UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/079
Judgment No.: UNDT/2017/063
Date: 9 August 2017
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

NCHIMBI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON REVISION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 14 July 2017, the Applicant filed an application for revision under art. 12.1 of the Dispute Tribunal's Statute of Judgment No. UNDT/2017/042, which this Tribunal rendered on 16 June 2017 in Case No. UNDT/NY/2016/043.

2. The application for revision was filed initially in Case No. UNDT/NY/2016/043, which was otherwise closed by Judgment No. UNDT/2017/042, and not as a new and separate application.

3. By email of 2 August 2017, the Registry informed the parties as follows (emphasis in the original):

> Upon her return from annual leave on 31 July 2017, reviewing the application for revision filed on 14 July 2017, Judge Greceanu, who was assigned to Case No. UNDT/NY/2016/043, instructed the Registry to register this application as a separate case in accordance with the general practice of the Dispute Tribunal.
>
> The application has therefore been registered under Case No. UNDT/NY/2017/079 and assigned to Judge Greceanu. To save time and on an exceptional basis, a separate new case has been created in the eFiling portal for the Applicant.
>
> By this notification, the application has been transmitted to the Respondent. Pursuant to arts. 29 and 35 of the Rules of Procedure, upon the instructions of the assigned Judge, the Respondent has until **5:00 p.m., Monday, 7 August 2017** to file his comments.

4. On 7 August 2017, the Respondent duly filed his reply in which he submits that the Applicant has not met the requirements for revision of the Judgment under art. 12.1 of the Statute of the Dispute Tribunal.

Applicant's submissions

5. When submitting his application for revision, the Applicant correctly used the "Form UNDT/F.9E". Under the heading, "III. Identify any decisive fact(s) that were,

at the time of the judgment was rendered, unknown to the Dispute Tribunal and you", the Applicant submits as follows (emphasis in the original omitted):

> The following decisive facts that were, at the time of the judgment was rendered, though were known but the Tribunal did not either consider them or it was an over sight on the part of the Tribunal:
>
> 1. It was ordered in Judgment No.: UNDT/2015/031 at Para 8, by the very same Tribunal and before the same Honorable Judge that, "The Tribunal concluded that the decision to remand the case to the NYGSCAC was reasonable and fair, awarded USD20,000 to each of the Applicants for excessive delays and procedural noncompliance:"
> 2. The Tribunal did not consider the issue of Preliminary Objection raised by the Applicant with compelling evidence.
> 3. The issue of jeopardizing the Applicant's future employment with United Nations as portrayed in UN Personal History Form (P11) at Para 32.
> 4. All issues related to flaws and misplacement of facts and appropriate compensation related to the Applicant's case have been filed under separate request for correction of judgment.

6. Under the heading, "IV. Explain when and how you became aware of the fact(s) specified in section III above […]", the Applicant makes the following contentions (emphasis in the original omitted):

> 1. The Applicant became aware of the facts specified in Section III above when reading the entire judgment and referencing to the 'Main Application' and 'all filings' that were made available to the Management Evaluation Unit (MEU) and this Fountain of Justice (UNDT). The Applicant realized that though some of these facts were intact in the filing, however, the Tribunal did either not set eyes on them or considers them irrelevant but during deliberations the Tribunal effected silent on addressing them objectively.
> 2. A clear look at Para 7 of the judgement, the Applicant wish to inform the Tribunal that… "This was a wrong approach because of the spirit of what was sent to MEU on 24th February 2016 at Para 5, reproduced below for easy of reference,
>
>> "The current one is this issue of checking me out from the Tribunal on account that some items that were issued to me have not been recovered (have been misplaced). She has decided to change the rules so that prices are inflated on me as

opposed to other staff members who have the similar cases. She has decided to discriminate me just as a move to harass and intimidate me, this include ignoring her own Information Circular no. 62 which has been used to effect revised prices of all items for staff members. All these correspondences in connection with checking out and misplaced items are collectively marked as Annex no. 04 (Footnote No.4 that was attached to the submission sent to MEU captioned "Emails Correspondences on Checking out and Misplaced Items vis a vis Investigations Number of Pages 27 (from Page No. 25 - 52)".

3. That when analyzing the judgment at Para 8 please note that, "The findings contained in the Investigation Report did not provide for this aspect on account that: "6.2 [The Applicant] signed the items for his office to be used for the organization for work purposes, not for his sole use but for other users also such as the interns and staff members who come in for TDY. 8.4 Since most of the items signed by [the Applicant] were not for his sole use but for the organization and other ICTR Staff Members, it wouldn't do justice to [the Applicant] to be held solely responsible for the missing items". 9. Recommendations - Considering that each of the missing item's life expectancy have all expired, the unavailability of ICTR PCIU updated verification inspection records and the fact that all these items were headed for the ICTR Liquidation process, it is recommended that the appropriate written off process/disposal of missing UN Owned Equipment be applied to the missing items. A simple understanding is that Information Circular No. 62 on Revised Prices should be used if at all the Tribunal finds it necessary though "it wouldn't do justice to [the Applicant] to be held solely responsible for the missing items" and also not inflating prices on the Applicant as the current practice of which the Tribunal decided to overlook".

4. That looking at Para 11 (6.6) the Tribunal should note that, "the alleged total value of missing items that was quoted to US$ $1,006.21 was imitational and unrealistic since there was already a revised prices in place that was used across the organization. Refer to pages 33 – 34 of Annex No. AA3 in which the actual prices of all items were supposed to be Tanzanian Shillings 420,000 and not even the one that was deducted from the Applicant's final payment of USD 687. 97. Hence MEU were aware that the Applicant raised an issue of inflated prices that was set against him, and yet they are claiming that it was not brought to their attention and the Tribunal despite having all these facts conceded with MEU and the Respondent.

5. At Para 15 of the judgment, the Applicant wish to inform the Tribunal that, "The Respondent did not file his reply as alleged and supported by the Tribunal. The only available e-Filing Portal is a truth teller that the Respondent filed his reply after the prescribed deadline and that the Applicant raised a "Preliminary Objection (PO)" to the same of which the Tribunal did not opt to say a word. Refer to Applicant's Reply to the Respondent's Closing Submission dated 13th November 2016". Similarly, The Applicant filed his "Applicant's Reply to Order on Case Management on 3rd November 2016" again this Honorable Tribunal decided not to consider, an act which is purportedly by the Applicant as miscarriage of justice".

6. At Para 20 (9) (d) of the judgment, the Applicant requests the Tribunal to take into account that, "Tough it was orders, "By Order No. 244 (NY/2016) dated 20th October 2016, the Tribunal instructed the parties as follows (emphasis in the original):- that "9 (d). By 5:00 p.m. on Friday, 4 November 2016, the Respondent is to file a copy of: The list of the lost items and the corresponding calculation for each object, resulting in the recovered amount of USD 687.87 from the Applicant's final payments as indicated in the "Check Out Separation" from 17 May 2016; However as of to-date the Respondent had not provided the requested list of the alleged lost item and the Tribunal has decided not to make decision on such a lapse on part of the Respondent for unknown reasons".

7. At Para 20 (11) of the judgment, the Applicant moves the Tribunal to note that, "When the Applicant agreed that, 'no further evidence is requested and the Tribunal can decide the case on the papers before it, he had of the opinion that all what have been filed before the Tribunal will be looked at objectively but the reality proved that the Tribunal did not objectively digested all paper submitted before it. This is evidenced by the fact that issue of late filing done by the Respondent was not even addressed though it was only mentioned in the judgment document. Likewise the issues submitted to MEU and to the Tribunal itself in the 'Main Application' were not thoroughly digested as it was anticipated by the Applicant. On the issue of deciding case on papers provided, the Applicant made it clear that "… he "had no objection whatsoever as to whether this case could be decided on the papers provided that justice was not only done but seen to be manifestly done". Please refer to Para 21 of the current judgment.

8. At Para 25 of the judgement, the comments of the Applicant is that, "The Applicant is of an opinion that the silence effected by the Tribunal on the 'Notice of Preliminary Objection' and that of 3rd November 2016 captioned, "Applicant's Reply to Order on Case Management" constitute the miscarriage of justice and hence

requests that the issue be addressed and reflected in the final requested revision of judgment".

9. That Para 26 of the Judgment is overlooked by the Tribunal in the sense that, "The silence on the Tribunal to address this issue constitutes a grave miscarriage of Justice since the issue of harassing the Applicant and the misconduct of the Respondent were overt and it was requested in the Applicant's Main Application under Para VII. Summary of the facts of the case or facts relied upon" with sub –Paras 1 – 17". The silence means that the Tribunal did actually support such misconducts exhibited by the Respondent against the Applicant".
10. The claims made by the Applicant at Para 27 (e) has been proved by the Tribunal in its own words at Paras 52 and 53, hence need to be readdressed and appropriate compensation be granted for.
11. At Para 28 (a) information provided by the Respondent contradicts with the reality. Refer to Para 6, of "Applicant's submission to MEU captioned 'Request for your Intervention; and an attachment to it captioned 'K105A' at pages 37-40", dated 24th February 2016 and 28th January 2016 – Which was attached to Applicant's Main Application as Annex No. AA3 - Reproduced below for easy of reference – "My humble request from your esteemed office is that you advise her to respect the rules, regulations and laid down procedure and treat all staff members equally. The prices that other staff members have been using when purchasing or accounting for missed items is the revised prices (Footnote no. 5 - Information Circular No. 62 on Revised Prices – (from Page Nos. 53 - 57) but when it comes to my case she is inflating prices on me just to ensure that she extends her intimidational tactics against my person and harass me. She is now hiding behind the ongoing investigation which even after asking them how long it will take those who are involved in have decided to effect ignorance. I have even asked to be paid part of my final payments so that I can take care of my family while waiting for investigation report she has declined because I have asked her to be rational and non-discriminatory in her decisions", unquote.

7. Under the heading, "V. Explain why the facts identified in section III above should be considered decisive and why they require a revision of the judgment in your case.", the Applicant makes the following submissions (emphasis in the original omitted):

1. That the facts identified in Section III should be consider decisive because they offer an insight of what has actually been transpired

during the whole course of filing the Main Application. They require a revision of the judgment in the Applicant's case since initially there seems to be an oversight on the party of the Tribunal for omitting them during its deliberations.

2. That looking at Para 52 of the judgment, the Tribunal admit that, "…. Furthermore, the Tribunal considers that there is no evidence that similar investigations were conducted for any other missing items assigned to other staff ICTR members during the liquidation process before their checkout was processed". What has been identified as unlawful procedure should not cover only delay but also deduction of his final leave days to offset for the said misplaced items some of which were recovered from another staff member's office as identified on pages 38 and 39 of Annex No. AA3 with proven evidence, hence such deduction were not warranted at all.

3. It was order in Judgment No. UNDT/2011/169, at Para 31, that "Having given due and careful consideration to both parties' submissions and the record, the Tribunal finds that the Applicant should be compensated by an award of USD 60,000 for the emotional distress and anxiety suffered by him as a result of the Respondent's actions, as well as for the damage caused to his reputation (see Shkurtaj 2011-UNAT-148, Shkurtaj UNDT/2010/156, and former United Nations Administrative Tribunal Judgment No. 1029, Bangoura (2001))". The Applicant's case is similar to this one in terms of distress, anxiety and reputation damage. He was summoned before Local Court for Criminal Case as depicted at Para 26 of the Judgment, that "On 20 January 2017, the Applicant filed a submission regarding proceedings in a criminal case filed against him by the Respondent; a case which was dismissed on 6 December 2016" But to the shock, this Honorable Tribunal did not consider such damage caused to his reputation.

4. That a careful look at United Nations Personal History Form (P11) at Para 32 reveals that,

> "HAVE YOU EVER BEEN ARRESTED, INDICTED, OR SUMMONED INTO COURT AS A DEFENDANT IN A CRIMINAL PROCEEDING, OR CONVICTED, FINED OR IMPRISONED FOR THE VIOLATION OF ANY LAW (excluding minor traffic violations)?" It was imperative for this Tribunal to consider the gravity of tarnishing of Applicant's reputation instituted by the Respondent and at least compensate him for such emotional distress, anxiety suffered by him and the damage caused to went through to defend the fictitious case and his future

> prosperity. A word from the Tribunal on the matter is very important.

5. That in Judgment No. UNDT/2011/068 the Tribunal put it clear at Para 20 that:

> "As the Tribunal stated in Applicant UNDT/2010/148, it is more appropriate to express compensation for emotional distress and injury in lump sum figures, not in net base salary. Such damages, unlike actual financial loss, are not dependent upon the applicant's salary and grade level. Dignity, self-esteem and emotional well-being are equally valuable to all human beings regardless of their salary level or grade. For reasons stated in Applicant UNDT/2010/148, the Tribunal finds it appropriate to order compensation for emotional harm and harm to reputation in the form of a lump sum payment". It was ordered at Para 21 that, "the Tribunal has determined that the amount of USD 50, 000 is appropriate compensation…" At Para 30 it was finally ordered that, "The Respondent shall pay to the Applicant USD 50,000 as compensation for non-pecuniary loss, including harm to his emotional well-being, consequential deterioration of health, and harm to his reputation".

6. The issue of compensation is well documented in Judgment No.: UNRWA/DT/2014/005 at Paras 35 and 36 hence it is imperative that the Tribunal will set eyes on them when readdressing the case at hand during this requested revision process.

7. The Applicant reported on a number of issues to MEU as per Annex No. AA3 and some were depicted in the Main Application at Paras VII (1-17) but during deliberation the Tribunal opted not to address them hence killing the spirit of language used at Paras VIII (1-14) and IX (1-10) of the Main Application.

Respondent's submissions

8. The Respondent's principal contentions may be summarized as follows:

a. The material elements that a moving party must establish in order for an application for revision to be granted by the Dispute Tribunal are as follows: (1) a new fact which, at the time the judgment was rendered, was unknown to the Dispute 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 (*Pirnea* 2014-UNAT-

456). No party may seek revision of the judgment merely because that party is dissatisfied with the pronouncement of the Dispute Tribunal and wants to have a second round of litigation (*Pirnea*);

b. The Applicant has failed to establish the material elements set out in *Pirnea*. The Applicant does not identify a new fact that was unknown to him and to the Dispute Tribunal at the time the Judgment was rendered;

c. The three items identified in Section III of the Application are neither new nor decisive facts. The first item is a question of law. A question of law is not a new fact (*Tiwathia* UNDT/2012/119). The second and third items concern submissions made by the Applicant prior to the issuance of the Judgment. The reintroduction of prior submission is not a new fact (*Awe* 2017-UNAT-735);

d. The Applicant in his submissions merely disagrees with the Dispute Tribunal's assessment of the facts and law in the Judgment. The Application for Revision is contrary to the letter and spirit of Article 12(1) of the Statute (*Gehr* UNDT/2012/106). An application for revision is an exceptional procedure, and not a substitute for an appeal. A party may not seek revision of a judgment because he is dissatisfied with the judgment (*Awe*).

Consideration

Applicable law

9. Article 12.1 of the Dispute Tribunal's Statute provides:

> 1. 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.

10. Article 29 of the Dispute Tribunal's Rules of Procedure regarding revision of judgment provides:

> 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.
>
> 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.
>
> 3. The application for revision will be sent to the other party, who has 30 days after receipt to submit comments to the Registrar.

11. As consistently held by the Appeals Tribunal, "the review procedure [of revision] is of a corrective nature and thus is not an opportunity for a party to reargue his or her case" (see *Sanwidi* 2013-UNAT-321, para. 8, as, for instance, affirmed in *Sidell* 2014-UNAT-489 and *Roig* 2014-UNAT-491 and held similarly in *Muthuswami et al* 2011-UNAT-102, *Massah* 2013-UNAT-356, *Elasoud* 2013-UNAT-391 and *Pirnea* 2014-UNAT-456). Moreover, an application for revision of a judgment is only receivable if it fulfills the strict and exceptional criteria established under art. 12.1 of the Dispute Tribunal's Statute and art. 29 of its Rules of Procedure, namely (see *James* 2016-UNAT-680, para. 13):

> … Accordingly, an application for revision of judgment is only receivable if it fulfils the strict and exceptional criteria established under Article 11 of the Statute (discovery of a decisive fact previously unknown not due to negligence, clerical or arithmetical mistakes, and interpretation of the meaning and scope of the judgment).

12. After having carefully studied the application for revision, which was filed within 30 days of the date of publication of Judgment No. UNDT/2017/042, the Tribunal notes that none of the circumstances to which he refers concern a "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" pursuant to art. 12.1 of the Statute Dispute Tribunal and art. 29 of its Rules of Procedure. Rather the Applicant

appears to seek a review of Judgment No. UNDT/2017/042 because he disagrees with the Tribunal's analysis and to reargue matters that have already been determined by the Tribunal and thereby to reopen his previous case. The reasons and submissions presented in the application for revision do not fulfill the strict and exceptional criteria of art. 12.1 of the Dispute Tribunal's Statute and art. 29 of its Rules of Procedure and may be invoked in an appeal, if any. There is therefore no basis for revising Judgment No. UNDT/2017/042.

Conclusion

13. In the light of the foregoing, the Tribunal DECIDES:

The application for revision of judgment No. UNDT/2017/042, issued in Case No. UNDT/NY/2016/043, is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 9th day of August 2017

Entered in the Register on this 9th day of August 2017

(Signed)

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge