UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-673

Nguyen-Kropp & Postica

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Sophia Adinyira Judge Deborah Thomas-Felix Judge Inés Weinberg de Roca Judge Luis María Simón Judge Mary Faherty Judge Richard Lussick
Case Nos.:	2016-884 and 2016-885
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Appellants:	Thad M. Guyer
Counsel for Respondent:	Rupa Mitra Carla Hoe

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it the separate appeals filed by Ms. Ai Loan Nguyen-Kropp and Mr. Florin Postica against the consolidated Judgment UNDT/2015/110/Corr.2, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York in the cases of *Nguyen-Kropp v. Secretary-General of the United Nations*, No. UNDT/2011/054, and *Postica v. Secretary-General of the United Nations*, No. UNDT/2011/055. Ms. Nguyen-Kropp and Mr. Postica filed their appeals on 11 January 2016, and the Secretary-General filed his answer on 11 March 2016. On 11 April 2016, the Appeals Tribunal issued Order No. 260 consolidating the two cases.

2. The Appeals Tribunal is of the view that these appeals raise a significant question of law. Consequently, they have been referred for consideration by the full bench or whole Appeals Tribunal, pursuant to Article 10(2) of the Statute of the Appeals Tribunal (Statute):

> Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgement is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A quorum in such cases shall be five judges.

Facts and Procedure

3. The following facts are uncontested, as found by the Dispute Tribunal:[1]

> ... On 30 July 2010 and 2 August 2010, respectively, Ms. Beatrice Edwards, the International Programme Director of [the Government Accountability Project (GAP), counsel for the complainants] wrote to Ms. Joan Elise Dubinsky, then Director of the Ethics Office, on behalf of each of the [complainants]. The letters set out complaints of retaliation, requested protection from further retaliation and, in the case of Ms. Nguyen-Kropp, requested interim relief. The background facts giving rise to the complaints are set out in detail in *Nguyen-Kropp and Postica* UNDT/2013/176 and *Nguyen-Kropp and Postica* 2015-UNAT-509.
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> ...
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> ... By interoffice memoranda dated 6 October 2010, the [complainants] were advised that the Ethics Office had completed its preliminary review of their complaints and determined that there was a prima facie case of retaliation. They were further informed that:

[1] Impugned Judgment, paras. 8 and 10.

> As per Section 5.10 of ST/SGB/2005/21 [(Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)], the Ethics Office is in the process of appointing an Alternative Investigating Panel [(AIP or Panel)]. This Panel will conduct an investigation to establish whether the detrimental actions taken against [the [complainants]] constitute[d] retaliation and whether [their] protected activities were contributing factors thereto.

4. Between 5 November 2010 and 13 December 2010, there were various e-mail exchanges between Ms. Edwards and Ms. Dubinsky regarding the AIP. The e-mails discussed, *inter alia*, the process for selecting AIP panel members, the Terms of Reference (TOR) setting out AIP's scope and authority, whether the TOR had been discussed with the alleged retaliator or influenced by him and the burden of proof to be applied by the AIP. With respect to this last point, Ms. Edwards had requested that a revised TOR be issued clarifying the burden of proof; in her view, the TOR was inconsistent with Section 2.2 of ST/SGB/2005/21, which provides that "the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity". Ms. Dubinsky responded the same day, stating that although the disputed provision of the TOR was silent as to which party had the burden of proof, it was not inconsistent with ST/SGB/2005/21, which was controlling in terms of both the burden and standard of proof for the investigation.

5. On 2 May 2011, the complainants were informed in writing by Ms. Dubinsky that the Ethics Office had determined, following an independent analysis of the investigation report of the AIP, that retaliation in their cases had not been established.

6. On 10 May 2011, Ms. Edwards wrote to Ms. Dubinsky stating that, in reviewing the decisions of the Ethics Office, there were a number of instances in which the burden of proof set out in Section 2.2 of ST/SGB/2005/21 had been misapplied. She requested a copy of the AIP's investigation reports "[g]iven the unmistakeable misapplication of the burden of proof; the lack of clear and convincing evidence presented by the Administration; and factual errors and oversights in the final decisions".[2]

[2] *Ibid*., para. 23.

7. On 23 May 2011, Ms. Dubinsky responded to Ms. Edwards reiterating the decision of the Ethics Office. She stated that it was satisfied that the Administration had proven, by clear and convincing evidence, that it would have taken the same actions absent the complainants' protected activities. Ms. Dubinsky also stated that complainants were not entitled to receive copies of relevant investigation reports under ST/SGB/2005/21 and that, under Section 5.7 of ST/SGB/2005/21, information contained in memoranda provided to them about the outcome of an investigation "are not intended to address and elucidate in detail the substantive findings of the Panel's investigation, or the Ethics Office's subsequent determination".[3]

8. On 31 May 2011, Ms. Edwards wrote to Ms. Dubinsky stating that the precise findings of the AIP had not been identified in Ms. Dubinsky's 2 May 2011 memoranda to the complainants. She asked for clarification of the Panel's determination in relation to each of the retaliation claims presented by the complainants. On 14 June 2011, Ms. Dubinsky sent a memorandum to Ms. Edwards providing a summary of the AIP's findings.

9. As noted by the Dispute Tribunal, the cases of Ms. Nguyen-Kropp and Mr. Postica have a "long and complex" procedural history.[4] Their cases were stayed three times pending adjudication of "other legal proceedings with a potential bearing on the outcome of the[] cases".[5]

10. Noting that the scope of the cases had become "somewhat confused during the course of the proceedings", the Dispute Tribunal proceeded to identify the contested decisions raised in the "almost identical" applications: [6]

> ... The decision to appoint the AIP to investigate the [complainants'] retaliation complaints, specifically the expertise, selection process and TOR of the [P]anel;
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> ... The 2 May 2011 determination by [the] Director of the Ethics Office, that retaliation was not established; [and]
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> ... [The] 23 May 2011 decision [by the Director of the Ethics Office] not to provide the [complainants] with a copy of the AIP's investigation report "nor even reasonably specific information as to the Panel's findings on each of [their] allegations".

[3] *Ibid*., para. 24
[4] *Ibid*., paras. 27-59.
[5] *Ibid*., para. 63.
[6] *Ibid*., para. 65.

11. The Dispute Tribunal made various additional findings regarding the scope of the cases before turning to the question of receivability.

12. It first addressed the statutory requirement, set forth in Article 8(1)(c) of the Dispute Tribunal Statute (UNDT Statute), for a management evaluation of a contested decision, finding that Ms. Nguyen-Kropp and Mr. Postica had not filed requests for management evaluation. In making this determination, the UNDT relied upon an e-mail dated 2 June 2011 from the Officer-in-Charge of the Management Evaluation Unit (MEU), which stated that "the Secretary-General ha[d] determined that the decisions of the Ethics Office lie outside the scope of management evaluation; thus, "[t]he staff member[s] may submit [their] request for review directly to the UNDT".[7]

13. Considering whether this e-mail could be considered a waiver of the statutory requirement for management evaluation, the UNDT stated:[8]

> ... [W]here the MEU has explicitly informed a staff member that it will not conduct management evaluation with regard to a certain category of requests (i.e.[,] requests concerning decisions of the Ethics Office), and that information is based on a decision of the Secretary-General that such decisions lie outside the scope of management evaluation, it would be illogical to require a staff member to submit such a request.

14. The UNDT then turned to the question of whether "acts or omissions of the Ethics Office" are subject to judicial review, and summarized the contentions of the parties:[9]

> ... The [Secretary-General] submits that the Ethics Office is independent from the Secretary-General. Accordingly, the actions or omissions of the Ethics Office cannot be attributed to the Organization and therefore do not constitute administrative decisions. The [Secretary-General] submits that the Ethics Office is limited to making recommendations to the Secretary-General and the Administration, which are not binding. Since the recommendations of the Ethics Office do not have direct legal consequences on a staff member's rights and obligations, the determinations of the Ethics Office do not constitute administrative decisions.
>
> ... The [applicants] submit that in accordance with sec. 6.3 of ST/SGB/2005/21, which states that the procedures under that bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse

[7] *Ibid*., paras. 28-29.
[8] *Ibid*., para. 83.
[9] *Ibid*., paras. 84-85.

> mechanisms, they are entitled to seek judicial review of the decisions of the Ethics Office. They further submit that they have suffered direct legal consequences as a result of the contested decisions in that they have been denied the right to be protected from retaliation. The failure to provide them protection from retaliation resulted from a flawed and inadequate investigation and misapplication of the burden of proof provided for under ST/SGB/2005/21.

15. The Dispute Tribunal then reviewed and considered, *inter alia*, the role of the Ethics Office and the applicable jurisprudence, most notably *Wasserstrom*[10] and *Nartey*,[11] holding that the Ethics Office is limited to making recommendations and, therefore, its decisions are not "administrative decisions" subject to judicial review. It opined that "it [was] difficult to characterize the conclusion reached by the Ethics Office ... as anything other than a decision",[12] and that its opinion was consistent with the dissenting opinion in *Wasserstrom*.[13] Nevertheless, the Dispute Tribunal dismissed the applications as non-receivable, stating that "it has no option but to accept that in accordance with the Appeals Tribunal judgments in [*Wasserstrom* and *Nartey*], the matters contested ... are not administrative decisions subject to judicial review".[14]

16. The Dispute Tribunal referred the "issues raised in [its] judgment ... to the Secretary-General for further consideration", expressing the views that (a) the current provisions of the Dispute Tribunal Statute, ST/SGB/2005/21 and ST/SGB/2005/22 do not adequately address the issue of whether the Dispute Tribunal has jurisdiction to review determinations of the Ethics Office affecting the right of staff members to be protected against acts of retaliation; (b) the current jurisprudence "establishes the total lack of accountability of the Ethics Office"; and, (c) the Appeals Tribunal's judgments issued in the *Wasserstrom* proceedings are contradictory. It also noted that the policy set out in ST/SGB/2005/21 is not well drafted, is currently under review and that there have been calls, including by the Internal Justice Council, for clarity on the question of judicial review of "decisions" made by the Ethics Office.

[10] *Wasserstrom v. Secretary-General of the United Nations*, Judgment No 2014-UNAT-457.
[11] *Nartey v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-544.
[12] Impugned Judgment, para. 108.
[13] *Ibid.*, para. 117, quoting para. 40 of Judge Faherty's dissent (expressing the opinion that a finding of the Ethics Office pursuant to its statutory mandate is an "administrative decision" capable of judicial review).
[14] *Ibid.*, para. 120.

Submissions

Ms. Nguyen-Kropp and Mr. Postica's Appeals

17. The Appeals Tribunal should overrule or modify its jurisprudence in *Wasserstrom* and *Nguyen-Kropp & Postica*, which limit receivability of decisions of the Ethics Office. If left to stand, these cases will continue to perpetuate injustice and lack of accountability for whistleblower retaliation, as they have done in the Appellants' cases. Alternatively, the Appeals Tribunal should join the Dispute Tribunal in urging administrative and legislative action to protect whistleblowers.

18. The Dispute Tribunal made clear that, but for the Appeals Tribunal's jurisprudence limiting receivability with respect to the Ethics Office, it would have concluded the applications were receivable. The decisions taken by the Ethics Office in connection with the Appellants' cases were indeed administrative decisions in line with Judge Faherty's dissent in *Wasserstrom*.

19. The current jurisprudence, as applied in the Appellants' cases, is inconsistent with credible whistleblower protection and should be abrogated. The practical implication is that "whistleblowers have no protection from retaliatory investigations that later prove to be groundless, because the decision to launch those investigations is not an 'administrative decision'". This effectively gives "the green light" to managers intent on retaliating against whistleblowers with career destructive investigations.

The Secretary-General's Answer

20. The Appellants have failed to establish any ground for appeal. They do not specify how or in what way the Dispute Tribunal's judgment is defective; nor do they make any assertions about a failure to exercise jurisdiction or an excess of jurisdiction or competence by the UNDT. Disagreement with the Appeals Tribunal's jurisprudence does not constitute one of the five grounds for an appeal prescribed by Article 2(1) of the Statute. The appeals, therefore, should be dismissed in their entirety.

21. By seeking to modify or overrule *Wasserstrom* and *Nguyen-Kropp & Postica*, the appeals essentially constitute an application for revision of those judgments. This is wholly inappropriate and not permitted by the applicable legal framework. Not only do the Appellants lack standing

to apply for revision of those judgments, but disagreement with the jurisprudence does not amount to a "discovery of a decisive fact" warranting revision.

22. The Appellants' alternative request, that the Appeals Tribunal call upon the Administration and General Assembly, should also be dismissed as not receivable on the grounds that the relief requested falls outside the statutory powers conferred upon the Appeals Tribunal.

23. Should the Appeals Tribunal find the appeals receivable, the Secretary-General requests the opportunity to respond to them on their merits.

Considerations

24. The Appeals Tribunal sitting *en banc* issues the following opinion (with Judge Faherty dissenting, except for receivability of the appeals):

Receivability of Appeals

25. Article 2(1) of the Statute provides that, in order to invoke the jurisdiction of the Appeals Tribunal, an appeal must assert that the Dispute Tribunal has exceeded its jurisdiction or competence; or failed to exercise jurisdiction vested in it; or erred on a question of law; or committed an error in procedure, such as to affect the decision of the case; or erred on a question of fact, resulting in a manifestly unreasonable decision.

26. The Secretary-General submits that the Appellants have failed to bring their appeals within any of the five grounds prescribed in Article 2(1), and therefore the appeals are not receivable.

27. We do not agree with that submission. The import of the appeals is that the UNDT erred on a question of law by following the Appeals Tribunal's jurisprudence in *Wasserstrom* and *Nguyen-Kropp & Postica* to dismiss their applications. We are satisfied that they fall within the jurisdiction of the Appeals Tribunal pursuant to Article 2(1) and, thus, are receivable.

The Appeals Tribunal's Jurisprudence

28. The UNDT dismissed the applications of Ms. Nguyen-Kropp and Mr. Postica as not being receivable. It found itself bound to follow the decisions of the Appeals Tribunal in *Wasserstrom* and *Nartey*, holding that the Ethics Office is limited to making recommendations to the

Administration and that such recommendations are not administrative decisions subject to judicial review. The UNDT accordingly decided that the matters contested in the applications were not administrative decisions subject to judicial review.

29. The Appellants ask the Appeals Tribunal to either overrule its decisions in *Wasserstrom* and *Nguyen-Kropp & Postica*,[15] or to join the UNDT in calling for corrective action by the Secretary-General and the General Assembly.

30. The law governing the powers of the Ethics Office to protect staff against retaliation for reporting misconduct is contained in the Secretary-General's Bulletins ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) and ST/SGB/2005/22 (Ethics Office – establishment and terms of reference). We find that there is no provision in these Bulletins which could be construed as giving power to the Ethics Office to make a judicially reviewable administrative decision. The Bulletins bestow on the Ethics Office only the power to recommend, advise and refer.

31. The UNDT expresses difficulty in reconciling the decision in *Wasserstrom* with "the decision-making powers accorded under [Sections] 5.2(c) and 5.8 of ST/SGB/2005/21".[16] In our opinion, Sections 5.2(c) and 5.8 of ST/SGB/2005/21 do not confer on the Ethics Office any decision-making powers capable of producing direct legal consequences.

32. Section 5.2 prescribes the functions of the Ethics Office with respect to protection against retaliation for reporting misconduct or cooperating with a duly authorized audit or investigation. Those functions are:

> (a) To receive complaints of retaliation or threats of retaliation;
> (b) To keep a confidential record of all complaints received;
> (c) To conduct a preliminary review of the complaint to determine if (i) the complainant engaged in a protected activity; and (ii) there is a *prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.

33. Section 5.2(c) provides for a preliminary review. It does not empower the Ethics Office to conduct an investigation, nor to make decisions on the findings of an investigation.

[15] *Nguyen-Kropp & Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509.
[16] Impugned Judgment, para. 110.

34. After its preliminary review, if the Ethics Office finds that there is a credible case of retaliation or threat of retaliation, it is obliged under Section 5.5 of the Bulletin to refer the matter in writing to the Office of Internal Oversight Services (OIOS) for investigation. Section 5.5 provides:

> If the Ethics Office finds that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days.

35. Although the Bulletin does not specifically provide for an instance where the Ethics Office does not find a credible case of retaliation, such a decision would not be a final decision carrying legal consequences. A complainant can always come back with better evidence or, under Section 6.3 of the Bulletin, can raise retaliatory motives in a challenge to an action taken by the Administration. Section 6.3 provides:

> The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding.

36. Section 5.7 of the Bulletin sets out the duties of the Ethics Office once it has received the investigation report. Section 5.7 provides:

> Once the Ethics Office has received the investigation report, it will inform in writing the complainant of the outcome of the investigation and make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management. Those recommendations may include disciplinary actions to be taken against the retaliator.

37. This provision does not give the Ethics Office any power to make a final decision on the investigation report, nor to make an investigation of its own. Its responsibility to make its recommendations is mandatory, not an option.

38. The Ethics Office must report directly to the Secretary-General. The head of the Ethics Office is accountable to the Secretary-General.[17] It is therefore not logical to conclude that the Ethics Office need not consult the Secretary-General but can unilaterally make a final decision

[17] ST/SGB/2005/22, Sections 1 and 2.

on the outcome of an investigation report; or, for that matter, any final decision having a direct impact on the terms of appointment or contract of employment of a staff member. Its limited role under Section 5.7 is very clear. It is precisely because of this limitation that it is essential the Ethics Office comply with its obligations under Section 5.7 to make a recommendation, regardless of the outcome of the investigation. The subsequent action – or non-action – of the Administration on the recommendation will constitute a contestable administrative decision if it has direct legal consequences affecting a staff member's terms and conditions of appointment.

39. Section 5.8 of the Bulletin provides:

> If the Ethics Office finds that there is no credible case of retaliation or threat of retaliation but finds that there is an interpersonal problem within a particular office, it will advise the complainant of the existence of the Office of the Ombudsman and the other informal mechanisms of conflict resolution in the Organization.

40. The UNDT is of the view that Section 5.8 gives the Ethics Office the power to make its own finding as to whether or not retaliation has been established. We disagree.

41. The word "finds" in Section 5.8 is a confusing piece of drafting. The Ethics Office does not have the power to conduct its own investigation, nor can it make findings on the outcome of an investigation report. These powers are not included in its functions set out in Section 5.2. Further, under Section 5.7, the Ethics Office is limited to making a recommendation when it receives an investigation report, so it follows that the final decision rests with the Administration. Moreover, the intention of Section 5.8 is merely to prescribe the circumstances in which the Ethics Office can advise the complainant of the existence of the Office of the Ombudsman and other informal mechanisms of conflict resolution in the Organization. The only power conferred on the Ethics Office by Section 5.8 is a power to advise. In our view, the correct interpretation of the word "finds" in Section 5.8 is that it means "finds from the investigation report". Section 5.8 does not give the Ethics Office the capability of making decisions that have a direct impact on a staff member's terms of appointment or contract of employment.

42. For the foregoing reasons, we affirm the majority decision in *Wasserstrom* that the Ethics Office is limited to making recommendations to the Administration which are not administrative decisions subject to judicial review.

43. We acknowledge that in the case of Mr. Wasserstrom, as in the case of the Appellants, the Ethics Office failed in its duty to make a recommendation pursuant to Section 5.7 of ST/SGB/2005/21. Under the law as it presently stands, the Tribunals do not have the power to order the Ethics Office to comply with Section 5.7, nor to order the Secretary-General to take action when the Ethics Office fails to do so. The remedy for such a situation rests with the General Assembly.

44. Having affirmed the majority decision in *Wasserstrom*, we find that the UNDT made no error in dismissing the applications of Ms. Nguyen-Kropp and Mr. Postica on the ground that the Ethics Office matters contested therein are not administrative decisions subject to judicial review. Thus, the appeals fail.

Judgment

45. Judgment No. UNDT/2015/110/Corr. 2 is affirmed and the appeals are dismissed.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

Receivability of the appeals before the Appeals Tribunal

(Signed)	*(Signed)*	*(Signed)*
Judge Chapman, Presiding	Judge Adinyira	Judge Thomas-Felix
(Signed)	*(Signed)*	*(Signed)*
Judge Weinberg de Roca	Judge Simón	Judge Faherty
(Signed)		
Judge Lussick		

The Appeals Tribunal's Jurisprudence

(Signed)	*(Signed)*	*(Signed)*
Judge Chapman, Presiding	Judge Adinyira	Judge Thomas-Felix
(Signed)	*(Signed)*	*(Signed)*
Judge Weinberg de Roca	Judge Simón	Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Faherty's Dissenting Opinion

1. For all of the reasons set out in my dissenting opinion in *Wasserstrom*, I respectfully disagree with my learned colleagues' decision that the Ethics Office is not amenable to judicial review. I adopt in full my reasoning in *Wasserstrom* for the purposes of my dissent in the present case and repeat, in particular, the following paragraphs 22-41 of my dissent in *Wasserstrom*:

> ... The provisions of Sections 5.1, 5.5 and 5.6 of ST/SGB/2005/21, when read together with the provisions of section 6.1, provides the Ethics Office with the power to admit, investigate and determine retaliation complaints and to recommend, in cases where retaliation is established, *inter alia*, the rescission of the retaliatory decision and/or reinstatement of the individual concerned. This power, in turn, confers on staff members believing themselves to have been retaliated against both substantive and procedural entitlements. Nowhere in the Bulletin is it a prerequisite, for the Ethics Office to admit a complaint or, for example, where retaliation is established, for it to recommend rescission or reinstatement, that the staff member was obliged to request administrative review of the retaliatory action.
>
> ... While, as recognised in the Bulletin, it is open to staff members to request administrative review/management evaluation of an action or actions they consider retaliatory, the absence of such a step is not a bar to invoking the protections of ST/SGB/2005/21.
>
> ... Section 6.3 of the Bulletin sets out the position as follows:
>
> > The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding.
>
> ... In my view, the inclusion of that provision is not dispositive of the majority opinion in this appeal that Mr. Wasserstrom should have sought administrative review of the actions he complained of or that he cannot challenge his [United Nations Interim Administration Mission in Kosovo (UNMIK)] termination by impugning the Ethics Office's findings. In particular, the word "may" in the above-quoted provision demonstrates that no logical or reasonable reading of ST/SGB/2005/21 makes it a pre-condition, for the initiation of a claim of retaliation, that a staff member must have sought administrative review of the actions claimed as retaliatory including where the staff member's complaint concerns wrongful/retaliatory termination of a post, assignment or secondment. Nor do the

circumstances in this case permit a conclusion that simply because his complaints include an allegation of wrongful termination of his UNMIK post, he is not entitled to have the Ethics Office's finding of no retaliation judicially scrutinised.

... That there is no statutory obligation on a staff member who invokes the intervention of the Ethics Office to firstly seek administrative review is, to my mind, further underscored by the provisions of Section 3.2 of ST/SGB/2005/22, which provides that "[t]he Ethics Office will not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances, with the exception of certain functions assigned to the Ethics Office under section 3.1(b)". Pursuant to the latter subsection, the Ethics Office is given the task of "[u]ndertaking the responsibilities assigned to it under the Ombudsman policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations", a reference to the powers given to that office under ST/SGB/2005/21, as already considered in this dissenting opinion.

... I find therefore there is no prohibition on Mr. Wasserstrom's entitlement to pursue a case before the Ethics Office or on his entitlement to judicially challenge a finding of no retaliation on the basis that he did not seek administrative review of his complaints. Accordingly, I would not deem his application as not receivable on this basis. Furthermore, I am satisfied that the 21 April 2008 finding by the Ethics Office of no retaliation had a direct consequence for Mr. Wasserstrom's terms of employment and conditions of service because that finding brought the complaint he had initiated pursuant to ST/SGB/2005/21 to an end and thus prevented him, rightly or wrongly (and this is a matter for consideration on the merits), from pursuing or being afforded any of the remedies provided for in Section 6.1 of ST/SGB/2005/21. Thus, the Ethics Office's determination of no retaliation clearly and unequivocally impacted on Mr. Wasserstrom's terms and conditions of employment.

... I turn now to the Secretary-General's primary legal arguments on receivability. The question to be determined in the context of the legal argument is whether the Ethics Office's finding of no retaliation constituted an "administrative decision" capable of being brought within the scope of judicial review. The requirement that the determination affected Mr. Wasserstrom's terms of employment and conditions of service has been satisfied. The issue is whether it is a decision taken by the Administration.

... To address this question, one must look to the nature of the Ethics Office itself and its place within the framework of the Organization.

... ST/SGB/2005/22 provides, *inter alia*, as follows:

> **Section 1**
> **Establishment of the Ethics Office**
> 1.1 The Ethics Office is established as a new office within the United Nations Secretariat reporting directly to the Secretary-General.
> 1.2 The objective of the Ethics Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.
>
> **Section 2**
> **Appointment of the head of the Ethics Office**
> The head of the Ethics Office shall be appointed by the Secretary-General and will be accountable to the Secretary-General in the performance of his or her functions.
>
> **Section 3**
> **Terms of reference of the Ethics Office**
> 3.1 The main responsibilities of the Ethics Office are as follows:
> (a) Administering the Organization's financial disclosure programme;
> (b) Undertaking the responsibilities assigned to it under the Organization's policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations;
> (c) Providing confidential advice and guidance to staff on ethical issues (e.g., conflict of interest), including administering an ethics helpline;
> (d) Developing standards, training and education on ethics issues, in coordination with the Office of Human Resources Management and other offices as appropriate, including ensuring annual ethics training for all staff;
> (e) Such other functions as the Secretary-General considers appropriate for the Office.
>
> 3.2 The Ethics Office will not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances, with the exception of certain functions assigned to the Ethics Office under section 3.1 (b) above.

... The Secretary-General argues that the Ethics Office is limited to making recommendations to him and the Organization. Therefore, he contends that the Ethics Office's finding of no retaliation was not a decision and submits that the legal basis for this argument lies in the decision of the Appeals Tribunal in *Koda*.[18] He argues that in *Koda*, the Appeals Tribunal distinguished between acts and omissions of independent entities and administrative decisions taken by the Secretary-General based on those acts and omissions. He submits that any appealable decision Mr. Wasserstrom could have is on the basis of an action taken by the Secretary-General "based on" the Ethics Office's recommendations. He likens the Ethics Office to that of the Ombudsman and relies on the decision of the former Administrative Tribunal in *Perez-Soto* which held that the Ombudsman only has authority to make recommendations and that therefore, the "conclusion that the Ombudsman cannot take a decision, whether explicit or implicit, leads unavoidably to the fact that no appeal of her actions, advice, views, proposals, recommendations, or lack thereof is possible".[19]

... I find no merit in this argument. A comparative analysis of ST/SGB/2002/12 entitled "Office of the Ombudsman – appointment and terms of reference of the Ombudsman" and ST/SGB/2005/22 does not bear out the Secretary-General's argument. Accordingly, I uphold the Dispute Tribunal's finding that "[t]he Ethics Office cannot in any meaningful sense be regarded as analogous to the Ombudsman".[20] The decision in *Perez-Soto*, which at most would have been persuasive, is of no assistance on the issue.

... The Secretary-General maintains that as an "independent" entity, the Ethics Office cannot be amenable to him. He draws attention to General Assembly resolution 60/1 which "request[ed] the Secretary-General to submit details on an ethics office with independent Status". He cites the General Assembly mandate as binding on his office and states that he took action to establish the Ethics Office in a manner that would be consistent with its independent status, including stating in his report to the General Assembly that the Ethics Office would be "located outside the Executive Office of the Secretary-General in order to guarantee its independence".[21]

... In resolution 60/254, the General Assembly endorsed the responsibilities of the Ethics Office "as outlined by the Secretary-General in his report and as established by the Secretary-General's bulletin".[22]

[18] *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130.
[19] Former Administrative Tribunal Judgment No. 1359 (2007) VI.
[20] UNDT Order No. 19 (NY/2010), para. 20.
[21] A/60/568, para. 2.
[22] A/RES/60/254, para. 16(c).

... Notwithstanding the arguments set out above, I do not consider them to be dispositive of the issue particularly when the provisions of ST/SGB/2005/21 and ST/SGB/2005/22 are read together.

... The question of whether the "independence" of the Ethics Office is such that it prevents a judicial review of its findings is more properly addressed by considering the ruling of the Appeals Tribunal in *Koda*.

... In that case, the Appeals Tribunal found:

> OIOS operates under the "authority" of the Secretary-General, but has "operational independence". As to the issues of budget and oversight functions in general, the General Assembly resolution calls for the Secretary-General's involvement. Further, the Secretary-General is charged with ensuring that "procedures are also in place" to protect fairness and due-process rights of staff members. It seems that the drafters of this legislation sought to both establish the "operational independence" of OIOS and keep it in an administrative framework. We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-General's administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.[23]

... Accordingly, the Appeals Tribunal held that "[t]o the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned".[24]

... The principle underlying our ruling in *Koda* is that notwithstanding an entity's operational independence, once it is part of the Secretariat, any decision capable of affecting an employee's terms of employment and conditions of service "may be impugned". As the Ethics Office's finding of no retaliation affected Mr. Wasserstrom's terms of employment and condition of service, I see no basis to insulate the Ethics Office from the test which the Appeals Tribunal applied in *Koda*.[25]

... Arriving at the aforesaid conclusion, I also place particular reliance, while accepting and acknowledging the "operational" independence of the Ethics Office, on [S]ections 1

[23] *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130, para. 41.
[24] *Ibid*., para. 42.
[25] Also see *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-135 for a discussion of the status of the Office of Legal Assistance (OSLA) within the Organization.

and 2 of ST/SGB/2005/22 and, in particular, [S]ection 5.7 of ST/SGB/2005/21 which provides:

> Once the Ethics Office has received the investigation report, it will inform in writing the complainant of the outcome of the investigation and make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management. Those recommendations may include disciplinary actions to be taken against the retaliator.

... Taking into consideration the entitlements provided to staff members pursuant to Sections 2, 5 and 6 of ST/SGB/2005/21, it is inconceivable that a finding of the Ethics Office pursuant to its statutory mandate can be otherwise than an "administrative decision" capable of review by the Dispute Tribunal. To hold otherwise would render nugatory the substantive protection and remedies afforded to staff members under ST/SGB/2005/21.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Faherty

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar