

UNDT/2014/033, Leboeuf

UNAT Held or UNDT Pronouncements

This case was first decided by the Dispute Tribunal by Leboeuf et al. UNDT/2010/206, rendered on 30 November 2010. The case, however, was remanded by the United Nations Appeals Tribunal for “further proceedings”. The UNDT found that the Applicants' claims against the lawfulness of the change introduced in December 2004, with effect from January 2005, are time-barred and not receivable under arts. 8.3 and 8.4 of the Tribunal’s Statute. The UNDT found that it had no jurisdiction to consider them and the application was receivable only with respect to the subsequent application of the policy on overtime in the relevant period immediately preceding the request for administrative review, dated 16 January 2009. With regard to the receivable claims, the Tribunal found that the Administration’s interpretation and application of the relevant provisions of Appendix B was lawful. Further, the UNDT found that, even if the lawfulness of the change introduced effective 1 January 2005 was properly before the Tribunal, its findings were as follows: (i) Prior to 2005, at least some of the units in DGACM developed, for reasons unknown and unsubstantiated by evidence, a practice whereby time taken off as annual leave, sick leave, and compensatory time off would be counted as actual work time (“hours of work”) for the purposes of overtime payments. This was not in line with the practices of other departments in the Organization. It was also not in line with the language of Appendix B. This practice developed in the absence of any official issuances by the Administration introducing it and contrary to reminders from the Administration as to how Appendix B was to be implemented; (ii) Subsequently, in December 2004, after the issue was brought to the attention of the Administration, it announced a change in practice in the application of Appendix B in DGACM. Specifically, the decision was announced that time taken off as annual leave, sick leave, and compensatory time off would not be included in the actual work time (“hours of work”) required for overtime payment. This decision was announced on 15 December 2004 and implemented 1 January 2005, including through monthly pay slips. The Administration’s interpretation and application of Appendix B in this respect was in line with Appendix B. At present and

since 2005, with respect to the issue at hand, Appendix B is interpreted consistently in terms of the interpretation in this Judgment throughout the offices and departments of the Secretariat; (iii) Although in the particular circumstances of this case consultations regarding the change were warranted and could have and should been held prior to the decision going into effect on 1 January 2005, this was in part remedied in the period of January to March 2005, when the Administration held consultations with staff representatives. Even if the consultation process were organized earlier, it is highly doubtful, in the circumstances of this case, that the outcome with respect to the issue in question would have been any different. The Respondent had a valid policy and legal rationale for bringing the inconsistent application within DGACM in line with the terms of Appendix B and with the practices of other departments. (iv) In view of the circumstances of this case, the Applicants acquiesced to the corrected practice in DGACM, in line with the wording of the relevant provisions of Appendix B, by not formally appealing it for more than four years after its introduction. With respect to the legitimate expectation of a continuation of the pre-2005 practice, the Applicants, having waited for more than four years to formally challenge the changes introduced effective 1 January 2005 and applied consistently thereafter, can no longer rely on the claim of legitimate expectation. Furthermore, if indeed claim for a legitimate expectation was sustainable and was taken away, the Respondent had a valid overriding policy and legal reasons for doing so, namely to bring the application of the relevant rules in DGACM in compliance with Appendix B and the practices of other departments. The UNDT dismissed the application.

Decision Contested or Judgment/Order Appealed

The Applicants, General Service level staff members in the Text Processing Units (“TPU”) of the Department for General Assembly and Conference Management (“DGACM”), contest their Department’s interpretation and application of the Organization’s rules on compensation for overtime work. Specifically, the main issue raised by the Applicants in their request for administrative review and in their application before the Tribunal is whether time taken on annual leave, sick leave, or compensatory time off should be included when calculating the eight hours of work required for additional payment for overtime. This case was first decided by the Dispute Tribunal by Leboeuf et al. UNDT/2010/206, rendered on 30 November 2010. The case, however, was remanded by the United Nations Appeals Tribunal for

“further proceedings”. The UNDT found that the Applicants' claims against the lawfulness of the change introduced in December 2004, with effect from January 2005, are time-barred and not receivable under arts. 8.3 and 8.4 of the Tribunal's Statute. The UNDT found that it had no jurisdiction to consider them and the application was receivable only with respect to the subsequent application of the policy on overtime in the relevant period immediately preceding the request for administrative review, dated 16 January 2009. With regard to the receivable claims, the Tribunal found that the Administration's interpretation and application of the relevant provisions of Appendix B was lawful. Further, the UNDT found that, even if the lawfulness of the change introduced effective 1 January 2005 was properly before the Tribunal, its findings were as follows: (i) Prior to 2005, at least some of the units in DGACM developed, for reasons unknown and unsubstantiated by evidence, a practice whereby time taken off as annual leave, sick leave, and compensatory time off would be counted as actual work time (“hours of work”) for the purposes of overtime payments. This was not in line with the practices of other departments in the Organization. It was also not in line with the language of Appendix B. This practice developed in the absence of any official issuances by the Administration introducing it and contrary to reminders from the Administration as to how Appendix B was to be implemented; (ii) Subsequently, in December 2004, after the issue was brought to the attention of the Administration, it announced a change in practice in the application of Appendix B in DGACM. Specifically, the decision was announced that time taken off as annual leave, sick leave, and compensatory time off would not be included in the actual work time (“hours of work”) required for overtime payment. This decision was announced on 15 December 2004 and implemented 1 January 2005, including through monthly pay slips. The Administration's interpretation and application of Appendix B in this respect was in line with Appendix B. At present and since 2005, with respect to the issue at hand, Appendix B is interpreted consistently in terms of the interpretation in this Judgment throughout the offices and departments of the Secretariat; (iii) Although in the particular circumstances of this case consultations regarding the change were warranted and could have and should been held prior to the decision going into effect on 1 January 2005, this was in part remedied in the period of January to March 2005, when the Administration held consultations with staff representatives. Even if the consultation process were organized earlier, it is highly doubtful, in the circumstances of this case, that the outcome with respect to the issue in question would have been any different. The Respondent had a valid policy and legal rationale for bringing the inconsistent application within DGACM in line

with the terms of Appendix B and with the practices of other departments. (iv) In view of the circumstances of this case, the Applicants acquiesced to the corrected practice in DGACM, in line with the wording of the relevant provisions of Appendix B, by not formally appealing it for more than four years after its introduction. With respect to the legitimate expectation of a continuation of the pre-2005 practice, the Applicants, having waited for more than four years to formally challenge the changes introduced effective 1 January 2005 and applied consistently thereafter, can no longer rely on the claim of legitimate expectation. Furthermore, if indeed claim for a legitimate expectation was sustainable and was taken away, the Respondent had a valid overriding policy and legal reasons for doing so, namely to bring the application of the relevant rules in DGACM in compliance with Appendix B and the practices of other departments. The UNDT dismissed the application.

Legal Principle(s)

Variation, acquiescence: In terms of fairness and reasonableness, an employer may only vary the terms and conditions of employment if there is a valid reason for the change in the conditions of employment and the change must be brought about through a fair procedure. In other words, the variation must be based on a rationalization of an economic, technical or structural nature, and, procedurally, the employer must consult or negotiate depending on the nature of the change in the terms and conditions. However, there may be situations where the employee consents to the variation, including through a waiver of a right (i.e., an express or implied abandonment of a right). Waiver in simple terms means that one of the parties by his words, actions or inaction, has evinced an intention not to enforce one or more of the rights conferred by his contract. Consent to the variation need not be express, and silence coupled with tacit acquiescence in the change may stop the parties from later denying the legality of the variation. 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. A party to a contract may also be deemed to have waived his rights if it does not act within a reasonable time. Legitimate expectation: With regard to any claims of legitimate expectation, the Tribunal notes that such expectation can be created either through the application of a regular practice or through an express promise. Legitimate expectations may result in the creation of an enforceable legal right, although the application of the doctrine is subject to a number of qualifications. However, not only

must the expectation be “legitimate” or have some reasonable basis, the fulfillment of the expectation must lie within the powers of the person or body creating the expectation. Furthermore, a decision that has the effect of taking away such an expectation must be shown to have been unfair, not merely adverse to the interests of the individual, and considerations of public policy could override an individual’s legitimate expectations in appropriate circumstances. Overtime: The correct interpretation of secs. (iv) and (vi) of Appendix B is that, for a staff member to be eligible for payment for overtime he or she must have actually worked more than eight hours that day, not including time taken off as sick leave, annual leave, or compensatory time off.

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Leboeuf

Entity

DGACM

Case Number(s)

UNDT/NY/2009/103/R1

Tribunal

UNDT

Registry

New York

Date of Judgement

21 Mar 2014

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Benefits and entitlements

Applicable Law

Administrative Instructions

- ST/AI/1999/13
- ST/AI/2005/2
- ST/AI/2005/3

Secretary-General's bulletins

- ST/SGB/274

Staff Rules

- Rule 103.12
- Rule 103.15

UNDT Statute

- Article 8.3
- Article 8.4

Related Judgments and Orders

UNDT/2010/009

UNDT/2010/060

UNDT/2011/142

UNDT/2011/156
UNDT/2012/178
UNDT/2013/011
UNDT/2013/006
UNDT/2013/090
UNDT/2013/137
2010-UNAT-036
2010-UNAT-043
2010-UNAT-094
2011-UNAT-108
2011-UNAT-146
2011-UNAT-185
2012-UNAT-191
2012-UNAT-260
2012-UNAT-268
2012-UNAT-273
2013-UNAT-354
2013-UNAT-289
2013-UNAT-296
2013-UNAT-308
2013-UNAT-389
UNDT/2010/206
UNDT/2010/218
UNDT/2011/198
UNDT/2012/051
UNDT/2012/118
UNDT/2012/087