UNITED NATIONS DISPUTE TRIBUNAL

Cases No.: UNDT/NY/2011/054
UNDT/NY/2011/055
Judgment No.: UNDT/2015/110/Corr.2
Date: 11 November 2015
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

NGUYEN-KROPP

POSTICA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicants:
Thad M. Guyer

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. This is a consolidated judgment on two separate, but similar, applications filed on 29 June 2011 by two investigators—Ms. Nguyen-Kropp and Mr. Postica—from the Investigations Division of the Office of Internal Oversight Services ("OIOS"), United Nations Secretariat. Though these cases have not, to date, been consolidated, both the parties and the Tribunal have treated this as one combined proceeding since at least 2014. This is evident from the fact that both the Applicants and the Respondent have filed numerous submissions regarding one consolidated matter before the Tribunal. Both Applicants made similar claims. They are represented by Mr. Thad M. Guyer of the Government Accountability Project ("GAP"), a whistleblower protection and advocacy organization. These cases are now formally subject to an order for combined proceedings.

2. On 30 July 2010 and 2 August 2010, respectively, GAP submitted retaliation complaints to the United Nations Ethics Office on behalf of Ms. Nguyen-Kropp and Mr. Postica.

3. The Applicants set out the contested decisions in almost identical terms as follows:

> … the 2 May 2011 determination by Ms. Joan Elise Dubinsky, Director of the UN Ethics Office, that retaliation was not established in [their] case. [The Applicants also challenge] the process that led to this decision, specifically in connection to the appointment of an Alternative Investigating Panel to investigate the retaliation against [them]. [They challenge] the expertise, selection process and Terms of Reference of this Panel, as well as Ms. Dubinsky's 23 May 2011 decision not to provide [them] with a copy of the Panel's investigation report, nor even reasonably specific information as to the Panel's findings on each of [their] allegations.

4. In the replies to the applications, dated 1 August 2011, the Respondent requested that in order to "protect their identities and reputations" the Tribunal refrain from referring to the names of any of the staff members involved in this matter other than the Applicants, the members of the Alternative Investigating Panel ("AIP") appointed to investigate their complaints, and the Director of the Ethics Office.

5. In their comments on the replies, dated 30 August 2011, both Applicants requested that their names be removed from the published judgment.

6. Article 11.6 of the Dispute Tribunal's Statute states that judgments of the Dispute Tribunal "shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal". The United Nations Appeals Tribunal has observed that "[t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability" (*Servas* Order No. 127 (UNAT/2013); see also *Utkina* 2015-UNAT-524).

7. Accordingly, the Tribunal rejects the requests from both the Applicants and the Respondent to remove names from the judgment.

Factual background

8. On 30 July 2010 and 2 August 2010, respectively, Ms. Beatrice Edwards, the International Programme Director of GAP wrote to Ms. Joan Elise Dubinsky, then Director of the Ethics Office, on behalf of each of the Applicants. 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.

9. On 23 August 2010, Ms. Edwards wrote to Ms. Dubinsky to provide further information about the Applicants' retaliation complaints.

10. By interoffice memoranda dated 6 October 2010, the Applicants 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:

> As per Section 5.10 of ST/SGB/2005/21, the Ethics Office is in the process of appointing an Alternative Investigating Panel. This Panel will conduct an investigation to establish whether the detrimental actions taken against [the Applicants] constitute retaliation and whether [their] protected activities were contributing factors thereto.
>
> …
>
> As soon as the Panel has been appointed, the Ethics Office will inform you of its composition and expected start date.

11. On 5 November 2010, Ms. Edwards wrote to Ms. Dubinsky on behalf of the Applicants expressing concerns about the AIP. Ms. Edwards noted that the Applicants had been informed by several sources that the AIP had already been appointed and begun its work, without formal notification of the same being provided to the Applicants. Ms. Edwards requested specific information relating to the selection process, who participated in the selection, how the pool of potential candidates was constituted, and the selection criteria for appointing the AIP members. She also requested to be informed of the names and biographies of the AIP members and to be provided with the Terms of Reference ("TOR") setting out the scope and authority of the work of the AIP.

12. On 8 November 2010, Ms. Dubinsky wrote to Ms. Edwards stating: "Please be advised that pursuant to 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 has appointed an Alternative Investigating Panel". Ms. Dubinsky provided the names of the three members of the AIP and

the dates for a preliminary work visit to New York (9–17 December 2010). Ms. Dubinsky stated that the Report of Investigation was to be provided to her, as Director of the Ethics Office, by 31 March 2011 and that the Applicants would be provided with the TOR of the AIP before their interviews with the Panel. However, the Tribunal notes that for reasons which remain unclear, Ms. Dubinsky declined to provide the Applicants with the information they requested regarding the process for selecting AIP panel members.

13. On 12 November 2010, Ms. Edwards wrote to Ms. Dubinsky noting that her previous letter did not provide biographies of the AIP members as requested. She observed that independent research suggested that, though the AIP members were distinguished national and international civil servants,

> none of them is experienced in the specific field of retaliation investigations, nor in the more general area of investigation per se. As you know, retaliation, like discrimination or harassment, is typically either disguised as presentable conduct, or takes place without witnesses, and it is therefore important that those assessing a retaliation complaint have experience in recognizing the behavior and its consequences. While we are certain that those selected will do their best to investigate fairly and skilfully, we are concerned about the selection criteria that were used to appoint this panel.

Ms. Edwards reiterated her request for information about the selection process for the AIP, including how the pool of potential panel members was constituted, the selection criteria used in appointing them, and copies of their curricula vitae. Ms. Edwards further stated:

> [W]e believe that panel members should be experienced in conducting independent investigations. We also believe that at least one panel member must be a current or former professional investigator, with experience supervising an investigation at an Intergovernmental Organization.

14. In an evasive response, dated 21 November 2010, Ms. Dubinsky responded to Ms. Edwards via email, stating: "[R]est assured that the members of the [AIP]

were selected on the basis of their professionalism and experience, and will conduct their duties in adherence to the highest standards of practice".

15. On 29 November 2010, Ms. Edwards wrote to Ms. Dubinsky asking for clarification regarding the TOR of the AIP and requesting a copy of the original and revised TOR for the AIP.

16. On 30 November 2010, Ms. Dubinsky responded to Ms. Edwards via email stating that the TOR of the AIP had not been discussed with the alleged retaliator or influenced by him. She reiterated that the Applicants would be provided with a copy of the TOR prior to their interviews by the AIP.

17. On 1 December 2010, Ms. Edwards wrote to Ms. Dubinsky requesting further clarification in relation to the TOR of the AIP.

18. On 6 December 2010, Ms. Dubinsky responded to Ms. Edwards via email reiterating that the Ethics Office had not discussed the TOR of the AIP with the alleged retaliator and stating that the alleged retaliator had not been provided with prior working drafts of the TOR. She further stated that "all final revisions were undertaken upon internal Ethics Office considerations".

19. On 9 December 2010, Mr. Postica received a "Notice of Hearing" from the Secretary of the AIP requesting him to attend an interview on 14 December 2010. The Notice stated that the AIP was appointed by the Executive Office of the Secretary-General. This contradicted the statements made by Ms. Dubinsky in her correspondence of 6 October 2010 and 8 November 2010 in which she referred to the AIP being appointed by the Ethics Office (see above). The TOR of the AIP were attached to the Notice.

20. On 13 December 2010, Ms. Edwards wrote to Ms. Dubinsky expressing concern that the burden of proof as expressed in the TOR of the AIP was inconsistent with sec. 2.2 of ST/SGB/2005/21, which states 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". She requested that a revised TOR be issued clarifying the burden of proof.

21. Ms. Dubinsky responded to Ms. Edwards via email the same day stating that though the disputed provision of the TOR was silent as to which party had the burden of proof, "it is not in our view inconsistent with ST/SGB/2005/21". She further stated that ST/SGB/2005/21 was "controlling in terms of both the burden and standard of proof" for the investigation.

22. On 2 May 2011, Ms. Dubinsky wrote to the Applicants to inform them that following an independent analysis of the investigation report of the AIP, the Ethics Office had determined that "retaliation in your case has not been established".

23. 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 sec. 2.2 of ST/SGB/2005/21 was unequivocally misapplied. The letter concluded by stating:

> Given 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 [the Applicants] are respectfully requesting a copy of the Panel's investigation report(s).

24. On 23 May 2011, Ms. Dubinsky responded to Ms. Edwards reiterating the decision of the Ethics Office and stating that the Office was satisfied that the Administration had proven, by clear and convincing evidence, that it would have taken the same actions absent the protected activities of the Applicants. She stated that complainants are not entitled to receive copies of relevant investigation reports under ST/SGB/2005/21 and that redacting the names of witnesses would not effectively safeguard their identities. She further stated that, under sec. 5.7 of ST/SGB/2005/21, information contained in memoranda provided to complainants

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".

25. On 31 May 2011, Ms. Edwards wrote to Ms. Dubinsky stating that Ms. Dubinsky had not identified the precise findings of the AIP in her 2 May 2011 memoranda to the Applicants. She stated that while the Applicants would not continue to argue for access to a redacted report of the AIP, they did wish to be informed of the Panel's findings. She asked for clarification of the Panel's determination in relation to each of the retaliation claims presented by the Applicants.

26. On 14 June 2011, Ms. Dubinsky sent a one and a half page memorandum to Ms. Edwards providing a brief summary of the AIP's findings.

Procedural background

27. The procedural history of these cases is a long and complex one. A number of relevant judgments of both the Dispute Tribunal and the Appeals Tribunal were issued during the course of proceedings, resulting in the proceedings in these cases being stayed three times. The scope of these cases has also evolved and become somewhat confused during the course of proceedings. An extensive procedural history is set out below to provide context to the considerations and findings in this judgment.

Management Evaluation Unit correspondence

28. On 25 May 2011, GAP wrote to the Officer-in-Charge of the Management Evaluation Unit ("MEU") on behalf of Mr. Postica. GAP requested clarification in regards to a statement made by the MEU on 4 November 2010 that "the Secretary-General has determined that decisions of the Ethics Office lie outside the scope of

management evaluation" (the MEU statement was made in response to a request for management evaluation by Mr. Postica in a separate but related case). GAP requested further clarification as to whether this position remained the same in light of recent rulings of the Dispute Tribunal (citing *Hunt-Matthes* UNDT/2011/063 on receivability). GAP stated:

> We are asking for clarification because Mr. Postica is considering appealing an Ethics Office decision to the UN Dispute Tribunal and would like to know if he should proceed directly to a Tribunal application, or request an MEU [review] first.

29. On 2 June 2011, Ms. Sheila Singh, the Officer-in-Charge of MEU, responded to the Applicants' representative by email stating:

> In response to your email inquiry set out below, as we stated in our correspondence of 4 November 2011, the Secretary-General has determined that the decisions of the Ethics Office lie outside the scope of management evaluation. Accordingly, the MEU will not conduct management evaluations with regard to such requests. The staff member may submit his request for review directly to the UNDT.

Applications, replies and response to replies

30. On 29 June 2011, each of the Applicants filed an application before the Tribunal. The application of Ms. Nguyen-Kropp was registered under Case No. UNDT/NY/2011/054. The application of Mr. Postica was registered under Case No. UNDT/NY/2011/055.

31. The Respondent filed separate replies to the applications on 1 August 2011.

32. On 30 August 2011, each of the Applicants filed a motion seeking leave to submit comments on the Respondent's replies. The motions included the proposed comments.

33. By Orders No. 274 and 275 (NY/2011), dated 21 November 2011, the Tribunal granted the Applicants' requests for leave to file comments on

the Respondent's replies. The Respondent was ordered to file a response to the Applicants' comments and both parties were ordered to state whether the issue of receivability could be considered on the basis of the documents before the Tribunal.

34. On 2 December 2011, the Applicants each filed a submission stating that they do not consent to determination of the issue of receivability on the basis of the documents before the Tribunal alone. They each stated that they consider the issue of receivability "to be an unusually fact determinative question in this case. The facts of receivability appear to be in dispute in this case, and that issue should, therefore, be adjudicated at the final hearing or at [a] prior evidentiary hearing".

35. On 9 December 2011, the Respondent filed submissions in response to the Applicants' comments on the replies. With regard to the issue of receivability being considered on the documents, the Respondent stated that he "does not seek to contest the Applicant's position regarding the need for a hearing".

36. On 9 October 2012, these cases, which had previously been assigned to another Judge of the Dispute Tribunal, were reassigned to the undersigned Judge.

Case management and initial stay of proceedings

37. A case management discussion ("CMD") was held on 24 October 2012 to discuss Cases No. UNDT/NY/2010/107, UNDT/NY/2011/004 (two separate but related cases filed by the Applicants), and the present two cases.

38. On 22 February 2013, the Tribunal issued *Nguyen-Kropp* UNDT/2013/028 and *Postica* UNDT/2013/029 finding that the applications in Cases No. UNDT/NY/2010/107 and UNDT/NY/2011/004 were receivable.

39. A CMD was held on 1 March 2013 at which it was agreed that all four cases concerning the Applicants should not be consolidated, but that Cases No. UNDT/NY/2010/107 and UNDT/NY/2011/004 should be heard together.

40. By Order No. 65 (NY/2013), dated 5 March 2013, the Tribunal ordered that the proceedings in these cases be stayed pending final determination of Cases No. UNDT/NY/2010/107 and UNDT/NY/2011/004.

41. On 19 December 2013, the Tribunal issued *Nguyen-Kropp and Postica* UNDT/2013/176 on liability and relief in Cases No. UNDT/NY/2010/107 and UNDT/NY/2011/004.

Further case management and second stay of proceedings

42. A CMD was held on 9 April 2014 to discuss these cases following the judgment in *Nguyen-Kropp and Postica* UNDT/2013/176. During the CMD, the Respondent orally requested a stay of proceedings until the Appeals Tribunal considered the appeals filed in relation to *Hunt-Matthes* UNDT/2011/063 and *Wasserstrom* UNDT/2012/092. It was claimed that these two cases presented similar, or identical, issues of receivability with respect to the Tribunal's jurisdiction over decisions made by the Ethics Office. The Applicants strongly opposed any stay of the proceedings.

43. Given the lack of precise particulars as to the grounds of appeal, including the particular error of law, in the *Wasserstrom* appeal, the Tribunal issued Order No. 59 (NY/2014), dated 9 April 2014, ordering the Respondent to file a motion with sufficient particulars setting out the precise grounds in support of the request for a stay of proceedings pending judgment by the Appeals Tribunal. The Applicants were granted leave to respond.

44. The parties filed their respective submissions on the issue of stay of proceedings on 23 April 2014 and 13 May 2014.

45. By Order No. 143 (NY/2014) dated 13 June 2014, the Tribunal ordered that all further proceedings be stayed pending publication of the fully reasoned judgments of the Appeals Tribunal in *Hunt-Matthes* and *Wasserstrom*.

46. On 29 August 2014, the Appeals Tribunal published *Hunt-Matthes* 2014-UNAT-444 and *Wasserstrom* 2014-UNAT-457 (both dated 27 June 2014), finding both cases not receivable and vacating the Dispute Tribunal's judgments. In *Wasserstrom* 2014-UNAT-457, the Appeals Tribunal ruled that the Ethics Office is limited to making recommendations to the Administration and that recommendations of the Ethics Office are not administrative decisions subject to judicial review.

Submissions after *Wasserstrom* 2014-UNAT-457

47. By Order No. 260 (NY/2014), dated 5 September 2014, the Tribunal ordered the Applicants to state whether they wished to continue with these proceedings notwithstanding the ruling of the Appeals Tribunal in *Wasserstrom* 2014-UNAT-457 and, if so, to show cause why these applications should not be struck out on the grounds that the Tribunal has no jurisdiction to consider each of their appeals against the acts and/or omissions of the Ethics Office.

48. On 6 October 2014, the Applicants filed a response to Order No. 260 (NY/2014) in which they focused their submissions on the elements of their applications concerning the creation, process and findings of the AIP.

49. On 10 November 2014, the Respondent filed a response to the Applicants in which he submitted that the elements of the applications relating to the AIP are not receivable because the Applicants did not request management evaluation in relation to these issues. In the alternative, the Respondent submitted that the Applicants should be ordered to make further submissions as to the terms of their employment that were breached by the appointment of the AIP and the conduct of the investigation.

50. On 25 November 2014, the Applicants filed a response to the Respondent's submission dated 10 November 2014.

51. A CMD was held on 8 December 2014 to discuss the parties' post-*Wasserstrom* submissions and the most appropriate way to proceed in these cases.

52. By Order No. 330 (NY/2014), dated 9 December 2014, the Applicants were ordered to file a concise statement of the nature of their claim, including the further particulars requested by the Respondent in his submission dated 10 November 2014. The Respondent was ordered to respond.

53. On 9 January 2015, the Applicants filed an 18-page response to Order No. 330 (NY/2014). In their submission the Applicants stated:

> To the extent that Applicants in their prior submissions made statements which can be understood as their concession that the Tribunal has jurisdiction only over the decision of the Secretary-General to appoint the Alternative Investigative Panel, but not over the findings or acts of omissions of that panel or the Ethics Office's adoption or approval of the same, the Applicants withdraw that concession.

The Applicants also stated:

> The present submission of additional detailed and particularized statements of this case, which are being made because of the Respondent's demands following its prior demands for a stay, should be considered as amendments of the Applications seeking to invoke the Tribunal's jurisdiction over the acts and omissions of the Ethics Office, the Alternative Investigating Panel, and/or the Secretary-General.

54. On 9 February 2015, the Respondent filed a response to the Applicants' detailed statement of particulars. The Respondent submitted, *inter alia*, that the Applicants' request to amend their applications should be denied. The Respondent reiterated submissions that all elements of the applications are not receivable. The Respondent requested a stay of proceedings, noting that the Secretary-General had appealed *Nguyen-Kropp* UNDT/2013/028, *Postica* UNDT/2013/029, and *Nguyen-Kropp and Postica* UNDT/2013/176.

Third stay of proceedings

55. By Order No. 41 (NY/2015), dated 11 March 2015, the Tribunal ordered a stay of proceedings pending publication of the Appeals Tribunal's judgment on the Secretary General's appeal against *Nguyen-Kropp* UNDT/2013/028, *Postica* UNDT/2013/029, and *Nguyen-Kropp and Postica* UNDT/2013/176.

56. On 17 April 2015, the Appeals Tribunal issued *Nguyen-Kropp and Postica* 2015-UNAT-509.

Final submissions in light of *Nguyen-Kropp and Postica* 2015-UNAT-509

57. By joint submission dated 7 May 2015, the parties requested leave to file additional submissions in light of the Appeals Tribunal's judgment in *Nguyen-Kropp and Postica* 2015-UNAT-509.

58. By Order No. 89 (NY/2015), dated 19 May 2015, the parties were granted leave to file additional submissions and responses to the opposing party.

59. The parties filed additional submissions on 29 June 2015 (the Respondent having filed an *ex parte* submission on 16 June 2015) and responses to the opposing party on 15 July 2015.

Consideration

Preliminary issue—request for a hearing

60. As noted above, the Applicants each considered that an oral hearing was necessary to determine the issue of receivability. The Respondent stated that he did not contest this position.

61. Article 16.1 of the Dispute Tribunal's Rules of Procedure states that the Judge hearing a case *may* hold oral hearings. Article 16.2 states that hearings

shall normally be held in cases involving an appeal against a disciplinary measure. Other than this guidance, the decision whether to hold oral hearings in a particular case is left to the Judge's discretion.

62. Having considered the voluminous submissions and documentation in these cases, as well as the legal authorities relied upon, the Tribunal does not consider that it is necessary to hold an oral hearing in these cases in order to determine the issue of receivability. The questions of receivability that arise in these cases are primarily of a legal nature. The limited factual issues that are relevant to the consideration of receivability are adequately covered by the documents on record.

Scope of the cases

63. A large number of submissions were filed in these cases due in part to the fact that other legal proceedings with a potential bearing on the outcome of these cases (including separate proceedings involving the Applicants) were progressing through the administration of justice system at the same time. The Tribunal granted requests for the proceedings to be stayed pending adjudication of these cases and allowed the parties to make additional submissions following key judgments from the Appeals Tribunal. Given the confused picture arising from the submissions, the Tribunal deems it necessary to set out with clarity what it considers are the claims arising in these cases.

64. As the Appeals Tribunal noted in *Massabni* 2012-UNAT-238:

> 25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

> 26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

65. The starting point for determining the decisions contested by the Applicants in these cases are the applications dated 29 June 2011. As noted at para. 2 of this judgment, the applications set out the contested decisions in almost identical terms. The Tribunal considers that the contested decisions can be broken down and summarized as follows:

a. The decision to appoint the AIP to investigate the Applicants' retaliation complaints, specifically the expertise, selection process and TOR of the panel;

b. The 2 May 2011 determination by Ms. Dubinsky, Director of the Ethics Office, that retaliation was not established;

c. Ms. Dubinsky's 23 May 2011 decision not to provide the Applicants 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".

66. In their submission dated 6 October 2014, the Applicants stated that they "further and independently contend that decisions taken by the [AIP] are receivable by the Tribunal". To the extent that the Applicants request, through this submission, to include new decisions within the scope of these cases, in addition to those identified above, that request is rejected as such decisions were not included in the applications.

67. In their submission dated 9 January 2015, the Applicants stated that their detailed statement of particulars "should be considered as amendments of the Applications". On 9 February 2015, the Respondent submitted that

the Applicants' request to amend their applications should be rejected. To the extent that the Applicants, through their submission of 9 January 2015, request the Tribunal to consider new administrative decisions not identified in their applications dated 29 June 2011, and summarized in para. 65 above, that request is rejected. The Tribunal has only considered the submission of 9 January 2015 insofar as it relates to the contested decisions identified in the applications.

68. In the Applicants' submissions dated 29 June 2015 and 15 July 2015, they stated that the AIP's "creation, process and findings can be challenged before this Tribunal as a failure to investigate allegations of harassment, retaliation, intimidation and abuse of authority with the meaning of the staff rights articulated in ST/SGB/2005/21 and ST/SGB/2008/5".

69. To the extent that the Applicants seek to expand the scope of their applications to include allegations of harassment and abuse of authority, and the failure to follow procedures under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) for the investigation of such complaints, that request is rejected. These issues were not raised in the applications dated 29 June 2011, nor were any submissions made to the Tribunal on these issues prior to 29 June 2015.

Receivability

Legal and policy framework

70. Articles 2.1(a) and 8.1(c) of the Dispute Tribunal's Statute provide:

> **Article 2**
>
> 1. 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 noncompliance;
>
> **Article 8**
>
> 1. An application shall be receivable if:
>
> …
>
> (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

71. Staff rule 11.2 provides:

> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment ... shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision …
>
> …
>
> (c) A request for management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

72. ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), issued on 19 December 2005, provides (emphasis added):

> The Secretary-General, for the purpose of ensuring that the Organization functions in an *open, transparent and fair manner*, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorized audits or investigations, and in accordance with paragraph 161 (d) of General Assembly resolution 60/1, promulgates the following:

Section 1

General

1.1 It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation.

…

2.2 … 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 referred to in section 2.1 above.

…

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. …

5.2 The functions of the Ethics Office with respect to protection against retaliation for reporting misconduct or cooperating with a duly authorized audit or investigation are as follows:

(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.

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

…

5.5 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.

…

5.7 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.

5.8 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.

…

5.10 Where, in the opinion of the Ethics Office, there may be a conflict of interest in OIOS conducting the investigation as referred to in section 5.5 above, the Ethics Office may recommend to the Secretary-General that the complaint be referred to an alternative investigating mechanism.

Section 6

Protection of the person who suffered retaliation

6.1 If retaliation against an individual is established, the Ethics Office may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the individual who has suffered retaliation, recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action. Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation.

6.2 Should the Ethics Office not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the Secretary-General. The Secretary-General will provide a written response on the recommendations of the Ethics

> Office to the Ethics Office and the department or office concerned within a reasonable period of time.
>
> 6.3 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.
>
> …

73. ST/SGB/2005/22 (Ethics Office—establishment and terms of reference), issued on 30 December 2005, provides (emphasis added):

> The Secretary-General, for the purpose of securing the highest standards of integrity of staff members in accordance with Article 101, paragraph 3, of the Charter of the United Nations, taking into consideration paragraph 161 of the 2005 World Summit Outcome and pursuant to General Assembly resolution 60/248, hereby promulgates the following:
>
> **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:
>
> …

> (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;

The issue of management evaluation

74. In their applications, the Applicants stated that they did not file requests for management evaluation because they relied upon the email of Ms. Singh, the Officer-in-Charge of the MEU, dated 2 June 2011, referred to at para. 29 above. The first question for the Tribunal is, therefore, to what extent this email can be considered a waiver of the statutory requirement that Applicants must request management evaluation of a contested decision in order for the Dispute Tribunal to have jurisdiction to review that decision.

75. The Tribunal recalls that the representative from GAP informed the MEU that "Mr. Postica is considering appealing an Ethics Office decision to the UN Dispute Tribunal and would like to know if he should proceed directly to a Tribunal application, or request an MEU first". The Respondent notes that Applicants' representative did not provide further particulars about the matters that the Applicants were considering contesting.

76. In response, the Officer-in-Charge confirmed that "the Secretary-General has determined that the decisions of the Ethics Office lie outside the scope of management evaluation. Accordingly, the MEU will not conduct management evaluations with regard to such requests. The staff member may submit his request for review directly to the UNDT".

77. The Tribunal considers that, in the circumstances of these cases, any element of the applications contesting "a decision of the Ethics Office" is therefore not subject to the requirements of art. 8.1(c) of the Dispute Tribunal's Statute or staff rule 11.2. The Tribunal must therefore determine which elements of the applications can be characterized as decisions of the Ethics Office. Ms. Dubinsky's decisions of

2 May 2011 and 23 May 2011—referred to as decisions (b) and (c) in para. 65—clearly fall within this definition. The only remaining question, therefore, is whether the elements of the application set out in para. 65(a) were decisions of the Ethics Office.

78. Comments from the Ethics Office dated 29 July 2011 ("the Ethics Office Note"), attached as Annex 1 to the replies to the applications, state that on 29 September 2010, the Ethics Office recommended that the AIP be established in accordance with sec. 5.10 of ST/SGB/2005/21.

79. According to the Ethics Office Note, the Executive Office of the Secretary-General approved this recommendation on 1 October 2010. The Ethics Office Note also includes the following statements:

> a. "The Panel members were selected by the UN Ethics Office with no influence from any other parties or entities relevant to the dispute";
>
> b. On 29 October 2010, the Director of the Ethics Office submitted a memo … [which] included … the initial draft of the Panel's ToRs";
>
> c. "[T]he Panel's ToRs were finalised exclusively pursuant to the 5 November 2010 discussions between the [AIP] and the Ethics Office".

80. In accordance with the Ethics Office Note, the Tribunal concludes that decisions relating to the "expertise, selection process and TOR" of the AIP, as contested in the applications, were indeed decisions of the Ethics Office, and therefore covered by the waiver contained in Ms. Singh's email dated 2 June 2011. Therefore, with the exception of the decision to establish the AIP, which was taken by the Executive Office of the Secretary-General based on the recommendation of the Ethics Office, all elements of the applications identified in para. 65 above are covered by the waiver dated 2 June 2011 from the Officer-in-Charge of the MEU.

81. This is not a case of the Dispute Tribunal waiving the requirement for management evaluation. Rather, the Officer-in-Charge of the MEU communicated to the legal representative of the Applicants a decision of the Secretary-General, i.e. the Respondent, that decisions of the Ethics Office lie outside the scope of management evaluation.

82. In his replies to the applications, the Secretary-General did not submit that the applications were not receivable, *ratione materiae*, because the Applicants had not requested management evaluation. Instead, he submitted that the matters contested in the applications were not administrative decisions subject to judicial review because of the independent status of the Ethics Office. The Tribunal considers that, in any event, he would have been estopped from arguing that the Applicants should have requested management evaluation of decisions of the Ethics Office given his previous decision, communicated to the Applicants by the MEU, that such decisions lie outside the scope of management evaluation.

83. For the avoidance of doubt, the Tribunal's conclusion is not based on any legal finding that decisions of the Ethics Office should not or cannot be reviewed by the MEU. Rather, its conclusion is based on a finding that, where 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.

Are acts or omissions of the Ethics Office subject to judicial review?

Contentions of the parties

84. The main submissions of the parties on this question can be summarised as follows. The Respondent 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 Respondent 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.

85. 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 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.

The nature of the Ethics Office and its place within the Organization

86. ST/SGB/2005/22 establishes the Ethics Office and its terms of reference. The preamble to the Bulletin states that the Ethics Office is established for the purpose of securing the highest standards of integrity of staff members. The Ethics Office is located *within the Secretariat* and *reports directly to the Secretary-General*. The head of the Ethics Office is appointed by the Secretary-General and *will be accountable to the Secretary-General in the performance of his or her functions*.

87. The Respondent refers to former United Nations Administrative Tribunal Judgment No. 1359, *Perez-Soto* (2007) in support of his position that the actions or omissions of the Ethics Office cannot be attributed to the Organization and therefore

do not constitute administrative decisions under art. 2.1(a) of the Statute. He argues that the Ethics Office is analogous to the Office of the Ombudsman.

88. In *Perez-Soto*, the former Administrative Tribunal found that the Ombudsman cannot be considered part of the hierarchical structure of the Administration, noting that sec. 3.2 of ST/SGB/2002/12 (Office of the Ombudsman—appointment and terms of reference of the Ombudsman) of 15 October 2002, states: "In the performance of his or her duties, the Ombudsman shall be independent of any United Nations organ or official". The former Administrative Tribunal found that the role of the Ombudsman is to act as an intermediary, not a decision-maker, noting sec. 3.8 of ST/SGB/2002/12, which states (emphasis added):

> *The Ombudsman shall not have decision-making powers*, but shall advise and make suggestions or recommendations, as appropriate, on actions needed to settle conflicts, taking into account the rights and obligations existing between the Organization and the staff member, and the equities of the situation.

89. The former Administrative Tribunal stated that the Ombudsman's lack of decision-making power is demonstrated through the inability to impose a binding solution upon a conflict between the Organization and a staff member. 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".

90. It is apparent that there are a number of key differences between ST/SGB/2002/12 and ST/SGB/2005/22. While the Office of the Ombudsman, like the Ethics Office, is located within the Secretariat and the Ombudsman is appointed by the Secretary-General, both sec. 1 and sec. 3.2 of ST/SGB/2002/12 explicitly state that the Ombudsman is independent. There is no corresponding provision in ST/SGB/2005/22 in relation to the Ethics Office (the Tribunal will consider

references to the independence of the Ethics Office by the Secretary-General and General Assembly at the end of this sub-section).

91. The Ombudsman has direct access to the Secretary-General but is independent of any United Nations organ or official. The Director of the Ethics Office, on the other hand, reports directly to and is *accountable* to the Secretary-General. ST/SGB/2002/12 explicitly states that the Ombudsman has no decision-making powers; there is no corresponding provision in ST/SGB/2005/22 and, indeed, ST/SGB/2005/21 states that one of the responsibilities of the Ethics Office is to make "determinations" as to whether or not there is a *prima facie* case of retaliation. Whether in law or practice (or both), it seems that the Ethics Office also has decision-making responsibilities following the receipt of an investigation report. This will be discussed further below.

92. The jurisprudence of the former Administrative Tribunal is not binding on the Dispute Tribunal; at most, it may be considered persuasive. In any event, the Tribunal does not consider that the Ethics Office is analogous to the Office of the Ombudsman or that the judgment in *Perez-Soto* has any relevance to these cases. This was also the conclusion reached by Judge Faherty in her dissenting opinion in *Wasserstrom* 2014-UNAT-457 (see para. 32 of the dissenting and separate opinion).

93. The Secretary-General also refers to the Appeals Tribunal's judgment in *Koda* 2011-UNAT-130. In that case, the Appeals Tribunal considered the role of OIOS, as set out in General Assembly resolution 48/218B (12 August 1994), which states:

> The Office of Internal Oversight Services shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties and, in accordance with Article 97 of the Charter, have the authority to initiate, carry out and report on any action which it considers necessary to fulfill its responsibilities with regard to monitoring, internal audit, inspection and evaluation and investigations.

Section 2 of ST/SGB/273 (Establishment of the Office of Internal Oversight Services) states the same.

94. The Appeals Tribunal then stated:

> 41. Thus OIOS operates under the "authority" of the Secretary-General, but has "operational independence" … 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.
>
> 42. To the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned. For example, an OIOS report might be found to be so flawed that the Administration's taking disciplinary action based thereon must be set aside.
>
> 43. Though the UNDT judge found flaws in the OIOS' report, no disciplinary action was based upon it—its recommendation for reassignment was disregarded by the administration, which renewed Koda's contract.

95. In the present cases, the Respondent submits that "like OIOS, the process undertaken and substantive determinations of the Ethics Office in performance of its mandate are not subject to the influence or interference of the Secretary-General and should, therefore, not be reviewable by the Tribunal".

96. The Dispute Tribunal does not consider that the Appeals Tribunal's reasoning in *Koda* is helpful to the Respondent in the present cases. The situations are not analogous. The Appeals Tribunal held that the Secretary-General had no power to influence or interfere with OIOS insofar as the contents and procedures of an individual report are concerned. The same would be true in respect of an investigation into retaliation conducted by OIOS or an alternative investigating

mechanism (the AIP in these cases) in accordance with sec. 5.5 or sec. 5.10 of ST/SGB/2005/21. The Secretary-General cannot influence or interfere in such an investigation. The role of the Ethics Office is significantly different to that of OIOS as evidenced by the fact that both have distinct roles to play in considering retaliation complaints.

97. In *Koda*, OIOS made a recommendation to a manager outside the independent framework of OIOS. That manager made an administrative decision. If that decision had resulted in adverse consequences for the staff member, and was based on a flawed OIOS report, according to the Appeals Tribunal, it could have been set aside. In the present cases, the AIP, acting in place of OIOS due to a conflict of interest, made a finding that there was no retaliation. This did not result in a recommendation to a manager outside of either OIOS or the Ethics Office, both of which, according to the Respondent, are independent offices. Instead, the Ethics Office conducted a second assessment, and reached its own conclusion that there was no retaliation (to be discussed further in the next sub-section). The finding of the Ethics Office was determinative.

98. Staff members requesting protection from retaliation under ST/SGB/2005/21 are seeking a positive finding of retaliation, and concrete actions in response. If either OIOS or the Ethics Office determines that no retaliation has occurred, and that finding is determinative—i.e. there is no recommendation to a manager outside of OIOS or the Ethics Office to reject the complaint of retaliation—the matter comes to an end. The staff member is denied the protection they have sought under ST/SGB/2005/21. This is different to the situation in *Koda*, which concerned the Secretary-General's ability to influence or interfere in the *procedures of an investigation and the contents of a report*. The Appeals Tribunal stated in *Koda* that the Dispute Tribunal *could* set aside adverse decisions resulting from such a report.

99. The Respondent also refers to a number of background documents to support his assertion that the Ethics Office is independent and therefore not subject to the Secretary-General's authority. In his replies to the applications, he states (emphasis in original):

> The Ethics Office has independent status. The Ethics Office was established by the Secretary-General pursuant to paragraph 161(d) of General Assembly resolution 60/1 on the "World Summit Outcome" which **"request[ed]** the Secretary-General to submit details on an ethics office **with an independent status"** (emphasis added). In his report in regard to the establishment of the Ethics Office (A/60/568), the Secretary-General explained that the Ethics Office would be "located outside the Executive Office of the Secretary-General in order to guarantee its independence".
>
> In its subsequent resolution 60/254, the General Assembly welcomed the establishment of the Ethics Office and "[e]ndors[d] the main responsibilities of the Ethics Office as outlined by the Secretary-General in his report [A/60/568] and as established by the Secretary-General's bulletin [ST/SGB/2005/22]". In the Secretary-General's reports to the General Assembly on the "Activities of the Ethics Office", the Secretary-General has consistently affirmed that "Independence and impartiality are of vital importance in the functioning of the Ethics Office, and must be actively preserved and strengthened as the final structure of the Office is put in place and its work evolves".

100. While taking note of these resolutions and report, the Tribunal does not consider these documents are determinative of the question whether any acts or omissions of the Ethics Office are administrative decisions capable of judicial review. The references appear to be more aspirational than authoritative, stating how the Ethics Office is intended to work. If independence and impartiality are of vital importance in the functioning of the Ethics Office, as stated in the Secretary-General's report, it is curious that neither word is used in ST/SGB/2005/22, which established the Ethics Office and its terms of reference. In any case, the Tribunal considers that it is more important to consider the nature of the work of the Ethics

Office, its relationship with the Administration, and its responsibilities under ST/SGB/2005/21.

The role and functions of the Ethics Office in relation to retaliation complaints

101. The role and functions of the Ethics Office in responding to complaints of retaliation are set out in secs. 5 and 6 of ST/SGB/2005/21, which are reproduced, insofar as they are relevant, at para. 72 above. In accordance with sec. 5.2, the Ethics Office is to receive complaints and conduct a preliminary review to determine whether the complainant engaged in any protected activities and, if so, whether there is a *prima facie* case of retaliation. If the Ethics Office finds a *prima facie* case of retaliation, it is to refer the complaint to OIOS for investigation or, if this would create a conflict of interest, as in the present cases, to an alternative investigating mechanism. Thus, the work of actually investigating the complaint, i.e. collecting evidence and interviewing witnesses, is to be conducted by another body. The investigating body is to submit a report to the Ethics Office.

102. The role of the Ethics Office after the investigation report has been completed is open to interpretation. ST/SGB/2005/21 is not drafted clearly, in that provisions relating to reporting retaliation, examining the initial complaint, referring the complaint for investigation, and taking certain actions after the investigation all fall under sec. 5, which is titled "Reporting retaliation to the Ethics Office".

103. Section 5.7 of ST/SGB/2005/21 states that once the Ethics Office has received an investigation report, it is to perform two actions:

a. inform the complainant of the outcome of the investigation; and

b. make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management.

104. Thus sec. 5.7 suggests that the Ethics Office has no independent role in determining whether or not retaliation actually occurred. This provision suggests that the Ethics Office role is limited to communicating the *outcome of the investigation* (not its own determination) and making recommendations, if any.

105. However, sec. 5.8 states that "[i]f *the Ethics Office finds* that there is no credible case of retaliation" it will advise the complainant and informal mechanisms of conflict resolution in the Organization. Section 5.8 therefore indicates that the Ethics Office has the power to make its own finding as to whether or not retaliation has been established.

106. This is reflected in a statement by the Organization on the website of the Ethics Office which, in a section titled "Protection Against Retaliation: Requesting Protection Against Retaliation", states (emphasis added):

> Upon completion of the investigation, the Ethics Office *conducts an independent assessment of the investigation report and supporting evidence, and makes a final determination* on whether retaliation has been established (accessed 5 November 2015).

107. In *Wasserstrom*, the former Director of the Ethics Office simply communicated the outcome of the OIOS investigation report, which found that there was no retaliation. This action seemed to accord with the first requirement of sec 5.7. However, no recommendation was made by the Ethics Office to the Administration. According to the Ethics Office Note, in relation to these cases, the Ethics Office conducted an independent analysis of the evidence obtained in the report and reached its own conclusion. The Ethics Office stated (emphasis added):

> Upon receipt of the Panel's investigation report, the Ethics Office conducted an *independent analysis* of the report and all investigation case materials, and concluded pursuant to Section 2.2 of ST/SGB/200S/21 that the Administration had proven by clear and convincing evidence that the actions in question were not taken in retaliation for Mr. Postica's and Ms. Nguyen-Kropp's protected

> activity. Specifically, the Ethics Office determined that retaliation had not been established …
>
> The Ethics Office performed an *independent analysis* of the evidence obtained by the Panel *in order to determine whether retaliation had occurred*. The Panel's report served as a primary piece of evidence but *was not the sole basis for the Ethics Office finding*. Other evidence involved the documents obtained by the Panel during its investigation, including statements by witnesses, email correspondence, the PPS reports, and Mr. Postica's Note to File. *That the Panel and subsequently the Ethics Office reach the same conclusion does not mean that the Ethics Office concurred with the phrasing or basis for each individual Panel finding*. The precise reasoning of the Ethics Office has been provided in this note. The Panel's report and supporting documentation is, therefore, not critical to Mr. Postica's and Ms. Nguyen-Kropp's challenge of the Ethics Office findings, yet would have significant adverse affects [sic] to the ability of the Ethics Office to conduct its work in future cases.

108. Though the conclusion of the Ethics Office was the same as that of the AIP —that retaliation had not been established—its reasoning for that conclusion was not entirely the same as that of the AIP, as noted in the final three sentences of the extract above. Without contorting the ordinary meaning of words, it is difficult to characterise the conclusion reached by the Ethics Office in these cases as anything other than a decision. The finding of the Ethics Office was also a final determination in that it brought the matter to an end without further review by any other entity or official.

109. In *Wasserstrom* 2014-UNAT-457, the Appeals Tribunal, by majority with Judge Faherty dissenting, upheld the Secretary-General's appeal on receivability. The Appeals Tribunal held (emphasis added):

> 39. … The Ethics Office accepted the OIOS report, and based upon it, *did not make a recommendation* to "the head of the department or office concerned and the Under-Secretary-General for Management" [sec. 5.7 of ST/SGB/2005/21].
>
> 40. Mr. Wasserstrom had legal remedies available to him regarding his claims of retaliation and wrongful termination. Under

> Section 6.3 of [ST/SGB/2005/21], Mr. Wasserstrom was not precluded from raising retaliatory motives in a challenge to the non-renewal of his appointment or to other actions taken by the Administration …
>
> 41. We agree with the Secretary-General that the Ethics Office is *limited to making recommendations to the Administration*. Thus, the Appeals Tribunal, with Judge Faherty dissenting, finds that *these recommendations are not administrative decisions* subject to judicial review and as such do not have any "direct legal consequences". Hence, the Secretary-General's appeal on receivability is upheld.

110. It is difficult to reconcile the finding of the Appeals Tribunal that the Ethics Office is limited to making recommendations to the Administration with the nature of the independent assessment and conclusion reached by the Ethics Office in these cases, the decision-making powers accorded under secs. 5.2(c) and 5.8 of ST/SGB/2005/21, and the Organization's own reference to the Ethics Office making "final determination[s]" on the website of the Ethics Office.

111. It is clear that under secs. 6.1 and 6.2 of ST/SGB/2005/21, the Ethics Office is limited to making recommendations *once retaliation had been established*. It cannot order or oblige the Administration to take any specific actions. However, it seems apparent that the Ethics Office also has a decision-making role in that it makes the determination as to whether retaliation has in fact been established. In the present cases, the "independent analysis" of the Ethics Office resulted in a final determination that retaliation had not been established. The Ethics Office determined that the Applicants did not have the right to be protected under sec. 1.2 of ST/SGB/2005/21 because no retaliation had occurred. In this sense, the Ethics Office was making a final administrative decision, which affected the rights of the Applicants under their terms of appointment and contract of employment, and which was binding on the Administration in that it was the Organization's final decision on the matter.

112. Judge Faherty in her dissenting and separate opinion in *Wasserstrom* stated (emphasis added):

> 27. … 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.

The Tribunal respectfully concurs with this opinion.

Summary and conclusion

113. Having considered the role and functions of the Ethics Office in relation to retaliation complaints, the Tribunal is not persuaded by the Respondent's submission that, because the Ethics Office is independent, the acts or omissions of the Ethics Office "cannot be attributed to the Organization", and therefore cannot be reviewed by the Dispute Tribunal. As noted in the previous sub-section, the Ethics Office was established within the Secretariat and reports directly to the Secretary-General. The Director of the Ethics Office is appointed by, and is accountable to, the Secretary-General and makes determinations on the rights of staff members under a bulletin—ST/SGB/2005/21—promulgated by the Secretary-General. Regardless of whether the Ethics Office has operational independence, the Tribunal cannot see how a final decision on the rights of staff members under a United Nations policy, taken by a staff member of the United Nations Secretariat, cannot be attributable to the Organization.

114. The Tribunal has considered the Respondent's submission that the ruling of the Appeals Tribunal majority in *Wasserstrom* does not preclude staff members from challenging administrative decisions that are improperly influenced by retaliatory intent.

115. Firstly, the Tribunal notes that the Applicants did exactly that in Cases No. UNDT/NY/2010/107 and UNDT/NY/2011/004, in which they contested, *inter alia*, the decision to conduct a secret and retaliatory investigation against them after they submitted a complaint of misconduct against the Officer-in-Charge of their department, OIOS. In *Nguyen-Kropp and Postica* UNDT/2013/176, the Dispute Tribunal found that the investigation was retaliatory, failed to follow due process, and paid scant regard to the risk of reputational damage to the Applicants. The Respondent was ordered to pay compensation to the Applicants. The Appeals Tribunal vacated the Dispute Tribunal's judgment in *Nguyen-Kropp and Postica* 2015-UNAT-509, finding that the appeals were not receivable because the decision to initiate an investigation was preliminary in nature. Thus, the Applicants were denied a remedy based on another technical finding of the Appeals Tribunal on receivability.

116. Secondly, the Tribunal considers that the Respondent is according little weight or value to the protections and procedure provided for under ST/SGB/2005/21. The fact that a staff member may contest an adverse administrative decision by alleging retaliatory intent (which may involve lengthy and costly litigation before the Dispute Tribunal) is likely to be of little consolation to staff members who have sought timely protection under ST/SGB/2005/21.

117. With respect, this Tribunal agrees with the conclusion of Judge Faherty, set out in her dissenting opinion in *Wasserstrom*, that:

> 41. 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.

118. Despite this view, as a first instance tribunal, the Dispute Tribunal is bound by the precedent of the Appeals Tribunal. The Tribunal has not been convinced by the submissions of the Applicants that their cases are distinguishable from *Wasserstrom*. In this respect, the Tribunal notes that the parties have been afforded the opportunity of making extensive submissions on the Appeals Tribunal jurisprudence.

119. The Tribunal has also considered *Nartey* 2015-UNAT-544, in which the Appeals Tribunal, citing its judgment in *Wasserstrom*, stated that a decision of the Ethics Office not to accept a report of retaliation (because giving testimony before the Dispute Tribunal is not "a protected activity" in accordance with the definition of that phrase in ST/SGB/2005/21) is also not an administrative decision subject to judicial review. Though the Tribunal does not necessarily agree with the statement in *Nartey*, it notes that this case does appear to extend the scope of *Wasserstrom*, or at least provide further guidance as to the thinking of the Appeals Tribunal in relation to the Ethics Office in *Wasserstrom*.

120. The Tribunal finds that, given the current state of the jurisprudence, it has no option but to accept that in accordance with the Appeals Tribunal judgments in *Wasserstrom* 2014-UNAT-457 and *Nartey* 2015-UNAT-544, the matters contested in these applications, as set out at para. 65 above, are not administrative decisions subject to judicial review.

121. Accordingly, after much hesitation, the Tribunal is obliged to dismiss these applications.

Observations

122. As stated above, as a first instance tribunal, the Dispute Tribunal is bound by the precedent of the Appeals Tribunal. However, ultimately, the questions raised in this judgment are ones of policy that should be decided by the Secretary-General, as

the chief administrative officer of the Organization (art. 97 of the United Nations Charter), in consultation with Member States. In the view of the Tribunal, the current provisions of the Dispute Tribunal's 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, under ST/SGB/2005/21, to be protected against acts of retaliation.

123. The current state of the jurisprudence establishes the total lack of accountability of the Ethics Office and this, in and of itself, seriously undermines the purpose underpinning ST/SGB/2005/21, which is to expose misconduct at all levels within the Organization and to protect those reporting misconduct in good faith.

124. The Appeals Tribunal majority did not discuss the detailed reasoning provided by the Dispute Tribunal in *Wasserstrom* Order No. 19 (NY/2010), in which the Dispute Tribunal found that the application in that case was receivable, or point out how the reasoning was flawed. In that Order, the Dispute Tribunal stated:

> [A]lthough the Ethics Office does have certain advisory functions, in relation to retaliation its functions cannot be accurately so described. It is the obligation of the Ethics Office not only to refer allegations of retaliation, where a credible case is demonstrated, to OIOS but also in due course to decide whether retaliation did or did not occur for the purposes of exercising the functions conferred on it by sec. 6 of ST/SGB/2005/21. The process by which the Ethics Office determines that retaliation occurred is not mentioned except for the requirement that it involve consideration of the OIOS report. Nevertheless, by whatever name, it is a decision. Furthermore, the decision as to whether retaliation occurred or not must be made by the Ethics Office (or the Director) and it cannot be delegated to OIOS. It follows from this that the investigation report must be carefully examined and an independent decision made as to the occurrence of retaliation or otherwise. Where the report contains inferences of fact, the Ethics Office must consider whether the primary material justifies the inferences. Where the report states conclusions of law, the basis for

> those conclusions must be examined to ensure that the investigator or the source of the conclusion is properly qualified to give it.
>
> 25. Retaliation against a staff member for the performance of his or her duty by another staff member is a violation of the retaliator's fundamental obligations towards the Organization and constitutes an abuse of power requiring a stern response if the integrity of the Organization is to be maintained. As is true of almost all wrongdoing, the most effective deterrent is the assurance or, at least, the fear that it will be found out and dealt with. Unless staff members subjected to retaliatory action or the threat of it can be confident that their reports will be adequately and competently investigated and considered, it is most unlikely that those reports will be made. This applies also to staff members who are aware, of other possible misconduct and fear the consequences of reporting it. Retaliation is difficult to prove, but this makes it all the more important that investigations are thorough and the Ethics Office, independent of all the protagonists, ensures that its decisions are properly based.

125. The Appeals Tribunal majority also did not discuss any of the Dispute Tribunal's findings on the merits in *Wasserstrom* UNDT/2012/092, contradicting a previous statement made by the Appeals Tribunal in *Wasserstrom* 2010-UNAT-060 (a judgment on the Secretary-General's appeal against *Wasserstrom* Order No. 19 (NY/2010)), that the question of whether a determination made by the Director of the Ethics Office constituted an administrative decision goes to the merits of the case and therefore required an adjudication on the merits.

126. The Appeals Tribunal was divided in *Wasserstrom*, with Judge Faherty providing a strong dissenting opinion supported by more detailed reasoning than that of the majority opinion. However, the law having been settled, it is now for the legislative bodies of the Organization to consider whether it is time to overhaul the policy that is intended to protect whistleblowers.

127. The Tribunal notes that the policy set out in ST/SGB/2005/21 is currently under review. The Report of the Secretary-General on the Activities of the Ethics Office (A/69/332), published on 20 August 2014, stated:

> [T]he Secretariat initiated an external expert review of its protection against retaliation policy in 2012-2013. Completed in the 2013–2014 reporting cycle, the expert review makes several recommendations, pursuant to emerging global best practices and considering the intent and purpose of the policy as originally formulated. Following receipt of the finalized review, the Ethics Office, in consultation with the Department of Management, the Office of Legal Affairs and OIOS, prepared a proposal on a revised protection against retaliation policy. The proposal is under review by the Executive Office of the Secretary-General. Thereafter, proposed amendments to the text of the Secretary-General's bulletin will be considered by the Office of Human Resources Management and submitted for consultations in accordance with the Organization's normal practice.

128. The Tribunal also notes that the decision of the Appeals Tribunal in *Wasserstrom* has attracted the attention of administration of justice oversight bodies and at least one Member State.

129. The Internal Justice Council was established by General Assembly resolution A/RES/62/228 (Administration of justice at the United Nations), adopted on 22 December 2007, to ensure independence, professionalism and accountability in the system of administration of justice and provide its views on the implementation of the system of administration of justice to the General Assembly (para. 37(d)). In its 2015 report on the administration of justice at the United Nations (A/70/188, dated 10 August 2015), the Internal Justice Council observed (emphasis added):

> 137. It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action (ST/SGB/2005/21, para. 1.1). In order to ensure that this system operates effectively, the Secretary-General has developed a scheme to protect those providing such information (whistle-blowers) from retaliation. Various stakeholders stated that this system was under review.
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> 138. The Internal Justice Council notes that under the present system the Director of the Ethics Office *makes the final decision as to whether retaliation has taken place*. However, because of the structure of the Ethics Office, the Appeals Tribunal has decided that the decision of that official, a staff member, is not subject to judicial review. *The Council considers that the panel of experts should*

> *examine this issue with a view to ensuring that the decisions of the Director of the Ethics Office, like other administrative decisions taken on behalf of the Secretary-General, are subject to judicial review. Unless this is done, the Council considers that the effective protection of whistle-blowers will remain seriously compromised.*

130. The Internal Justice Council's reference to the "panel of experts" refers to an interim independent assessment panel established by the General Assembly to carry out an independent assessment of the system of administration of justice (see paras. 10–13 of A/RES/69/203 (Administration of justice at the United Nations), adopted on 18 December 2014). The report of the interim independent assessment panel, which carried out its assessment in 2015, is forthcoming.

131. At least one Member State has also called for a review of this issue. In a statement to the Sixth Committee of the General Assembly on 26 October 2015, the Permanent Mission of Switzerland to the United Nations stated:

> Switzerland has taken note of the UN Appeals Tribunal's decision in Wasserstrom v Secretary-General of the United Nations, according to which recommendations of the Director of the Ethics Office on whether retaliation against a whistle-blower has taken place are not subject to judicial review. Following the recommendation of the Internal Justice Council, we would welcome a discussion on whether some form of judicial review against the conclusions of the Ethics Office is necessary to make the protection of whistle-blowers effective. Recommendations of the expert panel regarding this issue would be appreciated. [English text is an unofficial translation accessed by the Tribunal on the website of the Swiss Federal Department of Foreign Affairs on 3 November 2015]

132. The Tribunal notes that the Secretary-General has previously recommended that the General Assembly clarify the jurisdiction of the Dispute Tribunal in relation to independent entities, including the Ethics Office. The 2011 Report of the Secretary-General on Administration of justice at the United Nations (A/66/275, 8 August 2011) stated:

> 275. … the Secretary-General considers that it may be helpful for the General Assembly to clarify its intent regarding the scope of the jurisdiction of the Dispute Tribunal. In that connection, the Secretary-General emphasizes that excluding the acts and omissions of independent entities from the jurisdiction of the Dispute Tribunal would not mean that staff members would be deprived of recourse where they believed that their rights had been violated by such entities.
>
> 276. First, in a situation in which the Secretary-General takes an administrative decision based on an impugned act or omission by an independent entity, the decision itself can be challenged before the Dispute Tribunal. For example, if the Ethics Office determines that a staff member engaged in retaliation and the Secretary-General decides to impose a disciplinary measure against the staff member on the basis of the determination made by the Ethics Office, the staff member could then file an application with the Dispute Tribunal challenging the Secretary-General's imposition of the disciplinary measure and his reliance on an allegedly faulty determination by the Ethics Office. However, a determination by the Ethics Office regarding retaliation should not be subject to challenge before the Dispute Tribunal. As the independent status of the Ethics Office prevents the Secretary-General from instructing the Office how to make its determination of retaliation, the Secretary-General cannot be held liable for determinations made by the Office, even if they subsequently prove to be flawed.

133. The suggestion that restricting the Dispute Tribunal's jurisdiction would not deprive staff members of recourse where they believe their rights have been violated is, to say the least, grossly misleading. The example provided in the Secretary-General's report concerns a staff member who is disciplined as a result of a finding of retaliation. That staff member, who has been found by the Ethics Office to have engaged in retaliation, should be able to challenge administrative decisions by managers taken as a result of that finding. Could it legitimately be argued by the Organization that staff members who have been found to have engaged in retaliation should have the right to challenge adverse decisions against them but those who have reported misconduct should have no right to challenge a finding of no retaliation?

134. The purpose of ST/SGB/2005/21, and the concern of this judgment, is to ensure adequate protection is provided to those who have reported misconduct—"whistleblowers"—*from* retaliation. As noted in the considerations section of this judgment, the most damaging decision for those seeking protection under ST/SGB/2005/21 is a determination that retaliation did not occur and that they are not entitled to protection. According to the Respondent and the Appeals Tribunal, no reviewable administrative decision results as a consequence of that determination.

135. The stated purpose of the Organization's policy on retaliation is to ensure that the Organization functions in an open, transparent and fair manner, and to protect individuals who report misconduct. The Tribunal considers that this policy is too important to the integrity of the Organization to have the important issues raised in this judgment remain unclear. As stated by the Dispute Tribunal in *Wasserstrom* Order No. 19 (NY/2010), "[u]nless staff members subjected to retaliatory action or the threat of it can be confident that their reports will be adequately and competently investigated and considered, it is most unlikely that those reports will be made". If staff members do not feel comfortable submitting reports of misconduct, the integrity of the Organization will inevitably suffer.

136. If final decisions by the Ethics Office determining that retaliation has not occurred in a particular case are to remain immune from judicial review and scrutiny, the United Nations' policy on retaliation should clearly state this. The Tribunal invites Member States and the Secretary-General to make their intentions clear in this regard in any amendments to ST/SGB/2005/21.

Judgment

137. The applications are rejected.

138. The issues raised in this judgment are referred to the Secretary-General for further consideration.

(Signed)

Judge Goolam Meeran

Dated this 11th day of November 2015

Entered in the Register on this 11th day of November 2015

(Signed)

Hafida Lahiouel, Registrar, New York