Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

EGGLESFIELD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

recover the

The letter was counter-signed by an official of the Office of Human Resources Management ("OHRM") "[o]n behalf of the Secretary-General" (see *Egglesfield* UNDT/2012/208).

10. On the same day, 10 June 2011, the Applicant informed the CCPO of his acceptance of the offer from UNAKRT. He also advised him that he would therefore not seek a renewal of his appointment with UNOCI, which was due to expire on 30 June 2011. The Applicant requested the CCPO to arrange his repatriation to Brisbane, Australia. He pointed out that, since his arrival in Abidjan in 2003,

> the workload has never relented. I knew I was selected for the position of CCO in 2003 because of my demonstrated experience in Mission start-ups and expansions in such places as UNLB [United Nations Logistics Base], UNAMET [United Nations Mission in East Timor], UNMIK [United Nations Interim Administration Mission in Kosovo], MONUC [United Nations Organization Mission in the Democratic Republic of the Congo], UNAMSIL [United Nations Mission in Sierra Leone] etc etc. I had no idea however that this mission would remain in start-up phase for 8 years! My recent ill health and the distance and isolation from my family for what has now been 19 years, coupled with several personal tragedies, has prompted me to make this decision.

11. On 15 June 2011, the Applicant emailed UNOCI Administration regarding his repatriation to Australia in view of the move to UNAKRT. He stated in his email, "I understand however that this may affect my entitlement to my home leave taken recently. I am not sure if this is the case". On 16 June 2011, he sent a further email regarding, *inter alia*, the possible recovery of his home leave lump sum, stating that "[s]hould at a later stage it be discovered that the [home leave travel] should not have been recovered the funds can then be returned to me". It is not suggested that the Applicant at any stage waived his rights to make this claim.

18. On 13 October 2011, eight days after he filed his request for management evaluation, the Applicant received a letter from the Chief of the Management Evaluation Unit ("MEU") stating that "the MEU will hold your [present] case [on recovery of lump sum] in abeyance pending the decision by OHRM concerning your retroactive reinstatement". The letter further stated that, "[a]s soon the decision by OHRM [on reinstatement] is taken, we request that you kindly advise us, within 14 days of your notification of that decision, as to whether you continue to seek a management evaluation in respect of the above-mentioned administrative decision".

19. The Applicant's request for reinstatement was denied on 4 November 2011, and the MEU thereafter proceeded with its evaluation of his request regarding

Receivability of the management evaluation request

29. The Respondent submits that, pursuant to staff rule 11.2(c), the Applicant had only 60 calendar days from the date of notification of the contested decision (which, the Respondent submits, was on or around 23 June 2011) to submit his request for management evaluation. Instead, it was submitted on 5 October 2011.

30. The Applicant submits that he was engaged in informal resolution efforts conducted under the auspices of the Office of the Ombudsman, which ended on 30 August 2011, and that the time for the filing of his request for management evaluation was extended by implication, or ought to have been extended. The Applicant further submits that the Secretary-General cannot participate in an informal process in good faith but thereafter, when such a process does not result in an agreement, argue that the Applicant should have also filed a request for management evaluation. The Applicant further submits that notwithstanding the fact that the Tribunal is not competent to waive or extend the time limit of staff rule 11.2(c) (*Costa* 2010-UNAT-036), the Tribunal is competent to review whether a decision not to waive or extend the time limit was lawful.

31. Staff rule 11.1(c) states (emphasis added):

conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

33. Staff rule 11.4(c) provides (emphasis added):

> Where *mediation* has been pursued by either party within the deadline for *filing an application* with the United Nations Dispute Tribunal specified in staff rule 11.4 (a) or (b) and the mediation is deemed to have failed in accordance with the rules of procedure of

11.1(c).) This difference in the language of the relevant provisions was likely introduced to allow for a greater flexibility at the management evaluation stage to provide for additional possibilities of informal resolution.

36. The Tribunal accepts the Applicant's unchallenged final submission, dated 3 December 2012, that the Office of the Ombudsman was engaged in discussions with the Administration regarding his case. The Tribunal finds that the Applicant requested the assistance of the Office of the Ombudsman upon receiving the impugned decision on 23 June 2011 and, through the Office of the Ombudsman, engaged in discussions with UNOCI until 30 August 2011, which the MEU acknowledged in its communication to the Applicant of 1 February 2012. The Respondent has not sought to rebut the Applicant's submission that no further conditions have been promulgated by the Secretary-General under staff rule 11.2 for the extension of time for requesting management evaluation pending informal resolution efforts through the Office of the Ombudsman. The Tribunal therefore finds that staff rule 11.2 applied and the time for the filing of management evaluation was extended or waived pending informal resolution efforts through the Office of the Ombudsman. Therefore, the time for the filing of the Applicant's request for management evaluation started to run on 30 August 2011. He filed it on 5 October 2011, well within 60 calendar days from the date the informal efforts had ceased.

37. The finding above is sufficient to establish that the request for management evaluation was filed on time. Furthermore, the Tribunal finds that the doctrines of waiver and estoppel are relevant in this case. Waiver of a right is an express or implied abandonment of that right. If not expressly waived, a right may be impliedly waived by acquiescence or conduct that is inconsistent with the enforcement of the right on the part of the party entitled. For estoppel, the essential requirements are a representation by the representor that is accepted by the representee, and which induces the latter to act in such manner, or to alter his position, to his prejudice. In a

case in which the World Bank Administrative Tribunal ("WBAT") was called upon to determine the appropriate date for lodging a complaint regarding an injury of a cumulative nature (see WBAT Decision No. 349, *J* (2006))—and in which the applicant was told at one point that she could make a claim for lost wages, only to be informed later that her claim was subject to a limitation period—the WBAT cited *Ace Van & Storage Co. v. Liberty Mut. Ins. Co.*, 336 F.2d 925 (D.C. Cir. 1964), which stated that the "basis for the doctrine of waiver or estoppel is reliance upon the conduct in not meeting the deadline. … Such conduct may, when coupled with conduct occurring before the deadline, be evidence of a waiver".

38. The doctrine of estoppel has been relied upon by both the Dispute Tribunal and the Appeals Tribunal. In *Simmons* 2012-UNAT-221, the Appeals Tribunal found that, not having argued receivability *ratione materiae* prior to the rendering of the Dispute Tribunal's judgment, the Respondent was estopped from raising such issue on appeal before the Appeals Tribunal (see also *Castelli* UNDT/2009/075, affirmed in *Castelli* 2010-UNAT-037; *Tolstopiatov* UNDT/2011/012). As the International Court of Justice observed in its Judgment of 12 October 1984 concerning *Delimitation of the Maritime Boundary of the Gulf of Maine Area* (*ICJ Reports 1984*, p. 305), "the concepts of acquiescence and estoppel, [albeit based on different legal reasoning and] irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity" (also see *Tolstopiatov*).

39. Had the Administration not wanted to engage in informal resolution efforts, it had a good faith duty to inform the Applicant of this promptly and unequivocally. Not having done so and instead having submitted to the informal system mechanism and having engaged in communications with the Office of the Ombudsman, the Respondent is estopped from arguing that the informal resolution efforts were non-existent or inconsequential. Further, in light of the representations made to the Applicant, and the very specific circumstances of this case, the Respondent either

waived his rights to raise non-compliance or extended the time limits. Alternatively, in light of the circumstances of this case, the refusal to waive or extend the time limits was irrational and manifestly unreasonable.

40. Therefore, the Tribunal finds that the request for management evaluation was filed on time.

Receivability of the application before the Tribunal

41. The Respondent submits that the application with the Tribunal was filed out of time and that there are no reasons to waive the time limits. The Applicant submits that the deadline for the filing of his application started to run on 6 December 2011, when the letter of the MEU was sent to him. He further submits that in January and February 2012 there were further discussions with the MEU in connection with his case.

42. Several factual circumstances need to be taken into account in deciding whether a waiver or extension of the deadline for filing with the Tribunal should be granted in this case. Firstly, the MEU sent the Applicant a letter on 13 October 2011 stating that his request for management evaluation was placed "in abeyance" for an open-ended period. Secondly, the MEU sent a response to the Applicant's request for management evaluation on 6 December 2011, after the deadline prescribed under staff rule 11.2. Thirdly, the record demonstrates that, in January and February 2012, the MEU continued to actively communicate with the Applicant, even encouraging him to take advantage of a "further opportunity" to make additional submissions to the MEU. The continued involvement of the MEU without demur undoubtedly misled the Applicant.

43. There is a distinction between being ignorant of the law and being misled by the conduct and communications of the Administration. At all relevant times, the Applicant continued to pursue his case vigorously and the only reason why his

application was delayed was the continued involvement of the MEU which had the effect of misleading the Applicant about its role in the process, about when its

> granted home leave once in every twelve months. Staff members shall be eligible for home leave provided that the following conditions are fulfilled:
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> (i) The staff member's service is expected by the Secretary-General to continue:
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> a. At least three months beyond the date of his or her return from any proposed home leave; and
>
> b. In the case of the first home leave, at least three months beyond the date on which the staff member will have completed twelve months of qualifying service;

51. The entitlement to home leave under staff rule 5.2(l) is premised on twelve months' service at a designated duty station. The only condition required under staff rule 5.2(l)(i) is that the staff member's service "is expected by the Secretary-General to continue … [a]t least three months beyond the date of his or her return". Thus, the determinative factor is the expectation on the part of the Secretary-General of at least three months of post home leave employment. There is nothing in staff rule 5.2(l) that suggests that if a staff member fails to complete three months of continuous service upon returning from approved home leave travel, the lump sum paid for such travel is to be returned or can be recovered. No such provision is included in the Staff Rules.

52. The criteria in staff rule 5.2(l) are conditions for *eligibility* for home leave. Once those criteria are satisfied, home leave shall be granted. There is nothing more to the Staff Rules. No criteria for recovery of home leave entitlement are present in the Staff Rules, and therefore, once granted on satisfaction of conditions for eligibility, this entitlement cannot be taken away. Had the Secretary-General wished to make the three months service on return from home leave an absolute requirement for receipt of the lump sum, the Staff Rules would have been drafted in such a way as to make this clear. However, the use of the word "expected" in staff rule 5.2(l)(i) demonstrates that the requirement arises at the time of the request for home leave

when it is expected that the staff member would continue his service for a further three months on return.

53. In this case, at the time of the home leave in April 2011, it was expected by the Secretary-General that the Applicant's contract would continue for at least three months beyond the date of the Applicant's contract. No evidence has been offered to suggest the contrary. The non-fulfillment of the Secretary-General's expectation does not translate into an adequate legal basis to recover the lump sum paid.

54. The Respondent submitted that, as the Applicant had been applying for jobs with other offices of the Organization, he cannot argue that there was an expectation that he would continue his employment with UNOCI for at least three months after returning from his home leave. This argument is without merit. The Applicant applied for the post in UNAKRT in August 2010, was interviewed in October 2010, and was unaware of the outcome of the process until June 2011. There is no suggestion that he acted in bad faith, and in any event, his entitlement to home leave ensued on completion of twelve months service at the designated duty station. Furthermore, he remained within the United Nations system.

55. It is perfectly reasonable and normal for a staff member, particularly if engaged on a fixed-term contract, to apply for other positions whilst employed by the Organization, which the Applicant apparently had been doing in the course of the preceding three years. In this case, the Applicant's applications for other positions did not diminish the expectation at the relevant time that his contract with UNOCI was going to continue for at least three more months. He had a fixed-term contract, was apparently a valuable employee of 19 years, and the Respondent did not seek to contest his submission that his contract would have been renewed with UNOCI beyond 30 June 2011.

granted on compelling and justifiable reasons. There is no evidence this discretion was even exercised.

59. The Tribunal notes also that the Respondent acknowledges in para. 5 of the reply that, in 2011, unlike in 2010, the Applicant was not even notified, when he submitted his request for official travel, of the alleged recovery requirement in the event he serves for less than three months upon return from home leave. Of course, even if such a notification was made, it would be contrary to the clear language of staff rule 5.2(l). It is in any event clear from the documentation signed by the Applicant that he was expressly bound by the regulations, rules and properly promulgated administrative issuances and not bound by conflicting provisions in documents of inferior legal authority.

60. It should be noted, although this point was not pursued by the Respondent, that the provisions of ST/AI/2009/1 (Recovery of overpayments made to staff members) obviously would not apply to the present case as the lump sum paid to the Applicant was not an overpayment but a correctly paid entitlement. The Applicant met the eligibility criteria under staff rule 5.2 for his home leave at the time, and therefore it was due to him.

Conclusion

61. The Tribunal finds that, the Applicant having been found in *Egglesfield* UNDT/2012/208 to be in continuous service, his employment remained continuous beyond three months after his return from home leave, and, therefore, no recovery of the lump sum for home leave should have taken place and any recovered amounts should be returned to him.

62. The effect of *Egglesfield* UNDT/2012/208 aside, the Tribunal finds the present case receivable. The Tribunal further finds that the decision to recover the lump sum was based on an incorrect interpretation of the plain language of staff

rule 5.2 and on improperly imposed conditions not stipulated under staff rule 5.2(l)(i). The Respondent has failed to demonstrate a proper legal basis for the recovery of the lump sum paid to the Applicant. Therefore, the contested decision is unlawful and stands to be rescinded.

Order

63. The contested decision is rescinded. Any recovered lump sum for home leave shall be returned to the Applicant with proper adjustments made to his other entitlements and benefits.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 18th day of January 2013

Entered in the Register on this 18th day of January 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York