



... The investigation panel concluded its investigation and sent a report dated 14 April 2008 to OHRM. Paragraph 6 of th

not only unprofessional, but caused [person 1] to be stressed and fearful of [the Applicant].

b. The panel found that [the Applicant] had sent a romantic note to [person 2, name redacted] in September 2007 via her colleague, [person 3, name redacted] and that [person 3] had brought the note to the attention of the Chief of the Booth. The panel further found that when [person 2] became aware of the contents of the note, she felt stressed by it and by [the Applicant's] attitude. The panel noted that a few days after the incident, [person 2] told [the Applicant] that she did not appreciate the note, and asked [The Applicant] not to send any such note again.

c. The panel found that in September 2006, after [person 4, name redacted] joined the section, [the Applicant] called [person 4] twice on her private cell phone - the first time, to ask her how her weekend was; and the second time, to ask for her private address, reportedly to update the system. The panel further found that these calls, sometimes anonymous, continued until October 2006, and that they made [person 4] nervous. When [person 4] confronted [the Applicant] about the calls, [the Applicant] admitted that [he] had made them because [he] wanted to find out if the "signals [person 4] was sending [the Applicant] were real." [Person 4] denied that she had shown any interest in [the Applicant] and reported the matter to the Chief of the Interpretation Section.

d. In addition, the panel found that on 28 September 2006, when [person 4] was leaving the United Nations premises, she realized that [the Applicant] were [sic] behind her. [The Applicant] asked if [he] could walk her home and she agreed, as she did not want to be rude. However, when [the Applicant] asked [person 4] on 3 October 2006 if [he] could walk her home again some time, she refused and asked [him

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the case would be transferred to a Joint Disciplinary Committee ["JDC"] for advice. [The Applicant] would remain on suspension until such time as this proceeding is concluded and a final decision taken in his case.

...

... The Applicant, having obtained the benefit of legal advice, decided to waive his right to a review by the JDC and to accept the following agreed disciplinary measures, as confirmed in a letter dated 20 April 2009 from Ms. Catherine Pollard, ASG/OHRM:

- (a) demotion of one grade, with no possibility of pro-oo5 0()-32tw

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14. Mr. Santos asks that the Appeals Tribunal hold an oral hearing in his case.

Considerations

15. As a preliminary matter, this Tribunal denies Mr. Santos’ request for an oral hearing, finding there is no need for further clarification of the issues arising from his appeal, pursuant to Articles 2(5) and 8(3) of the Statute.

16. The 26 January 2011 letter to Mr. Santos refusing him a permanent appointment explained that the decision was taken “after a careful review of [his] case, taking into account all the interests of the Organization, and [was] based on the fact that [his] records show that a disciplinary/administrative measure [had] been taken against [him]”. In those circumstances the granting of a permanent appointment “would not be in the interest of the Organization”.

17. Mr. Santos’ application for conversion to a permanent appointment was considered pursuant to the procedures provided for in ST/SGB/2009/10. The possibility of conversion to permanent appointment was subject to two levels of review by OHRM. Firstly, review of Mr. Santos to determine his eligibility and secondly to determine his suitability. He was duly found to have fulfilled all the eligibility criteria for consideration for permanent appointment, namely that he had completed five years of continuous service and was on the relevant date under 53 years of age. Satisfying the eligibility requirement only qualified Mr. Santos to be considered for a permanent appointment.

18. Staff Regulation 4.5 and Staff Rule 4.13 provide that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of service. General Assembly Resolution 51/226 of 3 April 1997 provides, in part, as follows: “[F]ive years of continuing service ... do not confer the automatic right to a permanent appointment ... [O]ther considerations, such as outstanding performance, the operational realities of the organizations, and the core functions of the organization, may justify the non-renewal of a fixed-term appointment.”

against the interests of the Organization.

meet the highest standards of efficiency, competence and integrity established in the Charter.

Paragraph 9 of the “The Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered” (Guidelines) states:

In determining whether the staff member has demonstrated suitability as an international civil servant and has met the high standards of integrity established in the Charter, any administrative or disciplinary measures taken against the staff member will be taken into account. The weight that such measures would be given will depend on when the conduct at issue occurred and its gravity. Information about such measures is contained in the Official Status file of each staff member...

20. When Mr. Santos applied for conversion to a permanent appointment in 2010, this was against a backdrop whereby disciplinary proceedings which had been initiated against him by letter of 19 May 2008³ had ultimately culminated in his agreeing, with the assistance of counsel, to accept a number of disciplinary measures, as confirmed in a letter to him from the ASG/OHRM dated 20 April 2009.

sanctions which had been concluded in April 2009 and that in so doing, the UNDT exceeded its competence. It is further submitted that the contested administrative decision which was before the Dispute Tribunal was not the disciplinary measures imposed on Mr. Santos in 2009 but rather the decision made by the ASG/OHRM in 2011 not to convert his fixed-term contract to a permanent appointment.

24. In the course of his submissions, Mr. Santos contends that the Secretary-General errs when he asserts that the UNDT exceeded its competence by reviewing prior disciplinary measures in circumstances where, Mr. Santos argues, the very reason given by the Administration for not granting him a permanent appointment was because of the prior disciplinary issue. Mr. Santos argues that it was not the UNDT but the Administration that revisited the prior disciplinary sanction and therefore brought it within the scope of judicial review by the Dispute Tribunal.

25. Thus, what the Appeals Tribunal must determine is the lawful parameter of the Dispute Tribunal's judicial review of the decision not to grant Mr. Santos a permanent appointment.

Did the UNDT exceed its competence?

26. The Dispute Tribunal's statutory remit is to hear and pass judgment on, *inter alia*, (a) a staff member's appeal against an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment; and (b) an appeal of an administrative decision imposing a disciplinary measure.

27. In the instant case, in denying a conversion to a permanent appointment, the Administration relied on "disciplinary/administrative measures" taken against Mr. Santos. The issue to be decided is whether that reliance gave the Dispute Tribunal *carte blanche* to go behind the agreed sanctions imposed on 20 April 2009. The Appeals Tribunal is satisfied that it did not. In circumstances where, as provided for administratively (i.e. former Staff Rule 110.4(b)), the Administration and a staff member could (and in the present case did) agree on the disciplinary measures to be imposed, and in the absence of any challenge by Mr. Santos to the imposition of those disciplinary measures within the relevant timeframe for such challenge, he cannot use the later 2011 administrative decision to challenge or impugn the disciplinary measures agreed to in April 2009. If Mr. Santos had issues with the imposition of the agreed disciplinary measures he

was obliged, pursuant to Article 8(1)(d)(ii) of the UNDT Statute, to bring his application before the Dispute Tribunal within 90 days of the “administrative decision”. Moreover, the facts show that Mr. Santos, represented by counsel, agreed to the disciplinary measure. Even if he did not agree, the time had passed to challenge it. Thus, it was not open to him, in the context of his request of 17 January 2011 for management evaluation of the decision not to grant him a permanent appointment, to seek to impugn what took place on 20 April 2009.⁴

28. Similarly, it was not within the Dispute Tribunal’s competence or jurisdiction to embark on an inquiry into whether the 2009 disciplinary sanctions were lawfully imposed or otherwise excessive or disproportionate. Accordingly, we uphold the Secretary-General’s argument that having regard to the agreed mechanism invoked in 2009 to conclude the disciplinary issue and in the absence of any timely challenge to the events of April 2009 by Mr. Santos (and assuming he could overcome the fact that at the relevant tiuat398e ex(me289d01.2.8(hh(didt-2.2ni)(allengon7(mt)5398.7

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45. In all of the circumstances therefore, the Dispute Tribunal erred in rescinding the decision of the Administration denying Mr. Santos a permanent appointment and the UNDT Judgment is set aside in its totality.

Judgment

46. The appeal is upheld and the Judgment of the Dispute Tribunal is vacated.

Original and Authoritative Version: English

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

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Chapman

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

(Signed)

Weicheng Lin, Registrar