



## **Introduction**

1. The Applicant is a Security Lieutenant in the Security and Safety Service (“SSS”), Department of Safety and Security (“DSS”). He contests the decision to deny him conversion of his fixed-term appointment to a permanent appointment because of a disciplinary measure recorded in his Official Status File.

2. The principal issue in this case is whether the Respondent properly and fairly applied the policy on conversion to permanent appointment applicable at the time, ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) (“Bulletin on CPA”). The Tribunal must consider whether the applicable legal instruments conferred discretion on the decision-maker and, if so, identify the nature of that discretion and examine the facts to determine whether the discretion was properly and lawfully exercised in this case.

## **Factual background**

### **Disciplinary sanction**

3. On 7 May 2008, the Office of Internal Oversight Services (“OIOS”) received a complaint of possible misconduct regarding a number of staff members, including the Applicant. The Applicant was interviewed by OIOS on 3 October 2008. On 24 October 2008, OIOS issued its investigation report.

4. On 19 December 2008, the then Executive Officer, DSS, sent a memorandum to the Acting Chief of the Legal Unit, DSS, regarding the Applicant's request for conversion to permanent appointment.

5. On 12 January 2009, the Applicant received a memorandum from the Chief, Human Resources Policy Service (“HRPS”), Office of Human Resources Management (“OHRM”) informing him that following the conclusion of an investigation by OIOS, he was charged with misconduct. Specifically, the Applicant was charged with the improper use of the Organization’s information and communication technology (“ICT”) resources and failing to comply with his obligation under ST/SGB/2004/15 (Use of information and communication technology resources and data) to promptly report violations of that bulletin.

6. By email dated 26 January 2009, the Applicant responded to the Chief, HRPS, OHRM, showing the appropriate degree of contrition and taking full responsibility for his actions. He expressed the hope that the Organization would take into account that this was a single, isolated incident in over 18 years of exemplary service.

7. On 3 December 2010, the Applicant was informed that the Under-Secretary-General for Management (“USG/DM”), acting on behalf of the Secretary-General, had concluded that there was sufficient evidence that he had misused United Nations’ ICT resources by receiving and distributing emails containing prohibited material and failing to report such actions by other staff members. In light of these findings, the USG/DM imposed on the Applicant the disciplinary measure of a letter of censure to be placed in his Official Status File.

#### Consideration for permanent appointment

8. On 1 April 2011, Mr. Saunders, Executive Officer, DSS, sent Ms. Pollard, the Assistant Secretary-General, OHRM (“ASG/OHRM”) a memorandum setting out the recommendation in relation to the Applicant’s candidacy for conversion to permanent appointment. The memorandum was formatted so that Mr. Saunders could record, through checking a box, whether the Applicant met or failed to meet a number of criteria. In this way it was recorded that the Applicant: (a) received performance evaluations indicating that he had successfully met or exceeded performance



The Panel took into consideration recommendations received from the substantive Department and the respective Human Resources Office, and was of the view that the staff members should not be granted a permanent appointment. The Panel noted that the staff members have been the subject of a disciplinary measure and therefore they should not be considered suitable for conversion

11. On 29 February 2012, Ms. Pollard informed the Applicant that pursuant to the Bulletin on CPA it had been decided not to grant him a permanent appointment. The memorandum further stated that (emphasis added):

This decision is taken after a careful review of your case. It takes into account all the interests of the Organization, and is based on the fact that your records show that a disciplinary measure has been taken against you

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

12. On 12 March 2012, the Applicant appealed against the decision. He noted his distinguished record of over 22 years' service with the Organization, during which he had received numerous commendations.

13. On 5 April 2012, the Applicant requested management evaluation of the decision.

14. On 9 May 2012, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to endorse the decision.

### Performance

15. The Applicant received two meritorious service awards; was commended over the years for the high standard of his work with the Organization; was placed on the protective details of the former Secretary-General during some of his travels, as well as the details of Pope Benedict, former Presidents Clinton and Bush and, as recently as 2014, President Obama during their official visits to the United Nations. Mr. David Bongi, Chief, SSS, gave evidence attesting to the high opinion he had of









24. The Bulletin on CPA (ST/SGB/2009/10), issued on 23 June 2009, provides:

**Section 2**

**Criteria for granting permanent appointments**

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

**Section 3**

**Procedure for making recommendations on permanent appointments**

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

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

...

3.4 In the absence of joint support for conversion to permanent appointment, including cases where the department or office concerned and the Office of Human Resources Management or local human resources office both agree that the staff member should not be granted a permanent appointment, the matter shall be submitted for review to the appropriate advisory body designated under section 3.5 below. The purpose of the review shall be to determine whether the staff member concerned has fully met the criteria set out in section 2 of the present bulletin. The advisory body may recommend conversion to permanent appointment or continuation on a fixed-term appointment.

...

3.6 ... Recommendations in respect of all other staff members shall be submitted for decision to the Assistant Secretary-General for Human Resources Management.

25. On 29 January 2010, the ASG/OHRM approved the “Guidelines on

## **Procedures**

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

...

## **Referral of cases to advisory bodies and subsequent decisions**

...

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

27. In *Baig et al.* 2013-UNAT-357, the Appeals Tribunal held that staff members eligible 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.

28. In *Santos* 2014-UNAT-415, the Appeals Tribunal 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 the staff member.

29. The decision whether to convert a staff member's contract to a permanent appointment is a discretionary determination (sec. 2 of the Bulletin on CPA). However, such discretion must be exercised in a proper manner and, like any discretion, it may not be exercised in an arbitrary, capricious, or illegal manner (Sanwidi2010-UNAT-084). In Santos2014-UNAT-415, the Appeals Tribunal noted that in reviewing administrative decisions regarding applications for conversion to permanent appointment, the Dispute Tribunal considers: (1) whether the procedure as laid down in the Staff Regulations and Staff Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

What were the criteria for considering the Applicant's candidacy for conversion to a permanent appointment?

30. Section 2 of the Bulletin on CPA sets out two criteria to be considered by the decision-makers when assessing whether to grant a permanent appointment:

(i) whether an eligible staff member has, through their qualifications, performance and conduct, fully demonstrated their suitability as an international civil servant; and

(ii) whether the eligible staff member has shown that they meet the highest standards of efficiency, competence and integrity established in the Charter.

When making the decision whether to recommend conversion to permanent appointment, the decision-maker must also take into account "all the interests of the Organization".

31. Paragraph 8 of the Guidelines sets out a specific test to determine whether a staff member has met the "highest standards" of efficiency and competence, namely consideration of their last five performance evaluations. If they have received ratings of "fully successful performance" or "fully meets performance expectations" or

higher, they are deemed to have met the required standard for efficiency and competence. The record shows that the Applicant met this standard.

Of the nine disciplinary measures available to managers, written censure, which was the sanction imposed on the Applicant, is the least severe. The most severe measure is dismissal. Staff rule 10.3(b) states that any disciplinary measure “shall be proportionate to the nature and the gravity of [the] misconduct” (emphasis added).

Were the criteria correctly applied or was the decision-making process flawed or otherwise improper or unlawful?

36. The Applicant’s suitability for conversion to permanent appointment was considered by the following individuals:

a.

### The initial recommendation

38. The initial review of the Applicant's suitability for conversion to permanent appointment concluded, by checking boxes on what appears to be the standard format memorandum referred to in para. 9 of the Guidelines, that the Applicant did not meet the criteria set out under sec. 2 of the Bulletin on CPA, and consequently the Applicant was not recommended for conversion to permanent appointment.

39. It is significant that the memorandum did not provide any further substantive analysis or explanation as to the grounds upon which the recommendation was made. The memorandum simply implied, from the fact that a box is checked indicating that the Applicant had been subject to an administrative or disciplinary measure, that this was the reason for the decision. Paragraph 14 of the Guidelines was not complied with in that the written recommendation was not "supported by a reasoned explanation that indicates the basis on which the ... conduct of [the Applicant was] evaluated" (emphasis added). Further, there was no written assessment of the gravity or timing of the sanctioned conduct, as para. 9 of the Guidelines requires.

40. Mr. Saunders confirmed in evidence that the disciplinary sanction was the basis for his decision not to recommend the Applicant. It was his understanding that a staff member who has been subject to a disciplinary measure could not, and should not, be recommended for conversion to permanent appointment. He stated that he was aware of the nature of the conduct resulting in the disciplinary sanction against the Applicant because the Executive Office received investigation reports relating to its staff. He stated: "I did not take the decision not to recommend [the Applicant] lightly. I thought long and hard about it". He explained that, in his assessment, since the Applicant had been subject to a disciplinary measure for the misuse of the Organization's ICT resources, he did not meet the high standards of integrity required of an international civil servant, and offering him a permanent appointment was not in the best interests of the Organization. He also stated that "if I recall correctly, the disciplinary action was in the immediate past, it was not as if it





member found to have engaged in such conduct because of the need to uphold the highest standards of integrity. When asked by the Tribunal whether the decisions made by the Organization should be governed by the personal opinion of individual managers rather than the policy and procedures of the Organization, Mr. Shahinyan suggested that his personal opinion in this case was in line with the Organization's "zero tolerance" policy relating to sexual harassment.

44. Whilst Mr. Shahinyan was unable to identify the exact policy provision to support his contention, the Tribunal notes that he may well have had in mind sec. 4.2 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), which refers to a "zero tolerance" approach to the conduct prohibited under that bulletin. However, Mr. Shahinyan failed to provide a coherent or convincing explanation as to how the policy on sexual harassment was relevant to ST/SGB/2004/15 (Use of information and communication technology resources and data) and how precisely it related to the task of evaluating the Applicant's suitability for conversion to a permanent appointment. The conflation of these administrative instruments, devoid of any explanation on record as required by para. 14 of the Guidelines, or any evidence from the witnesses who were involved in the decision-making process, was an unjustified quantum leap.

45. Mr. Shahinyan's recommendation was flawed. He failed to provide a reasoned, written explanation for his recommendation that indicated the basis for his evaluation of the Applicant's conduct. The memorandum dated 15 August 2011 suggests that Mr. Shahinyan applied the same blanket policy of exclusion as Mr. Saunders, though he denied this in evidence. In any event, his oral evidence indicated that he based his recommendation on his understanding that the Organization had a "no tolerance" approach to the sanctioned conduct. There is no reference to such a policy in ST/SGB/2004/15 (Use of information and communication technology resources and data), which is the administrative issuance under which the Applicant was sanctioned. Mr. Shahinyan's reference to sexual

harassment suggests an erroneous understanding935 d Tw[(ndie natureneod gravity[(n)]TJ erroi.rl

“the staff members have been the subject of a disciplinary measure and therefore they should not be considered suitable for conversion”. The Judge asked Ms. Tabourian whether that sentence meant that anyone with a disciplinary measure was not to be considered as suitable. She answered “correct”. The Judge asked Ms. Tabourian whether this was the case regardless of the nature of the disciplinary measure. She

- c) Consult ALU to determine the weight and gravity of an administrative measure or disciplinary action taken against a staff member and when such action took place

52. Ms. Tabourian stated that CRP members review a case based on the documents before them, which in this case, she said, would have included the Bulletin on CPA and the Guidelines. Notwithstanding this, the memorandum of 1 February 2012 from the CRP Chairperson includes no assessment of the nature, gravity and timing of the conduct that resulted in the disciplinary action against the Applicant. It appears that the CRP may not even have known the exact nature of the misconduct for which the Applicant received a disciplinary sanction.

53. Further, the CRP wrote a single recommendation in respect of three different staff members, stating that all three should not be considered suitable for conversion based on the fact that they had been subject to a disciplinary measure. This approach is inconsistent with the Appeal Tribunal's ruling in *Baig et al.* that staff members are entitled to an individual, full and fair consideration of their suitability for conversion.

54. The memorandum of 1 February 2012 contained no reasoned explanation beyond the fact that the Applicant had been subject to a disciplinary measure. The CRP also appeared to be applying a policy, which the Tribunal has not seen set out in any regulation, rule, administrative issuance, bulletin or guidelines, that anyone with a disciplinary measure was not to be considered as suitable for conversion, regardless of the nature of the conduct. There is no evidence that the CRP considered the gravity and timing of the conduct in question as para. 9 of the Guidelines suggests, or that they enquired as to why those conducting the initial and subsequent review had not commented on these factors. There is also no record of the CRP contacting the Administrative Law Unit for further information about the relevant disciplinary measure, as suggested in the 31 July 2010 presentation.<sup>4</sup>

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<sup>4</sup> The Tribunal notes the inconsistency between the Guidelines and the presentation given to Central Review Body members. The Guidelines state that the weight that a disciplinary measure should be



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resulted in a recommendation that took into account his individual candidacy and circumstances.

64. Oversight bodies such as the CRP are an important component part of the decision-making process in ensuring procedural and substantive fairness, accountability and transparency. The effective discharge of their roles and responsibilities is essential in establishing and maintaining the legitimacy and credibility of managerial recommendations leading to fair and transparent decision-making in compliance with the Organization's commitment and duty under art. 101.3 of the UN Charter to secure the highest standards of efficiency, competence and integrity. Oversight bodies should play an important role in reviewing procedures and advising managers and should not be used, or conduct themselves in a manner, that amounts to simply rubber-stamping recommendations by managers without examining whether the manner in which the recommendations had been arrived at was in accordance with the applicable statutory instrument and guidelines.

65. The review bodies' oversight was intended to ensure proper consideration based on the application of procedural propriety and not simply to legitimize decisions, and the process by which they are reached, by a cursory and superficial review in breach of their own mandate as an oversight body. In this case, the CRP acted in dereliction of its duty to oversee the process prior to the matter being referred to Ms. Pollard for a final decision. As ASG/OHRM, Ms. Pollard could not have been expected to scrutinize every recommendation and the process by which it may have been reached. The system provides for these checks to be completed before a referral is made to the ASG/OHRM. Procedural propriety and substantive fairness in decision-making is predicated on the assumption that, at every stage of the process the statutory requirements have been followed and, to the extent that they may not have been, the CRP would act to ensure that the integrity of the process is maintained. In this case, they did not.





measure recorded on their [Official Status File] at the time of review for conversion to permanent appointment with the United Nations Office in Nairobi, the Economic Commission for Africa, the Economic Commission for Latin America and the Caribbean, the Economic and Social Commission for Asia and the Pacific, and the Economic and Social Commission for Western Asia were granted conversion to a permanent appointment”. The responses from the Respondent are consistent with a conclusion that managers were not exercising the discretion vested in them when considering conversion to permanent appointment and instead applied an informal and unpromulgated policy that excluded anyone who had been subject to a disciplinary measure, regardless of the nature and timing of the conduct or the severity of the disciplinary measure imposed.

69. In summary, the Tribunal finds that the procedure for determining the Applicant’s suitability for conversion to permanent appointment, as set out in the Bulletin on CPA and the Guidelines, was not correctly followed. This resulted in a failure to provide individual, full, fair and adequate consideration to his candidacy. The decision was flawed for the following reasons:

- a. both those making recommendations and the decision-maker fettered their discretion by applying an unpromulgated policy that no staff member who had been subject to a disciplinary measure could be converted to a permanent appointment;
- b. the CRP failed to perform its crucial oversight role and its recommendation to the ASG/OHRM in respect of three different staff members did not take into account the individual circumstances of the Applicant’s case;
- c. the Organization failed to follow its own guidelines. At no stage of the review process was a **reasoned** written explanation provided for the recommendations and decision not to convert the Applicant. None of those who were involved in the process provided a written assessment of the nature

and gravity of the conduct in question, or its timing, as required by the Guidelines.

**Observation – HermosoUNDT/2013/130**

70. The Respondent submitted that in the interest of consistency, the outcome of this case should be the same as the outcome in HermosoUNDT/2013/130, in which the Dispute Tribunal dismissed an application contesting a decision not to grant permanent appointment. The judgment in this case was not appealed. The Respondent will no doubt be aware of the fact that judgments of the first instance Tribunal are not

## Remedy

### Moral damages

72. The United Nations Appeals Tribunal held that “[n]ot every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damage” (Antaki2010-UNAT-095). The very purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations (Warren2010-UNAT-059; Iannelli 2010-UNAT-093).

73. In Solanki2010-UNAT-044, the Appeals Tribunal held that “compensation must be set by the [Dispute Tribunal] following a principled approach and on a case by case basis” and that “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case”. The Dispute Tribunal may award compensation “for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury” (Antaki2010-UNAT-095).

74. In his application the Applicant requested “appropriate compensation for moral damages”. In evidence, he stated that, after learning of the decision not to grant him a permanent appointment, his morale was very low, he was stressed and he was embarrassed. He had trouble sleeping. He sought assistance for these issues. Counsel for the Respondent suggested to him that any sense of embarrassment would require knowledge on the part of those who may know what had happened and that there was no evidence that this was the case. The Applicant said that, as far as he was aware, only he knew of the decision to deny him conversion to a permanent appointment. However, it was obvious from his UN identification card, which lists the expiration date of a contract, that he had not been granted a permanent appointment. He continued to be employed on contracts of two-year duration, despite his distinguished record as a Security Officer with the Organization. He confirmed that he felt embarrassed because he believed that others would wonder as to the reason why he

had been denied conversion to a permanent appointment when they saw his identification card.

75. A proper assessment of an award for non-pecuniary damages should follow the following steps:

- a. There should be a finding as to whether or not the Applicant did in fact suffer such damage;
- b. If s/he did not, there would be no basis for such an award;
- c. If s/he did, it will be important for the Tribunal to make a factual determination of the level of damage, bearing in mind that feelings of upset, stress, anxiety, psychological damage and all such components that either singly or cumulatively make up what has been referred to as “non-pecuniary damages”, are at varying levels of severity. At one end of the continuum lies a minimal level and, at the other end, a level of extreme severity. Between these two extremes is the appropriate level and the task of determining this level is properly entrusted to the Tribunal which has seen or has heard the individual giving evidence and describing his feelings and emotional state;
- d. The Tribunal has to be satisfied that the damage as described was attributable to action taken by the Respondent;
- e. Where the unlawful act was performed maliciously or was highhanded and without due regard for the legitimate concerns and feelings of the staff member, it is bound to have aggravated the feelings of distress and will accordingly attract a higher award;
- f. The Tribunal has to take into account that the assessment arrived at should be appropriate for the harm suffered. To award a paltry sum will discredit the policy underlying such awards as will an excessive award. Accordingly the Tribunal has to bear in mind the principle of proportionality;

g. Finally, the Tribunal will remind itself that it has no power to award exemplary or punitive damages and that the award must be truly compensatory.

76. Having heard the Applican

- (ii) The ASG/OHRM is directed to consider, in accordance with the relevant statutory provisions and the principles of substantive due process, whether the Applicant's fixed-term contract should be converted, retroactively, to a permanent appointment. This process is to be completed within 90 days of the promulgation of this Judgment.
- (iii) The Respondent is ordered to pay the Applicant the sum of USD 10,000 as moral damages for the anxiety and stress he suffered as a direct consequence of the decision and the manner in which he was treated in considering him for a permanent appointment.
- (iv) The Tribunal refers this case to the Secretary-General to consider any appropriate action to ensure that proper oversight and accountability measures are in place, with particular reference to the role of the CRP in ensuring procedural propriety in decision making within its remit.

79. Payment of the amount set out in para. 76(ii) is due within 60 days of the date that this Judgment becomes executable. If the total sum is not paid within that 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 4<sup>th</sup> day of March 2015

Entered in the Register on this 4<sup>th</sup> day of March 2015

(Signed

Hafida Lahiouel, Registrar, New York