



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

HUNT-MATTHES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Nigel Lindup

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (“UNHCR”). She filed an appeal with the former United Nations Administrative Tribunal (“former UN Administrative Tribunal”) contesting a decision of the Ethics Office dated 18 December 2006. This decision was in response to her complaint that she had been retaliated against for reporting misconduct. The Ethics Office conducted, a preliminary review of her complaint and found that although she had engaged in a protected activity by reporting misconduct, there was no *prima facie* case of retaliation against her (“the Contested Decision”).

Procedural Background

2. This claim is one of three claims brought in two cases by the Applicant with the former UN Administrative Tribunal. The others concerned the non-extension of her fixed term contract and the decision not to grant her an indefinite contract.

3. On 1 January 2010, the two cases were transferred to the Geneva Registry of the United Nations Dispute Tribunal (“the Tribunal”) in accordance with ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice). They were subsequently transferred to the Nairobi Registry by Order No. 51 (GVA/2010).

4. In *Hunt-Matthes* UNDT/2011/063, Boolell J held that the determination of the Ethics Office fell under the jurisdiction of the Tribunal. The Respondent did not appeal this judgment. The remaining two cases were then assigned to the undersigned Judge for final determination.

5. In preparation for the hearing of this case on the merits, the Tribunal issued Case Management Orders Nos. 129 and 159 (NBI/2012) and 002, 030, 038 and 041 (NBI/2013).

6. The hearing was held in Geneva being the nearest Registry to the Applicant, the Respondent and several of the witnesses on 28 February to 1 March 2013. The parties submitted written closing submissions on 11 and 18 March 2013. In accordance with Order No. 065 (NBI/2013) the parties filed further submissions on the retroactive application of ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) to the Applicant's case.

Issues

7. The issues to be determined in this case are:
- a. What were the legal obligations, correct principles and standards to be applied by the Ethics Office in relation to claims about events which preceded its existence?
 - b. Did the Ethics Office assess the Applicant's claim in conformity with the correct obligations, principles and standards?
 - c. What remedies are available to the Applicant, if any?

Employment background

8. The Applicant began her career with the United Nations in 1994 when she joined the Office of the High Commissioner for Human Rights in Rwanda as a Human Rights Field Officer conducting preliminary investigations for the International Criminal Tribunal for Rwanda. From February 1995 to January 1996, she served as a Crime Prevention and Criminal Justice Officer at the United Nations Office in Vienna. She then worked as the Executive Assistant to the Head of Civil Affairs in 1996 in the former Yugoslavia.

9. Between 1996 and 1998, she worked for UNHCR on short-term appointments as Fund Raising Officer, Human Rights Liaison Officer and Public Affairs Officer. From July 1998, she was employed by the World Food Programme ("WFP") in Rome, as an Inspection Officer at the P-4 level. During this period of employment she had several assignments on reimbursable loan from

WFP during which she conducted an investigation for the World Health Organization; she worked as an Advisor to the Director, Policy Strategy and Research for the United Nations Programme on HIV/AIDS in Geneva. The Applicant also worked as an Ethics and Oversight Advisor at the Global Alliance for Improved Nutrition in Geneva.

10. It is undisputed that throughout all these appointments, the Applicant's performance was consistently rated as being exceptional and exceeding managers' expectations.

11. In her performance evaluations, she was described as an excellent staff member, full of initiative, task oriented and delivered excellent work. She was considered for re-appointment for most of the positions.

Facts

12. The findings of fact in this case are made on the basis of the oral and written submissions of the parties and the oral and documentary evidence of witnesses for both parties taken at the hearing. The Applicant gave evidence and called one other witness: Francis Montil, former Senior Investigator with the Investigation Division of the Office of Internal Oversight Services ("ID/OIOS"). The Respondent called Ms. Susan John, a former Officer with the Ethics Office. The following is a chronological account of the basic facts in this case. The facts will be more closely examined in the consideration of each issue.

13. From 2 September 2003 the Applicant took up a one year Fixed-Term Appointment ("FTA") as Senior Investigation Officer in the Inspector General's Office ("IGO") of UNHCR. She was seriously injured in a car accident while on mission in Indonesia in July 2004 and was medically evacuated to Geneva. When the IGO made the decision not to renew her contract beyond 30 September 2004, she was still on sick leave.

14. The Applicant's contract with IGO was not renewed on grounds of unsatisfactory performance. The Applicant applied to the Rebuttal Panel to rebut the negative Performance Appraisal Report ("PAR") and challenged the non-renewal of her contract. She alleged that the negative PAR and the subsequent non-renewal of her FTA on performance grounds by her IGO supervisors was unlawful and amounted to acts of retaliation against her for reports of misconduct and abuse of authority within the IGO made by her in 2003 and 2004.¹

15. In late 2005, after the non-renewal of her contract with IGO, the Applicant visited New York to speak to a number of United Nations Headquarters officials in an attempt to have her allegations of abuse of authority and retaliation for reporting misconduct while at IGO investigated. On the advice of the Office of Human Resources Management ("OHRM") she took her concerns to OIOS.

16. Mr. Montil told the Tribunal that OIOS analyzed cases referred to it against a risk matrix to assess the risk to the Organization of not investigating the case. After speaking to the then Director of ID/OIOS and Mr. Montil, the Applicant's complaint was received by OIOS and was rated as suitable for investigation. Neither this investigation nor the rebuttal was ever concluded.²

17. From the end of September 2004, the Applicant was engaged on a series of short term FTAs by the Evaluation and Policy Analysis Unit ("EPAU") until 31 May 2006 when EPAU was abolished. She had been pronounced medically fit shortly before that. Though some of her colleagues were reassigned into the newly formed unit to replace EPAU, the Applicant was not, she was told by the Chief of the new Policy Development and Evaluation Service not to apply for positions in the new unit. She applied to the Joint Appeals Board ("JAB") for a Suspension of Action of the decision to end her contract with EPAU but the Suspension of Action was declined.

18. ST/SGB/2005/21 came into force on 1 January 2006. The Ethics Office was established by ST/SGB/2005/22 (Ethics Office—establishment and terms of reference) and was operational by early 2006.

¹ See *Hunt-Matthes* UNDT/2013/084.

² *Supra*

19. The Applicant submitted a request for protection with the Ethics Office on 7 April 2006 following an earlier telephone conversation with a case officer assigned to her case. She included a brief justification for her request and attached a ‘chronology of harassment’ that she had prepared for the JAB hearing on her request for a Suspension of Action. She said “this records the events that followed my protest and request of investigation of the several interferences in a preliminary investigation I conducted in Sri Lanka ...”

20. In summary, her case to the Ethics Office as set out in the chronology and the covering email was that she had engaged in protected activities in relation to three periods: September 2003 to December 2003; January 2004 to July 2004 and July 2004 to the “present”:

21. In the first period she said she had:

a. Complained about interference/obstruction with an investigation mission into an alleged rape of a UN staff member by another that she had conducted in October 2003 in Sri Lanka. [“The Sri Lanka obstruction complaint”] She also complained about being excluded from discussions about this case. [“The transparency complaint”] The complaints were documented in a record of interview dated December 2003 with the DIG about the interference to the investigation and in an email of 11 Mar 2004 to the Administrative assistant to the IG.

b. She complained about the decision of IGO in November 2003 to hire a staff member who was himself the subject of investigation by the IGO. [“The hiring complaint”]. This complaint was made in an interview with the DIG in December 2003.

22. In the second period, on 8 March, 30 March and 2 April, mid-May and 15 June 2004 she conveyed to the UNHCR mediator that she had:

a. Experienced an increase of tensions in the office towards her. (Work place tensions complaint).

b. Received a stern email from her supervisor in relation to her requests for transparency in the IGO especially about discussions about her cases. (The lack of transparency complaint). She said that her supervisor closed the matter although, according to the Applicant, it remained unresolved.

c. Was accused of breaching confidentiality and required to answer the allegations in writing. [“The breach of confidentiality complaint”]. Her request for an investigation of those allegations by OIOS on 5 May 2004 was denied.

d. She complained that the DIG had refused to allow a case of sexual harassment made against the then High Commissioner to be registered in accordance with UNHCR rules. This complaint was made on 27 April 2004 to the Applicant, the DIG and to her supervisor. (The failure to register complaint).

23. It is also apparent from this correspondence that the Applicant viewed her impending separation from EPAU as a continuation of the alleged retaliation against her.

24. On 17 May 2006 the case officer assigned to handle her case at the Ethics Office wrote to her that he and the Director of ID/OIOS had decided to jointly commence consideration of her case more or less immediately based on the various documents already provided to OIOS and the Ethics Office. He asked her if she had appealed to the JAB about the decision not to renew her contract and to send any materials other than that already held by the Ethics Office which were relevant to her claim of retaliation or which demonstrated that she had made a prior report of misconduct in a relevant way.

25. On 21 April 2006 the then Director of ID/OIOS told the Applicant by phone that she had received an instruction to reprioritise her cases.

26. The Applicant replied to the Ethics Office on 22 May 2006 repeating some of the issues of retaliation she had already referred to in her earlier correspondences. She told her case officer she had reported them to her supervisors with a request that it be referred to OIOS. She advised the Ethics Office of her attempts to obtain a suspension of the decision to prevent, what she saw as, continuing retaliation while working at EPAU.

27. She also advised the case officer about what had happened at the Rebuttal Panel as follows:

On May 27, 2005, the rebuttal panel constituted to review my performance evaluation recommended that issues of misconduct, which were brought to their attention during the preliminary review of the case, be referred to OIOS prior to the initiation of the review of performance, as per applicable regulations for reporting of misconduct. The UNHCR administration did not refer the matter to OIOS. On September 30th, a member of the panel wrote to OIOS to refer the matter for investigation. I attach the PAR and the report of the rebuttal panel dated May 27, 2005.

28. The case officer considered this information. In a note to a colleague about the subject on 26 May 2006, he said he was developing some misgivings about the bona fides of the Applicant. The reasons he gave were that her version of the Rebuttal Panel's referral to OIOS was not borne out by the documents attached and her PAR did not read to him "like a retaliatory boss." In the note, the case officer referred to the Applicant's "claimed car accident." He said he wanted evidence that the Applicant had reasonably accused the IG/IGO of interference in her investigation but noted that "given the supervisor's report on her competence, whatever intervention was made by the IG may well have been warranted."

29. In spite of these reservations, the case officer also said in the note that he gave the Applicant the benefit of the doubt but wanted more from her than she had given him so far.

30. The case officer spoke to the Applicant on the phone on 28 and 29 May 2006, he then wrote a summary of his reasons for a decision. These were that the Applicant was only a "technical whistleblower;" there was no report of a prior report of misconduct to link to retaliation; she was terminated twice for poor performance and did not claim retaliation at the time; she did not contact OIOS; and she seriously misrepresented what the Rebuttal Panel did and found. He concluded:

I think we let this one go, and see what the JAB says, and what if anything she offers to us as documentation. From her increasingly evasive manner on the phone last night, I am increasingly sure there

will be nothing in this. This is not to say an assault did not happen just that she is not a whistleblower within the meaning of the SGB.

31. That case officer left the Ethics Office in late May 2006. Apart from a note to file about follow up action nothing more was done on the Applicant's case until 10 August 2006 when Ms. John, who had joined the Ethics Office in July 2006, sent the Applicant an email to her husband's email address advising she had taken over the file. In that email she asked the Applicant for an update on her contractual situation and on her request to the JAB for the Suspension of Action.

32. The Applicant told the Tribunal that she did not receive the email as it had been sent to her husband's work email address and that they were away on holiday when it was sent. This is supported by the fact that it was only on 4 October 2006 when she called the Ethics Office to enquire about her case that she learned that her former case officer had left the Ethics Office. She wrote the next day to express her disappointment about the failure of the Ethics Office to address her situation in a timely and efficient manner.

33. On 6 October 2006 the then Acting Director of the Ethics Office wrote to the Applicant to say she regretted the delay and to inform her that the preliminary review of her request was currently underway and would be completed shortly.

34. The Ethics Office file notes show that during October 2006 steps were taken to review and understand the Applicant's file. The Director wrote to her again on 19 October 2006 asking for more information. On 4 December 2006, following a visit to the Ethics Office in New York, the Applicant wrote to the Ethics Office listing the "protected activities" she relied on with supporting documentation. In summary these were:

a. October 2004: the Applicant's supervisor insisted that a United Nations Volunteer ("UNV") who was the subject of an alleged misconduct resign from his post based on his pre-investigative judgment. After a full investigation, the subject was cleared of any misconduct but he appeared to be "blacklisted" thereafter. The Applicant reported this incident verbally to the UNHCR Mediator.

- b. October 2004: Sri Lanka obstruction complaint. Reported at a meeting with her immediate supervisor, the UNHCR Legal department, the then Deputy High Commissioner and the UNHCR Mediator.
- c. November 2004: the hiring complaint. The Applicant reported this to the Deputy Inspector General.
- d. 28 April 2004: The failure to register a sexual harassment complaint against the then Deputy High Commissioner. The Applicant reported this to her supervisor contemporaneously.
- e. July 2004: Minimum Operating Security Standards (MOSS) irregularities and Protection irregularities in the Indonesia Office where the Applicant had a car accident. She was severely injured and had to be medically evacuated to Geneva for treatment. The UNHCR car she was travelling in lacked safety belts. She said she subsequently reported this to the UNHCR Representative in Indonesia, Security officers, UNHCR headquarters and to the Controller in New York. The Applicant also reported the presence of police officers in the UNHCR Jakarta Office with weapons and on the Organization's payroll, the unlawful detention of refugees by senior UNHCR staff, leading to the death of a refugee while in detention and a report of sexual exploitation of a refugee by a UNHCR staff member. According to the Applicant this resulted in retaliatory complaints against her by the UNHCR Representative in Indonesia which were used in her performance appraisal.

35. Ms. John told the Tribunal that in considering this case of retaliation she looked to see if the complainant had reported a breach of United Nations rules or regulations to a person who had the authority to take some action about it such as a supervisor in the office or, if it involved the supervisor, then to the Head of Department or OIOS or Human Resources.

36. Ms. John said that then the Ethics Office looked to see if there was any change in the behaviour of the alleged retaliator after the report of misconduct. This could be corroborated by interviewing other people but in the Applicant's case no third party interviews were conducted.

37. On 18 December 2006, the Acting Director of the Ethics Office sent the Applicant the two page decision on the preliminary review of her request for protection against retaliation which is the subject of the Applicant's challenge to the Tribunal.

38. The decision acknowledged that the Applicant had engaged in protected activity because she had sought help from the mediator. In determining whether the protected activity was a contributing factor in the non-renewal of her contract she found, on the basis of the Applicant's unsatisfactory performance appraisal, that "there is no connection between [the Applicant's] reporting of misconduct and the decision not to renew her contract. The Ethics Office does not therefore find a *prima facie* case of retaliation."

39. Ms. John told the Tribunal that the Acting Director's decision contained a summary of the conclusions but not a full statement of the reasons for it. In evidence she said that the conclusion that the Applicant had engaged in protected activity because she had sought help from the mediator was a mistake because any conversation with a mediator is confidential and therefore could not be a protected activity under section 5.2(c) of ST/SGB/2005/21. However she stood by the conclusion that there was no act that was connected to retaliation. In her view there was no link between the protected action and the negative PAR because there was no protected activity.

Parties' submissions

40. The Applicant's principal contentions are that:

- a. On numerous occasions, she reported misconduct to various responsible officers in different forms as required by procedure;

- b. The decision-makers/senior managers were aware that she had made these reports of misconduct;
- c. She was a subject of retaliation for reporting the various acts of misconduct she had witnessed;
- d. There is a nexus between the protected activities she had engaged in and the senior officials' awareness of the protected acts and the consequence of the reporting which is the retaliation;
- e. The Ethics Office procedures applied in the review and in reaching a final decision of her case were fundamentally flawed;
- f. The Ethics Office failed to provide her with an adequately reasoned decision for rejecting her application for protection for engaging in protected activity;
- g. The Ethics Office failed to deal with her application within the prescribed time limit;
- h. If a report of misconduct is made orally, then it is the duty of the responsible officer to draft a note for the file in relation to the report made;
- i. There is no difference between a staff member of UNHCR reporting misconduct to the IGO and a member of the IGO reporting misconduct to a responsible officer in the IGO;
- j. The burden of proof to prove that actions taken were not acts of reprisal lies with the Respondent; and
- k. The Ethics Office acknowledged by the 19 October 2006 (over 180 days after she had filed her claim) that the delay was due to lack of implementation of procedures and inadequate staffing and not failings on her part.

41. The Respondent's principal arguments are that:
- a. The Applicant did not engage in protected activity as described in ST/SGB/2005/21. Reports of misconduct should be lodged with either the Head of Office/officer responsible for taking action.³ In the case of the office of UNHCR this is with the High Commissioner or OIOS;
 - b. In her complaint to the Ethics Office, the Applicant referred to being in a less secure contractual situation as a result of her poor PAR and movement from IGO but did not allege that the removal itself was an act of retaliation. The Ethics Office was only to determine whether a relevant report contributed to the alleged retaliatory acts in August 2004;
 - c. The Ethics Office erroneously characterized the Applicant's meeting with the UNHCR mediator in March 2004 as a protected activity;
 - d. As to retaliation, the material the Applicant submitted to the Ethics Office presented a picture of a staff member who did not have confidence in her colleagues, particularly her supervisors;
 - e. The totality of the material presented to the Ethic Office demonstrates that the PAR presented a genuine assessment and perspective of the Applicant's supervisor on her performance. It reflected a conflict between the Applicant's opinion and her supervisors'. That there were concerns about the Applicant's performance from September 2003 and throughout the performance cycle;
 - f. The material before the Ethics Office fully expressed the views of the Applicant's supervisors so there was no need for the Office to seek confirmation, corroboration or even contradiction of those views;
 - g. The Ethics Office delay in issuing a decision in the Applicant's case after the required 45 day limit was contributed to by the Applicant as she did not provide the requested information in a timely manner; she did

³ ST/IC/2005/19 (Reporting of suspected misconduct) and Section 2 of ST/AI/371 (Revised Disciplinary measures and procedures).

not advise the Ethics Office of the outcome of the JAB proceedings regarding the non-renewal of her contract with EPAU; and

h. The Applicant's rights were not violated by the Ethics Office in its decision not to sustain her allegations of retaliation and accordingly she is not entitled to compensation or any remedies.

Considerations

Preliminary

42. The role of the Tribunal is to review the actions taken and decisions made by the Ethics Office in its preliminary evaluation of the Applicant's complaint in the light of its legal obligations and the relevant and factually reliable information that it had in its possession.

Issue 1:

What were the legal obligations and correct principles and criteria to be applied by the Ethics Office in relation to claims about events which preceded its existence?

43. The Respondent argues that under ST/IC/2005/19 (Reporting of suspected misconduct) and section 2 of ST/AI/371 (Revised disciplinary measures and procedures) the staff member's duty was to report misconduct to the Head of Office or Responsible Officer who, in the Applicant's case was the UNHCR High Commissioner or OIOS and since she did not do so, she did not make a report that could be considered as a protected activity.

44. Section 3 of ST/SGB/2005/21 also stipulates to whom reports of misconduct should be made.

45. Given the timing of the events in this case, the first question is whether when the Ethics Office took and considered the Applicant's case in 2006, it should have applied any of these provisions which were enacted by ST/SGB/2005/21 after the alleged reports of misconducts.

46. The Ethics Office and ST/SGB/2005/21, which now governs the receipt and processing of what are known as whistle blower cases, did not exist before 2006, however before that time the concepts of whistle blowing and retaliation were not unknown to the United Nations. Relevantly, in 2003 UNHCR had promulgated IOM/FOM/65/2003 (The role and functions of the Inspector General's Office). This contained the IGO procedures for reporting and processing allegations of misconduct and prohibited action against staff or others as a reprisal for reporting allegations of misconduct or disclosing information to or otherwise co-operating with the IGO.

47. This is a very similar mandate to that given to the Ethics Office by ST/SGB/2005/21 to protect individuals against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations.

48. ST/SGB/2005/21 contains no transitional provisions to guide the Ethics Office on how to deal with cases which preceded its existence but that did not stop it from accepting such claims. The Respondent acknowledged in his submission in response to Order No. 065 (NBI/2013) that after 1 January 2006 the Applicant had a right to bring a request for protection to the Ethics Office under ST/SGB/2005/21.

49. On the question of the retroactive effect of ST/SGB/2005/21, the Respondent submitted that the general substantive right of staff to a workplace free from retaliation that existed before 1 January 2006 remained unchanged by the implementation of ST/SGB/2005/21 except that ST/SGB/2005/21 created an additional procedural right to request the Ethics Office to review complaints concerning limited categories of acts of retaliation.

50. The Respondent sought to distinguish between substantive and procedural rules and maintained that while substantive rights may be presumed to operate prospectively, procedural rules may have both prospective and retroactive application. The Respondent's position is that procedural rules, including rules that confer jurisdiction or affect remedies, apply without regard to whether the causes of action accrued before or after the enactment of the Rule.

51. The Tribunal rejects this proposition generally and in the specific context of this case. Rules affecting jurisdiction and remedies are not procedural but substantive in nature. A person cannot be entitled to remedies or be subject to penalties that come into force after the event in question.

52. In the context of this case, the criteria for determining whether a person has properly reported misconduct or engaged in a protected activity are not mere matters of procedure. A report of misconduct is the protected activity which is the very foundation of a claim for protection without which a claim cannot be considered.

53. The Tribunal holds that as a matter of general principle the criteria for assessing a claim of protected activity can only apply from the date on which the criteria came into force and may not be applied retroactively. In addition, retroactive application should not occur if it would be prejudicial or limit the protection to a claimant.

54. A significant difference between the pre and post 1 January 2006 whistle blowing reporting procedures is the manner in which misconduct is to be reported. Under section 3 of ST/SGB/2005/21, a report of misconduct is to be treated as a protected activity if it is made to the “established internal mechanisms: to the OIOS, the Assistant Secretary-General (“ASG”) for Office of Human Resources Management (“OHRM”), the Head of Department or Office concerned ...”

55. These categories are different and more limited than those in Section 5.2 of the IOM/FOM 65/2003. Under the IOM/FOM, UNHCR staff members who became aware of misconduct were obliged to report their observations to their Director, Representative or Chief of Mission who would then transmit the report(s) to the IG/IGO. UNHCR Staff members also had the choice of reporting allegations of misconduct directly to the IG/IGO. The IOM/FOM in force in 2004 made no reference to reporting misconduct to OIOS, the UNHCR High Commissioner or to the ASG/OHRM.

56. If, as suggested by the Respondent, section 3 of ST/SGB/2005/21 can be applied to pre-2006 claims for protection from staff members, then they are more likely to be rejected than if they are assessed against the IOM/FOM/65/2003 criteria or any other applicable rules and regulations that existed before ST/SGB/2005/21.

57. ST/SGB/2005/21 should not be applied in a manner that restricts the right of a United Nations staff member to bring a claim. The Tribunal strongly doubts and cannot infer that the Secretary-General intended that those staff members who had reported misconduct in line with their duty to those persons contemplated by IOM/FOM/65/2003 before ST/SGB/2005/21 came into force should be deprived of protection by virtue of its enactment. Such an intention would contradict the fundamental right of staff members to be protected against retaliation.

58. The Tribunal holds that the Ethics Office was obliged to assess the Applicant's claims that she had reported misconduct against the criteria and standards which were in force at the time of her reporting. In UNHCR those standards were contained in IOM/FOM/65/2003.

59. Section 2.2 of ST/SGB/2005/21 places the burden of proof on the Administration to show by clear and convincing evidence that it would have taken the same action against the claimant absent the protected activity. This burden and standard of proof is not excluded from the preliminary enquiry conducted by the Ethics Office into whether the complainant engaged in a protected activity and if there is a *prima facie* case that the protected activity was a contributing factor in causing retaliation.

60. There is no equivalent provision which stipulates the burden and standard of proof in IOM/FOM/65/2003 but under the heading "Principles governing the conduct of investigations" it speaks of the need for "strict regard for fairness, objectivity, the presumption of innocence and due process."

Issue 2

Did the Ethics Office assess the Applicant's claim in conformity with the correct obligations, principles and standards?

61. Once it accepted the Applicant's request for protection, the Ethics Office had a legal obligation and the Applicant had a legitimate expectation that it would deal with her request in a correct and transparent manner. The correct manner was in line with the standards that were in force at the time of the behaviours being complained about. In this case the Ethics Office had the standards and procedures set out in IOM/FOM/65/2003 against which to evaluate not only the acts of the Applicant but the response by the person or persons to whom she took her complaints of misconduct.

62. There are also some general principles which apply to all decision makers and which are reflected more or less in both the pre and post 2006 procedures. Even where a newly established office has no standard operating procedures or transitional measures, it is bound to observe the well-known fundamental principles of law which are that the facts relied on by the decision-maker must be correct and/or reliable; A decision-maker may only take into account relevant matters and must not consider irrelevant matters; The decision maker should have an unbiased and open mind (*See Abboud* UNDT/2010/001, para 15).

63. In considering the facts of the Applicant's matter, the Ethics Office was obliged to exercise its judgment when deciding what was reliable and relevant to its enquiry. It had to decide on two things: Did the Applicant make a report(s) of misconduct and was retaliatory action taken against her as a result of the report(s).

64. In assessing whether it exercised its judgment correctly the Tribunal takes note of the material provided to the Ethics Office by the Applicant, the internal notes provided by the Ethics Office to the Tribunal, the oral evidence of Ms. John and the written decision from the then Acting Director of the Ethics Office dated 18 December 2006.

Was there sufficient evidence in the material before the Ethics Office to establish if the Applicant had made report(s) of misconduct which amounted to a protected activity?

65. On 31 March, 7 and 20 April, 22 and 29 May, 5 and 11 October and 4 December 2006 the Applicant provided the Ethics Office with details of her reports of misconduct. The office also had access to the material provided to OIOS by the Applicant.

66. In its written decision of 18 December 2006 the Ethics Office said that the Applicant sought help from the previous UNHCR mediator and thus did engage in a protected activity. At that stage reports to the mediator were obviously deemed sufficient for the purposes of the Ethics Office's enquiries. The Tribunal holds that this was the correct conclusion. IOM/FOM/65/2003 specified persons to whom "normally" the report should be made. It does not list the specified persons as a closed list. The Tribunal does not accept the Respondent's argument at the hearing that this was an error.

67. However, even if it were an error, the Ethics Office had been told by the Applicant on 4 December 2006 but overlooked or ignored the fact that she had also reported misconduct to her immediate supervisor, the UNHCR Legal department and the then Deputy High Commissioner.

68. Each of those persons to whom the Applicant said she had reported met the criterion proposed by Ms. John that a report of misconduct should be made to a person who had the authority to take some action about it such as a supervisor in the office. Specifically, the Applicant's supervisor was the Head of the Investigation Unit at IGO and met the requirement of IOM/FOM/65/2003 paragraph 5.2.2 and ST/SGB/2005/21.

69. The Respondent made the valid point that the persons to whom the Applicant reported were more or less the subject of her complaints and would have had a conflict of interest. He submitted that in the circumstances she should have gone to OIOS or to the UNHCR High Commissioner.

70. However, IOM/FOM/65/2003 provides the process and mechanism by which the IGO administration could have dealt with this situation. Section 5 gives the IG/IGO overall authority and responsibility for ensuring that allegations of misconduct within UNHCR are investigated in a timely and appropriate manner and findings are transmitted to the High Commissioner.

71. The IGO is responsible for ensuring the investigation of those allegations of misconduct that involve persons having a direct contractual link with UNHCR. Section 5.1.9 states that "...if the alleged misconduct could possibly have a negative impact on the Office, the High Commissioner may request the IG/IGO to conduct an *ad hoc* inquiry". Following an *ad hoc* enquiry, section 5.1.10 provides that allegations of misconduct against senior staff of the Executive Office will be referred to OIOS as appropriate and will not be dealt with directly by the IGO.

72. Allegations against members of the Senior Management Committee, Representatives/Chiefs of Mission, or their deputies,⁴ will be investigated directly by the IGO, as will any case in which the alleged misconduct could *prima facie* have wide repercussions on the credibility and integrity of the Office.

73. Faced with an obvious conflict of interest the Administration had the legitimate option to refer the matter to OIOS as suggested by the Applicant.

74. The Tribunal finds that on the information before the Ethics Office at the time of its decision, there was sufficient evidence that the reports of misconduct made by the Applicant and the persons to whom those complaints were made met the criteria for complaints under IOM/FOM/65/2003 and were the equivalent of protected activities as now defined by ST/SGB/2005/21.

75. The Ethics office was in error by failing to take into account the evidence before it, of the reporting of these complaints.

⁴ For the purposes of this IOM-FOM the term "deputy" applies to the officer who would assume charge of an office or unit in the absence of the Director/Representative/Chief of Mission, whether or not formally designated Deputy Director or Deputy Representative/Deputy Chief of Mission. Where there are two or more formally designated Deputies, all are covered under this provision.

Did the Ethics Office properly assess whether actions taken by the Administration were in retaliation for her reports of misconduct?

76. In *Wasserstrom* UNDT/2012/092 the Tribunal stated:

.... maladministration or the reasonable belief that it may have occurred is usually identified by a staff member in the course of their carrying out their normal day-to-day functions. To exclude such circumstances from protected status will effectively render nugatory the underlying purpose of the policy underpinning protection to whistleblowers enshrined in ST/SGB/2005/21.

77. The Ethics Office was required to enquire whether the protected activities claimed by the Applicant were a contributing factor to the negative PAR and the subsequent non-renewal of her contract. At this stage of the enquiry it had to establish whether the Administration could prove by clear and convincing evidence that it would have taken the same action absent the protected activity. The Ethics Office was not obliged to investigate the Applicant's complaint of retaliation. It only had to determine if there was a credible case of retaliation and, if so, refer it to OIOS for substantive investigation.

78. To do this the Ethics Office was obliged to make a proper enquiry to ascertain what steps were taken by the Administration as a result of the reported misconduct.

79. The Applicant advised the Ethics Office on 7 April 2006 that her "immediate supervisor had initially supported her position" but "his supervisors, the IG and the DIG refused any further investigations of the interference." On 22 May 2006, she told the Ethics Office that she had asked the IGO to refer the matter to OIOS for investigation. In spite of this information, Ms. John confirmed in her evidence to the Tribunal that, other than referring to the contents of the disputed PAR, the Ethics Office did not enquire into the actions of the IGO in response to the Applicant's reports of misconduct.

80. This omission was not only prejudicial to the Applicant's complaint but also deprived the managers she accused of retaliating against her the opportunity to comment on her allegations.

81. It is evident from the notes to the Ethics Office file and the wording of the decision that the case officers at the Ethics Office relied almost entirely on the PAR evaluation of the Applicant's performance to assess the response of the Administration to her reports of misconduct.

82. In his first recorded evaluation of her claim, the case officer stated "given the supervisor's report on her competence, whatever intervention was made by the IG may well have been warranted." In his next note on the file he incorrectly stated that the Applicant had been terminated twice for poor performance. In fact the Applicant's contract was terminated only once for unsatisfactory performance based on the only substandard PAR she had ever received and which was contested by rebuttal.

83. The case officer's critical reaction to the Applicants description of the rebuttal process demonstrated that he had a negative attitude towards her case. Her case was approached on the basis that the obligation to demonstrate that she was entitled to protection lay with the Applicant. Although she was given the "benefit of the doubt" the onus was placed on her to provide more material.

84. In its final decision the Ethics Office stated that "records and documents shared with the Ethics Office indicate that UNHCR based its decision not to renew the Applicant's contract on her performance appraisal."

85. The Ethics Office did not question the validity of the PAR even though it was at that stage subject to rebuttal. The Respondent submitted that the PAR presents the genuine assessment and perspective of the Applicant's supervisor on her performance. It can reasonably be inferred from this that the Ethics Office accepted the Administration's perspective that the Applicant's allegedly unsatisfactory performance as recorded in the PAR was adequate justification for the non-renewal.

86. The Tribunal holds that the Ethics Office erred by relying on the PAR as the sole explanation for the decisions of the Administration not to renew her contract. Because the PAR had not been confirmed by the Rebuttal process and, according to the Administration, had been withdrawn, it was improper of the Ethics Office to take its contents into account in any probative sense. In doing so it took into account unverified facts and opinions about the Applicant and her performance and failed to properly consider the Applicant's allegations of maladministration that gave rise to her complaints in the first place.

87. The Ethics Office was obliged to look at the alleged detriment suffered by the Applicant to assess if there was any link between the reporting and the detrimental action. The ST/SGB/2005/21 standard of direct or indirect link only came into force after the protected activity but the fact is that there will seldom be direct, explicit evidence of retaliation. It is the nature of such actions that it is covert.

88. By failing to properly assess whether there was a link between the reporting of misconduct and the alleged retaliation the Ethics Office denied or radically limited the protections that the Secretary-General clearly intended to afford to United Nations staff members. This intent is demonstrated in the relevant documents. IOM/FOM/65/2003 (paragraphs 5.2.6 to 5.2.10) provides for the protection of the informant:

No action shall be taken against any staff member who reports in good faith, information on perceived misconduct that subsequently proves unfounded.

89. In conclusion the Tribunal finds that the Ethics Office did not assess the Applicant's claim in conformity with the correct obligations, principles and standards because:

- a. It applied the wrong criteria in considering whether the Applicant had engaged in protected activities.
- b. It overlooked her reports of misconduct to the UNHCR legal department and to the DIG/IGO and her request for the breach of confidentiality matter to be referred to OIOS.

c. It failed to identify that the retaliatory acts alleged by the Applicant were the findings of unsatisfactory performance and subsequent non-renewal. By relying on the unsubstantiated and totally discredited PAR it failed to make a proper enquiry into the link between the protected activity and the alleged retaliation.

Issue 3

What remedies are available to the Applicant?

90. The Tribunal is mindful that any remedies awarded in this case should not duplicate those awarded to the Applicant in *Hunt-Matthes* UNDT/2013/084⁵ and that it does not have the power to award punitive damages. Compensation should relate to the harm caused by the breach.

91. In this case the breach is the failure of the Ethics Office to properly conduct the preliminary enquiry into her claim for protection resulting in the rejection of her claim.

92. The Applicant accepted that it is hard to distinguish between the harm caused by the actions of the IGO and the Ethics Office. In the case of the Ethics Office she expressed deep disappointment at her realisation that there were serious questions as to whether the Ethics Office would provide protection for whistle blowers. She said that the delays by the Ethics Office in its enquiry also meant that she was unable to bring the matter to closure.

93. The Applicant produced a medical certificate that linked some of her medical problems to the stress she suffered as a result of the events which led to the cases before the Tribunal.

⁵ Case number UNDT/NBI/2010/053/UNAT/1539

94. Taking these matters into account the Tribunal awards the Applicant USD8,000 for the stress and anxiety caused by the breaches by the Ethics Office.

95. If payment of the compensation is not made within 60 days, an additional five per cent shall be added to the US Prime Rate in effect from the date of expiry of the 60-day period to the date of payment.

(Signed)

Judge Coral Shaw

Dated this 28th day of May 2013

Entered in the Register on this 28th day of May 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi