Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2012/047
Judgment No.:	UNDT/2012/175
Date:	9 November 2012
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

ROBINEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bettina Gerber, UNOG

Introduction

1. The Applicant, a former staff member of the United Nations Office at Geneva ("UNOG"), contests the decision to deny payment of an amount corresponding to 60 days of annual leave he had accrued between 1 May 1998 and 15 April 2011 and had not taken on the date of his retirement.

2. He requests payment of that amount.

Facts

3. Between 1989 and 2011, the Applicant was employed by the Organization under a series of fixed-term contracts. Between 1989 and 1997, he left the Organization several times upon expiration of his short-term contracts and was subsequently re-employed after short breaks in service. At the time of each of his separations from service, he received from the Organization a payment in commutation of the annual leave days he had not used, as reflected in the table below. On 1 May 1998 he was recruited under a two-year fixed-term contract which was subsequently regularly extended.

Date of entry on duty	Date of separation from service	Number of days of annual leave accrued and paid by the Organization
1 September 1989	31 July 1990	18
28 August 1990	31 July 1991	18.5
2 September 1991	31 July 1992	25
1 September 1992	31 October 1993	0
1 November 1993	31 December 1993	0
1 January 1994	16 December 1994	25.5
3 January 1995	16 December 1995	8
8 January 1996	31 July 1997	30.5
22 August 1997	31 December 1997	10
1 May 1998	15 April 2011	0

4. On 4 April 2011, the Applicant attended a pre-retirement seminar; he then retired on 15 April 2011. On the date of his separation from service, he had a balance of 60 days of unused annual leave.

5. On 7 May 2011, the Chief of the Payroll Unit informed the Human Resources Management Service ("HRMS") of the number of annual leave days accrued but not used by the Applicant during his successive short-term contracts and paid by the Organization at the end of each of these contracts. This calculation showed that between July 1990 and December 1997, the Applicant had been paid an amount corresponding to 135.5 days of annual leave.

6. By an email dated 3 June 2011, HRMS notified the Applicant that the Administration had paid him at the time of his previous separations from service the maximum entitlement (an amount corresponding to 60 days' salary) which he could claim under staff rule 9.9 for commutation of accrued annual leave days.

7. On 6 June 2011 the Applicant responded to this email expressing surprise and disappointment; he subsequently met a staff member of HRMS and the Chief of that Service to discuss the matter. By a memorandum dated 30 June and then in an email dated 28 July 2011, the Applicant requested the Chief of HRMS to explore a solution that would allow him to receive payment corresponding to the 60 days of annual leave accrued between 1 May 1998 and 15 April 2011.

8. By a letter dated 20 October 2011, the Chief of HRMS informed the Applicant that the Office of Human Resources Management of the United Nations Secretariat at New York had confirmed that the calculation of annual leave days made by HRMS was correct and that no payment in commutation of the 60 days of unused annual leave could be made to the Applicant.

9. On 16 December 2011, the Applicant requested a management evaluation of the decision dated 3 June 2011 denying him payment of 60 days of annual leave.

10. By a letter dated 8 February 2012, the Applicant was informed that his management evaluation request had been found to be time-barred and that the Secretary-General had therefore decided to reject it.

11. On 10 May 2012 the Applicant filed an application against the decision denying him payment for the 60 days of unused paid leave.

12. The Respondent submitted his reply on 14 June 2012 and the Applicant made observations on 26 October 2012.

13. On 7 November 2012, the Tribunal held a hearing at which the Applicant and the Counsel for the Respondent participated in person.

14. The Applicant made additional observations on 8 November 2012.

Parties' submissions

15. The Applicant's contentions are:

a. The application is receivable because his management evaluation request was not time-barred. Only the letter dated 20 October 2011, and not the email dated 3 June 2011, constitutes a final decision. Moreover, in the memorandum he sent to the Chief of HRMS on 30 June 2011, he made no reference at all to a decision. During his informal contacts with the Chief of HRMS, the latter indicated that he had undertaken consultations with UNOG and with the Secretariat of the Organization at New York and that he would take a decision after completing those consultations. When the Applicant asked whether he should file a management evaluation request, the Chief of HRMS responded that he should await a formal communication before taking that step;

b. If staff rules 4.17(c) and 9.9, which provide respectively for the adjustment of the amount payable on account of unused annual leave days on the basis of the payments made at the end of previous periods of service, and the limitation of the amount paid in lieu of unused annual leave days to 60 days' salary, had been applicable to him between 1989 and 1997, the Administration should not have paid him for more than 60 days of annual leave. The fact that the Administration paid him an amount corresponding to 135.5 days' salary suggests that these provisions limiting the amount due in respect of unused annual leave days were not applicable to his situation;

c. No one informed him in May 1998 or thereafter that he was no longer entitled to payment in commutation of the annual leave days he would accrue. He therefore accrued 60 days of annual leave in good faith;

d. The provisions concerning the re-employment of staff members have been amended several times. Rule 104.3(a) of the version of the Staff Rules applicable as of 1 January 1990, which was in force at the time when the Applicant was re-employed for the first time, provided that the limit of 60 days' salary for the payment of accrued annual leave days applied only to staff who had left the Organization at the end of a period of continuous service. Accordingly, the payment for the annual leave days he had accrued could not be adjusted in any way on the basis of subsequent re-employment. In the version of the Staff Rules which entered into force on 1 January 1993, a reference was added to rule 104.3(a) concerning adjustment of the payment of accrued annual leave days which a staff member re-employed within 12 months of his separation from service could claim in respect of a second separation from service. At all events, the Applicant's first and second separations from service occurred in 1990 and 1991, or before the entry into force of this amendment. It was only in the version of the Staff Rules that entered into force on 1 January 2003 that rule 104.3(a) was amended to refer to first and subsequent separations from service. Thus, the payment, between 1989 and 1997, of 135.5 days of accrued annual leave is not an administrative error, but the correct application of the rules applicable at the time of each of the Applicant's separations from service. Under the principle of non-retroactivity, the limit of 60 days needed to be respected after 1998, which was the case in the present instance.

16. The Respondent's contentions are:

a. The application is not receivable because the Applicant did not file his management evaluation request until 16 December 2011, i.e. more than six months after having been notified on 3 June 2011 that he could not receive an additional payment in respect of 60 days' unused annual leave. Staff rule 11.2(c) stipulates a time limit of 60 days to request a management

evaluation of a contested decision. The letter dated 20 October 2011 is simply a confirmation of what had been conveyed previously to Applicant and could not have the effect of restarting the time limits;

b. The fact that the Chief of HRMS told the Applicant that he could await the completion of the internal consultations before filing his management evaluation request could not have the effect of extending the time limits for filing a management evaluation request since only the Secretary-General has that prerogative;

c. The contested decision was taken in accordance with the applicable rules. Between 1989 and 1997, the Applicant was re-employed after each separation from service and, as a result of an administrative error, the Administration paid him an amount corresponding to 135.5 days' salary although he could not receive more than a maximum amount corresponding to 60 days' salary. In April 2011, the Administration realized that the Applicant had been paid more than he should have been under the Staff Rules. The Administration has an obligation to put an end to illegal situations as soon as it becomes aware of them. While it was not able to recover the amounts due, it determined that the Applicant was not entitled to the payment of an additional amount in commutation of the 60 days' unused annual leave;

d. The Administration could not inform the Applicant earlier because the error was discovered late. However, the Applicant cannot claim that he was unaware of the existence of staff rule 4.17(c) because he was informed about it at the seminar he attended on 4 April 2011. Moreover, as the Appeals Tribunal has noted, no one is deemed to be ignorant of the law.

Consideration

On admissibility

17. In support of its view that the Applicant is not entitled to request the Tribunal to order the Administration to pay him an amount corresponding to the

60 days of accrued leave he had not used on the date of his retirement, the Respondent maintains that the Applicant did not respect the prescribed time limits for filing a preliminary management evaluation request.

18. Staff rule 11.2 provides:

> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment ... shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
>
> ...
>
> (c) 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.

19. The documents in the file show that the Applicant was notified by email on 3 June 2011 that he had been paid the maximum amount which he could claim in commutation of unused annual leave. It is not disputed that after receiving this information, the Applicant had several written and verbal exchanges with HRMS during which he requested that the Administration pay him for the 60 days' annual leave unused on the date of his retirement. The letter dated 20 October 2011 sent to the Applicant by the Chief of HRMS also shows that the latter consulted the Office of Human Resources Management at New York regarding the validity of the position taken by HRMS.

20. Furthermore, the Respondent does not dispute that the Chief of HRMS informed the Applicant that he could await the outcome of the consultations undertaken with the Office of Human Resources Management before filing his management evaluation request.

21. Thus, while the Respondent is justified in maintaining that the time limits for filing the management evaluation request must be strictly respected and cannot be extended, except in circumstances which are not present in this case, the

Tribunal considers that the time limit can begin only as of the notification to the staff member of a final decision by the Administration. It follows from the foregoing that for the Chief of HRMS, and for the Applicant, the email of 3 June 2011 was not a final decision subject to appeal. The Applicant is therefore entitled to maintain that only the letter of 20 October 2011 had the effect of starting the time limits and that he was therefore within the time limit when on 16 December 2011 he filed his management evaluation request. The Tribunal therefore considers the application to be receivable.

On the merits

22. In order to assess the legality of the decision denying the Applicant the payment of an amount in commutation of annual leave days accrued between 1 May 1998 and 15 April 2011 and not used on the date of his retirement, the Tribunal must first determine which text is applicable to the present case.

23. Staff rule 9.9 in force on 15 April 2011 provides:

> If on separation from service a staff member has accrued annual leave, he or she shall be paid a sum of money in commutation of the period of such accrued leave up to a maximum of ... sixty working days for staff holding ... a fixed-term appointment, in accordance with staff rules 4.18 and 5.1.

24. It follows very clearly from the above text that it was only in respect of his last separation from service on 15 April 2011 that the Applicant, who had held a fixed-term appointment since 1 May 1998, could receive the commutation payment envisaged in that text. Thus, the Applicant's rights need to be considered under the rules applicable on the date on which the entitlement arose, i.e. 15 April 2011.

25. Contrary to the Applicant's contention that certain texts predating the above provision created rights in his favour, the Tribunal notes that the Applicant cannot claim acquired rights in this matter. Indeed, any rights in respect of leave acquired by the Applicant during the period of his last appointment, i.e. from 1 May 1998 to 15 April 2011, can only involve entitlement to annual leave, which is not disputed. However, with regard to the right to commutation of unused leave, this

right could only have arisen on the date of his retirement and in no event earlier since, up to the date of his retirement, the Applicant could at any time have opted to take his leave rather than accrue it with a view to a commutation payment.

26. The Tribunal must therefore consider whether on the date of 15 April 2011 the rules in force allowed the Applicant to obtain payment of an amount corresponding to 60 days of unused annual leave.

27. The following rule, in force on 15 April 2011, specifies the conditions under which such a payment may be made:

> **Rule 4.17**
> **Re-employment**
>
> ...
>
> (c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances less than twelve months after separation, the amount of any payment on account of ... commutation of accrued annual leave shall be adjusted so that the number of months, weeks or days of salary to be paid at the time of the separation after the new appointment, when added to the number of months, weeks or days paid for prior periods of service, does not exceed the total of months, weeks or days that would have been paid had the service been continuous.

28. It follows from the wording of the above rule that the Applicant, who since 1 September 1989 had received several new appointments less than 12 months after each of his separations from service in an organization which 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. In application of staff rule 9.9 cited above, his entitlement to a commutation payment is limited to 60 days for the entire period from his initial appointment on 1 September 1989 to the date of his retirement on 15 April 2011.

29. The documents in the file show that the Applicant received a series of payments in respect of the same period corresponding to 135.5 days of accrued leave. Thus, without it being necessary for the Tribunal to rule on the question of whether the Applicant rightly or wrongly received these payments in commutation of 135.5 days, it is clear that he received payment for more than 60 days and

therefore, the Tribunal considers that he cannot claim any payment in commutation of leave accrued at the time of his retirement.

30. While the Applicant maintains that the Administration did not inform him of his rights, the Tribunal recalls, on the one hand, that staff members are deemed to be familiar with all the provisions of the Staff Rules applicable to them, and on the other hand, that it was on 1 January 2003 that the Staff Rules (see Secretary-General's circular ST/SGB/2003/1) clearly specified in rule 104.3 that staff members in the Applicant's situation must be considered in relation to the entitlement at issue as having been continuously employed.

31. It follows from all the foregoing that even if the application is receivable *ratione temporis*, it must be rejected on the merits.

Conclusion

32. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 9th day of November 2012

Entered in the Register on this 9th day of November 2012

(*Signed*)

René M. Vargas M., Registry, Geneva