

UNDT/2013/006, Eggesfield

UNAT Held or UNDT Pronouncements

The recovery was made on the basis that the Applicant did not complete the expected period of three months of service in UNOCI upon return from his home leave. The Respondent submitted that the application was not receivable as the Applicant's request for management evaluation and application with the UNDT were not filed within the filing deadlines. The UNDT found that the Applicant having been found in Eggesfield UNDT/2012/208 to be in continuous service, his employment remained continuous beyond three months after his return from home leave and any recovered lump sum for home leave should be returned to him as part of implementation of that Judgment. The effect of Eggesfield UNDT/2012/208 aside, the UNDT found the application receivable. The UNDT found that the entitlement to home leave under staff rule 5.2(l) was premised on twelve months' service at a designated duty station and expectation by the Secretary-General that the staff member's appointment would continue for at least three months beyond the date of his or her return from home leave. The UNDT found that there was nothing in staff rule 5.2(l) to suggest that if a staff member failed to complete three months of continuous service upon returning from approved home leave travel, the lump sum paid for such travel would be returned or could be recovered. The UNDT found that the provision in the human resources handbook imposing recovery had no legal effect as it conflicted with staff rule 5.2(l). The UNDT rescinded the decision to recover the lump sum for home leave and ordered that any recovered amount be returned to the Applicant with proper adjustments to his other entitlements and benefits.

Decision Contested or Judgment/Order Appealed

The Applicant contested the decision made by the United Nations Mission in Côte d'Ivoire ("UNOCI") to recover the lump sum paid to him for home leave.

Legal Principle(s)

Difference between informal resolution at the management evaluation stage and at the stage of filing of an application with the UNDT: The Staff Rules provide that, for the time limits to be extended at the stage of management evaluation, it is sufficient to have had "efforts for informal resolution conducted by the Office of the Ombudsman" (emphasis added) (see staff rules 11.2(c) and 11.2(d)). In contrast, with respect to the extension of the time limits for the filing of an application with the Tribunal, the Statute of the Tribunal and the Staff Rules refer to mediation through the Mediation Division of the Office of the Ombudsman (see art. 8.1(d)(iv) of the Statute and staff rule 11.4(c)). (Of course, it should be noted that under art. 8.3 of its Statute, the Tribunal may extend, waive or suspend the deadlines for the filing of an application before it in exceptional cases even if no mediation took place, see paras. 41–46 below.) Accordingly, a less rigid criterion of "efforts for informal resolution conducted by the Office of the Ombudsman" is sufficient for extension of the time limits at the management evaluation stage as there is no requirement at that stage to conduct formal mediation through the Mediation Division of the Office of the Ombudsman. (Note also the language of staff rule 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.

Waiver of rights, waiver of a right: 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.

Estoppel: 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. 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 (cf WBAT Decision No. 349, J (2006)). The doctrine of estoppel has been relied upon by both the Dispute Tribunal and the Appeals Tribunal. “[T]he 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” (International Court of Justice, Judgment Concerning Delimitation of the Maritime Boundary of the Gulf of Maine Area (ICJ Reports 1984)).

Duty to inform the other party of one’s unwillingness to engage in information resolution efforts: If the Administration does not want to engage in informal resolution efforts, it has a good faith duty to inform the staff member of this promptly and unequivocally.

Recovery of lump sum for home leave, recovery of home leave: 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. 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. 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.

Applying for other jobs while in employment with the Organization: It is reasonable and normal for staff members, particularly on fixed-term contracts, to apply for other positions whilst employed by the Organization.

Legal hierarchy, hierarchy of legal norms: Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance which it elaborates (Korotina UNDT/2012/178).

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Egglesfield

Entity

UNHCR

Case Number(s)

UNDT/NY/2012/23

Tribunal

UNDT

Registry

New York

Date of Judgement

6 Jun 2013

Duty Judge

Judge Greceanu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

TEST -Rename- Benefits and entitlements-45

Home leave

Applicable Law

Administrative Instructions

- ST/AI/2000/6

Staff Rules

- Rule 11.1
- Rule 11.4
- Rule 5.2

UNDT Statute

- Article 8.1

Related Judgments and Orders

UNDT/2009/075

UNDT/2011/012

UNDT/2012/208

UNDT/2012/178

2010-UNAT-036

2010-UNAT-037

2012-UNAT-221