workload for the CTPU, the Chief, CTPU asserted that the backlog of bitext alignment would be completed by mid-June 2014, thus justifying the non-renewal of the contracts of the Appellant and her colleague who had complained about his abuse of authority. The Appellant contended that this assertion was false and a deliberate fabrication to justify the non-renewal of her employment as a retaliation against her. She said the same in relation to the second rationale for her selection, namely, that the effect of the General Assembly resolution to allocate a maximum of three working languages for the work of the human rights treaty bodies would result in a substantial reduction of up to one quarter of the workload of the CTPU from January 2015. This too, the Appellant maintained, was demonstrated by subsequent experience to be totally false, and thus provides a suspect rationale for her selection for termination.

20. In addition, the Appellant placed information before the UNDT showing that a ratio of one text processor to three translators could not be applied, and had not yet been applied in Geneva as the workload in Geneva was 85 per cent higher than in New York in 2013.

21. The Appellant made various other contentions and factual assertions in support of her claim that the contested decision was unreasonable and unfair. For reasons which will become apparent presently, it is unnecessary to canvass them.

22. The Respondent contended before the UNDT that the *bona fide* reason for non-renewal was supported by the evidence that there would be a reduction of work because bitext alignment would be completed by the end of June 2014 and the implementation of the General Assembly resolution 68/268 would bring about a 25 per cent reduction by January 2015. He argued that the Appellant had failed to substantiate her allegations of retaliation and had not met her burden of proof in that respect. The Respondent pointed out that the selection of the Appellant was

based on the fact that her post was financed by the budget for TAM, and that she was not eligible for redeployment as she had only passed the Administrative Support Assessment Test in Chinese. It is not clear why such a criterion, used to determine redeployment, would be relevant to a decision to continue or terminate employment. Nor is it clear whether the Appellant's post had been budgeted for by TAM for the entire 10 years of her period of service.

23. The UNDT found that it was not unreasonable for the Administration, on the basis of the data available at the time of the contested decision, to conclude that there would be a decrease of work in CTPU, *inter alia*, on the grounds of the change of workflows and the projected implementation of one text processor for three translators. Those reasons were supported by the detailed staffing tables of CTPU and of other TPUs covering different periods as well as other documents. The UNDT also found that the Appellant had failed to provide sufficient evidence to support her alleged expectancy for contract renewal, and further found that she was aware of the precarious nature of her contractual situation as her post was financed through the budget for TAM. The UNDT set out its approach to the factual issues that it believed required determination as follows:<sup>1</sup>

In determining whether the reasons so provided were supported by the evidence, and particularly in assessing the future workload of the CTPU at the time, the Administration necessarily had to make some prognosis, based on the elements available in May 2014. Accordingly, the [Dispute] Tribunal has to focus on this point in time. In contrast, factual developments relating to the future workload after the date of the decision have to remain out of consideration, and do not have an impact on the legality of the decision under review.

24. The UNDT went on to hold that it was not unreasonable for the Administration to conclude that there would be a decrease in workload for the reasons given by the Administration. It did not give much attention or consideration to the allegations of the Appellant that the reasons were a falsehood and a fabrication aimed at justifying retaliation against her on account of her complaint, and that this was most importantly borne out by the experience of the CTPU after her separation from service. The UNDT dealt with the issue in a single paragraph of its Judgment. It said:<sup>2</sup>

Concerning the Applicant's allegation that the decision was motivated by extraneous factors and constituted "retaliation" for her having filed a complaint of harassment

---

<sup>1</sup> Impugned Judgment, para. 40.

<sup>2</sup> *Ibid.*, para. 49.

against her direct supervisor, the Chief, CTPU, the [Dispute] Tribunal recalls that the burden of proof with respect to such extraneous considerations falls on the Applicant. The record available to the Tribunal does not allow for such a conclusion. Furthermore, such an inference is contradicted by the fact that, as described above, it was reasonable to conclude, in May 2014, that the projected workload of the CTPU would decrease and that, hence, the number of staff would be reduced, which is also reflected in the relevant staffing tables since 30 June 2014.

25. The exact nature and content of the record available to the UNDT, being the exclusive factual substratum upon which it relied to reject the allegation of retaliation, does not appear from the Judgment. Nor did the UNDT make any explicit factual findings, based on credible and reliable evidence, and the probabilities regarding the possibility of fabrication of the rationale for non-renewal. Instead, it simply ruled that the historical workload prognosis was reasonable and that finding supported an inference that there was no retaliation. It made no findings regarding the actual accuracy of the prognosis as evidenced by subsequent events, as it regarded such as irrelevant, and thus did not ponder whether a conceivably erroneous forecast permitted an inference of fabrication. By regarding such evidence as irrelevant, the UNDT excluded the issue of retaliation from full factual consideration.

26. On the basis primarily that it was not unreasonable for the Administration to conclude that there would be a decrease in work and that there was no promise of renewal as the Appellant alleged, the UNDT dismissed her application.

## **Submissions**

### **Ms. He's appeal**

27. The Appellant submits that the UNDT erred on questions of fact, resulting in a manifestly unreasonable decision. In essence, she contends that the UNDT failed to properly determine the factual issues of the case. Her case has always been that the two rationales forming the basis of the non-renewal of her contract were false and fabricated justifications amounting to retaliation for making a complaint against the Chief, CTPU. The two rationales, that the task of verifying the backlog of legacy bitexts would be completed by mid-June 2014 and the reform of the treaty bodies would reduce the total workload of the CTPU by 25 per cent, were demonstrably false as shown by the evidence of what transpired after she had separated from service. The UNDT, she argued, erred on the facts by excluding that evidence and ignoring its implications. The failure of the UNDT to make a

determination based on a proper factual determination, she further argued, has led to a manifestly unreasonable decision. In effect, the Appellant submitted that in following the approach it did, confining itself to the narrow issue of whether the Administration had reasonable grounds for its prognosis of a workload reduction in May-June 2014, the UNDT asked and answered the wrong question. The true question for factual determination was whether the contested decision was unreasonable or unfair on grounds of it being illegitimate retaliation. Although the UNDT touched upon the matter in its Judgment and dismissed the claim in that regard, it did not engage in an appropriate exercise of fact-finding to determine whether the allegations were probable or supported by clear and convincing evidence.

28. At the hearing of the UNDT on 26 November 2015, the Appellant produced documentary evidence showing that there was still a significant backlog of bitext documents, numbering close to 30,000, to be processed in May 2014. Contrary to the claim made by the Deputy Chief, LS/DCM, that the completion of the task of verifying the backlog of legacy bitexts by mid-June 2014 would greatly diminish the workload of CTPU, as of November 2015, roughly 90 per cent of the Chinese/English bitext documents in the eRef database had not been checked and corrected. Moreover, apart from a regulation requiring freelance translators to type their own translations, the work procedures and job content of CTPU remained completely unchanged. With the addition of the new bitext-alignment work, CTPU's workload greatly increased. Likewise, the change in working languages of the treaty bodies had no significant impact. The official languages of UNOG continue to include Chinese and the change in working languages of the treaty bodies would not result in a major reduction in the number of documents produced in Chinese. Therefore, the claim of a reduced workload as a reason for denying the renewal is inconsistent with the true facts. The Appellant essentially argued that an adverse inference may be drawn that the fabricated reasons were a dishonest justification for retaliation.

29. Moreover, the TPUs for other languages continued to hire staff during this period. The UNDT's view about TAM being the source of funding for the Appellant's post is equally questionable. Her fixed-term appointment, she maintained, was continuously financed through the regular budget, and was not financed through TAM at any point. And furthermore, none of the TPUs in Geneva, it was alleged, has been able to implement the 1:3 ratio of text processors to translators.

30. The Appellant accordingly argues that the UNDT adopted an incorrect approach to determining the facts. Any prognosis of the reduction in workload should have been based on an analysis of the actual situation, which was that the CTPU was in no way capable of completing, within two weeks, the bitext alignment of tens of thousands of documents that had accumulated in the backlog at the time the Appellant's contract was not renewed. It was essential for the UNDT to make factual findings about the actual situation both before and after May 2014 in order to decide if the offered reasons for non-renewal were a pre-text. The evidence in relation to the situation after May 2014 indicated that it was completely contrary to what the decision-makers had foreseen and that alone was sufficient to raise suspicion about the reasons proffered.

31. In the light of her submissions, the Appellant requests this Tribunal to "investigate and verify the facts presented by the Appellant, expose the retaliatory actions of the administrative personnel concerned, rule invalid the decision to deny the Appellant a renewal of her appointment, and renew the Appellant's fixed-term appointment" or to give her priority in the event of a vacancy, and to award her compensation.

### **The Secretary-General's answer**

32. The Secretary-General contended that the Appellant failed to identify any error by the UNDT and merely repeated or reiterated the arguments that she had made to the UNDT. The Respondent also legitimately raised a preliminary objection to the fact that the Appellant had filed five additional documents without seeking the permission of this Tribunal for doing so or providing any argument in support of their submission. While there is obvious merit in the objection, for reasons that will appear, it is unnecessary to make any ruling in relation to it.

33. In summary, the Respondent submits that the UNDT correctly concluded that the reasons provided by the Administration for the non-renewal decision, i.e., the reduction of work within CTPU and the workforce planning, were fully supported by the corroborating and contemporaneous facts. The Appellant failed to establish that the non-renewal decision had been taken on improper grounds. In that regard, the Respondent reiterates the finding of the UNDT that the contested decision was taken by the Deputy Chief, LS/DCM, and not the Chief, CTPU, against whom the Appellant had filed a complaint of harassment and abuse of authority. The Appellant described this finding as far-fetched and basically alleged that the two had acted jointly.

34. In the view of the Respondent, there was no error in the UNDT's finding that the weight of the evidence in the present case supported the non-renewal decision. The Respondent accordingly requests this Tribunal to affirm the UNDT Judgment and dismiss the appeal in its entirety.

### **The oral hearing by the UNDT**

35. This appeal raises the question of the correct approach to be followed by the UNDT in resolving factual disputes. Article 2(1)(e) of the Statute of the Appeals Tribunal requires that we decide, in some cases, whether the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision. Similarly, an appeal may require us to decide, in terms of Article 2(1)(d), whether the UNDT committed an error in procedure, such as to affect the decision of the case. An appeal is an appeal on the record. Article 2(7) provides that the written record means anything that has been entered in the formal record of the UNDT, including submissions, evidence, testimony, motions, objections, rulings and the judgment, and any evidence this Tribunal directs the UNDT to take. As a matter of good practice, in order to avoid delays, whenever the UNDT hears oral testimony and the application or appeal raises material disputes of fact, the oral testimony must be preserved and a transcript of it should form part of the record of appeal transmitted to this Tribunal. Normally, it will be impossible for this Tribunal to review the factual findings of the UNDT in an appeal alleging a material error of fact without a proper fact-finding exercise having been conducted by the UNDT and a transcript of the oral testimony before it. In a case that turns on disputed facts, we would have no choice, in the absence of a fact-finding exercise by the UNDT and a written transcript, but to remand to the UNDT for a new and recorded hearing.<sup>3</sup>

36. The record in this appeal is incomplete in more than one respect. For that reason, and because the resolution of the factual issues in this matter will be decisive, the Presiding Judge requested, obtained and listened to the audio recording of the hearing held by the UNDT in Geneva on 26 November 2015. The hearing lasted just over one hour. No witnesses were called to testify under oath at the hearing. It commenced with the Judge reciting to the parties the facts he considered relevant and proved by the documentary evidence. The facts he outlined were virtually identical to those set out in his Judgment and focused exclusively on the facts supporting his ultimate conclusion that the prognosis of a reduced workload at

---

<sup>3</sup> *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130.

the CTPU was reasonable. He afterwards asked the legal representatives to make any submissions they wished to make in relation to the facts he had preordained. Mr. Wang, counsel for the Appellant, then read a prepared written statement into the record and made a number of submissions and allegations, principal among them being the allegation that the non-renewal of the Appellant's contract was not justified on genuine operational requirement grounds and was in fact retaliation for exercising her rights to lodge a complaint of abuse of authority against her supervisor. Mr. Wang was followed by counsel for the Respondent, who likewise made submissions which focused on the prognosis for a reduced workload.

37. After counsel had addressed him, the Judge made certain comments affirming his view that the non-renewal was genuinely motivated by the prognosis of a reduced workload and commented for the first time on the allegation of retaliation. He started out by noting that the post vacated by the Appellant had not been filled after her departure. He went on to say that he knew and understood that Ms. He considered she had been victim of unfair treatment only because she had submitted a complaint. This, he said, was "a serious allegation", but despite its serious nature he felt it "difficult to find sufficient indications for such suspicions". He then stated that retaliation "cannot be excluded", and added "that is impossible". In other words, the Judge opined that it was impossible to exclude that there may have been retaliation.

38. The Judge went on to say that the facts before the court "tend to justify the decision not to renew the contract" and the facts suggesting retaliation did not amount to "clear evidence" and in his view were "rather weak". In short, the Judge's view, based on the documentary evidence before him, was that the reason for non-renewal was genuinely based on the prognosis of a reduced workload and that alone excluded the possibility of retaliation, because the facts indicating retaliation (he did not mention which) were "weak" or insubstantial. He then asked Mr. Wang to comment again. Mr. Wang put forward an argument in which he requested the Judge to look at the database confirming that the supposed reduction in workload was not true. He set out reasons supporting his case that the rationale was an obvious fabrication. The Judge dismissed Mr. Wang's submissions.

## Considerations

39. Our jurisprudence holds that a fixed-term appointment has no expectation of renewal. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged as being unreasonable on the grounds that the Administration has not acted fairly, justly or transparently, or was motivated by bias, prejudice or improper motive against the staff member. The staff member carries the overall burden of proof to show that such factors played a role in the administrative decision.<sup>4</sup> Such a challenge invariably will give rise to difficult factual disputes. The mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence.

40. The manner in which the UNDT went about investigating the disputed facts in this case was insufficient. There is a *bona fide* and material dispute of fact between the parties about the true reason for the non-renewal of the Appellant's contract. Posed against the legitimate reasons of the Respondent to reduce staff in the TPUs are the fact that the Appellant had made a complaint, which was found to have some merit, the fact that she was given notice of dismissal on the day after her complaint was resolved, the fact that she had been employed for almost a decade, the fact that in the immediately preceding period she was subjected to the practice of monthly renewal, the fact that the budgeting for her post may have been misstated and the existence of convincing evidence that the rationale for the non-renewal may have been false.

41. We hasten to say that this Tribunal has formed no view on whether there was retaliation. There is insufficient evidence before us to make such a finding. And therein lies the difficulty we face in deciding this appeal. There has not been an adequate fact-finding exercise by the UNDT which enables us to pronounce confidently on the facts, the inferences to be drawn from them and ultimately to decide if the Appellant has established on a balance of probabilities that the non-renewal of her contract was unreasonable on grounds of the true reason being retaliation. This appeal obliges us to ask whether a conspectus of all the evidence establishes that the non-renewal was motivated by improper purpose. All we have before us are submissions, allegations and "indications" from an incomplete documentary

<sup>4</sup> *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 34, citing *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021, para. 10.

record. And submissions, allegations and indications are exactly that: submissions, allegations and indications. They are not proven facts. The proof of contested material facts, points of difference, requires evidence subjected to examination, cross-examination and re-examination, which then can be assessed or evaluated on the basis of the credibility and reliability of the witnesses, in the light of their bias, demeanour and relationship to the parties; the probabilities attending their versions as tested by contemporaneous evidence of another kind; and ultimately the inherent probabilities. Nothing resembling such a process was conducted by the UNDT in this case; which is remarkable considering the Judge's observation at the hearing that it was not possible to rule out retaliation.

42. Before any definitive finding can be made about the true reason for the non-renewal, a number of facts need to be established regarding the extent of the backlog of unchecked documents in mid-May 2014, whether it was owing to a shortage of staff at the CTPU, and if it would have been possible to eliminate the backlog by the end of June 2014 and was reasonable to assume it was possible to do so. The UNDT was required to decide if the assertions by the CTPU Chief in his letter to the Deputy Chief, LS/DCM of 27 May 2014 regarding the backlog and likely reduction of work were true or false. Also, did the non-use of Chinese as a working language of the treaty bodies result in a major reduction in the amount of Chinese language documents produced or in the number of documents to be translated into Chinese? Moreover, it needs to be established if anybody took over the work and functions of the Appellant and her colleague after their separation from service. The Administration's response to the behaviour of which the Appellant complained in her second harassment complaint lodged in February 2014 is also not sufficiently clear, nor are the reasons for the dismissal of the former Chief, CTS and its relevance, if any, to the issues of workload and contract renewal in the CTPU. Other factual issues requiring decision include whether any of the TPUs in Geneva were able to implement the 1:3 ratio of text processors to translators in Geneva and whether the Appellant's fixed-term appointment was continuously financed through the regular budget or was financed through the TAM.

43. Most of the mentioned factual questions and others were impliedly placed in issue in the "pleadings" and submissions made before the UNDT. They were placed in issue in part because, depending on their resolution, they potentially will create the basis from which an inference of retaliation may be drawn. For the most part, they have not been definitively decided. Once these facts have been determined, they, together with other relevant facts, will

form a substratum and concatenation of primary circumstantial facts. The fact-finder will then be obliged to decide two key secondary facts. Firstly, it will need to ask whether an inference can be drawn from those proven facts that the rationale for non-renewal based on the reduction in the backlog and the number of Chinese texts was a deliberately fabricated falsehood. Any such inference sought to be drawn must be consistent with all the proved facts; and furthermore the proved facts should be such that they exclude other cogent inferences from them save the one to be drawn as most probable. Secondly, having reached the dispositive question, it must be asked similarly whether a legitimate inference may be drawn from the proved facts, including the finding of fabrication, that the non-renewal was an act of retaliation.

44. It appears from the written record, the audio recording of the hearing and its Judgment that the UNDT did not engage in fact finding of this kind. Hence its determination that there was no retaliation is factually unsustainable; and given the lack of a full and proper examination of the facts it may be said to have erred procedurally. Where there has been no fair trial of the principal issue submitted to adjudication, the resultant decision inevitably will be affected.

45. The UNDT, in its adjudication of the application before it, therefore, committed an error of procedure, such as to affect the decision of the case, as contemplated in Article 2(1)(e) of the Appeals Tribunal Statute. This Tribunal has some sympathy for the demands facing the UNDT in dealing with difficult factual disputes, and accepts that sometimes a robust approach may be taken to the facts when the issues are simple, undisputed or straightforward. But an adversarial approach is usually the best way to decide material factual disputes, especially when the motives and conduct of supervisory officials are impugned. The interests of justice demand that a victim of impropriety or a falsely accused official, whatever the case may be, should be properly vindicated by a proficiently conducted trial to determine where the truth may lie. Anything less, most likely, will only add insult to injury.

46. Article 7(2)(e) and (i) of the UNDT Statute require the Rules of Procedure of the UNDT (RoPs) to include provisions concerning oral hearings and evidentiary procedure. Article 9(1) of the UNDT Statute confers upon it a discretion to order the production of documents or “such other evidence as it deems necessary”. In terms of Article 9(2), the UNDT shall decide whether the applicant or any other person is required at oral proceedings and the manner in which that should be accomplished. Normally, the oral proceedings

should be conducted in public under Article 9(3). Articles 16, 17 and 18 of the UNDT RoPs confirm that the discretion to hold an oral hearing vests in the judge, but indicate that it should normally be held following an appeal against a decision imposing a disciplinary measure. The same caution might well be observed in the more serious cases involving discontinuation of employment. Article 17(1) permits parties to call witnesses and allows for cross-examination. Importantly, it also provides that the UNDT may examine witnesses and experts called by either party and may call any other witnesses or experts it deems necessary. Besides that, Article 18(2) provides that the UNDT may order the production of evidence by either party at any time and may require any person to disclose any document or provide any information that appears to it to be necessary for a fair and expeditious disposal of the proceedings. These provisions indicate that the UNDT may act inquisitorially to ensure that the evidentiary questions presented by the pleadings are properly ventilated in any hearing held to decide an application.

47. The submissions made on behalf of the Appellant by Mr. Wang during the hearing made it plain that further evidence or information was necessary for the fair disposal of the case. He pleaded with the Judge to investigate critical information regarding the workload in order to support the argued for inferences. The UNDT did not oblige. Instead, it held on a limited factual foundation that the Appellant had not discharged her onus to prove retaliation and rejected the inference of retaliation on the narrow basis that the prognosis of a decreased workload was reasonable. Although it is correct that the Appellant bears the overall onus to prove improper motive, the UNDT's conclusion that she had failed to discharge that onus is not justified in light of its failure to determine and rule upon the contested factual issues. It may well be that the Appellant may not discharge the onus, but that can only be decided once the facts have been properly established. A finding that an onus has not been discharged cannot rest on an assessment of mere submissions and allegations. By proceeding in that fashion, the UNDT did not sufficiently try the main and decisive issue submitted for adjudication. Given the discretion vested in the UNDT by its RoPs and the implied duty to do what is necessary to fairly dispose of the case, the Dispute Tribunal committed an error in procedure, such as to affect the decision of the case.

48. The need for more evidence, and a factual determination based upon it, requires the matter to be remanded to the UNDT for fresh consideration in terms of Article 2(3) of the Statute of the Appeals Tribunal.

**Judgment**

49. The appeal is upheld and Judgment No. UNDT/2016/007 is hereby vacated and the matter is remanded to the Dispute Tribunal.

THE UNITED NATIONS APPEALS TRIBUNAL

---

Judgment No. 2016-UNAT-686

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of October 2016 in New York, United States.

*(Signed)*

*(Signed)*

*(Signed)*

Judge Murphy, Presiding

Judge Thomas-Felix

Judge Halfeld

Entered in the Register on this 20<sup>th</sup> day of December 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar