

Judgment No. 2018-UNAT-890



Counsel for Mr. Mbaigolmem: Edward P. Flaherty
Counsel for Secretary-Ge

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2018-UNAT-890

... The [United Nations Dispute Tribunal (UNDT or Dispute Tribunal)] rendered (...) Judgment [No. UNDT/2017/051] on 29 June 2017 holding that the disciplinary sanction imposed on Mr. Mbaigolmem was unlawful. The UNDT accepted that if the alleged facts

alternative, the UNDT ordered in-lieu compensation in the amount equivalent to six months' gross salary plus post adjustment, deducting the staff assessment as well as the termination indemnity and compensation in lieu of notice that Mr. Mbaigolmem received upon his separation.

3. On 22 March 2018, this Tribunal issued Judgment No. 2018-UNAT-819 in which it granted the appeal in its entirety and vacated the UNDT Judgment. This Tribunal was satisfied on the evidence that the Secretary-General had discharged his overall onus before the UNDT and had established to the standard of clear and convincing evidence that Mr. Mbaigolmem had engaged in sexual harassment and thus the UNDT had erred in law. This Tribunal further held that the disciplinary measure imposed on Mr. Mbaigolmem for his serious misconduct was proportionate.

4. In light of the factual disputes in the case, the Appeals Tribunal, in *obiter dicta* in its Judgment, opined that in cases where the evidence emerging from the internal investigation is regarded by the UNDT as insufficient, it should hear additional evidence, which, depending on the circumstances of the case, might include oral testimony, with a view to determining the facts fully on the basis of the credibility and reliability of the witness testimony and the probabilities. It accepted that in some cases, the circumstances, the nature of the issues and the evidence at hand might obviate the need for a hearing. It considered that the case in hand was such a case.

Submissions

6. Moreover, Mr. Mbaigolmem argues that this “sudden reversal of jurisprudence” amounts to an arbitrary decision and a severe denial of justice because he has not been given the opportunity to defend his case accordingly, for instance by contesting the procedure before the UNDT or requesting that the Appeals Tribunal conduct a complete rehearing, as he had initially expected when he had asked for all relevant witnesses to be interviewed before the UNDT.

7. Mr. Mbaigolmem maintains that the Appeals Tribunal “punished” him with a detrimental judgment for the alleged procedural errors committed by the previous instance instead of following the proper course of action to remand the case to the UNDT. It is contradictory for the Appeals Tribunal to develop a new principle which requires a *de novo* hearing and then to neither hold an oral hearing itself nor to remand the case to the UNDT for proper consideration.

8. Mr. Mbaigolmem claims that with his application for revision he is not merely criticizing the Appeals Tribunal Judgment or asking for a second round of litigation but is rather asking to be given fair access to justice by having his case remanded to and reheard *de novo* by the UNDT in accordance with the newly established principle.

The Secretary-General’s Comments

9. The Secretary-General asserts that, in accordance with established jurisprudence, the Appeals Tribunal Judgment in the present case does not constitute a “new fact” apt to support an application for revision. The issuance of the Judgment constitutes law and Article 11(1) of the Appeals Tribunal Statute and Article 24 of the Appeals Tribunal Rules of Procedure do not provide for a revision based on law.

10. The Secretary-General argues that, in any event, Mr. Mbaigolmem’s assertions fail to address the core findings of the Appeals Tribunal Judgment, namely its determination that clear and convincing evidence existed for a finding of sexual harassment.

11. The Secretary-General accordingly requests that the Appeals Tribunal dismiss the application for revision in its entirety.

Considerations

12. Article 11(1) of the Statute of the Appeals Tribunal provides that either party may apply to the Appeals Tribunal for a revision of a judgment on the basis of the discovery of a decisive fact which, at the time of judgment, was unknown to the Appeals Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence.⁴ Any application which seeks revision of a final judgment rendered by the Appeals Tribunal can only succeed if it fulfills the strict and exceptional criteria established by Article 11(1).⁵

13. Thus, in order to succeed in his quest for revision, Mr. Mbaigolmem must therefore prove that he has discovered a decisive fact that was unknown to both him and this Tribunal at the time of judgment. The “decisive fact” which he maintains was unknown to him and the Appeals Tribunal was the Appeals Tribunal’s alleged reversal of its long-standing jurisprudence by requiring the UNDT to conduct *de novo* hearings in disciplinary matters. In support of his submission that there has been a reversal of long-standing jurisprudence, he relies principally on this Tribunal’s decision in *Said*⁶ where it was held that the UNDT should defer to the Administration in reviewing a decision not to renew a contract on grounds of poor performance.

14. The issuance of a judgment by the Appeals Tribunal does not constitute an unknown decisive fact, apt to support revision. It constitutes law and no possibility for a revision based on law is provided for in Article 11(1) of the Statute of the Appeals Tribunal.⁷ The *obiter dicta* in the Judgment offering directions for the resolution of factual disputes in disciplinary cases, which were not applied in reaching the decision in the case, do not constitute an unknown “decisive fact”. They are matters of law regarding procedure.

15. Moreover, and in any event, the *obiter dicta* do not involve a reversal of long-standing jurisprudence. The principles of judicial review applicable in a disciplinary case under Article 2(1)(b) of the UNDT Statute are well-established. They require consideration of the evidence adduced and the procedures utilized during the course of the investigation by the Administration.⁸ The UNDT must establish whether the facts on which the sanction is

⁴ See also Article 24 of the Appeals Tribunal Rules of Procedure.

⁵ *Beaudry v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-129, para. 16.

⁶ - ~~17-9 UNAT-30~~ *Beaudry v. Secretary-General of the United Nations* (2011) UNAT 129/2011, para. 16.

based have been established, whether the established facts qualify as misconduct under

probabilities of the situation, taken cumulatively, constituted a clear and convincing concatenation of evidence that established the misconduct with a high degree of probability.

18. In view of the foregoing, Mr. Mbaigolmem has failed to establish an unknown decisive fact that warrants revision of the Judgment and thus the application for revision falls to be dismissed.

Judgment

19. The application for revision is dismissed.

Original and Authoritative Version: English