



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

Judgment No. 2021-UNAT-1114

**Gudrun Fosse
(Applicant)**

v.

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

JUDGMENT ON APPLICATION FOR REVISION

Before:	Judge Graeme Colgan, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2020-1414
Date:	25 June 2021
Registrar:	Weicheng Lin

Counsel for Applicant: Omar Shehabi, OSLA
Counsel for Respondent: Maryam Kamali

JUDGE GRAEME COLGAN, PRESIDING.

1. On 27 March 2020, the United Nations Appeals Tribunal (Appeals Tribunal) rendered Judgment No. 2020-UNAT-1008 in the case of *Fosse v. Secretary General of the United Nations* dismissing, by a majority, the appeal of Ms. Gudrun Fosse (Ms. Fosse), with Judge Colgan dissenting. In its majority opinion, the Appeals Tribunal affirmed the decision of the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Judgment No. UNDT/2019/135. The UNDT had rejected Ms. Fosse’s application finding her claim regarding the issuance of personnel action forms and her request to be returned to her previous post to be moot. Additionally, the UNDT found Ms. Fosse’s claim of constructive dismissal to be not receivable as she had not submitted that particular claim for management evaluation. Ms. Fosse has now filed an application requesting this Tribunal to revise its Judgment. She relies on two separate statutory vehicles which, she says, allow such a revision. For reasons set out below, we dismiss the application for revision.

Facts and Procedure

2. We will only summarise briefly the extensive and detailed background information set out in our March 2020 Judgment. Ms. Fosse joined the Organization in June 1989 as an Associate Coordination Officer at the P-2 level with the United Nations Office at Geneva. On 1 May 2009, Ms. Fosse was selected as a Special Assistant at the P-5 level to the first Assistant Secretary-General for the Office of Information and Communications Technology or the Chief Information Technology Officer (ASG/OICT). In August 2012, she took up the functions of Chief of the Operations Support Section (OSS) at OICT.

3. In February 2014, the ASG/OICT asked Ms. Fosse to assume a new function of leading the effort to set up a “Global Help Desk” in connection with the implementation of the IT application, Umoja.¹ In October 2016, Ms. Fosse took another role as the Coordinator of the Digital Blue Helmets (DBH) program in OICT. In both these instances, no personnel action form was issued to record the change in Ms. Fosse’s function.

¹ The Global Help Desk was renamed the Global Service Desk and subsequently the Unite Service Desk.

4. On 1 June 2017, Ms. Fosse wrote to the ASG/OICT requesting that personnel action forms be issued to record her temporary assignments as the Coordinator of the Unite Service Desk and the Coordinator of the DBH program, and that she be returned to her previous post of Chief of OSS. Her request and her follow-up e-mails in June and July 2017 went unanswered.

5. On 22 February 2018, Ms. Fosse filed an application to the UNDT challenging (a) the Administration's decision not to return her to her original functions as Chief of OSS following her temporary change of responsibilities, and (b) the implicit decision not to recognize her two temporary assignments during the 2014-2017 period in her official status file.

6. On 20 August 2019, the UNDT rejected the application holding that the claim for the issuance of two personnel action forms was moot because the Administration had since issued them on 28 February 2018. Second, the UNDT found that Ms. Fosse was no longer entitled to return to her functions as Chief of OSS and neither could the UNDT issue such an order because Ms. Fosse had since accepted the position of Chief of Section, Programme Budget, at the P-5 level with the Secretariat of the Convention on Biological Diversity (SCBD) in Montreal, Canada. The UNDT reasoned that Ms. Fosse was released by the United Nations to the SCBD on transfer in accordance with the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the UN Common System of Salaries and Allowances dated 1 January 2012 (Inter-Organization Agreement). In respect of her claim of "constructive dismissal", Ms. Fosse sought an unspecified amount of financial compensation, *in lieu* of specific performance, considering her changed position upon transfer to the SCBD. However, the UNDT found the claim "constructive dismissal" not receivable as she had not submitted that claim for management evaluation.

7. Ms. Fosse's appeal to this Tribunal in October 2019 challenged the UNDT's rejection of her application on receivability grounds and requested that the Tribunal remand the case to the UNDT for review on the merits. In its majority opinion, the Appeals Tribunal agreed with the UNDT that the applicant's claim of constructive dismissal was indeed not receivable because she had not submitted a timely request for management evaluation. The Appeals Tribunal further found that the issue of the constructive dismissal was the only issue for the Tribunal to address since Ms. Fosse did not put forward any specific grounds of appeal with reference to the UNDT's findings that her claims were moot regarding the personnel

action forms and the refusal to return her to her original post of Chief of OSS. Therefore, that part of the appeal was not receivable.

8. By application filed on 21 July 2020, Ms. Fosse now seeks revision of that Judgment. The Respondent filed his comments on the application on 26 August 2020.

Submissions

Ms. Fosse's Application

9. Ms. Fosse addresses first the fact that she remains a United Nations Secretariat staff member, even though she accepted a position in the SCBD. As such, she maintains that the remedy of specific performance remains available to her. Ms. Fosse contends that the Tribunal believed the SCBD was an entity outside the UN Secretariat and therefore the specific remedy of return to her post as Chief of OSS was then not considered a viable option.

10. Ms. Fosse explains that the following facts were unknown both to her and the Tribunal: that (a) she retained a contractual relationship with the United Nations Secretariat because the SCBD is part of the United Nations Environment Programme (UNEP), which is an organisational unit of the United Nations Secretariat, and (b) that as a result of her continued status as a United Nations Secretariat staff member, her reassignment to the SCBD was not a transfer, and therefore she maintains a lien on her post as Chief of OSS.

11. Ms. Fosse thus argues that the Appeals Tribunal erred when it incorporated the UNDT's mistaken assumption that her movement to the SCBD was a transfer governed by the Inter-Organization Agreement. She explains this wrong assumption warrants a revision of the Judgment because her claim for specific performance – return to her former position – did not become moot when she joined the SCBD.

12. Alternatively, Ms. Fosse requests the Appeals Tribunal take notice of these decisive facts, and take appropriate action thereupon, through the exercise its inherent judicial powers pursuant to Article 31 of the Appeals Tribunal Rules of Procedure (Rules). Ms. Fosse explains that she and her counsel were unaware of the intricacies of the relationship between the United Nations Secretariat, the UNEP Secretariat, and the SCBD. She contends that it was the Administration which wrongly asserted that she lacked a contractual relationship with the United Nations Secretariat and had transferred to the SCBD under the Inter-Organization

Agreement, and as such, it would be a miscarriage of justice to penalise her for only now discovering the Administration's misrepresentations.

The Respondent's Comments

13. The Respondent argues that the only issue before the Appeals Tribunal is related to the issue of constructive dismissal. This is because Ms. Fosse did not put forth any specific grounds of appeal with reference to the UNDT's findings that her claims were moot regarding the personnel action forms and the rescission of the administrative decision not to return her to her original post of Chief of OSS. As such, the Respondent explains that Ms. Fosse cannot reargue her case, by raising facts that were known at the time and that are actually not relevant to the findings of the Appeals Tribunal.

14. Markedly, the Respondent argues that Ms. Fosse does not explain how the discovery of this new fact regarding her contractual relationship actually relate to her failure to request management evaluation on the issue of constructive dismissal, which was the sole issue decided upon by the Appeals Tribunal.

15. The Respondent explains that the Appeals Tribunal only made a reference to the Inter-Organization Agreement in its Judgment and that discovery of the new fact does not alter the basis for the Tribunal's decision. Importantly, the Appeals Tribunal, like the UNDT, found that the claim of constructive dismissal was not receivable because Ms. Fosse had not submitted the claim for management evaluation. The fact that Ms. Fosse remained a United Nations Secretariat staff member does not in any way affect the issue of receivability on the constructive dismissal claim.

16. Regarding Ms. Fosse's final argument pursuant to Article 31 of the Rules, the Respondent contends that the case does not present any exceptional or unique set of circumstances warranting a revision of the Judgment.

Considerations

17. Revisions of final judgments are permitted specifically only on narrow grounds under Article 11(1) of the Appeals Tribunal Statute (Statute) and also under Article 24 of the Rules. Several elements have to be established by Ms. Fosse. First, she must establish the existence of a fact which would be decisive of the appeal in her favour. Next, she must establish

that this decisive fact was unknown to her and to the Appeals Tribunal at the time the Judgment was issued. Third, she must establish that ignorance of this fact, as described, was not due to her own negligence. Put another way, even if Ms. Fosse did not know of this fact, she must also show that she could not reasonably have known of its existence at that time.

18. The second vehicle by which Ms. Fosse says that this Tribunal is empowered to revise its earlier Judgment is the jurisdictional “catch-all” of Article 31 of the Rules which provides materially:

Procedural matters not covered in the rules of procedure

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Appeals Tribunal on the particular case, by virtue of the powers conferred on it by article 6 of its statute.

19. Article 6 of the Statute referred to in the Rules does not refer to the revision of judgments or otherwise to their re-opening or re-visitation after their issuance.

20. Next, it is important to identify the basis upon which the Appeals Tribunal, by a majority, dismissed Ms. Fosse’s appeal and affirmed the correctness of the UNDT Judgment. We have set that out at paragraph 7 above.

21. There is a fundamental but insurmountable hurdle to Ms. Fosse’s application, which means that we must dismiss it. As set out above in paragraph 17, any error in the Judgment must be “decisive,” that is it must go to the heart of the Judgment and the reasoning for it and must persuade the Tribunal that, had it not acted in reliance of such error, the result of the appeal would have been reversed and in favour of the appellant.

22. This Tribunal, by a majority, found against Ms. Fosse on two separate grounds. One of those was that she had not submitted her relevant claim to management evaluation, an essential jurisdictional step to bringing that claim before the UNDT. Even if Ms. Fosse established an unknown and decisive error affecting the status of the two United Nations entities, that does not address the absence of management evaluation ground upon which her 2020 appeal foundered. It follows that even if she is successful in establishing that this Tribunal inadvertently erred on one of the two grounds upon which it rejected her appeal, that will not meet the essential test of decisiveness of the appeal as described above. Put another way, even if the Appeals Tribunal had

decided that ground in Ms. Fosse's favour, by a majority, it would still have found that her UNDT proceedings were not receivable because of the absence of necessary management evaluation.

23. In these circumstances we must, and do, dismiss Ms. Fosse's application for revision under Article 11 of the Statute.

24. We turn now to the same application, albeit made in reliance on Article 31 of the Rules. This does not avail the applicant. That is because Articles 11 of the Statute and 24 of the Rules do address expressly the revision of judgments that Ms. Fosse seeks now. In these circumstances, Article 31 of the Rules cannot be invoked as a catch-all or general empowering provision, where this recourse has been addressed expressly. Therefore, the application made in reliance on that article is likewise dismissed.

25. It is unnecessary, considering these conclusions, to address the Respondent's other grounds of opposition.

Judgment

26. The application for revision of Judgment No. 2020-UNAT-1008 is dismissed.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 1st day of July 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar