UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/028
Judgment No.: UNDT/2013/130
Date: 25 October 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

HERMOSO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Edwin Nhliziyo

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

Introduction

1. The Applicant, a Computer Assistant at the G-5 Level in the Internal Audit Division, Office of Internal Oversight Service ("OIOS") in New York, contests the decision of the Assistant Secretary-General for Human Resources Management, dated 26 October 2011, not to grant him a permanent appointment, on account of a written censure placed in his file on 3 December 2010.

2. The Applicant states that the contested decision was unlawful in that, *inter alia*, it amounts to double jeopardy for an offence for which he was previously disciplined. He further submits that the contested decision results in unequal and disproportionate punishment, when compared to staff members who already have permanent appointments, as such staff members would not have their permanent appointments downgraded to temporary or fixed-term status as a result of a similar disciplinary sanction. He states that this misconduct was not a serious violation of the United Nations Staff Rule since the Secretary-General censured him by putting a written censure note on his status file. Further, the Applicant submits that it is not clear for how long the effect of the written censure would continue. The Applicant requests the rescission of the contested decision.

3. The Respondent submits that the Applicant's contention regarding double jeopardy has no legal basis since the contested decision not to convert the Applicant's appointment was not a disciplinary measure but a separate discretionary administrative decision. The Respondent submits that the Applicant's prior misconduct was reviewed and taken into account by the Administration as part of his entire background and record, in accordance with the rules in relation to matters of conversion to permanent appointment. These rules require the Administration to examine whether the concerned staff members, 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 set out in the United Nations Charter. In making decisions regarding conversions, the Administration is required to consider "all the interests of the Organization".

Procedural matters

4. Having reviewed the parties' submissions and supporting documentation, on 23 July 2013, the Tribunal issued Order No. 173 (NY/2013), stating that the parties' submissions appeared to be sufficient to render a decision on the papers. The parties were given one week to file additional submissions, if any, indicating whether they wished to request a hearing. The Tribunal stated that, in the event no hearing was requested, the Tribunal would proceed with rendering its judgment, subject to any orders that may be issued.

5. The Applicant stated in his submission that he had no objection to the Tribunal rendering a final judgment on the papers before it. The Respondent, however, whilst consenting to the determination on the case on the papers, submitted that "should there be any dispute in regard to whether the Applicant has established and/or the Respondent has rebutted proof of unequal treatment [of the Applicant by the Administration], the Respondent requests a hearing on this matter … . Otherwise, the Respondent consents to the legal issue of whether the principle of unequal treatment applies to the allegations made in this case, being determined on the papers". The Respondent made a similar submission in relation to what he termed as "irrelevant factual allegations" made by the Applicant.

6. The Applicant objected to this form of submissions made by the Respondent, stating in his submission that the Respondent's submission in response to Order No. 173 (NY/2013) "appears to be that they do not want a hearing as long as the Judge decides for them but that if the Judge is going to decide against them, then they want a hearing".

7. It is clear from the papers that the Applicant has not alluded to any specific case indicating inequality of treatment, but made a general comment regarding the parity principle, which evidently could be met by legal argument. In the circumstances, it does not behove the Respondent to straddle two horses at the same time, dependent upon an anticipated outcome. A party's submission in response to an order must be clearly indicative of its position. A party cannot hold a court to ransom or endeavour to negotiate its position or impose conditions under which it would file its submissions or comply with the Tribunal's orders. Therefore, having received no further submission on the merits from the Respondent, the Tribunal proceeded, under art. 19 of its Rules of Procedure and in the interests of justice and in order to ensure a fair and expeditious disposal of the case, with the consideration of the case on the papers before it.

Facts

8. On 25 March 2010, the Applicant was recommended for conversion to a permanent contract by OIOS, which recommendation was submitted to the Assistant Secretary-General for Human Resources Management for confirmation.

9. The Applicant was subsequently charged with misconduct on 8 June 2010, following an investigation concluded in August 2009. He replied to the charges on 30 July 2010. On 3 December 2010, the Applicant was formally disciplined for

inappropriate conduct arising from his misuse of United Nations property. The disciplinary measure applied was a letter of censure that was placed in his official status file. The Applicant never appealed the said disciplinary charges or the disciplinary sanction.

10. By memorandum dated 7 January 2011, the Office of Human Resources Management ("OHRM") informed the Central Review Panel ("CRP") that it disagreed with the recommendation of OIOS to grant the Applicant a permanent appointment, based on the fact that the Applicant had previously been disciplined by censure. OHRM requested the Central Review Committee to review whether the Applicant met the criteria set out in sec. 2 of ST/SGB/2009/10.

11. By email dated 26 January 2011, OHRM informed the Applicant that:

> This is to inform you that in reviewing your case for conversion to permanent appointment in the context of the exercise for the one time review, there was no joint positive recommendation for the conversion to permanent appointment. Therefore, and in accordance with paragraph 17 of the Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members [Eligible to be Considered] as at 30 June 2009, your case was referred to the appropriate advisory body listed in section 3.5 of ST/SGB/2009/10.
>
> Upon receipt of the advice of the appropriate advisory body, the case will be submitted to the Assistant Secretary-General for final decision and you will be informed accordingly.

12. On 7 October 2011, the Chairperson of the CRP informed the Assistant Secretary-General for Human Resources Management that it had reviewed a number of requests for conversion to permanent appointment on 19 August 2011, including that of the Applicant. The Chairperson stated that, having taken into consideration the recommendations received from the substantive departments as well as OHRM,

the staff members listed in the memorandum, including the Applicant, should not be granted a permanent appointment because of previously-imposed disciplinary measures, and that the matter had been submitted to the Assistant Secretary-General for a final decision.

13. On 26 October 2011, the Assistant Secretary-General for Human Resources Management informed the Applicant that, "after a careful review of [his] case", and taking into account "all the interests of the Organization", the Applicant would not be granted a permanent appointment, "based on the fact that [his] records show that a disciplinary measure [had been] taken against [him]".

14. On 26 December 2011, the Applicant filed a request for management evaluation of the decision denying him conversion to a permanent appointment. By letter dated 26 January 2012, the Applicant was notified that his request for management evaluation was unsuccessful.

Applicable law

15. Staff regulation 1.2(b) states:

> Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

16. Staff regulation 4.2 states:

> The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible.

17. ST/SGB/2009/10 (Consideration of staff members for permanent appointment) states:

> **Section 1**
>
> **Eligibility**
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> To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:
>
> (a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and
>
> (b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.
>
> **Section 2**
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> **Criteria for granting permanent appointments**
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> In accordance with staff rules 104.12(b)(iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the highest standards of efficiency, competence and integrity established in the Charter.

Consideration

Claim of unequal treatment

18. The Tribunal finds it convenient to deal with the Applicant's claim of unequal treatment first. The Applicant submitted that the Administration's decision not to grant him a permanent appointment resulted in unequal treatment as compared to staff members with permanent appointment status with a disciplinary record,

because having a disciplinary measure applied to them would not result in them losing their permanent status.

19. As the United Nations Appeals Tribunal stated in *Tabari* 2011-UNAT-177, "the principle of equality means equal treatment of equals; it also means unequal treatment of unequals" (see also *Johnson* UNDT/2011/144 and *Gehr* UNDT/2011/150).

20. The Applicant does not allege that others who were in the same position as the Applicant—i.e. temporary or fixed-term staff committing the same offence—received differential treatment, contrary to the parity principle. Rather, the Applicant compares his situation to that of a permanent staff member who would not be deprived of her or his existing permanent appointment status. This comparison, however, is misguided. Misconduct committed by a staff member—regardless of her or his type of appointment—should result in an appropriate disciplinary sanction from the list of permissible measures in staff rule 10.2(a), which states:

> **Rule 10.2**
>
> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms only:
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> (i) Written censure;
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> (ii) Loss of one or more steps in grade;
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> (iii) Deferment, for a specified period, of eligibility for salary increment;
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> (iv) Suspension without pay for a specified period;
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> (v) Fine;
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> (vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

21. The two situations juxtaposed above by the Applicant are not rationally comparable. In the case of a permanent staff member (who has already overcome the eligibility and suitability hurdle) guilty of the same misconduct, the issue would be which disciplinary measure under staff rule 10.2 above would be appropriate, not a re-classification of the existing type of appointment. In the Applicant's case, however, the issue is whether, given his disciplinary record at the time, the Administration properly exercised its discretion in considering the permissible sanction when deciding not to convert him to a permanent contract.

Claim of double jeopardy

22. The Applicant submits that the decision not to grant him a permanent appointment due to his prior misconduct violates the principle of double jeopardy.

23. Decisions regarding conversion to a permanent appointment are discretionary and a staff member has no automatic right to have her or his contract converted to permanent status. For a temporary appointee to be converted to a permanent status, a staff member must meet various criteria set in relevant issuances. In the Applicant's case, particularly important are the provisions of ST/SGB/2009/10 containing the requirements for conversion.

24. The principle of double jeopardy in the context of disciplinary cases was referred to by the Dispute Tribunal in *Goodwin* UNDT/2011/104. The Tribunal

stated that "an employee, once he has been dealt with on charges arising from a particular set of facts, cannot be tried again on new charges arising from the same facts. That is, the rule against double jeopardy, simply stated, is that a staff member may not be subjected twice to investigation, charges and disciplinary or administrative measures arising from the same facts". The principle of double jeopardy in the context of disciplinary action was also referred to by the former United Nations Administrative Tribunal (see Judgment No. 1175, *Ikegame* (2001)). Notably, the Respondent in his reply to the present application "accept[s] that the principle of double jeopardy applies where a staff member is subject to a duplication of the disciplinary process", but submits that this is not such a case.

25. The Respondent contends that the principle of double jeopardy has no application in this case since the Applicant was not subjected to a second disciplinary process; he was not charged or sanctioned twice for the same conduct. Rather, relevant information concerning his conduct was taken into account in a separate decision to ascertain whether he should be granted a permanent appointment in accordance with the applicable Staff Rules and ST/SGB/2009/10, sec. 2 of which states (emphasis added):

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

26. It should be reiterated that in the present case the Applicant was not declared ineligible for conversion. To the contrary, he was determined as meeting the eligibility requirements under sec. 1 of ST/SGB/2009/10. However, when assessing his *suitability* under sec. 2 ST/SGB/2009/10, the Administration concluded

that the Applicant, by virtue of his recent disciplinary record, did not satisfy the criteria for conversion. Thus he fell short of the required standards, allowing the Administration to make a discretionary determination as to his unsuitability for conversion. A decision finding the Applicant not *suitable* for conversion is not the same in nature as the sanction of deferral of *eligibility* for consideration for promotion (staff rule 11.2(b)(vi)). The Applicant was eligible for conversion; rather, it was his suitability that was in issue.

27. The Tribunal finds that the Applicant was not disciplined or sanctioned twice, but, rather, his disciplinary record was taken into account to ascertain his suitability (as opposed to eligibility) for conversion to a permanent appointment. The decision of OHRM not to grant the Applicant a permanent appointment was a separate discretionary determination of the Administration as to the Applicant's suitability for conversion in accordance with the rules, and not as a second or veiled disciplinary measure. Whether such discretion was properly exercised is a matter discussed below.

Consideration of disciplinary record

28. In *Akyeampong* 2012-UNAT-192, the United Nations Appeals Tribunal considered whether a staff member of the United Nations High Commissioner for Refugees with two reprimands on her record could be denied promotion on account of those reprimands. The Appeals Tribunal found by majority that reprimands were a corrective measure and not a disciplinary measure and had to be "considered in the correct perspective". The Appeals Tribunal found that "[a] reprimand is not an adverse entry in the same way as an entry relating to sanction post-disciplinary proceedings would be". The Appeals Tribunal, with Judge Weinberg de Roca dissenting, ordered the rescission of the decision of the High Commissioner not to promote the Applicant on the ground of two reprimands, or payment of CHF10,000

as an alternative. Judge Weinberg de Roca, stated in her dissenting opinion that even reprimands—and not just disciplinary sanctions—could be taken into account in a promotion process.

29. The Applicant in the present case did not receive the administrative measure of reprimand, but was sanctioned with the disciplinary measure of a written censure (staff rule 10.2(a)(i)), which was taken into account to assess his suitability for conversion.

30. Section 2 of ST/SGB/2009/10 provides that, when considering a staff member for conversion, the Administration is required to take into account the staff member's "qualifications, performance and *conduct*" (emphasis added) (former staff rule 104.13 contained a similar requirement). In line with this provision, para. 9 of the Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered as at 30 June 2009 ("Guidelines"), approved by the Assistant Secretary-General for Human Resources Management on 29 January 2010, states that (emphasis added)

> in determining whether the staff member has demonstrated suitability as an international civil servant and has met the highest 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. The Administrative Law Unit of OHRM will confirm and provide any recent updates that may not yet have been reflected in the official status file.

31. Although office guidelines and manuals cannot overrule properly promulgated administrative issuances (*Korotina* UNDT/2012/178), the Applicant has failed to refer the Tribunal to any legislative instrument suggesting that it was

unlawful for the Administration to take into account his recent disciplinary sanction. To the contrary, sec. 2 of ST/SGB/2009/10 states otherwise. (It should be noted, however, that although para. 9 of the Guidelines states that "any *administrative* or disciplinary measures taken against the staff member will be taken into account", the ruling in *Akyeampong* appears to suggest that only disciplinary measures may be taken into account. Indeed, it is consistently argued before this Tribunal by the Respondent that reprimands are not disciplinary in nature and do not have the same adverse effect on staff.)

32. In this instance, no doubt based on the particular circumstances of his case, the Applicant only received a written censure. The Applicant did not appeal the sanction, possibly as the sanction was the most lenient. Prior to this sanction, the Applicant had more than 12 years of service with the United Nations with an apparently clean disciplinary record. Other than the submissions addressed herein, the Applicant has not alleged that the decision was absurd, unreasonable or otherwise improper.

33. The Tribunal finds that it was not unlawful for the Administration to take into consideration the Applicant's recent disciplinary sanction when considering whether he was suitable for conversion.

Observation

34. It is clear from staff rule 10.2 that disciplinary measures that may be imposed, other than the written censure, are finite and have a degree of certainty regarding their effect. Disciplinary measures should be progressive, fixed and certain, and punishment should not be meted out twice, especially as one's disciplinary record may be taken into account in various personnel-related matters.

35. In many jurisdictions, disciplinary codes and practices normally provide that written warnings, cautions, reprimands and censures have an expiry date. Accordingly, an employer may take into account current sanctions but is to disregard expired disciplinary measures for all purposes including future disciplinary sanctions, bonus and pay awards, selection for promotion, etc. Thus, employees know where they stand and what is expected of them. In many jurisdictions, first written warnings for instance normally remain active for six months, whilst final written warnings for twelve months. The consideration and effect of expired warnings may depend on the seriousness of the misconduct, and the propensity of the employee to commit similar future misconduct. This provides for a degree of flexibility and fairness, depending on the circumstances of each case.

36. In the United Nations context, the written censure is the least severe of disciplinary measures. It may be combined with some other form of punishment, for example ineligibility for promotion for a specified period. Yet a written censure, which is the most benign form of discipline, apparently has no expiry date and remains effective indefinitely.

37. The Applicant should not have this sanction indefinitely hanging over his head like the proverbial sword of Damocles. Even to this day, the Applicant has no certainty as to how long the effect of this sanction will be visited upon him. However, in the context of the present case, the imposed disciplinary sanction was recent (less than one year before the decision not to convert his appointment), and the Tribunal finds that, in assessing "when the conduct at issue occurred and its gravity" (para. 9 of the Guidelines), it was not manifestly unreasonable for the Administration to take it into account at the material time.

Conclusion

38. The Tribunal finds that the decision to take into account the Applicant's disciplinary record was not a new disciplinary sanction but an exercise of discretion with regard to a new and separate discretionary administrative process. The contested decision did not amount to unequal or unfair treatment of the Applicant as compared to staff members with existing permanent appointments. The Tribunal finds that the Administration considered the Applicant eligible for consideration for conversion, but determined that he was not suitable for conversion in view of the then recent disciplinary sanction imposed on him. The Tribunal finds that this decision was not manifestly unreasonable or otherwise unlawful.

39. The application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 25th day of October 2013

Entered in the Register on this 25th day of October 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York