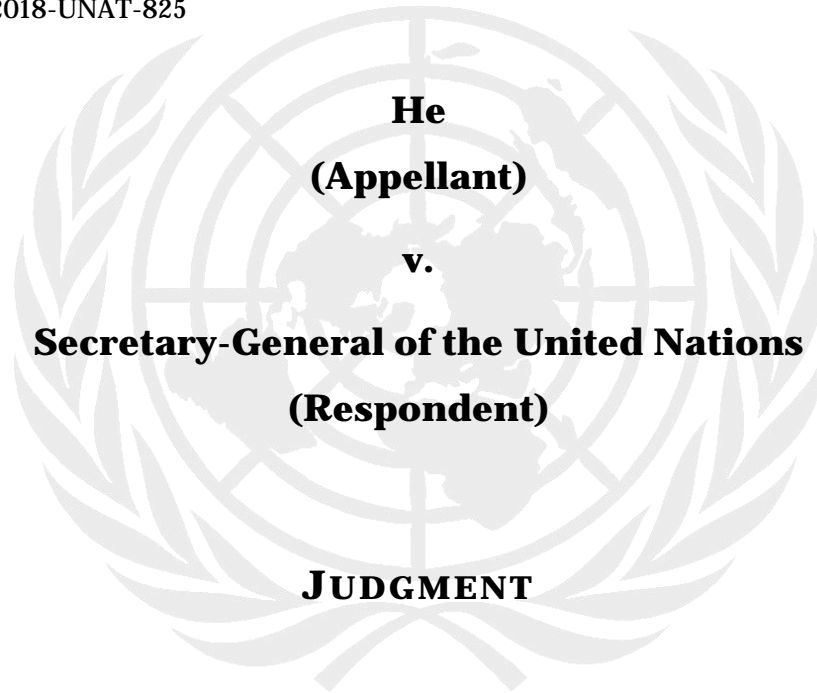




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-825



**He
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Sabine Knierim Judge Richard Lussick
Case No.:	2017-1114
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Ms. He:	Jia-Xiang Wang
Counsel for Secretary-General:	Wambui Mwangi

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/071 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 31 August 2017, in the case of *He v. Secretary-General of the United Nations*. Ms. Rui He filed her appeal on 15 September 2017, and the Secretary-General filed an answer on 8 January 2018.

Facts and Procedure

2. Ms. He began her service with the Organization as a Text Processing Clerk at the G-3 level with the Chinese Text Processing Unit (CTPU), Chinese Translation Section (CTS), Division of Conference Management (DCM), Office of the United Nations at Geneva (UNOG) in June 2005, on the basis of a short term appointment, and, subsequently, on temporary appointments. Her temporary appointment was converted into a fixed-term appointment (FTA) limited to DCM, effective 11 January 2010, and was subsequently extended for varying periods of duration from one to four months, to carry her through 31 December 2012. On 1 January 2013, Ms. He was granted a one-year FTA through 31 December 2013. Effective 1 January 2014, her FTA was extended for six months through 30 June 2014, when she was separated from service.

3. At a meeting of the Chiefs, DCM, held on 6 November 2012, it was stressed that Language Services (LS) Chiefs should stop recruiting temporary staff who were dictating their own texts, and that preference should be given to temporary staff who were able to type their own texts and corrections. It was further stressed that the LS Chiefs should increase the volume of work sent to the contractual work unit by 10 per cent. They were further encouraged to review the staffing tables of text processing units (TPUs), within the framework of the 2014-2015 budget preparation.

4. In June 2012, two temporary posts of Chinese Text Processing Clerks were advertised at the G-3 level, and Ms. He applied for them. However, the vacancy announcement was ultimately cancelled in December 2012. Ms. He subsequently filed a request for management evaluation of the decision to cancel the G-3 vacancy announcements. After the Management Evaluation Unit (MEU) informed her that the decision to cancel the G-3 vacancies had been upheld, Ms. He did not pursue the matter.

5. By e-mail of 7 January 2013, the Assistant Secretary-General, Department for General Assembly and Conference Management (DGACM) at Headquarters, of which DCM/UNOG is part, advised the DCM Director 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. On 6 March 2013, Ms. He filed a complaint of harassment and abuse of authority against her supervisor, the Chief, CTPU.

7. By e-mail of 30 December 2013, the LS Chief, DCM, UNOG, noted that LS would begin the 2014-2015 biennium “with further pressure to use contractual translation and text-processing (...) and 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 current ratio within LS was closer to 2:3, “it was clear that LS [had to] take action now if it [was] to achieve the desired ratio through attrition, retraining and redeployment”. 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”. In closing, the LS Chief encouraged the TPU 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”.

8. By e-mail also dated 30 December 2013, in response to the earlier e-mail from the LS Chief, the CTPU Chief proposed to extend Ms. He’s appointment and that of another CTPU staff member (also at the G-3 level) for six months through 30 June 2014 in light of the 2014-2015 budget for DGACM and pending the outcome of the workload evaluation in the TPUs. The LS Chief approved this request on the same day. Accordingly, Ms. He’s appointment was extended to 30 June 2014.

9. On 9 February 2014, Ms. He, together with two of her colleagues from the CTPU, filed a joint complaint of harassment, retaliation and abuse of authority against the CTPU Chief under Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). With respect to Ms. He, the complaint stressed, *inter alia*, that the CTPU Chief had always treated her as a temporary staff, and that, on the individual daily report dated 16 October 2013, her total non-productive time was six hours,

but the CTPU Chief had marked “no work available”. She stressed that only she and one other staff member had received such marks. She also referred to the cancellation of the temporary G-3 posts in December 2012, the complaints she and the other staff member had filed, and the retaliation she had subsequently experienced.

11. On 9 April 2014, the General Assembly decided, *inter alia*, “to allocate a maximum of three official working languages for the work of the human rights treaty bodies”.

12. On 23 May 2014, the Monitoring, Evaluation, Risk Management, and Statistical Verification Section (MERS), Central Planning and Coordination Service, Geneva, issued a draft report on the review of the working practices in the TPUs at UNOG. The final report was issued in August 2014.

13. By memorandum of 27 May 2014, the Acting Director-General, UNOG, informed Ms. He of the decision not to investigate the allegations she had made in February 2014.

14. By e-mail of 27 May 2014, the CTPU Chief advised the LS Deputy Chief that the appointments of Ms. He and another staff member at the CTPU were expiring on 30 June 2014. He stressed that since some staff members in his unit had complained against him, and while he strongly objected to the allegations made, he was not in a position to make recommendations which may affect them. He noted, however, the following:

However, as the line manager, I have to report to you the current situation of the CTPU, (1) all previous document backlog has been cleared; (2) the backlog of bi-text alignment will be completed by mid of June, (3) the number of words forecast is lower than in 2013; (4) the recent decision of the [General Assembly] concern [Human Rights] treaty bodies’ documentation, the workload of the CTPU will be reduced as from January 2015.

15. By e-mail of the same day, the LS Chief, referring to the above-referenced e-mail from the CTPU Chief, informed a Senior Human Resources Officer, Human Resources Management Service (HRMS), UNOG, that he had looked at the figures, which he noted supported the assertions made by the CTPU Chief. More specifically, the LS Chief stressed the following:

The completion of the work on the CTPU backlog of bitext alignment will certainly cause a significant drop in the workload. MERS has estimated that the CTPU has used 336 net staff days on the bitext alignment legacy in the past year. This alone has accounted for the work of 1.8 staff members according to MERS calculations. In addition, the workload in the CTPU is forecast to decrease by 7% in 2014 as compared with 2013. You may by now

be aware of the likely impact of the recent decision of the General Assembly to allocate a maximum of three official working languages for the work of the human rights treaty bodies. This is expected to result in a substantial reduction of up to one quarter of the workload of the CTPU as from January 2015, since it is extremely unlikely that Chinese will be one of the working languages of those bodies.

I would also mention that in all four scenarios in the “Review of working practices in the text-processing units at UNOG” (...), the number of TPU staff needed to complete the 2014 forecast is lower than the number of staff used in 2013. This review is the outcome of the audit announced by the Chief of Service in his message of 30 December, highlighting the steps to be taken by LS in light of a new DGACM budget for 2014-2015.

Taking all these things into consideration, and given [the CTPU Chief's] understandable reluctance to make a recommendation himself, I would recommend, with the agreement of the Chief of the Languages Service, that the fixed-term contracts of (...) and [Ms. He], which expire on 30 June 2014, should not be renewed.

16. On 28 May 2014, Ms. He was informed that her FTA would not be renewed beyond 30 June 2014, due to “the reduction of work within the Chinese Text Processing Unit and the on-going workforce planning done by the Language Services”.

17. Ms. He appealed. On 28 January 2016, the UNDT rendered Judgment No. UNDT/2016/007, dismissing Ms. He's application. 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 the 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 the CTPU and of the other TPUs covering different periods. The UNDT also found that Ms. He had failed to provide sufficient evidence to support her alleged expectancy for contract renewal, and noted in that regard that she was aware of the precarious nature of her contractual situation as her post was financed through the budget for temporary assistance for meetings (TAM).

18. Ms. He appealed Judgment No. UNDT/2016/007 to the Appeals Tribunal. In Judgment No. 2016-UNAT-686 dated 28 October 2016, the Appeals Tribunal remanded the case to the UNDT for fresh consideration. In the view of the Appeals Tribunal, the UNDT did not give much attention or consideration to Ms. He's allegations that the reasons that the Administration had provided for the non-renewal decision were a falsehood and a fabrication aimed at justifying retaliation against her on account of her complaints. Instead, the UNDT 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. Furthermore, the Appeals Tribunal found the manner in which the Dispute Tribunal had gone about investigating the disputed facts insufficient, the documentary record incomplete, certain factual findings regarding, *inter alia*, the extent of the backlog of the Chinese-English bitext alignment, the likely reduction of work as a result of the 1:3 ratio of text processors to translators in Geneva, and the source of funding for Ms. He's post (regular budget or TAM) inadequate, and its determination that there was no retaliation factually unsustainable.

19. After the remand, the Dispute Tribunal held a case management discussion on 13 April 2017 and a hearing from 7 to 9 June 2017, during which appeared Ms. He, her husband, the Chief and Deputy Chief, CTPU, the former Executive Officer, DCM and the former LS Chief.

20. On 31 August 2017, the Dispute Tribunal issued Judgment No. UNDT/2017/071. In the Judgment, the Dispute Tribunal again rejected Ms. He's application, holding that Ms. He had "failed to meet the burden of proof that the [non-renewal] decision was based [on] ulterior motives",¹ and that the non-renewal decision "was not *ultra vires*",² nor was it the result of bias.³ The UNDT assessed the reliability, credibility and probative value of the testimonies of the witnesses and examined the evidence regarding the CTPU workload, the impact of the reform of the treaty bodies on the CTPU, the backlog of the Chinese-English bitext alignment and the expectations for its elimination, the implementation of the 1:3 ratio, the source of funding for Ms. He's post and Ms. He's ST/SGB/2008/5 complaints.

21. Addressing the concerns of the Appeals Tribunal, the Dispute Tribunal found:⁴

... it was not unreasonable to conclude, at the time of the contested decision, that the reform of the human rights treaty bodies would reduce the workload of the CTPU: even if it may not have been possible to exactly quantify the impact of the reform on the workload of the CTPU, it was reasonable to conclude that the fact that as a result of the reform, many documents would no longer be systematically translated into Chinese, at least in total, and that a word limitation would apply, would lead to a considerable reduction of

¹ Impugned Judgment, para. 61.

² *Ibid.*, para. 64.

³ *Ibid.*, para. 55.

⁴ *Ibid.*, paras. 44 and 46.

workload at the CTPU (...) [and] the Administration's reliance on the completion of the backlog of bitext alignment of documents from 2010 and 2014 by mid-2014, in taking the non-renewal decision, was reasonable.

In respect of the issue of the source of funding for Ms. He's post, the Dispute Tribunal found that Ms. He's post was financed through established posts between September 2011 and December 2013 and only through TAM for the last six months of her appointment between 1 January 2014 and 30 June 2014, contrary to the suggestion that her appointment had been renewed on a monthly basis.

22. As noted above, Ms. He appealed Judgment No. UNDT/2017/071 to the Appeals Tribunal on 15 September 2017, and the Secretary-General filed an answer on 8 January 2018. On 16 January 2018, Ms. He filed a motion seeking "permission to make comments on the Respondent's answer". The Secretary-General objected to the motion, stating that the comments attached to the motion "merely reiterate or supplement the arguments she has already made in her Appeal" and Ms. He has not established any exceptional circumstances justifying the granting of her motion.

Submissions

Ms. He's Appeal

23. The Dispute Tribunal committed substantial errors that led it to reach a manifestly unreasonable decision. Contrary to the UNDT finding, the workload of the TPUs at UNOG was steadily increasing. Specifically, the CTPU's workload grew by 28 per cent in 2015, far exceeding that of 2014. While dictation had been reduced, it was still taking place even after 2014. If the CTPU were to operate in accordance with the established procedures while ensuring document quality, its workload "could only increase and never decrease".

24. As Ms. He has shown through her data, no reform of the treaty bodies could possibly have led to a 25 per cent reduction in the CTPU workload. To the contrary, subsequent to the reform of the treaty bodies, the CTPU workload actually soared by 28 per cent. It is not clear why the UNDT viewed the information from the Organization's document processing system database as "entirely unreliable". The UNDT showed favoritism towards the CTPU Chief and management. In fact, no initiative was taken to tackle the backlog of the bitext documents in the database, let

alone any effort to finish by mid-June 2014. That was purely contrived as an excuse. Likewise, the 1:3 ratio was a pretext.

25. Ms. He's appointment was funded from the regular budget from January 2011 to December 2012. However, the source of funding was changed to TAM beginning 1 January 2013, without her knowledge.

26. Ms. He experienced a series of retaliatory actions by the CTPU Chief, including the manner in which her appointment was extended, her performance was evaluated, and the malicious remark of "no work available" entered in her work log.

27. The fact that the CTPU did not recruit anyone else for quite some time after Ms. He had left the service reflected the concern of the CTPU Chief and management that to hire someone else while her appeal was on-going would lay bare the falsehood about there being insufficient workload.

28. The appointments of numerous employees in the TPUs including the CTPU were renewed beyond 30 June 2014. This fact proves that the announcement by the LS Chief that the service of some TPU staff would be extended only through 30 June 2014 was aimed only at Ms. He and another colleague of hers at the CTPU. They were singled out for having filed complaints of abuse of authority. Their action had infuriated those in charge of the Administration, and the CTPU Chief, the former LS Chief and MERS worked together to find a rationale for discontinuing her service with UNOG.

29. Ms. He requests that the Appeals Tribunal vacate the impugned Judgment, investigate and verify the facts that she has laid out, expose retaliatory acts, declare the non-renewal decision null and void, and order that her FTA be renewed or that she be given priority consideration for any future vacancy in the CTPU. Ms. He also requests that the Appeals Tribunal award her unspecified compensation for "monetary and psychological damages suffered owing to the non-renewal of her appointment".

The Secretary-General's Answer

30. The Dispute Tribunal correctly found that the decision not to renew Ms. He's FTA was reasonable and was not motivated by improper motive, based on a comprehensive examination of the evidence related to the reform of the human rights treaty bodies, the projected

implementation of the backlog of the bitext alignment, the implementation of the 1:3 ratio, the MERS report, the staffing tables, and DCM's budget proposal for 2014-2015. The UNDT finding is supported by corroborating and contemporaneous facts. The record before the Dispute Tribunal showed that the number of staff in all TPUs had decreased between 2014 and 2016.

31. Ms. He has failed to establish any error by the UNDT warranting a reversal of the impugned Judgment. Her numerous assertions are legally unsustainable. The forecasted reduction in the CTPU workload was projected as early as November 2012. Even if it did not come to pass, it does not demonstrate that the Administration, at the time, had fabricated the figures or the UNDT erred in its assessment of the facts. Ms. He has not presented any evidence that the 1:3 ratio was implemented to justify the decision not to extend her FTA. Regarding the backlog of the bitext alignment, even if it had not been fully implemented by the end of June 2014, it still fell within the bounds of the Administration's discretionary authority to decide, in May 2014, whether the existence of such backlog would justify Ms. He's retention beyond June 2014, especially considering the forecasted reduction in the CTPU workload.

32. Ms. He's post was funded under the regular budget from January 2010 through December 2013, and the funding was changed to TAM only upon the six-month extension of her FTA from 1 January 2014 to 30 June 2014.

33. As correctly found by the UNDT, Ms. He failed to provide evidence to substantiate any of her claims of improper motivation in the taking of the non-renewal decision. Her assertions, which she reiterates on appeal, are unsubstantiated and should therefore be rejected.

34. The Secretary-General requests that the Appeals Tribunal reject the appeal in its entirety and affirm the impugned Judgment.

Considerations

Motion for leave to comment on the answer

35. Under the Appeals Tribunal Statute, the Appellant is not entitled to file a response to the answer to her appeal. However, Article 31(1) of the Appeals Tribunal Rules of Procedure and Section II.A.3 of our Practice Direction No. 1 provide that we may allow leave to file additional pleadings after the filing of the answer if there are exceptional circumstances for

doing so. In the present case, however, the matters that Ms. He seeks to address in her comments are essentially a repetition of, or supplementary to, the submissions that she has already made in her appeal. As it does not establish that there are exceptional circumstances justifying the need to file a reply to the Secretary-General's answer, Ms. He's motion for leave to comment on the answer is rejected.

Merits

36. By the afore-mentioned Judgment, the Appeals Tribunal instructed the UNDT to address a number of factual issues, potentially related to the true reason for the non-renewal,⁵

... 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 [Ms. He] and her colleague after their separation from service. The Administration's response to the behaviour of which [Ms. He] 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 [Ms. He's] fixed-term appointment was continuously financed through the regular budget or was financed through the TAM.

37. The UNDT rejected Ms. He's application contesting the decision not to renew her fixed-term appointment, and she appeals that decision on the grounds that the UNDT committed substantive errors that led it to reach a manifestly unreasonable decision.

38. Ms. He raises a number of arguments, which need to be dealt with.

⁵ *He v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-686, para. 42.

39. Before embarking on a consideration of the specific arguments made on appeal in this case, it is apposite to reprise the jurisprudence of the Appeals Tribunal as to how the UNDT should exercise its powers of judicial review in relation to matters of appointments and promotions.

40. It is a well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.⁶

41. Even the renewal of the appointment of a staff member on successive appointments does not, in and of itself, give grounds for an expectancy of renewal, unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended. The jurisprudence requires this promise at least to be in writing.⁷

42. As provided in Staff Regulation 4.5(c) and Staff Rule 4.13(c), respectively, “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”, and “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14(b)”.

43. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper

⁶ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25, citing *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 33; *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216, para. 3; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, paras. 39-42; *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061, para. 13.

⁷ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25, citing *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

motive.⁸ The staff member has the burden of proving such factors played a role in the administrative decision.⁹

44. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.¹⁰

45. As stated in *Obdeijn*:¹¹

... An administrative decision not to renew [a fixed-term appointment] must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal. But that does not mean that the Administration is not required to disclose the reasons not to renew the appointment.

46. Rather, the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunals' ability to judicially review the validity of the Administration's decision.¹²

47. Ms. He submits that the UNDT ignored the facts and reached a completely erroneous conclusion in relation to the reduction of the CTPU workload. She contends that the reform of the treaty bodies did not actually lead to a reduction in the CTPU workload, and that the

⁸ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 27, citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 33; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, paras. 45-46.

⁹ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 27, citing *Kacan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-426, para. 20; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 33; *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

¹⁰ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 28, citing *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40 and cites therein.

¹¹ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 32.

¹² *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 30, citing *Ncube v. Secretary General of the United Nations*, Judgment No. 2017-UNAT-721, para. 17 and cite therein.

text-processing productivity per staff member per day in Geneva and the overall workload for CTPU has increased. She maintains that the Chief, CTPU, the Deputy Chief, LS, and the author of the MERS report did not have the “slightest understanding” of the types or the proportion of Geneva treaty-body documents that were produced in Chinese, or of the share of Geneva documents in Chinese that treaty-body documents represented overall, and they therefore “fabricated the implausible idea” that the reform of the treaty bodies would lead to a 25 per cent reduction in the CTPU workload. Further, Ms. He claims that no TPU in UNOG has achieved the 1:3 ratio since 2012, and that since no other TPU has used that ratio to justify the non-renewal of a staff member, the ratio was used as a pretext for the non-renewal decision.

48. We do not agree. The UNDT properly reviewed the contested decision in accordance with the applicable law and addressed the concerns identified by the Appeals Tribunal by establishing the critical facts as instructed by this Tribunal. It was cognizant of the Appeals Tribunal’s relevant jurisprudence governing the non-renewal of a FTA and applied correctly the right test that the exercise of discretion by the Administration had to pass, without entering into a detailed examination of the actual figures provided in the e-mails of 27 May 2014, or substituting its own assessment for that of the Administration.

49. Specifically, the UNDT noted that any *post facto* assessment of these matters was only relevant to the extent that it was able to demonstrate that on the basis of the information available at the time, no reasonable decision-maker would have made the non-renewal decision. It considered “whether from the point of view of a fair-minded objective observer, with the information available at the time of making the decision, the forecast made by the Chief, CTPU, and the Deputy Chief, LS, in their emails of 27 May [2014], was so far away from the reality that it made the non-renewal decision unreasonable”.¹³

50. Accordingly, the UNDT examined the evidence regarding the reduction in the CTPU workload, the backlog of documents and expectations regarding its completion, the implementation of the 1:3 ratio, the financing of Ms. He’s post, the recruitment of someone to replace Ms. He, and the inferences that could be drawn from the Appellant’s complaints pursuant to ST/SGB/2008/5. In this regard, the UNDT assessed the comprehensive documentary record before it and heard extensive witness evidence. Then, the UNDT

¹³ Impugned Judgment, para. 32.

considered whether, based on the factual evidence regarding the rationale for the non-renewal decision, inferences could be drawn that demonstrated a deliberately fabricated falsehood on the part of the Administration and whether the non-renewal decision was an act of retaliation.

51. In the first place, the UNDT noted:¹⁴

... that the basis for non-renewal of [Ms. He's] FTA contained in the memorandum of 28 May 2014 from the Senior Human Resources Officer, HRMS, UNOG, referred to "the reduction of work within the Chinese Text Processing Unit and the on-going workforce planning done by the Language Service". It was based on assessments made and set out in the emails of 27 May 2014 from the Chief, CTPU, and the Deputy Chief, LS, and which were endorsed by the former Chief, LS, and the Executive Officer, DCM.

... The Chief, CTPU, in his email of 27 May 2014 to the Deputy Chief, LS, had stressed that: "(1) all previous document backlog has been cleared; (2) the backlog of bitext alignment will be completed by mid of June; (3) the number of words forecast is lower than in 2013; (4) the recent decision of the [General Assembly] concern [Human Rights] treaty bodies' documentation, the workload of the CTPU will be reduced as from January 2015".

... The Deputy Chief, LS, in his email of the same day to the Senior Human Resources Manager, HRMS, UNOG, on his part, noted that:

The completion of the work on the CTPU backlog of bitext alignment will certainly cause a significant drop in the workload. MERS has estimated that the CTPU has used 336 net staff days on the bitext alignment legacy in the past year. This alone has accounted for the work of 1.8 staff members according to MERS calculations. In addition, the workload in the CTPU is forecast to decrease by 7% in 2014 as compared with 2013. You may by now be aware of the likely impact of the recent decision of the General Assembly to allocate a maximum of three official working languages for the work of the human rights treaty bodies. This is expected to result in a substantial reduction of up to one quarter of the workload of the CTPU as from January 2015, since it is extremely unlikely that Chinese will be one of the working languages of those bodies.

¹⁴ *Ibid.*, paras. 33-35.

I would also mention that in all four scenarios considered in the "Review of working practices in the text-processing units at UNOG" (which was presented to the TPU chiefs last Friday and to translation chiefs this week), the number of TPU staff needed to complete the 2014 forecast is lower than the number of staff used in 2013. This review is the outcome of the audit announced by the Chief of Service in his message of 30 December, highlighting the steps to be taken by LS in light of a new DGACM budget for 2014- 2015.

52. Subsequently, the UNDT, in order to understand the working situation and the workload at the CTPU at the time of the contested decision, and the impact of changing working patterns on the workload in 2014, heard extensive evidence from several witnesses, under oath, namely Ms. He, Ms. He's husband, the Deputy Chief, CTPU, the Chief, CTPU, the former Executive Officer, DCM, and the former Chief, LS, DCM.

53. The UNDT embarked on an analytical fact-finding exercise by thoroughly examining the witnesses and assessing their testimonies on the basis of credibility and reliability.

54. In this regard, the UNDT found, *inter alia*, that Ms. He¹⁵

"was not entirely forthcoming and did not, for example, provide much insight into her relationship with the Chief, CTPU, nor the treatment she allegedly suffered from him. Overall, her testimony was of not much assistance to the [Dispute] Tribunal for its assessment of the reasonableness of the projected forecast, on the one hand, and the allegation of *ulterior motives* on behalf of the Chief, CTPU, against [Ms. He], on the other hand"; "that while [Ms. He's] husband made best efforts to support his wife's case, and to provide relevant information to the [Dispute] Tribunal, he admitted that the data he had generated to establish the backlog in bitext alignment was not entirely reliable. In cross[-]examination he also noted that he never worked in the CTPU, nor was he invited to attend the meetings of and with the Chiefs, TPUs, or any discussions they had on bitext alignment or any other matter relevant to this matter. The [Dispute] Tribunal understood that this witness could not be familiar, in detail, with the actual and projected workload at the CTPU, and the reasonableness, or otherwise, of related management decisions". "The evidence of the Deputy Chief, CTPU, did not contest that the CTPU staffing had been considerably reduced since 2014, and that the work was accomplished by six staff members at the moment, compared with fourteen staff members in 2014. However, she expressed her view that as a consequence of the staff reduction, it was difficult to guarantee the quality of the work accomplished at the CTPU".

¹⁵ *Ibid.*, paras. 37-39.

55. Regarding the evidence heard from the Chief, CTPU, the UNDT¹⁶

... noted, with concern, the statement by the Chief, CTPU, that already in 2013, there had not been enough work to do and that some staff members were not working, for lack of workload. He stressed that this was a matter that had been discussed with other Chiefs of TPUs, who had similar problems, and that it appeared absurd to him that the same work was repeated several times on the same documents, just to keep staff members busy. He stressed that prior to his email of May 2014, he had already highlighted to management that he did not have enough work for all the staff members in his unit. In his evidence, the Chief, CTPU, repeatedly, quite credibly and with some expressed despair, stated that there was not enough work and that this made his management of the unit difficult. He described the day-to-day work in the unit, in which he was not able to give enough work to everyone. He also noted that in order to do effective bitext alignment, staff needed a certain level of English. That was also confirmed by the then Chief, LS. He further described that he made a genuine assessment of the workforce needed in 2014, particularly on the basis of the progress made with respect to the bitext alignment, and the reform of the Human Rights treaty bodies, which would lead to a further decrease of work. He expressed his conviction that as a manager, he was responsible to the Secretary-General, and had to ensure that the work is being accomplished with high efficiency, and not to waste the Organization's resources. He stated in cross-examination that the reason behind the non-renewal of [Ms. He's] FTA was the fact that there was not enough work available, and that it was unrelated to the complaints she had made against him. The [Dispute] Tribunal found the Chief, CTPU, was a credible and reliable witness.

56. The evidence of the Chief, CTPU was confirmed by that of the former Executive Officer, DCM, and the former Chief, LS, DCM. Both confirmed that it was obvious at the time of the contested decision that the work of the TPUs was changing, and that staff members of all TPUs had been encouraged to undertake trainings to change career paths, and to look for other opportunities, such as in information technology or human resources. Some staff members of TPUs were indeed transferred to other services in 2014, which was unfortunately not a possibility for Ms. He, in light of the limitations of her contract to DCM, her limited languages skills and the fact that she had not passed the Administrative Services Assessment Test (ASAT) in English or French, that is, either of the working languages.¹⁷ The latter, especially, stated in his evidence that¹⁸

¹⁶ *Ibid.*, para. 40.

¹⁷ *Ibid.*, para. 41.

¹⁸ *Ibid.*, para. 43.

in light of the upcoming technological changes, the introduction of the new software, and also the treaty body reform, he found it was reasonable to assume that the workload of the CTPU would be reduced. He expressed his view that the email from the Deputy Chief, LS, confirmed what he already knew, in light of his 30 years' experience in that area, and that the decision not to renew [Ms. He's] FTA was an informed and justified one. He also noted that Languages Service was under pressure to comply with the ratio of one text processing clerk for three translators, and that when contracts in the TPUs were up for renewal, management gave consideration to reassigning staff, if they had the necessary skills.

57. Finally, the UNDT, having regard to the evidence heard, determined and ruled upon the contested factual issues coming to the conclusion that¹⁹

... it was not unreasonable to conclude, at the time of the contested decision, that the reform of the human rights treaty bodies would reduce the workload of the CTPU: even if it may not have been possible to exactly quantify the impact of the reform on the workload of the CTPU, it was reasonable to conclude that the fact that as a result of the reform, many documents would no longer be systematically translated into Chinese, at least in total, and that a word limitation would apply, would lead to a considerable reduction of workload at the CTPU.

58. Further, in terms of the bitext alignment, the UNDT noted that²⁰

... [Ms. He] submitted long lists from the eRef tool to calculate the total number of documents in document storage for Geneva from 2000 to May 2014, which, she claimed, represents the backlog requiring bi-text alignment. However, at the hearing, it became apparent that the eRef and the data generated from it was entirely unreliable and not able to provide statistics on what documents had been aligned or when. Further, the [Dispute] Tribunal understood that the legacy bitext were old documents, which needed to provide a large enough 'translation memory' to ensure that eLuna [Computer Assisted Translation (CAT)] tool, which is based on a mathematical model counting numbers of occurrences of certain translations, works properly. Finally, the Administration clarified that it never claimed that there would be no further bitext alignment, and that what was meant by elimination of backlog was to create that large enough translation memory, amongst 2010 to 2014 documents, to make the eLuna work.

¹⁹ *Ibid.*, para. 44.

²⁰ *Ibid.*, para. 45.

59. We find no reason to differ from that conclusion. The Dispute Tribunal has broad discretion under Article 18(1) of its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here. This Tribunal is mindful that the Judge hearing the case has an appreciation of all the issues for determination and the evidence before it.²¹ We are satisfied that the UNDT conclusion is consistent with the evidence. Ms. He has not put forward any persuasive grounds to warrant interference by this Tribunal.

60. We also find that Ms. He has not established any error in the UNDT determination, in terms of her argument that she was placed on TAM as a result of the decision to cancel the G-3 vacancies in December 2012, that the rationale behind the Chief, CTPU's proposal to cancel the vacancies for the two G-3 posts was to efficiently use the Organization's resources, which the first instance Tribunal held to appear reasonable and sound management and a proper exercise of the Administration's discretion.

61. We hold the same view with respect to the Dispute Tribunal's further findings that from the chronology of appointment renewals it transpired that Ms. He had received a FTA of one year from 1 January 2013 to 31 December 2013, and one of six months on 1 January 2014, and her appointment had thus not been renewed on a monthly basis in retaliation for her having submitted complaints in March 2013 and February 2014, contrary to the assertions made by her. Additionally, the evidence on record shows, as correctly found by the UNDT, that no one was recruited to replace Ms. He, and that while in June 2014 the CTPU had fourteen staff members, in December 2014 it only had eleven. As of the date of the UNDT Judgment, the CTPU still had eleven established posts, but only six of them were encumbered by staff. Nevertheless, the work at the CTPU was completely accomplished. Having regard to all of the foregoing, this Tribunal shares the Dispute Tribunal's view that, in light of the further reduction in workload, "it seems coherent that for the 2018-19 budget, it is proposed that two of the currently vacant regular posts be abolished", and that the "contested decision was in no way unreasonable. It was made in order to adjust to a changing working environment in which the work of a Text processing clerk was becoming more and more

²¹ *Kacan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-582, para. 25, citing *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35 and cite therein.

obsolete. The decision was reasonable, and a proper exercise of discretion, at a time where the United Nations often face criticism of wasting of resources, and managers are asked to ‘achieve more with less’.²² Therefore, we reject the arguments advanced by Ms. He that the Administration “went for quite some time without recruiting anyone else (...) [which] (...) reflects the concern of the CTPU Chief and management that, were someone to be hired while the present case was ongoing, the falsehood about there being insufficient workload would fall apart on its own”.

62. Finally, the Appeals Tribunal finds no error in the UNDT finding that Ms. He failed to establish that the decision not to renew her FTA was tainted by improper motives and discriminatory, resulting from bias and *animus*, based on an ongoing conflict between her and the Chief, CTPU. Rather, such a decision, as correctly determined by the UNDT, was a legitimate exercise of the Administration’s discretion, based on the operational realities faced by the CTPU, and was justified in view of the reduction of the work at the CTPU as of mid-2014, which was such that it was not unreasonable or inappropriate to reduce its level of staffing at that time and render Ms. He’s services unnecessary.

63. The UNDT addressed in detail each of the parameters of the alleged ulterior motives and found them unsound.²³ It examined all of the critical facts, including the fact that Ms. He and her colleague, whose appointment was equally not extended, were the only G-3 Text Processing staff members in the CTPU, with a FTA limited to DCM, the issues relating mainly to the assignment of work or performance evaluation by the Chief, CTPU, the fact that Ms. He had many FTAs of a short duration, the fact that staff from the other TPUs were (temporarily) released from the TPUs in June 2014 “in order to open to them new career possibilities”, and generally, staff from the TPUs was asked to try to find other positions. The Dispute Tribunal came to the conclusion that Ms. He failed to meet the burden of proof that the decision was based on ulterior motives.

64. We find that the evidence supports that finding. The comprehensive record and extensive witness evidence, as established by the UNDT, demonstrate that the non-renewal decision was objectively based on the decreasing workload and the reducing staffing projections at the CTPU as of mid-2014. As rightly submitted by the Secretary-General, no inference can be drawn from the proven facts that the rationale for the

²² Impugned Judgment, paras. 50-51.

²³ *Ibid.*, paras. 56-63.

contested non-renewal based on the reduction in the backlog and the number of Chinese texts was a deliberately fabricated falsehood, or that it was an act of retaliation. Consequently, this Tribunal is satisfied with the detailed analysis of the totality of the evidence by the UNDT and agrees with its well-reasoned conclusion reached.

65. Accordingly, the appeal fails.

Judgment

66. The appeal is dismissed and Judgment No. UNDT/2017/071 is hereby affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Lussick

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar