United Nations AT/DEC/1373

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1373

Case No. 1264 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane, Vice-President; Ms. Brigitte Stern;

Whereas at the request of a staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 August 2005;

Whereas, on 31 August 2005, the Applicant filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, revision of Judgement No. 1172, rendered by the Tribunal on 23 July 2004;

Whereas in his Application, the Applicant requests the Tribunal, inter alia:

"7. [To find on the merits] …

(a) that the Applicant has placed before the Tribunal facts of such a nature as to be a decisive factor, which facts were, when [Judgement No. 1172] was given unknown to the Tribunal and the Applicant;

(b) that the facts and further considerations provided in the request for revision establish that there are compelling reasons for revising the Judgement; [and,]

8. [To order] …

(a) that the Respondent pay additional compensation in the amount of 12 months' net base salary … in addition to the compensation already awarded;

(b) that the Applicant be awarded interest in the amount of 6% per annum from 30 October 2004 until the Judgement is fully and finally implemented … in light of the egregious delays; [and,]

(c) [the award of costs.]"

Whereas the Respondent filed his Answer on 1 February 2006;

Whereas the Applicant filed Written Observations on 21 July 2006 and, on 22 September, the Respondent commented thereon;

Whereas the facts in the case were set forth in Judgement No. 1172.

Whereas the Applicant's principal contentions are:

1. Following the issuance of Judgement No. 1172, new information came to light providing clear evidence that his treatment was influenced by prejudice and other extraneous considerations for which the responsibility of the Organization is entailed beyond the violation of his rights found in that Judgement.

2. The compensation awarded by the Tribunal is "less by almost half than the agreed termination package" offered to him.

3. An award of costs in the amount of US$ 3,500 is fully justified in view of the exceptional nature of the circumstances surrounding the case and the hardship it has imposed on him.

Whereas the Respondent's principal contentions are:

1. 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. 1172 was rendered and, accordingly, his request for revision of Judgement is without merit.

2. The Applicant's request for the award of costs and the payment of interest is without merit.

The Tribunal, having deliberated from 23 April to 2 May 2008, now pronounces the following Judgement:

I. The Applicant initially filed his case with the Tribunal on 10 September 2002. The Tribunal considered that case and ruled on it in Judgement No. 1172. In that Judgement, the Tribunal found that the Applicant was discriminated against because UNDP was unwilling to consider him for any future placement unless he participated in the Resident Coordinator (RC) Competency Assessment Programme and that, "considering his long career, which was satisfactory except for a very short period when he received a negative performance review, the Administration did not make the good faith effort that is required of it to find for the Applicant another posting compatible with his position and experience". For this violation of the Applicant's rights, the Tribunal awarded the Applicant compensation in the amount of 12 months' net base salary at the rate in effect at the time of his separation from service. The Applicant is now submitting an Application for revision of Judgement No. 1172 pursuant to article 12 of the Statute of the Administrative Tribunal.

II. The competence of the Tribunal to revisit cases in which judgements have already been pronounced is, for the main part, described in article 12 of the Statute of the Tribunal, which reads as follows:

> "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 Tribunal strictly applies article 12: in paragraph I of its Judgement No. 303, *Panis* (1983), it ruled that "[a]pplications for revision of a judgement delivered by the Tribunal must be considered in the light of the standards imposed by article 12 of the Tribunal's Statute ... The standards contained in article 12 are ... relatively strict and lay a substantial burden upon the party who requests revision."

Recently, in paragraph V of its Judgement No. 1120, *Kamoun* (2003), the Tribunal stated:

> "In accordance with the Statute and case law, in order to be able to apply for revision of a judgement it is necessary to satisfy certain formal and substantive conditions. As regards formal conditions, article 12 sets a time limit for filing the application. As regards substantive conditions, in order for an application to be admissible the Applicant must, on the one hand, plead discovery of a new fact, that is to say one that was not known at the time the judgement was given, and, on the other, the new fact must be of such a nature as to be able to influence the outcome of the dispute as reflected in the judgement."

Even more recently, in paragraph III of its Judgement No. 1164, *Al-Ansari et al.* (2004), the Tribunal added that "the Tribunal has no jurisdiction to reopen cases in which judgement has been rendered based on mere bald assertions such as those made in these cases that the original judgements were works of incompetence and were wrong".

The Tribunal thus reiterates that the two essential substantive conditions allowing for the revision of a judgement are the existence of a new fact and the ability of that new fact to modify the judgement. The Tribunal will deal with these two aspects separately.

III. The Tribunal will first consider the existence of a fact which, when the judgement was given, was unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. A revision procedure is based, above all, on the discovery of a new "fact" which might modify the judgement given. In support of his Application for revision, the Applicant cites, as a new fact, a written testimonial from a former colleague, dated 22 August 2005, in which the latter concluded that:

> "[he] strongly dispute[d] the assertions of those officials in UNDP who faulted [the Applicant's] performance during this period. In particular, the assessment by his subsequent supervisor [the new

> Director who arrived in 1999] who was not even involved at the time in Rwanda and had no direct knowledge, is completely unjustified and can only have been motivated by an intent to discredit him. Unfortunately, this kind of unfounded rumour was allowed to influence the treatment of [the Applicant], seemingly resulting in his premature termination from UNDP in 2003."

In the view of the Tribunal, the written testimonial given by this colleague does not amount to a fact, but is an additional item of evidence attesting to the positive evaluation of the Applicant by his former supervisors and contradicting the negative evaluation given by the Applicant's new Director in 1999. The Tribunal is of the opinion, however, that an additional item of evidence should not be confused with a new fact and that a distinction must be drawn between the two. An additional item of evidence is an element that either confirms, strengthens or contradicts the evidence already presented when the judgement was given, while a new fact is an element that comes to light only after the conclusion of the proceedings and is of such a nature as to have a decisive influence on the judgement. In other words, the former does not bring any new element(s) to the proceedings, serving only to confirm or invalidate the judgement, whereas the latter, by virtue of its intrinsic "newness", may have a considerable influence on the judgement. In the case at issue, in support of his Application for revision, the Applicant thus seeks to present additional evidence relating not to new facts but rather to a factor on which the Tribunal should have based its judgement. The Tribunal has already had occasion to draw a distinction between a fact and an item of evidence. As it noted in Judgement No. 822, *Oudeh* (1997), "the Applicant thus attempts to present new evidence which he could have used in the earlier proceedings. Consequently, there is an attempt to reopen proceedings which had already led to the pronouncement of a definitive judgement." Moreover, it had already concluded in Judgement No. 497, *Silveira* (1990), that "any attempt to reopen issues which have already been decided by a judgement, and which are therefore *res judicata*, is improper and constitutes an abuse of its procedures".

More recently, in *Al-Ansari et al*., the Tribunal declared that

> "[n]o one should believe that a mere restatement of claims, even though made in new language and with changed emphasis, can be a basis for the revision of a judgement made by the Tribunal. As stated in Judgement No. 556, *Coulibaly* (1992), a revision is not a means of reopening issues that have been settled definitively and which are thus *res judicata*."

In light of the Applicant's argument, the Tribunal is of the opinion that the Applicant has failed to satisfy the conditions set out in article 12 and that the written testimonial from the Applicant's colleague does not amount to a new fact capable of justifying the revision of Judgement No. 1172.

IV. Furthermore, the supposedly "new" fact presented by the Applicant did not exist when Judgement No. 1172 was delivered, a condition that must be satisfied if the fact is to be taken into consideration for revision under article 12 of the Tribunal's Statute. In fact, it was obtained after the Judgement was delivered and in response to that Judgement, as the Applicant himself explained in his Application for revision, which was filed with the Tribunal on 31 August 2005:

> "*Following the issuance* of Judgement No. 1172 on 30 September 2004, *the following new development* occurred. The Applicant initiated contact with a former colleague in Rwanda, [who] is one of the foremost experts on the Humanitarian Crisis in Rwanda, having been in charge of the [United Nations] peacekeeping operation there at the time of the genocide. He has written and lectured extensively on the subject. The judgement was shared with [this colleague], who was at that time a visiting instructor at Harvard University. [He] was immediately struck by the injustice represent[ed] in the misrepresentation of the Applicant's service in Rwanda. Following further exchanges, *in August 2005 he provided a written testimonial*." (Emphasis added.)

The Tribunal also wishes to point out that, prior to the issuance of Judgement No. 1172, the Applicant himself had submitted to the Tribunal, on 13 May 2004, excerpts from his colleague's book, "*Shake Hands with the Devil: The Failure of Humanity in Rwanda*", in which the latter gave a positive account of the Applicant's role during his mission to Rwanda in 1994. Consequently, the Tribunal takes the view that, insofar as the Applicant wished to cite a statement from this colleague as evidence, he could have done so before Judgement No. 1172 was delivered. Indeed, insofar as this colleague had already included positive statements about the Applicant in his book, the Applicant could, as well as providing the Tribunal with excerpts from the book before the issuance of Judgement No. 1172, have asked him to provide a written testimonial, which in fact he did, but only after the Judgement was delivered. The Tribunal therefore concludes that the statement in question was not a statement that existed before the issuance of the Judgement, unknown to the Applicant and discovered only after the Judgement was delivered, but rather that it is a new element that came to light after the Judgement was delivered. Such an element, arising after the delivery of the Judgement, does not satisfy the conditions set out in article 12 of the Tribunal's Statute.

V. Lastly, the Tribunal wishes to add that, even if the letter from the Applicant's colleague could be regarded as a new fact, which is not the case here, it would not be of such a nature as to have a "decisive influence" on the outcome decided upon by the Tribunal. In fact, the written testimonial from the Applicant's colleague gives only his subjective interpretation of the situation and amounts to nothing more than an additional statement contradicting the negative performance evaluation given by the Applicant's new Director in 1999. What the Applicant presents as a new fact is, in the Tribunal's view, a value judgement drawing subjective conclusions. But the Tribunal had already taken account of other statements contradicting the negative evaluation from the Applicant's new Director. In its Judgement No. 1172, the Tribunal had already drawn conclusions similar to those set out in the Applicant's colleague's written testimonial. The Tribunal notes that its analysis did not differ significantly from the opinion expressed by the Applicant's colleague. The latter points out, for example, that "the assessment by [the Applicant's] supervisor ... is completely unjustified and can only have been motivated by an intent to discredit [the Applicant]". Indeed, in its Judgement No. 1172, the Tribunal had already clearly established that the new Director was hostile to the Applicant. The Tribunal stated that,

> "[i]n 1998, the Applicant received a positive performance assessment from his then supervisor … [The] new Director … attempt[ed] to persuade the [Management Review Group] to downgrade the Applicant's [performance appraisal report] for the year 1998 … despite the fact that she had not supervised the Applicant for the main part of the performance period covered."

The Tribunal further noted that:

> "[it could not] but notice that the supervisor's evaluation of the Applicant's performance [was] not commensurate with the several preceding evaluations of the Applicant's work, which [were] of a rather laudatory nature. In particular, the Tribunal ha[d] found the supervisor's evaluation to fly in the face of previous references to the Applicant's performance, and precisely in relation to his Rwandan tenure of office … The Tribunal [could not] hide its *astonishment* when comparing this highly negative vision of the new supervisor with the evaluation of the Applicant's performance by his prior supervisors in connection with his service in Rwanda, the former being directly contradictory to the latter." (Emphasis added by the Tribunal.)

Moreover, the Tribunal also pointed out that

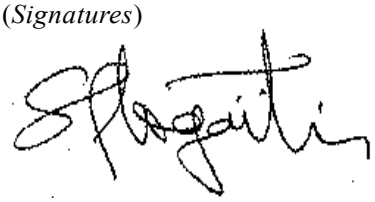
> "the … measures taken with regard to the Applicant have the appearance of *persecution*: he is singled out among sitting or former [Resident Representative/RC] staff members to participate in the efficiency test; he is sent home on [special leave with full pay (SLWFP)] for long periods of time; and, finally, he is separated from service, before having reached retirement",

and that "it [could not] but consider that putting staff on SLWFP for more than two years amount[ed] to a form of *abuse* … which should not be tolerated". (Emphasis added.) Lastly, the Tribunal concluded "that the Applicant's rights were violated by the Respondent's actions" and ordered the Respondent "to pay compensation for the violation of the Applicant's rights in the amount of 12 months' net base salary at the rate in effect at the time of his separation from service". Thus, the Applicant's colleague's subjective conclusion that "the assessment by [the Applicant's] supervisor … is completely unjustified and can only have been motivated by an intent to discredit [the Applicant]" is in line with the conclusions set out by the Tribunal in its Judgement No. 1172 and would not have modified the Tribunal's decision, even if that conclusion had been a new fact, which, as emphasized above, is not the case here.

In conclusion, the Tribunal considers that the written testimonial from the Applicant's colleague does not amount to a new fact which was unknown to the parties when Judgement No. 1172 was given and would justify a revision of that Judgement, and that it is certainly not a fact of a potentially decisive nature or of such a nature as to be able to influence the outcome of the dispute as reflected in the Judgement.

VI. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(*Signatures*)



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New York, 2 May 2008

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