



Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

AL-MULLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON APPLICATION FOR
REVISION**

Counsel for Applicant:
Winston Sims

Counsel for Respondent:
Jérôme Blanchard HRMS, UNOG

Introduction

1. This is an application for revision of judgment *Al-Mulla* UNDT/2011/105 (“the Judgment”). In the Judgment, the Dispute Tribunal (“the Tribunal”) decided *inter alia* that the decision to require the Applicant to revert to his initial P-3 post had not been the subject of a management evaluation and was not receivable by the Tribunal.¹
2. The Applicant alleges that at the time the Judgment was rendered, it was unknown to him and to the Tribunal that his request for Management Evaluation of 21 December 2009 contained *inter alia* a request for review of the decision reverting him to his P-3 post.
3. He alleges that neither the MEU and/or the Respondent—to the degree they are separate entities—nor the Tribunal had accepted or acknowledged a memorandum of 4 December 2009 advising him that he would no longer be laterally reassigned to the UNODC Sub-Regional Office in Abu Dhabi, United Arab Emirates (“UAE”) as being the administrative decision under appeal.
4. The Applicant requests the Tribunal to vacate paragraphs 6,7,11, 44, 45 and 47 of the Judgment. In addition, he requests the Tribunal:
 - a. To establish the date when the Respondent became aware of his repeated misstatements and flatly incorrect testimony, at best, or perjury, at worst;
 - b. For an independent investigation to verify this date;
 - c. To ascertain when the MEU finally became cognizant of the full extent of its false testimony, what did it do with this information and whether it informed the UNDT or the United Nations Appeal’s Tribunal (“UNAT”)? And if not, why not?

¹ See paragraph 6 of *Al-Mulla* UNDT-2011-105.

Issues

5. In determining an application for revision of a judgment, the Tribunal must establish whether the application for revision is properly made in accordance with art. 12.1 and art. 29 of the UNDT Statute and its Rules of Procedure respectively.

Facts

6. The Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), filed an application with the Tribunal challenging the decision made on 4 December 2009 to no longer laterally reassign him to the UNODC Sub-Regional Office in Abu Dhabi, UAE (“contested decision”), as UNODC Representative to UAE and Special Representative to all Gulf countries.

7. The Applicant entered the service of the United Nations in 1985. He was promoted to the P-3 level in September 1992 and his initial fixed-term appointment was converted to a permanent one in September 2006. From 1 July 2007, the Applicant was appointed to the L-4 project post of Regional Programme Coordinator for the Gulf Cooperation Council (“GCC”) countries, Division of Operations, UNODC and he was based in Vienna.

8. The Applicant requested management evaluation of the contested decision on 21 December 2009. In answer to the question in the MEU application form “specify the decision to be evaluated” the Applicant reproduced the email indicating that his lateral reassignment had been cancelled and that he would have to revert to his former P-3 post, which he referred to as a demotion.

9. In its decision dated 3 February 2010 the MEU stated:

Dear Mr. Al-Mulla,

Pursuant to provisional Staff Rule 11.2, the Secretary-General has reviewed your request for a management evaluation of the decision not to laterally reassign you to the UNODC Sub-Regional Office in Abu Dhabi which was communicated to you during a meeting held on 1 December 2009.

[...]

In essence, you contended that you were not provided with the reasons for the decision to cancel your reassignment to the Abu Dhabi Sub-Regional Office and that the decision was tainted by improper motives

[...]

Accordingly, the MEU concluded that the decision not to laterally reassign you to Abu Dhabi should be upheld.

10. The Applicant challenged the contested decision before the Tribunal on 4 May 2010. A case management and an oral hearing on the merits were held on 23 May 2011 and on 16 and 17 June 2011 respectively during which the Applicant was represented by counsel.

11. The Tribunal found that the main issues to be resolved were the legality of the decision not to laterally reassign the Applicant, and whether his assignment to the post in Abu Dhabi was subject to any conditions to be fulfilled by the Organization and/or the Applicant.

12. On the issues before it, the Tribunal held that heads of departments/offices retain the authority to transfer staff members within their departments or offices to vacant posts at the same level, and held that the decision to reassign the Applicant was not tainted by improper motives, bias or bad faith.

13. In relation to the requirement for the Applicant to return to his initial P-3 post, the Tribunal stated at paragraph 6 of the Judgment:

The Applicant was also critical of the fact that after the withdrawal of his lateral reassignment he was required to return to a post at his original P-3 level. Again that decision has not been the subject of a management evaluation and is not receivable by the Tribunal.

14. The Applicant appealed the Judgment to the Appeals Tribunal which rendered judgment *Al-Mulla* 2012-UNAT-226. The Appeals Tribunal summarised the Appellant's submissions in support of his appeal as follows:

18. Mr. Al-Mulla appeals the UNDT Judgment on the grounds that the UNDT erred in law and fact in examining the legality of the decision to withdraw the lateral reassignment offer. Mr. Al-Mulla seeks the rescission of the contested decision, one year's

net base salary as compensation for “emotional and actual” damages, as well as the nominal sum of one US Dollar for “injustices suffered”.

19. Mr. Al-Mulla submits that the UNDT erred in finding that his reassignment to the Abu Dhabi office was not contingent on the completion of the project document. He submits that the UNDT erred in law in finding that he was responsible for the preparation and completion of the project document, when the final approval and signing of the final document was the responsibility of the Field Representative. He further submits that the UNDT erred in finding that there is no legal requirement for a project document to be completed prior to the assumption of a project-related post.

20. Mr. Al-Mulla submits that the UNDT erred in finding that the reclassification of the UNODC Representative post did not breach the Host Country Agreement. The UNDT failed to provide any basis in policy or jurisprudence for determining that the creation of a P-5 post was not a binding condition of the Host Country Agreement. The UNDT erred by concluding that it was within the Administration’s discretion to classify posts. The reclassification of the position of UNODC Representative constituted a unilateral amendment to the Host Country Agreement.

21. Finally, Mr. Al-Mulla submits that the UNDT erred in concluding that the decision to withdraw the lateral reassignment offer did not breach ST/AI/2006/3.

15. The Appeals Tribunal found that, in his appeal, Mr. Al-Mulla had not demonstrated that the Dispute Tribunal had erred on matters of law or fact and therefore dismissed the appeal.

16. On 29 April 2013, Mr. Al-Mulla filed with the Appeals Tribunal an application for revision of Appeal’s Tribunal judgment *Al-Mulla* 2012-UNAT-226 which is currently pending before the Appeals Tribunal.

17. On 3 July 2013, Mr. Al-Mulla filed with the Tribunal an incomplete application for revision of Judgment *Al-Mulla* UNDT/2011/105 which was completed on 31 July 2013. The Application was served on the Respondent and on 23 August 2013 the Respondent filed his comments to the Applicant’s request for revision.

Parties' submissions

18. The Applicant submits that:

a. The MEU did not review the entirety of the email of which he requested evaluation and “skipped” his request for management evaluation of the decision not to “demote” him from P-4 to P-3 which was part of the contested decision;

b. The Respondent falsely testified and denied before the Tribunal that a request had never been made to review the decision to “demote” him;

c. He offered to read the memo of 4 December 2009 at the Tribunal’s hearing. He alleges that opportunity was denied by the Tribunal;

d. The fact that the decision concerning the “demotion” was deemed not to have been receivable because the Applicant did not request management evaluation, is a clear indication that the Tribunal was not aware of the fact that he had made the request;

e. In pleadings made by the Respondent in subsequent cases brought by him, the Respondent accepted that he had sought management evaluation for the requirement for him to return to his original P-3 post. He alleged that in his reply of 24 February 2012, the Respondent admitted, for the first time, that the memo of 4 December 2009 with respect to which a request for review had been made, had also included the issue of his demotion; and

f. In his Reply of 12 June 2013 the Respondent conceded to the Applicant’s contention that the MEU had not properly reviewed all the decisions before it in its management evaluation dated 3 February 2010.

19. The Respondent submitted that the Applicant has not met the conditions for revision of judgment because:

a. The alleged “newly discovered fact” was known to the Applicant and the Tribunal at the time the Judgment was rendered. The Applicant should

have mentioned to the Tribunal that MEU had overlooked an issue in his request for management evaluation;

b. The allegations that the Respondent gave “false testimony” on the fact that he had not requested management evaluation are unsubstantiated;

c. The Respondent’s reply of 24 February 2012 and 12 June 2013 cannot be considered as newly discovered facts; the contents of the submissions of 24 February 2012 have been known to the Applicant for over a year. The 12 June 2013 submission is a summary of the Applicant’s several requests of management evaluation hence bears no evidence of new fact;

d. The Applicant’s return to his P-3 post, to which he refers to as a “demotion” in the 4 December 2009 email, was a mere reiteration of the Applicant’s terms of contract of 21 May 2007; as such it was a confirmation of an earlier decision and not a new decision; and

e. The Applicant’s application is frivolous and is an abuse of process that requires an award of costs.

Considerations

20. Article 12.1 of the statute, which is echoed in art 29.1 and 29.2 of the Tribunal’s rules of procedure, provides that:

Either party may apply to the Dispute Tribunal for a revision of an executable judgment on the basis of the discovery of a decisive fact which was, at the time the judgment was rendered, unknown to the Dispute 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 judgment.

Executable judgment

21. Pursuant to art. 11.3 of the statute of the Tribunal, the judgments of the Dispute Tribunal “shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal”. In this case, the time for appeal

of the Judgment expired on 21 August 2011 following which the judgment became executable. The Applicant's appeal to UNAT was heard and disposed of on 29 June 2012. The Judgment was therefore technically executable in terms of the Statute at the time this application was filed.

Discovery of decisive fact

22. The decisive fact relied on by the Applicant in his application for revision was that the issue of the return of the Applicant to his initial P-3 position had been the subject of a request for management evaluation.

23. The Applicant acknowledged in the Application for revision that at the time the Judgment was rendered it was apparent that that key, essential information had not come to the Tribunal's attention.

24. However, it is clear that the Applicant knew of the decisive fact. In his application for revision the Applicant says that:

[He] had requested a review by the MEU on 21 December 2009 ... of the entire memo to him of 4 December 2009 ... which included the decision to demote him from P-4 to P-3 ... The Applicant, possibly out of some naïveté, was certain these bodies would eventually come to acknowledge the fact that a review of the demotion had been requested. It was such a simple documented fact. The Applicant had no knowledge that that simple fact would NOT be accepted and acknowledged.

25. This statement shows that the Applicant had knowledge that he had included the issue of his alleged "demotion" to a P-3 post in his 21 December 2009 request for management evaluation, and that he knew the MEU had not addressed this decisive fact before he filed his application with the Tribunal on 4 May 2010.

26. The Tribunal does not accept the Applicant's contention that the discovery of the decisive fact was on the date the Respondent so "conceded" on 24 February 2012 or in 11 June 2013, in his replies to other applications that were pending before the Tribunal.

Negligence of the party

27. The Applicant's lack of awareness of the importance of the need for the decisive fact to have been clearly adduced at the hearing can only be attributed to his negligence or that of his counsel advising him throughout the proceedings. Neither the Applicant nor his counsel raised the issue with the Tribunal during the hearing or in subsequent submissions to the Tribunal or to UNAT.

Date of Application

28. In *Masri* 2013-UNAT-320, the Appeals Tribunal dismissed an application for revision stating that "an application for revision of judgment is only receivable if made within one year of the judgment." In *El Khatib* 2013-UNAT-317, the Appeals Tribunal held that an application for revision can only succeed if it fulfils the strict and exceptional criteria established by art. 11 of the Appeals Tribunal Statute.²

29. An application for revision is to be made within 30 days after discovery of the decisive fact. The Judgment sought to be reviewed was rendered on 22 June 2011. The application for revision was made on 3 July 2013. If, at best, the discovery of the decisive fact is deemed to be the date of the Judgment, the application for revision was made two years and 11 days after that. It is just under two years after the 30-day time limit for filing following the discovery of the decisive fact imposed by art 12.1 of the Tribunal's statute, and one year and 11 days after the one-year time limit following the date of the Judgment.

30. Even if the Tribunal were to accept 24 February 2012 (the date of the Respondent's submission on the decisive fact) as the first date of the discovery of the "decisive fact", the duration between the "discovery" by the Applicant and date of application for revision exceeds the time limit by one year and four months.

² The requirements for revision of a judgment in Article 11 of the Appeals Tribunal Statute are similar to those in art. 12.1 of the Dispute Tribunal's Statute.

31. While the Applicant may have an argument with respect to a decisive fact, his application does not meet the other requirements in art. 12.1 of the Tribunal's statute.

Costs

32. Article 10.6 of the Tribunal's statute empowers the Tribunal to award costs against a party where it "determines that a party has manifestly abused the proceedings before it". In this case, the Applicant brought a baseless application for revision well outside the time limits for doing so and after UNAT had dismissed his appeal on the merits.

33. The application borders on abuse but is not manifestly so. However, any further applications by the Applicant in relation to judgment *Al-Mulla* UNDT/2011/105 may entail/result in an award of costs against him.

Conclusion

34. In view of the foregoing, the Tribunal DECIDES that:

- a. The Application is dismissed in its entirety; and
- b. The Respondent's request for costs is rejected.

(Signed)

Judge Coral Shaw

Dated this 24th day of October 2013 in Nairobi, Kenya

Entered in the Register on this 24th day of October 2013 in Geneva, Switzerland

(Signed)

René M. Vargas M., Registrar,