UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2014-UNAT-415

Santos

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Luis María Simón Judge Rosalyn Chapman
Case No.:	2013-466
Date:	2 April 2014
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	Vinita Ullal, Esq.
Counsel for Appellant/Respondent:	Stéphanie Cartier

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/038, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 28 February 2013 in the case of *Santos v. Secretary-General of the United Nations*. The Secretary-General appealed on 29 April 2013 and Mr. Roderick Papa Santos answered on 26 June 2013.

Facts and Procedure

2. The following findings by the UNDT are uncontested:[1]

> ... On 14 June 2011, the Applicant filed his application with the Dispute Tribunal claiming, firstly, that he was wrongfully accused of sexual harassment in 2007 and had already been subject to disciplinar[y] measures for that and, secondly, that after 11 years of service and very good electronic performance appraisal ("e-PAS") reports these disciplinary measure[s] formed the basis of a denial of permanent appointment in 2010.
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> ... The Respondent's reply, dated 15 July 2011, denies the claims stating that the allegations of sexual harassment had been established after a proper investigation, that the disciplinary measures were appropriate and proportionate and that the Applicant had agreed to the imposition of these disciplinary measures. Furthermore, the disciplinary measures were properly taken into account in determining whether or not the Applicant was suitable for conversion to permanent appointment.
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> ...
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> ... On 26 November 2007, Ms. Jan Beagle, then Assistant Secretary-General for Human Resources Management ("ASG/OHRM"), informed the Applicant, in writing, that she had received three complaints of sexual harassment against him and that, in accordance with paragraph 9 of ST/AI/379 (Procedures for dealing with sexual harassment) applicable at the time, she had decided to appoint a panel of two officials to investigate the allegations. Paragraph 2 of that letter informed the Applicant that, in the event that it was decided to pursue these complaints as a disciplinary matter, he would receive formal allegations of misconduct and a copy of the documentary evidence against him. He would also be provided with an opportunity to respond formally in writing and to have the assistance of counsel in accordance with paras. 6 and 7 [of] ST/AI/371 (Revised Disciplinary measures and procedures).

[1] Judgment No. UNDT/2013/038, paras. 1, 2, 4-11, 14, 16-19, 21-28.

... The investigation panel concluded its investigation and sent a report dated 14 April 2008 to OHRM. Paragraph 6 of the executive summary of the investigation report describes the Applicant's conduct in the following terms:

> ... while the Applicant was not reportedly aggressive in manner, never physically touching any of the complainants and appeared naive, the Panel felt that his behaviour was somewhat unusual in his pursuit of courtship of the plaintiffs. The cumulative effect of the Applicant's pursuit of courtship was one of unprofessional behaviour.

... Further, at para. 10 of the report, the panel states:

> This cumulative effect of [the Applicant's] behaviour also created fear which was experienced by each complainant and which impacted their professional ability to work effectively and efficiently although they were never harassed physically by [the Applicant], one complainant expressed being afraid to work late at night, and afraid that he would follow her in the corridors during the breaks. Their fear of [the Applicant] is based on his behaviour which was not predictable.

... The executive summary ends, at para. 14, by making reference to appropriate counseling and psychiatric help and recording the fact that the psychiatrist advised the Applicant to be careful in the way he interacted with females especially at work, since some may misinterpret his intentions and accuse him of sexual harassment.

... In the conclusions of the report, the panel stated, at para. 36, that it had (emphasis added):

> ... reviewed the evidence and verified the facts of this alleged sexual harassment. While [the Applicant] never physically touched the complainants, *the Panel finds that [the Applicant's] unusual and repeated patterns of behaviour amount to highly inappropriate and unprofessional activity that is unsuitable in the workplace*.

... On 19 May 2008, OHRM wrote to the Applicant outlining the allegations made against him and referring to the report of the investigation panel, which included the allegations, the Applicant's response to the panel, and the panel's findings, which were expressed as follows:

> ... With regard to the alleged incidents, the panel made the following specific findings:
>
> a. The panel found that [person 1, name redacted] received numerous unwelcome emails and repetitive personal phone calls, (including anonymous phone calls) from [the Applicant] between June and October 2006, despite having clearly asked [him] to stop contacting her in relation to any non work-related matter. The panel further found that the escalation in the content of the emails (in particular, the email dated 2 October 2006) was

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] to stop calling her for personal matters.

e. Finally, the panel found that [the Applicant] sent [person 4] flowers at home on 21 April 2007 with a note wishing her a pleasant weekend, but that [his] name and address did not appear on the parcel. The panel did not accept that the shipping company had omitted [his] name and address from the parcel, and found [his] explanation to be unconvincing.

... In summary, the panel found that [the Applicant] did not deny the facts stated by the three complainants, but that rather, [he] sought to justify [his] behaviour and claimed that [his] intentions had been misinterpreted. The panel noted [his] explanation that [he] was simply expressing [his] feelings for each of the complainants and trying to determine whether they were interested in [him], and whether they were married (in which case [he] did

> not intend to pursue [his] advances[)]. However, the investigation panel specifically noted:
>
> "In each case, the complainants told [the Applicant] that they considered his gestures and advances to be unwelcome and unwarranted. Each complainant indicated that she had never given him any indication to the contrary. These seemingly innocent experiences, along with an apparent resistance and/or simple non-comprehension by [the Applicant] that the complainants were each individually not interested, perpetuated an unprofessional atmosphere in the workplace."

... The Applicant was informed that, on the basis of the investigation report and the supporting documentation, he was being charged with sexual harassment which, if established, would constitute a violation of the Secretary-General's policy on harassment promulgated by ST/SGB/2008/5 (Prohibition of discrimination and harassment including sexual harassment and abuse of authority). He was also informed that, if established, his behaviour would constitute a violation of former staff rule 101.2(d) (applicable at the time), which stated that:

> Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.

... The Applicant was advised that he could obtain the assistance of a member of the then panel of counsel. Up to that moment in time, he was on special leave with pay. Upon being charged with the disciplinary offence, his status was converted to suspension with pay for an initial period of three months or until the conclusion of the proceedings whichever was earlier.

...

... ...[P]ara. 37 of the investigation report states:

> Against this background and the verification of fact concerning sexual harassment, and taking due note of both sides' accounts, the Panel feels that the administration should:
>
> A) Address the legitimate concerns expressed by the three complainants reflecting their feelings of safety and risks of retaliation as the defendant is in possession of personal information such as home addresses and personal phones numbers;
>
> B) Ascertain, as also indicated in the report of the former Chief of Interpretation Service and immediate supervisor of [the Applicant], [person 5], to [the Department of Safety and Security] on 30 April 2007, if there has been similar cases over time involving [the Applicant] in the said division, and if so provide guarantees to those among the staff who would like to come forward to do so;

> C) Take all necessary and immediate measures to re-establish a harmonious, stress-free working environment in that Service, taking also due note of concerns expressed by [person 5] in the above-mentioned report and a subsequent email dated 9 May 2007 to [name redacted, person 6].

...

... By an email dated 17 January 2009 from Ms. Michelle Phippard, Legal Officer, the Administrative Law Unit, OHRM ("ALU/OHRM"), to Mr. Leandro Lachica, the Applicant's legal counsel at the time, the issue relating to a possible resolution was explored. He was advised that, under the Organization's procedures for dealing with disciplinary matters, a case must be referred to a Joint Disciplinary Committee ("JDC") for advice before a disciplinary measure was imposed. However, the staff member and the Administration could agree on a disciplinary measure to be imposed in which event the staff member would be waiving his right to have the case heard by the JDC. The purpose of the letter was to explore the possibility of an expedited resolution that would be afforded by a waiver of the Applicant's right to appear before the JDC.

... Mr. Lachica replied by email on 28 January 2009 indicating that the Applicant was not admitting the allegations of sexual harassment, but was nevertheless prepared to engage in without prejudice discussions to resolve this matter and to return to work.

... A subsequent e-mail sent by Ms. Phippard on 12 February 2009 to Mr. Lachica indicated the nature of the agreed disciplinary measures, which the Administration was prepared to impose by consent, namely "a demotion with no possibility of promotion for two years, and that [the Applicant] receive a written censure". Ms. Phippard also indicated that the Applicant would be "required to undergo counseling and would be reassigned so that he does not have access to colleagues' personal information".

... According to email dated 25 February 2009 from Ms. Phippard to Mr. Lachica, the Applicant apparently advanced a counter proposal which, following consultations with the office of the Deputy Secretary-General, the Administration was unable to accept. The email included the following (emphasis added):

> In this regard we would note the serious view taken by the Secretary-General of incidences of sexual and workplace harassment ... *the recent practice ... has been to separate staff members who engage in such conduct from service.* The lesser disciplinary measure proposed in [the Applicant's case] has been in recognition of certain mitigating factors in his case, including his prior record of service.
>
> In light of the above, we would request that [the Applicant] reconsider his position on the proposed penalty. In the event he is not prepared to do so,

> 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 promotion for two years;
>
> (b) a written censure, to be placed on [his] Official Status file;
>
> (c) attendance at counseling with the Staff Counselor's Office in respect of the alleged conduct;
>
> (d) reassignment to the Publishing Section, Department for General Assembly and Conference Management ["DGACM"], commencing upon [his] return to work in the first week of May, 2009.

... Whilst these negotiations were taking place, consideration was being given to offering eligible staff members conversion to permanent appointments. These discussions led to the issuance of ST/SGB/2009/10, ...

... The procedure for consideration for permanent appointment in this case began with a memorandum dated 28 April 2010 from the Executive Office of DGACM to the ASG/OHRM. In this memorandum, DGACM indicated that it did not recommend the Applicant for a permanent appointment because DGACM indicated that he had had a case with ALU/OHRM and that, in the circumstances, he did not meet the high standards of efficiency, competence and integrity. It is clear that when the staff member's parent department does not recommend to the ASG/OHRM that the appointment of the staff member should be made permanent, it would be rare for such a recommendation not to be followed.

... In an email dated 5 April 2010, OHRM requested advice on the matter from ALU/OHRM (copied to five other United Nations officials). By email of 22 May 2010, ALU/OHRM's response was that the Applicant had received an agreed upon demotion for sexual harassment after waiver of a JDC in April 2009 and did not appeal since the sanction was agreed to by him. However, the ALU/OHRM official noted that she did not have the guidelines with her at the time and added that "it would appear that the imposition of such a serious sanction so recently ... would be grounds for OHRM not to recommend his conversion". The email ended by asking all recipients to contact ALU/OHRM if they wished to discuss the matter. There is no evidence that OHRM subsequently considered or investigated the matter of the Applicant's disciplinary sanction any further. They did not contact ALU/OHRM for any further guidance.

> ... On 26 June 2010, OHRM sent the recommendation not to convert the Applicant's appointment to permanent status to the Chairperson of the Central Review Board ("CRB"). ... (emphasis added [by the UNDT]):
>
> > ... Attached is a recommendation for the conversion of the contractual status of [the Applicant] to permanent.
> >
> > ... Taking into account the provisions of staff rule 13[.]4 and section 2 of ST/SGB/2009/10, Section D of the Human Resources Services [sic] has decided not to recommend [the Applicant] for permanent appointment in the interest of the Organization.
> >
> > ... This decision is made on the basis of the gravity of [the Applicant's] receipt and agreement to be demoted for *sexual harassment* after his waiver of the JDC in April 2009 ...
> >
> > ... Kindly note that [DGACM] informed us (OHRM) that they were unable to make an informed decision to offer [the Applicant] a permanent appointment based on the seriousness of his ALU case.
> >
> > ... In accordance with section 3.4 of ST/SGB/2009/10, we would appreciate if you could review and confirm that [the Applicant] has not fully met the criteria set out in section 2 of ST/SGB/2009/10.
>
> ... [T]he CRB was informed that the lack of a positive recommendation was "on the basis of the gravity of the Applicant's receipt and agreement to be demoted for sexual harassment." In the circumstances, the CRB concurred with the recommendation not to offer permanent appointment to the Applicant.
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> ... By letter dated 21 January 2011, the ASG/OHRM notified the Applicant that his fixed-term appointment would not be converted to a permanent appointment. The reason given in the 21 January 2011 letter was incorrect in that it stated that the non-conversion was based upon unsatisfactory performance. This error was subsequently corrected by letter dated 26 January 2011 in which the ASG/OHRM made it clear that the decision taken was in "the interests of the Organization" and was "based on the fact that [the Applicant's] records showed that a disciplinary/administrative measure had been taken against [him]". The Tribunal accepts that no adverse inference is to be drawn from this administrative error.
>
> ... The Applicant requested a management evaluation of the administrative decision not to grant him a permanent appointment on 17 January 2011 and received a response on 24 March 2011.

3. On 28 February 2013, the UNDT issued Judgment No. UNDT/2013/038. The UNDT found that in 2008, OHRM had mischaracterized Mr. Santos' offence as "sexual harassment" rather than "harassment" in the previous disciplinary proceedings and had improperly relied on

this mischaracterization to deny him the conversion to a permanent appointment. The UNDT further found that there was a breach of the Administration's duty to fully inform Mr. Santos, "when he was induced into agreeing the disciplinary measures in that they did not mention the important adverse consequence that it would affect his prospect of being granted a permanent appointment".[2] Therefore, the UNDT ordered that the decision to deny Mr. Santos a permanent appointment be rescinded; that any consequential loss in salary or other benefits, if any, be made good by the Secretary-General. Furthermore, the UNDT ordered non-pecuniary damages in the amount of USD 10,000 for the distress suffered.

4. The Secretary-General appeals the UNDT Judgment.

Submissions

The Secretary-General's Appeal

5. The Secretary-General submits that the UNDT exceeded its competence by reviewing the disciplinary measures against Mr. Santos in 2009. The contested administrative decision did not relate to the disciplinary measures imposed on Mr. Santos in 2009, but was, rather, the decision of the ASG/OHRM not to grant him a permanent appointment in 2011. Since the disciplinary process had been finalized in 2009, it was thus not open to review by the UNDT. Furthermore, Mr. Santos is estopped from submitting claims in relation to the disciplinary measures since he voluntarily agreed to such measures and waived his right to have his case referred to the JDC. Even if the UNDT had competence to review the disciplinary measures Mr. Santos had agreed to with the assistance of counsel, his claim would be time-barred.

6. The Secretary-General contends that the UNDT erred in law in holding that the Administration had a duty to inform Mr. Santos of the consequences of agreeing to disciplinary sanctions. This ruling is inconsistent with the jurisprudence of the Appeals Tribunal. Mr. Santos was represented by counsel in 2009 and was therefore in the best possible position to make a free and fully informed decision. Furthermore, in considering Mr. Santos for a permanent appointment, it was reasonable for the Administration to consider the four agreed disciplinary measures arising from multiple instances of harassment.

[2] Impugned Judgment, para. 54.

7. The Secretary-General argues that the UNDT erred in rescinding the contested decision and ordering compensation when Mr. Santos had no foreseeable chance of being granted a permanent appointment. The disciplinary measures arose from incidents of harassment, which generated fear and anxiety in Mr. Santos' colleagues and which were incompatible with the highest standards of conduct required of international civil servants.

8. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Mr. Santos' Answer

9. Mr. Santos contends that the UNDT did not exceed its competence by reviewing the disciplinary measures that had been imposed on him. It was in fact the Administration that revisited the disciplinary measures by using them as a ground to deny him a permanent appointment. The UNDT had therefore competence to review both decisions. In support of his contention, Mr. Santos points to several cases where the UNDT reviewed and overturned prior administrative procedures and where the Appeals Tribunal accepted the UNDT findings.

10. Mr. Santos submits that the UNDT did not err in law in holding that the Administration had a duty to inform Mr. Santos of the consequences of agreeing to disciplinary actions. While Mr. Santos and his counsel were aware of the law, they were not aware of the Administration's internal procedures. Mr. Santos submits that he was coerced into signing the disciplinary agreement and that he would have never signed it if he had known of the future consequences of so doing.

11. Mr. Santos contends that, contrary to the Secretary-General's contention, his request is not time-barred since, once notified of the non-conversion of his appointment, he filed his case within the applicable time limits.

12. Mr. Santos submits that the UNDT did not err in ordering the rescission of the contested decision and in awarding compensation. Mr. Santos had been wrongly accused of sexual harassment and had been denied his due process rights. The sanctions imposed on him were disproportionate.

13. He requests that the UNDT Judgment be upheld in its entirety.

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 post, should be duly taken into account."

19. Section 2 of ST/SGB/2009/10 provides:

> 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 they

> 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 2008[3] 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. This letter read as follows:

> By memorandum dated 28 May 2008, you were charged with misconduct on the basis of an investigation report dated 15 April 2008, prepared by a panel established by OHRM pursuant to ST/AI/379, and supporting documentation. You were afforded the opportunity to comment on the charges, and did so by memorandum dated 25 June 2008.
>
> Following discussions with your counsel..., you have indicated that you would be willing to waive your right to have your case referred to a Joint Disciplinary Committee in return for the imposition of agreed disciplinary measures, formulated after consideration of the entire dossier in this matter. Specifically, you have agreed to:
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> (a) demotion of one grade, with no possibility of promotion for two years;
>
> (b) a written censure, to be placed on your Official Status file;
>
> (c) attendance at counseling with the Staff Counsellor's Office in respect of the alleged conduct;
>
> (d) reassignment to the Publishing Section, DGACM, commencing upon your return to work in the first week of May, 2009.

[3] Following the investigation by a panel pursuant to ST/AI/379 of three complaints of sexual harassment made against Mr. Santos.

> The Secretary General has decided to approve the disposition of your case in this manner. The necessary steps will now be taken to implement these measures, and your case will be closed.
>
> This letter serves as a letter of censure of the misconduct detailed in the charges and investigation report. Please note that any repetition of the conduct for which you are being censured would lead to sterner measures. A copy of this letter will be placed on your Official Status File.

21. Former Staff Rule 110.4(b) provided the legal basis for the Administration and Mr. Santos to enter into an agreement on the disciplinary sanction to be applied by waiving the referral of the case to the JDC. That Rule provided as follows:

> No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate, except that no advice shall be required
>
> (i) If referral to the Joint Disciplinary Committee is waived by mutual agreement of the staff member concerned and the Secretary General[.]

The scope of the case before the Dispute Tribunal

22. At the outset of its "consideration" of Mr. Santos' application, the Dispute Tribunal stated:

> Although [Mr. Santos] was still aggrieved by what he regarded as a wrongful accusation of sexual harassment, it was accepted during the [case management discussion] on 8 November 2012 that the pursuit of this contention was permissible only to the extent that the charges and findings in relation to sexual harassment formed the necessary and, it would appear, the sole reason for denying him a permanent appointment. In the circumstances, it was agreed that the principal issue in relation to which a decision was required from the Tribunal was the decision not to convert his fixed-term appointment into a permanent appointment because of the disciplinary measures recorded on his official status file.

23. In this appeal, it is argued on behalf of the Secretary-General that contrary to its own preliminary ruling on the scope of the case before it, the Dispute Tribunal did not limit itself to determining whether the decision not to grant a permanent appointment could be lawfully based on the existence of disciplinary measures against Mr. Santos. The Secretary General contends that the UNDT embarked on a fully-fledged review of the facts underlying the disciplinary

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 time he had the benefit of counsel's advice), the UNDT was obliged to record due deference to the agreement reached between the Secretary-General and Mr. Santos in April 2009.

29. Accordingly, we are satisfied that in reopening the referred to disciplinary matter and purporting to make findings of fact in respect thereof, the UNDT exceeded its competence and the Secretary-General's appeal on this ground is upheld.

Was the Administration's discretion lawfully exercised when it declined to convert Mr. Santos' fixed-term contract?

30. It must of course be emphasized that the mere existence of administrative/disciplinary sanctions on a staff member's official status file is not a charter for the Administration to refuse conversion, as the decision not to grant a permanent appointment is always subject to judicial review in cases where procedural or substantive unfairness is alleged by a staff member. Thus, the scope of the Dispute Tribunal's judicial review in the present case was an inquiry into the manner of the Administration's consideration of Mr. Santos' application for conversion of his fixed-term contract. In *Sanwidi*, we have stated that "judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision".[5]

[4] *See Ivanov v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-378; *Roig v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-368;
[5] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

31. In *Malmström et al.,* the Appeals Tribunal held that applicants for conversion to permanent appointment

> 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 as the principles of international administrative law, require no less. This principle has been recognized in the jurisprudence of the Appeals Tribunal.[6]

32. We have also stated that the right of a staff member "is not to the granting of a permanent appointment but, rather, to be fairly, properly, and transparently *considered* for permanent appointment".[7]

33. In reviewing administrative decisions regarding appointments and promotions (and, by analogy, applications for conversion), the UNDT examines the following:

1. Whether the procedure as laid down in the staff regulations and rules was followed; and

2. Whether the staff member was given fair and adequate consideration.

34. In the present case therefore, the scope of judicial review to be undertaken by the UNDT was to ascertain, against established legal norms, whether the Secretary-General's refusal to grant Mr. Santos a permanent appointment because of a prior disciplinary issue met the test of procedural fairness and to inquire whether the decision was free from arbitrariness, capriciousness or discriminatory conduct.

35. It is recognized by the jurisprudence of this Tribunal that the Secretary-General has broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own

[6] *Malmström et al. v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-357, para. 66, citing *Abbassi v. Secretary-General of the United Nations,* Judgment No. 2011-UNAT-110; *Charles v. Secretary-General of the United Nations,* Judgment No. 2012-UNAT-242; *Dannan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-340.
[7] *Malmström et al. v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-357, para. 70,

decision with that of the Secretary-General regarding the outcome of a selection or, by analogy, a conversion process. [8]

36. In as much as it was not open to Mr. Santos, in his 2011 application before the UNDT, to seek to challenge a course of action agreed on 20 April 2009, similarly it would not be open to the Administration, when reviewing Mr. Santos' application for conversion, to in any way re-categorize or embellish the nature of the disciplinary measures imposed on him by agreement in April 2009. Thus, the Dispute Tribunal's function was to review the information the Administration relied on in the course of 2010/2011 to deny Mr. Santos' conversion application in order that that Tribunal would have an informed view of whether or not the Administration had properly exercised its discretion.

37. Consideration of Mr. Santos' application for conversion began with a memorandum of 28 April 2010, which outlined that he "has NOT met the high standards of efficiency, competence and integrity or has NOT demonstrated ... suitability as an international civil servant or the granting of a permanent appointment to the staff member would NOT be in the interests of the Organization". In an email of 22 May 2010, sent to OHRM from its Administrative Law Unit (ALU), OHRM was advised as follows:

> With respect to Mr. Santos, he received an agreed upon demotion for sexual harassment after waiver of a JDC in April 2009. He did not appeal (the sanction was, as I mentioned, agreed to by him). I do not have the SGB/guidelines with me at the moment, but it would appear to me that the imposition of such a serious sanction so recently and for [sexual harassment] would be grounds for OHRM not to recommend his conversion.

38. On 26 June 2010, OHRM sent its recommendation not to convert Mr. Santos' fixed-term contract to the Chairperson of the Central Review Panel. That recommendation read as follows:

> ... Taking into account the provisions of staff rule 13.4 and section 2 of ST/SGB/2009/10, Section D of the Human Resources Services has decided not to recommend Mr. Santos for a permanent appointment in the interest of the Organization.

[8] *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, quoting *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216 and *Sanwidi v. Secretary-General of the United Nation*s, Judgment No. 2010-UNAT-084.

> ... This decision is made on the basis of the gravity of Mr. Santos' receipt and agreement to be demoted for sexual harassment after his waiver of the JDC in April 2009 ...
>
> ... Kindly note that the Department for General Assembly and Conference Management informed us (OHRM) that they were unable to make an informed decision to offer Mr. Santos a permanent appointment based on the seriousness of his ALU case.
>
> ... In accordance with section 3.4 of ST/SGB/2009/10, we would appreciate if you could review and confirm that Mr. Santos has not fully met the criteria set out in section 2 of ST/SGB/2009/10.

39. The aforesaid e-mails comprised part of the decision-making process that led to the communication of 26 January 2011 to Mr. Santos informing him that he was not getting a permanent contract because "a disciplinary/administrative measure [had] been taken against [him]". The Appeals Tribunal is satisfied that the contents of the aforesaid emails fairly reflected what had been agreed between Mr. Santos and the Administration in the course of the 2009 disciplinary process as recorded in the letter of 20 April 2009, already referred to herein. More particularly, that letter, which was placed on Mr. Santos' Official Status File, "serve[d] as a letter of censure in respect of the misconduct detailed in the charges and investigation report".

40. Thus, we do not find that the reference in the 26 June 2010 communication to Mr. Santos having been "demoted for sexual harassment" would of itself be sufficient to impugn the discretion vested in the Administration when considering applications for conversion under ST/SGB/2009/10.

41. In considering Mr. Santos' suitability for a permanent position, the Administration was entitled to have regard to the fact that misconduct was recorded in his official status file and that that misconduct merited a series of sanctions by way of a disciplinary measure. We find nothing to suggest that the discretion vested in the Administration pursuant to paragraph 9 of the Guidelines, there for the purpose of ensuring that the aspirations of section 2 of the ST/SGB/2009/10 were achieved, was unfairly or capriciously exercised, given Mr. Santos' recorded misconduct and the proximity of that misconduct and the disciplinary measures imposed therefor to his application for conversion to a permanent appointment.

Did the UNDT err on a question of law in holding that the Administration had a duty to inform Mr. Santos of the consequences of agreeing to a disciplinary sanction?

42. The Secretary-General submits that the Dispute Tribunal did not provide any legal basis to support its finding "[p]ursuant to the implied requirement of good faith and fair dealing between the parties to an agreement"[9] that the Administration had an affirmative duty to inform Mr. Santos of any negative consequences that could possibly stem from the existence of disciplinary measures against him.

43. The question to be decided here is whether, prior to 20 April 2009, the Administration was obliged to advise Mr. Santos that his agreeing to the imposition of certain sanctions would have a negative impact on any application he might make for advancement within the Organization, on the grounds that he might be deemed not to have met the high standards of efficiency, competency and integrity required for advancement, including conversion to a permanent appointment.

44. The obligation on the Administration in the course of the disciplinary process involving Mr. Santos between 2007 and April 2009 was to ensure that that process was conducted in accordance with the relevant Staff Regulations and Rules and in accordance with the requirements of procedural fairness and due process, including Mr. Santos' entitlement to counsel, which he was afforded and whose advice and guidance enabled him to make a fully informed decision as to how he would meet the disciplinary process invoked against him. Following upon Mr. Santos' agreement to waive a JDC review, in return for the agreed disciplinary sanctions already referred to elsewhere in this Judgment, it cannot be said that Mr. Santos was unaware of possible adverse consequences on his career within the Organization since the agreed-to disciplinary measures themselves included negative consequences for the immediate future, including Mr. Santos' demotion by one grade, a letter of censure on his file and no possibility of promotion for two years. We do not envisage any situation whereby the Secretary-General, when pursuant to Staff Rule 110.4(b)(i) engaging with a staff member who is legally represented, would be obliged to inform Mr. Santos about future adverse consequences beyond those which were the subject of the agreement reached on 20 April 2009. Moreover, we are not persuaded that there is any merit in the contention that there was an obligation on the Secretary-General to warn or otherwise alert Mr. Santos that by agreeing to the imposition of sanctions he could thereby be disbarring himself from consideration for a permanent appointment, especially in circumstances where ST/SGB/2009/10 did not come into force until after Mr. Santos had agreed to the disciplinary measures in 2009. In holding otherwise, the UNDT erred in law and the appeal on this ground is upheld.

[9] Impugned Judgment, para. 48.

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)	*(Signed)*	*(Signed)*
Judge Faherty, Presiding	Judge Simón	Judge Chapman

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

(Signed)

Weicheng Lin, Registrar