



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/090
Judgment No.: UNDT/2015/067/Corr. 2
Date: 9 September 2015
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BARACUNGANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

CORRECTION OF JUDGMENT

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Karen Madeleine Farkas, UNHCR

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Background and facts

1. The Applicant joined the United Nations High Commissioner for Refugees (UNHCR) in May 2005 as a Senior Programme Clerk (GL5) in Muyinga, Burundi, on a fixed term contract until 31 December 2005.

2. He was re-employed on a fixed term contract on 1 January 2006 and served until 1 January 2007, the date on which he was separated.

3. He was rehired as a Secretary in Bujumbura on a fixed term contract in August 2007 and separated on 1 January 2010.

4. On 9 June 2011, the Applicant filed a claim for compensation under Appendix D to the Staff Rules in respect of an illness which manifested itself shortly after he separated from service on 1 January 2010. He also requested for a waiver of the time limit for the submission of his claim.

5. On 26 July 2011, the responsible officer of the Compensation Claims Service (CCS) at the United Office in Geneva (UNOG) informed the UNHCR Human Resources (HR) Associate that he was recommending that the claim not be accepted as the Applicant's illness was not deemed attributable to the performance of his official duties on behalf of UNHCR.

6. The UNHCR HR Associate forwarded a copy of the decision to the Applicant on 10 August 2011. The Applicant was also told that he could appeal the decision within 30 days from its notice to him pursuant to art. 17 of Appendix D of the Staff Rules.

7. By e-mail of 7 September 2011 the Applicant sought to challenge the decision of the CCS/UNOG. The request was forwarded by the UNHCR HR Associate to the responsible officer of CCS/UNOG by email of 9 September 2011.

8. By memorandum dated 2 November 2011 the responsible officer CCS/UNOG transmitted the Applicant's request to the Advisory Board on Compensation Claims (ABCC) in New York.

9. At its 463rd meeting held in June 2013, the ABCC granted the Applicant a waiver of the time limit for claim submission but denied the claim that the illness of the Applicant was service incurred.

10. On 16 July 2013, the recommendation of the ABCC was approved on behalf of the Secretary-General.

11. The UNHCR HR Associate informed him on 25 June 2014 that his case had been reviewed by the ABCC and that his claim had been rejected.

12. On 22 September 2014 the Applicant filed his Application challenging the decision of the ABCC through the UNDT corporate email account of the Nairobi Registry. On that date the Applicant was within the time frame for filing his Application.

13. The Applicant was advised to resubmit his Application through the Tribunal's e-filing portal which he did on 9 October 2014.

14. On 30 July 2015¹, the Tribunal issued a judgment rejecting the Application as being time barred. The Tribunal proceeded on the basis that the filing was done on 9 October 2014, at which date the deadline of 90 days for the filing of the application had expired.

15. On 18 August 2015 the Applicant filed an Application for reconsideration of the 30 July Judgment on the ground that the correct date of filing was 22 September and not 9 October 2014. The Respondent filed a Reply to the Application for reconsideration on 25 August 2015.

Applicant's Submissions

16. First the Applicant submits that the Tribunal has no power to proceed to a revision of the judgment as it is not an executable judgment within the meaning of art. 12.1 of the Statute of the Tribunal as a judgment becomes executable under art. 11.3 of the Statute after the time limit for appeal has expired. The Applicant in

¹ On 31 July 2015, the Tribunal issued Judgment No. UNDT/2015/067/Corr. 1, which inserted a new paragraph 29 into the original judgment.

the present case has until 29 September 2015 to appeal the receivability judgment and it is therefore not executable.

17. Secondly, the Applicant argues that as revision is not permissible the Tribunal should use its powers under art. 36.1 of the Rules of Procedure to reconsider the case.

18. According to the Applicant, the purpose of art. 36.1 of the Rules of Procedure is to ensure that the Tribunal has the power to do justice to the parties even if the rules of procedure do not provide for a procedural mechanism for dealing with a particular matter provided that if a power has already been granted under a different provision the Tribunal cannot expand that power.

19. Thirdly, the Applicant submits that the Tribunal may use its powers under art. 12.2 of the Statute to make the appropriate corrections.

Respondent's submissions

20. The Respondent's submissions are summarized below:

a. The Application is misconceived and the Applicant should follow the appropriate procedures for an appeal of the judgment to the United Nations Appeals Tribunal (UNAT).

b. The issue of whether the UNDT was mistaken as to the date of filing of the Application is not a matter to be addressed by a Practice Direction or a matter where there is a lacunae in the UNDT's Rules of Procedure. UNAT is competent to hear and pass judgment on an appeal filed against a judgment rendered by the UNDT where it is asserted, *inter alia*, that the UNDT has erred on a question of fact, resulting in a manifestly unreasonable decision.

c. Article 29.1 of the UNDT's Rules of Procedure explicitly set out the scope of revision of judgments. Pursuant to that art. 29.1, "decisive facts" are not new or newly discovered, as they were put properly before the UNDT.

d. Article 12.2 of the UNDT Statute provides that “[c]lerical or arithmetic mistakes or errors arising therein from any accidental slip or omission, may at any time be corrected by the Dispute Tribunal, either on its own motion or on the application of any of the parties”. However, the present case is not a situation of mistake or accidental slip. The UNDT’s determination of the issue of receivability cannot be considered as a mistake in the sense of art. 12.2 because it was a determination on a live issue that was litigated before the UNDT.

e. The Application before the UNDT included a claim for compensation for a delay in notifying the Applicant of the outcome of his application under Appendix D to the Staff Rules. That claim was found by the Tribunal to be a matter for which the Applicant should have requested a management evaluation, a factor that the UNDT Judgment recognized and which was found not to be receivable.

Considerations

Issues

21. The following are the legal issues arising for consideration.
 - a. Can the Tribunal reconsider the receivability judgment?
 - b. If the answer to the above is in the affirmative, under which provision of the Statute and/or the Rules of Procedure should this be done?
22. The power to revise a judgment is conferred on the Tribunal by art. 12.1 of the Statute which provides:

Either party may apply to the Dispute Tribunal for a revision of an executable judgement on the basis of the discovery of a decisive fact which 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. 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.

23. The corresponding article 29.1 of the Rules of Procedure that deals with revision of judgments is identical but for the use of the word “executable” and the stipulation as to timelines. It reads:

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.

24. Under the circumstances of the present case, the “decisive fact” was known to both the Tribunal and the moving Party; and the ignorance was certainly due to oversight on the part of the Registry. The judgment cannot therefore be revised under art. 12.1 of the Statute.

25. Can the Tribunal revise a judgment by invoking its powers under art. 36.1 of the Rules of Procedure as moved for by the Applicant? Art. 36.1 reads:

Procedural matters not covered in the rules of procedure

All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

26. The Appeals Tribunal has held that art. 36 does not allow the UNDT to augment its jurisdiction in violation of art. 2 of the UNDT Statute². Article 36 of the Rules of Procedure does not allow the Dispute Tribunal to violate art. 2.2 of the Statute.

27. To the extent that the revision or correction of a judgment is provided for by arts. 21.1 and 12.2 of the Statute respectively, art. 36.1 cannot be resorted to for the purposes of a revision or correction.

28. The motion to reconsider the judgment under art. 36.1 of the Rules of Procedure is therefore dismissed.

29. Can the judgment be corrected under Article 12.2 of the Statute which reads:

² *Kasmani* 2010-UNAT-011; *Chocobar* 2014-UNAT-488

Clerical or arithmetical mistakes, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Dispute Tribunal, either on its own motion or on the application of any of the parties.

30. The circumstances obtaining in this case fall squarely within the ambit of art. 12.2 of the Statute and art. 31 of the Rules of Procedure. The Tribunal recalls that the Application was filed in the UNDT corporate email account of the Nairobi Registry on 22 September 2014. The Applicant was well within the deadline then. The subsequent filing in the e-filing portal does not alter the date of the filing. To that end, the Judges of the Dispute Tribunal issued a Practice Direction on 27 April 2012 and which was revised on 1 July 2014. The relevant part reads:

If the filing party does not have access to the eFiling portal, the filing may be made by email. Documents and material should be filed with the Registry by electronic means and in PDF format.

31. In the case of *Harrich*³ s referred to by Applicant's Counsel, Meeran J. ruled that a filing to the UNDT email account was a valid application. In the instant case, the filing of the Application by email to the UNDT Nairobi corporate account was not properly recorded by the Registry; the email was not placed on the file, nor was the Respondent informed when the Application was served on him.

32. In the case of *Ishak*⁴, the Appeals Tribunal dismissed an appeal on the ground that it was time barred. The Appeals Tribunal, through no doubt an oversight, overlooked the fact that the Appellant had been granted an extension of time to file his appeal. On realizing this, the Appeals Tribunal issued a judgment⁵ in which it corrected that error. The considerations of the Appeals Tribunal are as follows;

The review of the e-mail correspondence between the Registry and Ishak confirms that the Registry informed Ishak that the time limit to file his appeal was extended to 16 February 2010. As recorded in paragraph 7 of the Judgment, Ishak filed his appeal on 16

³ UNDT/2014/109.

⁴ 2010-UNAT-050.

⁵ *Ishak* 2010-UNAT-050/Corr.1.

February 2010. Accordingly, the appeal was receivable under Article 7 of the Statute of the Appeals Tribunal.

Article 26 of the Rules of Procedure of the Appeals Tribunal provides that “[c]lerical or arithmetical mistakes, or errors arising from any accidental slip or omission, may at any time be corrected by the Appeals Tribunal, either on its own initiative or on the application by any of the parties on a prescribed form”. It is necessary to correct the Judgment to reflect that Ishak’s appeal was receivable. Given that this Tribunal considered the merits of the appeal in the Judgment, the correction does not alter the outcome of the appeal.

33. The Appeals Tribunal then proceeded to make the necessary corrections to the said Judgment to make it clear that Ishak’s appeal was not time barred and was therefore receivable.

34. The Tribunal, in the present case, will follow the *cursus* adopted by the Appeals Tribunal and proceed in the same way.

35. The Tribunal makes the following corrections to Judgment No. *Baracungana* UNDT/2015/067/Corr.1.

a. At the end of paragraph 14, the following is added: “The Applicant filed his application on 22 September 2014 by sending it to the UNDT corporate email account of the UNDT”.

b. Paragraph 20 is deleted and replaced by the following paragraph:

“It is clear from the sequence of events that the Applicant did file his Application with the Registry of the Tribunal within the time limit required by art. 8.1(b)(ii) of the Statute of the Tribunal which reads

An application shall be receivable if: ...

(d) The application is filed within the following deadlines:

...

(ii) In cases where management evaluation of the contested decision is not required, within 90 calendar days of the applicant’s receipt of the administrative decision.

The filing through email was a valid application”.

c. Paragraphs 21 to 25 are deleted.

d. Paragraph 28 is deleted and replaced by the following: “The Application is therefore receivable”.

e. Paragraph 29 is deleted and replaced by the Following: “The Tribunal is also in presence of a Motion to amend the original Application. In view of the finding above, the motion for amendment will be served on the Respondent”.

(Signed)

Judge Vinod Boolell

Dated this 9th day of September 2015

Entered in the Register on this 9th day of September 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi