UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-1059

Sonia Bezziccheri

(Applicant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT ON APPLICATION FOR REVISION

Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2020-1360
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Applicant:	François Loriot
Counsel for Respondent:	Maryam Kamali

JUDGE GRAEME COLGAN, PRESIDING.

1. On 25 October 2019 the United Nations Appeals Tribunal (Appeals Tribunal) rendered Judgment No. 2019-UNAT-948 in the case of *Bezziccheri v. Secretary-General of the United Nations* dismissing the appeal of Sonia Bezziccheri and affirming the decision of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Judgment No. UNDT/2019/012. The UNDT had declined to recommend her for consideration for a disability benefit by the United Nations Staff Pension Committee (UNSPC) saying this was outside its legal competence. Ms. Bezziccheri has now filed an application requesting this Tribunal to revise its Judgment. For reasons set out below, we dismiss the application for revision.

Facts and Procedure

2. We will only summarise the extensive and detailed background information set out in our October 2019 Judgment. Ms. Bezziccheri entered the service of the United Nations Office on Drugs and Crime (UNODC) in 2002 but between 2008 and 2013 became unwell and took multiple and long periods of leave in an attempt to have treatment, to recover and to return to work. Eventually, her position was abolished and she was separated from service on 31 December 2013 when her fixed-term appointment expired. Shortly before her separation, she applied for the Organization's support for a disability pension. A year later, on 29 December 2014, this application was declined.

3. Ms. Bezziccheri applied to the UNDT contesting the decision not to recommend her for consideration by the UNSPC for a disability pension. By judgment issued on 29 January 2019, the UNDT found in Ms. Bezziccheri's favour, concluding that the Administration's decision to obtain an independent medical examination of the applicant was deficient, that the process followed by the Administration to determine her sick leave status was flawed, and that this and the decision about submitting her case for a disability pension had to be reconsidered. To mark its disapproval of the Administration's role in the delays that had dogged her case, and to mark what it described as the deficient regulatory regime and long and abusive proceedings, the UNDT ordered the Secretary-General to pay Ms. Bezziccheri costs of USD 5,000.

4. The Appellant's appeal to this Tribunal in 2019 challenged the UNDT's rejection of her claim that the Administration's refusal of her claim to a disability pension failed because she had not exhausted her sick leave entitlements. The Appeals Tribunal rejected that assertion of error on the part of the UNDT but highlighted the still disputed and unresolved question of the composition of the Medical Board that was required to decide her disability pension claim. The Appeals Tribunal invited the Secretary-General to apply what was the then recently adopted administrative instruction that purported to resolve the lacuna created by that disagreement about the Medical Board's composition. This instruction was in the form of a document issued in early 2019 known as Administrative Instruction ST/AI/2019/1 (Resolution of disputes relating to medical determinations), the content (and in particular Section 4.3) of which is central to the case presently before us.

5. By application filed on 17 January 2020 Ms. Bezziccheri now seeks revision of this Judgment. The Respondent filed his comments on the application on 12 March 2020.

Submissions

Ms. Bezziccheri's application

6. Ms. Bezziccheri addresses first a document she says was unknown to her and to this Tribunal at the time the Appeals Tribunal 2019 Judgment was issued (25 October 2019). This was ST/AI/2019/1 issued by the United Nations on 15 February 2019 and was "retroactively introduced covertly in[to] the … [a]ppeal" proceedings without her knowledge or an opportunity to address it. She says that this Tribunal was unaware of Section 4.3 of this document which contradicted Staff Rule 6.2(k) requiring the agreement of both parties to the appointment of the Chair of a Medical Board. She says that an identical Administrative Instruction had been discussed between the parties in a pre-trial conference with the UNDT, but that the UNDT Judge had rejected its application because it clashed with the Staff Rule.

7. The Applicant says that she first became aware of the relevance of ST/AI/2019/1 when she received the Appeals Tribunal's Judgment on 21 December 2019.

8. The Applicant says that the Appeals Tribunal did not address the conflict between this new (and to her unknown) Administrative Instruction and the requirement in Staff Rule 6.2(k) for agreement on the issue of selection of the Chair of a Board. She says that this was not due to her negligence. Indeed, she says it had been introduced "secretly" into the Appeals Tribunal

documents' record by the Respondent but was not referred to in the Respondent's written answer to her appeal which she received.

9. Ms. Bezziccheri submits that in the 12 months of its apparent existence, ST/AI/2019/1 was not ever brought to her notice as someone potentially affected by it in relation to her disability case. She says that had it not been kept secret in this way, it could have assisted settlement discussions between the parties. Nor, she says, was the document ever the subject of consultation with relevant United Nations Staff Unions although this was mandated under Staff Regulation 8.1.

10. The Applicant says that this issue is decisive of her case because by implementing Staff Rule 6.2(k), the General Assembly intended to require "parity" between staff and the Administration on this issue, whereas ST/AI/2019/1 now purports to vest control of this important step in the constitution of a Medical Board in the Administration, in the person of the Medical Director. This will, the Applicant submits, enable the Administration to what might be called "personality shop", that is to select a Medical Board Chair who is likely to act favourably towards the Administration and not independently.

11. The Applicant submits that ST/AI/2019/1 is contrary to the letter and spirit of the General Assembly's 2007 Resolution on the Administration of justice at the United Nations establishing a "transparent, impartial, independent and effective system of administration of justice".[1] This Resolution also aims to "eliminate any conflicts of interest in the system of administration of justice". The Applicant says that allowing the Administrative Instruction to trump the Staff Rule will "institutionalize and bolster bias" by allowing the Medical Director to control who will review his or her critical medical decisions.

12. The Applicant says that the issue is very significant as it will affect numerous staff members who may require recourse to Medical Boards in the course of their service with the Organization.

13. The balance of the Applicant's submissions in support of her application address the alleged demerits of the Appeals Tribunal Judgment which this case cannot and does not concern and we will therefore not reiterate them. The remedies sought by the Applicant include a proposal by this Tribunal of a "fair, unbiased and genuine alternative dispute

[1] A/RES/61/261.

resolution mechanism for the appointment of Medical Board chairpersons"; the deletion of any references (we assume in the judgments) to Section 4.3 of ST/AI/2019/1; and to hold a public hearing with the Organization's Staff Unions to address and consult on the United Nations current Medical Board system; to remand the case to the UNDT to assess damages for the absence of a "fair, expeditious and valid internal justice mechanism"; and to award costs against the Secretary-General for "breach of due process, by allowing the covert adduction of an illegal document in the Court".

The Respondent's comments

14. Again, so far as these address the application now before us and not the merits of the Appeals Tribunal Judgment, they are simply as follows.

15. The Respondent emphasises the requirements of Article 11(1) of the Statute of the Appeals Tribunal which we set out below and submits that these have not been met by the Applicant.

Considerations

16. We do not propose to reiterate the conclusions of, and reasoning in, the Judgment sought to be revised. It is recent, comprehensive and self-explanatory. This Judgment must, therefore, be read in conjunction with its earlier counterpart.

This Tribunal's power to revise a Judgment lies in Article 11(1) of the Statute, and Article 24 of the Rules (the latter of which cannot be inconsistent with the former).

17. These provisions are, respectively:[2]

> Article 11
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> 1. Subject to article 2 of the present statute, either party may apply to the Appeals Tribunal for a revision of a judgement on the basis of *the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Appeals Tribunal and to the party applying for revision*, always provided that such ignorance *was not due to negligence*. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

[2] Emphases added.

> Article 24
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> Either party may apply to the Appeals Tribunal, on a prescribed form, for a revision of a judgement on the basis of *the discovery of a decisive fact that was, at the time the judgement was rendered, unknown to the Appeals Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence.* The application for revision will be sent to the other party, who has 30 days to submit comments to the Registrar on a prescribed form. The application for revision must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

18. Although it is natural for a dissatisfied litigant to wish to challenge, appeal or to have reviewed, an adverse decision, that is not possible unless the narrow and particular grounds set out above are made out for revision of a judgment. In this regard, we acknowledge and follow the jurisprudence of such former Judgments of this Tribunal as *Sanwidi*[3] and *Awe*[4].

19. As may be seen from the provisions set out above, there are three elements that an applicant for revision must establish cumulatively before a final judgment of the Appeals Tribunal can be revised. Failure to establish any one of these will be fatal to the application. First, the previously-absent fact must be decisive of the case. Second, that fact must have been unknown to both the Appeals Tribunal and to the Applicant at the time the Appeals Tribunal judgment was rendered. And third, such ignorance of the fact cannot have been attributable to negligence, presumably of the applicant. These are simple but strict tests.

20. As did the original Judges in the 2019 Appeals Tribunal case, we agree that ST/AI/2019/1 is inapplicable in law to this case. It came into effect after the litigation had commenced so the previous regime, inadequate as it was, continued to apply to Ms. Bezziccheri's case. We infer that the Judges of the Appeals Tribunal who decided the 2019 appeal recognised, as a matter of practicality, what they considered was by then a "tie-breaker" methodology to appoint the third, final and Chair member of a Medical Board. This was to assess the Applicant's claim to a disability pension and might allow for a resolution between the parties. This was still achievable in Ms. Bezziccheri's case. It was made by the Appeals Tribunal as a "recommendation" to the Administration in paragraph 51 of the Appeals Tribunal 2019 Judgment and it referred expressly to Section 4.3 of ST/AI/2019/1. This recommendation was not, however, referred to in the formal order (termed the "Judgment") of the Tribunal at its

[3] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-321, para. 8.
[4] *Awe v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-735, paras. 16-22.

paragraph 53. That simply recorded that the appeal was dismissed and the UNDT's Judgment was affirmed. The *obiter dicta* (non-binding commentary) of that paragraph is nevertheless central to this application. It indicates that ST/AI/2019/1 was known to the Appeals Tribunal when it issued its Judgment. That alone would fail the Article 11(1) cumulative test referred to above.

21. Even more fundamentally however, the content of ST/AI/2019/1 is not decisive of Ms. Bezziccheri's case. That first necessary element of allowing for the revision of the Appeals Tribunal Judgment is not present, also meaning that the application must be dismissed. The reference to ST/AI/2019/1 in the Appeals Tribunal Judgment was not to determine her appeal: rather, it was to identify for the parties (in a helpful but non-directory and non-binding manner) one new way in which they might consider progress could be made on the substantive merits of the Applicant's claims, that is whether the Organization would support her application for a disability pension and assist with the still-unresolved nature of her leave . It matters not whether Ms. Bezziccheri was aware of the provision at that time or whether the Respondent should have made her aware of it. That is because it was not determinative of her case. It was referred to by the Appeals Tribunal in its Judgement.

22. Despite what might appear to be the arguable futility of offering suggestions to try to help the parties, we will do so in the unusual circumstances of this case. We preface that advice by noting that the issues of Ms. Bezziccheri's disability date from 2008 and this litigation from 2015. Ms. Bezziccheri has long since left the Organization's service. It is time this litigation concluded. That is for the sake of all, but particularly for the Applicant whose entitlement to a disability pension should now be agreed or decided, including in conjunction with the Pension Fund which apparently still awaits receipt of medical information to make its decision.

23. This case now needs procedural progress and then substantive finality. There are several courses open to the parties to make this progress that is so long overdue. First, they can agree on the identity of a new Independent Medical Examiner who, following the UNDT's Judgment which is accepted in this regard and properly directed as to his or her role, can produce a report which can go to the Pension Fund. Alternatively, they can agree (informally) to use the ST/AI/2019/1 procedure. This provides, contrary to the Applicant's impression, that the choice of Chair of a Medical Board shall be made by an "appropriate external medical authority". As we understand this provision, the externality of this authority will ensure its independence of the United Nations, the Applicant and their nominated medical practitioners

who will constitute the other two members of the Board. Such external medical authorities may include national or international organizations of medical practitioners specialising in the area(s) of medical assessment appropriate to this case.[5] We respectfully suggest that it should not be beyond the capability of the parties, objectively advised and in a spirit of mutual trust and, if necessary compromise, to select a bespoke arrangement to now resolve matters of process for determining paid leave and disability to close the final chapter on Ms. Bezziccheri's service with the United Nations.

24. Because Ms. Bezziccheri's submissions seem to be presented on an incorrect assumption about the effect of ST/AI/2019/1, we will comment briefly on this misapprehension. Section 4.3 of ST/AI/2019/1 does not aggregate the power to select the Chair of a medical board to the United Nations' Administration. Rather it requires, in circumstances of inability of the other two Board members to agree on who shall be Chair, that the Medical Director must refer this decision to an appropriate external medical authority. It will be the decision of that body alone as to who is to chair the Medical Board. This process is a common tie-breaker in such analogous circumstances as international (and other) commercial arbitrations in which there is disagreement about who should be the arbitrator or chair the panel of arbitrators. Law Societies or Bar Councils are often the appropriate external authorities consulted in arbitration cases and we interpret Section 4.3 similarly in relation to Medical Boards. It is rarely resorted to but there must be some procedural finality and this methodology works in practice. We invite the parties to place their trust and confidence in it if they cannot otherwise resolve this issue themselves. But this cannot be by revision of this Tribunal's 2019 Judgment.

[5] In many jurisdictions these are known as "Colleges" of particular specialist doctors or physicians or surgeons who are independent entities whose tasks include the training, qualification, and discipline of members as well as providing expert advice and the advancement of medical research and other concerns.

Judgment

25. For the foregoing reasons, we dismiss the application for revision of Judgment No. 2019-UNAT-948.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)	*(Signed)*	*(Signed)*
Judge Colgan, Presiding Auckland, New Zealand	Judge Murphy Cape Town, South Africa	Judge Raikos Athens, Greece

Entered in the Register on this 16th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar