United Nations AT/DEC/1350

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1350

Case No. 1313 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 31 October 2005, a staff member of the United Nations, filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1232, rendered by the Tribunal on 22 July 2005;

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 16 April 2006 and once thereafter until 16 May;

Whereas the Respondent filed his Answer on 9 May 2006;

Whereas the Applicant filed Written Observations on 22 May 2006;

Whereas the Applicant submitted additional documentation on 12 December 2006 and 2 October 2007;

Whereas the facts in the case were set forth in Judgement No. 1232.

Whereas the Applicant's principal contentions are:

1. Since the delivery of Judgement No. 1232, the Applicant has been alerted to the fact that the former Executive Secretary of the Economic Commission for Africa (ECA) pushed the Applicant out of his post to make room for another person, purportedly recruited as a "Visiting Fellow" on a six-month contract.

2. Before appointing this Visiting Fellow the post was never properly advertised, which amounted to a denial of the Applicant's right to reasonable consideration for employment.

Whereas the Respondent's principal contention is:

The Applicant failed to introduce any fact of a decisive nature which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1232 was rendered and, accordingly, his request for revision of Judgement is without merit.

The Tribunal, having deliberated from 23 October to 21 November 2007, now pronounces the following Judgement:

I. This is an Application for the revision of Judgement No. 1232, which was rendered by the Tribunal on 22 July 2005. In that Judgement, the Tribunal, adopting the findings of the Joint Appeals Board (JAB), rejected the Application dated 7 October 2003 filed by the Applicant, in which he requested the Tribunal, inter alia, to "[rescind] the decision not to renew the Applicant's contract [as a Regional Adviser with ECA] beyond 31 December 2002"; "direct that [he] be deemed to [have been] in the service of the United Nations from … [1] January … to 5 June 2003"; "[and to award him] moral damages equivalent to two years' net base salary". This latter period was the only period the Applicant had been out of service with the United Nations as a result of the decision he complained of as, on 4 June 2003, he was re-employed by the Organization.

The Tribunal found that the Applicant's fixed-term employment was governed by staff rule 204.3, "[t]he terms of [which] are clear: the Administration of the United Nations has the discretionary authority to renew or extend fixed-term appointments, or not to do so, without having to justify its decision". It recalled that staff members have "no legal expectancy to renewal with respect to any fixed-term contract" and that those serving "on 200 Series contracts enjoy fewer rights regarding future employment than their counterparts with 100 Series contracts". It held that the Applicant had not discharged the burden of proving that "countervailing circumstances" existed in his case and that, as "a number of staff members were affected by the [impugned] exercise, [it was not] credible that the entire exercise was concocted to target the Applicant, or any other individual staff member". The Tribunal reviewed its jurisprudence "that the Administration is not obliged to explain its decision not to renew a fixed-term contract, but that when a reason is given, however, '[it] must be supported by the facts' (Judgement No. 885, *Handelsman* (1998)", finding that whilst he had "made some very troubling accusations, … the Tribunal [was] not satisfied that there exist[ed] sufficient evidence to support [the Applicant's] claims". Accordingly, the Application was rejected in its entirety.

II. In considering his Application for revision of Judgement, it is important to bear in mind that the Applicant had joined issue with the decision not to renew his contract as a Regional Adviser with ECA on

the grounds that the decision demonstrated an abuse of power and was premised upon the "personal whims and preferences" of the then Executive Secretary of ECA. It was, he alleged, a decision which was unsupportable as it had been improperly motivated. He claimed that the reasons advanced for the non-renewal of his fixed-term appointment were "inconsistent" as well as "disingenuous and unconvincing". In its Judgement, the Tribunal stated that it agreed with the JAB and that "the Applicant had not discharged his burden of proof" in respect of these allegations.

III. On 31 October 2005, the Applicant filed an Application for revision of Judgement No. 1232. His Application initially reads as an attempt at a further appeal: he disagrees with the Judgement, preferring selected findings in the dissenting opinion in Judgement No. 1254 (2005), which Judgement derived from the same ECA exercise and was rendered by the Tribunal at the same session, albeit by a different panel. The Applicant continues to criticise the JAB for its inadequate fact-finding, and is unhappy with the censure which was made in Judgement No. 1232 for the "rhetoric [he] employed … in making serious allegations regarding the JAB's impartiality".

The Applicant then seeks to have recourse to article 12 of the Statute of the Tribunal, claiming that he recently discovered that the post of Regional Advisor he had encumbered at ECA was not truly abolished but that the functions were initially assigned to a Visiting Fellow, recruited for a six-month period, who was then retained to fulfil the duties on an ongoing basis. It is very clear that the Applicant is not happy with the Tribunal's acceptance of the conclusions of the JAB in Judgement No. 1232. He indicates that he entertained a number of "reservations" about the Judgement but, with much reluctance, came to consider the case as "closed" when he received and read the Judgement. The Applicant describes his metamorphosis in the following, rather revealing, language:

> "However as [he] struggled with, and gradually started adjusting to the new reality it occurred to [him] to share the outcome of the case with his former colleagues in Addis Ababa. That was when he stumbled on a new piece of information - one which, had he come in possession of earlier, would have enabled him to furnish the proof that he needed to buttress his argument."

Clearly, he feels that with this new information he would have had a better chance to "buttress" his original claim of improper motivation on the part of the ECA management. The Applicant may be right in his perception or he may be wrong, for who can, at this distance of time, predict how the JAB might have reacted to this information. However, significantly, even the Applicant does not claim that it necessarily constituted information of a decisive character. At most, it would have been one additional factor which might or might not have tipped the scales in the cumulative assessment of evidence regarding the "very troubling accusations" he made against the then Executive Secretary.

Basically, the Applicant would have liked the Tribunal to have held in Judgement No. 1232 that the JAB failed to perform its responsibilities and would much prefer the dissenting approach in Judgement No. 1254. However, sadly for him, the Tribunal did not find such a failure on the part of the JAB either in Judgement No. 1232 or in the majority Judgement No. 1254. This, then, is the reality he must face.

IV. Insofar as his Application is an effort to reargue his case, the Applicant is on thin ice because there is no such right of recourse available to him: it is well-established that "[n]o party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation". (Judgement No. 894, *Mansour* (1998).) In Judgement No. 1201, *Berg* (2004), the Tribunal dismissed such an attempt in the following terms: "what the Applicant is seeking is 'another bite at the cherry', another chance to litigate the same issues which have been settled in the previous litigation. The jurisprudence of the Tribunal is clear that he cannot do this …".

V. Nonetheless, it should be apparent from paragraph III above that the Tribunal takes the view that this is essentially an effort to produce fresh evidence that might have supported the Applicant's original claim. If he has a right to do this, the decision of the Tribunal in Judgement No. 1232 that he had not met his burden of proof may have to be changed or set aside. This is a very different case from one which might trigger the very restricted competence of the Tribunal in exercising its jurisdiction under article 12 of its Statute. For such an application to succeed, there must be the discovery of a new fact which was not only unknown to the Tribunal and the party applying for revision at the time of the judgement, but which could not have been discovered with due diligence.

The Tribunal is cognizant of the difficulties which staff members have in adducing proof in charges of improper motivation and abuse of power. However, article 12 of the Statute of the Tribunal is clear in its requirements:

> "The Secretary-General or the Applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

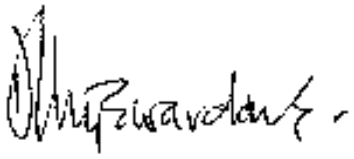
The Applicant explains the provenance of his "new fact", in that he was alerted thereto when he discussed his case with former colleagues after the distribution of Judgement No. 1232. The information he presents is not, however, new, even if it was new to him, as it comprises the Programme of Work for a conference held at the African Development Forum from 11-15 October 2004, almost one year *prior* to the Tribunal's original decision on 22 July 2005. The Applicant does not give any reason why he did not share his concerns about the charges he brought with his erstwhile colleagues from ECA at an earlier point of time or why such colleagues failed of their own accord to provide this information to him more expeditiously, when it must have surely been known to them that the Applicant was seriously questioning the good faith of the ECA management. They were, however, under no obligation to exercise due diligence on behalf of the Applicant and it is apparent that there was no effort made by any of the parties involved to

conceal the functions of the former Visiting Fellow as the documentation now provided by the Applicant was printed from the internet, where it was apparently publicly available.

VI. The Tribunal appreciates that this Judgement will be as disappointing to the Applicant as was its previous Judgement. In the parlance of Judgement No. 1227 (2005), "[i]t is abundantly clear that only another review of the original case, resulting in a different outcome, would give the Applicant satisfaction". However, as the Tribunal held in that case, "[t]his he is not entitled to."

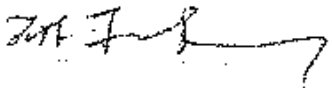
VII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)



Dayendra Sena **Wijewardane**
Vice-President

Brigitte **Stern**
Member



Goh Joon Seng
Member

New York, 21 November 2007

Maritza **Struyvenberg**
Executive Secretary