UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/050
Judgment No.: UNDT/2013/038
Date: 28 February 2013
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

SANTOS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Vinita Ullal, Esq.

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

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 disciplinarily measures for that and, secondly, that after 11 years of service and very good electronic performance appraisal ("e-PAS") reports these disciplinary measure formed the basis of a denial of permanent appointment in 2010.

2. 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.

3. The Tribunal observes that the claim regarding the decision to impose the disciplinary measures was filed more than three years after the event. In the circumstances, the only claim being receivable by the Tribunal, pursuant to art. 8.4 of the Statute of the Dispute Tribunal, is that concerning the Applicant being denied a permanent appointment. This decision was based on the disciplinary measures, which had been recorded on his files. Accordingly, in order to assess the lawfulness of the decision to deny permanent appointment, the Tribunal must also consider the propriety of the decision to impose disciplinary measures as factual background for the impugned decision.

Findings of fact

4. 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 or ST/AI/371 (Revised Disciplinary measures and procedures).

5. 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.

6. 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.

7. 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.

8. 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*.

9. 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."

10. 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.

11. 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.

12. It is important to note that para. 15 of OHRM's letter is not strictly consonant with the findings in para. 36 of the investigation report, dated 14 April 2008. It is therefore necessary to record both. Paragraph 15 of the letter states that:

> In summary, *the panel found that the allegations of sexual harassment against [the Applicant] were substantiated by the available evidence*. While [the Applicant] did not physically touch the complainants, the panel found that [his] "unusual and repeated patterns of behaviour amount[ed] to highly inappropriate and unprofessional activity that [was] unsuitable in the workplace." [Emphasis added]

13. Whereas para. 36 of the investigation report states that:

> [The investigation panel] *has 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 behavior amount to highly inappropriate and unprofessional activity that is unsuitable in the workplace*. [Emphasis added]

14. The subsequent recommendation made by the investigation panel is significant as an aid to understanding and interpreting the panel's findings in para. 36 in that para. 37 of the investigation report states that:

> 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].

15. It is difficult to discern the correct meaning to be attached to the reference to verification of the facts at paras. 36 and 37 of the investigation report. However, an examination of the investigation panel's recommendations would appear to favour the interpretation that "verified" and "verification" mean no more than that the panel

examined the allegations for determining their factual accuracy and not to the conclusion to be drawn therefrom. The last three and a half lines of para. 36 of the report is a clear statement of the panel's findings that the Applicant's conduct constituted "inappropriate and unprofessional activities". This is significantly and materially different to a finding of sexual harassment.

16. 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.

17. 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.

18. 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".

19. 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.

20. It should be noted that, in the course of this email exchange, apart from a reference to there being no possibility of promotion for two years, no mention was made by the Administration that such sanction, if agreed to by the Applicant, would affect, or might possibly affect, the prospect of him being granted a permanent appointment. This particular failure on the part of the Administration together with the fundamental error of categorizing the panel's findings as "sexual harassment" raises a question as to whether there had been a due process breach of the requirement of good faith and fair dealing during these negotiations.

21. 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 [the Applicant's] 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 [the Applicant's] return to work in the first week of May, 2009.

22. 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 contents of which ought reasonably to have been in the minds of OHRM when it offered the Applicant the opportunity of a waiver of his right to go to the JDC.

23. 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.

24. 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.

25. 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"). It is instructive that the referral is in the following terms (emphasis added):

> … 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.

26. It should be noted that the 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.

27. 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.

28. 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.

29. At a case management discussion ("CMD") on 8 November 2012, the Tribunal discussed with the parties the issues in the case as well as its future conduct. The Applicant was present and was clearly distressed. The Tribunal noted that there was no evidence of any repetition of the conduct in question and it seemed clear that the advice and counseling, which the Applicant received, had its desired effect. The Applicant had very good e-PAS reports and was well regarded by his supervisors and colleagues with whom he now worked. In all the circumstances, the Tribunal considered it appropriate to explore an alternative resolution of the dispute. By Order No. 226 (NY/2012) dated 9 November 2012, the parties were encouraged to consider the option of a referral to the mediation services of the Ombudsman. In the event, the parties, having considered the matter, opted for a judicial determination on the documents.

Applicant's submissions

30. The Applicant's contentions may be summarized as follows:

a. The administrative decision not to grant the Applicant a permanent appointment is challenged on the grounds that he was wrongly charged with sexual harassment; that the disciplinary measures were arbitrary and made on a presumption of guilt rather than innocence; and that, having complied with all the disciplinary measures, he was now being punished again in breach of natural justice and international standards for administrative efficiency and fairness;

b. The finding of sexual harassment in so far as it states that he was guilty of sexual harassment is wrong in that the intention behind his actions was never explored. The Applicant's advances towards his female colleagues were with a view to courtship in the hope of establishing a long-lasting relationship with colleagues of a similar age as himself and sharing in common a Spanish speaking background. His approaches were exploratory in nature in that he was seeing if there was mutual interest and, as soon as he was informed that there was not, he ceased his advances. No allowance was made for the Applicant's Filipino background where the actions of a suitor pursuing a potential relationship would have been considered as normal;

c. Having accepted the disciplinary sanctions and having served, as it were, his sentence, it was wrong, in principle, for the Applicant to be punished again for the same offence by a denial of a permanent appointment (the rule against double jeopardy).

Respondent's submissions

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

a. Since the disciplinary measures in question were imposed with effect from 20 April 2009, the Applicant failed to challenge the disciplinary measures within the period of 90 days as required;

b. In the circumstances, the Applicant is time-barred from pursuing the actual imposition of the disciplinary measure since he did not file his application prior to 19 July 2009;

c. The imposition of the disciplinary measure was as a result of negotiation and mutual agreement between the parties to waive the requirement of a review before the JDC;

d. The complaint that he was coerced into accepting the disciplinary measures has no merit because he was represented by legal counsel and had the opportunity of making an informed decision on the basis of legal advice, his rights to due process were respected throughout the disciplinary proceedings and finally the burden of proof of prejudice or other improper motive rested on him;

e. With regard to the decision not to convert his fixed-term appointment to a permanent appointment, any attempt to impugn that decision was without merit;

f. The Applicant was properly considered in accordance with the procedures provided for in ST/SGB/2009/10 (Consideration for conversion to a permanent appointment of staff members of the Secretariat eligible to be considered by June 2009) and "the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered" (set out below under "Applicable law");

g. The procedure adopted for considering a staff member's conversion to permanent appointment was in two phases. The first phase was to consider eligibility and the second phase was to review and assess the staff member's suitability for a permanent appointment;

h. The Applicant was considered to be eligible for consideration to a permanent appointment because he had completed five years of continuous service on a fixed-term appointment under the former 100-series of the Staff Rules. Furthermore, he was under the age of 53 and received, at least, two fully successful or frequently exceeds ratings on his electronic performance appraisal system ("e-PAS") valuations over the previous five years. However, satisfying the requirements for eligibility is not enough: they merely qualified the staff member for consideration.

Applicable law

32. General Assembly resolution 51/226, of 25 April 1997 states, in relevant parts:

> Decides that five years of continuing service as stipulated in its resolution 37/126 of 17 December 1982 do not confer the automatic right to a permanent appointment, and also decides that other considerations, such as outstanding performance, the operational realities of the organizations and the core functions of the post, should be duly taken into account.

33. Former staff rule 101.2(d), as quoted in para. 10 above, sets out the general prohibition against any form of harassment, particularly sexual harassment.

34. Former staff rule 110.4(b) provided the legal basis for the Respondent and the staff member to enter into an agreement on the disciplinary sanction by waiving the referral of the case to the JDC:

> 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 such 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;

35. Section 2 of ST/SGB/2009/10 provides as follows regarding the eligibility of staff members for permanent appointment:

> … 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.

36. "Sexual harassment" is defined in ST/SGB/2008/5, sec. 1.3, as follows:

> Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

37. In contrast, ST/SGB/2008/5, sec. 1.2, defines "harassment" as:

> … any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

38. "The Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered" stipulate the standards according to which a disciplinary measure is to be taken into account when

considering a staff member for permanent appointment provides and they provide, in para. 9, that (emphasis added):

> 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 …

Consideration

Scope of the case

39. Although the Applicant was still aggrieved by what he regarded as a wrongful accusation of sexual harassment, it was accepted during the CMD 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.

40. In examining this issue, the Tribunal will consider three aspects:

a. Whether a fair and objective reading of the report of the investigation panel could, as a matter of fact, reasonably lead OHRM to the conclusion that the panel made a finding that the Applicant had, in fact, breached the norms and provisions on “sexual harassment” under former staff rule 101.2(d) and ST/SGB/2008/5?

b. Whether, during the discussions/negotiations leading up to the Applicant consenting to the disciplinary measures in contention, the Administration breached its duty to fully and properly inform him about his options as well as the consequences of his acceptance of these measures?

c. If it is established that OHRM breached the Applicant's rights during the process leading up to the agreed disciplinary measures, was there a breach of the Applicant's rights to a fair and unbiased consideration in that these disciplinary measures were used as a basis for determining whether the Applicant was suitable for a permanent appointment?

*Did OHRM mischaracterise the Applicant's offence as "*sexual *harassment"?*

41. Former staff rule 101.2(d) specifically provides that different forms of harassment may occur in the workplace. It is noted from the difference in the definitions of "sexual harassment" and "harassment" in ST/SGB/2008/5 that these cover two distinctively separate behaviours albeit both being unacceptable. "Sexual harassment" is explicitly defined in sec. 1.3 of the Bulletin in terms of the sexual content or nature of the relevant behaviours. However, sec. 1.2 defines "harassment" in terms akin to the actual conduct of the Applicant as found by the investigation panel at para. 36 of its report (as quoted in para. 13) as well as in other places (see quotations in paras. 5, 6, 7 and 14 above). It is also instructive that, in para. 36, the investigative panel did not refer to the Applicant's conduct as sexual harassment, but merely that this was "alleged".

42. Furthermore, none of the behaviours that the Applicant engaged in, as set out by OHRM in its letter dated 19 May 2008 (see para. 9 above), was in any manner portrayed as being of a sexual nature within the meaning of "sexual harassment" pursuant to sec. 1.3 of ST/SGB/2008/5. Instead, a fair reading of the investigation panel's findings, as described by OHRM, suggests that the Applicant's actions were

somewhat misguided romantic advances, which were, however, highly inappropriate and unprofessional and would appear to fit the description of "harassment" at the lower end of the range of seriousness under sec. 1.2 of ST/SGB/2008/5.

43. The World Bank Administrative Tribunal in *Applicant v. International Bank for Reconstruction and Development* Decision No. 366 found that "annoying and inappropriate ways" of a male staff member towards his female colleagues, including unrequested massages, an offer to read a staff member's palm, invitations to get together after work or to go to the Applicant's apartment for dinner, did not constitute sexual harassment.

44. Similarly, the Tribunal finds that inappropriate and unprofessional activity is not equivalent to sexual harassment notwithstanding the fact that such conduct has no place in the interactions between staff members and is deserving of an appropriate sanction. The Tribunal further finds that OHRM conflated the disciplinary charge against the Applicant with the actual findings of the investigation panel.

45. The mischaracterisation of the Applicant's behaviour as "sexual harassment" rather than "harassment", repeated at para. 28 of the Respondent's reply, has also resulted in a failure to properly give effect to "the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered", para. 9 (see para. 38 above), which provide that the weight to be given to the measures imposed "will depend on when the conduct at issue occurred and its gravity". An examination of the documentary evidence reveals that various individuals involved in the decision-making process failed to notice the significant distinction between findings of "sexual harassment" and "harassment" because of the preconceived mind-set that they were dealing with a staff member, who had the disciplinary measure of "sexual harassment" recorded in his files.

46. It would appear that although there was no bad faith on the part of the OHRM officials concerned, they were less than meticulous in their examination of

the investigation panel's findings. They thereby failed to note the differences between the charges and the actual findings, and then failed to apply properly the definitions in secs. 1.2 and 1.3 of the Bulletin to those findings. They also failed to follow their "the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered".

47. Accordingly, the Tribunal finds that OHRM, as a matter of fact, misinterpreted the investigation report and mischaracterised the Applicant's offence as "*sexual* harassment" rather than "harassment", if at all, at the lower end of the range of seriousness.

During the negotiations leading up to the agreed disciplinary measures, did the Administration fully and properly observe the Applicant's rights to due process by informing him about his options as well as the consequences of his accepting the proposed disciplinary measures?

48. Pursuant to the implied requirement of good faith and fair dealing between parties to an agreement, it is reasonable to expect that the Administration, when negotiating an agreement on a disciplinary measure pursuant to former staff rule 110.4(b), had a duty to inform the staff member about any foreseeable consequence of that agreement, including, in particular, any possible adverse consequences.

49. As indicated in paras. 16-20 above, during the negotiations leading to the agreed disciplinary measurements, neither the Applicant nor his then legal adviser were informed that the agreed sanction would affect in any way the Applicant's suitability for advancement within the Organization on the grounds that the recording of such disciplinary measures would be regarded by the Administration as the Applicant not having met the high standards of efficiency, competence and integrity required for further advancement, including lawful conversion to a permanent appointment. In this regard, the Applicant was induced into signing

the agreement in the belief that, having accepted the sanctions, a veil would be drawn over the unfortunate episodes. It should also be noted that, during the course of the exchange of correspondence with the Applicant's then legal counsel, the email from ALU/OHRM dated the 25 February 2009, by which the Applicant's counter proposal was rejected, stated that "the recent practice … has been to separate staff members who engage in such conduct from service", but that a lesser sanction was proposed "in recognition of certain mitigating factors in his case, including his prior record of service" without any further specification.

50. At this crucial moment during the negotiations, the message that is clearly being given to the Applicant is that if he did not reconsider his position on the proposed penalty, there was a real possibility that an investigation by the JDC would more likely than not result in a recommendation that he be separated from service. This conclusion may legitimately be drawn from the reference to "the recent practice" of the Secretary-General to separate staff members who "engage in such conduct". The inducement of a lesser sanction in the proposed agreement is noted.

51. It is important for the credibility of ST/SGB/2008/5 that penalties imposed should not be disproportionate, or seen by staff members as being disproportionate, to the offence. Whilst there was a risk inherent in going before the JDC, the Tribunal is aware of cases arguably similar to that of the Applicant's, which were determined around the same time as his and where a staff member, who had been found to have committed sexual harassment, was not recommended to be separated from service, as otherwise suggested by ALU/OHRM. For instance, in para. 52 of ST/IC/2019/30 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2008 to 30 June 2009), the Under-Secretary-General for Management describes a situation where a staff member sexually harassed six staff members, but only received the disciplinary sanction of written censure after the advice of a JDC, a sanction even much less severe than that ALU/OHRM actually proposed to the Applicant. In another example mentioned in ST/IC/2019/30, at

para. 48, a staff member, who had sexually harassed three new staff members, exactly the same sanction as that suggested to the Applicant was meted out and not that of separation from service.

52. Accordingly, taking into consideration all the facts, and giving appropriate weight to the absence of any indication that the agreed sanction would include loss of opportunity for a permanent appointment for an indefinite period, had the Applicant fully known his options and the possible consequences of his choice, he may well have chosen to take his chances with the JDC rather than accepting the disciplinary sanction proposed by the Respondent.

53. In the Tribunal's view, it is immaterial whether the Applicant would, or would not have accepted an agreed disciplinary measure that included having no prospect of a permanent appointment. The fact is, in the context of what the Respondent has referred to as the negotiated and agreed disciplinary measure, the Applicant was fully entitled to know the possible consequences of any such agreement and to be presented with all viable options. The Tribunal is not aware of any case in which the JDC recommended that a staff member be denied a permanent appointment for an indefinite period notwithstanding that he may have been rehabilitated and has excellent e-PAS reports.

54. The Tribunal finds that there was a breach of the Administration's duty fully to inform the Applicant, 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.

Did OHRM breach the Applicant's right to have his contractual status properly assessed for permanent appointment?

55. It is not within the Tribunal's judicial review powers to replace the role of the Administration when considering a staff member for permanent appointment (see

the Appeal's Tribunal in *Doleh* 2010-UNAT-025 and *Charles* 2012-UNAT-233). However, the Tribunal may consider whether the Administration undertook a proper review of the case before it, including whether it was decided on the basis of well-documented facts and not erroneous, inconsistent or fallacious grounds such as incorrect legal findings and inducement (*Bertucci* 2011-UNAT-121, as well as *Masri* 2010-UNAT-098).

56. The Tribunal finds that OHRM were in error in recommending to the CRB that the Applicant should not to be granted a permanent appointment because of his "receipt and *agreement* to be demoted for *sexual harassment.* A proper examination of the report of the investigation panel shows that he in fact did not sexually harass his colleagues pursuant to the statutory definition included in ST/SGB/2008/5. Furthermore, he was induced into agreeing to the disciplinary measures in that OHRM did not fully and properly inform him of his options and the possible outcome of his acceptance of the agreement. However, from the evidence presented to the Tribunal by the Respondent, particularly the email from ALU/OHRM of 22 May 2010, it is clear that OHRM did not undertake a proper review of the Applicant's case and appeared to have acted under the misapprehension that it involved a serious case of sexual harassment.

57. Consequently, the Tribunal finds that OHRM failed to undertake a proper and fair appraisal of the underlying facts before it when recommending to the CRB that the Applicant's contractual status should not be converted to a permanent appointment.

Summary of the Tribunal's findings on liability

58. The decision that the Applicant's employment was not to be converted to a permanent appointment was fundamentally flawed and is set aside for the following reasons:

a. Based on the investigation report and ST/SGB/2008/5, OHRM mischaracterised the Applicant's offence as "sexual harassment" rather than "harassment" at the lower end of the range of seriousness. By doing so, OHRM also failed to follow its own procedures at para. 9 of the "The Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered" in that they failed to give appropriate weight to the nature of the Applicant's offence as well as its timing and gravity.

b. There was a breach of the Applicant's rights to due process and the duty of good faith and fair dealing in that the Applicant was induced into entering into an agreement to accept certain disciplinary measures without being properly informed of the possible or probable effect of voluntarily accepting the disciplinary measures on his prospects of obtaining a permanent appointment;

c. In preparing the recommendations to the CRB, OHRM should have undertaken a proper examination of the underlying facts, which would have led it to realise its previous mistakes, as set out in (a) and (b) above. By failing to do so OHRM breached the Applicant's right to have a fair and proper assessment of his eligibility and suitability to have his contractual status being converted to a permanent appointment.

Non-pecuniary damages

59. It was clear to the Tribunal, at the CMD on 8 November 2012, that the Applicant was, and still is, distressed by the decision, and the reasons for denying him a permanent appointment. The Tribunal does not consider it necessary in this case to convene a separate hearing to determine the degree to which the Applicant was distressed so as to quantify the award for non-pecuniary damages.

The Tribunal considers that it has sufficient information based on the documents, the observations made at the CMD, and taking judicial notice of the fact that treatment such as that to which the Applicant was subjected to would cause distress and anxiety to an individual. It was evident that it had such an effect on the Applicant.

60. As a matter of principle, it is the Tribunal's view that an award for non-pecuniary damages should be expressed as a lump-sum rather than in terms of net base salary. After all, the Tribunal is assessing the degree of injury suffered by the individual and quantifying the award accordingly. This exercise is not related to the status or seniority of the individual and an award should therefore not be related to the individual's earning or status, but to the actual distress suffered. Each case is to be assessed on its own facts and the unique characteristics of the individual, the manner in which s/he has been treated and the impact of the treatment on the individual concerned (see, for instance, the Appeals Tribunal in *Solanki* 2010-UNAT-044, *Warren* 2010-UNAT-059, *Ianelli* 2010-UNAT-093, *Zhouk* 2012-UNAT-224). A principled approach minimises the risk of awards being disproportionate.

61. In this case, the award for non-pecuniary damages is not being made for any damages suffered in 2008 by the agreed disciplinary sanction, but the unfair reliance upon this sanction, in January 2011, to justify the refusal of a permanent appointment. The Tribunal assesses the non-pecuniary damages as being more than minimal, but less than moderate.

Conclusion

62. Pursuant to art. 10.5 of the Statute of the Dispute Tribunal, the Tribunal orders that:

a. The decision to deny the Applicant a permanent appointment is rescinded;

b. Any consequential loss in salary or other benefits, if any, are to be made good by the Administration;

c. The Respondent is to pay to the Applicant the sum of USD10,000 in non-pecuniary damages for the distress suffered.

63. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed above in para. 62(b) and (c) is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Goolam Meeran

Dated this 28th day February 2013

Entered in the Register on this 28th day February 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York