UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/025
Judgment No.: UNDT/2018/048
Date: 11 April 2018
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MUNYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT ON APPLICATION FOR REVISION

Counsel for Applicant:
Self-Represented

Counsel for Respondent:
Bettina Gerber, UNOG
Cornelius Fischer, UNOG

Introduction

1. By application filed on 23 March 2018, the Respondent in Judgment *Munyan* UNDT/2018/028 ("the Respondent"), rendered on 26 February 2018 in Case No. UNDT/GVA/2017/004, requests revision of that judgment.

2. The Respondent requests the Tribunal to revise the amount of the compensation in lieu of rescission awarded to the Applicant in *Munyan* ("the Applicant"), alleging that the Respondent became aware of new facts that were not known to the Tribunal at the time the judgment was rendered.

3. The application was served on the Applicant on 28 March 2018. Pursuant to art. 29.3 of the Tribunal's Rules of Procedure, he has until 25 April 2018 to file a reply.

Facts

4. On 26 February 2018, the Tribunal rendered Judgment *Munyan*, in which it decided:

> a. The selection decision for the position of Humanitarian Affairs Officer (Financial Tracking Service) (P-3) in OCHA, advertised under Job Opening No. 54262, is hereby rescinded;
>
> b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant the equivalent of two months' net base salary at the P-3 level, step 1; and;
>
> c. All other claims are rejected.

5. In setting the amount of compensation in lieu of rescission pursuant to art. 10.5(a) of its Statute, the Tribunal considered that at the time of the judgment the Applicant held a fixed-term appointment at the P-2 level at the United Nations Conference on Trade and Development ("UNCTAD") and that he was temporarily assigned to a post at the P-3 level for which he was in receipt of a special post allowance. The Tribunal held that as a consequence of the contested decision, the Applicant was "deprived of the opportunity to be offered a fixed-term appointment

at the P-3 level, which represented an important step forward for his career development". This finding was based on the facts asserted by the Applicant in his application filed on 1 February 2017, which were not contradicted by the Respondent.

6. According to the Respondent's submissions, "[i]n the summer of 2017, Counsel for the Respondent was informally notified of a promotion of the Applicant within UN[C]TAD during an interaction with [the] Chief, Human Resources Management, UNCTAD, regarding another matter".

7. On 26 February 2018, Counsel for the Respondent received and reviewed Judgment *Munyan* and noted that the Tribunal had not considered the promotion of the Applicant.

8. Counsel for the Respondent consequently enquired with the Chief, Human Resources Management, UNCTAD, to verify if the Applicant had indeed been promoted to the P-3 level.

9. On 28 February 2018, the Chief, Human Resources Management, UNCTAD, formally informed Counsel for the Respondent of the Applicant's promotion as of 1 July 2017 by submitting his Personnel Action.

Respondent's submissions

10. The Respondent's principal contentions are:

a. The Applicant had a duty, while the case remained pending with the Dispute Tribunal, to apprise the Tribunal of the fact that he had been promoted to the P-3 level effective 1 July 2017;

b. The Applicant did not advise the Tribunal of this fact and the latter was permitted to proceed on an incorrect factual basis, namely that the Applicant was still at the P-2 level with only a temporary assignment to a P-3 post;

c. As a consequence, the Tribunal set an amount of compensation in lieu of rescission based on incorrect information.

Consideration

11. The issue of the application's receivability is a matter of law which may be assessed even if not raised by the parties and without waiting for the opposing party to file a reply (see *Gehr* 2013-UNAT-313, *Christensen* 2013- UNAT-335). Bearing this in mind, and considering that in the circumstances of the case it is in the interest of all parties that the present matter be disposed of as soon as possible, the Tribunal deems appropriate to rule on the application for revision by summary judgment, in accordance with art. 9 of its Rules of Procedure, without waiting for the Applicant's reply.

12. Applications for revision are governed by art. 12.1 of the Dispute Tribunal's Statute, which provides that:

> 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.

13. Pursuant to art. 11.3 of the Tribunal's Statute, judgments are executable "following the expiry of the time provided for appeal in the statute of the Appeals Tribunal", that is "within 60 calendar days of the receipt of the judgment" (art. 7(1)(c) of the Appeals Tribunal's Statute).

14. Art. 29 of the Dispute Tribunal's Rules of Procedure contains a provision, similar to art. 12.1 of the Tribunal's Statute, stating that:

> 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 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.
>
> 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.

15. The Tribunal notes that contrary to art. 12.1 of the Dispute Tribunal's Statute, art. 29 of its Rules of Procedure does not contain the word "executable" before "judgment". That being said, the Tribunal's Statute prevails over its Rules of Procedure so the receivability of the application shall be determined in light of art. 12.1 of the Tribunal's Statute.

16. It follows that the receivability of an application for revision is subject to the following cumulative requirements:

a. The judgement is executable; and

b. The application is made within 30 calendar days of the discovery of the fact by the requesting party and no more than one year from the date of the judgment.

17. The present case raises issues in respect of each of the two requirements set out above. These will be addressed in turn.

Whether the judgment is executable and whether this requirement applies to the present case

18. The Respondent acknowledges that the judgment is not yet executable as the deadline to appeal will not expire until 27 April 2018. It is unknown at this time whether one or both of the parties will appeal the judgment. The Respondent explicitly stated in his application for revision that he did not exclude this possibility.

19. The Respondent claims, however, that he is forced to file his application for revision before the judgment becomes executable as he will otherwise not be able to respect the 30-day time limit to file it, taking into account that he allegedly became aware of the fact that prompted his request for revision on 28 February 2018.

20. The Tribunal notes that art. 12.1 of its Statute may *a priori* appear to be internally inconsistent in circumstances where a party discovers a fact that could prompt a revision of a judgment shortly after its issuance, namely within 30 days. The same problem would arise if the judgment had been appealed, in which case it would not become executable 60 days after its issuance. However, this contradiction is only apparent and consideration of the full breath of the recourses available to the parties allows for a coherent interpretation of said provision.

21. The requirement set forth in art. 12.1 of the Dispute Tribunal's Statute is very clear and mandates that a judgment be executable, that is, final and binding upon the parties, for it to be subject to review by the Tribunal. The reason for this requirement is that judgments could otherwise be subject to appeal to the Appeals Tribunal and to revision by the Dispute Tribunal at the same time. This situation would obviously trigger legal complications and not be in the interest of judicial economy. Hence, an application for revision is not possible when the judgment in question is subject to appeal; the appropriate avenue for a party to adduce new facts during this period is through appellate proceedings.

22. Therefore, the Tribunal finds that since the judgment is not executable, it does not have jurisdiction to entertain the application at this stage.

Whether the application was filed within 30 days of the discovery of the fact

23. In any event, the Tribunal finds that the requirement that the application be filed within 30 days of the discovery of the fact by the filing party is also not met.

24. In the case at hand, Counsel for the Respondent became aware of the Applicant's promotion in the summer of 2017 through the Chief, Human Resources Management, UNCTAD. This must have certainly been regarded as a reliable source of information as the Applicant was promoted within that specific entity. Indeed, the formal confirmation of the Applicant's promotion later came from this very same person. Yet, the Respondent did not take any action to verify this information, if he deemed it at all necessary, or asked for documentary evidence until 26 February 2018 after the judgment was issued. The formal confirmation

obtained on 28 February 2018 can therefore not be seen as the discovery date of the fact.

25. The Tribunal notes that the Applicant was promoted after the Respondent had already filed his reply on 14 June 2017. The Respondent had ample opportunities to bring this new fact to the attention of the Tribunal before the judgment was issued, notably following the Tribunal's Order No. 29 (GVA/2018) of 1 February 2018, which required him to file additional documents and requested both parties to indicate whether they agreed that the case be decided on the papers. The Respondent took no action to bring this allegedly relevant fact to the attention of the Tribunal. Allowing him to reopen the case at this stage while he did not exercise the necessary diligence in due time would jeopardize the principles of legal certainty and judicial economy.

26. The Respondent claims that the duty to apprise the Tribunal of this new fact fell on the Applicant, notably in light of the arguments that he put forward in his reply to Order No. 29 (GVA/2018) dated 15 February 2018, and that he should consequently not be allowed to benefit from a remedy to which he was not entitled.

27. Firstly, the Tribunal recalls that it is for each party to adduce the facts that they deem relevant for the determination of the case. Secondly, the Tribunal notes that whilst it could have been expected that the Applicant apprise the Tribunal of his promotion once it happened, it cannot be concluded in this case that the Applicant misrepresented the facts or deliberately sought to mislead the Tribunal about his professional situation. The Applicant had not been promoted at the time of filing his application and was promoted only a year after the contested decision, of which he was notified on 22 July 2016. Hence, the Applicant's promotion did not have the effect of removing any entitlement to compensation in lieu of rescission as he remained at the P-2 level during that year and occupied a post at the P-3 level only on a temporary basis.

28. The Applicant's additional submission dated 15 February 2018, which sought to respond to the Respondent's argument that he was not entitled to any compensation due to the fact that he occupied a temporary post at the P-3 level,

must be seen in this context and do not constitute a misrepresentation of the facts, especially in the context where the Applicant is self-represented and did not necessarily appreciate that his promotion a year after the contested decision could possibly impact on the determination of the amount of compensation in lieu of rescission that he may obtain.

29. The Tribunal finds that since the Respondent discovered the fact that prompted his application for revision in the summer of 2017, that is prior to the issuance of Judgment *Munyan*, and he filed the application for revision only on 23 March 2018, he did not comply with the 30-day time limit set forth in art. 12.1 of the Dispute Tribunal's Statute.

30. It follows from the above that the application is not receivable.

Conclusion

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

The application for revision of Judgment *Munyan* UNDT/2018/028 is rejected.

(*Signed*)
Judge Teresa Bravo
Dated this 11th day of April 2018

Entered in the Register on this 11th day of April 2018
(*Signed*)
René M. Vargas M., Registrar, Geneva