United Nations AT/DEC/1374

Administrative Tribunal

Distr. Limited
31 May 2008

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1374

Case No. 1328 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Ms. Brigitte Stern;

Whereas, on 27 March 2006, a former staff member of the United Nations, filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, revision of Judgement No. 1254, rendered by the Tribunal on 22 July 2005;

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

"1. ... to find that [several] new pieces of evidence which came to the [Applicant's] attention when he visited [the Economic Commission for Africa (ECA)] on 8 March 2006, have important implications for a just and fair judgement of the case ...

2. ... [and] on the basis of this new evidence, [to] further find:

a. That ... [his non-renewal] was based on reasons openly discriminatory towards [him].

b. That neither a credible, nor systematic nor in-depth review of the 14 posts of Regional advisers took place at ECA during 2002 ...

c. That, as a result of a number of serious procedural irregularities, the [Applicant's] rights to a transparent, fair, and equitable procedures were ... violated ...

3. [and] to:

a. Review and revise Judgement [No.] 1254 [accordingly] ..."

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 31 August 2006, and twice thereafter until 24 October;

Whereas the Respondent filed his Answer on 27 October 2006;

Whereas the Applicant filed Written Observations on 9 December 2006;

Whereas the facts in the case were set forth in Judgement No. 1254.

Whereas the Applicant's principal contentions are:

1. New evidence, which came to his attention when he visited ECA on 8 March 2006, provides ample justification for review and revision of Judgement No. 1254.

2. This new evidence clearly shows that he was discriminated against and that the decision not to renew his contract suffered from a number of serious procedural irregularities.

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. 1254 was rendered and, accordingly, his request for revision of Judgement is without merit.

The Tribunal, having deliberated from 22 April to 2 May 2008, now pronounces the following Judgement:

I. This is a request for revision of the Tribunal's Judgement No. 1254, rendered on 22 July 2005. In those proceedings, the Applicant had appealed to the Tribunal against the non-renewal of his fixed-term contract. His position as Regional Adviser in Food and Agricultural Policy and Planning at ECA had not been renewed following a comprehensive reorganization and restructuring which took place at ECA in 2002. The Applicant claimed that this decision was disingenuous and wrongly motivated, was arbitrary, lacked transparency and constituted an abuse of authority on the part of the Executive Secretary. In a majority decision, the Tribunal rejected his Application in its entirety, holding that there "was a real process of restructuring of the ECA and [that] the Applicant's post was abolished as a result". The Tribunal stated that "due process appears to have been observed". This somewhat qualified observation on the part of the Tribunal, taken in conjunction with a dissenting opinion made by the third member of the Tribunal, reveals that there was much that was controversial in the management of ECA at the time. A serious level of staff discontent is apparent and critical reports were issued by the Office of Internal Oversight Services in 2004 (A/58/785) and 2005 (A/60/120).

II. It is in this context that the Applicant returns to the Tribunal. He appears unable to come to terms with the fact that his Application was, from his point of view, regrettably - perhaps even incorrectly - rejected by the Tribunal. However, it was rejected in its entirety and that is the reality he must face. Whilst it is evident that he would prefer a fresh panel of the Tribunal to reconsider his case, undoubtedly with the hope that, despite all that has

taken place with regard to his grievances, he may yet obtain some relief, he has no such recourse. Article 11, paragraph 2, of the Statute of the Tribunal specifically provides that, "[s]ubject to the provisions of article 12, the judgements of the Tribunal shall be final and without appeal".

Pursuant to article 12, an applicant may apply to the Tribunal "for a revision of a judgment 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". This, then, is the only procedure available to the Applicant in the present case, and it is apparent from the jurisprudence of the Tribunal that there are steep hurdles to overcome for a revision application to be successful. Such a request is not simply a way to provide additional, or superior, evidence which was initially held in reserve or which was discovered at a later date. Nor does it permit appeal in the event that a party is dissatisfied with the outcome of the case. The Tribunal has "repeatedly held that these provisions in the Statute limit the scope of an application for revision and do not enable a party to reopen issues which have been adjudicated. (See, for example, Judgement No. 1055, *Al-Jassani* (2002).)" (Judgement No. 1201, *Berg* (2004).)

III. What are the new facts the Applicant wishes to present? They are listed as the following six annexes to his request for revision:

- Audio recording and transcript of a briefing held on 20 September 2002;
- Minutes of the Senior Management Team meetings in 2002;
- OIOS report issued as A/58/785, dated 6 May 2004;
- OIOS report issued as A/60/120, dated 14 July 2005;
- Professional staffing table as at March 2005; and,
- Request and authorization for additional resources for the period August - December 2003.

It is all too clear on the very face of these documents that five of the items could, and should, if the Applicant deemed them pertinent, have been adduced as evidence prior to the Tribunal's consideration of the Applicant's case, as they are dated well in advance of the Judgement which was delivered on 22 July 2005. Indeed, one of the documents (the final one listed) *was* presented to the Tribunal in the original pleadings. It may well be that the information contained in the other annexes was knowledge that was new to the Applicant, but that does not satisfy the threshold of article 12. With the exception of A/60/120, the documents could have been obtained by him, either through a request for production of documents or through the exercise of due diligence on his part well prior to July 2005. With respect to A/60/120, which is dated 14 July 2005, after the deadline for submission of documents to the Tribunal that session, the Tribunal considers it to contain information of a general nature, which is not directly material to the case advanced by the Applicant. Rather, it demonstrates the broader situation at ECA.

The Tribunal finds, therefore, that the Applicant has failed to satisfy the requirements of article 12. He has not demonstrated discovery of new facts, let alone facts which can be characterized as of a decisive nature which would have impacted the conclusions arrived at by the Tribunal in July 2005.

IV. The observations which this Tribunal made in Judgement No. 1350 (2007), in addressing a very similar effort for revision, are most pertinent to this Application and merit quotation *in extenso*:

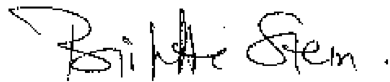
> "... Insofar as his Application is an effort to reargue his case, the Applicant is on thin ice because there is no such right of recourse available to him: it is well-established that '[n]o party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation'. (Judgement No. 894, *Mansour* (1998).) In [*Berg* (*ibid*.)], 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 …'.
>
> ... Nonetheless, it should be apparent … 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 [original] decision of the Tribunal … 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 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 [his] Judgement ... 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 … almost one year *prior* to the Tribunal's original decision ... 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 [relevant information] as the documentation now provided by the Applicant was printed from the internet, where it was apparently publicly available.
>
> ... 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'.

V. In the present case, the Tribunal is satisfied that the same reasoning applies and, therefore, rejects the Application in its entirety.

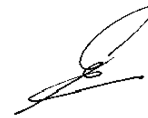
(*Signatures*)

Jacqueline R. **Scott**
First Vice-President

Dayendra Sena **Wijewardane**
Second Vice-President



Brigitte **Stern**
Member



New York, 2 May 2008

Maritza **Struyvenberg**
Executive Secretary