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

[redacted]

Counsel for Ms. Kortes: Simon Thomas

Counsel for Secretary-General: Phyllis Hwang/Patricia C. Aragonés

JUDGE RICHARD L

Consequently, ST/AI/2007/3 declining to permit a

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) resmE64(, as t1s.1(tho)er 4(h)2.J21.74324J20164 T4ra)0 TD-.017TJ-31.6sw

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.

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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. Kort

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

(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

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.

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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.

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