



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

Judgment No. 2020-UNAT-1043

**Hine-Wai Kapiti Loose
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Graeme Colgan, Presiding
Judge Dimitrios Raikos
Judge Jean-François Neven

Case No.: 2020-1392

Date: 30 October 2020

Registrar: Weicheng Lin

Counsel for Ms. Loose: Marcos Zunino

Counsel for Secretary-General: Francisca Lagos Pola

JUDGE GRAEME COLGAN, PRESIDING.

1. The Secretary-General appeals against the Judgment of the United Nations Dispute Tribunal (UNDT or the Dispute Tribunal) dated 10 March 2020, *Loose v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/038. The UNDT found in favour of Hine-Wai Loose, who was engaged in Geneva, Switzerland, as a Political Affairs Officer with an United Nations body which we will name fully only once, the “Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects”. We will refer to it henceforth by its acronym “CCW”. Ms. Loose was engaged first in 2011, initially biannually and then annually, but always on a series of fixed-term appointments (FTAs). In September 2017, she was advised that her then-current appointment would not be renewed when it expired on 31 December 2017 because of a lack of funding for it. She was separated from service on 1 January 2018. Arising out of this non-renewal and separation and the events leading to it, Ms. Loose brought three separate claims to the UNDT.

2. The UNDT concluded that the Secretary-General had failed to justify in law the non-renewal of Ms. Loose’s fixed-term appointment and that her separation from service was therefore unlawful. The UNDT directed either the rescission of the Organisation’s separation decision or that she be paid a sum equivalent to 12 months’ net base salary. In relation to Ms. Loose’s second claim before the UNDT that she had been unlawfully not selected for a temporary position for which she had applied when the prospect of her separation from service had become apparent in October 2017, the UNDT concluded that there was no unlawfulness by the Organisation attaching to this. Her third claim before the UNDT was that she had been wrongly refused a period of special leave without pay (SLWOP) for the first three months of 2018. This claim was also rejected by the UNDT.

3. There is no appeal by Ms. Loose against those two latter aspects of the UNDT’s Judgment that went against her so that the sole subject-matter of the case now before us is what is known to the parties as the “non-renewal” decision of the Organisation. For reasons set out below, we dismiss the appeal.

Facts and Procedure

4. Although we have attempted to simplify the complex series of relevant events that led to the case in the UNDT, the following background is necessary to understand the issues now on appeal. In fairness to Ms. Loose, we should say that there is no criticism of her performance of her duties. These involved the preparation for and holding of meetings of the representatives of CCW Member States. She was experienced and we assume she was nothing other than successful in the role because her appointment had been renewed upon its expiry on several occasions.

5. The following recitation of the facts attempts to place them in chronological sequence although they concern separate, albeit related, events.

6. CCW (including the work undertaken by Ms. Loose and her small office) was funded principally, but voluntarily, by its major signatory nations (known as the “High Contracting Parties” or “HCPs”) several of which, by 2016, had failed to pay their expected contributions to its operating expenses. In 2017, CCW assessed that, unless its financial position improved, these deficits would mean that the employment contracts of staff would not be extended beyond their expiry dates. Relevant staff, including Ms. Loose, were recommended to apply for alternative positions before the expiries of their fixed-term contracts, to give them priority as internal candidates. Resources were set aside for separation payments and staff were to be kept advised in a timely fashion of developments including non-extensions of their contracts.

7. A first extension of Ms. Loose’s contract was able to be achieved by re-prioritising. However, on 19 September 2017 Ms. Loose was advised that because of the lack of HCP funding, her contract would not be renewed upon its expiry on 31 December 2017. The Administration considered that this gave her more than necessary time to both search for alternative employment and to do so from the advantageous position of an internal applicant affected by downsizing.

8. Accordingly, in October 2017, Ms. Loose applied for a vacant temporary position with the Conference on Disarmament team in Geneva as a Political Affairs Officer until 31 March 2018 but with the possibility of extension beyond that date. Although short-listed as one of five interviewees (out of more than one hundred applicants) for the position, what was said to have been a strictly competency-based selection eventually meant that Ms. Loose was advised,

on 20 January 2018, that is several weeks after the expiry of her fixed-term appointment, of her lack of success in this application.

9. In the meantime, in mid-November 2017, Ms. Loose had applied for management evaluation of the decision not to renew her fixed term appointment. She subsequently applied for suspension of the non-renewal decision pending that re-evaluation. This latter request was declined.

10. On 4 December 2017, the General Assembly of the United Nations adopted Resolution 72/68 in relation to CCW. Under Article 17 of the UN Charter, the General Assembly is obliged to consider and approve the CCW's budget. The General Assembly thus has a direct hand in the setting and allocation of this budget. The General Assembly's resolution may be summarised pertinently for the purposes of this case as:

- Regretting that relevant 2017 meetings relating to the development of lethal autonomous weapons systems could not take place because of inadequate funding.
- Calling on the funding nations not only to fully and promptly comply with their financial obligations but also to explore options to improve CCW's financial situation and ensure its financial stability.
- Acknowledging the work of the Implementation Support Unit (ISU), CCW, in which Ms. Loose was engaged.

The inferences to be drawn from these resolutions and their rationale include that the General Assembly wished strongly that the disarmament work done by CCW (including by Ms. Loose's unit) should continue and that if funding was restored, this would occur.

11. As we understand the position, by the time the HCP funding defaults became known and their significance appreciated, funds had already been budgeted by the General Assembly for the work of CCW during the 2018 calendar year. These included for meetings and other activities of CCW with a view to undertaking its important disarmament mandate in which Ms. Loose, upon a renewal of her fixed-term contract, herself expected, and would have been expected, to play a continuing and valuable role.

12. Regulation 5.1 of the United Nations Financial Regulations and Rules (ST/SGB/2013/4) provides at Article V (“Appropriations”) that appropriations voted by the General Assembly “shall constitute an authorization to the Secretary-General to incur commitments and make payments for the purposes for which the appropriations are voted and up to the amounts so voted”. Regulation 5.2 provides that such appropriations shall be available for commitment “during the budget period to which they relate”.

13. In mid-December 2017, Ms. Loose requested that after the notified expiry of her fixed-term contract on 31 December 2017, she be granted a SLWOP for the first six months of 2018 to assist her with continuing medical insurance coverage for her family and to allow her continued residence in Switzerland. Although she was advised that this was unacceptable for “operational considerations”, there was agreement between Ms. Loose and the Office of the United Nations at Geneva (UNOG) for the latter to explore other ways in which Ms. Loose might be assisted with her insurance and residency concerns. These were subsequently agreed with Swiss authorities to be extended to 31 March 2018.

14. Ms. Loose then made a further request for SLWOP, this time for the first three months of 2018. She explained that she did not have an alternative job and needed that period to apply for positions as an internal candidate. On 26 December 2017, however, Ms. Loose was advised that this request was declined as to have granted it would “not [have been] in the interest” of the Organisation.

15. As already noted, Ms. Loose was separated from service with effect from 1 January 2018, that is immediately following the expiry of her fixed-term appointment.

16. On 8 February 2018, Ms. Loose lodged a further request for management evaluation, this time in respect of the decisions not to select her for the temporary position for which she had been unsuccessful described above and of the decision to deny her SLWOP request.

17. On 26 March 2018 Ms. Loose filed her application with the UNDT challenging the decisions not to renew her fixed-term appointment, not to select her for the temporary position, and not to grant her request for SLWOP.

18. There followed two management evaluation decisions. On 4 May 2018, Ms. Loose was advised of the upholding of the non-renewal decision as having been taken in accordance with the relevant rules and procedures. On 18 May 2018, Ms. Loose was advised of the lack of

success of her management evaluation requests in respect of her non-appointment to the temporary position and of her second request for SLWOP.

19. As already noted, Ms. Loose was partially successful and partially unsuccessful before the UNDT. Because there is no challenge by her to those parts of the UNDT decision that went against her, we will not do other than mention them for context and completeness. The UNDT found, in relation to her unsuccessful application for the temporary position, that this had been fully and fairly considered and that the selection of another person was both proper and lawful. Next, it found that Ms. Loose's reasons for seeking SLWOP (and in particular to give herself more time to apply for other jobs as an internal candidate) were not valid reasons under Staff Rule 5.3.

20. Turning to Ms. Loose's challenge, which is now on appeal by the Secretary-General, i.e., the 19 September 2017 non-renewal decision, the Dispute Tribunal made the following findings. It concluded that the Administration had failed to justify that decision supported by the facts, and that it was flawed. The UNDT decided that the Secretary-General had provided no evidence in support of the circumstances which the Organisation claimed had prevailed at the time. This was that its funds would not be sufficient to cover both the meeting costs and the staff costs for the ISU comprising Ms. Loose and another staff member, in 2018, or that the CCW Member States had decided on 25 November 2017 to prioritize the CCW meetings over the payment of staff costs. In the view of the UNDT,¹

... the Administration failed in evaluating promptly and considering the evolution of the financial situation before the expiration of [Ms. Loose's] FTA in the last months of the contract, thus failing to balance those results with the previous one, and the position expressed by the Member States on the staffing of the ISU and its cost. The said developments and facts could have influenced the decision by the Administration not to renew the contract, which is consequently unlawful.

Moreover,

... the express reference in the official Report of the CCW to the costs for a P-3 Position for activities related to two different meetings for 6 months each, undoubtedly influenced the legitimate expectation of [Ms. Loose] to have her contract renewed before its expiration notwithstanding the previous notice of non-renewal.²

¹ Impugned Judgment, para. 59.

² *Ibid.*, para. 56.

21. In these circumstances, the UNDT ordered rescission of that decision or the payment to Ms. Loose of compensation equivalent to 12 months' net base salary.

Submissions

The Secretary-General's Appeal

22. The Secretary-General says that the UNDT erred in fact and in law by concluding that the decision to not renew Ms. Loose's fixed-term appointment was unlawful. It did so by finding that the Administration had failed to justify the non-renewal decision by shifting the "burden of proof" about the Organisation's financial situation which under-pinned entirely the non-renewal decision, away from Ms. Loose.³ He says that established caselaw confirms the Secretary-General's broad discretion in such management decisions and that these can be subject to judicial review only in limited circumstances.⁴ He concedes that this is not a principle of absolute application: the non-renewal may be justified if based on "valid reasons".⁵ He says that a funding shortfall has been recognised as a valid consideration in the non-renewal of a staff member's appointment.⁶ He emphasises that the September 2017 letter to her advised her of both the non-renewal of her post and that this was because of lack of funding.

23. Next, the Secretary-General refers to the United Nations' rules and regulations around funding. Made in accordance with Article 17.1 of the Charter, these do not permit the Secretary-General to commit the Organisation's funds unless they have been designated for a particular purpose by the General Assembly. Addressing voluntary financial contributions as were at issue in this case, he says that the General Assembly must approve the receipt of any voluntary contribution that would involve additional liability for the Organisation, whether directly or indirectly. In Ms. Loose's case, as an extra-budget-funded staff member, her engagement for an extended period would have required the completed transfer to the Organisation of the voluntary contribution to cover the costs of her extended employment. When voluntary contributions to CCW's work fell below a level at which not all its activities

³ Although this has been addressed as a "burden of proof" question, that phrase refers to the standard of proof. Rather, we think that the appropriate term is the "onus of proof", that is who has the obligation to establish error. The standard to which that must be established is a second and separate question. We propose to treat these references to "burden" as being to onus of proof.

⁴ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-234, para. 39.

⁵ *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, para. 45.

⁶ *Liverakos v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-206, paras. 13–16.

could be predicted to be funded, the Secretary-General says it was open to him to consider where savings could be made including in relation to Ms. Loose's continued employment and that of others.

24. Because Ms. Loose was serving CCW in a post funded by voluntary contributions, the failure in 2017 of signatory nations to transfer sufficient funds to the United Nations for it to undertake a commitment to continue to employ Ms. Loose in her post beyond 31 December 2017 meant that such a commitment would have created a liability for the United Nations beyond the amounts of the voluntary contributions actually received. This would have been in violation of Article 17 of the United Nations Charter and the relevant Financial Regulations and Rules. While it found that the Administration had provided a valid justification for the non-renewal of Ms. Loose's fixed-term appointment, and in the absence of any evidence showing the decision to be unlawful, the UNDT improperly shifted the burden of proof to the Secretary-General, without any legal basis, even assuming that a burden of proof lay on the Administration.

25. The Secretary-General contends that the UNDT erred in fact in finding that the reason for the non-renewal of Ms. Loose's FTA provided on 19 September 2017 did not persist to the end of her FTA on 31 December 2017. On the contrary, there was ample and well-documented evidence showing the dire financial situation confronting CCW throughout 2017, including at the time of the expiry of Ms. Loose's FTA at the end of that year. At the close of 2017, the CCW fund was not balanced and did not have sufficient funds to support Ms. Loose's post for a complete budgetary period.

26. The Secretary-General maintains that the Dispute Tribunal erred in finding that the payment of the HCP arrears, the passing of the operational budget, and the passing of a budget for two meetings scheduled in 2018 were proof that there were funds to pay for Ms. Loose's post in 2018. The payment by contributing states of arrears in 2017 only showed that there were no more outstanding arrears' payments, but not that there were funds to pay for future costs. Further, even a surplus at the beginning of the year did not necessarily mean that there were sufficient funds to cover Ms. Loose's post. Moreover, the passing of the operational budget and the meetings budget did not mean that the United Nations had received the actual funds to commit to financing Ms. Loose's post in 2018.

27. Finally, the Secretary-General submits that the Dispute Tribunal erred in fact and in law in finding that Ms. Loose had a legitimate expectation of the renewal of her FTA. The approval of the meetings budget, which made express reference to a P-3 post (that held by Ms. Loose), was not an authorisation to incur commitments and make payments. Neither was it a guarantee of an available fund for the United Nations to make a commitment to fund a P-3 post in the 2018 budget period. Moreover, there was not an express promise that Ms. Loose's FTA would be extended beyond 31 December 2017.

28. The Secretary-General requests that the Appeals Tribunal vacate the impugned UNDT Judgment in its entirety.

The Respondent's Answer

29. Ms. Loose submits that the non-renewal decision was not supported by the facts. A 25 November 2017 CCW Report that was before the UNDT showed that CCW had decided to continue and staff the ISU (Ms. Loose's unit) in order to carry out the tasks of consulting on cost saving measures before the 2018 meeting, reporting on its activities annually and presenting a biennial budget to each future CCW meeting. Before the UNDT, the Secretary-General argued that the non-renewal decision had been taken by CCW and implemented by the Administration. Before the Appeals Tribunal, the Secretary-General now argues that the separation was not a decision by CCW, but that the Office of Disarmament Affairs (UNODA) was obliged by the financial situation to separate Ms. Loose from service against CCW's wishes. Having failed to persuade the UNDT of one justification, the Secretary-General now seeks to persuade the UNAT of another.

30. Ms. Loose maintains that the UNDT did not find that payment by one HCP meant that CCW was not in arrears. It did not draw any conclusion about CCW's financial situation; it simply made justifiable comment regarding the Secretary-General's refusal to provide evidence of the actual financial situation of CCW.

31. Ms. Loose states that the UNDT did not err in finding that the express budgeting for a P-3 position created a legitimate expectation of the renewal of Ms. Loose's FTA to a certain degree, as that negated the earlier stated reasons of a lack of funding for separation.

32. Ms. Loose requests that the Appeals Tribunal dismiss the present appeal and uphold the UNDT Judgment.

Considerations

33. There are several pertinent Regulations that affect the issues in this case. We will summarise them and their effect as follows.

34. Staff Regulation 4.5 applicable at relevant times⁷ allows for the appointment of staff such as Ms. Loose on fixed-term appointments. These are said to bear no expectation, in law or otherwise, of renewal or conversion (to continuing employment) irrespective of the length of service.

35. Staff Rule 4.13 provides that such fixed-term appointments may be for periods of one year or more (but only up to five years at a time). The term's expiration date shall be specified in the holder's letter of appointment. Such appointments may be renewed for any period of up to five years at a time.

36. We move now to the Secretary-General's particular grounds of appeal.

37. As to the onus of proof on an employee's challenge to the lawfulness of his or her separation from service, we start with the self-evident proposition that a decision to not renew or extend an FTA or convert it to continuing engagement, is that of the Secretary-General as employer. It is not unreasonable, therefore, to expect the employer to justify in law his decision when challenged to do so and when an applicant has made out an apparent (*prima facie*) case of absence of lawful justification. It should not make any difference in principle that the decision is not to renew a fixed-term appointment from which there is no express expectation of renewal and the expiry of which is a matter of express contractual provision, so that the decision is really about a failure or refusal to extend or renew rather than one to terminate by separation.

38. Unlike, for example, the separation from service of a staff member for reasons of serious misconduct in which the relevant circumstances will be likely to be known to the staff member, non-renewal of a fixed-term staff member to an existing role for reasons that have nothing to do with the staff member's work performance involves very different levels of knowledge by the parties. Although, as in this case, the staff member may be informed that budgetary constraints mean that she can no longer be employed, the relevant financial and

⁷ Staff Regulations and Rules of the United Nations, in Secretary-General's Bulletin ST/SGB/2017/1 issued on 18 January 2017.

operational information relied on, supporting and justifying this decision, is likely to be unknown to the staff member. In such circumstances, it is usually very difficult, if not impossible, for the staff member alone to assemble and present sufficient information to establish that the decision not to renew was not justifiable. In this case, Ms. Loose applied to the UNDT for an order that the Secretary-General furnish further background financial information which may have supported, or perhaps thrown into doubt, the unaffordability of a renewed role or the lawfulness of the decision taken not to renew. Surprisingly, it was opposed by the Secretary-General and the UNDT did not allow that application. The UNDT Judgment was eventually in Ms. Loose's favour, but the principle must apply to all circumstances, including those in which a case may fail for want of relevant evidence that one party can withhold. We should only add here that we do not suggest that the Administration's motive in this case was to conceal relevant information from Ms. Loose for its forensic advantage; rather, it is the potential for this to occur that concerns us, if this onus of proof principle, advanced by the Secretary-General in the circumstances of this case, is interpreted and applied so absolutely.

39. The leading, and most recent decisions of this Tribunal on this issue of onus (or as it is termed, burden) are two 2019 judgments. The first is in *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902. That too was a case of non-renewal of employment because of lack of funds. This Tribunal, at paragraph 65 of that Judgment, made it clear that the onus of establishing error lies on the staff member, especially where "... the lack of funds would have led any reasonable decision-maker to make the non-renewal decision ...".⁸ That principle was followed in the second judgment of this Tribunal, issued at the same time, *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932. But this approach begs the question of whose obligation it is justly to furnish that information to the Dispute Tribunal to enable it to reach the most just decision on the best information available. To require as an absolute onus the staff member to establish his or her case entirely while allowing the Administration to withhold (and even potentially oppose production of) information relevant to that decision has the potential to cause injustice. While this is established jurisprudence that we should follow, it is neither forever immutable nor of absolute application in any particular case.

⁸ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902, para. 64.

40. *Nouinou* is, in any event, distinguishable from the present case on its facts. In the former, the staff member had no evidence whatsoever of impropriety in her selection. Her allegations were founded on suspicion. In the present case, there was documentary information before the UNDT which, if acceptable to the Tribunal as it was, needed to be contradicted by the Secretary-General if that information was not to be decisive. Ms. Loose's case before the UNDT was not suspicion-based and speculative as was Ms. *Nouinou*'s.

41. The circumstances of this case illustrate the impracticability, if not the impossibility, and therefore the injustice, of putting a blanket onus (or burden as it was termed) of proof on a staff member in such circumstances. Rather, we consider that the more nuanced application of a shifting onus of proof is appropriate for such cases. By that we mean that there is an initial onus on a staff member such as Ms. Loose to establish a sufficient or apparent case of adequacy of resources to support a renewal or extension or other relevant grounds for not discontinuing the employment. When that initial onus has been discharged by the staff member, the onus of justifying in law the decision not to renew where that is justiciable (such as in cases of legitimate expectation of renewal) moves to the Administration. It will then be able (and indeed in practice be required) to adduce the evidence that only it has to support its decision whichever of not to extend or renew an FTA or convert it to a continuing engagement in circumstances in which that would otherwise be expected to occur.

42. In cases such as this, also, the UNDT should ensure that it has sufficient relevant information (documentary and oral evidence) to be able to ascertain for itself whether the decision not to renew was justified in circumstances where it might otherwise have been expected that there would be a renewal. In doing so, the UNDT will avoid potentially inequitable practises of requiring one party to prove everything in issue whilst allowing the other to put that first party to the proof of those issues and not assist the Tribunal by providing it with relevant evidence.

43. So, applying this test, did the UNDT impose erroneously the onus of justification upon the Organisation and, if so, did it err in law in the conclusion(s) it reached on the question? This requires close examination of the UNDT's reasoning.

44. There are several references to the word "proof" and its requirements in the UNDT's Judgment. They relate in substantial part to Ms. Loose's request for further disclosure by the Secretary-General of documents relevant to her case. We have already referred to this

application. The first reference to “proof” is at paragraph 51 of the Judgment. Noting that documents already before it confirmed that, during the last few months of 2017, the CCW’s financial position had improved (and was projected to improve further) and that decisions had been taken which would have involved Ms. Loose had she been retained after 31 December 2017, the UNDT stated that it considered “... with the content of this document, [Ms. Loose’s] burden of proof is met thus rendering [it] not necessary to grant her request for additional disclosure or an oral hearing”.

45. As will be clear from these words, this was a reference to a burden (or onus) not on the Secretary-General, but on Ms. Loose. We consider that the UNDT Judge intended to convey that the document before him established a fact or facts favouring Ms. Loose’s case so that she did not need to do more to satisfy the onus upon her to establish by evidence the relevant facts that were, or may have been, contentious.

46. Once the UNDT assesses all relevant facts established before it, including, in getting to that position, by applying the onus and burden of proof of contentious facts, it must apply the law to those facts to reach an outcome to the case. In that latter exercise, it is not a question of either party being required to establish a more convincing case by application of an onus or burden, but rather of the Tribunal’s assessment of where the justice of the case lies in respect of those established facts and the applicable law.

47. In this instance, the contents of the Secretary-General’s document established the fact to the UNDT’s satisfaction so that the onus on the applicant (Ms. Loose) of so doing had been discharged. This is not an example of an erroneous reversal of an onus of proof.

48. The next reference to “burden of proof” comes at paragraph 57 of the impugned Judgment. There, the UNDT did purport to impose on the Secretary-General a burden of proof. This concerned the UNDT’s analysis of evidence of the Organisation’s financial circumstances in relation to its claimed inability to continue to pay Ms. Loose. It wrote at paragraphs 57 and 58:

... In this case, however, the Respondent who bears on this issue the burden to prove the specific and concrete financial situation, gave no evidence at all about the alleged cash problems or inconsistency of the budget.

... In particular, no evidence was given on the fact that despite the payment of arrears by one of its Member States, the funds would not suffice to both ensure meetings

of the CCW and the payment of the staff costs of the ISU in the year 2018, and/or that in their meeting on 25 November 2017, the Member States decided to hold meetings of the CCW over the payment of staff costs. Also, there is no specific evidence about the fact that the renewal of [Ms. Loose's] contract would not have been financially feasible. The Respondent, who expressly opposed [Ms. Loose's] for additional disclosure of information and oral witnesses, did not ask for further investigation on these issues.

49. The reality of the evidential situation was that information relating to CCW's financial circumstances, which the Secretary-General had invoked as justification for not renewing Ms. Loose's contract as it would otherwise have done, was entirely within his possession and control. He had not released that information to Ms. Loose, so it would have been unrealistic to expect her to have adduced it before the Dispute Tribunal. Yet his justification for separating her from service was apparently impeached by other information issued by CCW that was before the UNDT. We agree that, in these circumstances, it was incumbent upon the Secretary-General, if he was to explain the apparent discrepancy between the stated grounds for non-renewal and CCW's public statements of its circumstances, to have adduced this evidence, which he did not. In that sense, therefore, there was in practice an onus on the Secretary-General to do so if the UNDT was to be dissuaded from its inference that Ms. Loose had been separated from service, apparently for at least, inadequate reasons.

50. The evidence before the Dispute Tribunal pointed against the Secretary-General's stated reasons for separating Ms. Loose from service. If the UNDT was to be dissuaded from the inference it drew from the documents put before it, it was incumbent on the Secretary-General, as the party against whose case the inference told, to furnish evidence to disabuse the Dispute Tribunal of that inferential conclusion if the claim was not to succeed. The Secretary-General might be said thereby to have had an onus, but which he failed to discharge. We find nothing objectionable in the UNDT's references to a burden (or onus) of proof resting on the Secretary-General in these circumstances.

51. The Secretary-General's burden of proof grounds on the appeal do not succeed.

52. We turn to the next ground of appeal. This is a challenge to the UNDT's factual conclusion that, by the end of December 2017 when Ms. Loose's fixed-term appointment expired, CCW's financial situation had sufficiently improved to enable her FTA to be renewed. Put another way, did the grounds for not renewing her contract that existed in September 2017 no longer persist in December 2017? The Secretary-General's case is that there was ample and

well-documented evidence showing the adverse financial situation confronting CCW throughout 2017, including at the time of the expiry of Ms. Loose's fixed-term appointment. He says that, at the end of 2017, the CCW fund was not balanced and did not have sufficient funds to support Ms. Loose's post for a complete budgetary period.

53. This ground of appeal is brought by the Secretary-General as one of error of fact. It follows that the Secretary-General accepts, as he did before the UNDT, that if a decision is taken not to renew an employee's fixed-term contract in circumstances where, all things being equal, it would have renewed, there is a continuing obligation to consider whether there may have been a later change in those circumstances before the expiry of the contract occurs and whether severance need still to take place. Accordingly, the UNDT concluded, at paragraph 42, that "the reason constituting the ground of the administrative decision should persist till the end of the contract, thus continuously supporting the reasons for the Administration's choice". And at paragraphs 47 and 54, the UNDT articulated this principle as follows: "the Administration was under an obligation to verify whether the financial constraints precluding the renewal of [Ms. Loose's] appointment continued to exist [after the notification of the contested decision]".

54. The Secretary-General conceded before UNDT that he would have rescinded the non-renewal decision if CCW's financial situation had changed to a degree which would have allowed for both the ISU's continued staffing and the holding of CCW's meetings and activities in 2018. It thus becomes for us only an issue whether the UNDT erred in fact in finding that this financial recovery had occurred before the expiry of Ms. Loose's fixed-term appointment.

55. In our assessment, the UNDT did not err in concluding that the Secretary-General failed in that forum to establish by evidence that CCW's financial situation at the time of Ms. Loose's severance from service was still sufficiently grave that she could not be renewed in a role that was otherwise still needed. Ms. Loose is right that it is not open to the Secretary-General to now seek to do so in a more adequate or persuasive way than that was put forward at first instance. This ground of the appeal likewise fails for this reason.

56. The Secretary-General's next ground of appeal is that the Dispute Tribunal erred in finding that the belated payment of contribution arrears by major HCPs, the passing of the operational budget, and the passing of a budget for two meetings scheduled in 2018, established that there were actual funds to pay for Ms. Loose's post in 2018. He says that

evidence of the payment of contribution arrears in 2017 only showed that arrears had been cleared, but not that there were funds to pay for future costs. Further, even a surplus at the beginning of the year did not necessarily mean that there were sufficient funds to cover Ms. Loose's post. Moreover, the passing of the operational budget and the meetings budget did not mean that the United Nations had received the actual funds to commit to financing Ms. Loose's post in 2018.

57. This ground of the appeal too must fail. Our task is to assess the information that was before the UNDT and to decide whether it erred in its decision based on that information. The UNDT cannot, without evidence presented to it, be expected to know of, and to apply, the intricacies and nuances of the Organisation's financial systems. It is not a part of the bureaucracy. Such considerations need to be brought to the UNDT's attention by evidence or submissions if it is to be expected to apply them. The Secretary-General now wishes to advance with the benefit of hindsight and, no doubt, in view of Ms. Loose's success before the UNDT, information that it should have adduced there. It cannot do so.

58. Finally, there is the Secretary-General's ground that the Dispute Tribunal erred in fact and in law in finding that Ms. Loose had a legitimate expectation of the renewal of her FTA. He says that the approval of the meetings budget, which makes express reference to a P-3 post in the unit in which Ms. Loose held just such a post, was not an authorisation to incur commitments and make payments. Neither was it a guarantee of an available fund for the United Nations to make a commitment to fund a P-3 post in the 2018 budget period. Moreover, there was not an express promise that Ms. Loose's fixed-term appointment would be extended beyond 31 December 2017.

59. The starting point for consideration of fixed-term engagements such as Ms. Loose's is the United Nations' Staff Rules. ST/SGB/2017/1, effective from 1 January 2017, provides at Article IV, Regulation 4.5, that a fixed-term appointment "does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service." Staff Rule 4.13(c) provides likewise, although Rule 4.13(b) allows for the renewal of a fixed-term appointment for any period up to five years at a time. So, while a fixed term creates no expectation of renewal, such is possible and, as the undisputed facts of this case and many others illustrate, is a relatively common occurrence.

60. We do not consider that the UNDT erred in its decision that, in all the circumstances, Ms. Loose had a reasonable and legitimate expectation that, all things being equal, her engagement would be extended or renewed to enable CCW to perform its important functions as the General Assembly clearly wished it to. To her knowledge, the financial impediments to that happening had apparently been resolved. That appeared to be confirmed by the passing of budgets, including the meetings budget relating to her particular work. Likewise, there had, to her knowledge, been budgetary provision made for a P3 role in her unit, the same as she had held. In the absence of the financial and organisational information that the Secretary-General now wishes to rely on but was not provided either to Ms. Loose or to the UNDT, it cannot be said to have erred in concluding that she had a legitimate expectation of continued employment, despite the previous notice of non-renewal. Again, the Secretary-General's failure to fully and fairly inform Ms. Loose of all the information upon which it relied means that it cannot now be permitted to take belated advantage of that. Although the Secretary-General is correct that there was no express promise of contract renewal made to her, in all the circumstances just described and otherwise, that is not an absolute necessity for a legitimate expectation to be created. There is ample evidence to support the UNDT's conclusion on this issue.

61. For the forgoing reasons, the appeal must fail and is dismissed.

Judgment

62. The appeal is dismissed and Judgment No. UNDT/2020/038 is upheld.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 20th day of November 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar