



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
James Provenzano, UNOPS
Kong Leong Toh, UNOPS

Introduction

1. On 10 September 2015, the Applicant, a staff member at the P-5 level, acting as Officer-in-Charge at the D-1 level, New York Operations, Investigations Division, Office of Internal Oversight Services (“OIOS”) in New York, filed an application contesting the 7 August 2015 decision of the Ethics Office to deny him protection from alleged retaliation. The Applicant requested, as relief, that “the decision of the Ethics Office to deny [his] request for protection from retaliation be deemed as *ultra vires*” and that the Dispute Tribunal “decide upon [his] application for protection from retaliation”.

2. The Respondent submits that the Application is not receivable because the United Nations Appeals Tribunal has made it clear that determinations of the Ethics Office are not administrative decisions.

Procedural history

3. On 11 September 2015, the Dispute Tribunal transmitted the application to the Respondent and provided notification that, in accordance with art. 10 of the Dispute Tribunal’s Rules of Procedure, the reply to the application was due on 12 October 2015.

4. On 28 September 2015, the Respondent filed a motion for leave to address issues of receivability as a preliminary matter.

5. On 29 September 2015, the Tribunal (Duty Judge) instructed the Applicant, via email notification, to provide his observations and comments on the Respondent’s motion, if any, by 6 October 2015.

6. On 5 October 2015, the Applicant filed his submission, objecting to the Respondent’s motion of 28 September 2015.

7. By Order No. 261 (NY/2015), dated 6 October 2015, the Tribunal (Duty Judge) rejected the Respondent's motion to consider issues of receivability as a preliminary matter. The Tribunal directed the Respondent to file a full reply addressing issues of receivability and merits.

8. On 12 October 2015, the Respondent filed his reply to the application, addressing issues of receivability and merits.

9. On 13 October 2015, the Tribunal (Duty Judge) issued Order No. 268 (NY/2015), directing the Applicant to file, by 30 October 2015, a response to the issues of receivability raised in the Respondent's reply. The Tribunal further ordered that this case would join the queue of cases pending assignment to a Judge in due course, and that no further submissions were to be filed without leave of the Tribunal.

10. On 13 October 2015, the same day on which Order No. 268 (NY/2015) was issued, the Applicant filed his response to the issues of receivability raised by the Respondent.

11. On 2 April 2016, the Applicant filed a motion for leave to submit a document entitled "Taking Action on Sexual Exploitation and Abuse by Peacekeepers—Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic" ("the CAR Report"). The Applicant submitted that the CAR Report is dated 17 December 2015 and was therefore unknown to the Applicant or the Respondent at the time of his application. The Applicant stated that the CAR Report "issued a determination of Abuse of Authority against a senior UN Official" and that the Report relates to the "central issues under consideration" in the present case. According to the Applicant, the Report is relevant to his case as it discusses (in the Applicant's words) "the inter-relationship (in regards to the issues at hand) between the Chef de Cabinet for the Secretary-General, the

Director of the Ethics Office and the Under-Secretary-General for the Office of Internal Oversight Services”.

12. By Order No. 84 (NY/2016), dated 7 April 2016, the Tribunal (Duty Judge) directed that the Applicant’s motion of 2 April 2016 would be considered in due course once the matter is assigned to a Judge.

13. On 9 May 2016, the case was assigned to the undersigned Judge. The New York Registry notified the parties of the case assignment on 10 May 2016.

14. By Order No. 128 (NY/2016) dated 3 June 2016, the Tribunal instructed the Respondent to file a response to the Applicant’s motion dated 2 April 2016.

15. The Respondent filed his response on 9 June 2016 submitting that the motion should be dismissed because the contents of the CAR Report are not relevant to the application. The Respondent submitted that the central issue under consideration, besides the issue of receivability, was whether the Ethics Office was correct in concluding that ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) did not apply to the Applicant’s case.

16. By Order No. 141 (NY/2016) dated 15 June 2016, the Tribunal granted the Applicant’s motion for leave to submit the CAR Report by 20 June 2016, and directed that parties file their closing submissions on the issue of receivability by 1 July 2016, following which the Tribunal would consider the issue of receivability on the papers before it.

17. On 15 June 2016, the Applicant filed a copy of the CAR Report as well as his closing submission on the issue of receivability.

18. On 27 June 2016, the Respondent filed his closing submission on the issue of receivability.

Relevant background

19. On 20 July 2015, the Applicant submitted to the Ethics Office a “Protection Against Retaliation Form”, seeking protection from retaliation under ST/SGB/2005/21. The request stated *inter alia*:

I. Background

Please provide the name, position, and agency of person(s) who has committed the alleged act(s) of retaliation:

Ms. [CL]; USG/OIOS

II. Protected Activity (Section 2.1 of the SGB refers):

Did you report misconduct?

Yes

What misconduct did you report? Please describe in the context of Section 2.1(a) of the Bulletin. If known, please stipulate the specific UN rule or regulation that was violated.

On 10 July 2015 I reported the USG/OIOS for abuse of authority; a violation under ST/SGB/2008/5.

To whom and when (date) did you make your report of misconduct?

The Secretary-General of the UN; 10 July 2015.

Did you cooperate with a duly authorized investigation or audit? Who was, or, has been made aware of your cooperation?

I would assert that yes I was cooperating with an investigation/audit as directed by the [Secretary-General]. On 22 June the Secretary-General issued a statement pertaining to the appointment of a panel to conduct an assessment associated to allegations of sexual exploitation and abuse in the Central African Republic. ... As outlined by my complaint after having been informed by a subordinate staff member that a member of the panel had been investigated by OIOS I felt it prudent to review the applicable case files. After having reviewed same I felt the information contained therein was important for the [Secretary-

General] to be apprised of and recommended to my Director that he forwarded the summaries to the USG OIOS “as someone should advise the [Secretary-General]”. I did the review and submitted my Observations/Recommendations as a component of my assigned duties. The USG/OIOS, however, took exception with my efforts and undermined my professionalism and integrity—probably to defend her one failure to properly apprise the [Secretary-General].

Notwithstanding the above the USG OIOS was informed of my complaint to the [Secretary-General] on 9 July 2015.

...

III. Allegation of Retaliation:

Describe, in as much detail as possible, the detrimental action(s) (i.e. alleged retaliation) that you suffered as a result of your protected activity, described in Section II (i.e. reporting the misconduct, or, cooperating with a duly authorized audit or investigation). Please attach additional pages, if necessary.

On 10 July 2015 and 14/15 July 2015 the USG OIOS continued to attack my professionalism and integrity. Her attacks were in fact more extreme referencing a “pathetic attempt to undermine the panel” or my integrity for attacking a staff member’s reputation.

...

IV. Purpose of complaint:

Please state your goal in lodging this complaint. What would you like to happen?

As previously outlined I cannot afford to have unfounded and unwarranted accusations or insertions, direct or indirect, that I have undermined someone’s career, or that I have leaked information to a journalist being distributed amongst senior officials within the UN.

In light of how this has already happened I am asking 1) that it cease forthwith; 2) that I be provided a written apology; 3) that this apology be distributed to any party that has received the USG OIOS emails questioning my professionalism or integrity and 4) that I be provided an appropriate level of financial compensation for the damage already caused to my reputation.

V. History

Who else besides the Ethics Office have you contacted for assistance?

No one.

Do you have a case pending in any other forum? (e.g. OHRM, DPKO Conduct and Discipline Unit, OIOS, MEU, UNDT)

Nothing pending. I have, however, been in contact with OSLA.

Note: In accordance with Section 3.3 of the ST/SGB/2005/22 (Ethics Office – establishment and terms of reference), “[T]he Ethics Office will not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances, with the exception of certain functions assigned to the Ethics Office”.

20. On 7 August 2015, the Ethics Office sent an email to the Applicant informing him of its determination that ST/SGB/2005/21 did not apply to his complaint. The Ethics Office informed the Applicant as follows (emphasis in original):

The UN Ethics Office has completed its assessment of your submitted 20 July 2015 protection against retaliation request.

As per your provided documentation, on 24 June 2015 you conducted a review of ID/OIOS investigations pertaining to a member of the recently convened Independent Review Panel. You forwarded a summary of this review to Mr. [MS], Director, ID/OIOS, on the same date, with the recommendation that Ms. [CL], USG/OIOS, be apprised.

On 9 July 2015, Ms. [CL] sent an email to Mr. [MS], stating that an article had been published concerning the said panel member. Ms. [CL] wrote that “the article contained details that can only have been available to OIOS/ID staff members”, and that she was “ashamed and embarrassed by this blatant disclosure of the file details by our own staff members, which constitutes misconduct”. Ms. [CL] further stated, “[f]rom [the Applicant’s] summary of the case files, it is not at all apparent that the panel member was ever aware of OIOS’ involvement ...”. Ms. [CL] concluded her correspondence by writing, “... please draft a very strongly worded note to your staff reminding them of their obligations with

regard to confidentiality of matters, past or present, that concern matters under review”.

Mr. [MS] responded to Ms. [CL] on the same date, copying [the Applicant] on the exchange: “To assist me to understand what this is about please forward the article you are referring to, along with why you believe that it was only OIOS/ID staff that could done [sic] this “leak”? Please also advise who you may have copied (bcc or fwd) this message to as it reads more as a statement to a third party than as a specific instruction to me. I would also like to address them on the issues you raise. I cannot comment on the accuracy of your summary of [the Applicant’s] note so have copied [the Applicant] for him to provide his direct response to you”.

On 10 July 2015, you submitted a “Complaint of Prohibited Conduct – Abuse of Authority, Ms. [CL] – USG OIOS” to the Secretary-General. In your complaint, you allege that Ms. [CL’s] 9 July 2015 email to Mr. [MS] unjustly criticised your integrity and professionalism, thereby constituting an abuse of authority. You further state that you “will not tolerate any inference that [your 24 June 2015 information] is not accurate or that [you were] involved in the leak of this information as the USG OIOS has clearly alluded”. You also take issue with Ms. [CL] referring to you in her 9 July 2015 email as “Mr. [W]” rather than “[Applicant’s first name]”.

On 14 July 2015, you further submitted a “Complaint of Retaliation in the Work Place” to the Secretary-General. In this submission you allege additional, unspecified attacks by Ms. [CL] on your professionalism and integrity. Concerning a specific allegation of retaliation, you write, “Other retaliatory acts can be assessed on how the USG OIOS continues to refer to me as “*Mr. [W]*’ ... I find her reference to me as ‘Mr. [W]’ as being demeaning and belittling in that she has never referred to me in this manner in the past 4.5 years that I have known her”.

On 16 July 2015, you submitted an addendum to your 10 July 2015 complaint against Ms. [CL] to the Secretary-General. In this addendum you again take issue with Ms. [CL] referring to you as “Mr. [W]”, and allege *inter alia* that Ms. [CL] has accused you of being involved in a leak of information, thereby trashing your professionalism and integrity.

On 20 July 2015, you forwarded to the UN Ethics Office your 14 July 2015 retaliation complaint to the Secretary-General. In

supplemental information provided to the Ethics Office, you further allege that Ms. [CL] referred to your case review work as a “pathetic attempt to undermine the panel”, and that her attacks on your professionalism and integrity intensified following the submission of your 10 July 2015 complaint to the Secretary-General.

The Ethics Office’s review of your retaliation complaint

As you are aware, the UN Secretariat’s protection against retaliation policy, as contained in ST/SGB/2005/21, applies to staff members who allege they have been subjected to detrimental, retaliatory action as a result of (i) a prior report of misconduct, or (ii) for having cooperated with a duly authorised audit or investigation. Pursuant to Section 2.1 (a) of ST/SGB/2005/21, reports of misconduct must contain information or evidence to support a reasonable belief that misconduct occurred.

Having reviewed your 10 July 2015, “Complaint of Prohibited Conduct - Abuse of Authority, Ms. [CL] – USG OIOS”, the Ethics Office does not consider that this complaint contains information or evidence supporting a reasonable belief that misconduct was committed by Ms. [CL]. While your 10 July 2015 complaint specifically pertains to Ms. [CL’s] noted 9 July 2015 e-mail to Mr. [MS], the Ethics Office notes that this email only references you as follows: “From Mr. [W’s] summary of the case files, it is not at all apparent that the panel member was ever aware of OIOS’ involvement”. The Ethics Office does not consider this comment to be abusive, or impugn your professionalism, integrity, or character.

The Ethics Office further notes that Ms. [CL] does not accuse you of leaking information in her 9 July 2015 e-mail to Mr. [MS]. She instead states that the details in the published article could only have been available to OIOS/ID staff members. The email does not suggest impropriety on your part. Despite your taking offense, her reference to you as “Mr. [W]” does not constitute an act of misconduct. As your 10 July 2015 complaint to the [Secretary-General] does not contain information supporting a reasonable belief that misconduct has been committed by Ms. [CL], it does not constitute a protected activity pursuant to the requirements of ST/SGB/2005/21. The protection against retaliation policy therefore does not apply to your raised matter.

While taking issue with Ms. [CL’s] email correspondence, your provided documentation furthermore does not demonstrate that

you have suffered any resulting professional or reputational damage.

The Ethics Office lastly notes that Ms. [CL's] alleged, though unsubstantiated, trashing of your professionalism and integrity, as allegedly expressed in her 9 July 2015 and subsequent emails pertains not to your 10 July 2015 complaint to the Secretary-General, but is rather attributed by yourself to the matter of your noted 24 June 2015 case review.

While it is the understanding of the Ethics Office that Ms. [CL] is scheduled to retire in September 2015, you may nonetheless wish to consider approaching the Office of the Ombudsman and Mediation Services for guidance regarding possible informal resolution of your concern with Ms. [CL].

21. On 3 September 2015, the Applicant filed a management evaluation request identifying the contested decision as follows:

Specify the decision you are requesting [the MEU] to evaluate (please attach a copy of the decision, if any):

A determination by the Ethics Office that I 1) did not participate in a protected activity and 2) that I am not entitled to protection from retaliation.

22. By letter dated 10 September 2015, the MEU replied to the Applicant's request for management evaluation, stating that his submission was not receivable as he did not contest an administrative decision that could be subject to an appeal.

Parties' submissions on receivability

23. The Respondent's submissions on receivability may be summarized as follows:

a. This application is not receivable. The United Nations Appeals Tribunal has ruled that determinations of the Ethics Office are not administrative decisions within the meaning of the Dispute Tribunal's Statute, but only recommendations (*Wasserstrom* 2014-UNAT-457; *Gehr*

2014-UNAT-475; *Nartey* 2015-UNAT-544). Hence, applications regarding such Ethics Office determinations are not receivable and must be dismissed;

b. The case of *Nartey* is especially relevant, because it shows that a determination by the Ethics Office that a complaint does not constitute a protected activity under ST/SGB/2005/21 is not an administrative decision. Since the Applicant is seeking to challenge the Ethics Office's determination pursuant to sec. 5.2(c) of ST/SGB/2005/21 that his complaint was not a protected activity, the application is not receivable;

c. Whether or not one considers the abovementioned Appeals Tribunal's cases to be correct, it is for the legislative bodies to decide whether to change the law (*Nguyen Kropp & Postica* UNDT/2015/110);

d. Even though Ethics Office determinations are not administrative decisions, staff members who claim retaliation are not without legal remedies (see *Wasserstrom*, para. 40). Instead of complaining to the Administration about the Ethics Office, the Applicant should have complained to the Administration about the USG/OIOS's alleged retaliatory "attacks on the Applicant's professionalism and integrity" (*Nwuke* 2010-UNAT-099).

24. The Applicant's submissions on receivability, related to the above-mentioned aspects invoked by the Respondent, may be summarized as follows:

a. The Ethics Office failed to properly perform its functions in relation to the Applicant's complaint. For instance, although the Applicant provided the Ethics Office with relevant evidence and information, the Ethics Office "specifically chose not to review this material in contravention of their very [own] policies";

b. The Applicant submits that “[i]n conducting their review the Ethics Office has provided absolutely no consideration of the information or evidence [the Applicant had] provided” and that

In their submission the Respondent again quotes *Wasserstrom, Gehr, Nortley*—none of which are relevant to my application. More specifically the lacunae recognized by the [former United Nations Administrative Tribunal] by paragraph IV Andronov AT/Dec.1157. Paragraph 8 of my Application again specifically refers. How can an arbitrary decision of the Ethics Office provide a staff member absolutely no recourse for judicial review when there is evidence of bias and the Ethics Office both exceeding and failing to exercise the due diligence of its very own mandate?

a. The Applicant further submits that he has a contractual right to be protected from retaliation. There must be judicial review available when there is evidence that the Ethics Office exceeded or failed to exercise its mandate because of a conflict of interest or bias. The Tribunal should have jurisdiction over this matter, despite *Wasserstrom, Gehr, and Nartey*.

Consideration

Relevant legislative issuances

25. Article 2 of the Statute of the Dispute Tribunal states (emphasis added):

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;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

26. ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) states:

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.

...

Section 3

Reporting misconduct through established internal mechanisms

Except as provided in section 4 below, reports of misconduct should be made through the established internal mechanisms: to the Office of Internal Oversight Services (OIOS),

the Assistant Secretary-General for Human Resources Management, the head of department or office concerned or the focal point appointed to receive reports of sexual exploitation and abuse. It is the duty of the Administration to protect the confidentiality of the individual's identity and all communications through those channels to the maximum extent possible.

Section 4

Reporting misconduct through external mechanisms

Notwithstanding Staff Rule 101.2 (q), protection against retaliation will be extended to an individual who reports misconduct to an entity or individual outside of the established internal mechanisms, where the criteria set out in subparagraphs (a), (b) and (c) below are satisfied:

- (a) Such reporting is necessary to avoid:
 - (i) A significant threat to public health and safety; or
 - (ii) Substantive damage to the Organization's operations; or
 - (iii) Violations of national or international law; and
- (b) The use of internal mechanisms is not possible because:
 - (i) At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or
 - (ii) It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanisms; or
 - (iii) The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such a report; and
- (c) The individual does not accept payment or any other benefit from any party for such report.

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.

5.2 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.

5.4 All offices and staff members shall cooperate with the Ethics Office and provide access to all records and documents requested by the Ethics Office, except for medical records that are not available without the express consent of the staff member concerned and OIOS records that are subject to confidentiality requirements. Reports of the Joint Appeals Boards shall be routinely sent to the Ethics Office unless the appellant objects.

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.

5.6 Pending the completion of the investigation, the Ethics Office may recommend that the Secretary-General take

appropriate measures to safeguard the interests of the complainant, including but not limited to temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant within or outside the complainant's office or placement of the complainant on special leave with full pay.

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.

5.9 If the Ethics Office finds that there is a managerial problem based on the preliminary review of the complaint or the record of complaints relating to a particular department or office, it will advise the head of department or office concerned and, if it considers it necessary, the Management Performance Board.

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.

27. ST/SGB/2005/22 (Ethics Office—establishment and terms of reference) states:

Section 1

Establishment of the Ethics Office

1.1 The Ethics Office is established as a new office within the United Nations Secretariat reporting directly to the Secretary-General.

1.2 The objective of the Ethics Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.

Section 2

Appointment of the head of the Ethics Office

The head of the Ethics Office shall be appointed by the Secretary-General and will be accountable to the Secretary-General in the performance of his or her functions.

Section 3

Terms of reference of the Ethics Office

3.1 The main responsibilities of the Ethics Office are as follows:

(a) Administering the Organization's financial disclosure programme;

(b) Undertaking the responsibilities assigned to it under the Organization's policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations;

(c) Providing confidential advice and guidance to staff on ethical issues (e.g., conflict of interest), including administering an ethics helpline;

(d) Developing standards, training and education on ethics issues, in coordination with the Office of Human Resources Management and other offices as appropriate, including ensuring annual ethics training for all staff;

(e) Such other functions as the Secretary-General considers appropriate for the Office.

3.2 The Ethics Office will not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances, with the exception of certain functions assigned to the Ethics Office under section 3.1(b) above.

3.3 The Ethics Office shall maintain confidential records of advice given by and reports made to it.

3.4 In respect of its advisory functions as set out in section 3.1(c) above, the Ethics Office shall not be compelled by any United Nations official or body to testify about concerns brought to its attention.

Section 4

Access to the Ethics Office

4.1 All staff shall be informed of the manner in which they can bring matters of concern to the attention of the Ethics Office.

4.2 No person who brings a matter to the attention of the Ethics Office or provides information to it shall be subjected to reprisals because of such action.

...

Section 7

Access to internal recourse mechanisms

Nothing in the present bulletin shall limit the ability of staff members to seek redress through the internal recourse mechanisms.

28. ST/SGB/2005/22 (Ethics Office—establishment and terms of reference) states:

Section 1

Definitions

...

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

...

Section 3

Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission

3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the

obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin

Section 4

Preventive measures

...

4.6 In order to resolve problems which could potentially give rise to instances of prohibited conduct, managers and supervisors shall maintain open channels of communication and ensure that staff members who wish to raise their concerns in good faith can do so freely and without fear of adverse consequences.

...

Section 5

Corrective measures

5.1 Individuals who believe they are victims of prohibited conduct are encouraged to deal with the problem as early as possible after it has occurred. The aggrieved individual may opt for an informal or a formal process, as explained below. Regardless of the choice made, the aggrieved individual is encouraged to keep a written record of events, noting dates, places, a description of what happened and the names of any witnesses and of anyone who may have information concerning the incident or situation at issue.

...

5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

...

Formal procedures

5.11 In circumstances where informal resolution is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the head of department, office or mission concerned, except in those cases where the official who would normally receive the complaint is the alleged offender, in which case the complaint should be submitted to the Assistant Secretary-General for Human Resources Management or, for mission staff, to the Under-Secretary-General for Field Support. Formal resolution may also be initiated by the submission of report of prohibited conduct from a third party who has direct knowledge of the situation to one of the officials listed above (the “responsible official”). The aggrieved individual or third party shall copy the written complaint or report to the Office of Human Resources Management for monitoring purposes.

...

5.20 Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

Receivability framework

29. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073; *O’Neill* 2011-UNAT-182; *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.

30. The Dispute Tribunal’s Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

31. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

32. The Applicant is a current staff member of the United Nations and he filed an application in accordance with art. 3.1 of the Dispute Tribunal’s Statute and art. 2.1 of ST/SGB/2005/21. The present application is therefore receivable *ratione personae*.

Receivability *ratione temporis*

33. The Tribunal notes that the Applicant filed the present application on 10 September 2015, within 90 days from the date of 14 July 2014, when he received the response from the MEU. The application is therefore receivable *ratione temporis*.

Receivability *ratione materiae*

34. The Tribunal will further consider whether this application is receivable *ratione materiae*, namely, whether the Applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute).

35. Having reviewed the legal provisions together with the consistent and binding jurisprudence of the Appeals Tribunal applicable in the present case the Tribunal considers that:

a. Sections 5.2(a)–(c) of ST/SGB/2005/21 expressly mention that the functions of the Ethics Office *with respect to protection against retaliation* are: (i) to receive complaints of retaliation or threats of retaliation; (ii) to keep a confidential record of all complaints received; and (iii) to conduct a *preliminary review* of the complaint to determine whether the complainant engaged in a protected activity and if there is a *prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation within 45 days of receiving the complaint.

b. Pursuant to secs. 5.5, 5.8 and 5.9 of ST/SGB/2005/21, the Ethics Office can make the following findings:

- i. That there is a credible case of retaliation or threat of retaliation. In this case the Ethics Office has (“will”) to:
 1. Immediately refer the matter in writing to OIOS for an investigation. In cases where in the opinion of the Ethics Office, there may be a conflict of interest in OIOS conducting the investigation, the Ethics Office may recommend to the Secretary-General that the complaint be referred to an alternative investigating mechanism (secs. 5.5 and 5.10);
 2. Immediately notify in writing the complainant that the matter has been so referred for investigation to OIOS or to an alternative investigating mechanism. The investigation report is to be submitted to the Ethics Office within 120 days after being referred (sec. 5.5);
 3. After receiving the investigation report inform in writing the complainant of the outcome of the investigation and make recommendations on the case to the head of the department or office concerned and the USG for Management aimed at correcting negative consequences suffered as a result of the retaliatory action (secs. 5.7–6.1);
 4. In case the Ethics Office is not satisfied with the response from the head of department or office concerned, it can make recommendations to the Secretary-General, who will provide a written response on the recommendations of the Ethics

Office to the Ethics Office and the Department or office concerned (sec. 6.2). The Tribunal considers that it is clear that in case the Ethics Office finds that there is a credible case of retaliation, its activity consists only in recommendations and that the decision based on these recommendations is made by the head of the department /office or ultimately by the Secretary-General;

- ii. That there is no credible case of retaliation or threat of retaliation, but that there is an interpersonal problem within a particular office. In this case the Ethics Office has to (“will”) advise the complainant of the existence of the Ombudsman and the other informal mechanisms of conflict resolution in the Organization (sec. 5.8);
- iii. That there is a managerial problem based on the preliminary review of the complaint or the record of complaints relating to a particular office. In this case the Ethics Office has to (“will”) advise the head of the department or office and if considers it necessary, the Management Performance Board (sec. 5.9).

36. The Tribunal concludes that in the last two situations ((ii) and (iii)), the Ethics Office’s findings are not followed by recommendations, like in the first case (i) and the only obligation that the Ethics Office has is to advise either the complainant or the head of the department.

37. The Ethics Office’s findings which are assessing the credibility of the case/complaint of retaliation or threat of retaliation are followed only by recommendations or advice which do not constitute an administrative decision

and do not have a direct impact on a staff member's contractual rights and obligations.

38. In *Wasserstrom* 2014-UNAT-457, the Appeals Tribunal, in a majority decision, held that the Dispute Tribunal erred in finding receivable an application challenging a determination of the Ethics Office, and, while upholding the award of USD15,000 in costs against the Secretary-General, vacated *Wasserstrom* UNDT/2012/092 (on liability) and *Wasserstrom* UNDT/2013/053 (on relief). The Appeals Tribunal made the following pronouncements on the issue of receivability:

The receivability issue

32. The decision of the Appeals Tribunal (Judge Faherty dissenting) is as follows: as a preliminary issue, Section 2 of the Secretary-General's Bulletin ST/SGB/2005/22 entitled "Ethics Office – establishment and terms of reference" states that 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. And it is the Secretary-General who is a party to this appeal on behalf of the Ethics Office.

33. The Secretary-General appeals the Dispute Tribunal's conclusion that the Ethics Office's determination of no retaliation constitutes an administrative decision that comes within its statutory jurisdiction. He contends that it is not an administrative decision subject to judicial review.

34. The former Administrative Tribunal's definition of an administrative decision that is subject to judicial review has been adopted by the Appeals Tribunal:

a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized

by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. [Footnote 5: Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V. See *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-365; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313; *Al-Surkhi et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-304.]

35. The key characteristic of an administrative decision subject to judicial review is that the decision must “produce direct legal consequences” affecting a staff member’s terms or conditions of appointment. “What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.” [Footnote 6: *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18, citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.]

...

37. On 3 June 2007, Mr. Wasserstrom made a complaint of retaliation to the Ethics Office, complaining about the closing of OPOE and the termination of his UNMIK employment contract on the one hand and his treatment at the airport and the search of his premises on the other hand.

38. The Ethics Office made a determination on 12 July 2007 that there was a “prima facie” case of retaliation against Mr. Wasserstrom and referred the matter in writing to OIOS for investigation under Section 5.5 of the Bulletin.

39. Mr. Wasserstrom was granted special leave with pay and protected status as a “whistleblower” pending investigation by OIOS (Bulletin, Section 5.6). After the completion of the enquiry, OIOS presented its report and conclusions on 11 April 2008 to the Ethics Office, finding that no retaliation had occurred. The Ethics Office accepted the OIOS report and, based upon it, did not make any recommendation to “the head of the department or office concerned and the Under-Secretary-General for Management”. (Bulletin, section 5.7.)

40. Mr. Wasserstrom had legal remedies available to him regarding his claims of retaliation and wrongful termination. Under Section 6.3 of the Bulletin, 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. However, he never sought management evaluation of the decisions to close OPOE or to end his contract with UNMIK or of the alleged retaliatory actions at the Greek border and the search of his premises, despite the requirement under our Statute, Rules and jurisprudence that he must do so to pursue those decisions through the internal grievance mechanism of the administrative justice system.

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.

39. In *Gehr* 2014-UNAT-475, the Appeals Tribunal reiterated its conclusion that determinations of the Ethics Office are not administrative decisions but recommendations which do not have legal consequences :

13. The Dispute Tribunal decided that the Ethics Office’s determination that no credible *prima facie* case of retaliation had been established constitutes an administrative decision that comes within its statutory jurisdiction.

14. The Secretary-General contends that it is not an administrative decision subject to judicial review under Article 2 of the Statute of the UNDT.

...

19. Mr. Gehr had legal remedies available to him regarding his claims of retaliation and wrongful termination. Under Section 6.3 of ST/SGB/2005/21 entitled “Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations”, he was not precluded from raising retaliatory motives in a challenge to the non-renewal of his appointment and other actions taken by the Administration. The Appeals Tribunal Judgments Nos. 2012-UNAT-234, 2012-

UNAT-236, 2012-UNAT-253, 2013-UNAT-293, 2013-UNAT-294, 2013-UNAT-299, 2013-UNAT-313, 2013-UNAT-328, 2013-UNAT-333 and 2013-UNAT-365 all considered these same events. His case has been argued, re-argued, adjudicated and re-adjudicated. The recommendation of the Ethics Office had no legal consequences.

20. We hold that the decision of the Ethics Office is not an administrative decision but a recommendation, and in view of the lack of evidence, no compensation for moral injury should have been awarded [footnote omitted].

40. In 2015, the Appeals Tribunal reiterated this pronouncement in *Nartey* 2015-UNAT-544, stating:

61. On appeal, the Secretary-General argues that the UNDT exceeded its competence by considering *sua sponte* the Ethics Office's decision since it is not an administrative decision subject to judicial review or, alternatively, Mr. Nartey had not sought management evaluation of the decision. Additionally, the Secretary-General contends that the UNDT erred in concluding that the Ethics Office disobeyed Order No. 25.

...

64. The Appeals Tribunal determines that the UNDT exceeded its competence in considering *sua sponte* the decision of the Ethics Office. First, Mr. Nartey did not raise any claims against the Ethics Office and did not contest the Ethics Office's decision not to receive his report of retaliation in violation of Order No. 25. It is axiomatic that the Dispute Tribunal is not competent to address a claim that is not set forth in the application. [Footnote 21: Cf. *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-400, para. 63.] Additionally, even if Mr. Nartey had challenged the Ethics Office's decision not to receive his report of retaliation, that decision is not an administrative decision subject to judicial review. [Footnote 22: *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457, para. 41.] Thus, the Ethics Office's decision not to receive Mr. Nartey's report of retaliation was not properly before the UNDT for review.

41. Thus, the United Nations Appeals Tribunal has consistently held that the role of the Ethics Office under ST/SGB/2005/21 is limited to making

recommendations to the Administration and such recommendations do not constitute administrative decisions subject to judicial review.

42. In this sense, in *Nguyen-Kropp & Postica* 2016-UNAT-673, published on 24 August 2016, the full bench of the Appeals Tribunal, with one dissenting opinion, affirmed the majority decision in *Wasserstrom* that the Ethics Office is limited to making recommendations to the Administration, which are not administrative decisions subject to judicial review.

43. Further, the Appeals Tribunal decided at para. 35 of *Nguyen-Kropp & Postica* that “[a]lthough the Bulletin [ST/SGB/2005/21] does not specifically provide for an instance where the Ethics Office does not find a credible case of retaliation such a decision would not be a final decision carrying legal consequences”.

44. The Tribunal notes that, as clearly stated in secs. 5.1 and 6.3 of ST/SGB/2005/21,

5.1 Individuals who believe that retaliatory action has been taken against them because they 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.

...

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.

45. Further, sec. 7 of ST/SGB/2005/22 states that “[n]othing in the present bulletin shall limit the ability of staff members to seek redress through the internal recourse mechanisms”.

46. It results that the Ethics Office’s review does not substitute the internal system of justice, which includes the Dispute Tribunal. Therefore, the filing of a complaint with the Ethics Office does not replace the requirements of the Tribunal’s Statute, its Rules of Procedures, and the Staff Rules. Any administrative decisions subject to the review of the Ethics Office always precede the review and recommendations/advice of the Ethics Office and are directly appealable within the relevant jurisdictional requirements. A complaint to the Ethics Office can be submitted either before or after an appeal before the Dispute Tribunal regarding the same decision which is subject to the Ethics Office review, and it cannot, in and of itself, waive and/or suspend the time limits for appeal.

47. Further, although the recommendations of the Ethics Office may lead to other administrative decisions being taken by the Administration on the basis of the Ethics Office’s recommendations, it will be those final administrative decisions that may be subject to appeal, and not the recommendations of the Ethics Office.

48. As results from the evidence, the contested decision in the present case includes the Ethics Office’s findings that the Applicant’s complaint specifically pertains to Ms. CL’s email to Mr. MS of 9 July 2015, and this comment was not considered by the Ethics Office to “be abusive, or impugn [his] professionalism, integrity, or character”. The Ethics Office also found that Ms. CL

does not accuse [the Applicant] of leaking information in her 9 July 2015 email to Mr. [MS]. She instead states that the details in the published article could only have been available to OIOS/ID staff members. The email does not suggest impropriety on [the Applicant’s] part and her reference to [him] as “Mr. [W]” does not

constitute an act of misconduct. As your 10 July 2015 complaint to the [Secretary-General] does not contain information supporting a reasonable belief that misconduct has been committed by [Ms. CL], it does not constitute a protected activity pursuant to the requirements of ST/SGB/2005/21. The protection against retaliation policy therefore does not apply to your raised matter.

49. The Ethics Office further concluded that the “provided documentation furthermore does not demonstrate that [the Applicant] ha[s] suffered any resulting professional or reputational damage”. The Ethics Office provided the following advice: “While it is the understanding of the Ethics Office that Ms. [CL] is scheduled to retire in September 2015, you may nonetheless wish to consider approaching the Office of the Ombudsman and Mediation Services for guidance regarding possible informal resolution of your concern with [Ms. CL]”. The Ethics Office made the finding that no retaliation occurred, which does not constitute a reviewable administrative decision.

50. In light of the above considerations, including the binding jurisprudence of the Appeals Tribunal, the findings made by the Ethics Office that no retaliation has occurred and its advice do not constitute a final administrative decision carrying legal consequences and the Tribunal finds that the present application is not receivable *ratione materiae* and that is not competent to review the merits of the present case.

51. Regarding the CAR Report, which was issued on 17 December 2015, five months after the Applicant received the contested response from the Ethics Office (7 August 2015), the Tribunal notes that it has no impact on the receivability *ratione materiae* of the contested decision in the present case.

Conclusion

52. In the light of the foregoing IT IS DECIDED:

- a. The application in Case No. UNDT/NY/2015/053 is dismissed as not receivable.

(Signed)

Judge Alessandra Greceanu

Dated this 15th day of September 2016

Entered in the Register on this 15th day of September 2016

(Signed)

Hafida Lahiouel, Registrar, New York