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Judgment No. 2020-UNAT-1043

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

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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)

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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 o 1 (fter)1 Tj E 1 (a) -1 (1 Tf [(10) 1 (4) 1 (3)

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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 “

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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

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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

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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.

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

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40. *Nouinou*

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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

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well-documented evidence showing the adverse financial situation confronting CCW

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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

