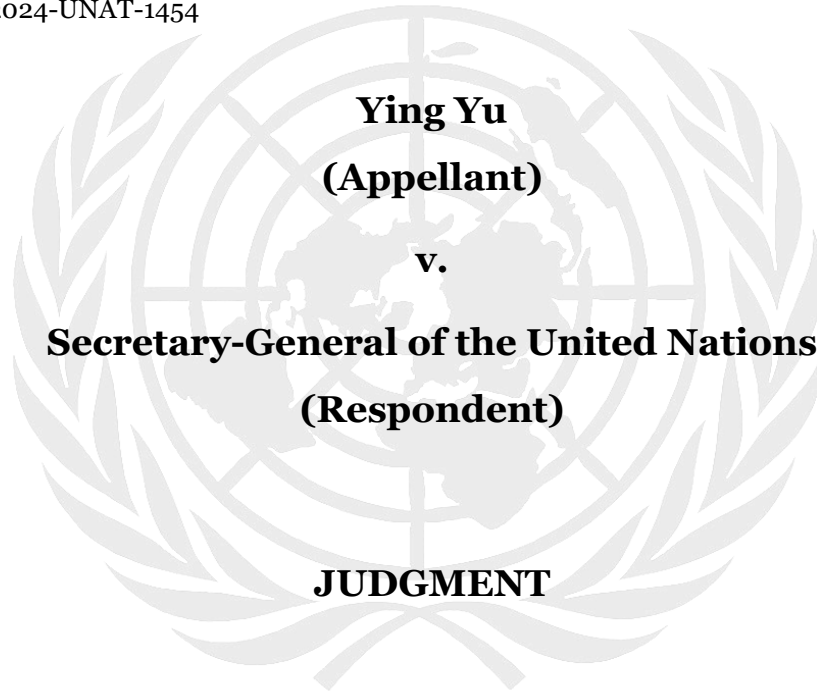




UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1454



Ying Yu
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Gao Xiaoli, Presiding Judge Katharine Mary Savage Judge Abdelmohsen Sheha
Case No.:	2023-1826
Date of Decision:	28 June 2024
Date of Publication:	25 July 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Amanda Stoltz

JUDGE GAO XIAOLI, PRESIDING.

1. Ms. Ying Yu (Ms. Yu), a former P-4 staff member on a temporary appointment with the United Nations Conference on Trade and Development (UNCTAD), has filed an appeal of Judgment No. UNDT/2023/033 (the impugned Judgment)¹ to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal), in which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that her application was not receivable *ratione temporis*. In her application before the UNDT, Ms. Yu had contested UNCTAD's decision not to reappoint her.
2. The UNDT also struck from the record materials containing privileged and confidential information regarding Ms. Yu's engagement with the Office of the Ombudsman (Ombudsman) and the outcome of those discussions.
3. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

4. Ms. Yu was a former P-4 Legal Officer on a temporary appointment at UNCTAD in Geneva. On 23 August 2022, Ms. Yu's temporary appointment expired, resulting in her separation from the Organization.
5. On 6 October 2022, the Head of the Competition and Consumer Policies Branch at UNCTAD informed Ms. Yu that the Organization was still awaiting the final disbursement from a donor to proceed with planned activities and temporary appointments. Consequently, the available funds were insufficient to support her reappointment under a temporary appointment.
6. On 19 October 2022, Ms. Yu requested management evaluation of what she characterized as a "non-renewal decision".
7. By a letter dated 2 December 2022, Ms. Yu was notified of the outcome of her request for management evaluation, which upheld the contested decision. In the e-mail, Ms. Yu was asked to "kindly acknowledge receipt of this email".

¹ *Yu v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/033 (23 May 2023).

Procedure before the Dispute Tribunal

8. On 3 March 2023, Ms. Yu filed an application with the UNDT, contesting UNCTAD's "[n]on-reappointment of temporary contract after mandatory separation, and withholding fix[ed]-term appoint[ment] following selection without giving any reason for doing so".

9. On 18 April 2023, the Secretary-General filed a motion to have the issue of receivability determined as a preliminary matter and a motion to strike from the record confidential materials of discussions with the Ombudsman.

10. On 19 April 2023, the Dispute Tribunal requested Ms. Yu to comment, *inter alia*, on the receivability issue raised by the Secretary-General, providing evidence of the date and time she received the outcome of her 19 October 2022 management evaluation request.

11. On 25 April 2023, Ms. Yu submitted her comments as requested.

12. On 27 April 2023, the Dispute Tribunal instructed the Secretary-General to file his observations on Ms. Yu's 25 April 2023 comments, which he did on 1 May 2023.

The impugned Judgment

13. The UNDT found that the evidence on record showed that Ms. Yu received the management evaluation outcome on Friday, 2 December 2022, at 7:42 p.m. (Geneva time) and filed her application on Friday, 3 March 2023, at 12:58 a.m. (Geneva time), one day late according to the 90-day time limit set out in Article 8(1)(d)(i)(a) of the UNDT Statute and Article 7(1)(a) of the UNDT Rules of Procedure (UNDT Rules).²

14. At the time that she filed her application, Ms. Yu was in London, and in that time zone, she had filed on 2 March 2023 at 11:57 pm (e.g., 3 minutes before the deadline). However, the UNDT highlighted that the statutory time limits were calculated based on the time zone of the Tribunal seat which had geographical jurisdiction over the contested decision, not according to the location of the Applicant or the Respondent. Therefore, the UNDT concluded that the application was not receivable *ratione temporis*.³

² Impugned Judgment, paras. 12-13.

³ *Ibid.*, paras. 16-18.

15. The UNDT further concluded that, according to Article 15(7) of the UNDT Rules, Ms. Yu's references to her discussions with the Ombudsman and the outcome documents were to be struck from the record.⁴

Procedure before the Appeals Tribunal

16. On 22 July 2023, Ms. Yu filed an appeal against the impugned Judgment with the Appeals Tribunal, to which the Secretary-General responded on 25 September 2023.

Submissions

Ms. Yu's Appeal

17. Ms. Yu requests that the Appeals Tribunal:

- 1) Set aside the impugned Judgment in its entirety.
- 2) Repeal the decision allowing the Secretary-General's motion to exclude confidential and privileged materials related to discussions with the Ombudsman from the record.
- 3) Acknowledge the receivability of Ms. Yu's application to the UNDT, taking into account the mediation process.
- 4) Provide unequivocal guidance on the interpretation of the terms "receipt" and "as appropriate" as specified in Article 7(1)(a) of the UNDT Rules.
- 5) Remand the case to the UNDT for a merits-based review, with full consideration of all evidence and arguments presented by Ms. Yu.

18. First, Ms. Yu submits that the impugned Judgment erred in removing materials related to discussions with the Ombudsman from the record. She asserts that, although Article 15(7) of the UNDT Rules precludes submitting all documents and oral arguments during the mediation process to the Dispute Tribunal, the Dispute Tribunal must "determine the extent and dates of the Mediation Division's involvement" in receivability matters.⁵ Therefore, the Dispute Tribunal misinterpreted this Article and should have considered the dates related to mediation efforts for receivability purposes.

⁴ *Ibid.*, paras. 19-21.

⁵ Ms. Yu relies on *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/004, para. 18.

19. Second, Ms. Yu contends that the impugned Judgment failed to consider the impact of the mediation process when determining whether her application was time-barred. She states that she was engaged in mediation efforts with the Ombudsman and the mediation broke down on 16 December 2022. According to Article 8(1)(d)(iv) of the UNDT Statute, the breakdown date of 16 December 2022 reset the clock and should be the starting date for filing a UNDT application within the 90 days. Therefore, Ms. Yu asserts that her application on 3 March 2023 met the deadline.

20. Third, Ms. Yu argues that the impugned Judgment wrongly interpreted the Appeals Tribunal's Judgment in *Temu* when interpreting the meaning of "receipt" of the management evaluation outcome.⁶ She submits that *Temu* established that "receipt" should be an "active, conscious act rather than a passive event." Since the management evaluation outcome e-mail on 2 December 2022 requested her "acknowledgement of receipt", Ms. Yu argues it is her reply e-mail on 6 December 2022 that constituted "receipt". As a result, even if the mediation did not toll the application time limit, the 90-day clock should not start until 6 December 2022, when Ms. Yu consciously accepted and understood the content received.

21. Ms. Yu emphasizes that her interpretation aligns with the term "as appropriate" in Article 7(1)(a) of the UNDT Rules. She argues that the Dispute Tribunal ignored the impact of the term "as appropriate" in Article 7(1)(a) and left it open to various interpretation. Ms. Yu submits that "as appropriate" applies exactly in her situation to ensure a fair and considerate treatment, where the e-mail containing the management evaluation outcome arrived at 7:42 p.m. on a Friday night after work to a non-UN staff member. Therefore, combined with her interpretation of "receipt," Ms. Yu argues that her application was receivable *ratione temporis*.

The Secretary-General's Answer

22. The Secretary-General requests that the Appeals Tribunal uphold the impugned Judgment and dismiss the appeal.

23. First, the Secretary-General submits that the UNDT correctly held that Ms. Yu's application was time-barred and not receivable *ratione temporis*. He argues that the UNDT accurately found that Ms. Yu received the management evaluation outcome on Friday,

⁶ *Hoyce Temu v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1174. Here, both Ms. Yu and the Secretary General identify a clerical error in the impugned Judgment, where the Judgment number was incorrectly referenced by the UNDT as 2021-UNAT-1171.

2 December 2022, which required her to file her application by 2 March 2023 at the latest. However, Ms. Yu filed her application on 3 March 2023, rendering it time-barred.

24. Second, the Secretary-General claims that, the UNDT correctly granted the motion to strike from the record the privileged and confidential materials of discussions with the Ombudsman in accordance with Article 15(7) of the UNDT Rules. The Secretary-General observed that, according to Ms. Yu's comments, the information was presented by Ms. Yu to demonstrate "the inconsistency in the line manager's account of [Ms. Yu's] performance evaluation" as an example of an alleged abuse of authority. The Secretary-General maintains that such information clearly falls within the prohibition on disclosure contained in Article 15(7) of the UNDT Rules.

25. Third, regarding the impact of the mediation process on the deadline for filing an application, the Secretary-General highlights that Ms. Yu is pursuing an entirely new argument for the first time and should be therefore dismissed with no exceptional circumstances justifying the introduction of this additional evidence known to Ms. Yu at the time of the UNDT proceedings.

26. Fourth, the Secretary-General submits that even if the new argument is admissible, there is no evidence of any mediation on the dispute in question, specifically the decision not to reappoint Ms. Yu, that could toll the time limit of the application. The Secretary-General argues that only mediation on the subject matter of the dispute in question could result in an extension of the filing deadline.⁷ However, the Secretary-General asserts that, in this case, the evidence improperly provided by Ms. Yu demonstrates that her discussions with the Ombudsman concerned her final performance evaluation only, which has no bearing on the reappointment dispute. Consequently, the mediation does not impact the application deadline, and the UNDT did not err in finding that Ms. Yu's application was time-barred.

27. Fifth, the Secretary-General submits that Ms. Yu fails to demonstrate any error in the impugned Judgment regarding the interpretation of the term "receipt". Contrary to Ms. Yu's subjective standard, the Secretary-General argues that the Appeals Tribunal has consistently

⁷ The Secretary-General relies on *Survo v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-644.

upheld an objective standard for determining the date of receipt that triggers the time limit for filing an application to the UNDT, regardless of when it was actually read.⁸

28. Moreover, the Secretary-General addresses Ms. Yu's contention that a late Friday e-mail is "unreasonable and unjust" by highlighting that the Appeals Tribunal has established that: (1) the day of receipt is not counted in the calculation of time limits; (2) it is the staff member's responsibility to read the management evaluation outcome as soon as possible; (3) the 90-day time limit is sufficiently long, even if staff members do not immediately read the outcome; and (4) ignorance of the applicable procedures in the context of the administration of justice is not an excuse for failure to file a timely application.⁹ Additionally, the Secretary-General asserts that the UNDT did not err in referencing *Temu* when determining the objective date on which the management evaluation outcome was received.

29. Finally, the Secretary-General submits that Ms. Yu's request for an interpretation of "receipt" and "as appropriate" in Article 7(1)(a) of the UNDT Rules should be rejected, as "the role of the UNAT is not to issue advisory or academic declarations, but to adjudicate on existing disputes".¹⁰

30. The Secretary-General concludes that the UNDT did not err in determining Ms. Yu's application was not receivable *ratione temporis*.

Considerations

31. The issues presented for this Tribunal are: (1) Did the Dispute Tribunal err in dismissing Ms. Yu's application as not receivable? and (2) Did the Dispute Tribunal err in granting the Secretary-General's motion to strike from the record privileged and confidential materials of discussions with the Ombudsman?

Whether the Dispute Tribunal erred in dismissing Ms. Yu's application as not receivable

32. Concerning time limits for filing applications, Article 8 of the UNDT Statute provides:

1. An application shall be receivable if:

⁸ The Secretary General relies on *Temu* Judgment, *op. cit.*, para. 33.

⁹ The Secretary General relies on *Czaran v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-373, para. 20 and *Temu* Judgment, *op. cit.*, para. 36.

¹⁰ The Secretary General relies on *Pio v. United Nations Joint Staff Pension Board*, Judgment No. 2015-UNAT-569, para. 35.

...

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

...

33. Further, Article 7 of the UNDT Rules provides:

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

...

34. Therefore, pursuant to Article 8(1)(d)(i)(a) of the UNDT Statute and Article 7(1)(a) of the UNDT Rules, an application before the Dispute Tribunal shall be filed within 90 calendar days of the receipt of the management evaluation outcome.

35. Even though the UNDT Statute does not specify how to calculate the time limits, we agree with the UNDT's interpretation that "statutory time limits are calculated in the time zone of the Tribunal's seat having geographical jurisdiction over the matter, not according to the location of the Applicant or the Respondent".¹¹ We remind that Article 7(1) of the UNDT Rules mandates that applications shall be submitted to the "Dispute Tribunal" through the "Registrar" of that Tribunal. This provision must be read in conjunction with Article 6(2) of the UNDT Statute, which provides that the UNDT is seated in three different locations, i.e., in New York, Geneva, and Nairobi, each with its own Registrar. It follows that the only constructive interpretation of Article 7(1) of the UNDT Rules is to consider the time zone of the tribunal to which the dispute has been referred for decision, according to its established geographical jurisdiction, as the time zone according to which the time limit for filing applications is set.

36. Paragraph 15 of Practice Direction No. 4 of the UNDT states the following:

Applications shall be submitted the Registry in Geneva, Nairobi and New York in accordance with the following geographical distribution:

¹¹ Impugned Judgment, para. 16.

- a. Geneva Registry: Applications from staff assigned at the time of the contested decision in duty stations located in Europe and Asia (including the Pacific).

Paragraph 6 of the Information Note to Parties Appearing before the UNDT repeats this guidance.

38. Since Ms. Yu is challenging the administrative decision of the UNCTAD in Geneva, her application should be sent to the UNDT in Geneva. Even though Ms. Yu was not located in Geneva at the time that she filed the application, the statutory time limits must be calculated in Geneva's time zone, as the UNDT seat in Geneva is the tribunal to which the dispute has been referred. In the present case, the evidence on record shows that Ms. Yu received the management evaluation outcome on 2 December 2022, at 7:42 p.m. (Geneva time) and filed her application on 3 March 2023, at 12:58 a.m. (Geneva time), 58 minutes past the 90-day time limit set out in the UNDT Statute.

39. Firstly, Ms. Yu in her appeal argues that the breakdown of mediation on 16 December 2022 should mark a different starting point for the 90-day period stipulated for application submission.

40. We notice that this argument on time limitation was never raised by Ms. Yu before the UNDT. In *Amani*, we emphasized that “a party cannot raise a new argument for the first time on appeal, since this would be a violation of the two-tier United Nations system for the administration of justice”.¹² Consequently, we concur with the Secretary-General that this argument is new and was not raised before the UNDT, and therefore it must be dismissed.

41. Even if we were to consider this new argument, we still find that the mediation in question did not pertain to the decision not to reappoint Ms. Yu. In her submission to the UNDT, Ms. Yu stated that the purpose of the mediation was “to demonstrate the inconsistency in the line manager's account of my performance evaluation”. She asserted that this information was relevant to the Tribunal's understanding of the conduct of her line manager, who she claimed engaged in “abuse of authority while representing the United Nations.”¹³ It is clear that the mediation process mentioned by Ms. Yu concerned her final performance evaluation and did not address the dispute which is the subject matter of the present case (the non-renewal

¹² *Koffi Gilles Wilfried Amani v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1301, para. 61.

¹³ Applicant's Response to the Respondent's Motion to Strike Absolutely Privileged and Confidential Materials, para. 3.

of her appointment). Accordingly, the said mediation process has no bearing on the deadline for Ms. Yu's application. The breakdown of mediation on 16 December 2022 cannot constitute a different starting point for the 90-day period stipulated for application submission, as Ms. Yu asserts.

42. Secondly, Ms. Yu contends that the filing deadline of the application should begin from the date she acknowledged receipt of the management evaluation outcome on 6 December 2022, and that the Dispute Tribunal made an erroneous citation of the *Temu* Judgment.

43. In *Temu*,¹⁴ we clarified the event that triggered the time limit for filing an application before the Dispute Tribunal:

(...) According to the clear and unambiguous wording of Article 8(1)(d)(i)(a) of the UNDT Statute, and confirmed by the jurisprudence of the Appeals Tribunal, it is the receipt of the management evaluation which triggers the time limit for filing an application to the UNDT, and not the moment when the staff member or her legal representative could reasonably be assumed to have taken notice of this response.

44. As correctly noted by the Dispute Tribunal, Ms. Yu received the management evaluation outcome on 2 December 2022 at 7:42 p.m. (Geneva time). This receipt triggered the 90-day time limit for filing an application, rather than her acknowledgement of receipt on 6 December 2022. Ms. Yu's interpretation of the "receipt" in Article 7(1)(a) of the UNDT Rules is therefore misplaced.

45. As for the erroneous citation of *Temu* in the impugned Judgment, we find that there is a typographical error in the Judgment number. The Dispute Tribunal should have referred to Judgment No. 2021-UNAT-1174. However, this error has no substantial significance and does not interfere with the Dispute Tribunal's reasoning.

46. Thirdly, Ms. Yu avers that the Dispute Tribunal failed to consider the official working hours of the United Nations Office at Geneva. This argument is irrelevant to the 90-day time limit for filing an application. Upon receiving the management evaluation outcome, Ms. Yu had 90 calendar days to file her application with the Dispute Tribunal through any suitable method, including the e-Filing portal or e-mail. As stated in *Czaran*:¹⁵

¹⁴ *Temu* Judgment, *op. cit.*, para. 33.

¹⁵ *Czaran v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-373, para. 20.

The 90-day time limit for staff members to submit an application after receiving a response to a request for a management evaluation is sufficiently long to allow them to address, as in this case, any technical problems with transmission of the letter and any difficulties that the staff member encounters in taking note of the administration's response.

47. Meanwhile, the calculation of time limits is unaffected by official working hours according to Article 34 of the UNDT Rules:

Calculation of time limits

The time limits prescribed in the rules of procedure:

(a) Refer to calendar days and shall not include the day of the event from which the period runs;

48. Based on the foregoing, the day of Ms. Yu's receipt of the management evaluation response on 2 December 2022 was not included in the time limit. The first day of the 90-day period was 3 December 2022. The fact that Ms. Yu received the management evaluation outcome outside official working hours on 2 December 2022 is therefore irrelevant, because the first day of the time period would have been 3 December regardless of whether Ms. Yu received the management evaluation response at 9:00 a.m. or at 10:00 p.m. on 2 December.

49. Fourthly, Ms. Yu requested guidance on the interpretation of the phrase "as appropriate" in Article 7(1)(a) of the UNDT Rules, apparently because she believes that it might affect the timeliness of her application. The phrase "as appropriate" is based on the word "appropriate" which means "suitable, proper".¹⁶ In the context of Article 7(1)(a), "as appropriate" is modifying the term "management evaluation", not "90 calendar days". This phrase means that if the management evaluation process is "suitable", e.g., it is a required step given the nature of the contested decision, the application must be submitted to the UNDT within 90 calendar days from the receipt of the outcome of the management evaluation by the applicant. In the present case, management evaluation was a compulsory step before Ms. Yu could proceed to litigation.¹⁷ We note that our interpretation of the phrase "as appropriate" is buttressed by reference to the French language version of the UNDT Rules. In French, Article 7(1)(a) concludes with the phrase: "s'il est obligatoire", which translates into English as "if mandatory". In other words, a staff member must file an application with the UNDT within

¹⁶ Concise Oxford English Dictionary (12th edition).

¹⁷ If Ms. Yu had been challenging a disciplinary decision, then Article 7(1)(a) would not have been applicable because management evaluation is not "appropriate" or suitable for decisions of this type.

90 days of receiving a response from management evaluation, if management evaluation was mandatory for his or her claim.

50. Ms. Yu requested management evaluation of the contested decision (as was mandatory for her claim) and she was notified the outcome of the management evaluation on 2 December 2022. Therefore, the calculation of the time limit of 90 days for Ms. Yu's application commenced on 3 December 2022, the day after. Ms. Yu's speculation that "as appropriate" in Article 7(1)(a) alters the time frame for submission of her application is untenable.

51. Additionally, Article 7(5) of the UNDT Rules provides additional relief for the parties, stating:

In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

52. However, Ms. Yu did not request an extension of the time limits from the UNDT prior to the expiry of the 90-day period.

53. Furthermore, we recall what we have said in *Ali*:¹⁸

This Tribunal has repeatedly and consistently strictly enforced the time limits for filing applications and appeals. Strict adherence to filing deadlines assures one of the goals of the current system of administration of justice established in 2009: the timely hearing of cases and rendering of judgments. It is irrelevant whether a deadline is missed by several minutes, several hours or several days.

54. Consequently, as correctly found by the UNDT, Ms. Yu failed to file her application within the stipulated time frame, and thus her application was not receivable *ratione temporis*.

Whether the Dispute Tribunal erred in granting the Secretary-General's motion to strike from the record privileged and confidential materials pertaining to discussions with the Ombudsman

55. Ms. Yu argues that pursuant to the jurisprudence established in Judgment No. UNDT/2013/004, the Dispute Tribunal must determine the extent and dates of the Mediation Division's involvement in her case, as it influences the assessment of receivability. However, as

¹⁸ *Ali v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-773, para. 13 (internal citation omitted).

discussed earlier, we have determined that the mediation process which occurred here did not affect the deadline for filing her application before the Dispute Tribunal. Therefore, the Dispute Tribunal does not need to consider the dates of the discussions with the Ombudsman.

56. Article 15(7) of the UNDT Rules provides:

All documents prepared for and oral statements made during any informal conflict-resolution process or mediation are absolutely privileged and confidential and shall never be disclosed to the Dispute Tribunal. No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Dispute Tribunal.

57. It follows that the materials referenced by Ms. Yu fall within the prohibition against disclosure and shall be struck from the record. The Dispute Tribunal therefore did not err in granting the Secretary-General's motion to strike from the record privileged and confidential materials pertaining to discussions with the Ombudsman.

Judgment

58. Ms. Yu's appeal is dismissed, and Judgment No. UNDT/2023/033 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)

Judge Gao, Presiding

(Signed)

Judge Savage

(Signed)

Judge Sheha

Judgment published and entered into the Register on this 25th day of July 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar