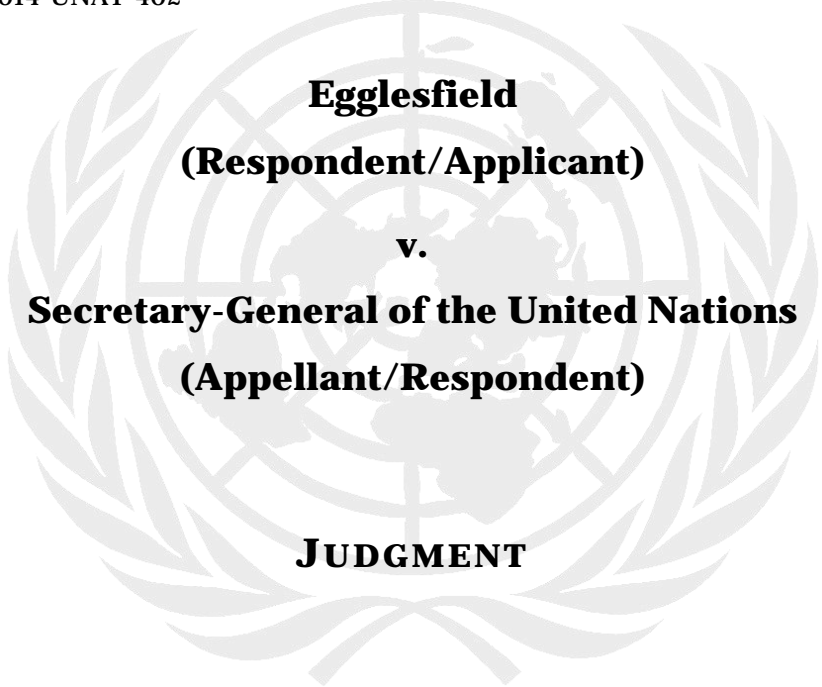




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-402



**Eggesfield
(Respondent/Applicant)**
v.
**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Inés Weinberg de Roca
Judge Luis María Simón

Case No.: 2013-452

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Robbie Leighton

Counsel for Appellant/Respondent: John Stompor

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2013/006, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 18 January 2013 in the case of *Eggesfield v. Secretary General of the United Nations*. On 19 March 2013, the Secretary-General filed an appeal and Mr. Martin Eggesfield filed his answer on 20 May 2013.

Facts and Procedure

2. The parties do not dispute the following facts:¹

... [Mr. Eggesfield] joined the United Nations in 1996 as a Communications Technician at the FS-4 level. He served in several peacekeeping missions before joining UNOCI [United Nations Mission in Côte d'Ivoire] in or around 2003. Since 1 January 2008, [he] served as a Chief Communications Officer at the FS-6 level on a fixed-term contract. ...

... On 12 April 2011, [Mr. Eggesfield] requested a lump sum payment for his 2011 home leave travel, which was from 22 April to 30 May 2011. He traveled to Brisbane, Australia, on or around 22 April 2011 and returned to Côte d'Ivoire on 2 June 2011.

... On 8 June 2011, [Mr. Eggesfield] received an offer of appointment from the United Nations Department of Economic and Social Affairs ("DESA") of the United Nations Secretariat for a position with the United Nations Assistance to the Khmer Rouge [Trials] ("UNAKRT"), in Phnom Pehn, Cambodia, at the FS-5 level. (DESA provides administrative and human resources support to UNAKRT.) [Mr. Eggesfield] applied for that post in August 2010 and was interviewed in October 2010, but was unaware of his selection until 8 June 2011.

... [Mr. Eggesfield] accepted the offer on 10 June 2011, indicating that he would be able to travel on 10 July 2011. His subsequent letter of appointment stated that it was for a fixed-term appointment of one year "in the Secretariat of the United Nations". The letter was counter-signed by an official of the Office of Human Resources Management ("OHRM") "[o]n behalf of the Secretary-General ...

... On the same day, 10 June 2011, [Mr. Eggesfield] informed the [Chief Civilian Personnel Officer (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

¹ Impugned Judgment, paras. 6-12, 14, 16, and 20.

UNOCI, which was due to expire on 30 June 2011. [Mr. Eggesfield] requested the CCPO to arrange his repatriation to Brisbane, Australia. ...

... On 15 June 2011, [Mr. Eggesfield] 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 23 June 2011, [Mr. Eggesfield] was informed that, upon his departure from UNOCI on 30 June 2011, the lump sum paid for his home leave would be recovered in full. ...

...

... On 30 June 2011, [Mr. Eggesfield] left UNOCI and was repatriated to Brisbane, Australia. He travelled from Brisbane to Cambodia on 10 July 2011. ...

...

... On 5 October 2011, [Mr. Eggesfield] filed a request for management evaluation of the contested decision to recover the lump sum paid for his home leave.

... On 13 October 2011, ... [Mr. Eggesfield] 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". ...

...

... On 6 December 2011, the MEU informed [Mr. Eggesfield] that his request for management evaluation of the contested decision was time-barred as he had failed to present it within 60 days of being informed of the decision on 23 June 2011, as required by staff rule 11.2(c). ...

3. On 21 March 2012, Mr. Eggesfield filed an application with the UNDT challenging the decision to recover the home leave payment, and on 25 April 2012, the Secretary-General filed his reply. On 18 January 2013, the Dispute Tribunal issued Judgment No. UNDT/2013/006, in which it found that Mr. Eggesfield had made a timely request for management evaluation, his application was receivable, and the administrative decision to recover the payment for home leave was unlawful and should be rescinded. In the event the payment for home leave had already been recovered from Mr. Eggesfield, the UNDT ordered that it should be returned to him "with proper adjustments made to his other entitlements and benefits".

Submissions

The Secretary General's Appeal

4. The Secretary-General requests that the Appeals Tribunal find that the application was not receivable *ratione materiae* and order that the Judgment should be annulled in its entirety.

5. The UNDT erred in concluding that Mr. Eggesfield submitted a timely request for management evaluation and his application was receivable. Mr. Eggesfield failed to request management evaluation within sixty calendar days from notification of the impugned decision, as required by Staff Rule 11.2(a). Since Mr. Eggesfield was notified of the decision on 23 June 2011, he had until 22 August 2011 to request management review; however, he did not do so until 5 October 2011. Thus, his request was untimely.

6. The UNDT erred in concluding that Mr. Eggesfield engaged in informal resolution efforts with UNOCI through the Office of the Ombudsman. Mr. Eggesfield has presented no evidence of any informal resolution efforts; he did not produce his emails. Merely sending an email inquiry to the Ombudsman's Office does not mean that "informal resolution efforts" have commenced and that the management evaluation deadline under Staff Rule 11.2(a) is extended; otherwise, the deadline would be meaningless.

7. The UNDT erred in concluding that the Secretary-General extended or waived the deadline for Mr. Eggesfield to file a request for management evaluation. Article 8(3) of the UNDT Statute precludes the UNDT from presuming a waiver took place.

8. The UNDT erred in concluding that the Administration waived its right to raise non-compliance with the management evaluation deadline. The UNDT has, in effect, determined that the Administration has the obligation to affirmatively inform a staff member that it does not intend to engage in informal resolution efforts and, *absent* such advice, the Administration has waived its rights to claim the request for management evaluation was untimely. This conclusion conflicts with Article 8(3) of the UNDT Statute, as well as Staff Rule 11.2(a).

Mr. Eggesfield's Answer

9. The UNDT did not err in concluding that Mr. Eggesfield submitted a timely request for management evaluation and that his application was receivable. As the UNDT correctly found, the time limits had been extended or waived by the Administration.

10. The UNDT did not err in concluding that Mr. Eggesfield engaged in informal resolution efforts with UNOCI through the Office of the Ombudsman. The Office of the Ombudsman is part of the Secretariat and, as such, it cannot rob a staff member of his or her opportunity for judicial review of an impugned decision by delaying to start informal resolution negotiations after being contacted by a staff member. Thus, Mr. Eggesfield reasonably assumed that the Ombudsman was engaged in settlement negotiations from the date he initially contacted the Office.

11. The UNDT did not err in concluding that the deadline for Mr. Eggesfield to file a request for management evaluation had been extended or waived. Waiver may be inferred from the circumstances of the case.

12. The UNDT did not err in concluding that the Administration waived its right to raise non-compliance with the deadline for Mr. Eggesfield to file a request for management evaluation. The Office of Ombudsman did not advise Mr. Eggesfield that settlement negotiations would not proceed until 25 August 2011 – after the initial deadline had passed for him to file a request for management evaluation.

13. To encourage the use of informal resolution procedures, the UNDT's Judgment should be affirmed.

Considerations

14. Mr. Eggesfield requests an oral hearing “if required to settle whether and in what manner [his] communications with the Ombudsman should be disclosed”. This Tribunal does not find that an oral hearing is necessary or would “assist in the expeditious and fair disposal of the case” within the meaning of Article 18(1) of the Appeals Tribunal Rules of Procedure; thus, Mr. Eggesfield's request is denied.

15. On appeal, the Secretary General contends that the UNDT erred in law when it concluded that Mr. Eggesfield's request for management evaluation was timely and his application was receivable *ratione materiae*. The Secretary-General is correct for the reasons discussed below.

16. Under Article 2(1) of the Dispute Tribunal Statute, the UNDT has jurisdiction to receive applications appealing administrative decisions only "when a staff member has previously submitted the impugned administrative decisions for management evaluation and the application is filed within the specified deadlines".²

17. Staff Rule 11.2 (c) provides:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

18. There is no dispute that Mr. Eggesfield learned of the impugned decision on 23 June 2011 and he did not request management evaluation until 5 October 2011 – more than sixty days later. Nevertheless, the Dispute Tribunal concluded that Mr. Eggesfield's request for management evaluation was timely, stating:³

... 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). ...

... The Tribunal finds that [Mr. Eggesfield] 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 ... 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 [Mr. Eggesfield'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.

² *Ajdini v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108, para. 23.

³ Impugned Judgment, paras. 35-37.

... 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. ...

19. The Dispute Tribunal's analysis is replete with both factual and legal errors and does not comport with the jurisprudence of this Tribunal. Initially, Staff Rule 11.2(c) provides that only the Secretary-General can extend the deadline for making a request for management evaluation, and there is no evidence that the Secretary-General did so. Nevertheless, as the Appeals Tribunal has noted, "it is arguably not unreasonable ... for the UNDT to infer that the Ombudsman's participation in settlement negotiations amounted to the Secretary-General's implicit extension of the management evaluation deadline for the period of the negotiations".⁴

20. The evidence shows that Mr. Eggesfield contacted the Office of the Ombudsman (Ombudsman) on 23 June 2011 – the day he learned of the impugned decision. However, the evidence does not show that efforts for informal resolution commenced on that day. In fact, there is no evidence that any informal negotiations took place prior to 23 August 2011 -- after the sixty-day period for seeking management review had expired. In his answer, Mr. Eggesfield candidly acknowledges that after his initial contact with the Ombudsman, and continuing for more than a month (through at least 29 July 2011), his email correspondence with the Ombudsman focused on ascertaining who would handle his case, answering questions asked of him and providing documentary information. Clearly, this initial 36-day period cannot be considered part of any informal resolution efforts with UNOCI and the limitations period cannot be tolled for this time.

21. On 23 August 2011, the Ombudsman advised Mr. Eggesfield, for the first time, that it was in contact with UNOCI and on 25 August 2011 -- a mere two days later – it notified him that it could not be of assistance in resolving his dispute. These facts support a reasonable inference that the Ombudsman's efforts to resolve the dispute with UNOCI took place only during the period of 23 August to 25 August 2011 -- beyond the management review deadline. Thus, the UNDT made an error of fact and law when it tolled the limitations period for seeking management evaluation for the period 23 June to 23 August 2011. Tolling the limitations period for the two or three days of the Ombudsman's assistance, which took place after the limitations period had expired, does not assist Mr. Eggesfield.

⁴ *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306, para. 25.

22. As we held in *Wu*, there is no legal authority for the UNDT to commence the running of the sixty-day limitation period from the end of the Ombudsman's settlement negotiations, rather than from "the date on which the staff member received notification of the administrative decision to be contested".⁵ The language of Staff Rule 11.2(c) is clear.

23. It is not necessary for this Tribunal to address the UNDT's analytical errors regarding waiver and estoppel. Suffice it to say, the Dispute Tribunal's approach exceeded its jurisdiction and competence in that it ignored the statutory prohibition against suspending or waiving the deadline for management evaluation set forth in Article 8(3) of the UNDT Statute. This Tribunal has repeatedly and "consistently held that the UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review".⁶

24. Lastly, the Appeals Tribunal notes that nothing prevented Mr. Eggesfield from seeking assistance from the Ombudsman and timely filing his request for management evaluation. Mr. Eggesfield is an experienced staff member who is "deemed to be aware of the provisions of the Staff Rules".⁷

25. The Appeals Tribunal determines that Mr. Eggesfield's request for management evaluation was untimely and his application was not receivable *ratione materiae*.

Judgment

26. Judgment No. UNDT/2013/006 is vacated and the appeal is granted.

⁵ *Ibid.*, para. 26.

⁶ *Ajdini v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108; *Trajanovksa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-074; *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-043; *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-036.

⁷ *Diagne et al. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067, para. 22.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar