Case No.: UNDT/NY/2010/006/ UNAT/1583

Judgment No.: UNDT/2011/195

Date:

resignation, were limited to the administrative decision not to grant her a permanent appointment and, instead, to extend her probationary contract for another six months.

5. Additionally, it should be noted that, had the Applicant's resignation been due to alleged harassment, this would have been reflected in contemporaneous records. At the time of her resignation in April 2006, the Applicant was already in litigation with the Organization, having filed her request for administrative review (on 15 December 2005), having complained to the Panel of Discrimination and Other Grievances (on 17 January 2006), and having appealed to the JAB (on 30 January 2006). Despite all of this, in her letter of resignation, dated 13 April 2006, the Applicant stated that she resigned for "personal reasons", making no reference whatsoever to any alleged harassment or other improper reasons that necessitated her resignation. The Tribunal finds that it is highly improbable that, if she felt compelled to resign because she was being subjected to continued harassment, she would not have mentioned it in her letter of resignation. Furthermore, she should have filed a further request for administrative review. She did not do so. Therefore, the issue of the Applicant's resignation is outside the scope of the present case.

6. Accordingly, the legal issues in this case are as follows:

a. Was the decision not to grant the Applicant a permanent appointment in breach of her rights?

b. If it was, what is the amount of compensation to be awarded to the Applicant?

c. With respect to the finding of the JAB that the Applicant was subjected to a hostile work environment, should further compensation be awarded in addition to the two months' net base salary already paid?

Procedural matters

*Case management discussions*

7. The Tribunal held two case management discussions on 2 June 2010 and 17 October 2011. Both Counsel agreed that the matter could proceed on the papers. The parties were directed to file final submissions by 24 October 2011, with responses to each other's submissions due on 27 October 2011. The submissions were duly filed and considered by the Tribunal.

*Closing submissions*

8. The parties were directed, by Order No. 243 (NY/2011), to file their closing submissions on liability by 24 October 2011. The Applicant's final submission on liability, filed on 24 October 2011, contained, as annexes, the unsigned and unsworn statements of Ms. Vera Blankley (Staff Repr

Facts

12. The factual summary below is based on the parties' submissions and the report of the JAB. Only those facts deemed

> 1. The probationary appointment of [the Applicant], P-2, Interpreter (English) extended for one year in accordance with Staff Rule 104.12(a)(i), is due for review in November 2005.
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> 2. In light of the fact, that the staff member's overall performance during the period of her appointment has not met the expectation of the Chief of the English Interpretation Section and the Chief of the Interpretation Service, the Department recommends separation of the staff member at the completion of the three years on probationary appointment.

20. On 2 November 2005, Ms. Chami referred the matter to the Central Review Committee, stating that, although the Rebuttal Panel recommended the upgrading of the Applicant's rating to "fully successful", the Applicant "[did] not seem to have reached the requisite level for consideration for conversion of her appointment to

> *and rules, her probationary appointment is to be converted to permanent appointment*. We will coordinate with the Colleagues in the Executive Office of DGACM implementation of the above.

It should be noted that the Applicant first discovered the existence of this communication on 20 January 2006, when she inspected her personnel file.

23. Later that day, 11 November 2005, the Applicant was informed by Ms. Chami, in the presence of Mr. Mikheyev, Staff Representative for Interpretation Service, that Mr. Chen (Under-Secretary-General, DGACM) had decided to grant her a permanent appointment. However, approximately one hour later that same day, the Applicant received a voicemail message from Ms. Chami, retracting her initial statement and stating that she had spoken too soon and that Mr. Chen had, in fact, not yet taken a decision and that the Applicant's case would be reviewed the following week and she would be informed of the decision.

24. On 17 November 2005, the Applicant's contract was extended by one month to 31 December 2005, pending a decision on the question of her contractual status.

25. On 29 November 2005, the Applicant's contract was extended for a further period of six months. The reason given for the extension was to provide the Applicant with a final opportunity to show that she met the conditions for conversion, as explained in a memorandum of 29 November 2005 from Ms. Beagle to Mr. Chen:

> 1. Please refer to the case of [Ms. Corbett], a P-2 English Interpreter, whose probationary appointment was extended in 2004 for a third year until the end of November 2005, in accordance with staff rule 104.12(a)(i). The Central Review Committee which reviewed the recommendation made by DGACM and OHRM to separate the staff member at the end of her third year was of the view that, while the recommendation was in good order and properly documented, it was not in a position to support it given that the PAS Rebuttal Panel had upgraded Ms. Corbett's rating for the period 2004–2005 to "Fully successful performance".
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> 2. After a thorough consideration of the matter, I find that it would be appropriate in this particular case to give Ms. Corbett a final opportunity to show that she meets the conditions specified in staff

rule 104.13(a) and General Assembly resolution 51/226 of 3 April 1997. Staff rule 104.13(a) requires that 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", for conversion of their probationary appointment to permanent. In addition, Section III.B, paragraph 20, of General Assembly resolution 51/226 requests the Secretary-General, in the case of staff recruited through competitive examinations, "to ensure that only those who meet the highest standards of efficiency, competence and integrity established in the Charter are granted permanent appointments".

3. Accordingly, in accordance with staff rule 112.2(b), I have decided to make an exception to st

consideration, she did not have a right to receive a permanent appointment, and that, "[w]hile [the JAB] had doubts that [the Applicant] had been given such [full and fair]

shall *normally be two years*. In exceptional circumstances, it *may be reduced or extended for not more than one additional year*.

*At the end of the probationary service, the holder of a probationary appointment shall either be granted a permanent appointment or be separated from service*.

The probationary appointment shall have no specific expiration date and shall be governed by the Staff Regulations and Staff Rules applicable to temporary appointments which are not for a fixed term.

39. Former staff rule 104.13 stated (emphasis added):

Permanent appointments

(a) The permanent appointment may be granted, in accordance with the needs of the Organization, to 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*, provided that:

(i) They have completed the period of probationary service required by rule 104.12(a)(i);

…

(b) Recommendations proposing the grant of permanent appointments on the ground that a staff member whose probationary period has been either completed or waived under the terms of rule 104.12(a)(ii) or (b)(iii) has met the requirements of this rule may be made to the Secretary-General by agreement between the Office of Human Resources Management and the department or office concerned. Such agreements shall be reported to the Appointment and Promotion Board before submission to the Secretary-General.

40. Former staff rule 112.2 stated (emphasis added):

(b) Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly, *and provided further that it is agreed to by the staff member directly affected* and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

Applicant's submissions

41. The Applicant's principal contentions may be summarised as follows:

a. The Administration did not give full and fair consideration to converting her contract from probationary to permanent. The evaluations of her performance and the decision-making process were tainted by workplace harassment and discrimination against her. The Applicant's due process rights were violated and the Administration failed to address the situation properly;

b. There was arbitrariness and abuse of discretionary authority in the way the Administration handled her contractual status. By its own actions, the Administration created a reasonable expectation with regard to the Applicant's permanent appointment, as demonstrated by Ms. Chami's statement on 11 November 2005 and corroborated in the email of 11 November 2005 from Ms. Chami to Mr. Beagle, stating that the Applicant would be granted a permanent appointment. The Applicant was never informed of this email exchange and, since the conversion did not take place, something dubious must have happened that led the Under-Secretary-General for DGACM to change his mind;

c. The Applicant's supervisors displayed an absolute disregard for the rebuttal process given to the Applicant by announcing, even prior to the first hearing of the Rebuttal Panel, that they would recommend separating her;

d. The Respondent was required, at the end of the three-year period, to decide on the Applicant's conversion. The Applicant could not have been separated because her performance was upgraded to "fully successful performance" and due to the fact that the Central Review Committee did not agree with the recommendation to separate her in view of the successful rebuttal. The Respondent was not permitted to rely on former staff rule

performance for 2002–2003 and 2003–2004 were not rebutted and are therefore final. The rating of fully successful performance for only one of three years shows that the Applicant failed to demonstrate her suitability for a permanent appointment. It is not the role of the Tribunal to determine whether or not the Applicant met the criteria for being granted a permanent appointment;

b. The Applicant's appointment was extended for a further period of six months beyond the three-year limitation on probationary appointments to see if her performance would improve. Without this extension, the Applicant would have been separated, as a conversion to a permanent appointment could not have been reasonably justified. Rather than a violation of the Applicant's rights, it was a further opportunity to meet the requirements by granting a contract extension of six months as an exception to staff rule 104.12(a)(i). At the end of that six-month period, a final decision was to be made regarding conversion to permanent appointment. However, the Applicant resigned in April 2006, prior to the end of that period;

c. Any representations allegedly made to the Applicant at the meeting on 11 November 2005 about the decision of the Under-Secretary-General, DGACM, to grant her a permanent appointment cannot be relied upon. Ms. Chami did not have any authority to make that statement, nor did the Under-Secretary-General, DGACM, since the rules require the Assistant Secretary-General, OHRM, to agree to such recommendation prior to a decision being taken. A promise made by an individual who lacks the requisite authority, and is subsequently withdrawn, does not give rise to a legitimate expectation. Further, th

The email of 11 November 2005 was not communicated to the Applicant at the time and thus did not give rise to any expectation on her part;

d. Should the Applicant succeed on the merits, she may be entitled to claim compensation only for potential loss of opportunity to be considered for conversion and for enduring a hostile work environment. There can be no certainty in this case that the Applicant would have been converted. Further, the Applicant would not be entitled to claim compensation for the conduct she refers to as constituting a "denial of due process" as she did not appeal this conduct and this claim is not properly before the Tribunal;

e. The compensation in the amount of two months' net base salary already granted to the Applicant was adequate and appropriate for any harm suffered, and the Applicant's claims for further relief are excessive and should be denied. The Applicant's quantification of her claims is arbitrary and lacks support. Even assuming that she was entitled to conversion, the Applicant resigned effective 20 April 2006 for personal reasons and thus any compensation should be limited by that consideration. She cannot claim that the Organization is responsible for any loss of earnings that flowed from her decision to resign;

f. The Applicant's claim of USD42,000 in withdrawn pension contributions, made by the Organization on her behalf, is not receivable as the Applicant failed to properly contest that decision. Further, this claim is without merit as the Applicant resigned for personal reasons;

g. The Applicant's claims for compensation on the basis of gross salary and entitlements are incorrect as any calculation should be based on net base salary, without entitlements and benefits. The Applicant also failed to provide any exceptional circumstances justifying a request for compensation in excess of two years' net base salary, as required by art. 10.5(b) of the Tribunal's Statute.

requirements, including consideration of whether that determination was reasonably open to the Administration to make. The administrative discretion is posited on the assumption of fair dealing and full and fair consideration being given to a staff member on probation. Whilst acknowledging that it is for a staff member's managers and not for the Tribunal to make decisions as to the competence of the staff member and her or his suitability for a permanent appointment, the Tribunal may, in appropriate cases, call into question that assessment if it appears to lack essential components of rational decision-making or appears to have been arrived at in circumstances that could reasonably be considered to have been unfair.

47. In this regard, due weight is to be given to the internal mechanisms put in place by the Respondent to ensure the application of standards of consistency and fairness, including the role and function of the central review bodies. In arriving at its assessment as to whether the Applicant's rights were respected, the Tribunal takes into account the long line of cases endorsing the principle that it is not for the Tribunal to substitute its judgment for that of the Applicant's supervisors', properly conducting themselves in accordance with the facts and observing fully the staff member's rights to due process.

48. In this case, the Tribunal was guided by the reports of the Rebuttal Panels and the JAB, as well as the recommendation of the Central Review Committee. Taken collectively, these bodies call seriously into question the manner in which the Applicant had been treated and the performance assessments of the Applicant's supervisors and managers.

*Applicant's performance during the relevant period*

49. The Applicant commenced her probationary appointment on 25 November 2002. It was extended by one year in November 2004, and expired on 25 November 2005, reaching the three-year limit.

50. For the periods of 25 November 2002 to 31 March 2003 and 1 April 2003 to 31 March 2004, the Applicant's performance was rated as "partially meets performance expectations". The Applicant received the same initial rating for the period of April 2004–March 2005, but it was subsequently upgraded by the Rebuttal Panel to "fully successful performance". It was not submitted to the Tribunal that this final rating was changed in any way by the Secretary-General, and the Respondent is bound by it.

51. In November 2005, when the Administration was deciding on the Applicant's case, no performance evaluation report for the period of April 2005 to November 2005 existed, as it would only be finalised after March 2006 (because it was of the April 2005–March 2006 performance cycle). However, it is apparent that the Administration believed that the Applicant's performance between April and November 2005 was also lacking; the Applicant was subsequently assessed by her supervisors as "partially meets performance expectations" in her performance evaluation report for April 2005 to March 2006. This rating, however, was upgraded by the Rebuttal Panel on 9 March 2007, which determined that the Applicant's performance for the period April 2005–March 2006 was fully successful. It is significant to note that the Rebuttal Panel found that this rating was not connected with the improvement plan as the plan had been declared "ineffective" by the Panel. The findings of the Rebuttal Panel for April 2005–March 2006 were not challenged or questioned in these proceedings and are deemed to have been accepted. In the Tribunal's view, they provide a reliable indication of the Applicant's performance in the seven months leading up to November 2005, when the decision was made to extend her probationary appointment by a further period of six months. It follows, therefore, that the Applicant's performance in the period of April 2004 to November 2005, when the decision had to be made whether or not to confirm her conversion, must have been fully successful as assessed by the Rebuttal Panel.

52. Thus, the Tribunal finds that, while the Applicant's performance was partially successful in the first 16 months of her probationary appointment (i.e., from

25 November 2002 to 31 March 2004), it was fully successful in the last 20 of her 36 probationary months (i.e., from 1 April 2004 to 25 November 2005).

*Decision to extend the Applicant's appointment beyond November 2005*

53. Instead of making a decision to separate the Applicant or to grant her a permanent appointment, as was required by the Staff Rules, the Applicant's appointment was extended further for a period of six months, under former staff rule 112.2(b) (on exceptions to staff rules), apparently in order to see whether there would be a sustained improvement in her performance and whether she would meet the conditions for conversion.

54. However, former staff rule 112.2(b) required any exception to the Staff Rules to be "agreed to by the staff member directly affected". It is clear that the Applicant's consent was not sought by the Administration or given by the Applicant prior to this exception being relied upon. Such consent was vital to the proper application of that rule. The Applicant obviously did not agree with the course of action chosen by the Administration, as is evident from the meetings she had with her supervisors on 12 and 15–16 December 2005 regarding the proposed performance improvement plan. She also sought administrative review of the decision on 15 December 2005, approximately two weeks after her appointment was extended on 29 November 2005. In the circumstances, the reliance on staff rule 112.2(b) was inappropriate and the procedure for consideration of conversion to permanent status was not properly followed. This was a fundamental breach in the application of the procedure.

55. The Tribunal does not accept the Respondent's submission that the fact that the Applicant stayed with the Organization for more than four months after the decision to extend her contract confirmed that she was in agreement with that decision. It would be entirely unreasonable to expect staff members to resign in protest whenever they disagree with administrative decisions applied to them and to treat their failure to do so as acquiescence to the decision.

56. It would appear that the resort to the exception under former staff rule 112.2(b) was no more than a device to get round the stark choice which faced the managers concerned. Either they offered the Applicant a permanent contract or separated her from service and faced the potential consequences as advised by the Central Review Committee, who warned that unless the Rebuttal Panel's report was overturned as provided for under sec. 8.3 of ST/AI/2002/3 (Performance Appraisal System), the legitimacy of the separation "would clearly be open to question".

57. It should be noted that para. 1 of Ms. Beagle's memorandum of 29 November 2005 was misleading and appears to seek to minimise the importance of the advisory caution issued by the Central Review Committee. The Committee did not say that it was "not in a position to support" the recommendation. The Committee said that "they could not approve the recommendation unless the Rebuttal Report provided on her latest performance report (2004–2005) … was overturned by the authority of the Secretary-General". The Tribunal has not been provided with any evidence to the effect that the Rebuttal Panel's report was overturned and it is unsafe to infer that this may have been done in the absence of clear and unequivocal evidence to this effect. Ms. Beagle's decision does not appear to be in compliance with the recommendation of the Central Review Committee. Whilst it is accepted that the recommendations of the Central Review Committee are not binding and that management have the final say, the Organization's legal framework envisages the process whereby the role, functions, and recommendations of central review bodies are to be respected. The recommendations are not to be lightly set aside and, if they are be disregarded by management, there should be good and cogent reasons for doing so. Furthermore, there should be an audit trail, in the interests of transparency and accountability, and, in the event of a challenge, for the Tribunal to be able to assess whether there has been an error of law or breach of due process.

58. In the circumstances, the legitimacy of the Administration's course of action is clearly open to question. Where eligibility for a permanent contract is at stake, there has to be clarity and transparency when exceptions are made that have the effect

of detrimentally affecting the rights of a staff member. The notion that the mere sending of Ms. Beagle's letter constitutes compliance with the fundamental procedural requirement cannot be accepted by the Tribunal.

59. The Tribunal finds that the Administration's decision to extend the Applicant's probationary contract beyond the two-year limit, without her agreement, was improper and in contravention of the established procedures. Although it was permissible to make an exception to the Staff Rules under former staff rule 112.2(b), the procedural requirements of that staff rule were not met. The Administration was required to decide, at the expiration of the three-year probationary term, whether to separate the Applicant or to grant her a permanent appointment. They did not do so. The Applicant was denied the right to be considered for a permanent appointment in accordance with the established procedures.

*Assessment of the Administration's decision*

60. The Respondent submits that, but for the six-month extension granted to the Applicant in November 2005, she would have been separated from service. Further, the Respondent had to make the decision based on the information available to it in November 2005, and at that time of the three relevant performance evaluation reports (November 2002–March 2003, April 2003–March 2004, and April 2004–March 2005), only the last report rated the Applicant's performance as fully successful. In this case, the Respondent argues that a rating of fully successful performance in the

March 2007. The flawed performance assessment by her managers can legitimately be considered as casting doubt on the assessment that the Applicant was not suitable for a permanent appointment.

62. The events of 11 November 2005 also cast doubt on the decision-making process with regard to the Applicant's case. The Respondent submits that the initial information that the Under-Secretary-General, DGACM, was minded to grant the Applicant a permanent appointment was promptly corrected on the same day, and the subsequent communications demonstrate that no final decision had been made. However, even if the Tribunal were to accept all of the Respondent's arguments with respect to the events of 11 November 2005, it would not affect the findings of the Tribunal with respect to the decision not to extend the Applicant's contract for another six months.

63. The Tribunal finds that the Administration acted unlawfully in that it failed in its duty to give full, fair, timely, and proper consideration to the Applicant's legitimate aspiration for a permanent appointment in November 2005.

*Compensation in relation to the issue of conversion to a permanent appointment*

64. As the Appeals Tribunal stated in *Solanki* 2010-UNAT-044 and *Ardisson* 2010-UNAT-052, compensation must be set by the Dispute Tribunal following a principled approach and on a case-by-case basis. In cases such as this, the Dispute Tribunal should be guided by two elements. The first element is the nature of the irregularity that led to the unlawfulness of the contested administrative decision. The second element is the assessment of the staff member's genuine prospect of the positive career change had the correct procedure been followed. Damages may only be awarded to compensate for negative effects of a proven breach and the award should be proportionate to the established harm suffered by the Applicant (*Antchow* 2010-UNAT-035). The Dispute Tribunal is in the best position to decide on appropriate relief, given its appreciation of the case (*Solanki*).

65. Having considered the parties' submissions on relief and taking into account the totality of circumstances in the present matter, including the errors identified in the decision-making process, the Tribunal finds that had the proper procedures been followed and proper factors been taken into account, and noting the positive comments and ratings in two separate Retention Panel reports, the Applicant stood a reasonable prospect of being given a permanent appointment. The Tribunal accepts that such assessments are, by their very nature, speculative. However, taking into account the reports and recommendations of the internal mechanisms for ensuring consistency and fairness, and giving due consideration to the expressed concerns of the Applicant's managers, it is not unsafe to conclude that she had a reasonable probability—but not a certainty—of being offered a permanent contract.

66. Even if the Applicant were to have been given a permanent contract, there is no certainty as to how long she would have continued in employment under such a contract. It must be taken into account that she resigned in April 2006, citing personal reasons, as explained in paras. 4-5 above. This fact has to be considered in assessing the probability or percentage chance that she may well have left the Organization in any event. Further, the relationship between the Applicant and her managers had deteriorated to such an extent that it would appear to any reasonable and informed observer that it would have had a very limited lifespan. Her compensatory losses will therefore be subject to a significant discount, limiting the amount of compensation.

67. Therefore, taking into account all the above factors, even if the Applicant were to have received a permanent contract, the Tribunal finds that the prospect of her having remained in employment for any significant period was, in all the circumstances, remote.

68. Accordingly, the Tribunal considers it appropriate to order that the Applicant be paid nine months' net base salary at the date of her separation as compensation for the established breach of her right to be properly considered for permanent

appointment and any resultant harm, including loss of chance of continued career opportunities, employment, earnings and associated benefits and entitlements.

*Adequacy of compensation for working in a hostile work environment*

69. The Applicant confirmed that she accepted, under protest, the two months' compensation granted by the Respondent. The Tribunal finds that such payment was accepted without prejudice to the Applicant's right of appeal.

70. As stated in the Under-Secretary-General for Management's letter dated 22 August 2007, the Respondent accepted that a hostile work environment existed and the only question remaining is whether the two months' salary paid to the Applicant was adequate. It is therefore not necessary to re-litigate the issue of the existence of a hostile work environment.

71. In the view of the Tribunal, the payment of two months' salary was insufficient to compensate her for the damage she suffered in connection with the hostile work environment over an extended period of time as a staff member on a probationary appointment. Every staff member has the right to a harmonious work environment that protects his or her physical and psychological integrity (*Nwuke* 2010-UNAT-099). If this right is violated, proper compensation is warranted, taking into account the particular circumstances of the case.

72. The Tribunal has considered the totality of the circumstances, including the findings of the JAB as to the seriousness of the infringement of her rights as a staff member and the recommendation that she be compensated in the sum of USD50,000 or six months' gross salary, whichever is greater. The Tribunal decides that, in addition to the two months' net base salary already paid to her, the Applicant should be paid USD20,000 as compensation for the breach of her right to a harmonious work environment (*Nwuke*).