UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-1048

Felix Ross

(Applicant)

v.

Secretary-General of the United Nations

(Respondent)

APPLICATION FOR REVISION

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Martha Halfeld Judge Graeme Colgan
Case No.:	2020-1359
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Mr. Felix:	Self-represented
Counsel for Secretary-General:	Francisca Lagos Pola

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Applicant had disputed his non-selection for the P-4 position of Senior Protection Officer for the United Nations High Commissioner for Refugees ("UNHCR") in Rabat, Morocco (the "Position"). On 28 June 2019, the United Nations Appeals Tribunal (Appeals Tribunal) issued Judgment No. 2019-UNAT-944 (the "UNAT Judgment") dismissing the appeal and confirming the United Nations Dispute Tribunal's determination that the Applicant had received full and fair consideration for the Position.

2. The Applicant applies for revision of the UNAT Judgment pursuant to Article 11(1) of the Appeals Tribunal Statute (the "Statute") which provides that revision is available "on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Appeals Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence".

3. The Applicant requests revision because he says he became aware, on 9 & 10 January 2020, of the fact that the Inspector General's Office ("IGO"), UNHCR, had not made a finding on whether the hiring manager's conduct amounted to misconduct; in addition, the Respondent made misleading comments to the Appeals Tribunal, which led the latter to "erroneously conclude [...] that the IGO had investigated and determined that no misconduct occurred". He also seeks leave to exceptionally submit additional pleadings, a referral for accountability enforcement, an award of costs, and compensation for additional moral harm.

4. For reasons set out below, we dismiss the application.

Facts and Procedure

5. In paragraphs 2 to 5 of the UNAT Judgment, the Appeals Tribunal relied on findings made by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Judgment No. UNDT/2019/005 (the "UNDT Judgment") and outlined the history of the appeal to date. We will not repeat those findings and history but rely on them in our determination.

6. In summary, the Applicant joined the service of UNHCR in November 2008 as a Legal Officer (Human Resources) at the P-3 level in the Legal Affairs Service of UNHCR in Geneva, Switzerland. In November 2010, he was transferred to the position of Senior Protection Officer

in the UNHCR office in Sudan. In January 2013, the Applicant began a six-month, temporary assignment as a Legal Officer at the P-3 level in the UNHCR office in Nairobi, Kenya. From July 2013 through June 2015, he was on a leave of absence. On 1 July 2015, the Applicant began a temporary assignment as a Senior Protection Officer at the P-4 level in the UNHCR office in Rabat, Morocco.

7. In September 2015, the Applicant applied for the Position, which he had been encumbering on a temporary basis since July 2015. On 30 November 2015, the UNHCR Division of Human Resources Management ("DHRM") recommended the selection of a candidate other than the Applicant for the Position. On 23 December 2015, the Applicant was informed that he had not been selected for the Position.

8. On 8 January 2016, the Applicant obtained from DHRM the Hiring Manager's views pertaining to his candidacy for the Position.

9. On 14 January 2016, the Applicant submitted to UNHCR a complaint regarding the Hiring Manager's not having recommended him for the Position.

10. On 18 January 2016, the IGO informed the Applicant that the Investigation Service had "thoroughly reviewed the allegations that [the Applicant had] presented to the IGO" impugning the Hiring Manager's conduct and informed him that the IGO would "not be proceeding with a formal investigation".

11. On 29 April 2016, the Applicant filed an application to the UNDT contesting the decision not to appoint him to the Position. In the 16 January 2019 UNDT Judgment, the UNDT found that the Applicant had received full and fair consideration for the Position and that, consequently, there was no basis to award any compensation for moral damages. The UNDT dismissed the application.

12. On 13 March 2019, the Applicant appealed the UNDT Judgment. In the UNAT Judgment, the Appeals Tribunal concluded that the Applicant did not have a right to promotion but only to be fully and fairly considered for one. This Tribunal confirmed the UNDT's conclusions that the Applicant had received full and fair consideration for the Position. The Appeals Tribunal further concluded that the Applicant had not presented evidence to support his allegations of discrimination, improper motive and bias in the selection process and, therefore, dismissed the appeal.

13. On 23 January 2020, the Applicant filed this application for revision.

Submissions

Applicant's Application for Revision

14. The Applicant reiterates that, contrary to the Appeals Tribunal's finding that "the investigation into allegations of abuse of authority initiated against [the Hiring Manager] did not confirm any such abuse", an investigation never took place. On 9 & 10 January 2020, he discovered from Counsel of UNHCR that the IGO did not make any finding on whether the Hiring Manager's conduct amounted to misconduct and therefore, the IGO did not investigate this possibility. Instead, the IGO referred the Applicant to the management evaluation procedure as the "more appropriate avenue".

15. Further, the Applicant submits that the Respondent made misleading statements to the Appeals Tribunal leading to its erroneous conclusion that the IGO had investigated and determined that no misconduct had occurred. The Applicant lists what he says are misleading statements of the Respondent from 18 January 2016 to 12 June 2019, including those in the Respondent's answer to the appeal of 13 May 2019. He argues that he strongly objected to these misleading statements in his additional pleadings of 4 June 2019, but the Respondent continued to mislead the Appeals Tribunal by arguing this was a matter of "interpretation".

16. The Applicant argues the Respondent had a "duty to investigate allegations of possible misconduct as part of its duty to care towards" him and as part of its obligation set forth in the UNHCR's IGO policy. He says the IGO violated the duty of care when it decided not to investigate the allegations of misconduct against the Hiring Manager. In addition, the Respondent did not "actively dispute the individual facts put forward" by the Applicant before the Appeals Tribunal and the Dispute Tribunal. Therefore, the allegations should be considered as undisputed.

17. In addition, the Applicant says a staff member "has a right to have allegations investigated" and refers to the ILO Administrative Tribunal judgments that the burden of proof regarding allegations of harassment shifts in cases where the Respondent fails to investigate such allegations. The Applicant argues that the Appeals Tribunal should make an adverse inference against the Respondent for the failure to investigate.

18. The Applicant seeks leave to submit additional pleadings "closely" related to the new facts and to refer the matter to the Secretary-General for accountability enforcement, an award of costs against the Respondent for "repeatedly making false and misleading statements" and reimbursement for his own representation in the amount of USD 15,000, and an award for additional compensation for moral harm suffered because of the "Respondent obtaining two incorrect judgments".

The Secretary-General's Comments

19. The Respondent or the Secretary-General submits that, contrary to the Applicant's assertions, the fact that the IGO did not open an investigation and make a finding on misconduct does not constitute a decisive fact that was unknown to him. Based on the record, the Applicant knew, well before the issuance of the UNAT Judgment that the IGO had decided not to open an investigation against the Hiring Manager and that it had not made a finding on the Hiring Manager's conduct. Indeed, in his own Appeal, which he filed on 13 March 2019, the Applicant stated "[the IGO] never opened an investigation and never determined whether or not the conduct of [the Hiring Manager] amounted to misconduct". The Witness Statement of the Head of the Investigation Service of the IGO, which was transmitted to the Applicant in 2016 in the context of the UNDT proceedings, also indicated that "[t]he Investigation Service never opened an investigation […]" and that "the Deputy High Commissioner correctly informed [the Applicant] that the IGO did not find that [the Hiring Manager's] actions may have amounted to misconduct." The Applicant's submission that he was unaware that the IGO did not make a finding on misconduct must, therefore, be rejected.

20. Further, the Applicant's assertion that the Appeals Tribunal in the UNAT Judgment "erroneously concluded that the IGO had investigated and determined that no misconduct occurred" is incorrect. He relies on paragraph 25 of the UNAT Judgment where the Appeals Tribunal found that "the investigation into allegations of abuse of authority initiated against [the Hiring Manager] did not confirm such abuse". This finding does not change the fact that the Administration had thoroughly reviewed the Applicant's allegations against the Hiring Manager and had decided not to open an investigation against the latter. Additionally, this does not disturb the Appeals Tribunal's core finding that the Applicant did not meet his evidentiary burden of proving discrimination, improper motive and bias against the Hiring Manager. The absence of any evidence to support the Applicant's contention of improper motive or discrimination against the Hiring Manager, and not the fact that there

might have been an investigation that concluded that there was no such abuse, was the reason why the Appeals Tribunal dismissed the Applicant's appeal.

21. As for the remedies sought by the Applicant, the Secretary-General submits that the Applicant has failed to explain why the additional pleadings are exceptional and would justify the Appeals Tribunal's receipt of his additional pleadings. With the exception of the award of costs, the additional pleadings submitted by the Applicant are mere reiterations of requests for remedies that he had already submitted in his Application and in his Appeal. They were rejected by the UNDT and Appeals Tribunal in their respective Judgments. The Applicant is merely unsatisfied with the outcome of these Judgments and is seeking a new avenue to reiterate his requests for remedies and, thus, to relitigate matters that are *res judicata*.

22. With regard to the Applicant's request for an award of costs, the Applicant has failed to show any abuse of process in the present case. He is simply unsatisfied with the outcome of the UNAT Judgment.

23. In view of the foregoing, the Secretary-General says the Applicant has failed to establish a new decisive fact, within the meaning of the UNAT Statute and Rules of Procedure, which warrants a revision of the UNAT Judgment. He also has failed to meet the requirements of the Statute and Rules of Procedure for supplementing his pleadings or an award of costs. The Respondent requests the Appeals Tribunal to dismiss the Application for Revision in its entirety.

Considerations

I. The Revision Application

A) Test for Revision of an UNAT Judgment

24. Article 11(1) of the Statute of the Appeals Tribunal provides that either party may apply to the Appeals Tribunal for a revision of a judgment on the basis of the discovery of a decisive fact which, at the time of judgment, was unknown to the Appeals Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence (see also Article 24 of the Appeals Tribunal Rules of Procedure). Any application which seeks revision

of a final judgment rendered by the Appeals Tribunal can only succeed if it fulfills the strict and exceptional criteria established by Article 11(1).[1]

B) Is there a Newly Discovered "Decisive Fact" to Warrant Revision?

25. In order to succeed in his request for revision, the Applicant must prove that he has discovered a decisive fact that was unknown to both him and this Tribunal at the time of judgment. The "decisive fact" which he maintains was unknown to him and the Appeals Tribunal was his recent revelation that no investigation took place and therefore, the the Appeals Tribunal's statement (paragraph 25 of the UNAT Judgment) that the "*investigation* into allegations of abuse of authority initiated against [the Hiring Manager] did not confirm any such abuse"[2] is in error.

26. The Applicant says he learnt this fact on 9 & 10 January 2020 from UNHCR's Counsel that the IGO had never made any kind of finding whatsoever as to whether the Hiring Manager's conduct amounted to misconduct. He asserts that this is contrary to what the Respondent had claimed until now as the Respondent had been using the Deputy High Commissioner's statement in her management evaluation, the IGO's e-mail, and the affidavit of counsel for the Respondent to support the claim. He argues that all three statements are ambiguous regarding the IGO's actions and the Respondent used this ambiguity to mislead the Appeals Tribunal.

27. In Annex 2 of the Application for Revision, the Applicant lists what he says are "misleading" statements in communications from the Respondent on the lack of investigation. In an 18 January 2016 e-mail from the IGO to the Applicant, the IGO stated that "… The Investigation Service has thoroughly reviewed the allegations that you presented to the IGO, against the mandate of the IGO and the formal criteria applicable in assessing misconduct… *Please be informed that the IGO will not be proceeding with a formal investigation*".[3] This e-mail was before the Dispute Tribunal as part of the Respondent's Reply. In the Respondent's

1. *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-890, para. 12, citing *Beaudry v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-129, para. 16; *Walden v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-573; *Maghari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-392, para. 15, citing *Macharia v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-128, para. 7.

[2] Emphasis added.

[3] Emphasis added.

13 May 2019 Answer to the Appeal submitted to the Appeals Tribunal, the Respondent argued "… The IGO reviewed the allegations and did not find that the Hiring Manager's actions amounted to harassment, abuse of authority or any other form of prohibited conduct. Consequently, the IGO informed the Appellant that his complaint would be more suited for a management evaluation request." This was before the Appeals Tribunal. In addition, the Applicant stated in his appeal filed on 13 March 2019 before the Appeal Tribunal that: "[the IGO] never opened an investigation and never determined whether or not the conduct of [the Hiring Manager] amounted to misconduct".

28. Also, he argued before Appeals Tribunal (as summarized in the UNAT Judgment) as follows:

> The UNDT erred in fact in finding that an investigation had taken place into [the Hiring Manager's] misconduct. The Office of the Inspector General (IGO) never opened an investigation because it considered that management evaluation was the appropriate avenue. It therefore never determined whether or not [the Hiring Manager's] conduct amounted to misconduct. The decision by the IGO was manifestly unlawful because it had to investigate possible misconduct by staff members.

29. Therefore, it is clear in these communications and submissions that both the Applicant and the Appeals Tribunal were aware that the IGO had not conducted a formal investigation. With the benefit of hindsight and what might now be seen as the imprecise language used in the judgments finding that an "investigation" had taken place into the misconduct allegations, it would have been more precise to call the IGO's actions a preliminary "review" of the allegations, as was characterized by the IGO itself. Whether the review was "thorough" as indicated in the email is indeterminate. One interpretation of the IGO's e-mail of 18 January 2016 is that the IGO assessed that the complaint did not establish a *prima facie* case of misconduct and therefore, a formal investigation was not warranted. If so, that would explain acceptably both that consideration was given to the complaint, and that the outcome of the review was such that it fell short of warranting a formal "investigation" involving other people and other evidence. Nevertheless, this possible looseness in, and the materiality of, the characterization of the IGO's actions and interpretation of the IGO's e-mail as referencing an "investigation" compared to a "review", must be considered in the context of the case and the application before us, which is one for revision.

30. In applying the test required for revision, we do not accept that the Applicant first became aware of this fact in January 2020 and as such this cannot be a "newly discovered fact" as required by Article 11 of our Statute to warrant a revision of the UNAT Judgment.

31. Not only is the fact that the IGO did not conduct a formal investigation not a newly discovered fact, but we find it was not a "decisive fact" for the Appeals Tribunal in the UNAT Judgment.

32. In paragraph 25 of the UNAT Judgment, the Appeals Tribunal found that:

> Allegations of discrimination, improper motive and bias are very serious and ought to be substantiated with evidence; evidence which should have been presented to the UNDT to support the allegations in the instant case. This was not done. Indeed, the investigation into allegations of abuse of authority initiated against [the Hiring Manager] did not confirm any such abuse. Mr. Ross was therefore required to present the evidence which he may have had at the hearing before the UNDT. In the absence of any such evidence to support Mr. Ross' contention of improper motive or discrimination in the selection process for the position, this ground of appeal must fail.

33. In holding that the Applicant did not provide evidentiary support for his claim of improper motive, discrimination and bias, the Appeals Tribunal dismissed his allegation, holding that there was no evidence of a causal link between his claim of improper motive, discrimination and bias and his non-selection.[4] This was the material finding by the Appeals Tribunal, and the statement that the investigation did not confirm any abuse was an expository statement as evidenced by the use of the adverb "indeed" in the statement.

34. Therefore, we find that the test for revision as articulated above has not been met. The fact the IGO did not formally investigate the Applicant's allegations was not newly discovered but already known to the Applicant and the Appeals Tribunal, and, in the alternative, it is not a material fact for which, had it been known, would have impacted the UNAT Judgment.

[4] Impugned Judgment, para. 26.

35. In order to succeed in a request for revision, the "strict and exceptional criteria" established by Article 11 of our Statute must be met to review a final judgment rendered by the Appeals Tribunal.[5] That has not been done here. The application for revision is refused.

II. Relief and Remedies sought by the Applicant

36. As we refuse the application for revision, the relief and remedies sought by the Applicant are also refused.

37. In particular, we refuse the Applicant's request for leave to submit additional pleadings in order to respond to the Secretary-General's comments to his application for revision for the following reasons.

38. Article 10(1) of the Rules provides that "(i)n exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with such additional documentary evidence, it may receive the additional evidence from a party".

39. In his motion for additional pleading, the Applicant seeks to address paragraph 10 of the Secretary-General's comments which he says is false. However, as we determined above, the Applicant possessed this information in the various communications before the Dispute Tribunal and the Appeals Tribunal. He had the opportunity to respond to these statements, including the "ambiguous" e-mail from the IGO, which he did. He made submissions on this point. The Applicant was aware the IGO did not conduct a formal investigation which fact he is dissatisfied with. He should have anticipated the Respondent's comments on his application for revision. These are not exceptional circumstances and the motion for additional pleadings is refused.

40. Similarly, the Applicant's requests for referral for accountability, costs and moral harm are also refused. The requests for accountability referral by, and costs against, the Administration have already been litigated and determined by the Appeals Tribunal in the UNAT Judgment, which refused these applications. It found that there were "no reasons to believe that the Secretary-General did not make his submissions in good faith and his stance

[5] *Walden v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-573, para. 17.

is by no means an abuse of process".[6] There is no jurisdiction to reconsider these determinations.

41. As for the application for compensation for moral harm, it must also be refused as being a new claim following the UNAT Judgment presented for the first time in an application for revision. Although the Applicant says additional moral suffering has been caused by the experience of obtaining an erroneous judgment based on the misrepresentations by Respondent, as indicated above, we do not accept the basis of the Applicant's revision application. Even more fundamentally, we do not accept that such compensation is available for alleged harm deriving, not from an administrative decision, but from a judicial determination.

[6] Impugned Judgment, para. 22.

Judgment

42. The application for revision of judgment is dismissed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding Vancouver, Canada	Judge Halfeld Juiz de Fora, Brazil	Judge Colgan Auckland, New Zealand

Entered in the Register on this 3rd day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar