



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

ROBERTS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

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, Administrative Law Unit, informing her that in “October and December 2008 [DSS] received from [OIOS] seven investigation reports on misuse of information and communication technology resources by DSS staff members”. The Applicant was one of the staff members identified.

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

expectations during the relevant period; (b) had been subject to an administrative or disciplinary measure; and (c) was serving in an entity that was not downsizing or expected to close. The memorandum then stated:

6. On the basis of the above, we have determined that:

<p>The staff member has NOT met the high standards of efficiency, competence and integrity or has NOT demonstrated [his] suitability as an international civil servant or the granting of a permanent appointment to the staff member would NOT be in the interests of the Organization</p>	<p>[x]</p>	<p>[x]</p>
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7. Accordingly, we hereby:

<p>Do NOT recommend that [the Applicant] be offered a permanent appointment, pursuant to ST/SGB/2009/2010</p>	<p>[x]</p>	<p>[x]</p>
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9. In a memorandum dated 15 August 2011, Mr. Shahinyan, Chief, Section 1, Human Resources Services, Learning, Development and Human Resources Services Division (“HRS/LDSD”) informed the Chairperson, Central Review Panel (“CRP”), that having taken into account the provisions of staff rule 13.4 and sec. 2 of the Bulletin on CPA, the Section concurred with the recommendation of DSS not to grant a permanent appointment to the Applicant. The memorandum further stated that “[t]his decision is based on the fact that [the Applicant’s] records show that a disciplinary measure has been taken against him” (emphasis added). This was the sole reason given by Mr. Shahinyan for the decision.

10. On 1 February 2012, the Chairperson of the CRP informed Ms. Pollard that the CRP had reviewed submissions for conversion to permanent appointment for three staff members, including the Applicant. The memorandum stated (emphasis added):

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 Bonggi, Chief, SSS, gave evidence attesting to the high opinion he had of

the Applicant's professional approach to his duties and asserted that if he had any concerns regarding the Applicant's integrity he would not have assigned these duties to him.

16. Further, the Applicant has consistently received high ratings and praise from his supervisors in his performance appraisals ("ePAS"). In each of the four ePAS reports he received between 2007 and 2010, he received an overall rating of "consistently exceeds performance expectations". In the two ePAS reports between 2011 and 2012, he received an overall rating of "exceeds performance expectations". In every ePAS between 2007 and 2012, the Applicant was rated as "outstanding" for his adherence to each of the Organization's core values of integrity, professionalism and respect for diversity and gender.

Procedural background

17. At a case management discussion on 18 June 2014, the Tribunal informed the parties that following the Appeals Tribunal's judgment in *Santos* 2014-UNAT-415, its area of enquiry would concentrate on whether the decision to deny the Applicant's request for conversion to permanent appointment was procedurally correct.

18. At a hearing on 3 November 2014, the Tribunal received evidence from the Applicant and four witnesses: Mr. David Bongi, Chief, SSS; Mr. Christian Saunders, former Executive Officer, DSS; Mr. Suren Shahinyan, Chief, Section 1, HRS/LDSD; and Ms. Katia Tabourian, Chief, Central Review Bodies Secretariat.

19. The parties filed their closing submissions on 18 November 2014.

Applicant's submissions

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

a. The decision not to grant him a permanent appointment was arbitrary and discriminatory as it was based on what was referred to as the “blind application” of an “unpromulgated policy”, namely that no one with a disciplinary sanction on their record could be granted a permanent appointment;

b. The decision amounts to an additional disguised disciplinary measure with the result that he has been punished twice for the same conduct;

c. The administrative guidelines issued under the Bulletin on CPA require the Respondent to exercise judgment in individual cases by considering both the gravity of the sanctioned conduct and when it occurred. The Respondent failed to exercise his discretion or to individually assess the Applicant’s suitability for a permanent appointment in that the record of decisions does not reflect any deliberation, analysis or exercise of discretion and there is no record of an individual, considered assessment;

d. The oral testimony of witnesses confirmed that his candidacy was subject to a blanket exclusion based on the disciplinary sanction on his file.

21. The Applicant seeks an order for rescission of the contested decision and an award of moral damages to compensate him for the anxiety and stress that he suffered as a result of the impugned decision and the manner in which it was reached.

Respondent’s submissions

22. The Respondent’s principal contentions may be summarized as follows:

a. The Organization properly applied its delegated discretionary authority taking into account all the interests of the Organization;

b. The Applicant's record reflected that he had received a disciplinary sanction, therefore it was proper for the Administration not to grant him a permanent appointment;

c. The disciplinary measure imposed was in close proximity to the decision to deny him conversion to permanent appointment;

d. In the interest of consistency, the outcome of this case should be the same as the outcome in *Hermoso* UNDT/2013/130, in which the Dispute Tribunal dismissed an application contesting a decision not to grant permanent appointment. The applicant in that case engaged in misconduct of the very same nature as that of the Applicant and both received the same disciplinary measure, a written censure.

Consideration

Applicable law

23. ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations) applicable at the time of the Applicant's consideration for conversion to permanent appointment states, in relevant part (emphasis added):

Rule 13.4

100-series fixed-term appointment

...

(b) Notwithstanding that a 100-series fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment, a staff member who has completed five years of continuous service on a 100-series fixed-term appointment on or before 30 June 2009 who has fully met the highest standards of efficiency, competence and integrity and who is under the age of 53 years on the date on which he or she reaches five years of qualifying service *will be given every reasonable consideration for a permanent appointment*, taking into account all the interests of the Organization.

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 consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009” (“the Guidelines”). The Guidelines provide those who are assessing the suitability of a staff member for conversion to permanent appointment with a framework to assist them in determining how to apply the Organization’s discretion. Those making recommendations can reasonably be expected to follow guidelines approved by OHRM.

26. The Guidelines provide (emphasis added):

Criteria for granting permanent appointments

6. The criteria for granting permanent appointments are set out in section 2 of ST/SGB/2009/10. 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 high standards of efficiency, competence and integrity established in the Charter.

7. In determining the interests of the Organization for the purpose of granting a permanent appointment, the operational realities of the Organization shall be taken into account, in accordance with Section 2 of ST/SGB/2009/10.

8. In determining whether the staff member has met the high standards of efficiency and competence, the most recent five performance evaluations on record of the staff member will be reviewed. When this record shows ratings of “fully successful performance” or “fully meets performance expectations” or higher, the requirement will be met.

9. 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. 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.

...

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 (*Sanwidi* 2010-UNAT-084). In *Santos* 2014-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.

32. The Guidelines do not set out such a specific test to determine whether a staff member meets the “highest standards” of integrity¹ or whether, by their conduct, they have fully demonstrated their suitability as an international civil servant. However, para. 9 of the Guidelines states that, in determining whether these standards have been met, “any administrative or disciplinary measures taken against the staff member *will* be taken into account. The *weight* that such measures will be given will depend on *when* the conduct at issue occurred and its *gravity*” (emphasis added).

33. This guidance suggests that those assessing the suitability of a staff member should examine the circumstances of the *conduct at issue* in order to determine what weight it should carry in their overall assessment of whether the staff member should be granted conversion to permanent appointment. Reference to the “weight” to be accorded to the administrative or disciplinary measure implies that this is only one factor that should be considered or weighed in determining whether the staff member meets the criteria for permanent appointment in terms of conduct and integrity.

34. The guidance set out in para. 9 of the Guidelines is logical given the fact that administrative and disciplinary measures may be imposed in response to a wide spectrum of conduct ranging from minor infractions that do not warrant a disciplinary measure² to serious misconduct justifying dismissal. Indeed, the Staff Rules explicitly recognize the scope for differing levels of misconduct and provide for different sanctions.

35. Staff rule 10.2(a) sets out the disciplinary measures available to the Administration when a staff member is found to have committed misconduct.

¹ Though the Tribunal notes the expanded definition of “integrity” set out in staff regulation 1.2(b), which states: “The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status”.

² Staff rule 10.2(b) establishes an explicit distinction between administrative measures and disciplinary measures.

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. Mr. Saunders, by memorandum dated 1 April 2011 to Ms. Pollard, did not recommend that the Applicant be offered a permanent appointment;
- b. Mr. Shahinyan, by memorandum dated 15 August 2011 to Ms. Lopez-Martinez, concurred with the above recommendation;
- c. The members of the CRP who, through a memorandum dated 1 February 2012 from its chairperson, Ms. Lopez-Martinez, to Ms. Pollard, stated that it was the view of the CRP that three staff members, including the Applicant, should not be granted a permanent appointment; and
- d. Ms. Pollard informed the Applicant, by letter dated 29 February 2012, that she had decided not to grant him a permanent appointment.

37. Paragraph 9 of the Guidelines states that 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 was evaluated*” (emphasis added). A standard format memorandum is also referred to in the paragraph. The guidance set out in para. 9 is logical given the importance of documenting, in writing, the reasons for making decisions that may later be subject to judicial review.

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

were twenty years ago”. From his evidence, it appears that he took into account the timing of the disciplinary sanction, rather than the timing of the actual conduct, as required by para. 9 of the Guidelines.³

41. The recommendation of Mr. Saunders was flawed in that it was based on the mistaken understanding that no staff member who had been subject to a disciplinary measure could or should be recommended for conversion to permanent appointment. This position is not set out in any regulation, rule, issuance, policy or guidelines. In addition, in making his recommendation, he failed to adhere to paras. 9 and 14 of the Guidelines.

The Human Resources review

42. The memorandum dated 15 August 2011 prepared by Mr. Shahinyan similarly failed to provide a reasoned explanation of the grounds for his decision to support the initial recommendation. The memorandum simply stated that “[t]his decision is based on the fact that [the Applicant’s] records show that a disciplinary measure has been taken against him”. There is no written assessment of the gravity or timing of the relevant conduct or weighing of the sanction against other considerations such as the Applicant’s excellent performance record. There is also no written consideration given to the overall interests of the Organization.

43. In evidence before the Tribunal, Mr. Shahinyan stated that it was his understanding that each staff member was to be considered on a case-by-case basis and that a disciplinary sanction did not automatically disqualify the staff member from being recommended for permanent appointment. However, there was a “no tolerance” approach to the conduct for which the Applicant was sanctioned and, in his personal opinion, a permanent appointment should never be granted to a staff

³ Although it is not clear from the record when exactly the relevant conduct occurred, it clearly predated the complaint submitted to OIOS on 7 May 2008. The sanction was not imposed until 3 December 2010, at least two and a half years later.

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 understanding of the nature and gravity of the conduct in question.

46. The Tribunal finds that Mr. Shahinyan's recommendation amounted to an improper exercise of discretion which appears to have been fettered by his reliance, to the exclusion of all other factors (such as the *gravity* or the *timing* of the conduct at issue), on a "zero tolerance" approach to the conduct for which the Applicant was sanctioned. At this stage, no fair and adequate consideration of the Applicant's individual circumstances was carried out.

The Central Review Panel's review and recommendation

47. Section 3.4 of the Bulletin on CPA states that in the absence of joint support for conversion to permanent appointment by both the office or department concerned and OHRM, the matter shall be submitted for review to the appropriate advisory body, in this case the CRP. 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 Bulletin on CPA]". The CRP's recommendation is submitted to the ASG/OHRM for a final decision.

48. The Respondent called Ms. Tabourian, Chief of the Central Review Bodies Secretariat and the Secretary of the Central Review Board, as a witness to give evidence in regard to the decision-making process within the Central Review Bodies when considering requests for conversion to permanent appointment. Ms. Tabourian confirmed that she was not a member of the CRP which considered the Applicant's candidacy. However, she could testify as to general policy and procedures. Ms. Tabourian explained that the central review bodies are a mechanism that provide checks and balances to ensure that there is procedural fairness in the decision-making process.

49. The Judge drew Ms. Tabourian's attention to the memorandum dated 1 February 2012 in which the Chairperson of the CRP, Ms. Lopez-Martinez, stated

“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 answered “correct”. The Judge drew Ms. Tabourian’s attention to para. 9 of the Guidelines. She noted that the members of the CRP review the documents that are provided to them. The Judge recalled the documents that Ms. Tabourian had previously stated were before the CRP, namely the Bulletin on CPA, the Guidelines, the pro forma completed by Mr. Saunders, and the covering notes. The Judge asked whether any other documents were before the CRP. Ms. Tabourian noted that the Applicant’s ePAS evaluations were also provided. The Judge asked: “So the panel members would have no idea what the offence was? It would not be in the e-PAS, the cover letter, or the pro forma. Is that right?” The witness confirmed this.

50. By Order No. 298 (NY/2014) dated 4 November 2014, the Tribunal ordered the Respondent to produce “any documentation regarding the Organization’s policy when determining a staff member’s suitability for permanent appointment”.

51. In his response dated 11 November 2014, the Respondent produced a document titled “The Role of the Central Review Bodies in the conversion to permanent appointments exercise”, which was a presentation delivered to the Central Review Body members on 31 July 2010. The document contains the following statement at para. 10 (emphasis added):

In conducting their review, the advisory bodies may:

- a) Request additional information from [LDS] or the department/Office concerned to further justify their decisions to grant or not to grant a permanent appointment to the staff member.
- b) Review the staff members’ Official Status Files for additional information on the staff members.

- 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.⁴

⁴ 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

55. This approach is inconsistent with the Appeal Tribunal's ruling in *Santos* that even where a staff member considered for permanent appointment has a disciplinary sanction on their record, the decision must still be made in a way that is procedurally and substantively fair.

The decision by the ASG/OHRM

56. Having received recommendations from Mr. Saunders, Mr. Shahinyan, and the CRP that the Applicant should not be granted a permanent appointment, each with the sole justification that he had been subject to a disciplinary sanction, Ms. Pollard concurred and informed the Applicant of her decision by letter dated 29 February 2012. Although Ms. Pollard stated that she had taken into account the interests of the Organization, she also stated that the decision was "based on the fact that your records show that a disciplinary measure has been taken against you".

Conclusion

57. The Tribunal concludes that those concerned at all stages of the process, including the CRP, fettered their discretion in accordance with an unpromulgated policy or practice that anyone with a disciplinary measure was not to be considered suitable for conversion, regardless of the nature of the conduct or when it occurred. Although Mr. Shahinyan stated in evidence that he did not believe that anyone who had received a disciplinary measure was unsuitable for conversion, he did state that anyone who had engaged in the conduct in question would be unsuitable because of the Organization's "zero tolerance" policy, which is not part of the relevant legal instrument applicable to conversions to permanent appointments and if it was, it has not been explained in any contemporaneous document or in evidence.

accorded will depend on when the *conduct* at issue occurred. The presentation suggested to Central Review Body members that the relevant consideration was when the *disciplinary action* took place.

58. In resolution A/RES/63/250 (Human resources management), adopted on 24 December 2008, the General Assembly approved new contractual arrangements comprising three types of appointments (temporary, fixed-term and continuing), to take effect on 1 July 2009. Accordingly, eligibility for conversion to permanent appointment ended on 30 June 2009. It has effectively been replaced by ST/SGB/2011/9 (Continuing appointments) of 18 October 2011, setting out the eligibility criteria to be considered for the granting of the new category of contract. Section 2.1(f) of ST/SGB/2011/9 specifically states that to be considered, staff members “must not have been subject to any disciplinary measure during the five years prior to their consideration for the granting of the continuing appointment”. This subsection removes any discretion from decision-makers, in clear contrast to the Bulletin on CPA and the Guidelines.

59. The eligibility criteria set out in sec. 2.1(f) of ST/SGB/2011/9 suggests that the Organization may have identified a gap in the Bulletin on CPA and the Guidelines and consciously decided to remove any discretion from decision-makers. If a similar provision had been included in the Bulletin on CPA, then the recommendations and the decision in this case would clearly have been consistent with the terms of a properly promulgated policy. However, the Bulletin on CPA and the Guidelines, applicable at the relevant time in this case, clearly provide the staff members and managers making recommendations, as well as the final decision-maker, with a discretion in respect of conversion to permanent appointment. By fettering their discretion, as demonstrated by the facts in this case, the decision-makers violated the Applicant’s right to due process.

60. The Tribunal finds that there are no regulations, rules or administrative issuances that justify the stance taken that a staff member cannot be granted a permanent appointment if they have a disciplinary measure on their record or if they have misused the Organization’s ICT resources, regardless of the individual circumstances. It is settled law that decisions must be based on properly promulgated rules and policies and should not contravene the Organization’s own guidelines.

Above all, the decision-makers should not fetter the discretion, which they are duty bound to exercise.

61. The primary and binding legal instrument is ST/SGB/2009/10, to be read together with the Guidelines made thereunder. It is not for the decision-makers to operate outside the strict terms of the primary legal instrument by explicit or tacit agreement to adopt a rule of practice or procedure that is not in strict compliance with the Bulletin on CPA and its guidance. Above all, those making recommendations or decisions must be guided by the Organization's policies as reflected in properly promulgated administrative guidelines that remain within the parameters of the primary instrument and not through the moral precepts of any individual or group of individuals.

62. The Tribunal further finds that, when conducting the final stage of the review process, the CRP, whose role is crucial in advising the ASG/OHRM, did not receive details relating to the date and type of conduct and the nature of the sanction. Rather, the documents provided to the CRP only reflected the existence of "an administrative or disciplinary measure". The CRP did not seek further information so as to make an informed recommendation to the ASG/OHRM. Therefore, the CRP's review of the procedural propriety of the process in this case was flawed in that it was conducted in the absence of elements that were essential in determining the Applicant's suitability as an international civil servant and whether he met the high standard of integrity for granting conversion to a permanent appointment.

63. The CRP also made a single recommendation in respect of three different staff members, without providing individual and differentiated analyses of the different cases, including taking into account the gravity of the conduct in question and when it took place. It would appear that the CRP did not give independent consideration to each recommendation but grouped them together. Based on the evidence before the Tribunal, it cannot be said that the Applicant received an individual, full and fair review of his suitability for conversion to permanent appointment, which would have

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.

66. The Tribunal concludes from the oral and documentary evidence that the presence of a sanction in the Applicant's file was the sole reason why the Organization denied the Applicant a permanent appointment. The Tribunal recognizes that it is part of the Organization's discretion to determine its own interests, including issues of integrity and suitability. However, such discretion has to be properly applied. 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". By adopting the stance that because of the mere existence of a sanction against the Applicant, there was no need to give any further consideration to his suitability, the Organization effectively fettered its discretion and established a criterion that is not stipulated in the Bulletin on CPA. It would appear that those involved at various steps of the process were oblivious to the full requirements of the Bulletin on CPA, as clarified in the Guidelines, which state that the weight given to a sanction will depend on when the conduct at issue occurred and its gravity.

67. By Order No. 157 (NY/2014) dated 24 June 2014, the Tribunal ordered the Respondent to inform the Tribunal "whether any, and if so, how many staff members with a disciplinary measure recorded in their Official Status File had been granted conversion to permanent appointment in accordance with ST/SGB/2009/10". In response, on 22 August 2014, the Respondent indicated that records from the Department of Management, New York Secretariat and the United Nations Office in Geneva indicated that none of the 28 staff members with a disciplinary measure recorded in their Official Status File were granted permanent appointment.⁵

68. The Tribunal addressed the issue again at the hearing on 3 November 2014 and by Order No. 298 (NY/2014), dated 4 November 2014, the Tribunal ordered the Respondent to complete his response to Order No. 157. In his response dated 11 November 2014, the Respondent confirmed that "no staff with a disciplinary

⁵ During the conversion review exercise conducted at the United Nations Office in Vienna there were no staff members with a disciplinary measure recorded in their Official Status File.

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 – *Hermoso* UNDT/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 *Hermoso* UNDT/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 binding. Furthermore, insofar as the Respondent's plea for consistency in judgments is concerned, he has failed to provide sufficient particulars to show how or why this Tribunal should conclude that the factual and legal matters in *Hermoso* are so strikingly similar as to logically and legally lead to the same judicial outcome.

71. Even if the Tribunal were minded to take this submission seriously, it is clear that there are significant differences between the two cases. If a party is so desirous of consistency in dealing with similar issues, the onus is on that party to draw to the attention of the Tribunal any cases which they consider should be subject to an order for combined proceedings. The Administrative Law Section is best placed to identify such cases. They did not do so. The Tribunal will follow the clear legal principles enunciated by the Appeals Tribunal in *Santos* 2014-UNAT-415, which stated 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, and in *Baig et al.* 2013-UNAT-357, which stated that candidates for conversion to permanent appointment are entitled to *individual, full and fair consideration* of their suitability.

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” (*Antaki* 2010-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 (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093).

73. In *Solanki* 2010-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” (*Antaki* 2010-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 Applicant's evidence, the Tribunal has had the opportunity to form its own assessment as to the degree to which the Administration's flawed decision impacted on the Applicant's well-being. Accordingly, having regard to the foregoing principles, the Tribunal assesses the degree of moral damage as commensurate to awards in the lower third of the range of awards to date. Accordingly, the sum of USD 10,000 is considered appropriate as compensation for moral damages.

Accountability

77. Article 10.8 of the Statute of the Dispute Tribunal states that the Tribunal may "refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability". The evidence in this case reveals a lack of vigilance at every level but particularly on the part of the CRP in carrying out the necessary checks and balances to ensure procedural propriety and fairness in decision making. It is for the Secretary-General to consider whether this is an isolated instance or whether any measures need to be taken to remind the review bodies of the purpose for which they have been established and the duty they have to maintain the integrity of the decision-making process by carrying out a proper oversight of the process.

Judgment

78. The Judgment of the Tribunal is that:

- (i) The decision to deny the Applicant conversion to permanent appointment is rescinded.

- (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 4th day of March 2015

Entered in the Register on this 4th day of March 2015

(Signed)

Hafida Lahiouel, Registrar, New York