



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

AUSTIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Security Officer in the Department of Safety and Security (“DSS”) of the United Nations Secretariat, contests the decision denying him conversion of his fixed-term appointment to a permanent appointment due to a disciplinary measure being recorded in his Official Status File (“OSF”). The Applicant requests that the impugned decision be reversed.

Facts

Disciplinary measure

2. On 7 May 2008, a fact-finding investigation was initiated by the Office of Internal Oversight Services (“OIOS”) into allegations of improper use of the United Nations’ Information and Communications Technology (“ICT”) resources by the Applicant and, on 17 September 2008, he was interviewed by investigators from OIOS. By memorandum dated 12 January 2009, the Applicant was charged with misconduct (improper use of the propriety of the United Nations and failure to promptly report those violations of ST/SGB/2004/15 (Use of information and communication technology resources and data)). He filed his response to these charges on 29 January 2009.

3. From mid-2009 to the end of 2010, the Office of Staff Legal Assistance and the Respondent met and discussed the appropriate disciplinary measure to be applied in cases involving the misuse of ICT resources by staff members, including that of the Applicant, that were pending resolution by OHRM.

4. On 10 January 2011, the Applicant received a memorandum dated 3 December 2010 from the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) informing him that the Under-Secretary-General for

distributing emails containing pornographic material and failing to report such actions by other staff members. In light of these findings, the USG/DM imposed on the Applicant the disciplinary measure of a written censure, a loss of two steps in grade and a deferral, for two years, of his eligibility for salary increment. By application dated 7 April 2011, the Applicant contested the application of this disciplinary measure in front of the Dispute Tribunal. In *Austin* UNDT/2013/080, dated 22 May 2013, the Dispute Tribunal found that:

26. The Applicant, by his own recognition, sent and received the contested emails thereby breaching the applicable rules governing the use of ICT resources, as well as staff rule 110.1, resulting in the determination that the Applicant's actions amounted to misconduct. The Applicant does not contest the Organization's finding of misconduct based on his receipt and distribution of the contested emails, but rather only that not reporting the actions of a fellow staff member can not reasonably amount to misconduct.

...

42. Consequently, the Tribunal finds that there is no evidence before it that would suggest that the Respondent did not act reasonably and in a timely manner when determining the disciplinary sanction to be applied in the present case or that no consideration was given to any mitigating circumstances. ...

43. Taking the above into consideration, the Tribunal finds that the Applicant's due process rights were respected and that the disciplinary measures that were applied against him were lawful, proportional and were taken in accordance with the regulations and rules.

Consideration for permanent appointment

5. On 1 April 2011, the Executive Officer, DSS and the Chief, Human Resources Services, Learning Development and HR Services Division ("HRS/LDSD), OHRM, sent the ASG/OHRM a memorandum that had been completed by DSS and OHRM regarding their recommendation as to whether the Applicant should be offered a permanent appointment. The memorandum noted that the Applicant's two most recent electronic performance appraisals ("ePAS") ratings were "Consistently Exceeds" expectations and that in the prior two appraisals,

he had been graded as “Frequently Exceeds” expectations. The memorandum further noted that after reviewing the Applicant’s record both DSS and OHRM had determined that he had “been subject to an administrative or disciplinary measure” and that as a result he had “**NOT** met the high standards of efficiency, competence and integrity or ha[d] **NOT** demonstrated **his** suitability as an international civil servant or the granting of a permanent appointment to the [Applicant] would **NOT** be in the interests of the Organization”. In conclusion, DSS and OHRM chose to “**NOT recommend** that [the Applicant] be offered a permanent appointment, pursuant to ST/SGB/2009/10” (emphasis in original).

6. On 15 August 2011, the Chief, HRS/LDSD, informed the Chairperson, Central Review Panel (“CRB”), that they “concur[ed] with the recommendation of [DSS] not to grant [the Applicant] a permanent appointment ... based on the fact that [his] records show[ed] that a disciplinary measure has been taken against him ... we would appreciate if you could review and advise whether [the Applicant] has fully met the criteria set out in section 2 of ST/SGB/2009/10”.

7. On 1 February 2012, the Chairperson, CRB, informed the ASG/OHRM that following its review of the Applicant’s request for conversion to permanent appointment, and taking into consideration the views of DSS and OHRM, they were “of the view that [the Applicant] should not be granted a permanent appointment. The Panel note[d] that [the Applicant had] been the subject of a disciplinary measure and therefore [he] should not be considered suitable for conversion”.

8. On 29 February 2012, the ASG/OHRM informed the Applicant that pursuant to ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) she had determined not to grant the Applicant a permanent appointment. The memorandum further stated that:

... pursuant to ST/SGB/2009/10, [she] determined not to grant [the Applicant] a permanent appointment

This decision is taken after careful review of [the Applicant's] case. It takes into account all the interests of the Organization, and is based on the fact that [his] records show that a disciplinary measure has been taken against [him].

Therefore, the granting of a permanent appointment would not be in the interest of the Organization.

Procedural history

9. On 27 April 2012, the Applicant requested management evaluation of the decision not to grant him permanent appointment as a result of the 3 December 2010 imposition of a disciplinary measure. On 3 May 2012, OHRM responded to a request for comments from the Management Evaluation Unit ("MEU"). On 21 May 2012, the MEU informed the Applicant that his "due process rights in the decision process had not been violated given that the Administration conducted its review in accordance with the proper procedures and did not take into account improper considerations" and that the Secretary-General had decided to endorse the MEU's findings. The MEU's memorandum also summarized OHRM's 3 May 2012 request for comments as follows:

... OHRM referred to the Secretary-General's Bulletin on "Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009" ("ST/SGB/2009/10") and the respective "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009" (the "Guidelines").

OHRM indicated that on 1 April 2011, it received the Department of Safety and Security's ("DSS") submission concerning [the Applicant's] review for permanent appointment. OHRM further indicated that DSS did not recommend [him] for conversion to a permanent appointment because [he] did not meet the high standards of efficiency, competence and integrity. OHRM contended that it also conducted its own review and determined that [the Applicant was] not suitable for conversion to a permanent appointment in light of the provisions of Section 2 of the ST/SGB/2009/10. ...

Regarding [the Applicant's] contention about "double jeopardy", where [he] assert[s] that [he] should not be punished twice for the same misconduct, it was OHRM's opinion that not granting

a permanent appointment cannot be considered as an additional disciplinary measure because the two procedures were different in “nature and purpose”.

... OHRM further asserted that while the disciplinary measures were taken at the lowest scale of the established punishment scope of this particular incident, they constituted a disciplinary action. OHRM deemed the disciplinary action an indicator that [the Applicant’s] actions were inconsistent with the highest standard of integrity and conduct for an international civil servant.

OHRM asserted that [the Applicant’s] exemplary performance was taken into account during the review exercise and [he] met the requirements of section 2 of ST/SGB/2009/10 for high performance standards. However, [the Applicant] did not meet the requirements of high standards for conduct and integrity stipulated in the same section. OHRM submitted that the disciplinary measures were indicative of [his] failure to meet the high standards of conduct expected of [him] as a staff member.

10. The Applicant filed the present appeal on 6 June 2012 and the Respondent duly filed his reply on 3 July 2012.

11. On 7 August 2014, by Order No. 227 (NY/2014), the Tribunal instructed the parties to attend a Case Management Discussion (“CMD”) to take place on 20 August 2014. Due to the unavailability of Counsel for both parties, the CMD was rescheduled for 25 August 2014.

12. During the 25 August 2014 CMD, the Tribunal enquired with the parties as to their views on whether the facts in this case were similar or could be distinguished from the ones that led to the findings by the Dispute Tribunal in *Hermoso* UNDT/2013/130 and the Appeals Tribunal in *Santos* 2014-UNAT-415. Due to the nature of the matter, the parties requested, and the Tribunal granted them, the opportunity to make submissions with respect to the effect of these precedents in writing. The Tribunal also ordered the Respondent to indicate whether the Administration had taken any steps, following the issuance of the Dispute Tribunal’s observations in *Hermoso*: (a) to adopt legal provisions regarding the duration during which a staff member’s OSF will reflect the imposition of a disciplinary measure; (b) how long such a measure will affect future administrative

decisions; and (c) if the disciplinary measure applied on the Applicant is still reflected in his OSF.

13. On 12 September 2014, the parties duly filed their submission and informed the Tribunal that a judgment could be rendered on the papers before it. Further, the Respondent also sought leave from the Tribunal to provide it with “additional evidence from the Comparative Review Panel’s review of [the Applicant’s] case”.

14. On 17 September 2014, by Order No. 245 (NY/2014), the Respondent’s request was granted and the parties were ordered to file closing submissions by 29 September 2014. Both parties duly complied with the Tribunal’s order.

Applicant’s submissions

15. The Applicant’s principal contentions may be summarized as follows:

a. The decision to sanction the Applicant is unlawful and is currently under appeal before the Dispute Tribunal. Consequently, any decision relying on such a disciplinary measure must therefore also be unlawful and ought to be reversed;

b. The continuous renewal of the Applicant’s fixed-term appointment posterior to the misconduct “confirms that he is considered suitable to be, or better, remain an international civil servant [...] which is all that the terms of Section 2 of ST/SGB/2009/10 appear to require in order to grant a permanent appointment”. Consequently, there can be no connection between the refusal to grant a permanent appointment

d. The present case can be distinguished from the jurisprudence established in *Hermoso* UNDT/2013/130 and *Santos* 2014-UNAT-415 as, while unsuccessful, the Applicant challenged the disciplinary measure imposed on him (see *Austin* UNDT/2013/080).

Respondent's submissions

16. The Respondent's principal contentions may be summarized as follows:

a. The Applicant's claims have no merit. The Applicant and his record were given reasonable consideration in accordance with the relevant regulations and rules, including whether his qualifications, performance and conduct fully demonstrated his suitability as an international civil servant and that he met the high standards of efficiency, competence, and integrity established in the Charter;

b. The Applicant's record indicated that he had misused United Nations assets to send and receive pornography. The ASG/OHRM therefore acted reasonably in determining that his actions consisted in a substantial departure from the standards of conduct expected of a staff member and international civil servant and that he had neither demonstrated the minimum standard of conduct required for the granting of a permanent appointment nor was it in the interests of the Organization to do so;

c. The decision to continue to employ the Applicant on a fixed-term contract was lawful and reasonable. His rights have not been violated and he does not establish a factual or legal basis for his claim. The Application should therefore be dismissed.

Consideration

Applicable law

17. ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) issued on 23 June 2009 states:

Section 2

Criteria for granting permanent appointments

In accordance with staff rules 104.12 (b) (iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the highest standards of efficiency, competence and integrity established in the Charter.

Section 3

Procedure for making recommendations on permanent appointments

3.1 Every eligible staff member shall be reviewed by the department or office where he or she currently serves to ascertain whether the criteria specified in section 2 above are met. Recommendations regarding whether to grant a permanent appointment shall be submitted to the Assistant Secretary-General for Human Resources Management.

3.2 A similar review shall also be conducted by the Office of Human Resources Management or the local human resources office.

3.3 In order to facilitate the process of conversion to permanent appointment under the present bulletin, recommendations to grant a permanent appointment that have the joint support of the department or office concerned and of the Office of Human Resources Management or local human resources office shall be submitted to the Secretary-General for approval and decision in respect of D-2 staff, and to the Assistant Secretary-General for Human Resources Management for all other staff.

3.4 In the absence of joint support for conversion to permanent appointment, including cases where the department or office concerned and the Office of Human Resources Management or local human resources office both agree that the staff member should not be

18. The “Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as 30 June 2009” (“Guidelines”) provide:

Criteria for granting permanent appointments

6. The criteria for granting permanent appointments are set out in section 2 of ST/SGB/2009/10. A permanent appointment may be granted, taking into account all the interests of the Organization, to

Procedures

14. The procedures for making recommendations on conversion to permanent appointments are summarized in section 3 of ST/SGB/2009/10. In order to expedite the process, the bulletin provides for a review by the department or office concerned and the appropriate human resources office, either OHRM or the local human resources office. The recommendations are to be made in writing and supported by a reasoned explanation that indicates the basis on which the performance and conduct of the staff members were evaluated. A standard format of a memorandum to recommend or not recommend is attached.

15. The review will consist of the following: review of the staff member's records and employment history to assess whether the eligibility criteria set in section 1 of ST/SGB/2009/10 are met and review of the eligible staff member's suitability for conversion to permanent appointment, as set out in Section 2 of ST/SGB/2009/10, while taking into account all the interests of the Organization, in accordance with Section 2 of ST/SGB/2009/10.

...

17. If there is no joint positive recommendation, the appropriate human resources office will send both recommendations to the appropriate advisory body listed in section 3.5 of ST/SGB/2009/10 and inform the staff member that the recommendations in his or her case have been sent to the appropriate advisory body.

...

Referral of cases to advisory bodies and subsequent decisions

...

20. The decision by the Assistant Secretary-General for Human Resources Management or the Secretary-General after receiving advice from one of the advisory bodies mentioned above will be communicated to the appropriate human resources office, which will notify the staff member. This will be done by providing a copy of the personnel action if the decision is positive. If the decision is negative, the staff member will be informed in writing of the decision and the reasons for the decision, and will be reminded that the decision may be appealed within two months from the date of the notification of the decision in writing.

a permanent appointment was not premature, irrespective of

into account, as required, the gravity of the conduct at issue. The Applicant therefore concludes that this failure amounts to an apparent unlawfulness and fettering of discretion.

25. After the Respondent filed additional new documentary evidence relating to the CRB's review of the Applicant's case on 18 September 2014, the Applicant filed a subsequent submission stating that the CRB considered that the mere presence of a disciplinary measure in a staff member's record was a direct bar to conversion to permanent appointment, that the CRB had no information as to the nature of the conduct at issue nor when it occurred and that, therefore, it is not possible that the CRB, in line with the Guidelines, gave any weight to the disciplinary measure applied against the Applicant when considering him for conversion to permanent appointment.

26. The review of the Applicant's suitability for permanent appointment involved the following steps:

- a. On 1 April 2011, DSS submitted its recommendation to OHRM stating that, based on the fact that the Applicant's 045t685 Tw[(on 18 Septem)8.licant's

d. On 29 February 2012, the ASG/OHRM informed the Applicant that based on the fact that his records show that a disciplinary measure has been taken against him, the granting of a permanent appointment would not be in the interest of the Organization.

27. The Tribunal considers that, as results from sec. 2 of ST/SGB/2009/10 and paras. 6–9 of the Guidelines, a permanent appointment may be granted to an eligible staff member taking into account all the interests of the Organization based on a complex and mandatory determination of the following cumulative criteria:

(a) The interests of the Organization based on the operational realities of the Organization;

(b) The staff member's high standards of efficiency and competence based on a review of his/her five most recent ePAS' on record; and

(c) The staff member's suitability as an international civil servant and his/her high standards of integrity, based on his/her qualifications, performance and conduct.

28. Paragraph 7 of the Guidelines states that “in determining the interests of the Organization for the purpose of granting a permanent appointment, the operational realities of the Organization *shall* be taken into account” (emphasis added). The Tribunal finds that in the present case there is no evidence that, when determining the interests of the Organization for granting a permanent appointment to the Applicant, the operational realities of the Organization were taken into consideration. It results that the first criteria remained undetermined in the present case and the requirement from para. 7 was not respected.

29. Paragraph 8 of the Guidelines states that “[i]n determining whether the staff member has met the high standards of efficiency and competence, the most recent five performance evaluations on record of the staff member will be reviewed. When this record shows ratings of “fully successful performance” or “fully meets

performance expectations” or higher, the requirement will be met”. In the present case, the 1 April 2011 review of the Applicant’s five most recent ePAS’ covered the period 2004-2009. The Applicant’s ratings over this period were: 2004-2005–fully successful; 2005-2006–frequently exceeds; 2006-2007–frequently exceeds; 2007-2008–consistently exceeds and 2008-2009–consis

32. In accordance with para. 14 of the Guidelines titled “Procedures”, “recommendations are to be made in writing and supported by a reasoned explanation that indicates the basis on which the performance and conduct of the staff members were evaluated”.

33.

The recommendations from DSS, OHRM and the CRB, as well as the decision taken by the ASG/OHRM, referred only in general terms to the fact that the Applicant had been subject to a disciplinary measure without including any reasons thereto.

37. The Tribunal finds that during the entire process of considering the Applicant's suitability for permanent appointment, the Administration failed to apply its own Guidelines. As discussed, these Guidelines, require that a mandatory review of the date and gravity of the disciplinary measure applied to the Applicant be conducted and that any resulting decision include a reasoned explanation containing the basis on which the performance and the conduct of the staff member were evaluated, neither of which took place in the present instant.

38. The Tribunal finds that, when conducting the final stage of the review process, the CRB, whose role is crucial in advising the ASG/OHRM, did not receive details related to the date and type of the measure applied to the Applicant. Rather, the documents provided to the CRB only reflected the existence of "an administrative or disciplinary measure". Therefore, the CRB's review was conducted in the absence of elements that were essential in determining the Applicant's suitability as an international civil servant and whether he met high standard of integrity for granting the conversion to permanent appointment, namely the date and gravity of the disciplinary measure applied to him.

39. The Tribunal also finds that the CRB was responsible for reviewing

suitability for conversion to permanent appointment based exclusively on his qualifications, performance and conduct as a result of the specific disciplinary measure applied to him, as well as its date and gravity. It results that the determination of the last criteria, namely the Applicant's suitability as an international civil servant and of his high standard of integrity was conducted improperly and is unlawful.

40. In *Malmström* 2013-UNAT-357, the Appeals Tribunal found that

66. ... staff members ... are entitled to individual, "full and fair" (in the lexicon of promotion cases) consideration of their suitability for conversion to permanent appointment. The established procedures, as well the principles of international administrative law, require no less. This principle has been recognized in the jurisprudence of the Appeal Tribunal.

67. [t]he ASG/OHRM decision as communicated to the staff members, provides no hint that their candidature for permanent appointment was reviewed by OHRM against their qualifications, performance or conduct; their proven or not proven, as the case may be, suitability as international civil servants; or the highest standards of efficiency, competence and integrity, as established in the United Nations Charter. Each candidate for permanent appointment was lawfully entitled to an individual and a considered assessment on the above basis before a permanent appointment could be granted or denied.

...

69. The approach adopted by the ASG/OHRM offended against the provision in former staff rule 104.12(b)(iii) that staff members would "be given every reasonable consideration for a permanent appointment". This rule did no more than give effect to the wish expressed by the General Assembly as far back as 1982 in Resolution 37/126 that "staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment"

...

70. The right of the staff members ... is not to the granting of a permanent appointment but, rather to be fairly, properly, and transparently *considered* for permanent appointment. ...

71. Accordingly the matter must be remanded.

documented process which is to be completed within 90 days of the date of

criteria.

5.6 If a continuing appointment is granted, it shall be effective on the date the decision of granting such appointment to the staff member is made.

48. Therefore, the Tribunal observes that sec. 2.1(f) (Eligibility) of ST/SGB/2011/9 (Continuing appointments), adopted on 18 October 2011, states that in order for a staff member to be eligible for consideration for the granting of a continuing appointment, he/she must not have been subject to any disciplinary measure during the five years prior to them being considered for the granting of a continuing appointment.

49. ST/AI/2012/3 (Administration of continuing appointments) dated 14 August 2012 states with regard to disciplinary measures that:

2.23 In accordance with section 2.1 (f) of ST/SGB/2011/9 a staff member must not have been subject to any disciplinary measure during the five years preceding the eligibility date.

2.24 A staff member shall not be assessed ineligible for the granting of a continuing appointment based on administrative measures such as a reprimand, pursuant to staff rule 10.2(b).

50. The Tribunal observes that the above provisions are not applicable in the present case as they apply exclusively to staff members being considered for continuing appointments and not permanent ones. These provisions do not apply to other areas of a staff member's career and cannot be considered as representing a distinct procedure with regard to a staff member's disciplinary record.

51. The Tribunal further observes that, in light of the procedure which permits a yearly ranking of eligible staff members based on which they can be granted continuous appointment, requiring a five-year period of eligibility for granting such benefit appears to be reasonable. However, it is excessive to indiscriminately apply such an exclusionary time-period with regard to the effects of a staff member's disciplinary record on his current and future terms of appointment.

52. Articles 1.3 and 1.4 of the Charter states that the United Nations is the center

for harmonizing the actions of nations in the attainment of, *inter alia*, achieving international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and

