

UNDT/2023/024, Das

UNAT Held or UNDT Pronouncements

Whether the application is receivable

Having reviewed the application in its entirety, the Tribunal notes that the Applicant identified the decision of 1 October 2021 as the final administrative decision, and that in his request for management evaluation he explicitly listed the decision of 1 October 2021 as the decision to be evaluated.

Noting the difference in the fundamental element of the decisions of 12 August 2021 and 1 October 2021, i.e., the amount of the overpayment to be recovered, the Tribunal cannot but conclude that the decision of 1 October 2021 constitutes a new administrative decision.

Considering that the Applicant received the notification of the contested decision on 2 October 2021 and noting that the Applicant filed his request for a management evaluation of the contested decision on 5 November 2021, the Tribunal concludes that the application is receivable.

Whether the contested decision is lawful

It follows from the wording of staff rule 4.17 that the Applicant, who received a new appointment less than 12 months after his first separation from service in an organization that is part of the United Nations common system, must be considered, in respect of his entitlement to a commutation payment, as if he had been employed continuously.

The purpose of staff rules 4.17(c) and 9.9 is to avoid financial prejudice to the Organization by fictionalizing a continuous employment relationship when a staff member receives another appointment in the UN common system within 12 months of separation from service.

In application of staff rule 9.9, the Applicant's entitlement to a commutation payment is limited to 60 annual leave days for the entire period from his initial appointment with the Organization. The evidence on record shows that in November 2016, the Applicant was paid 60 accrued annual leave days upon his separation from UNDP.

Accordingly, upon his separation from UN Women in 2021, the Applicant was not entitled to any additional payment of accrued annual leave pursuant to staff rules 4.17(c) and 9.9.

Nevertheless, in the context of employment law, "[a] legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and that the other party does so" (see Sina UNDT/2010/060, para. 35, affirmed in Sina 2010-UNAT-094).

In the present case, in March 2021, the Applicant's then supervisor "asked him to consider not taking all his accrued leave days before separating due to operational needs" and mentioned that "fixed-term staff members generally had the option to be paid the accrued annual leave up to 60 days at the end of the employment". It is also relevant to note that the Applicant's supervisor has the authority to approve or deny annual leave requests pursuant to staff rule 5.1.

Considering the circumstances of the case, a legitimate expectation of receiving a commutation payment for 60 days of annual leave following his second separation from service from the Organization was created by virtue of the Applicant's supervisor's representation.

Moreover, the Applicant's supervisor was acting on behalf of the Administration. As such, her representation binds the Organization in line with the principle of good faith. In this respect, the Tribunal recalls that "the Administration has a general duty to act fairly, justly and transparently in its dealing with its staff members" (see Obedijn 2012- UNAT-201, para. 33).

Thus, the Applicant's legitimate expectation of receiving another commutation payment of annual leave 60 days exceptionally justify a payment that he might not have been entitled to under the Staff Regulations and Rules. Accordingly, the decision to recover the overpayment of 60 annual leave days upon the Applicant's second separation from the Organization is unlawful.

Decision Contested or Judgment/Order Appealed

By application filed on 1 March 2022, the Applicant contests the decision to recover the overpayment of 60 annual leave days upon his second separation from the Organization.

Legal Principle(s)

It is well-settled law that the Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see, e.g., Fasanella 2017-UNAT-765, para. 20; Cardwell 2018-UNAT-876, para. 23).

Moreover, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine" (see, e.g., Kerby 2020-UNAT-1064, para. 37).

It is well-established jurisprudence that legitimate expectations may result in the creation of an enforceable legal right (see, e.g., Popkins UNDT/2021/072, para. 40; Candusso UNDT/2013/090, para. 39; Sina UNDT/2010/060, para. 35). Specifically, in Nwuke UNDT/2013/157, the Tribunal made it clear that "[t]he doctrine of legitimate expectation applies to administrative decisions" and held, at para. 167, that:

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past Practice.

Accordingly, giving a staff member a legitimate expectation may be a good reason for the Tribunal to interfere with the Administration's failure to act accordingly on the grounds of unfairness and unjust dealing with the staff member (see, e.g., Ahmed 2011-UNAT-153, para. 46).

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Das

Entity

UN-WOMEN

Case Number(s)
UNDT/GVA/2022/010
Tribunal
UNDT
Registry
Geneva
Date of Judgement
21 Apr 2023
Duty Judge
Judge Bravo
Language of Judgment
English
Issuance Type
Judgment
Categories/Subcategories
Annual leave
TEST -Rename- Benefits and entitlements-45
Applicable Law
Staff Rules

- Rule 11.2 (c)
- Rule 4.17
- Rule 9.9
- Rule 5.1(e)(ii)

UNDT Statute

- Article 10.5(a)
- Article 10.5(b)

Related Judgments and Orders

2017-UNAT-765
2018-UNAT-876
2020-UNAT-1064
UNDT/2021/072
UNDT/2013/090
UNDT/2010/060
UNDT/2013/157
2011-UNAT-153
2010-UNAT-094
2012-UNAT-201