UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2019-UNAT-925

Kortes

(Respondent/Appellant on Cross-Appeal)

v.

Secretary-General of the United Nations

(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2018-1219
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Ms. Kortes:	Simon Thomas
Counsel for Secretary-General:	Phyllis Hwang/Patricia C. Aragonés

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/105, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 October 2018, in the case of *Kortes v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 18 December 2018, Ms. Mary Lee Kortes filed her answer and a cross-appeal on 15 February 2019, and the Secretary-General filed his answer to the cross-appeal on 16 April 2019.

Facts and Procedure

2. The following facts and procedure have been established by the UNDT:[1]

> ... The Applicant joined the United Nations on 3 December 2007. One of her key reasons for deciding to join the Organization was the security and benefits offered, health insurance being a priority on the list for her and her husband, who had been freelancers with difficulty affording proper health insurance for a long time before that.
>
> ... After joining the Organization, the Applicant discussed the post-retirement health insurance options with a staff member in human resources (Ms. JM, who has since retired). Ms. JM stated that the Applicant would be qualified to receive [After-service health insurance (ASHI)], but that if she had less than 10 years of service at the time of retirement, she may have to make some additional payments herself.
>
> ... As a citizen of the United States where there is no nationalized health insurance, and as someone married to a dependent spouse who had no other insurance coverage, the Applicant wanted to be sure that they would have coverage under ASHI. Thus, on 25 January 2011, the Applicant wrote an email to the United Nations Insurance Service with a query as follows:
>
> > Dear Mr. [K]:
> >
> > I will only have worked 9 years at age 62, my mandatory retirement age, but I understand that 10 years of service is required in order to receive health insurance coverage at the time of separation/retirement. I was told by [Ms. JM] in OHRM (now retired) that in a case like this a staff member can pay premiums for one year after retirement and then be covered like all other retirees. Can you confirm this and/or let me know if anything has changed? I couldn't find information on this on the website.

[1] Impugned Judgment, paras. 3-24.

... On the same day, Mr. K from the Insurance Service responded to the Applicant by email as follows:

> Dear Mary Lee:
>
> information is correct, however you must have been covered for those nine years you have been employed.

... On the same date, 25 January 2011, the Applicant responded to Mr. K, thanking him for his prompt reply, and [...] pointed out that she would actually be 13 months short of the 10 years required to have regular ASHI coverage without a "buy in". The Applicant did this just to confirm that it would not make a difference that it was 13 months, rather than the "one year" she had previously mentioned. Mr. K responded to the Applicant's email some hours later confirming that it would not be a problem. He said, "yes, you would be allowed" to pay for the 13 months. He also said, "you need at least 5 years of coverage and you must be covered at the time of retirement".

... From the Applicant's interactions with Mr. K in 2011, and based on his responses to her questions, the Applicant was of the understanding that she would separate on retirement, pay an extra premium for 13 months, and then her husband and she would be covered under the regular ASHI rules from when she turned 62. The Applicant therefore did not make further queries until 2016, when she began preparing for her upcoming retirement.

... In June 2016, the Applicant went to the insurance office to see if there were any administrative steps she should be making for a smooth transition to ASHI. The insurance office representative told the Applicant that she could not apply for ASHI until the first month during which she would be retiring, which would mean October 2016.

... On 12 October 2016, the Applicant read an email (sent on 11 October 2016) sent to her by Ms. MH of the health insurance office stating that she had been determined ineligible for ASHI.

... On 14 October 2016, the Applicant again went to the insurance office and spoke with Ms. MH. At this time, the Applicant was told that she was ineligible for ASHI. After the insurance office reviewed the emails from January 2011, their response was that the buy-in option had changed on 1 July 2007 and that the Applicant was not eligible.

... On 24 October 2016, the Applicant filed her request for management evaluation of the contested decision.

... On 24 October 2016, the Applicant filed an application for suspension of action of the contested decision, which was rejected by the Dispute Tribunal by Order No. 253 (NY/2016) dated 31 October 2016 on a *prima facie* unlawful basis.

... On 13 February 2017, the Applicant filed the [...] application on the merits.

...

3. In the impugned Judgment, the UNDT rescinded the decision as unlawful. The UNDT noted that the right to medical care and health insurance was a fundamental human right. It held in accordance with the established hierarchy of legal norms that Staff Rules and Administrative Instructions introducing a limitation to the application of the United Nations Charter, Staff Regulations, or other resolutions adopted by the General Assembly, unless corroborated by higher legal norms, were null and void. The only existing provisions in the Staff Regulations and Rules relating to health insurance are set forth in Staff Regulation 6.2 and Staff Rule 6.6, neither of which refer specifically to ASHI; thus the eligibility requirements for ASHI are set forth in inferior legislation in the Administrative Instruction. Furthermore, General Assembly resolution 61/264 reiterated the fundamental human right to medical care, which included ASHI. It should have been implemented through clear Staff Rules, and not inferior legislation such as an administrative instruction. There was no express provision in the resolution to limit the buy-in provisions after more than five years of participation or limit buy-in up to 10 years of contributory participation for staff members recruited after 1 July 2007.

4. The UNDT further held that the Administration erred when it did not implement the resolution which referred only to ASHI for staff members recruited on or after 1 July 2007, through a separate new document, but instead created a new administrative instruction applicable to staff members recruited before and after 1 July 2007. This error created a parallel system whereby staff recruited before this date retained the right to buy -in after five years while staff members recruited after that date had no such right. The human right to ASHI could not be denied or restricted by virtue of a date of employment. Furthermore, there was no equal right to access under this parallel scheme. The General Assembly made no pronouncement to discriminate against staff members based on their recruitment date.

5. The UNDT further held that the Administration's interpretation of Administrative Instruction ST/AI/2007/3 (After-service health insurance) in Ms. Kortes' case was incorrect. The Management Evaluation Unit (MEU) indicated that it was reasonable for Ms. Kortes to rely on the information provided by a Benefits Assistant in 2011 for five years thereafter and noted also that the Secretary-General accepted that her reliance on this information was reasonable. Further, while the Administration has a duty to correct itself, in the instant case, the correction came after five years. This lengthy passage of time was sufficient to estop the Administration, especially since Ms. Kortes' reliance on this five-year long mistake was to her detriment. The UNDT found no reason for the discriminatory system to exist since it was the right of

staff members not to be discriminated against. It noted that no liabilities would be incurred to the Organization if staff members employed after 1 July 2007 were equally afforded the right to buy-in extra years up to 10 years in order to participate in ASHI. The Secretary-General had acknowledged that buy-in payments included both contributions of the staff member and the Organization. Thus, the Administration bore no unjustified costs. The UNDT further held that refusal to allow Ms. Kortes to pay for the buy-in out of her own pocket with no fiscal impact to the Organization not only violated her rights but also her spouse's derivative rights.

6. The UNDT thus ordered that Ms. Kortes be permitted to pay the contributory buy-in payments for 13 months and be considered eligible for ASHI retroactively from her date of separation. Noting that the contested decision related to her separation from service, which was not termination, the Tribunal found it was not required to establish an alternative compensation pursuant to Article 10(5)(a) of the UNDT's Statute. It rejected Ms. Kortes' request for compensation to cover the difference in health care costs outside of ASHI on grounds that the retroactive eligibility obviated the need. The UNDT awarded Ms. Kortes USD 3,000 in moral damages, noting that the applicable evidentiary standard in effect at the time of Ms. Kortes' testimony provided that her testimony was sufficient evidence for an award of moral damages. Her testimony was rendered prior to the issuance of *Timothy*,[2] wherein the Appeals Tribunal interpreted the evidentiary standards for moral damages in light of the amended UNDT Statute.

Submissions

The Secretary-General's Appeal

7. The Secretary-General argues that the UNDT exceeded its jurisdiction and erred in law in its conclusion that the implementation of General Assembly resolution 61/264 through ST/AI/2007/3 was unlawful. The preamble of ST/AI/2007/3 expressly states that it was promulgated for the purpose of implementing the resolution. Paragraph 12(a) of the resolution states that changes for staff members recruited after 1 July 2007 included "eliminating the buy-in provision after five years of participation". Thus, a plain reading of the General Assembly resolution 61/264 clearly indicates that the General Assembly had eliminated the buy-in option after five years of participation for staff members recruited on or after 1 July 2007.

[2] *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-2017.

Consequently, ST/AI/2007/3 declining to permit a buy-in provision in order to be eligible for ASHI was in full conformity with the resolution.

8. Likewise, the UNDT exceeded its jurisdiction and erred in law when it found that the requirements for ASHI violated a fundamental human right, as the UNDT does not have the jurisdiction to review the legality of a decision taken by legislative and regulatory bodies such as the General Assembly. This limit of the UNDT's competence was affirmed by the Appeals Tribunal in *Lloret-Alcañiz*.[3] In the instant case, the ASHI requirements were set by the General Assembly and for the UNDT to declare it inconsistent with human rights norms means the UNDT assumed the role of a constitutional court. Nonetheless, the UNDT erred in its interpretation of the human rights norm as the human right relates to the obligation of governments to provide a health insurance system and for employers to include contributions to health insurance as part of remuneration. These obligations were not in issue in this case.

9. The UNDT exceeded its jurisdiction and erred in law in finding that ST/AI/2007/3 was discriminatory. The Appeals Tribunal held in *Tabari*[4] that there is no discrimination when different treatment of staff members comes from general considerations of a category of staff in comparison to other categories. In turn, the UNDT was incorrect in its observations regarding legislative changes the Organization should make to the legal framework governing ASHI.

10. The UNDT erred in concluding that the Administration was estopped from correcting its mistake due to the passage of five years' time. There is no jurisprudence supporting the notion that the passage of time itself is sufficient to find that the Administration should be estopped from correcting a mistake. In *Kule Kongba*,[5] the Appeals Tribunal emphasized that the Administration has a duty to rectify its errors and that not even the creation of legitimate expectations resulting from such an error could compel the Organization to act contrary to the legal framework.

11. Even assuming *arguendo* that the UNDT correctly found the decision was unlawful, ordering Ms. Kortes to be enrolled into ASHI is an unlawful remedy as the UNDT is limited to placing Ms. Kortes into the position she would have been in had the Organization complied with its contractual obligations. This remedy places the staff member in a more advantageous position

[3] *Lloret-Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840.
[4] *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-177, para. 26.
[5] *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849.

than the one to which he or she would have been entitled. The UNDT created a remedy that is not foreseen in the legal framework. Ms. Kortes was not eligible, and the mistake had no effect on her eligibility.

12. The UNDT erred on a question of fact resulting in a manifestly unreasonable decision. The letters from prospective employers offering positions to Ms. Kortes did not indicate that she would receive health insurance coverage upon retirement. Also, the costs incurred by Ms. Kortes for health insurance coverage after her retirement is a consequence of the absence of the national health insurance in the United States. Neither of these situations are a consequence of the information provided by the Administration in 2011. Furthermore, staff members are obliged to know the Regulations and Rules and accordingly the UNDT erred in its finding of detrimental reliance. Even if the Appeals Tribunal finds that Ms. Kortes relied to her detriment, the remedy must be grounded in law.

13. Lastly, the UNDT erred in awarding moral damages as the evidence in support of this claim was solely Ms. Kortes' testimony. As the Appeals Tribunal has affirmed in *Kallon, Zachariah, Auda, Timothy, and Langue*,[6] evidence of moral damages consisting solely of the testimony of the complainant is not sufficient without corroboration.

Ms. Kortes' Answer

14. Ms. Kortes requests the Appeals Tribunal to address a limited issue on appeal, namely, the UNDT's finding on estoppel and her reasonable detrimental reliance on the Organization's representation. Despite basing her arguments before the UNDT on the doctrine of "reasonable reliance", "estoppel," and "legitimate expectations," and never once mentioning the legislative framework or human rights analysis, the UNDT discussed this broader framework at length. Similarly, this is the primary concern on appeal, as the Secretary-General's legal arguments mainly deal with objections to this issue with only one legal sub-argument (five paragraphs out of the 32 paragraphs of the appeal) responding to the UNDT's estoppel finding. The UNDT's "Observations" about the legislative framework and human rights norms are *obiter dicta* on which the Appeals Tribunal is not required to address. Ms. Kortes emphasizes that she does not

[6] *Langue v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858; *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847; *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787; *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764; and *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

seek to litigate the legislative framework establishing ASHI and this distinguishes her case from *Lloret-Alcañiz,* which was cited by the Secretary-General in his appeal. In that case, the staff member made allegations of discrimination directed at the nature and content of the legislative and regulatory choices of the General Assembly. Therefore, Ms. Kortes submits that the Secretary-General's arguments are moot and implores the Appeals Tribunal to address only the estoppel findings.

15. The Secretary-General requests this Tribunal to find that the UNDT erred in holding that the passage of time itself was sufficient to estop the Administration from exercising its right and duty to correct an administrative error. The Secretary-General has not otherwise challenged the elements of the estoppel finding including the finding of Ms. Kortes' reasonable reliance to her detriment. In the context of the Organization's previous admissions of these elements, Ms. Kortes requests the Appeals Tribunal to uphold the UNDT's findings on the elements of estoppel which are namely that i) a representation was made by one party, (ii) which the other party reasonably relied upon, (iii) to her detriment. Despite the fact that the Secretary-General has not challenged these findings on appeal, Ms. Kortes sets forth the legal basis for the doctrine of estoppel wherein the Tribunals' jurisprudence in *Tolstopiatov, Simmons, Castelli, and Sina* has accepted this doctrine.[7] Further, in numerous cases, the Secretary-General has accepted this definition of estoppel and detrimental reliance in its arguments before the Tribunals. For instance, in *Ruyooka,* the Secretary-General argued that the "essential elements of the principle of estoppel are a representation by a representor to the representee which induces the representee to act in reliance upon the representation to his or her detriment".[8]

16. The UNDT correctly found that the Organization was estopped from reneging on its representation and that Ms. Kortes reasonably relied upon this information to her detriment. It is agreed that the representation was made in 2011 in writing by a staff member of the OHRM Insurance Section. She was also told orally she was entitled to buy-in to ASHI. The Secretary-General seeks to relitigate the issue as to whether the Insurance Section made a mistake regarding her start date. The UNDT, however, quoted the Organization's own admission and determined the fact that she made her start date clear in her exchanges. The argument on

[7] *Tolstopiatov v. Secretary-General of the United Nations,* Judgment No. UNDT/2011/012*; Simmons v. Secretary-General of the United Nations,* Judgment No. 2012-UNAT-221; *Castelli v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-037; *Sina v. Secretary-General of the United Nations,* Judgment No. UNDT/2010/060.
[8] *Ruyooka v. Secretary-General of the United Nations,* Judgment No. UNDT/2013/154, para. 86.

appeal that the Administration misunderstood her start date from her e-mail is not representative of what the UNDT established and what the Administration had previously admitted. Further, the Secretary-General has the burden to show how this is an error of fact and how it resulted in a manifestly unreasonable decision. The Secretary-General, however, makes no such arguments in his appeal and therefore does not meet his burden. Thus, the UNDT's factual finding of a representation being made must stand.

17. The UNDT found, and the Secretary-General did not dispute in the appeal, that her reliance on that misrepresentation was reasonable. Likewise, the MEU had already conceded that her reliance was reasonable. The Secretary-General has not claimed on appeal that the UNDT erred in its finding that her reliance was reasonable and accordingly the finding of her reasonable reliance must stand.

18. The UNDT correctly found that Ms. Kortes' reliance on the Organization's representation was to her detriment. She gave sworn testimony, was subjected to questioning by the UNDT and to a cross-examination, and submitted multiple documents into evidence, including multiple signed statements. This served as the basis for the UNDT to establish and find that the third element for estoppel—detriment—was established. The UNDT correctly found in this regard that Ms. Kortes turned down multiple employment offers but continued to work in the United Nations for the rest of her career because she was told she would have health insurance through ASHI following her retirement. She is now in a position where she does not have health insurance equivalent to ASHI and cannot take back her working years. The detriment for which the UNDT ordered compensation is specific and clear. The Secretary-General had a chance to challenge the evidence relating to her claims of detriment at the trial and is not now in a position to request the Appeals Tribunal to review this evidence *de novo*. He has not alleged a manifestly unreasonable decision caused by any errors of fact and therefore the UNDT's finding that Ms. Kortes' reliance was to her detriment must stand.

19. The Organization refused to honour its representation five years later because it claimed to have made a mistake. The three elements for estoppel are met. While the Secretary-General argues that *Kule Kongba* supports the notion that the Organization is entitled to correct its mistake, the facts therein are vastly different and should be rendered inapplicable to Ms. Kortes' situation. In *Kule Kongba*, the "mistake" was actually a prior misrepresentation made by a staff member regarding his nationality and once the correct nationality had been discovered the prior mistake was corrected via the decision not to renew his contract. The Administration was

not seeking to rectify its mistake by voiding *ab inito* his prior contracts, and unlike in that case, Ms. Kortes did not make a misrepresentation.

20. The Secretary-General suggests that the Administration should be permitted to correct its mistakes without consequence. This is inapposite to fairness and fails to acknowledge the nuances of the jurisprudence regarding the limitations on the Organization to correct its mistakes. In *Cranfield*, relied upon in the appeal, the Appeals Tribunal noted that "when responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefore".[9] *Cranfield,* thus, does not give the Administration a carte blanche ability to correct any decision without consequences. The type of responsibility referred to is what Ms. Kortes is asking for in her case: responsibility to remedy the detriment suffered. *Cranfield,* factually is in Ms. Kortes' favour as the Administration realized it made an error when it advised Ms. Cranfield she was eligible for a permanent appointment, and then corrected that decision within three months. The Appeals Tribunal found that there was also no reliance by the staff member for the period between the error and the correction. This differs vastly from Ms. Kortes, who relied reasonably for six years, during which her detriment accumulated. There was absolute reliance as she shaped the trajectory of her career based on the understanding that upon retirement she would have health care. Applying *Cranfield,* the Administration should be estopped. Ms. Kortes also notes that in *Cranfield*, both the UNDT and Appeals Tribunal awarded damages. Based on the foregoing, Ms. Kortes requests that the UNDT's finding as to the Organization's liability be upheld.

21. Regarding Ms. Kortes' compensation, the Secretary-General merely argues that the UNDT is limited to placing Ms. Kortes back into the position in which she would have been. This argument does not establish any error. The Tribunals have consistently applied the doctrine of estoppel which forms part of a staff member's contract. The Secretary-General also did not argue that the remedy is impossible. The remedy is a simple stroke of a keyboard and she can be enrolled in ASHI with no material loss resulting and no adverse precedent created, given the very specific nature of her circumstances regarding the representation made by the Administration in 2011. Doing so would not place her in a more advantageous position than she would have been in particularly in light of the anxiety and financial struggles she has faced since retirement regarding health care coverage. Furthermore, the argument that she should not be enrolled into ASHI does not mean she is not entitled to a remedy. Because the UNDT ordered that she be

[9] *Cranfield v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-367, para. 36.

enrolled, it did not set a quantum for material damages. However, as was on record before the UNDT, the compensation necessary to place her in the position in which she would have been is not fully covered by the retroactive enrollment in ASHI because for the last three years since her retirement, she has paid USD 51,022 in health care costs with her and her dependent having taken only the bare minimum medical treatment. Even when she transitions to Medicare at age 65 and her dependent does so in 2022, ongoing costs will be over USD 12,000 a year due to the requirement that she purchase secondary insurance.

22. If this Tribunal agrees that the doctrine of estoppel applies but that Ms. Kortes is not able to be enrolled in ASHI then she should be compensated for her expenses of USD 51,022 minus USD 8,584, the amount she would have paid under ASHI, which is an economic loss of USD 42,438 for the three-year period. Assuming a life expectancy of 80 years, from age 65 to 80 she and her husband will conservatively spend an additional USD 180,000 on health care. Thus, if alternative compensation is set, it should reflect her harm, which is USD 180,000 minus the ASHI premium.

23. As for moral damages, *Kallon* was not decided at the time of her application and to hold her to a standard of evidence that did not exist at the time is unequitable. Moreover, Ms. Kortes disagrees with the proposition that *Kallon* is strict authority that testimony of a staff member can never be sufficient to establish moral harm. The partial dissent by Judges Thomas-Felix, Lussick, and Chapman, on which the Secretary-General relies, states explicitly that "there will be some exceptions" to this rule. Nonetheless, if expert corroboration is required on appeal, as was not required before UNDT given it was before *Kallon* was issued, Ms. Kortes is able to submit a statement from a physician.

Ms. Kortes' Cross-Appeal

24. Ms. Kortes argues that the UNDT erred in law, or in the alternative, that it failed to exercise the jurisdiction vested in it, when it declined to order compensation for her economic losses described above. She has incurred USD 51,022 for external health care with bare minimum medical treatment and this amount increased at a rate of over USD 1,000 per month and will not be remedied unless an additional award of compensation is made in addition to the retroactive enrolment in ASHI. Ms. Kortes has suffered significant financial detriment as a result of the Organization's breach and will continue up until the point she is enrolled in ASHI. Thus, she requests this Tribunal to compensate her for a total sum calculated on the basis of

USD 4,000 per month between Ms. Kortes' retirement in October 2016 and the date of the execution of this Tribunal's judgment.

The Secretary-General's Answer to the Cross-Appeal

25. The Secretary-General argues that Ms. Kortes has failed to establish a basis for her cross-appeal as she has the burden to establish a reversible error. The UNDT correctly did not award her financial compensation. At no time before the UNDT did Ms. Kortes request to be compensated for health care expenses that she had paid since her retirement but only gave comparative documentation on economic losses estimated for the future. Throughout the proceedings before the UNDT, she did not request both rescission and economic compensation but only economic compensation in lieu of rescission. Thus, in light of its decision to order rescission and her enrolment in ASHI, the UNDT did not err in not setting an alternative compensation. Should this Tribunal consider the merits of her request for additional compensation, her claim is not supported by evidence. There is also no evidence to support whether she has mitigated her losses. She attaches additional evidence to her appeal entitled, "[H]ealth care costs since retirement" but she has not first sought leave for this submission. As it was not part of the UNDT record she was required to comply with Article 2(5) of the Appeals Tribunal's Statute for submission of additional evidence.

Considerations

26. The following submissions by the Secretary-General are not contested by Ms. Kortes:

(i) The UNDT exceeded its jurisdiction and erred on questions of law in concluding that the implementation of General Assembly resolution 61/264 through ST/AI/2007/3 was unlawful;

(ii) The UNDT erred in concluding that the General Assembly did not eliminate the buy-in provision after more than five years of participation;

(iii) The UNDT exceeded its jurisdiction and erred on a question of law in concluding that the eligibility requirements for ASHI, as set by the General Assembly, violated a fundamental human right;

(iv) The UNDT exceeded its jurisdiction and erred on questions of law in concluding that ST/AI/2007/3 discriminated against staff members recruited on or after 1 July 2007; and

(v) The UNDT erred in its observations regarding the changes that needed to be made to the Organization's legal framework governing ASHI.

27. The remaining issue for decision by the Appeals Tribunal is whether the UNDT erred in concluding that the Administration was estopped from correcting its mistake by finding that Ms. Kortes was not eligible for ASHI, having advised her in 2011 that she could avail herself of the buy-in option.

28. It is not in issue that the Administration mistakenly provided Ms. Kortes with incorrect information when she inquired about her eligibility for ASHI.

29. Pursuant to ST/AI/2007/3, a staff member recruited on or after 1 July 2007, in order to be eligible for ASHI, is required to have been a participant in a contributory health insurance plan of the United Nations for a minimum of 10 years. By contrast, a staff member recruited before 1 July 2007 is required to have had a minimum of five years of participation, and to have paid the costs of contributory participation for at least 10 years. In other words, staff members recruited before 1 July 2007 can still be eligible for ASHI even if they have participated in a United Nations health insurance plan for only five years, as long as they have paid the health insurance premiums for the full 10 years (the buy-in option).

30. Ms. Kortes joined the Organization on 3 December 2007 and became a participant in the Organization's health insurance plan as of 1 January 2008. She therefore needed 10 years of contributory participation to be eligible for ASHI and the buy-in option was not available to her.

31. As recited above, on 25 January 2011 she had two exchanges with the Administration regarding her eligibility for ASHI. It was the second of these exchanges which gave rise to the issue now before us. In that exchange, Ms. Kortes provided the information that "I have been covered since joining on 12/3/07. I will have to retire on 31/10/16, which is about one month shy of nine years". Since Ms. Kortes referred to her retirement date of 31 October 2016 as "31/10/16", the Administration understood from her e-mail that her date of joining the Organization was 12 March 2007 (12/3/07). The Administration accordingly confirmed that

she would be allowed to use the buy-in option in order to have the full 10 years of contributory participation necessary to be eligible for ASHI.

32. The Administration's error, therefore, was to inform Ms. Kortes that she could buy-in to ASHI, based on a misunderstanding that the date of joining the Organization specified by her was 12 March 2007 (12/3/07) rather than 3 December 2007. Ms. Kortes did not make further enquiries until 2016, when she began preparing for her upcoming retirement.

33. The UNDT applied the doctrine of estoppel to find that "in the present case, a correction of a mistake by the Administration in January 2011 [...] after more than five years, is itself sufficient to find that the Administration should be estopped from correcting the decision, taking into consideration that [Ms. Kortes] relied on the information provided by the Administration to her detriment".[10]

34. The UNDT based this conclusion on the case of *Cranfield,*[11] in which the Appeals Tribunal held that the Administration was not estopped from correcting its mistake. In that case, the Appeals Tribunal found that the Administration had sought to correct the situation within a time frame of 97 days from the initial communication to Ms. Cranfield, during which time she had not acted to her detriment.

35. The UNDT reasoned that the Appeals Tribunal in that case considered that the Administration's action in correcting a mistake was reasonable given that 97 days was a relatively short period, whereas in the present case, correction of a mistake after more than five years was, of itself, sufficient to find that the Administration should be estopped from correcting its error, taking into account that Ms. Kortes relied on the information provided by the Administration to her detriment.

36. We find that the UNDT committed an error of law in coming to that conclusion. In the first place, there is no law that puts a time limit on the right and duty of the Administration to correct an administrative error of that kind.[12] Moreover, in considering the applicability of estoppel in *Cranfield*, the Appeals Tribunal also took into account that

[10] Impugned Judgment, para. 75.
[11] *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367.
[12] *Ibid.*; see also *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849; *Husseini v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-701.

no blame could be laid at the feet of Ms. Cranfield for the Administration's mistake.[13] In the present case, the same cannot be said of Ms. Kortes.

37. The information Ms. Kortes provided in her e-mail of 25 January 2011 created the impression that she had joined the Organization on 12 March 2007 ("12/3/07"). Since the date of retirement she provided ("31/10/16") must have been correct, it is quite understandable that the Administration assumed that the same numerical configuration applied to her joining date. It appears that Ms. Kortes did not perceive any potential confusion in the way in which she had worded her e-mail. Neither Ms. Kortes nor the Administration addressed the matter again for almost six years. These facts of course do not absolve the Administration from blame for the situation that eventually arose, but they do show that Ms. Kortes was herself not blameless.

38. Estoppel is an equitable doctrine. Accordingly, any person wishing to assert an estoppel must come to court "with clean hands". On the facts of the present case, it would be inequitable to estop the Administration from correcting an error to which Ms. Kortes had also contributed. Ms. Kortes never had a right to qualify for ASHI and the Administration therefore had the right and duty to correct its administrative error.

39. For the foregoing reasons, we uphold the appeal and dismiss the cross-appeal.

[13] *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 49.

Judgment

40. The appeal is allowed, and the cross-appeal is dismissed. Judgment No. UNDT/2018/105 is vacated in its entirety.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Lussick, Presiding	Judge Knierim	Judge Halfeld

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar