



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/028

Judgment No.: UNDT/2013/130

Date: 25 October 2013

Original: English

Before: Judge Ebrahim-Carst84d ()Tj /TT4 1 Tf -1.8 -1.6maTm -.-.0003 Tc -

Introduction

1. The Applicant, a Computer Assistant at the G-5 Level in the Internal Audit Division, Office of Internal Oversight Se

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 behave for 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 renege 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 August 2010.

inappropriate conduct arising from his misuse of United Nations property. The disciplinary measure applied was that 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 for Staff Members [Eligible to

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

To be eligible for consideration for conversion to a permanent appointment under the present ~~title~~ 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

Criteria for granting permanent appointments

In accordance with staffrules 104.12(b)(iii) and 104.13, a permanent appointment may be granted, taking into 1 Tfw [(nyerm)8(anentt yent a

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 *Tibari* 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 ~~one~~ 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 ~~an~~ permanent staff member who would not be deprived of her or his existing perman

(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 commit 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 permanent appointment are discretionary and a staff member has no automatic right to

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 *Segame* (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 *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. 2 of ST/SGB/2009/10. However, when assessing his suitability under sec. 2 ST/SGB/2009/10 the Administration concluded

unlawful for the Administration to take into account his recent disciplinary sanction.

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

Conclusion

38. The Tribunal finds that the decision 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