



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

HE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Jia-Xiang Wang

Counsel for Respondent:

Jérôme Blanchard, UNOG

Introduction

1. By an incomplete application filed on 13 October 2014, completed upon the Tribunal's instruction on 7 December 2014, Text Processing Units ("TPUs") the Applicant, a former Text Processing Clerk (G-3) at the Chinese Text Processing Unit ("CTPU"), Chinese Translation Section ("CTS"), Division of Conference Management ("DCM") of the Office of the United Nations at Geneva ("UNOG"), contests the decision not to renew her fixed-term appointment beyond 30 June 2014.

Facts

2. The Applicant has served as Text Processing Clerk (G-3 level) at the CTPU since 6 June 2005; first, on short-term contracts and, subsequently, on temporary appointments. Effective 11 January 2010, her temporary appointments were retroactively converted into fixed-term appointments limited to DCM, funded through the budget for Temporary Assistance for Meetings ("TAM").

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 Applicant applied for one of the two positions.

4. By email of 6 November 2012, the Chief, Languages Service ("LS"), requested the Chiefs, Text Processing Units ("TPUs") to review the staffing tables of the TPUs 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".

5. In December 2012, the above-mentioned VA, for which the Applicant had applied, was cancelled.

6. By email of 7 January 2013, the Assistant Secretary-General, Department for General Assembly and Conference Management ("DGACM"), advised the Director, DCM, UNOG, that DCM should—like DGACM—schedule a ratio of

1 text processor for 3 translators and that, as a result, DCM should “be pegging about 66 text processors (rather than the 116 still shown [in its budget])”.

7. On 6 February 2013, the Applicant requested management evaluation of the decision to cancel VA No. 12/GS/INT and EXT/27.

8. On 6 March 2013, the Applicant filed a complaint for harassment and abuse of authority against the Chief, CTPU, with the Assistant Secretary-General for Human Resources Management.

9. By letter dated 28 March 2013, the Management Evaluation Unit (“MEU”) advised the Applicant that the decision to cancel VA No. 12/GS/INT and EXT/27 had been upheld. The Applicant did not contest this decision before the Tribunal.

10. By email of 30 December 2013, the Chief, LS, DCM, UNOG, 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 the ACABQ had endorsed this abolishment, that the Fifth Committee had approved it and that, as a consequence, effective 1 January 2014, DGACM would have “21 fewer text processing posts”.

11. In his 30 December 2013 email, the Chief, LS, DCM, UNOG, further stressed that LS would begin the new 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 LS current ratio 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 also noted 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 ... as planned, to input their own translations using either a keyboard or voice recognition, as from 1 January 2014”. He underlined too 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 Chief, LS, DCM, UNOG, 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”.

12. By email also of 30 December 2013, the Chief, CTPU, UNOG, proposed to the Chief, LS, UNOG, to extend the Applicant’s contract, as well as that of another CTPU staff member, 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, UNOG, approved said request on the same day.

13. On 3 February 2014, the Applicant submitted to the Acting Director-General, UNOG, a complaint against her direct supervisor, the Chief, CTPU, alleging that he had engaged in prohibited conduct under Secretary-General bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), with respect to her and other members of the CTPU team. She further alleged that the Chief, CTS, her second reporting officer, had connived with the Chief, CTPU, and shielded him.

14. By resolution A/RES/68/268 (Strengthening and enhancing the effective functioning of the human rights treaty body system) of 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”.

15. By memorandum of 27 May 2014, the Acting Director-General, UNOG, replied to the Applicant’s complaint informing her that he had decided to take managerial action against the alleged offender, and not to further investigate the allegations.

16. By email of the same day, the Chief, CTPU, addressed with the Deputy Chief, LS, DCM, UNOG, the forthcoming expiration, on 30 June 2014, of the Applicant's contract and that of one of her colleagues. The former noted that in light of complaints of allegations of harassment made against him he was "no longer in a position to make recommendations which might 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]", 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.

17. By email of the same day, the Deputy Chief, LS, DCM, UNOG, 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 Applicant and of one other staff member of CTPU, equally at the G-3 level, not be renewed upon their expiration on 30 June 2014.

18. By memorandum dated 28 May 2014, the Senior Human Resources Officer, HRMS, UNOG, informed the Applicant that her fixed-term appointment would not be renewed beyond its expiration date, i.e., 30 June 2014. It further stated that "[t]his decision [was] based on the reduction of work within the [CTPU] and the on-going workforce planning done by the Language Services".

19. On 6 June 2014, the Applicant requested management evaluation of the non-renewal decision; on 12 June 2014, she filed an application for suspension of action concerning said decision. By Order No. 89 (GVA/2014) of 19 June 2014, the request for suspension of action was rejected.

20. On 30 June 2014, the Applicant was separated from the service of the Organization.

21. By memorandum dated 21 July 2014, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to accept the recommendation of the MEU to uphold the contested decision.

22. On 13 October 2014, the Applicant filed an incomplete application, which she completed subsequently, as per instructions from the Tribunal, on 7 December 2014.

23. The application was served to the Respondent, who filed his reply on 8 January 2015, with some annexes filed on an under seal basis.

24. By Order No. 29 (GVA/2015) of 5 February 2015, the Tribunal granted the Applicant's motion to file comments on the Respondent's reply, which she did on 27 February 2015.

25. By Order No. 164 (GVA/2015) of 31 August 2015, the Tribunal ordered that the Respondent provide it with some additional documentation and information, and that the annexes that he had filed under seal with his reply remain under seal.

26. The Respondent filed the requested additional information on 11 September 2015, with ten annexes filed *ex parte*.

27. On 17 September 2015, the Applicant filed a motion for disclosure of the *ex parte* documents filed by the Respondent.

28. By Order No. 185 (GVA/2015) of 2 October 2015, the Tribunal ordered, *inter alia*, that the Applicant be granted access to all but one of the *ex parte* documents filed by the Respondent, after redaction by the Tribunal.

29. By Order No. 229 (GVA/2015) of 10 November 2015, the Tribunal convoked the parties to a hearing on 26 November 2015.

30. By email of 17 November 2015 and a submission through the Tribunal's eFiling portal of 20 November 2015, Counsel for the Applicant filed a motion for interpretation services from English or French to Chinese and vice-versa, for the purpose of the hearing, which was rejected by Order No. 241 (GVA/2015).

31. The hearing was held on 26 November 2015.

Parties' submissions

32. The Applicant's principal contentions are:

a. The decision constitutes retaliation since it was taken after she had reported the illegal behaviour of her supervisors to the Administration;

b. It is discriminatory, because only her and a colleague who had also filed a complaint were subject to non-renewal, whereas other staff of other TPUs, including overstaffed TPUs, were not affected;

c. One of the principle authors of the decision, the Chief, CTS, whose abuse of authority and mismanagement had been reported and investigated by OIOS, was compelled to resign in January 2015; this is irrefutable evidence corroborating the Applicant's allegation of discrimination; the systematic retaliation ultimately leading to the non-renewal of her appointment should be reviewed by the Tribunal;

d. Documents on file, particularly a five year trend reflected in the report of the Secretary-General on the pattern of conferences (A/69/120) of 21 July 2014, and a statement by the USG, DGACM, of 15 January 2015 show that there is no reduction of the workload for the CTPU;

e. The work of bitext alignment is not completed, and the alignment between English and Chinese poses the most problems; hence, the work continues to be done by CTPU to date;

f. The reduction of the official working languages of the treaty bodies to three does not impact the translation of documents from the treaty bodies into Chinese or the workload in the CTPU; traditionally, only a very small number of documents of the treaty bodies are translated into Chinese, most of which is done in New York;

g. A ratio of one text processor to three translators cannot yet be applied to Geneva; the situation in DCM is different from that of DGACM since in Geneva, TPUs continue to receive dictations from translators, which is not the case in New York; this is the reason why workload for TPUs in Geneva was 85% higher than in New York in 2013;

h. She was specifically targeted, together with one other colleague who had also filed a complaint reporting the Chief's illegal behaviour; apart from the two of them, all their colleagues at the TPUs, LS, DCM, had their contracts renewed; additionally, in 2013 VAs were continuously advertised in other TPUs; furthermore, on 22 January 2015, six months after the non-renewal of her FTA, it was decided in a meeting of Chiefs, LS, that staff in the same situation be extended for one year; during 2014, FTAs in other TPUs were extended by one year, and the Tribunal should request the list of contracts extended in TPUs in 2014;

i. She had been given an express promise that her contract would be renewed, as the MEU, in its reply dated 28 March 2013 to her request for management evaluation of the decision to cancel VA No. 12/GS/INT and EXT/27, noted that "Assuming the General Assembly approves the Division's proposed 2014-2015 budget request, UNOG considered that adequate temporary assistance funds will be available for the coming biennium"; however, despite the fact that the Division's 2014/15 budget was approved, her FTA was not renewed beyond June 2014; UNOG's promise has thus been breached;

j. The decision is contrary to ST/SGB/2002/13; ST/SGB/2008/5, ST/AI/371/Amend.1, ST/AI/2004/3, as well as staff rule 1.2 and 10.1.;

k. The Deputy Chief, LS, was not in a position to take the contested decision, since at the time of its making, his nomination had no longer any legal force;

1. The Applicant requests reinstatement to CTPU, and an apology by the Chief, CTPU; should reinstatement not be possible, she requests compensation in the amount of two years of salary.

33. The Respondent's principal contentions are:

a. The only matter properly before the Tribunal is whether the non-renewal decision was arbitrary, procedurally deficient or tainted by improper motives, or whether it was justified and the justification given was supported by the facts;

b. The Applicant was not given any express promise that would have given her an expectancy of renewal; quite the contrary, the MEU letter of March 2013 clearly refers to further deep budgetary cuts and zero allotment for TAM for the next biennium; additionally, changing work patterns, which affected the TPUs, were already being discussed with and explained to the Applicant in March 2013;

c. The reason provided for the non-renewal, namely the reduction of workload in the CTPU and the on-going workforce planning done by the Language Services, is supported by evidence;

d. The decision was taken by the Deputy Chief, LS, who stated, in his email of 27 May 2014 to a Senior Human Resources Officer, UNOG, that "the completion of the work on the CTPU backlog of bitext alignment will certainly cause a significant drop in the workload", and referred to the decision of the General Assembly to allocate a maximum of three official working languages for the work of the human rights treaty bodies, as well as to a resulting expectation of a substantial reduction of up to one quarter of the workload of CTPU as from January 2015;

e. The decision was based on the overall decrease of the volume of the CTPU workload, which fell precipitously in June 2014 and further in 2015. Indeed, the facts show that (i) the workload forecast for 2014 implied a 7% reduction or a reduction of 145 net staff days of work, as reflected in the

report on the Monitoring, Evaluation, Risk Management and Statistical Verification Section (“MERS”); (ii) on 16 June 2014, the task to verify the alignment of legacy bitexts was completed; the workload at CTPU was about to diminish further after the General Assembly decision to allocate a maximum of three official working languages—none of them being Chinese—for the work of the human rights treaty bodies, as reflected in para. 30 of General Assembly resolution 68/268 of 9 April 2014; this was expected to result in a considerable drop in the workload, since the work on treaty bodies represented 25% of the total workload of the CTPU;

f. These trends are the result of recent DGACM decisions and of change in work patterns in the TPUs; they were already discussed at the end of 2012; this is also true for budget cuts in DGACM and DCM, and the approved ratio of 1:3 between text processors and translators; the imminent decrease in the CTPU workload and the reduction of tasks typically performed by less qualified text-processors is also mentioned in the MERS report and in the study performed on the TPUs, attached to the application;

g. The reform of the Human Rights treaty bodies, including the reduction of official working languages to three other than Chinese, led to a lower workload forecast for the treaty bodies for the first half of 2015 for translation in Arabic, Chinese and Russian compared to English, French and Spanish; the relevant General Assembly resolution (A/RES/68/268) contains further measures to reduce words to be processed, and a reform including a net reduction of \$10,305,400 in 2015 from the TAM portion of DCM budget;

h. The Applicant failed to substantiate her allegations of retaliation; hence, she has not met the burden of proof in this respect; in any event, the decision was not taken by the Chief, CTPU, but by the Deputy Chief, LS, who is the second reporting officer of the Chiefs of all the TPUs, and the manager with overall responsibility of the TPUs; the Applicant failed to demonstrate ill-motivation of the Deputy Chief, LS, decision;

i. At the time of the contested decision, CTPU was composed of twelve staff members with regular fixed-term or permanent appointments from G-4 to G-7, and two staff members at the G-3 level, with FTAs limited to DCM—that is, not endorsed by a Central Review Body—namely the Applicant and the other colleague whose contract was not renewed; the Applicant's and that colleague's post were the only ones financed through TAM; the Applicant passed the Administrative Support Assessment Test only in Chinese; as such, she is not eligible for redeployment to another service; these were the motives for which the Applicant was identified as one of the staff members whose FTA was not renewed;

j. Other TPUs were also affected by changing work practices and work reduction, in that staff members were re-assigned to different functions or departments, and some posts re-programmed; some staff members in other TPUs were not replaced, and some were separated; e.g. since 2012, the English TPU has lost five posts; the French TPU transferred two staff members for one year to HRMS, UNOG, in 2014 and the FTA of one G-3 in the Russian TPU was not renewed in December 2014;

k. The decision was legal and properly taken by the Deputy Chief, LS; the projected decrease in workload in the CTPU to an extent that rendered the G-3 Text Processing Clerk unnecessary is a valid reason for the non-renewal of the FTA of its incumbent;

l. The application should be rejected.

Consideration

34. At the outset, it has to be emphasized that it is only the contested decision not to renew the Applicant's contract that is properly before the Tribunal.

35. Staff rule 4.13(c) provides that “[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)”.

36. A non-renewal decision can be challenged in case the Administration does not act fairly, justly or transparently, or if the decision is motivated by bias, prejudice or improper motive against the staff member; the latter has the burden of proving that such factors played a role in the administrative decision (cf. *Said* 2015-UNAT-500, referring to *Ahmed* 2011-UNAT-153; *Obdeijn* 2012-UNAT-201; *Asaad* 2010-UNAT-021).

37. The Appeals Tribunal has consistently held that an international organization has the power to restructure some or all of its departments or units, which includes the abolition of posts, the creation of new posts and the redeployment of staff (*Lee* 2014-UNAT-471; *Gehr* 2012-UNAT-236).

38. Further, the Appeals Tribunal confirmed that where the Administration provides a reason for the non-renewal of a fixed-term appointment, that reason must be supported by the facts (*Islam* 2011-UNAT-115).

39. In the present case, the reasons for the non-renewal of the Applicant's appointment—provided in the decision of 28 May 2014—were:

- a. the reduction of work within the CTPU; and
- b. the on-going workforce planning done by the Language Services.

40. 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 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.

41. The Tribunal finds that the record shows that on the basis of the data available at the time, it was not unreasonable 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 a ratio of one text processor for three translators.

42. The concrete examples referred to by the Administration—apart from the change in workflows—to explain the expectation that workload of the CTPU would decrease in mid-2014/2015—namely the reform of the human rights treaty bodies and the completion of the bitext alignment—do not appear unreasonable either. The Applicant’s argument that, at the date of the hearing, the database of CTPU showed that an enormous amount of documents had not yet been revised, is irrelevant for any consideration with respect to the reasonableness of the prognosis, made at the time of the contested decision, with respect to the reduction of workload at the CTPU as of mid-2014/2015. Also, any personal views of the Applicant, according to which the contested decision had a negative impact on the work of the CTPU, which in her opinion has ever since been understaffed, is equally irrelevant. Indeed, it falls within the discretion of the Administration to organize its services, and the perceived need, with hindsight, to recruit more people to avoid the accumulation of backlog is immaterial.

43. The prognosis of a reduction of workload in 2014 is further supported by the MERS report concerning Central Planning and Coordination Service rendered on 23 May 2014. Indeed, based on the report’s data, released only a few days prior to the contested decision, it was noted that applying various possible scenarios, the number of staff needed to complete the 2014 forecast in the CTPU was lower than that utilized in 2013.

44. Therefore, the inference drawn by the Administration at the time of the contested decision on the basis of said data and parameters appears reasonable, independently from the fact that the overall work for translators in the CTS (and other translation sections) might still increase in the future.

45. In this respect, the Tribunal also notes that it was provided, upon its request, with additional information and detailed staffing tables of CTPU and of other TPUs, covering different periods. The Tribunal cannot but note that while on the staffing table of 30 June 2014, the Applicant appears against post No. 504534, as Text Processing Clerk, G.3, CTPU, on TAM, that post has remained vacant ever since. Also, in subsequent staffing tables, including the latest staffing table requested by the Tribunal (namely that of 31 March 2015), no new Text

Processing Clerk, G.3, had been recruited at CTPU, neither on TAM nor under an established post. The foregoing shows that the reasons provided for the non-renewal—namely the reduction of workload and workforce planning—is also supported by the staffing tables, which confirm that in light of the expected (and actual) workload, it was not deemed necessary to continue to employ the Applicant or any other person against her or an equivalent G-3 post at CTPU, from June 2014 through (at least) March 2015.

46. Furthermore, while the situation in other TPUs is not really relevant for the assessment of the evolution of the workload and staffing situation within CTPU, the Tribunal notes that the available record shows that the number of posts filled in other TPUs has equally decreased and/or that staff from other TPUs has been lent to other services, thus showing that the change of workflows in the translation sections, as well as the related reduction of workload and need for staff, is a trend that can also be observed in other TPUs.

47. Additionally, the record shows that the DCM budget proposal for 2014-2015 included a reduction to its base budget, including a reduction in TAM, which further confirms the trend of a reduction of workload. In this respect, the Tribunal notes that the Applicant's post was financed through TAM.

48. With respect to the Applicant's allegation that she had an expectancy for renewal, the Tribunal finds that a reference—in the response dated 28 March 2013 to the Applicant's request for management evaluation of the decision to cancel VA No. 12/GS/INT and EXT/27 VA—to UNOG considering that subject to the General Assembly approval of the Division's proposed 2014-15 budget request, "adequate temporary assistance funds [would] be available for the coming biennium", does not suffice to meet the standard of an express promise set by the above-referenced jurisprudence of the Appeals Tribunal. In this respect, the Tribunal also notes that contemporaneous emails from the Applicant show that she was indeed well aware of the precariousness of her situation.

49. Concerning the Applicant's allegation that the decision was motivated by extraneous factors and constituted "retaliation" for her having filed a complaint of harassment against her direct supervisor, the Chief, CTPU, the 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.

50. Also, the Tribunal notes that the decision was not taken by the Chief, CTPU—who was diligent by not taking a decision with respect to the Applicant's contract in light of the complaint she had filed against him—but by the Deputy Chief, LS, on the basis of data available at the time. Therefore, the Tribunal finds that the record does not lead to conclude that the decision was taken on improper grounds.

51. Finally, the Tribunal takes note of the Applicant's argument—made at the hearing—that the contested decision could not be taken by the Deputy Chief, LS, since, as from 1 February 2014, he had been serving on the post for more than three months, and no temporary job opening had been issued, in direct contradiction of sec. 3 of ST/AI/2010/4 (Administration of temporary appointments).

52. The Tribunal is of the view that such possible shortcoming, which is not part of the present proceedings, would not impact the legality of the contested decision. There is no reason to doubt that the post of Deputy Chief, LS, existed in May 2014 (cf. *Hubble* UNDT/2014/069), and that the decisions taken by its incumbent cannot be considered as *ultra vires*. The Applicant's argument in this respect has no merit.

Conclusion

53. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 28th day of January 2016

Entered in the Register on this 28th day of January 2016

(Signed)

René M. Vargas M., Registrar, Geneva