



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

Judgment No. 2022-UNAT-1224

**Howard Andrew Giles
(Applicant)**

v.

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

**JUDGMENT
ON APPLICATION FOR REVISION**

Before: Judge Kanwaldeep Sandhu, Presiding
Judge Graeme Colgan
Judge Sabine Knierim

Case No.: 2021-1564

Date: 18 March 2022

Registrar: Weicheng Lin

Counsel for Appellant: Michael P. Giles

Counsel for Respondent: André Luiz Pereira de Oliveira

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Howard Andrew Giles (Mr. Giles or the Applicant) has filed an application for revision of Judgment No. 2021-UNAT-1106 of the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
2. Previously, the Applicant challenged the decision of the Advisory Board on Compensation Claims (ABCC) not to reverse its prior recommendation to the Secretary-General to discontinue his partial disability benefit. On 19 March 2021, UNAT issued Judgment No. 2021-UNAT-1106, affirming the UNDT Judgment No. UNDT/2020/091 of 19 June 2020, in which the UNDT dismissed Mr. Giles' challenge. He now applies to revise the UNAT Judgment on the basis of what he says was discovery of a decisive fact that was, at the time the Judgment was rendered, unknown to him and the Appeals Tribunal.
3. For the reasons set out below, we deny the application.

Facts and Procedure

4. The following background is taken from Judgment No. 2021-UNAT-1106¹:
 3. The Appellant commenced service with MONUSCO on 8 March 2007. On 27 April 2010, he sustained an injury at work, and his appointment was terminated for health reasons on 27 December 2011.
 4. In November 2011, the United Nations Joint Staff Pension Fund (UNJSPF) awarded the Appellant a disability benefit (the UNJSPF Benefit) under Article 33 of the Regulations, Rules and Pension Adjustment System of UNJSPF (Article 33 of UNJSPF Regulations).
 5. On 18 December 2012, the ABCC recommended to the Secretary-General that:
 - (i) the Appellant's injury be recognized as service-incurred, resulting in a 12 percent permanent loss of function of the whole person and that he be awarded compensation under Article 11.3 (c) of Appendix D to Staff Rules (Appendix D), and
 - (ii) the permanent loss of function be recognized as a partial disability with 100 percent loss of earning capacity and that the staff member be awarded an annual compensation (the ABCC Benefit) under Article 11.2 (d) of Appendix D.

¹ Footnotes omitted.

6. On 19 February 2013, the Secretary-General approved the ABCC Benefit. However, questions were subsequently raised regarding the Appellant's continuing disability status.

The UNJSPF Benefit

7. On 18 February 2015, the UNJSPF's Chief, Legal and Compliance Unit, requested the Appellant to submit copies of his 2011 to 2014 tax returns along with other proof of his earnings from the time he began receiving the UNJSPF Benefit (November 2011) as well as a sworn statement detailing the exact periods and the nature of the work he had undertaken since his separation from the United Nations.
8. On 13 March 2015, the Appellant provided the requested sworn statement but not copies of his tax returns claiming that the returns contained personal information, which was not his alone and as such were subject to federal and state privacy laws. In addition, the CEO of Hostile Control Tactics LLC (for which the Appellant allegedly did some work) issued a letter on 9 October 2014 attesting that the Appellant had never been his employee and that he was only featured on his company website as a freelance or independent contractor.
9. On 5 May 2015, UNJSPF's Chief, Legal and Compliance Unit, wrote to the Secretary of the ABCC with a summary of the Appellant's case, including information on his subsequent work: (i) as an Instructor for the United States Federal Air Marshalls from September 2011 to October 2012 teaching two 45-minute classes per week, and (ii) as a Watcher at the Federal Law Enforcement Training Center from January 2013 to May 2014, which he performed "sporadically". UNJSPF noted the Appellant did not provide information on the amount he earned in either capacity and also that he declined to provide tax returns as they contained information pertaining to his spouse. UNJSPF also informed ABCC that its Standing Committee decided to suspend the UNJSPF Benefit to the Appellant as of 1 August 2015, pending further review in November 2015.
10. On 12 May 2015, the ABCC recommended that the Appellant's ABCC Benefit be discontinued based on evidence regarding the Appellant's earning capacity and internet search results showing that he actively promoted his work capabilities in the security field. The Controller, on behalf of the Secretary-General, approved this recommendation on 5 June 2015, effectively discontinuing the ABCC Benefit.
11. On 22 November 2016, the Appellant was seen for an independent medical evaluation (IME) at the United Nations Medical Officer's request. On 22 December 2016, taking into account the IME's findings, UNJSPF reinstated the Appellant's UNJSPF Benefit as of 1 November 2016 and, later, also retroactively reinstated his benefit between August 2015 and October 2016. To proceed with the reinstatement, the Appellant was required to provide a sworn statement that he had not undertaken any paid employment besides the one he undertook in 2012.

The ABCC Benefit

12. On 3 February 2017, the Appellant informed the ABCC of the UNJSPF decision to reverse the suspension of the UNJSPF Benefit and requested that the ABCC follow suit and reinstate the ABCC Benefit, retroactive to 5 June 2015 (the date of the initial suspension).
13. On 27 April 2017, the Appellant provided to the ABCC and the UNJSPF his sworn statement that he had not undertaken any paid employment besides in 2012.
14. On 25 May 2017, the ABCC informed the Appellant that its findings are independent of the UNJSPF and invited the Appellant to provide it with evidence regarding his earning capacity for consideration.
15. On 14 June 2017, the Appellant submitted several documents, including medical reports and statements from the Appellant and the Chief Executive Officer of Hostile Control Tactics LLC.
16. On 29 December 2017, the ABCC informed the Appellant that it had considered the matter but that it would not change its previous recommendation to discontinue the ABCC Benefit (the Contested Decision). It also stated that it might consider his case prospectively, but not retroactively, upon submission of his complete and true income tax returns for 2011 to 2017.
17. On 19 February 2018, the Appellant requested management evaluation of the Contested Decision. On 16 July 2018, the Management Evaluation Unit upheld the decision.
18. On 19 June 2020, the Dispute Tribunal held the Appellant's application was receivable but dismissed the application, finding that the ABCC and UNJSPF are two independent bodies, governed by different legal regimes. In particular, for the ABCC Benefit, Article 11.2(d) of Appendix D requires proof of an adverse effect upon earning capacity whereas UNJSPF Article 33(a) requires only proof of "incapacitation," a purely medical factor which only requires medical evidence to prove.
19. In addition, the Dispute Tribunal held there is no legal basis for the submission that the ABCC Benefit is subject to periodic disability review of the UNJSPF, not the ABCC. The Dispute Tribunal found that it is for the ABCC to determine the nature of proof that was necessary in the circumstances pursuant to Article 15 of Appendix D.
20. Finally, the Dispute Tribunal also held it could not "assail the decision given the Applicant's failure to avail his tax returns which the ABCC would have established the quantum and source of the Applicant's earnings during this period in issue." The ABCC did not deny the Contested Decision was partly based on the online posts and photographic evidence posted by Hostile Control Tactics LLC. All relevant matters were considered by the ABCC before arriving to its decision not to reverse its recommendation to discontinue the benefit.

21. Therefore, the Dispute Tribunal concluded that the Contested Decision was legal, rational, and procedurally correct.

The UNAT Judgment (2021-UNAT-1106) (the “Judgment”)

5. The Appeals Tribunal held that the applicable legal provisions confirmed the authority of the Secretary-General to review and revoke benefits based on change of entitlement to those benefits.²

6. The Appeals Tribunal considered whether the UNDT erred in law or fact when it held: (a) the ABCC correctly interpreted Article 11.2(d) of Appendix D requiring proof of an adverse effect on earning capacity for continuation of the ABCC Benefit but not for the UNJSPF Benefit under Article 33 of the UNJSPF Regulations, and (b) the ABCC correctly relied on Mr. Giles’ failure to produce his tax returns in making its decision regarding his continued eligibility for the ABCC Benefit.³

7. The Appeals Tribunal held that UNDT did not err when it held that the legal frameworks for the two benefit systems, namely the UNJSPF and the United Nations Staff Rules and Regulations, are different and that the decisions made under the two legal regimes need not be consistent.⁴ The Appeals Tribunal held that the two benefits require two different standards and have different eligibility requirements.⁵ The Appeals Tribunal, therefore, held that UNDT correctly held that the recommendation to grant or not to grant the benefit was within the mandate of the ABCC, not UNDT.⁶

8. Noting that the ABCC required Mr. Giles to furnish tax returns as further evidence on the adverse effect of the disability on his earning capacity and his continued eligibility for receiving a disability benefit, the Appeals Tribunal held that the tax returns were (and are) relevant to Mr. Giles’ earning capacity, including what work had been declare, and the quantum and source of earnings. Further, the Appeals Tribunal held that it was within the discretion of the ABCC to draw an adverse inference ABCC drew from Mr. Giles’ refusal to produce the tax returns. The Appeals Tribunal found that the Organisation considered all relevant matters, including the refusal to produce the tax returns, and the reasons provided for

² Judgment, para. 4.

³ *Ibid.*, para. 49.

⁴ *Ibid.*, para. 55.

⁵ *Ibid.*, para. 59.

⁶ *Ibid.*, para. 61.

that refusal.⁷ In sum, the Appeals Tribunal held that the UNDT correctly concluded that the contested decision was legal, rational and procedurally correct, affirmed the UNDT Judgment and dismissed the appeal.⁸

Submissions

Mr. Giles' Application

9. The Applicant identifies as a decisive “fact” blank copies of the United States Individual Income Tax Returns for the years 2011-2019. He says these blank copies are relevant to his appeal and were unavailable for him to produce to the Appeals Tribunal. These blank documents would have provided support to his argument that the production of his tax returns and those of his wife to the Respondent as part of its consideration of his request to reinstate the benefit in question would have been of no benefit and contained no relevant evidence of his earning capacity, contrary to the findings of the Appeals Tribunal. Specifically, tax returns would not have been relevant in determining the earning capacity of the Mr. Giles as they would have included the income of his wife, which would have to have been redacted on line 7 of those returns for tax years 2011-2017 and line 1 for the tax years 2018-19. Even if the information of the total income of the Applicant and his wife had not been redacted, there would have been no way to determine how much of the income to apportion to the Applicant and his wife respectively as the forms only provide for “joint/combined” income.

10. The Applicant submits he became aware of the availability of blank copies of the United States Individual Income Tax Returns on or about 1 June 2021 when a search was conducted on the website of the United States Internal Revenue Service (IRS), and it was discovered that said returns were “now” being made available to the public.

11. Further, the Applicant submits that the Appeals Tribunal failed to consider that his disability benefit was subject to the period disability review of the United Nations Joint Staff Pension Fund. This failure by the Tribunal to consider that the benefit in question was subject to the review of the UNJSPF became apparent on 4 May 2021, when the Judgment was issued.

⁷ *Ibid.*, para. 68.

⁸ *Ibid.*, paras. 70-71.

12. Therefore, the Appeals Tribunal's failure to consider this changes the legal framework in determining whether the Applicant qualified for said benefit. He submits that the Appeals Tribunal did not consider the references the Respondent made to "the periodic disability review of UNJSPF", but rather considered the legal framework of the ABCC, not the UNJSPF, in exercising its authority to recommend that the benefit in question be discontinued. The Applicant submits that the statement relating to the period disability review of UNJSPF cannot be ignored, as it was ignored by the Appeals Tribunal, and that "its impact on the legal framework in determining the benefit in question must be considered".

13. The Applicant requests the Appeals Tribunal to revise the Judgment, and to reverse the UNDT Judgment and reinstate the benefit in question, retroactive to 5 June 2015.

The Secretary-General's Answer

14. The Secretary-General requests the Appeals Tribunal to reject the Application for Revision in its entirety.

15. The Secretary-General submits that the Applicant's assertions are meritless; the application does not reflect the discovery of any decisive new fact unknown to the Applicant or to the Appeals Tribunal when it rendered its Judgment. The Secretary-General submits that the Applicant's tax returns are not new facts which were unknown to Mr. Giles at the time of filing submissions before the Appeals Tribunal. Rather, blank copies of the United States Individual Income Tax Return forms (Form 1040) were always available on the IRS website. The Secretary-General submits that Mr. Giles should have known this, especially as he conceded that he had filed similar forms in previous years. Relying on *Vukasović*⁹, the Secretary-General submits that ignorance of the law is no excuse.

16. The Secretary-General contends that the Applicant is attempting to relitigate claims that failed on appeal but the Judgment was a final decision, and its authority cannot be set aside.

17. The Secretary-General does not respond to the Applicant's submissions regarding consideration of the UNJSPF.

⁹ *Vukasović v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-699 at para. 14.

Considerations

18. An application for revision of judgment is governed by Article 11(1) of the Appeals Tribunal Statute and Article 24 of the Appeals Tribunal Rules of Procedure. By these provisions, an applicant must show or identify the decisive facts that, at the time of the Appeals Tribunal's judgment, were unknown to both the Appeals Tribunal and the party applying for revision; that such ignorance was not due to the negligence of the applicant; and that the facts identified would have been decisive in reaching the decision.

19. Article 11(1) of the Appeals Tribunal Statute provides:

Subject to article 2 of the present statute, either party may apply to the Appeals Tribunal for a revision of a judgement 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. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

20. Article 24 of the Appeals Tribunal Rules of Procedure states:

Either party may apply to the Appeals Tribunal, on a prescribed form, for a revision of a judgement on the basis of the discovery of a decisive fact that 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. The application for revision will be sent to the other party, who has 30 days to submit comments to the Registrar on a prescribed form. The application for revision must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

21. 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.¹⁰

22. In the present case, the Applicant states that at the time of the Appeals Tribunal proceedings, he was not aware that blank copies of tax returns for years 2011-2019 were available and if he had known this, he would have provided them to the Tribunal. He then

¹⁰ *Masri v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-163, para. 12; *Beaudry v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-129, para. 16; *Shanks v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-026bis, para. 4.

reiterates the same arguments that he made in his appeal regarding the relevancy of his completed tax returns. However, there is no evidence provided by Mr. Giles that these blank tax returns were publicly *not* available including on the IRS website; rather, it seems that he was simply not aware that they were available on the website. It is reasonable to assume that the IRS has made publicly available blank, uncompleted tax returns to allow people to complete them for filing. Even if blank returns were not available on the website, it is reasonable to infer that they could have been obtained by the Applicant as it is undisputed that the Applicant completed these returns for the years in question and filed them with the IRS. If these blank returns were required by the Applicant for his appeal, he could have obtained them with due diligence and submitted them with his submissions. There is no evidence that he could not have done so. Therefore, we are not satisfied that the Applicant has shown that the blank tax returns were “unknown to the Appeals Tribunal and to the party applying for revision” at the time the Judgment was rendered as required by Article 11 of the Statute. In addition, we are not satisfied that blank tax returns are a “decisive fact” as required by Article 11.

23. In the Judgment, the Appeals Tribunal held that the ABCC made a request for the Applicant’s completed tax returns and the Applicant denied this request in contravention of the legitimate authority conferred to the Administration under Article 15, Appendix D to request additional documentation to determine continuing eligibility. The Appeals Tribunal held that the completed tax returns were relevant to the determination of Mr. Giles’ earning capacity and continuing eligibility. Mr. Giles uses the present application to relitigate this argument, which is not the intention or purpose of an application pursuant to Article 11.

24. Similarly, the Applicant reiterates his arguments that it was the UNJSPF and only the UNJSPF that had the authority to review periodically the benefit in question. In the Judgment, the Appeals Tribunal considered this argument and made its determination and provided reasons.

25. As stated previously by the Appeals Tribunal in *Maghari*¹¹, an application for revision is not a substitute for an appeal; and no party may seek revision of a judgment merely because he or she is dissatisfied with it and “wants to have a second round of litigation”. A revision of

¹¹ *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.

a final judgment is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.

26. We are not persuaded that the Applicant has produced a decisive new fact justifying a revision of the Appeals Tribunal Judgment.

Judgment

27. Mr. Giles' application for revision is hereby dismissed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 10th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar