UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/092
Judgment No.: UNDT/2019/016
Date: 31 January 2019
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

NIKOLARAKIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON REVISION

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Respondent in the closed file of Case No. UNDT/NY/2016/039 (Nikolarakis) filed an application for revision of this Tribunal's Judgment in *Nikolarakis* UNDT/2017/068, contending that certain decisive facts were unknown to the Dispute Tribunal and Counsel for the Respondent at the time the Judgment was rendered.

2. In response, the Applicant submits that the Respondent's application should be dismissed as the basic conditions for revision of a judgment have not been met. The Applicant contends that the Respondent had prior knowledge of these decisive facts and it is irrelevant that they were unknown to his Counsel and that the Respondent wrongfully conflates or equates knowledge of a legal representative with knowledge of a party, contrary to the requirements of art. 12.1 of the Dispute Tribunal's Statute and art. 29 of the Rules of Procedure.

Background

3. On 25 August 2017, the Dispute Tribunal issued its Judgment in *Nikolarakis* UNDT/2017/068 in the closed file of Case No. UNDT/NY/2016/039, finding, *inter alia*, that (emphasis in the original):

> […]
>
> *Loss of opportunity to obtain continuing appointment and impact to career progression*
>
> 69. The Applicant states that the loss of opportunity to compete has affected his career advancement and job security. He argues that he is now the longest serving S-2 level officer without a promotion to S-3 level, despite receiving favourable performance reviews. He has reached the highest level of S-2, step 12, and is stuck thereat. Given the significant number of posts recruited against, i.e., 20 posts, it means he will not have an opportunity to compete for an S-3 level

SSO post for some time to come and that he is unable to be considered for conversion for continuing appointment as this consideration requires staff members who are at least at the S-3 level. The Applicant fulfils all the required eligibility requirements for a continuous appointment except this element, see SGB/2011/9 (Continuing appointments). Having recruited so many S-3 level SSOs through an unlawful process, it follows that opportunities at that level will not arise for a significant period of time.

70. The Applicant cannot be considered for conversion to continuing appointment unless he is at S-3 level. The Applicant has been recommended for promotion by both his reporting officers whenever the earliest opportunity arises. The infraction of 12 unlawful recruitments has compounded the improbability of another recruitment for S-3 level SSO's in the near future as hereinbefore mentioned. Although he currently satisfies the age and performance criteria, his exclusion from the recruitment exercise has prevented him from fulfilling the other continuing appointment criteria and set him back several years. The Tribunal finds that the contested decision has impacted the Applicant's opportunity for career advancement and job security, and awards the sum of USD5,000 to the Applicant.

[…]

Conclusion

75. The Tribunal has found that the Applicant has suffered damages for loss of chance of the right to be fairly considered in the promotion exercise and that the contested decision has impacted his opportunity for career advancement and job security.

In view of the foregoing, the Tribunal DECIDES:

a. Liability having being admitted, the application succeeds and the decision to exclude the Applicant from the recruitment exercise is rescinded;

b. As an alternative to rescission, the Respondent may elect to pay the Applicant compensation in the amount of USD20,000;

c. The Respondent is to pay the Applicant the amount of USD5,000 for loss of opportunity for career advancement and for loss of job security;

d. The total amount of USD24,166.55, being the sums above, less USD833.45 already paid, shall bear interest at the

> U.S. Prime Rate effective from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

4. On 26 September 2017, the Respondent filed an application for revision of *Nikolarakis* UNDT/2017/068.

5. On the same day, the case was assigned to the undersigned Judge and, in accordance with art. 29 of the Dispute Tribunal's Rules of Procedure, the Registry transmitted the application to the Applicant instructing him to file his comments by 26 October 2017.

6. On 19 October 2017, the Chief of the Office of Staff Legal Assistance ("OSLA"), on behalf of Counsel for the formerly self-represented Applicant, filed a motion for extension of time to file the Applicant's comments, stating that his Counsel had been on certified sick leave and unable to attend to his work. Counsel's return to the office was anticipated on the following Monday.

7. On 24 October 2017, the Dispute Tribunal was informed by the Appeals Tribunal that an appeal of *Nikolarakis* UNDT/2017/068 had been filed on behalf of the Secretary-General.

8. By Order No. 238 (NY/2017) dated 24 October 2017, in the absence of the assigned Judge on certified sick leave, Judge Greceanu granted the requested extension of time and ordered the Applicant to file his comments addressing the request for revision of Judgment No. UNDT/2017/068 by 2 November 2017.

9. On 2 November 2017, Counsel for, and on behalf of, the Applicant, filed his comments.

10. By email of 13 November 2017, the Tribunal ordered the parties to attend a

Case Management Discussion ("CMD") on 15 November 2017.

11. At the 15 November 2017 CMD, the Applicant's Counsel participated via Skype from Geneva and the Respondent's Counsel was present in person in the New York courtroom. The assigned Judge explained that due to her impending home leave, she had called the CMD to inform the parties that it would not be possible for her to determine the matter before her return in January 2018. Counsel for the Respondent confirmed that, in addition to the Administrative Law Division ("ALD", previously named, Administrative Law Section) having filed the application for revision in the present case, the Office of Legal Affairs ("OLA") had also filed an appeal of the original case with the Appeals Tribunal. Counsel for the Applicant further explained that the selection process involving Applicant was still ongoing. Noting that the next Appeals Tribunal session would be in March 2018, and due to the particular circumstances of the matter, the Tribunal encouraged the parties, without prejudice to the final determination of the revision application, to seek further instructions from their respective clients to explore the possibility of an amicable solution and to inform the Tribunal of the progress by the end of December 2017. Counsel for both parties commendably agreed to explore such possibilities upon Respondent Counsel's return from annual leave in early December 2017.

12. By Order No. 257 (NY/2017) dated 16 November 2017, the Tribunal ordered the parties to explore the possibility of solving the present case informally and to inform the Tribunal about the outcome of their discussions by 29 December 2017.

13. On 28 December 2017, the Officer-in-Charge of OSLA filed a motion stating that both Counsel were on leave and that OSLA could not reach either of them "in order to ascertain the status of such discussions". He also mentioned that both Counsel were expected to return from leave on 2 January 2018 and requested a one-week extension of the deadline indicated in Order No. 257 (NY/2017).

14. By Order No. 280 (NY/2017) dated 29 December 2017, on behalf of the assigned Judge, Judge Greceanu granted the request for time extension and instructed the parties to inform the Tribunal about the outcome of the discussions aimed at resolving the case amicably by 5 January 2018.

15. By joint submission in response to Order No. 280 (NY/2017) dated 5 January 2018, the parties informed the Tribunal that they had not been able to informally resolve the matter.

16. On 22 March 2018, the Appeals Tribunal pronounced that the case was to be remanded to the Dispute Tribunal although providing no reasons for its ruling at that stage. The pronouncement of the Appeals Tribunal dated 22 March 2018 is encapsulated in the document entitled, "Outcome of Judgments Rendered by the United Nations Appeals Tribunal during its 25th Session in Amman from 11 to 22 March 2018", which simply states, "Case remanded to [the Dispute Tribunal, "UNDT"]", without more.

17. By submission dated 19 April 2018, Counsel for the Respondent filed an "addendum to the application for revision of judgement", stating, *inter alia*, as follows:

> … On 22 March 2018, the Appeals Tribunal pronounced its judgement in *Nikolarakis*, Case No. 2017-1121. The Appeals Tribunal in its pronouncement remanded the case to the Dispute Tribunal for consideration of the Respondent's application for revision of judgement. The Appeals Tribunal has not yet issued its written judgement.
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> … On 23 March 2018, the Applicant was selected for the S-3 position advertised in Job Opening No. 17-SEC-DSS-77938-R-NEW YORK (R). The Applicant accepted the position on 29 March 2018 [reference to annex omitted].

> … In view of the above, the Respondent requests the Dispute Tribunal to revise the amount of compensation awarded to Applicant for loss of opportunity.

18. As the matter was to all intents and purposes therefore still *sub judice* before the Appeals Tribunal in the absence of a fully reasoned judgment, the Dispute Tribunal took no action on the Respondent's "addendum to the application for revision of judgement".

19. On 23 May 2018, the Appeals Tribunal provided its full judgment, *viz.* Judgment No. 2018-UNAT-832, including the following reasons (reference to footnotes omitted):

> 20. The Secretary-General has acknowledged liability for the irregularities in the contested selection process. His appeal challenges the quantum of damages awarded by the UNDT.
>
> 21. As already recited above, the Secretary-General paid Mr. Nikolarakis compensation in the sum of USD 833.45. However, the UNDT took the view that there was a "'compelling' case" […] for awarding higher compensation on the basis that the Secretary-General's calculation of compensation was wrongly based on the probability that another S-3 selection exercise would take place within the first quarter of 2017, whereas his "prospects for promotion appear bleak, at least for the next few years, the last such recruitment exercise having taken place way back in 2011". […]
>
> 22. Consequently, in its Judgment issued on 25 August 2017, the UNDT ordered rescission of the contested administrative decision and in-lieu compensation of USD 20,000, plus USD 5,000 for loss of opportunity for career advancement and for loss of job security.
>
> 23. One of the main factors in the UNDT's assessment of compensation was its assumption that Mr. Nikolarakis had been deprived of an opportunity to compete for an S-3 level appointment for a significant period of time.
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> 24. In regard to that particular question, on 22 September 2017, the Secretary-General filed an application for revision of judgment, requesting the UNDT to take note of the new DSS JO that was issued in April 2017 for thirteen S-3 level vacancies, for which

Mr. Nikolarakis was invited to interview.

25. The present appeal was filed on 24 October 2017, which was the deadline for filing the appeal, since the UNDT Judgment was issued on 25 August 2017. The filing of the appeal has prevented the UNDT from proceeding with the hearing of the application for revision. This is because, pursuant to Article 12(1) of the UNDT Statute, an application for revision must relate to an executable judgment, whereas, under Article 7(5) of the Appeals Tribunal Statute, the filing of the appeal has the effect of suspending the execution of the judgment. Consequently, the application for revision of judgment is still pending before the UNDT.

26. Article 12(1) of the UNDT Statute 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.

27. Article 7(5) of the Appeals Tribunal Statute states: "The filing of appeals shall have the effect of suspending the execution of the judgement or order contested."

28. In our view, the application for revision that is currently pending before the Dispute Tribunal concerns a new consideration which could be relevant to the issue of the quantum of compensation. The outcome of the application for revision, whatever it may be, is likely to impact on the appeal before us. Therefore, we are of the view that to proceed with the appeal without giving the UNDT an opportunity to hear and pass judgment on the application for revision would neither be appropriate for the fair and expeditious disposal of the case nor to do justice to the parties.

29. In the circumstances, it is appropriate to remand the case.

20. By Order No. 119 (NY/2018) dated 5 June 2018, with reference to Judgment No. 2018-UNAT-832, and in view of the information that the Applicant had now been selected for and accepted an S-3 level position on 29 March 2018 and considering the particular circumstances of the present case, including the continuing employment relationship, the Tribunal entreated the parties to make all attempts to

amicably resolve this matter if possible in order to save inordinate delay and costs, and to continue to promote a harmonious working environment and culture within the Organization. Accordingly, the Tribunal ordered that the parties file a jointly signed submission by 19 June 2018, indicating whether they agreed to attempt informal resolution and, if so, whether they required suspension of proceedings; alternatively, that the parties were to attend a CMD on 10 July 2018 in the event they did not so agree.

21. On 18 June 2018, the parties filed a joint submission in response to Order No. 119 (NY/2018) stating that "the parties have agreed to attempt informal resolution through *inter partes* discussions. The parties are not requesting a suspension of proceedings".

22. By Order No. 126 (NY/2018) dated 19 June 2018, the Tribunal ordered the parties, by 19 July 2018, to inform the Tribunal as to the progress of the *inter partes* informal discussions and/or whether the case has been resolved.

23. By joint response to Order No. 126 (NY/2018), the parties informed the Tribunal on 19 July 2018 that they had attempted informal resolution through *inter partes* discussions but had been unable to reach an agreement and were not requesting a further suspension of the proceedings.

24. By Order No. 175 (NY/2018) dated 12 September 2018, the Tribunal instructed the parties to attend a CMD on 19 September 2018 (subsequently rescheduled to 20 September 2018 upon the request of the Respondent's Counsel).

25. At the 20 September 2018 CMD, the Applicant's Counsel participated via telephone while Counsel for the Respondent was present in the New York courtroom. The Tribunal, once again, encouraged the parties to make every effort to resolve any outstanding issues in this matter amicably without the need for a revision of

judgment, with its attendant costs, and the issuance of a reasoned judgment thereafter. The Tribunal highlighted that such course of action would save valuable resources all round and also contribute to inculcating a harmonious working environment and culture within the Organization, and sustain the continuing current employment relationship between the Applicant and his office. The Tribunal emphasized that all CMD discussions were without prejudice to the consideration of the receivability and/or merits of the revision application. The Tribunal also observed that while Judgment No. UNDT/2017/068 would remain on the Dispute Tribunal's website in case an amicable settlement was reached, the principles expressed therein would still be open for appeal to the Appeals Tribunal, as relevant, in another case. Alternatively, if the issue of compensation was resolved, whether the judgment may be rescinded, varied or set aside in respect to relief. Counsel for the Applicant responded that his client remained open to further informal discussions, while Counsel for the Respondent expressed reluctance as he saw only minimal scope for success. The Tribunal noted that, if no agreement was reached on resuming the informal discussion, it would instruct the parties to file their closing statements and proceed to determine the matter on the papers before it.

26. By Order No. 187 (NY/2018) dated 21 September 2018, the Tribunal made the following orders (emphasis omitted):

> … The parties are to consult with their respective clients on whether to resume the informal discussion and, by 4:00 p.m. on Friday, 12 October 2018, inform the Tribunal of the outcome. In the affirmative case, the parties are to indicate for how long time they would request the Tribunal to suspend the proceedings;
>
> … If the parties do not agree to resume the informal discussions, the parties are to file their closing statements by 4:00 p.m. on Friday, 19 October 2018.

27. In joint submission of 12 October 2018, the parties informed the Tribunal that they have "not agreed to resume informal discussions".

28. The parties filed their respective closing statements on 19 October 2018 (the Respondent) and on 20 October 2018 (the Applicant).

Consideration

29. It is recalled that *Nikolarakis* UNDT/2017/068 concerned only the issue of relief, liability having been conceded by the Respondent, whereupon the Tribunal rescinded the contested decision, and set a sum of compensation as an alternative, together with loss of opportunity damages. The issues of the present case are whether—under the very particular circumstances of the Respondent's application—the Tribunal may revise its judgment in *Nikolarakis* UNDT/2017/068 under art. 12.1 of its Statute or, in the negative, whether the Tribunal would otherwise have the power to make a variation of its previous orders, or determine the matter in any manner other than by way of revision of judgment, under art. 36.1 of its Rules of Procedure, as mandated by art. 7 of its Statute.

30. On the substantive issue of this application for revision, the Tribunal observes that, contrary to the submissions made and/or the evidence adduced at the hearing of the substantive matter on 4 April 2017, a selection exercise for thirteen S-3 positions took place pursuant to a job opening issued on 21 April 2017, following which the Applicant was appointed to an S-3 level position on 29 March 2018. The Respondent maintains that these are decisive facts warranting a revision of the judgment on quantum, which facts were unknown to the Dispute Tribunal and Counsel for the Respondent at the time the judgment was rendered on 25 August 2017. The Tribunal also observes that the Appeals Tribunal has stated that the "application for revision that is currently pending before the Dispute Tribunal concerns a new consideration which could be relevant to the issue of the quantum of compensation". This observation was of course made without prejudice to any final consideration on the merits or demerits of the application for revision, which the Applicant submits is

primarily doomed to fail since art 12.1 of the Tribunal's Statute and art. 29 of the Rules of Procedure require lack of knowledge on the part of the Respondent, and not his Counsel.

31. As for the factual background, the Tribunal notes that the parties appear to agree that the applying party, namely the Respondent (who, in this context, is to be understood as the Administration of the United Nations at large as the United Nations Charter, art. 97, designates the Secretary-General as " the chief administrative officer of the Organization"), at least as a matter of principle, must have known about the ongoing recruitment exercise and the Applicant's job application for the Job Opening in question before *Nikolarakis* UNDT/2017/068 was issued. Indeed, following the Applicant's closing submissions on 17 March 2017, the Administration issued the relevant job opening on 21 April 2017. In those closing submissions, the Applicant referred to his loss of opportunity for career progression in light of so many posts having been admittedly unlawfully filled, and the remoteness of any future opportunities based on what is described as the Respondent's "unsupported assertions" regarding future recruitment exercises, including in the first quarter of 2017. The Tribunal notes that the Respondent did not rebut this submission, nor provide support for these assertions, including at the hearing on damages on 4 April 2017, despite the ongoing plans for the new recruitment drive for which the Job Opening was advertised on 21 April 2017, and to which the Applicant applied on 12 May 2017.

32. It follows from the facts before the Tribunal that the recruitment exercise in question commenced after the hearing on 4 April 2017. However, it appears that the parties agree that the Respondent's Counsel, although also working as a lawyer of the Administration, had not been fully instructed or informed of recent developments regarding the recruitment exercise in question. For this reason, Counsel did not apprise the Tribunal about this fact, just as the Applicant's Counsel did not know

about the job application, even if his client, the Applicant, knew about it. As submitted by the Applicant's Counsel, the period following a hearing is not a period when client and representative are in communication and to that extent, neither Counsel nor the Tribunal was apprised of any recent developments. Furthermore, it appears to the Tribunal that neither the Respondent nor the Applicant appears to have been deliberately withholding any information; it seems, rather, as if neither of them understood or anticipated its possibly decisive importance in the Tribunal's considerations and calculation of the compensation sum stated in *Nikolarakis* UNDT/2017/068. Nevertheless, the Tribunal here is not dealing with the substantive application for revision and will make no further reference to the submissions of either party in this regard.

33. The Statute of the Dispute Tribunal, art. 12.1, provides as follows regarding the revision of a judgment (a provision which is also reflected in arts. 29.1 and 29.2 of the Rules of Procedures):

> … 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.

34. The Applicant has made several submissions regarding receivability including, *inter alia*, that at the time of filing the application for revision the judgment was not executable, that new evidence has arisen in this case the receipt of which requires exceptional circumstances, and more particularly that the relevant fact was in any case known to the Respondent at the time of the judgment. The Tribunal will deal with the Applicant's latter submission since it is clear under art. 12.1 of the Statute of the Dispute Tribunal, that an application for revision is predicated upon the ignorance or lack of knowledge of a decisive fact on the part of the moving party.

The party applying for revision in this instance is the Respondent. In this instance, the question is therefore whether a "party" is to be understood as solely an applicant and/or a respondent or also to include their counsel as the provision states that the relevant decisive fact had to be "unknown to the Dispute Tribunal and to the party applying for revision".

35. Meriam-Webster's online law dictionary (https://www.merriam-webster.com/) defines a "party" as "one (as a person, group, or entity) constituting alone or with others, one of the sides of a proceeding …". In the context of the Dispute Tribunal, its Rules of Procedure, in art. 12.1 on representation, makes a clear distinction between a "party" and his "counsel" as it provides that:

> ... A party may present his or her case to the Dispute Tribunal in person, or may designate counsel from the Office of Staff Legal Assistance or counsel authorized to practice law in a national jurisdiction.

36. In line herewith, Practice Direction No. 2 on legal representation, art. 3, states that (emphasis in original):

> **Legal representation of applicant and respondent**
>
> 3. A party may present his or her case to the Tribunal in person, or may designate counsel as per art. 12 of Rules of Procedure of the Tribunal. …

37. Consequently, it would appear to the Tribunal that, in the present case, as the applying party, the Respondent, meaning the Administration at large, must have known about the ongoing recruitment exercise and the Applicant's job application for the Job Opening. At the very least, such knowledge must be imputed or assumed to have been known to the Respondent, although from the factual circumstances it is quite clear that the pertinent information was within the knowledge of the Respondent. Such knowledge however cannot be imputed to Counsel if not so instructed. One of the fundamental conditions for granting a revision of judgment is

therefore not present in this case and, on a strictly technical basis, on this ground alone, a revision of the judgment is not possible. In line herewith, in a leading judgment on revision, *Beaudry* 2011-UNAT-129, the Appeals Tribunal found that:

> 16. An application for "reconsideration", "guidance", "ruling on issues of appellate jurisdiction" and "approach", or any application which, in fact, seeks a review of a final judgment rendered by the Appeals Tribunal can, irrespective of its title, only succeed if it fulfills the strict and exceptional criteria established by Article 11 of the Statute of the Appeals Tribunal (discovery of a decisive fact previously unknown not due to negligence, clerical or arithmetical mistakes, and interpretation of the meaning).
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> 17. As this Court stated in [*Shanks* 2010-UNAT-26bis] and [*Costa* 2010-UNAT-063], the authority of a final judgment – *res judicata* – cannot be so readily set aside. There are only limited grounds, as enumerated in Article 11 of the Statute of the Appeals Tribunal, for review of a final judgment.
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> 18. In this respect, the applicant's arguments are irrelevant if they do not meet the requirements clearly established in the Statute to ensure the finality of a judgment.
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> 19. Neither can the parties rely on the Tribunal's "inherent power to reconsider" to obtain a revision expressly forbidden by the Statute from a rule based on the concept of *res judicata*, designed to avoid litigation *ad aeternum*, particularly applicable to the highest court of a judicial system.

38. As the application for revision is not sustainable in this instance, it would therefore seem necessary for the Tribunal to examine if, under art. 36.1 of its Rules of Procedure, as mandated by art. 7 of the Statute, the Tribunal may otherwise grant a variation of its orders made in a previous judgment considering certain particular circumstances that may not have been anticipated by the drafters of the Dispute Tribunal's Statute and/or Rules of Procedure.

39. Article 36.1 of the Dispute Tribunal's Rules of Procedure concerns "[p]rocedural matters not covered in the rules of procedure" and states as follows:

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

40. As stated above, in the present case, it appears to the Tribunal that, only subsequent to the issuance of *Nikolarakis* UNDT/2017/068, both Counsel realized that each of their clients had failed to inform them of a possibly decisive fact, namely the impending recruitment exercise followed by the publication of the Job Opening, and the Applicant's job application for the opening, and that the Tribunal was therefore not apprised about it in a timely manner. Further, it would seem as if neither party appears to have acted in bad faith—none of them simply understood the relevant fact's importance in the Tribunal's ultimate consideration in the specific context. Both Counsel also now seem to agree that, if accepted, the new fact could have a decisive influence on how the case is decided; a conclusion, which the Tribunal concurs with, at least based on how the matter has been presented to it by the parties subsequent to the issuance of *Nikolarakis* UNDT/2017/068. In addition, it is common cause that, on 23 March 2018, one day after the pronouncement of the Appeals Tribunal's decision, that the Applicant was selected for an S-3 level position which he accepted on 29 March 2018. Thus, it could well be argued that he has received some satisfaction with regard to remedies.

41. It would appear to the Tribunal that this case presents a very exceptional and unique set of circumstances, which were simply not contemplated by the drafters of the Statute and/or the Rules of Procedure, or even by the Appeals Tribunal in *Beaudry*.

42. The Tribunal observes that the Appeals Tribunal has stated that "the application for revision that is currently pending before the Dispute Tribunal concerns a new consideration which could be relevant to the issues of the quantum of compensation". There is no doubt that the principle that a judgment is final and

unalterable is sacrosanct, except in limited or exceptional circumstances. In many jurisdictions, a court may have the power, upon the application of any party affected or, *mero motu*, to vary its own judgments and orders in certain circumstances. Some of these may include—an order or judgment which was erroneously sought or erroneously granted particularly in the absence of a party affected thereby; one in which there is an ambiguity or patent error or omission; or where an order or judgment was granted as a result of a mistake common to both parties. A final judgment may also be set aside on discovery of new facts or documents, or error and irregularities in procedure for example. A party in whose favor a judgment has been given may also abandon the judgment or decision in whole or in part.

43. In reality, the principle and only contention in this case is the quantum of compensation. If the Tribunal now refused to make a variation of or somehow revisit its previous orders in *Nikolarakis* UNDT/2017/068, the result would be that, in order to ensure that the factual basis for calculating the compensation amount is correct, the Respondent would then be forced to appeal *Nikolarakis* UNDT/2017/068 to the Appeals Tribunal (which he has already done once only to have it remanded pending this Tribunal's decision on the present application for revision, which has been found to be unsustainable). Under the Appeals Tribunal's Rules of Procedure, the Respondent would thereafter need to request to submit additional evidence to show that the Applicant had actually applied for the Job Opening, although both parties already now agree on this and it is also demonstrated by the evidence on record before this Tribunal as the Applicant has secured a position. If this new evidence is accepted, the Appeals Tribunal would then face a similar dilemma, and have to examine this Tribunal's findings in *Nikolarakis* UNDT/2017/068 based on what is an agreed incorrect factual basis, due to an unwitting mistake of the parties but not attributable to their counsel. The Appeals Tribunal's option could possibly then be either to remand the case back to the Tribunal for a new determination taking into consideration the new fact, or to make a determination of the case as it then stands. In

the latter case, neither party, who both recognize the mistake, would then benefit from a proper two-tier trial of the matter as otherwise envisioned in the General Assembly's founding resolutions concerning the internal justice system at the United Nations (see General Assembly resolution 261/61 (Administration of justice at the United Nations), para. 19, and General Assembly resolution 62/228 (Administration of justice at the United Nations), art. 39). All this would not augur well for judicial economy and costs for both parties.

44. At the same time, an argument could be made against the making of any variation or any other manner of disposal of the case, as the General Assembly in its resolution 63/253 (Administration of justice at the United Nations) stated that "the United Nations Dispute Tribunal … shall not have any powers beyond those conferred under their respective statutes". Nevertheless, in other cases, the Appeals Tribunal has recognized that, in some situations, the Dispute Tribunal may have "inherent judicial power[s]" beyond those granted through its Statute (see, for instance, *Igbinedion* 2014-UNAT-410, para. 29). This rationale appears to be the same as that of drafters of art. 36 of the Dispute Tribunal's Rules of Procedure, namely that it would simply be impossible to foresee and/or include all possible procedural scenarios in a single set of rules of procedure, or indeed to anticipate such relief or orders as may be just fair and equitable in particular circumstances. The Tribunal's inability to grant relief in such particular circumstances could result in an absurdity and miscarriage of justice, prejudicial to both parties.

45. In light of the above, with reference to art. 36.1 of the Dispute Tribunal's Rules of Procedure, the Tribunal is therefore inclined to allow a variation or setting aside in whole or in part, or other reconsideration of its judgment specifically the orders made in *Nikolarakis* UNDT/2017/068. To do justice to the parties and preserve judicial economy, particularly as the Applicant was selected and is now placed at the S-3 level, and there is a continuing employment relationship, the Tribunal will grant

the parties the possibility to settle the matter informally. If the parties fail to resolve the matter within a specified time, then the Tribunal will thereafter make a final determination on the matter on the papers before it, but after allowing the parties to file their final contentions on the Tribunal's observations made in the present Judgment.

IT IS ORDERED THAT:

46. The application for revision of the judgment *Nikolarakis* UNDT/2017/068 is rejected on the grounds stated above.

47. By **4:00 p.m. on Thursday, 21 February 2019**, the parties are to file a joint motion in which they state whether they have agreed to settle the matter amicably or, if not, present their respective submissions on liability in light of the Tribunal's findings contained in the present judgment after which the Tribunal will proceed to determine the matter on the papers before it unless otherwise ordered.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of January 2019

Entered in the Register on this 31st day of January 2019

(Signed)

Nerea Suero Fontecha, Registrar