

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 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.

submissions on liability in light of findings contained in
the present judgment after which the Tribunal will proceed to
determine the matter on the pap

veracity:

- (a) On 21 April 2017, Job Opening No. 17-SEC-DSS-77938-R-NEW YORK (R) was advertised for Senior Security Officer, S3,

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.

9. 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 bidden 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 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 Rules of Procedure seems to correspond to the inherent power to reconsider judgments rejected in *Beaudry*. In that case, position was that essentially even if their request for revision were procedurally barred,

j 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 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 each party to adduce the facts that . That case was also appealed to the Appeals Tribunal where the Secretary-General did not seek to introduce the fact of the A 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 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 . 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 1 475.42[(Tf1 0 g0 G[()] TJ0- Tm86(

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.

considered I 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;

1. 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 have plainly been damaged by a two-year delay to his potential promotion. This delay resulted directly from icant from being involved in a competitive recruitment exercise. Instead, twelve candidates were

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

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.

competence to vary Judgment No. UNDT/2017/068 arguing, *inter alia*, that the 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. 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 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