UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/092
Judgment No.: UNDT/2019/117
Date: 26 June 2019
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

NIKOLARAKIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Robbie Leighton, OSLA

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

Introduction

1. On 22 September 2017 the Respondent in the closed file Case No. UNDT/NY/2016/039 (Nikolarakis) filed an application for revision of this Tribunal's Judgment in *Nikolarakis* UNDT/2017/068 dated 25 August 2017 on relief, liability having been duly admitted, 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 the present case, Case No. UNDT/NY/2017/092, by Judgment No. UNDT/2019/016 dated 31 January 2019, the Tribunal rejected the application for revision of Judgment No. UNDT/2017/068 on a technical basis as a fundamental condition for granting revision was absent. The Tribunal thus ruled, in line with *Beaudry* 2011-UNAT-129, as affirmed by *Abassa* 2014-UNAT-484 which stated that revision applications are only receivable if they "fulfill the strict and exceptional criteria in the Statute" (see para. 33), this principle applying to the Dispute Tribunal as well. However in the judgment rejecting the revision application, the Tribunal, whilst recognizing the principle that a judgment is final and unalterable as sacrosanct except in limited or exceptional circumstances, indicated that it was "inclined to allow a variation or setting aside in whole or in part, or other reconsideration of its judgment specifically the orders made" (see paras 42-44) subject to any contentions filed by the parties (see para. 45). In light of its findings, and with reference to art. 36.1 of the Rules of Procedure (Procedural matters not covered in the Rules of Procedure), the Tribunal issued the following orders (emphasis omitted):

> 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.

3. On 21 February 2019, the parties filed a joint response to Judgment No. UNDT/2019/016 in which was stated that they had been unable to settle the manner amicably. The parties also filed separate submissions and contentions in light of the Tribunal's findings in Judgment No. UNDT/2019/016.

4. By Order No. 52 (NY/2019) dated 28 March 2019, the Tribunal requested the parties to attend a Case Management Discussion ("CMD"), which, following postponement due to unforeseen circumstances and availability of all concerned, was held on 30 May 2019. At the CMD, the parties confirmed that they were not able to settle the matter.

5. For the procedural history leading up to Judgments Nos. UNDT/2017/068 and UNDT/2019/016 and the relevant factual background, reference is made to the respective judgments. However, it is pertinent to recall that this matter was remanded back by the Appeals Tribunal in *Nikolarakis* 2018-UNAT-832 for the Dispute Tribunal - "to complete its hearing of the application for revision of judgment" as in its view the revision application concerned "a new consideration which could be relevant to the issue of the quantum of compensation" (see para. 28). This "new consideration" follows immediately hereunder at para. 6.

The facts that were not disclosed to the Tribunal when Judgment No. UNDT/2017/068 was issued

6. The Tribunal observes that the Respondent in his application for revision of Judgment No. UNDT/2017/068 identifies the alleged decisive facts that were not disclosed to the Tribunal when Judgment No. UNDT/2017/068 was issued on 25 August 2017 as the following, noting also that the Applicant has not objected to their

veracity:

> (a) On 21 April 2017, Job Opening No. 17-SEC-DSS-77938-R-NEW YORK (R) was advertised for Senior Security Officer, S3, within the Department of Safety and Security. This job opening is for 13 vacancies;
>
> (b) On 12 May 2017, the Applicant applied for job opening;
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> (c) On 5 August 2017, the Applicant participated in a written assessment for job opening; and
>
> (d) On 23 August 2017, the Applicant was invited to interview for the job opening.

7. It will be recalled that, on 4 April 2017, the Tribunal held a hearing on the issue of damages, and that judgment in the substantive relief matter was issued on 25 August 2017, two days after the Applicant was called for an interview. By submission dated 19 April 2018, the Respondent added the following uncontested facts, "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". The Tribunal notes that the Applicant therefore secured an S-3 level post some seven months after its Judgment No. UNDT/2017/068 on the merits.

The relevant compensation amounts of Judgment No. UNDT/2017/068 to possibly be examined for variation

8. In Judgment No. UNDT/2017/068, the Tribunal held as follows in para. 75:

> 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.

Summary of the parties' contentions

9. In the Applicant's closing submissions of 21 February 2019, he contends, in essence, that:

a. *Beaudry* 2011-UNAT-129 specifically addresses the notion of an inherent power of the Tribunal to reconsider its judgments and indicates that parties cannot rely on such a power in circumstances where revision is "expressly forbidden by the Statute from a rule based on the concept of *res judicata*, designed to avoid litigation *ad aeternum*";

b. While the finding relates to parties, rather than to a decision of the Tribunal's own volition to alter a judgment, it is relevant to the question as to whether the award in *Nikolarakis* UNDT/2017/068 should be varied. Any decision to vary the judgment in accordance with art. 36 of the Dispute Tribunal's Rules of Procedure seems to correspond to the inherent power to reconsider judgments rejected in *Beaudry*. In that case, the moving party's position was that essentially even if their request for revision were procedurally barred, variation should be made nonetheless in the interests of justice;

c. The Dispute Tribunal may feel any decision to vary judgment in the instant case is made *sua sponte*. However, that any variation would follow a

judgment finding the Respondent's application for revision of judgment procedurally barred would appear to contradict such. The finding in *Beaudry* is consistent with the principle of *lex specialis derogat legi generali*. Article 36 of the Statute of the Dispute Tribunal provides an inherent power where no specific provision exists. However, a clear provision with procedural requirements exists for the revision of judgment. That provision specifically requires that a fact used to vary a judgment must not have been known to parties at the time of judgment and such lack of knowledge must not have been due to negligence. Thus, the rule envisages a situation where a fact relevant to variation of a judgment may be presented to the Tribunal and, yet, the judgment not be varied purely because the party should have had prior knowledge. With reference to *Munyan* 2018-UNAT-880, the provision indicates that drafters prioritized the principle of legal finality over the risk that a judgment might rely on an inaccurate fact scenario. Any decision to vary the award in Judgment No. UNDT/2017/068 does the converse and finds a power of the Tribunal inconsistent with the provisions of art. 12 of the Dispute Tribunal's Statute and the principle of *lex specialis derogat legi generali*;

d. In the instant case, the Respondent has insisted there existed an obligation on the Applicant to inform the Tribunal regarding the recruitment exercise advertised prior to release of the Judgment. The same insistence was made in *Munyan* where the applicant had presented legal submissions to the Dispute Tribunal after his promotion, not mentioning his promotion. The Dispute Tribunal found in that case that "it is for each party to adduce the facts that they deem relevant for the determination of the case". That case was also appealed to the Appeals Tribunal where the Secretary-General did not seek to introduce the fact of the Applicant's promotion, presumably as he considered exceptional circumstances for the introduction did not exist.

Instead, it was argued that the Dispute Tribunal had erred in basing its calculation of compensation "on the assumption that, after expiration of his temporary appointment at the P-3 level, [the applicant] would not continue to receive a P-3 salary and would return to his [previous] P-2 position". The Secretary-General criticized the Dispute Tribunal for making such a speculation without seeking evidence. *Munyan*, which followed the summary judgment on revision and referenced the summary judgment decision, did not disturb the award despite it having been made without full knowledge of the circumstances of the Applicant in that case. This again suggests that the finality of judgments represents a priority over the risk that they may be based on an incomplete understanding of the facts;

e. A finding that a judgment may be varied without procedural requirements, without time limit, in any circumstances where the Dispute Tribunal is informed by a party of facts deemed relevant after determination of the case represents a significant assault on judicial certainty. It runs contrary to the practice of the Appeals Tribunal to apply procedural requirements for revision in the strictest possible manner;

f. The fact relied on by the Respondent is not dispositive as to the legality of the relevant decision. The Tribunal made no concrete findings regarding the Applicant's opportunities or prospects for promotion finding only that they appeared bleak. This appearance counted among a conspectus of all material factors and imponderables, upon which the calculation of compensation was based.

g. Regarding the Applicant's opportunity for career advancement and job security, the Tribunal based its award on the unlawful recruitment against 12 posts. The fact that a subsequent recruitment exercise now takes place does not change the fact that unlawful recruitment to 12 posts impacted on the

Applicant's chances of promotion. The Applicant should have been afforded the opportunity to compete for those posts and was not this reduced his chances of an opportunity to be promoted and advance his career. Indeed, the outcome of the current recruitment process remains in doubt with no guarantee that it will result in the advancement the Applicant seeks;

h. The fact relied on by the Respondent is not decisive in the case. It is simply one in a number of factors that had to be weighed by the Tribunal. It was available to the Respondent to provide further clarity on this factor but he failed to do so. This meant the Tribunal had to come to a determination based on imponderables;

i. In *Marsh* 2012-UNAT-205, EUR2,500 were awarded to an applicant whose chances of selection were deemed slight. In such a case the loss of opportunity could not be deemed to have impacted on career prospects so such is not a requirement for an award of compensation. In *Niedermayr* 2015-UNAT-603, the UNAT upheld an award of USD10,000 in relation to recruitment to a single post. When making such an assessment of imponderables it is not possible to say that one factor was decisive and justifies a revision of judgment.

j. The Applicant has never accepted that the fact of the advertisement of a vacancy announcement at the time judgment was passed represented a decisive fact in the calculation of damages. Should a variation be made to the award previously made these arguments would suggest any amendment should be minimal;

k. The Tribunal made no concrete finding in Judgment No. UNDT/2017/068 regarding the Applicant's opportunities or prospects for promotion finding only that they appeared "bleak at least for the next few

years". Use of the word "few" suggests more than one but a small number. With the benefit of hindsight, it is now clear that his prospects were negatively affected for a period in excess of two years. Thus, the view of the Tribunal at the time of the judgment was not far from what actually occurred. The finding that the Applicant's prospects were negatively impacted was considered among "a conspectus of all material factors and imponderables", upon which the calculation of damages was based. It follows that either the award should not be disturbed or any reduction should be minimal in nature since the Judgment expressly indicates that the circumstance altered by the new fact was only one of a number that led them to the award and the facts indicate that the circumstance altered was not significantly altered;

l. The Applicant contested a recruitment decision from 1 March 2016. The Tribunal now proposes to vary Judgment No. UNDT/2017/068 based on a promotion occurring over two years later, on 29 March 2018. That promotion occurred seven months after Judgment No. UNDT/2017/068 was handed down in the matter. Even if the release of a vacancy announcement prior to Judgment No. UNDT/2017/068 represented a decisive fact is accepted, the Applicant's career prospects have plainly been damaged by a two-year delay to his potential promotion. This delay resulted directly from the Respondent's actions which prevented the Applicant from being involved in a competitive recruitment exercise. Instead, twelve candidates were selected from an outdated roster. This impacted the Applicant's career progression, pension remuneration and ability to access a continuous appointment. In other cases, significant awards have been made for failure to give full and fair consideration in a recruitment exercise, without any consideration as to career prospects. In this case damage was caused. It should also be noted that only one element of the award was identified as relating to "loss of opportunity for career advancement" that being the award of

USD5,000. It follows that only this award may be amended should the Applicant's involvement in a subsequent recruitment exercise be deemed decisive;

m. In *Munyan*, responding to an argument that the Dispute Tribunal had failed to establish the impact of the decision when setting an amount in compensation, the Appeals Tribunal reiterated that compensation under art. 10.5(a) offered as an alternative to rescission, "is not compensatory damages based on economic loss. It is compensation covering the possibility that the staff member does not receive the concrete remedy of rescission ordered by [the Dispute Tribunal]. Such compensation is completely different from the compensation regulated by [art. 10.5(b)], which compensates the victim for the negative consequences caused by the illegality committed by the Administration". This finding that alternative compensation is not related to economic loss follows previous findings of the Appeals Tribunal. In the Applicant's submission, damage to career prospects is synonymous with economic. Referring to *Munyan*, it is a "negative consequence caused by the illegality committed by the Administration". Should the fact of the Applicant's promotion be deemed relevant to the award, at law, it may not be relevant to the compensation offered as an alternative to rescission. The award of USD20,000 may not be disturbed. It follows that the only element of compensation ordered that might be varied is the USD5,000 for loss of opportunity for career advancement and for loss of job security. As indicated above damage to career advancement has occurred even if it may have been less than envisaged by the Dispute Tribunal at the time of the original judgment;

10. The Respondent, on the other hand, in his closing submissions of 21 February 2019, contends that:

a. The Organization has fully compensated the Applicant for the irregularity in the selection process. The Dispute Tribunal should vacate the award of compensation in Judgment No. UNDT/2017/068;

b. The purpose of compensation is to place the staff member in the same position that he or she would have been in had the Organization complied with its obligations. Compensation may only be awarded if it has been established that the staff member actually suffered damages.

c. In *Hastings* 2011-UNAT-109, the Appeals Tribunal held that except in very rare circumstances, damages should not exceed the percentage of the difference in pay and benefits for two years. The Organization's payment of USD833.45 reflected this principled approach to compensation. The Applicant loss of chance from the Organization's procedural error was 12.3 percent. This loss of chance is calculated by factoring the Applicant's chance to be selected for one of twelve positions against ninety-seven total qualified job candidates who had an equal chance at selection. Twelve divided by 97 yields a 12.3 percent chance of selection.

d. The above percentage was, in turn, multiplied by the difference between the Applicant's salary at the S-2 level and the salary that he would have received at the S-3, i.e., USD3,388 over a two-year period. The mathematical formula of USD3,888/year * 2 years * 12.3 percent yields USD833.45;

e. It is evident from the new facts described in Judgment No. UNDT/2019/016 that the Organization has fully compensated the Applicant. The Appeals Tribunal has held that, with reference to *Solanki* 2010-UNAT-044, where a staff member complaining of non-promotion was able to apply in the following year's promotion exercise, compensation for

material harm for loss of opportunity was limited to that one-year period. Applying that jurisprudence, the Applicant only lost an opportunity for promotion for a period of 1 year and 4 months. The Applicant's material loss was therefore only USD556. The Dispute Tribunal should therefore vacate the award of compensation in Judgment No. UNDT/2017/068.

Consideration

The Tribunal's competence to vary Judgment No. UNDT/2017/068

11. It is recalled that Judgment No. UNDT/2017/068 concerned only the issue of relief, liability having been properly 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. It is also recalled that the Dispute Tribunal has already rejected the application for revision and the question arises therefore as to whether it may still revise or vary the compensation award made in the subject judgment. That question was answered in the revision judgment (Judgment No. UNDT/2019/016) when the Dispute Tribunal opined that it was minded to issuing a variation or setting aside in whole or in part, or other reconsideration of its judgment specifically the orders made, following consideration of submissions from the parties as to its competency to do so. The Appeals Tribunal apparently having formulated the view that, "One of the main factors in the [Dispute Tribunal's] assessment of compensation was its assumption that [the Applicant] had been deprived of an opportunity to compete for an S-3 level appointment for a significant period of time" (see para. 23 *Nikolarakis* UNAT-2018-832), is the Dispute Tribunal then nevertheless bound to revise the compensation award having dismissed the application for revision?

12. The Tribunal notes that although the Appeals Tribunal found that the assumption that the Applicant had been deprived of an opportunity to compete was

one of the main factors in the assessment of compensation, it is evident from the substantive judgment (Judgment No. UNDT/2017/068) that the Tribunal relied on a conspectus of factors and imponderables. In any event, this relates to the aspect of future damages which is at best always speculative, an inexact science. A judgment cannot be held in abeyance pending a selection exercise and the Tribunal does the best it can, on the evidence led and information provided.

13. In the Applicant's 21 February 2019 submission, he challenges the Tribunal's competence to vary Judgment No. UNDT/2017/068 arguing, *inter alia*, that the Dispute Tribunal's Statute and Rules of Procedure do not allow the Tribunal to order any variation of a final judgment, that the Judgment was a final judgment, that the interests of finality and judicial certainty trump all other possible considerations, and that no procedural requirements such as time limits exist for introducing such a measures. In particular, the Applicant relies on the decision in *Munyan* and contends that art. 36 of the Tribunal's Statute provides an inherent power where no specific provision exists, yet in this instance there exists a very clear provision with procedural requirements for revision applications.

14. The Tribunal finds the Applicant's argument persuasive that if a judgment is varied without any statutory or procedural provision and requirements such as time limits, form and circumstances, this may be tantamount to an assault on finality and certainty of judgments. It must be recalled that unlike the old system, the new two-tier system of justice was set up in 2009 to determine disputes arising between the administration and staff to render decisions that are binding, not merely recommendations. The Tribunal also notes that any variation would not be correcting a mere slip in the figure, but require a reconsideration of the facts, whilst at the same time not relitigating the matter. In all the circumstances, the Tribunal finds it has no competency to disturb the award in the judgment, as the Tribunal has already rejected the revision application in Judgment No. UNDT/2019/016. The Tribunal finds that

justice would be better served for these matters to be considered by the Appeals Tribunal as there is a further issue that complicates the assessment of compensation herein in light of changed circumstances or new facts. In particular, the Tribunal observes that, on 22 March 2018, the Appeals Tribunal in its pronouncements, remanded the matter to the Dispute Tribunal. However, the Appeals Tribunal only issued its full reasoned judgment *Nikolarakis* 2018-UNAT-832 on 23 May 2018 remanding the appeal because the application for revision had been filed, and as it found that (emphasis added):

> 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 Dispute Tribunal] 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.

15. The Appeals Tribunal found that the application for revision raised a new consideration, which could be relevant to the issue of the quantum of compensation. However, the outcome of the application for revision is that it was dismissed, and as such there is no impact on the quantum of compensation ordered by the Dispute Tribunal. As stated above, the pronouncement in *Nikolarakis* 2018-UNAT-832 was on 22 March 2018 and the full reasoned judgment issued on 23 May 2018 when the matter was remanded to the Dispute Tribunal for a new consideration on the narrow ground above. However, it appears unbeknownst to the Appeals Tribunal, that on 23 March 2018, a day following the public pronouncement of its judgment, and two months prior to its reasoned judgment remanding the matter to the Dispute Tribunal, the Applicant was selected for an S-3 level post. This circumstance postdates the Dispute Tribunal's judgment and the remand is an entirely new fact outside the purport of the Dispute Tribunal's consideration of the revision application, and is a

matter which would be best suited to be dealt with by the Appeals Tribunal such as to ensure a just and equitable relief at one time. The remanded revision application having been rejected, the pending appeal is revitalized.

16. Accordingly, the revision application having been rejected, the Tribunal makes no order for revision or variation of the compensation ordered.

Conclusion

17. In view of the foregoing, the Tribunal finds it has no competency to disturb the award of compensation and makes no order for variation of the compensation ordered in Judgment No. UNDT/2017/068.

(Signed)
Judge Ebrahim-Carstens
Dated this 26th day of June 2019

Entered in the Register on this 26th day of June 2019

(Signed)
Nerea Suero Fontecha, Registrar