



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

CHOI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON APPLICATION
FOR REVISION**

Counsel for Applicant:

Gim Bichma

Counsel for Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 25 August 2014 with the Registry of the United Nations Dispute Tribunal in Geneva (“Geneva Registry”), the Applicant requests the revision of Judgment *Choi* UNDT/2011/181.

Facts

2. On 24 October 2011, the Dispute Tribunal (Judge Jean-François Cousin) issued Judgment *Choi* UNDT/2011/181, disposing of Case No. UNDT/GVA/2011/047 by which the Applicant had contested a disciplinary decision dated 28 October 2009 dismissing him on grounds of harassment and abuse of authority.

3. In an email of 20 October 2011 to the Geneva Registry, the Applicant wrote that “[t]he judge, [he] and respondent ha[d] heard and witnessed that [the Complainant] [had been] lying at the hearing”; he further advised that he would appeal before the United Nations Appeal Tribunal (“UNAT”).

4. By email of 31 October 2011, the Geneva Registry provided to the Applicant two links to download the audio recording of his case’s hearing (Case No. UNDT/GVA/2011/047).

5. On 1 November 2011, the Applicant emailed the Geneva Registry pointing out what he labelled as “material discrepancies” between the Complainant’s statement at the hearing and, *inter alia*, her “statement at the fact-finding interview”, “ESCAP HR Chief[’s] statement at the fact-finding interview”, “her father’s statement”, the Respondent’s statement as well as several witnesses’ statements. The Applicant, therefore, asked the Geneva Registry to inform him “about the UNDT procedure of the request for re-investigation on the [discrepancies]”.

6. On the same day, the Geneva Registry emailed the Applicant replying that “[t]here is no UNDT procedure to re-investigate the matter” and that, “[a]s [he] already [knew], the UNDT Judgment in [his] case [could] be appealed to the [UNAT]”.

7. By email of 3 November 2011 to the Geneva Registry, the Applicant reiterated the above-mentioned “material discrepancies” and requested “the immediate suspension of action of [his] case and [to] take an immediate re-investigation as granted by the UNDT Rules of Procedure”.

8. On the same day, the Geneva Registry responded to the Applicant that “Judgment No. UNDT/2011/181 ... [was] final and [had] the effect of *res judicata*”. The Geneva Registry reiterated to the Applicant that if he wanted “to contest [the] Judgment, [he] may file an appeal with the Appeals Tribunal” and that, however, if he “[wished] to file a new formal application with the [UNDT], [he should] use one of the forms available on the Tribunal’s website”.

9. By email of 20 November 2011 to the Geneva Registry, the Applicant conveyed his intention to submit an application for revision, and stated that “[o]n the basis of the discovery of a decisive fact, this is to apply for revision of the judgment UNDT-2011-181 (Choi) [of] 24 Oct 2011 within 30 calendar days”.

10. In the following year, an exchange of emails took place between the Geneva Registry and the Applicant about the requirement to properly file his application through the Tribunal’s eFiling portal (Court Case Management System or “CCMS”).

11. By email of 5 October 2012 to the Geneva Registry, the Applicant, who had not yet filed his application for revision electronically, advised that he had “material evidence more than sufficient to reverse the decision taken by the UNDT [in] its 2012 judgment”. He therefore requested information on “how to proceed with this new material evidence” and “how to proceed if this new evidence [had been] once again ignored by the UNDT-Geneva”.

12. By email of that same date, the Geneva Registry replied to the Applicant recalling previous communications with him, and drawing his attention to art. 29 of the Tribunal's Rules of Procedure governing applications for revision of judgments. The Geneva Registry reiterated, in closing, that the Applicant had to file his application through the eFiling portal, and provided him, again, with the contact details of the portal's support team.

13. By email of 23 October 2012, the Applicant requested "a revision of Judgment UNDT/2011/181" providing what he believed to be "decisive evidence with material facts".

14. Following a series of emails between the Applicant, the Geneva Registry and the CCMS support team, the Geneva Registry created, on 17 July 2014, the electronic case file of the Applicant's application for revision of a judgment, and uploaded documents received from him to CMMS. The Application was registered under Case No. UNDT/GVA/2014/056 pending the Applicant's submission of a completed application form.

15. On 30 July 2014, the Applicant requested to be sent all filings and the record of the hearing in Case No. UNDT/GVA/2011/047; the Registry took administrative action to give the Applicant the technical means to access the full record of Case No. UNDT/GVA/2011/047 via the Tribunal's eFiling system. The Applicant further moved for an extension of 30 days after being granted access to Case No. UNDT/GVA/2011/047 to file his application for revision.

16. By Order No. 115 (GVA/2014), issued on 31 July 2014, he was granted the above-requested extension until 25 August 2014.

17. On 11 August 2014, by email to the Geneva Registry, the Applicant requested to be emailed the recordings of the hearing in his case, and to be granted a two-month extension to file his application for revision.

18. By Order No. 119 (GVA/2014), of 12 August 2014, the Tribunal rejected the Applicant's request for a two-month extension to file his application for revision. On the same day, the Geneva Registry emailed a link to the Applicant to allow his downloading the audio recording of the above-mentioned hearing.

19. On 13 August 2014, the Applicant filed a motion to "Request for Audio Transcript and CCTV-Video Footage on Perjury Under Oath Committed by the Complainant at the UNDT—Geneva Face-to-Face Hearing on 17 October 2011".

20. By Order No. 121 (GVA/2014), issued on 14 August 2014, the Tribunal rejected the Applicant's request for "Audio Transcript and CCTV-Video Footage" noting that

there is no "CCTV-Video Footage" of the hearing held back in 2011 [and] that even if it existed, said footage, as well as "audio transcripts" of said hearing, are not relevant to the Applicant's application for revision. Indeed, they do not and cannot amount to and/or contain new decisive facts unknown to the Dispute Tribunal at the time the initial judgment was rendered. To the contrary, they were well known then and, therefore, are not fit to be used as a source for a "decisive fact" within the meaning of art. 12.1 of the UNDT Statute.

21. On 25 August 2014, the Applicant completed his application for revision of Judgment UNDT/2011/181 *Choi*.

22. By electronic notification dated 26 August 2014, the application for revision was transmitted to the Respondent.

23. On 30 August 2014, the Applicant, without seeking prior leave from the Tribunal, filed a submission titled "Urgent Request for Clarification by 05 September 2014 by [the] Former Respondent".

24. On 25 September 2014, the Respondent filed his comments on the Applicant's Application for revision of judgment.

25. On 28 September 2014, the Applicant made an additional filing, without previously requesting leave from the Tribunal, entitled "Annex to the Application for UNDT Revision of Previous Judgment No. UNDT/2011/181".

26. By Order No. 162 (GVA/2014), issued on 2 October 2014, the Tribunal ordered the parties to file reasoned objections, if any, to a judgment being rendered on the papers without an oral hearing. The Respondent did not respond to Order No. 162 (GVA/2014), whereas the Applicant requested that a hearing be held.

Parties' submissions

27. In support of his request for review, the Applicant puts forward the alleged newly discovered facts:

a. The case alleged by the Respondent and the Judge under Case No. UNDT/GVA/2011/047 was never established due to perjury committed at the hearing by the Complainant;

b. The Respondent failed to deny his involvement in this perjury, potentially assisting the Complainant to make a false statement before the UNDT, since he did not reply to the Applicant's 30 August 2014 inquiry in this respect (see para. 23 above);

c. The UNDT attempted to establish facts based on a false statement and perjury under oath, and not on clear and convincing evidence of material fact;

d. Mr. ... from Human Resources, ESCAP, invented a false statement as if it stemmed from the Applicant and conveyed it to the Complainant as if it were true to artificially establish the case (UNDT/GVA/2011/047) against him. This new fact surfaced at the hearing of Case No. UNDT/GVA/2011/047 where the Complainant testified that it was Mr. ... who forced her to submit written allegations against the Applicant;

e. The Respondent and the Judge failed to prove that the Applicant has made any negative statement on the Complainant; furthermore, the counter-allegation to the complaint against the Applicant was proved and materially established at the UNDT public hearing of Case No. UNDT/GVA/2011/047 by the Complainant's "attempt of falsification with denial, reversal and admission of her physical act of sexual harassment";

f. The former Judge in Case No. UNDT/GVA/2011/047 explicitly admitted the breach of the Applicant's due process rights by "confessing [in Judgment UNDT/2011/181] that he would only consider ... partial evidence, implying that he would omit the countering and/or contradicting evidence"; and

g. Order No. 121 (GVA/2014) contains new decisive material fact for it states that the content of the audio file of the hearing in Case No. UNDT/GVA/2011/047 was well known to the Tribunal; such content clearly shows the perjury under oath and since it is decisive, it cannot be set aside simply because it is past evidence.

28. The Respondent's principal contentions are:

a. The Applicant has not met the requirements for revision of a Judgment under art. 12.1 of the Tribunal's Statute; his dissatisfaction with the findings of fact made by the Dispute Tribunal does not constitute the discovery of a new fact; as per settled jurisprudence, a party may not seek revision of a judgment merely because of dissatisfaction with a judgment and/or a wish to have a second round of litigation;

b. The Applicant had a right to appeal Judgment UNDT/2011/181 to the Appeals Tribunal under art. 11.3 of the Statute of the Dispute Tribunal and he chose not to exercise it;

c. In essence, the Applicant seeks to have the Dispute Tribunal sit on an appeal of its own decision, and the Tribunal has no competence to do so as the first instance tribunal;

d. The application is time-barred because it was not filed within one year of the date of the judgment; and

e. The application contains unfounded allegations that impugn the honesty, professionalism and integrity of a witness, counsel for the Respondent, and a Judge of the Dispute Tribunal; the Applicant has manifestly abused these proceedings, and his conduct warrants an award of costs under art. 10.6 of the Tribunal's Statute.

Consideration

29. Article 12.1 of the Tribunal's Statute, echoed in arts. 29.1 and 29.2 of its 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.

30. Judgment 2014-UNAT-456 *Pirnea* states that:

The Statute and Rules set out the material elements which a moving party must show for revision to be granted: (1) a new fact which, at the time the judgment was rendered, was unknown to the Appeals Tribunal and the moving party; (2) such ignorance was not due to the negligence of the moving party; and (3) the new fact would have been decisive in reaching the original decision.

31. From the well settled jurisprudence on applications for revision of a judgment, one cannot but conclude that if one of the cumulative conditions in art. 12.1 of the Tribunal's Statute is not met, such an application must fail.

32. The “decisive fact” being relied upon by the Applicant is the alleged perjury of the Complainant, who had filed a grievance leading to the Applicant’s dismissal that the latter challenged in Case No. UNDT/GVA/2011/047. The Applicant’s multiple communications to the Tribunal and its Geneva Registry focus exclusively on this matter.

33. The Tribunal underlines that the audio recording of the hearing held by Judge Jean-François Cousin in Case No. UNDT/GVA/2011/047, does not, and cannot, amount to and/or contain new decisive facts unknown to the Dispute Tribunal at the time Judgment UNDT/2011/181 was rendered. The audio recording contains all the information and testimony heard by the respective Judge before adjudicating the matter, and his judgment is based on the testimony given by the complainant. No perjury was found at the time, and the Applicant has not produced evidence that could put this determination into question.

34. Judgment 2014-UNAT-456 *Pirnea* also stated that:

“No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation” [from Muthuswami et al. v. United Nations Joint Staff Pension Board, Judgment No. 2011-UNAT-102, para. 11 (citing former Administrative Tribunal Judgment No. 894, Mansour (1998))].

35. The Applicant may well disagree with the outcome of Case No. UNDT/GVA/2011/047, and with the analysis of the evidence made by the judge in that case. An examination of the Applicant’s submissions clearly shows that he is attempting to re-litigate his case. This is not, however, a valid ground to entertain an application for revision of judgment.

Request for award of cost

36. Article 10.6 of the Tribunal Statute provides that “[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party”.

37. From the Applicant's submissions and lengthy exchanges with the Tribunal's Registry in Geneva, his disagreement and frustration with the outcome of his case before the UNDT is evident. The Tribunal is of the view that these may have brought him to poorly formulate some of his motions/requests, and that they could reasonably be construed as borderline allegations. The Applicant's actions in this respect do not, however, amount to an abuse of proceedings.

38. Consequently, the Tribunal sees no grounds for the award of cost in this case.

Conclusion

39. In view of the foregoing, the Tribunal DECIDES:

The application for revision is dismissed.

(Signed)

Judge Thomas Laker

Dated this 6th day of July 2015

Entered in the Register on this 6th day of July 2015

(Signed)

René M. Vargas M., Registrar, Geneva