



Judgment No. 2016-UNAT-686



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

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.

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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

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 h9(k)-.J15.9230.1ca.3(e c86 -1.8l3e wa)-

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.

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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.⁴ 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.

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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

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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 ob

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

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

(Signed)