



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

Judgment No. 2021-UNAT-1128

**Dianne Fairweather
(Applicant)**

v.

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

JUDGMENT

ON APPLICATION FOR INTERPRETATION AND REVISION

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge John Raymond Murphy
Case No.:	2020-1416
Date:	25 June 2021
Registrar:	Weicheng Lin

Counsel for Applicant: Self-represented

Counsel for Respondent: Jiyoung Kwon

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. On 27 March 2020, the United Nations Appeals Tribunal (Appeals Tribunal) issued Judgment No. 2020-UNAT-1003 in the matter of *Fairweather v. Secretary-General of the United Nations*.¹ In the Judgment, the majority decision dismissed the appeal of the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) Judgment No. UNDT/2019/134 wherein the UNDT held the staff member's (the Applicant's) application contesting an inordinate delay in the rebuttal process of performance appraisals was not receivable as it was not an appealable administrative decision. The majority of the Appeals Tribunal agreed and held that the delay did not result in direct legal consequences and that the automatic ineligibility for certain benefits without an application for those benefits was not sufficient to constitute direct legal consequences.

2. The Applicant applies for Revision and Interpretation of the Appeals Tribunal's majority Judgment pursuant to Article 11 of the Appeals Tribunal Statute (Statute) and Articles 24 and 25 of the Appeals Tribunal Rules of Procedure (Rules). An application for Interpretation is "only needed to clarify the meaning of a judgment when it leaves reasonable doubts about the will of the Tribunal or the arguments leading to a decision."²

3. The Applicant applies for Interpretation of the Judgment to clarify and interpret the scope of the majority opinion on: (i) what constitutes direct legal consequences of an administrative decision, given the unreasonable delay and/or failure of the Administration to respond to her requests for rebuttal of the performance appraisals led to her ineligibility to apply for certain benefits; and (ii) her contractual employment rights, considering her performance appraisal for the period 2010-2011 was reversed on appeal.

4. An application for Revision of Judgment is based on the discovery of a decisive fact, unknown at the time of judgment to the Appeals Tribunal and to the party applying for the revision.³ The Applicant's submission, however, was presented on the basis that, after the Judgment, she unsuccessfully requested the Administration to consider her request for payment of her benefits, given the reversal of her performance rating for 2010-2011.

¹ *Fairweather v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1003 dated 27 March 2020 (Impugned Judgment).

² *Abbasi v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-315, para. 18.

³ See Article 11 of the Statute.

5. We deny the applications for reasons below.

Facts and Procedure

6. In May 2013, the Applicant, a now retired staff member of the Office of the High Commissioner for Human Rights (OHCHR), requested a rebuttal of her performance appraisals for the periods 2010-11 and 2011-12, in which she received the ratings of “partially meets performance expectations”. She subsequently followed up on multiple occasions regarding the status of her request, even after she retired in October 2016.

7. On 19 July 2017, the Applicant requested management evaluation of the decision “not to respond to and/or take appropriate and timely action to consider, complete and report on request for rebuttal on her performance appraisal filed on 13 May 2013” (the Contested Decision). Having received no response to her management evaluation request, the Applicant filed an application with the Dispute Tribunal challenging the Contested Decision on 17 October 2017.

8. On 29 November 2017, a rebuttal panel issued its reports, recommending an upgrade of the Applicant’s rating to “successfully meets performance expectations” for the 2010-2011 time period but recommending no change to the 2011-2012 rating of “partially meets performance expectations”.

9. On 5 August 2019, the UNDT issued Judgment on Receivability No. UNDT/2019/134, dismissing the application as not receivable. The UNDT found that an inordinate delay in the rebuttal process of an appraisal was not an administrative decision, unless it was shown that it had, by itself, a direct and negative impact on a staff member’s conditions of service. The Applicant therefore needed to demonstrate that the delay in conducting the rebuttal process on her rating “partially meets performance expectations”, by itself, had a direct and negative impact on her conditions of service.

10. With respect to her claim for the long-service step entitlement, the UNDT noted there was no evidence that the Applicant had applied for or challenged a decision pertaining to the long-service step. Therefore, there was no reviewable administrative decision concerning the long-service step. Regarding the Applicant’s eligibility to participate in the Young Professionals Programme (YPP) exam, the UNDT also noted that there was no reviewable administrative decision in that regard either.

11. On appeal, in its majority opinion, the Appeals Tribunal affirmed the UNDT decision that the Applicant's application was not receivable. The majority found the Applicant did not actually apply for the long-service step or the YPP exam. The majority thus held that the Applicant's claim that her applications for the long-service step or for the YPP exam were not necessary, could not be sustained. The Tribunal explained:⁴

The decisions to grant or deny the long-service step or eligibility for the YPP exam are not part of the performance appraisals rebuttal process and constitute in themselves separate administrative decisions. If the Appellant believed that, regardless of the ongoing rebuttal process, she was eligible for the long-service step or the YPP exam, she would have applied and challenged any denial, especially if it was based on her performance appraisals under review in the ongoing rebuttal process.

(...) In the absence of applications for long-service step or the YPP exam, the Appellant cannot backtrack and presume the direct negative legal consequences of a decision that might have existed but never did.

12. Consequently, the Tribunal held that the delay or lack of response to a request for a rebuttal of performance appraisals had no direct legal effect and was neither an administrative decision nor an implied decision.

Submissions

The Applications

Application for Interpretation of Judgment

13. The Applicant requests the Appeals Tribunal to "clarify the scope and meaning" of the Judgment in so far as it does not consider her automatic ineligibility for several administrative actions as direct legal consequences of the Contested Decision.

14. She says the statements in paragraphs 38 and 43 of the Judgment are inconsistent. Paragraph 38 states "the Appellant alleges that the delay in the rebuttal process had direct negative legal consequences and was a decision, in itself. She alleges that the delay affected her eligibility for 'the long-service step' and made her ineligible for the YPP exam." Meanwhile, paragraph 43 of the Judgment states "the absence of a decision in response to a request for a

⁴ Impugned Judgment, para. 41-42.

rebuttal of performance appraisals had no direct legal effect and was neither an administrative decision nor an implied decision.”

15. Further, she asks the Appeals Tribunal to clarify whether, owing to the Judgment, she is not entitled to the long-service step under the Staff Rules considering the reversal of her performance appraisal for 2010-2011.

Application for Revision of Judgment

16. The Applicant submits that the Appeals Tribunal erred in its interpretation of the facts and the law in this case.

17. First, she says any delay beyond six months in responding to a request for rebuttal of a performance appraisal is excessive.⁵ Second, the Applicant argues the Appeals Tribunal incorrectly considered in paragraph 41 the issue of the long-service step pursuant to Information Circular ST/IC/2008/45 (Revised salary scales for staff in the General Service and related categories at Headquarters) and not as per the human resources guidelines for such entitlement. Third, she argues that contrary to paragraph 40, staff members are not required to apply for the long-service step. She explains that failure to have five consecutive successful e-PASes automatically disqualifies one for such benefit, and this is a direct legal consequence under the Staff Rules. Finally, the Appeals Tribunal, including in the dissenting opinion, misunderstood the process for the long-step service step.

18. In terms of new facts, she stated that, after the Judgment, she requested the Administration to consider payment of her entitlement benefits given the reversal of her performance rating for 2010-2011. The Administration responded that given the majority Judgment, they considered the matter closed unless there was a basis to reopen the matter.

19. Finally, she submits that the Judgment is not only incorrect as to her entitlements and rights under her contract of employment, but neither are the facts, the evidence nor the Staff Rules correctly considered in arriving at a reasonable conclusion.

⁵ See Section 15.4 of Administrative Instruction ST/AI/2010/5/Corr.1 (Performance Management and Development System).

20. The Applicant requests the Appeals Tribunal to grant a retroactive award of her long-service step and the related recalculation of her pension benefit based on the reversal of her 2010-2011 performance report and award any damages it deems fit and just under the circumstances.

The Respondent's Observations

21. The Respondent argues the Applicant has incorrectly quoted paragraphs 38 and 43 of the Judgment in her application for interpretation and there is no allegation of ambiguity in the text of either paragraph 38 or 43, as required in the test for interpretation previously outlined by UNAT.⁶

22. Also, as per *Abbasi*, the Respondent says this application is a disguised attempt to criticize the Judgment.⁷ As such, the Respondent asks that the application for interpretation be dismissed.

23. The Respondent argues that rather than identifying any new fact which was, at the time of the Judgment, unknown to the Appeals Tribunal and to the Applicant, the Applicant instead attempts to re-litigate her claims that failed on appeal.

24. The Respondent submits that there is no basis to grant the application to revise the Judgment as the Applicant has failed to include any new fact in her submissions, which would have been decisive in reaching the original decision.⁸

Considerations

25. A final decision of this Tribunal cannot be readily set aside based on the principle of *res judicata*. Article 10 (6) of the Statute provides that judgments of the Appeals Tribunal “shall be final and without appeal, subject to provisions of article 11” of the Statute. Article 11 sets out the limited grounds for review or revision of a final judgment.⁹

⁶ See *Abbasi* Judgment, *op. cit.*

⁷ *Ibid.*

⁸ See Article 11 of the Statute; *Muthuswami et al. v. United Nations Joint Staff Pension Board*, Judgment No. 2011-UNAT-102, para. 13.

⁹ *Chaaban v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-497, para. 19.

Application for Interpretation

26. Article 11(3) of the Statute provides that “[e]ither party may apply to the Appeals Tribunal for an interpretation of the meaning or scope of the judgment.” Article 25 of the Rules provides that the Appeals Tribunal “will decide whether to admit the application for interpretation and, if it does so, shall issue its interpretation.”

27. This Tribunal found in *Abbasi* that:¹⁰

[I]nterpretation is only needed to clarify the meaning of a judgment when it leaves reasonable doubts about the will of the Tribunal or the arguments leading to a decision. But if the judgment is comprehensible, whatever the opinion the parties may have about it or its reasoning, an application for interpretation is not admissible, as it happens in the present case.

28. In the present case, the majority Judgment is clear and unambiguous in its meaning. There is no confusion or reasonable doubt about the conclusions or reasons of the Tribunal. The Applicant incorrectly quotes paragraph 38 in an attempt to point out an alleged inconsistency with paragraph 43 of the Judgment. Paragraph 38 clearly summarizes the Applicant’s submissions and allegations on appeal. Paragraph 43, on the other hand, clearly sets out the conclusion of the majority of the Appeals Tribunal that it “did not agree with the Appellant’s reasoning”. There is no inconsistency.

29. The Applicant says the Appeals Tribunal did not consider her automatic ineligibility for several administrative actions, such as being “debarred” from certain entitlements under the Staff Rules and based on her employment contractual rights. However, the majority of the Appeals Tribunal clearly did consider this when it considered the Applicant’s arguments regarding her automatic ineligibility for the long-service step and her ability to participate in the YPP exam. The majority considered these arguments and held that the “Appellant cannot (...) presume the direct negative legal consequences of a decision that might have existed but never did.”¹¹

¹⁰ *Abbasi* Judgment, *op. cit.*, para. 18.

¹¹ Impugned Judgment, para. 42.

30. The majority Judgment does not need interpretation or clarification as it leaves no reasonable doubt as to what it means.¹² Rather, we find the application “constitutes a disguised way to criticize the Judgment or to disagree with it.”¹³ Therefore, we deny the application for interpretation.

Application for Revision

31. Article 11 (1) of the Statute provides that a party may apply for revision “on the basis of the discovery of a decisive fact which was, at the time of 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.”¹⁴

32. Therefore, in an application for revision, an applicant must show or identify: (i) fact(s) that, at the time of the Appeals Tribunal’s judgment, were unknown to both the Appeals Tribunal and the party applying for revision, (ii) that such ignorance was not due to the negligence of the applicant, and (iii) that the facts identified would have been decisive in reaching the decision.¹⁵

33. The Applicant does not identify a decisive fact unknown at the time of the Judgment. She says that she has unsuccessfully written to the Administration, after discerning that irrespective of the Judgment, she is still entitled to the long-service step benefit as per the Staff Rules, which would also impact her pension benefit. However, this is not a fact that is relevant to the issues before the Appeals Tribunal, as this relates to events subsequent to the Judgment. As such, this cannot be “decisive” to the majority decision on the issues.

34. The Applicant makes several submissions and allegations of how the Appeals Tribunal erred, or misunderstood, or misinterpreted matters in its Judgment. However, she does not identify a decisive fact, that at the time of the Judgment, was unknown and would have been decisive in reaching the decision.

¹² *El Shaer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1009, paras. 18-20.

¹³ *Abbasi* Judgment, *op. cit.*, para. 16.

¹⁴ See also Article 24 of the Rules.

¹⁵ *Awe v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-735, para. 16-22; *Muthuswami et al. v. United Nations Joint Staff Pension Board*, Judgment No. 2011-UNAT-102, paras. 9-10; 13.

35. As stated by the Appeals Tribunal previously, an application seeking revision of a final judgment of the Appeals Tribunal can only succeed if it fulfils the strict and exceptional criteria established under Article 11 of the Statute.¹⁶

36. The Applicant has failed to meet the “strict and exceptional criteria” required by Article 11 of the Statute. Instead, the Applicant attempts to use the present application as an additional opportunity to re-litigate arguments that failed at trial or on appeal.¹⁷ For these reasons, the application for revision must fail.

37. As an aside, the Applicant asks the Appeals Tribunal to provide an opinion on whether she is entitled to the long-service step benefit in light of the reversal of her performance appraisal for 2010-2011. We deny this request as this is outside the scope of either application (for interpretation or revision).

38. The applications do not meet the required criteria, and they are dismissed.

¹⁶ *Awe* Judgment, *op. cit.*, para. 19; *Masri v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-163, para. 11.

¹⁷ *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. 19.

Judgment

39. The applications are dismissed.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 27th day of July 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar