



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

GEHR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Bettina Gerber, UNOG

Stéphanie Cochard, UNOG

## Introduction

1. The Applicant, a former staff member of the United Nations Office on Drugs and Crime (“UNODC”), contests the decision of the Ethics Office dated 17 October 2011, taken in response to his request for protection against retaliation dated 14 November 2010. The Ethics Office found that the Administration’s actions towards the Applicant were unrelated to his report of misconduct and therefore that a credible *prima facie* case of retaliation had not been established.

## Facts

2. The Applicant joined the UNODC in Vienna in 2002 and, in 2007, was appointed as a Crime Prevention and Criminal Justice Officer at the Terrorism Prevention Branch (“TPB”), Division of Treaty Affairs (“DTA”). His fixed-term appointment was extended several times until 31 December 2011, when he was separated from service of the Organization.

3. In the fall of 2009, the Chief, TPB, and the Officer-In-Charge, DTA, announced to TPB staff that the Branch was to be reorganised. In early November 2009, the Chief, TPB, and the Officer-in-Charge, DTA, were the Applicant’s first and second reporting officers respectively; as such, they conducted with the Applicant his mid-point review for the performance cycle period of 1 April 2009 to 31 March 2010 (“2009-2010 performance appraisal”).

4. On 8 December 2009, the Applicant was informed that his post would be abolished and that he would be reassigned to the position of Senior Legal Adviser which was to be created within the Office of the Chief, TPB.

5. In a letter dated 31 January 2010 sent to the UNODC Executive Director, the Applicant explained that, in his view, the decision to abolish his post and reassign him to the position of Senior Legal Adviser was motivated by extraneous considerations. He further explained that the decision had been preceded by prohibited conduct, including harassment, on the part of his first and second reporting officers.

6. The Applicant alleges that on 1 December 2010 he sought the assistance of the Ethics Office following the receipt of his 2009-2010 performance appraisal.

7. On 14 December 2010, the Applicant submitted to the Ethics Office a request for protection from retaliation based on ST/SGB/2005/21 (Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations). He claimed in particular that his first and second reporting officers had made negative comments in his 2009-2010 performance appraisal, that he had been denied the right to rebut the appraisal and that he had been threatened by his second reporting officer with the non-renewal of his contract. This, he submitted, constituted retaliation against him for having reported prohibited conduct to several officials and institutions in 2009 and 2010.

8. After the filing of his request, several communications ensued between the Applicant and the Ethics Office which will be enunciated below, when the Tribunal considers the process at the Ethics Office when dealing with the Applicant's request for protection.

9. By letter dated 17 October 2011 which the Applicant received on the following day, he was notified that, following a preliminary review of his complaint of retaliation, the Ethics Office had determined that a credible *prima facie* case of retaliation had not been established.

10. On 18 November 2011, the Applicant sought management evaluation of the determination by the Ethics Office conveyed by the letter of 17 October 2011 and the Management Evaluation Unit ("MEU") informed him by letter of 15 December 2011 that they did not have the authority to evaluate the decision of the Ethics Office, because the Secretary-General had taken the position that he could not be held liable for the acts or omissions of the Ethics Office.

11. On 22 December 2011, the Applicant filed the present application with the Tribunal, challenging the determination made by the Ethics Office and the inordinate delay by the Ethics Office in reaching a decision.

12. The Respondent filed his reply on 25 January 2012.

13. By Order No. 70 (GVA/2012), dated 10 April 2012, the Tribunal directed the parties to attend a case management hearing on 18 April 2012, in which the present and several other extant cases before the Tribunal were discussed.

14. On 4 November 2012, the Applicant filed a motion for recusal of the undersigned judge and by Order No. 092 (NBI/2013) issued on 2 May 2013, the then President of the Dispute Tribunal rejected the application for recusal.

### **Parties' submissions**

15. The Applicant's principal contentions are:

- a. His application is receivable, *ratione materiae*;
- b. The Ethics Office did not fulfil its obligation in a timely manner as it took almost 10 months to conduct a preliminary review which defeats the purpose of seeking protection; and
- c. The decision of the Ethics Office dated 17 October 2011 contains factual errors and contradictions; as such the reasoning is flawed and illogical.

16. The Applicant prays the Tribunal to:

- a. Rescind the contested administrative decision;
- b. Award appropriate compensation for the moral injury which he suffered as a consequence of the continuous retaliation by his First and Second Reporting Officer for having reported their prohibited conducts and for not having received protection;
- c. Award appropriate compensation for the damage caused to his reputation;
- d. Reimbursement of the cost of medical treatment and travel to the medical centre incurred as a direct consequence of his being subject to prohibited conducts by the Administration;

e. Recommend that the non-compliance and misuse by the First and Second Reporting Officer of the rules governing performance appraisal be recorded on their respective PAS; and

f. Refer the case of his FRO and the Director of the Ethics Office to the Secretary-General of the United Nations for possible action to enforce accountability pursuant to art. 10.8 of the UNDT's Statute.

17. The Respondent's principal contentions are:

a. The decision of the Ethics Office is not an administrative decision and the omissions of the Ethics Office cannot be attributed to the Organization, therefore the Tribunal has no jurisdiction over the matter;

b. The duration of 45 days under sec. 5.3 of ST/SGB/2005/21 is an "aspirational requirement"; the Applicant submitted voluminous material regarding his case hence it may have required the Ethics Office additional time to conduct a comprehensive review;

c. There is no inaccuracy in the decision of the Ethics Office; and

d. The Ethics Office found that most of the elements alleged by the Applicant were moot and had been addressed by the Tribunal in earlier Judgments.

e. The Respondent prays the Tribunal to find the application non-receivable and, in the event the Tribunal considers it to be receivable, to reject it on grounds that the claims raised by the Applicant have no factual or legal basis.

### **Issues**

18. The Tribunal finds that the issues to be determined are:

a. Whether the decision of the Ethics Office is an administrative decision within the meaning of art. 2.1 of the Tribunal's Statute;

- b. Whether the delay by the Ethics Office in reviewing the Applicant's request for protection was inordinate;
- c. Whether the decision of the Ethics Office to find that the Applicant's claim did not amount to a *prima facie* case of retaliation was lawful; and
- d. What remedies are available to the Applicant, if any.

### **Considerations**

*Does the Tribunal have jurisdiction over the decision of the Ethics Office?*

19. Article 2.1 of the Tribunal's Statute provides as follows:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

20. The Appeals Tribunal held in *Nwuke* 2010-UNAT-099 that "whether or not the UNDT may review a decision not to undertake an investigation, ... will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?" In that judgment, the Appeals Tribunal further held that "a staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules". It noted that the provisions of ST/SGB/2008/5 concerning the prohibition of discrimination, harassment, including sexual harassment and abuse of authority, provide for such a right and that under that bulletin,

[T]he staff member is entitled to certain administrative procedures.

If he or she is dissatisfied with their outcome, he or she may

request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with applicable law. The UNDT can also determine the legality of the conduct of the investigation.

21. In that case, the Appeals Tribunal concluded that the decision not to conduct an investigation under ST/SGB/2008/5 constitutes an administrative decision, subject to judicial review.

22. The Tribunal notes that ST/SGB/2005/21 which provides for reports of retaliation to be made to the Ethics Office, was promulgated by the Secretary-General for the protection of staff members.

23. The Appeals Tribunal in *Koumoin* 2011-UNAT-119, referring to the establishment of the Ethics Office, stated that its objective was:

[...] 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. Safeguards against retaliation are also provided by ensuring that no staff member shall be subject to reprisals for bringing a matter to the attention of the Ethics Office or providing information to it.

24. This in itself portrays the delicate mandate of the Ethics Office and the potential impact its decisions taken under ST/SGB/2005/21 may have on the rights of staff members who submit a complaint for retaliation under the bulletin.

25. In addition, this Tribunal has already held that ST/SGB/2005/21 describes certain administrative procedures to which the complaining staff member is entitled and has concluded that a finding of the Ethics Office that there was no *prima facie* case of retaliation constitutes an administrative decision under art. 2.1 (a) of the Tribunal's Statute (*Hunt-Matthes* UNDT-2011-063). For example, sec. 5.5 provides "[i]f 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 referred.” On the other hand, pursuant to sec. 5.8 of the bulletin,

[i]f 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.

26. Finally, the Tribunal emphasizes that in the case of *Servas* 2013-UNAT-349, where the Applicant had contested the Ethics Office decision not to initiate an investigation, the Appeals Tribunal held that a request for management evaluation has to be submitted prior to bringing an application before the Tribunal. Additionally the Appeals Tribunal stated:

Moreover, based on the facts of the present case, even if the MEU failed to resolve [the Applicant’s] complaints about the contested decision, she still had the opportunity to timely file an application in the UNDT for judicial review after she received the response from the MEU; however, she did not choose to do so.

27. In other words, the Appeals Tribunal held that staff members need to request management evaluation before submitting an application against a decision of the Ethics Office to the Dispute Tribunal and even if the MEU fails to resolve the issue, the procedural step to request judicial review of the decision would have been fulfilled.

28. It is the Tribunal’s understanding of the above quotation of the Appeals Tribunal’s Judgement *Servas* 2013-UNAT-349, as well as of the principles and standards set down by the Appeals Tribunal in its Judgment *Nwuke*, quoted above, that a decision of the Ethics Office is a contestable administrative decision, falling within its jurisdiction.

#### *Duration of consideration by the Ethics Office*

29. Regarding the merits of the case, the first question to be determined is whether the Applicant’s procedural rights have been respected, or whether the Ethics Office considered the Applicant’s request with undue delay.



30. On 14 December 2010, the Applicant filed a request for protection against retaliation against his First Reporting Officer (“FRO”) and Second Reporting Officer (“SRO”) with the Ethics Office. He made an additional report of misconduct against the same persons on 14 February 2011.

31. On 31 March 2011, the Applicant wrote to the Ethics Office to inquire on the possible date on which he could expect a reply to his request for protection, but he received no reply from the Ethics Office.

32. The Applicant wrote again on 4 April 2011, inquiring when the preliminary review of his case would be completed. On 5 April 2011, an Officer at the Ethics Office replied and informed the Applicant that he was going away on mission the following week and that he would not be able to complete the review of the Applicant’s case before then.

33. On 18 April 2011, the Applicant wrote to the Ethics Office, noting that the Tribunal had scheduled oral hearings regarding his other cases before it and on 19 April 2011, the Officer at the Ethics Office replied and told the Applicant that the Tribunal would be the best forum for resolving the difficult issue.

34. On 28 July 2011, the Applicant once again wrote to the Ethics Office and inquired on when he could expect to receive a reply to his 14 December 2010 request, however he did not receive a reply from the Ethics Office. Consequently, on 5 August 2011, the Applicant filed a request for management evaluation of the Ethics Office inaction to his request for protection against retaliation.

35. On 25 August 2011, the MEU wrote to the Applicant and informed him that his request for management evaluation was beyond the scope of the MEU.

36. On 6 September 2011, the Applicant received an email from the Officer of the Ethics Office, apologising for the delay and assuring the Applicant that he would be informed of the outcome of the review by the end of that week. On the following day, the same Official enquired with the Applicant about the status of his cases before the Tribunal and requested to be provided with a copy of his request for management evaluation with respect to another case.

37. On 12 September 2011, the Officer of the Ethics Office wrote to the Applicant and informed him that he would soon get an official answer to his request. The Officer also shared his views and perspective regarding the Applicant's case with the latter and informed him about the role of the Ethics Office.

38. On 23 September 2011, the Officer of the Ethics Office informed the Applicant that he would be notified about the outcome of the review upon the return from mission of the Director of the Office, within one week. Since he did not receive any decision within a week, on 30 September 2011, the Applicant filed his case before the Tribunal, contesting the inaction by the Ethics Office to his request for protection against retaliation. The matter was registered under case No. UNDT/GVA/2011/064 and determined by Judgment *Gehr* UNDT/2012/069, subsequently affirmed by Judgment *Gehr* 2013-UNAT-294.

39. By a letter dated 17 October 2011, the Ethics Office issued its decision to the Applicant's request for protection of 14 December 2010. In that decision the Applicant was notified that, following a preliminary review of his complaint, the Ethics Office had determined that a credible *prima facie* case of retaliation had not been established.

40. The Applicant contends that the Ethics Office did not fulfil its obligation of conducting a preliminary review in a timely manner, since it took ten months to issue the preliminary review on his request for protection.

41. The Respondent however contends that the wording of sec. 5.3 of ST/SGB/2005/21 to "[...] seek to complete preliminary review within 45 days" is an "aspirational requirement" and that depending on the complexity of the case, the Ethics Office may require additional time to conduct a thorough and comprehensive review. The Respondent stresses that the Applicant submitted voluminous documents regarding his request to the Ethics Office and that the latter engaged the services of the Ombudsman, who allegedly met with the Applicant during the review period.

42. ST/SGB/2005/21 provides

## **Section 5 Reporting retaliation to the Ethics Office**

5.1 Individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible. Complaints may be made in person, by regular mail or by e-mail, by fax or through the Ethics Office helpline.

....

5.3 The Ethics Office will seek to complete its preliminary review within 45 days of receiving the complaint of retaliation.

43. At the outset, the Tribunal emphasizes that in view of the delicate nature of the issues covered by ST/SGB/2005/21 and of the mandate of the Ethics Office, timely reaction is essential for the effective protection of any “whistle-blowing” activity. As such, staff members who have reported misconduct or cooperated with a duly authorized audit or investigation and who believe that retaliatory action has been taken against them as a result of such report or cooperation are themselves obliged to submit their complaint and supporting documentation “as soon as possible” to the Ethics Office (see sec. 5.1). It is only fair to expect that the Ethics Office fulfils its legal obligations under the bulletin without any undue delay.

44. Although sec. 5.3 does not appear to provide that the Ethics Office is bound to finalise its preliminary review within 45 days, it provides clear guidance as to the timeframe in which complainants can expect to receive a response to their complain from the Ethics Office. As such, it contains a clear legal obligation on the part of the Ethics Office to review the matter swiftly and inform the staff member concerned accordingly, in due time. This is supported by Judgement *Koumoin* 2011-UNAT-119, in which the Appeals Tribunal found that the preliminary review by the Ethics Office has to be completed within 45 days.

45. In view of the foregoing, it is unacceptable that it took the Ethics Office about 112 days, namely until 5 April 2011, before it sent a very first reaction to the Applicant’s first report of 14 December 2010, merely to let him know that the Officer charged with the matter was going away on mission the following week

and that he would not be able to complete the review of the Applicant's case before then.

46. In the end, it took more than six more months until the Applicant received the contested decision of 17 October 2011.

47. Even considering that the Applicant's complaint may have been voluminous and complex, a delay exceeding the normal time-frame seven times more, is not acceptable, given the purpose of the preliminary review and the well-founded expectations of the complainant. The Tribunal therefore finds that in sending the Applicant a final decision on its preliminary review only on 17 October 2011, the Ethics Office acted with undue delay.

*Was the decision of the Ethics Office lawful?*

48. The Ethics Office in its review of the Applicant's request for protection first looked into the question whether the Applicant had engaged in a protected activity as per the requirements of sec. 2.1 of ST/SGB/2005/21 which provides:

## **Section 2**

### **Scope of application**

2.1 Protection against retaliation applies to any staff member (regardless of the type of appointment or its duration), intern or United Nations volunteer who:

(a) Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service, including any request or instruction from any staff member to violate the above-mentioned regulations, rules or standards. In order to receive protection, the report should be made as soon as possible and not later than six years after the individual becomes aware of the misconduct. The individual must make the report in good faith and must submit information or evidence to support a reasonable belief that misconduct has occurred; or

(b) Cooperates in good faith with a duly authorized investigation or audit.

49. The Applicant alleged to have made three reports of misconduct against his FRO and SRO. Firstly, the Applicant indicated that his alleged reports of misconduct were his request for management evaluation to the MEU on 22 February 2010 and his applications to the UNDT on 27 April 2010, which the Ethics Office concluded did not constitute reports of misconduct. The Tribunal agrees with this finding. Applications before the Tribunal and requests for management evaluation do not constitute a protected activity under the terms of sec. 2.1 of ST/SGB/2005/21.

50. Secondly, the Applicant alleged that he had made an oral report of misconduct to the Executive Director, UNODC. In the report, the Applicant stated that his FRO accused him of jeopardising UNODC relationship with the Permanent Mission of the Netherlands, and that the alleged incident took place in October 2009, which was part of a pattern of harassment.

51. The Applicant submitted that he contacted the Permanent Mission of the Netherlands regarding the statement made by the FRO and that the Permanent Mission clarified that they were disappointed about the duration it took to implement projects, and expressed their concerns in relation to the structure of TPB and the lack of an evaluation body at UNODC.

52. When the Applicant went to the SRO and explained the information he had received from the Permanent Mission, she apologised to the Applicant, while the FRO who had made the comment did not. The Applicant further noted that the SRO declined to take the file he had presented to her containing the relevant correspondence from the Permanent Mission regarding the subject.

53. The Ethics Office found that the incident was by nature one where “a staff member [was] defending himself from what he considered an unfair contention rather than a report of misconduct required by the bulletin” and that “[t]he incident [was] in the form of performance dispute as opposed to a substantiated report of misconduct” and as such did not constitute a report of misconduct, as envisaged by ST/SGB/2005/21.

54. The Tribunal equally agrees with this finding and concludes that the oral report to the Executive Director, UNODC, does not constitute a protected activity under the bulletin. Additionally, the Tribunal stresses that despite the statement by the Applicant's FRO, his SRO apologised for the incident, and there is no evidence that the difficulties in the relationship between TPB and the Permanent Mission of the Netherlands were being held against the Applicant.

55. Thirdly, the Ethics Office had to consider the Applicant's letter of 31 January 2010 to the Director, UNODC, to which the Applicant referred to as "summary of grievances". In that letter, the Applicant contended that the decision to abolish his post and to reassign him was motivated by extraneous considerations and that it was preceded by prohibited conduct, including harassment, on the part of his FRO and SRO. All the reports referred to in the "summary of grievances" are dated between 2009 and 31 January 2010.

56. The Ethics Office in its review accepted this "summary of grievances" of 31 January 2010 as a report of misconduct made according to ST/SGB/2005/21. The Ethics Office then weighed this report against the provisions of sec. 1.4 of ST/SGB/2005/21, which provides that "[r]etaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct."

57. The Applicant cited that his 2009-2010 performance appraisal constituted retaliation by both his supervisors, in reaction to his "summary of grievances" of 31 January 2010. The Ethics Office determined that since the Applicant's 2009-2010 performance appraisal was dated 19 November 2010, it preceded all the claimed reports of misconduct. The Ethics Office concluded that the 2009-2010 performance appraisal could not be said to have been caused in whole or in part by the report of misconduct of 31 January 2010.

58. This conclusion cannot be accepted for the following reason: the Applicant received the 2009-2010 performance appraisal on 19 November 2010, whereas he had made his report of misconduct to the Executive Director, UNODC, on 31 January 2010, about nine months before he received the appraisal. Considering

the lapse of time between the report of misconduct and the receipt of the performance appraisal, the 2009-2010 performance appraisal could potentially be qualified as retaliation.

59. On the other hand, all other major incidents the Applicant qualifies as retaliation—his mid-term review, his reassignment, the conflict with the Netherlands Mission—clearly precede the written “summary of grievances” of 31 January 2010 and, as such, cannot possibly constitute acts of retaliation. Also, the performance appraisal of 19 November 2010 was not final. It was amended several times and is still under consideration before this Tribunal.

60. Therefore, and despite the Tribunal’s disagreement with the Ethics Office’s conclusion with respect to the possible connexion between the 2009-2010 performance appraisal and the report of misconduct of 31 January 2010, taking into account all the circumstances, the Tribunal concludes that the Ethics Office did not err in finding that no credible *prima facie* case of retaliation had been established.

### **Compensation**

61. The foregoing notwithstanding, and since the Tribunal found that the Ethics Office had acted with undue delay, it has to determine whether that undue delay caused the Applicant harm warranting compensation. In *Appellant* 2011-UNAT-143, the Appeals Tribunal upheld the Dispute Tribunal’s finding that the prejudice caused by the Administration’s failure to respond to the Appellant’s complaint in a timely manner warranted compensation.

62. In *Shkurtaj* 2011-UNAT-148 the Appeals Tribunal confirmed the award of compensation to the Appellant for the Administration’s failure to timely act on recommendations by the Ethics Office regarding the Appellant’s case. Additionally, the Appeals Tribunal held that damages awarded for violation of due process rights though not exemplary or punitive in nature, must be awarded with great care and be of reasonable amount.

63. The Ethics Office failure to address the Applicant's request for protection in a timely manner caused the Applicant anxiety and unnecessary frustration, which inclined him to file an application before the Tribunal (UNDT/GVA/2011/064), as a result of the silence from the Ethics Office. Therefore, and in view of the parameter set down by the Appeals Tribunal in the above referenced judgment, the undue delay by the Ethics Office in responding to the Applicant's complaint warrants moderate financial compensation for moral damages.

### **Conclusion**

64. In view of the foregoing, the Tribunal DECIDES:

- a. The Respondent shall compensate the Applicant in the amount of USD3,000 for moral injury;
- b. This amount shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment; and
- c. All other pleas are rejected.

*(Signed)*

Judge Thomas Laker

Dated this 17<sup>th</sup> day of October 2013

Entered in the Register on this 17<sup>th</sup> day of October 2013

*(Signed)*

René M. Vargas M., Registrar, Geneva