UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/069
Judgment No.: UNDT/2012/040
Date: 28 March 2012
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LIKUYANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Jason Okemwa, Advocate

Counsel for the Respondent:
Saidou N'Dow, UN-Habitat

Introduction

1. The Applicant is a former staff member of the United Nations Centre for Human Settlements ("UNCHS"), as it then was. He was suspended without pay on 3 April 1997. Two charges were brought against him. The first was making unauthorized calls and the other was an allegation of submitting false medical claims from Aga Khan Hospital Nairobi.

2. The Applicant was subsequently summarily dismissed and filed an appeal with the former United Nations Administrative Tribunal. On 17 November 2000, the former UN Administrative Tribunal delivered Judgment No. 976 in respect to the Applicant's appeal.

3. On 20 September 2010, the Applicant filed an "Application for Revision of Judgment Number 976", in which he requested the United Nations Dispute Tribunal ("UNDT") to revise the whole of Judgment No. 976. The Respondent filed a response to the Application on 30 November 2010. The Tribunal heard this case on 14 November 2011.

Applicant's submissions

4. The Applicant's submissions are summarized below:

a. The former UN Administrative Tribunal erred in rejecting his appeal because the following decisive facts were unknown to both the Applicant and to the former UN Administrative Tribunal on 17 November 2000:

i. The authority to suspend staff members during disciplinary investigations was delegated to the Director-General of the United Nations Office in Nairobi ("UNON") only on 19 June 2006 and not in 1995, 1997, 1998, or at any other time prior to 19 June 2006.

ii. Neither the Chief Finance Officer of UNCHS in Nairobi, nor the Head of Staff Administration at UNON, nor the Officer-in-Charge of Division of Administrative Services in Nairobi, nor any other official of UNON, had the authority to suspend him at all on 3 April 1997, on 17 December 1998, on 27 October 1998, on 28 October 1998, or on any other date prior to 19 June 2006.

iii. The Respondent knew about the above-mentioned lack of authority before, during, and after, the alleged summary dismissal of the Applicant, including the time when the former UN Administrative Tribunal delivered the Judgment on 17 November 2000.

iv. The former UN Administrative Tribunal would have reached a different decision had they known about this "decisive fact".

Respondent's submissions

5. The Respondent's submissions are as follows.

6. The circumstances whereby the Tribunal may review or revisit a Judgment are strictly limited as stipulated by art. 12 of the Statute of the Dispute Tribunal. In addition, art. 11(2) states that subject to the provisions of art. 12, the judgments of the Tribunal shall be final and without appeal.

7. In order to be able to apply for revision of a judgment, it is necessary to satisfy certain formal and substantive conditions. These conditions have not been satisfied in this case.

8. In the present case, the judgment was rendered on 17 November 2000 and this Application was only submitted in September 2010. This is outside the time limits stipulated by the rules and the Applicant has not advanced any reason why his Application was not brought within the required time limit or, at the very least, immediately upon his alleged discovery of what he erroneously calls a new fact.

9. The Applicant has not presented any new fact, let alone one of a decisive nature, which was unknown to the parties when Judgment No. 976 was rendered. The Applicant rests his Application primarily on the grounds that the authority to suspend staff members during disciplinary investigations was delegated to UNON only on 19 June 2010 and not in 1995, 1997, 1998 or any time prior to 19 June 2010.

10. The legality or otherwise of the fact of the Applicant's suspension was not a decisive factor in the judgment rendered by the former UN Administrative Tribunal. It was not an issue that fell for determination by the former UN Administrative Tribunal. At page 12 of the judgment, the former UN Administrative Tribunal hinted that it was already established on the record that on 17 December 1998, the Applicant was restored to full pay status as of 3 April 1997 to 27 October 1998, and separated from service on 28 October 1998. This effectively meant that there was no suspension issue and that whatever alleged error or wrong caused to the Applicant by his suspension was addressed prior to the judgment. It therefore could not have made any difference whatsoever in the outcome of the judgment and was therefore not a decisive factor in the judgment.

11. The issue for determination at the time of the judgment was whether the decision to separate the Applicant from service was a proper exercise of discretion. On the totality of the evidence adduced before the Tribunal, the Respondent submits that the Tribunal properly considered that the conduct of the Applicant regarding the unauthorized telephone calls constituted a disciplinary misconduct and that the Secretary-General properly exercised his discretion to separate the Applicant from service. The Applicant has not advanced any fact which vitiates this finding or would justify a reconsideration of the judgment.

12. The discovery of where or in whom authority lies in meting out a suspension as a form of disciplinary measure could therefore not have made any difference or have been a decisive fact which might justify reconsideration of the original evidence or any issue in the case which was not considered by the Tribunal. The Respondent submits that the Applicant cannot simply use this request for revision of a 10 year old

judgment to re-litigate the underlying issues in the hope of reaching a conclusion more satisfactory to him.

13. The Respondent further submits that the UN Appeals Tribunal has held, in *Piskolti* 2011-UNAT-106 that the UNDT does not have the jurisdiction to revise judgments of the former UN Administrative Tribunal.

14. In view of the foregoing, the Respondent submits that the Applicant has failed to meet the conditions required by art. 12 of the Statute of the Dispute Tribunal and art. 29 of the Tribunal's Rules of Procedure.

Considerations

15. The applicable law governing revision of judgments is art. 29 of the Tribunal's Rules of Procedure which provides as follows:

> 1. Either party may apply to the Dispute Tribunal 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 Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence.
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> 2. An 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.

16. If an applicant discovers a material fact that was unknown to the former UN Administrative Tribunal and to him/her at the time of judgment, he may file an application for review of the judgment within 30 days of the discovery of the fact and within one year of the date of the judgment. A decisive or material fact is one that was not known at the time the judgment was given. That fact must be of significant weight such that its application to the case should lead to a revision of the judgment[1].

[1] See for example former UN Administrative Tribunal Judgment No. 1120, *Kamoun* (2003).

17. The Respondent has argued that the UNDT does not have the jurisdiction to revise judgments of the former UN Administrative Tribunal. In *Kiarie-Nyoike* UNDT/2012/003, this Tribunal held that the Dispute Tribunal has power to revise the judgments of the former UN Administrative Tribunal, being its successor and subject to compliance with the provisions of art. 29 of the Tribunal's Rules of Procedure. That having been said, in the present case, the Applicant avers that on 28 February 2010, he discovered a decisive fact, namely, that the power to suspend staff members during disciplinary investigations was delegated to the Director-General of UNON only on 19 June 2006 and not at any time prior to 19 June 2006.

18. The issue of power to suspend a staff member during the disciplinary process is a matter of law and not of fact. The Applicant is making the argument that someone exercised power that they did not have which is a matter of law and not a fact. This Application therefore fails to satisfy the requirements of art. 29 and is accordingly not receivable.

Conclusion

19. The Application is not receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of March 2012

Entered in the Register on this 28th day of March 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi