UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2018-UNAT-890

Mbaigolmem

(Applicant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT ON APPLICATION FOR REVISION

Before:	Judge John Murphy, Presiding Judge Sabine Knierim Judge Richard Lussick
Case No.:	2018-1183
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Mr. Mbaigolmem:	Edward P. Flaherty
Counsel for Secretary-General:	John Stompor

JUDGE JOHN MURPHY, PRESIDING.

1. On 22 March 2018, the United Nations Appeals Tribunal (Appeals Tribunal) rendered Judgment No. 2018-UNAT-819 in the case of *Mbaigolmem v. Secretary-General of the United Nations*. On 22 June 2018, Mr. Jacob Mbailgolmem filed a request for revision of judgment in terms of Article 11(1) of the Statute of the Appeals Tribunal and on 27 July 2018, the Secretary-General filed his comments.

Facts and Procedure

2. The following facts are taken from the Appeals Tribunal Judgment:[1]

> ... Mr. Mbaigolmem joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in November 2011 as its Assistant Regional Representative (Supply) in Kinshasa, Democratic Republic of the Congo (the DRC) at the P-5 level.
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> ... From 17 to 27 June 2014, Mr. Mbaigolmem attended a UNHCR Workshop for Emergency Management (WEM) in Starum, Norway. All participants stayed in accommodations on-site and were divided into teams for various exercises. Mr. Mbaigolmem was named as the head of his team, which included a female staff member (the complainant) serving as Supply Associate (G-6) in Budapest, Hungary.
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> ... On the evening of 20 June 2014, after dinner and an all-team meeting, the complainant worked with Mr. Mbaigolmem in his hotel room on part of their team's assignment.
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> ... A few days before the end of the workshop, a staff counsellor informed Mr. Mbaigolmem orally that certain workshop colleagues had complained about inappropriate behaviour on his part. Subsequently, on 17 July 2014, the complainant lodged a complaint for sexual harassment against Mr. Mbaigolmem with the Inspector General's Office (IGO), UNHCR.
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> ... In her complaint, the complainant alleged that, on the evening in question, during their work session, Mr. Mbaigolmem enquired if she would be interested in P-2/P-3 positions in the DRC and later, as she gathered her things to leave, Mr. Mbaigolmem proposed that they take a hotel room together and spend the weekend after the workshop in Oslo. The complainant further alleged that, as she approached the door to leave, Mr. Mbaigolmem hugged her and tried to kiss her. She turned her head to avoid the unwelcome advance and tried to back away. She told Mr. Mbaigolmem that she did not want that. He kept his arms around her and tried to kiss her again, after which he moved his arms downward, putting his hands on her buttocks. She repeatedly told him that his actions made her uncomfortable. She finally left the room.

[1] Impugned Judgment, paras. 2-15.

... IGO launched an investigation into the allegations. Seven witnesses were interviewed between August and October 2014 as part of the investigation, including the complainant and Mr. Mbaigolmem, as well as two trainers and three participants in the WEM, to whom the complainant had confided about the alleged incident on the following day or a few days later. Two of them (both female participants in the WEM) stated, after the complainant recounted the incident to them, that Mr. Mbaigolmem had also acted in an inappropriate manner with them during the training. One of them claimed that Mr. Mbaigolmem had touched her neck during a coffee break. The other said that she had encountered Mr. Mbaigolmem in the hotel corridor one evening during the WEM and he had proposed to her that they spend the night together. Neither of these participants brought a complaint against Mr. Mbaigolmem regarding these allegations.

... On 5 December 2014, the IGO gave Mr. Mbaigolmem its draft investigation findings, invited him to comment on them and informed him that disciplinary procedures based on the investigation report could be initiated. Mr. Mbaigolmem provided his comments on 14 December 2014.

... The IGO rendered its investigation report on 18 December 2014. It concluded on a preponderance of evidence standard that Mr. Mbaigolmem engaged in misconduct by sexually harassing the complainant at the end of the working session in his hotel room.

... By letter dated 5 February 2015, the Director of the Division of Human Resources Management (DHRM), informed Mr. Mbaigolmem that disciplinary charges for sexual harassment were being brought against him. She sent the investigation report to Mr. Mbaigolmem and gave him an opportunity to answer to the allegations and produce countervailing evidence. Mr. Mbaigolmem submitted his comments on 28 February 2015, denying all of the allegations. He included in his submissions a brief written statement by one of the participants in the WEM indicating that on the evening he supposedly propositioned another female participant to spend the night with him, he had in fact spent the evening having drinks with a number of other colleagues in another hotel room.

... On 26 June 2015, the Director, DHRM, transmitted to the High Commissioner for Refugees, who has the authority to make decisions regarding the imposition of disciplinary sanctions on UNHCR staff, a memorandum titled "Recommendation for a disciplinary measure". The memorandum contained a legal analysis of the case and advised that Mr. Mbaigolmem be issued a disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The High Commissioner approved this recommendation on 3 July 2015 and Mr. Mbaigolmem was informed accordingly on 9 July 2015. The decision was based on the finding that Mr. Mbaigolmem had engaged in sexual harassment, specifically, by making unwelcome sexual advances towards a colleague. Mr. Mbaigolmem filed his application with the UNDT challenging his separation from service on 6 October 2015.

... 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 had indeed occurred, they would have amounted to sexual harassment as defined in Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). It identified the key question for determination to be whether the facts at issue were established to the required standard. However, despite the complainant being present at the hearing, it declined to permit her examination on the substance of the allegations and made no effort to obtain additional evidence from the women to whom the complainant had reported the incident or who had complained of similar misconduct by Mr. Mbaigolmem. Instead, it reviewed the conduct of the investigation by the IGO and found that there were flaws in the investigation in that the investigator "made a series of choices that seriously weakened the completeness and reliability of his conclusions",[2] and that during the procedure following the investigation the Administration's "assessment was tainted by an improper and excessive reliance on statements regarding different alleged incidents with other participants to the WEM".[3]

... The UNDT concluded that the facts at issue were not established to the required standard of clear and convincing evidence. In this regard, it noted that the evidence before it was restricted to the written statement of the complainant (which it accepted as more credible than Mr. Mbaigolmem's statement), the statements of the witnesses to whom the complainant reported the incident and the similar fact evidence of the other women allegedly harassed by Mr. Mbaigolmem, which were mere hearsay in relation to the incident involving the complainant. Whilst such evidence, in its opinion, established that the incident had probably occurred (on a preponderance of evidence), the nature and scope of the evidence meant it had not established the facts of the misconduct as highly probable on the basis of clear and convincing evidence.

... The UNDT was especially critical of the fact that the investigator had only interviewed witnesses unfavourable to Mr. Mbaigolmem and not interviewed other participants at the WEM, including those who occupied the rooms adjacent to Mr. Mbaigolmem and the alibi witness who averred that Mr. Mbaigolmem was in his room when he supposedly propositioned the other female participant. The UNDT offered no explanation in its Judgment for why these persons were not called by Mr. Mbaigolmem as witnesses at the UNDT hearing; and, accordingly, did not discuss whether any adverse inference might be drawn from that failure.

... By way of remedy, the UNDT ordered rescission of the disciplinary measure and remanded the decision to the Administration for it to resume the disciplinary procedure, with complementary investigative action if deemed necessary for the High Commissioner to make a new decision in light of its findings and any additional relevant evidence. As an

[2] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/051, para. 43.
[3] *Ibid*., para. 53.

> 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

Mr. Mbaigolmem's Application

5. Mr. Mbaigolmem submits that the Judgment of the Appeals Tribunal as such constitutes a new decisive fact within the meaning of Article 11(1) of the Appeals Tribunal Statute, arguing that the Appeals Tribunal "suddenly reversed its long-standing jurisprudence" on the scope of judicial review by the UNDT in disciplinary cases. He claims that he became aware of this "radical change" only when the Appeals Tribunal Judgment was notified to him and it was unbeknown to him at the relevant time: When the Dispute Tribunal decided not to proceed with a complete rehearing of the case and when the Judgment was appealed he did not know and could not have anticipated this change.

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] *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500.
[7] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-393, para. 16.
[8] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

based have been established, whether the established facts qualify as misconduct under the Staff Regulations and Rules, and whether the sanction is proportionate to the offence.[9]

16. The UNDT, in exercising judicial review in a disciplinary case, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the proscribed misconduct has not been factually established and the disciplinary measure is not proportionate to the misconduct as proven by appropriate evidentiary methods. However, due deference must be shown to the Secretary-General's decision on sanction because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard. The situation is different in a review in terms of Article 2(1)(*a*) of the UNDT Statute. This Tribunal has confirmed in several judgments that the appeal contemplated in Article 2(1)(*a*) of the UNDT Statute is a judicial review and will not involve a *de novo* consideration. The *obiter dicta* do not seek to alter that long-standing jurisprudence. Rather, with reference to different methods of fact-finding, they confirm the long-established jurisprudence by elaborating on the practical requirements of giving effect to the principles of review applicable in disciplinary cases under Article 2(1)(*b*) of the UNDT Statute.

17. In so far as Mr. Mbaigolmem complains that he has been denied an opportunity to pursue his case in accordance with the methodology suggested in the *obiter dicta*, such does not bring his application within the parameters of Article 11(1) of the Statute of the Appeals Tribunal. The fact that the methodology was not used is not a decisive fact "unknown" to the Appeals Tribunal. In any event, as appears from the ultimate conclusion in the case, the Appeals Tribunal was satisfied that the fact-finding method of the UNDT in the particular circumstances adequately established the fact that Mr. Mbaigolmem had perpetrated sexual harassment. The undisputed facts, the evidence of the victim's first report, coherent hearsay evidence pointing to a pattern of behaviour, the internal consistency of the witness statements, the unsatisfactory statement of Mr. Mbaigolmem and the inherent

[9] *Ibrahim v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-776, para. 48; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018, para. 27; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024, para. 31; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 43; *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098, para. 30; and *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 17 and 19-21.

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

Dated this 26th day of October 2018 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Knierim	Judge Lussick

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar