UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/044/ JAB/2008/087
Order No.:	19 (NY/2010)
Date:	3 February 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

WASSERSTROM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDERS ON RECEIVABILITY AND PRODUCTION OF DOCUMENTS

Counsel for applicant:
Mary Dorman

Counsel for respondent:
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Introduction

1. The applicant made a complaint of retaliation to the Ethic Office under ST/SGB/2005/21. A credible case of retaliation was found and the matter was referred to the Office of Internal Oversight Services (OIOS) for investigation. The investigation concluded there was no retaliation. The Director of the Ethics Office (Director) adopted this conclusion. The applicant contends that the report was significantly flawed and the Director's decision that there was no retaliation was wrong as it was based upon insufficient grounds. There is a preliminary issue as to whether the decision is an "administrative decision" within the meaning of art 2.1(a) of the Statute of the Tribunal.

Background

2. The applicant, who was a senior United Nations official in the United Nations Interim Administration Mission in Kosovo (UNMIK), alleged that certain actions, supported by other senior UN officials, concerning the management of public enterprises in Kosovo were unlawful. He cooperated with an ensuing investigation undertaken by OIOS and provided other information of what he alleged to be impropriety, which later came to his attention.

3. In March 2007 the applicant had been approached by the management of certain companies to discuss the possibility of employment, should he leave UNMIK. As the applicant had no plans to leave UNMIK at the time these were inconclusive but the applicant was informed on 8 May 2007, shortly after the investigation commenced, that his secondment to UNMIK would expire on the 30 June 2007 for budgetary reasons and, on 24 May 2007, he entered into an employment contract with the companies, to commence on 1 July 2007 after termination of his UNMIK assignment.

4. On 25 May 2007 the Special Representative of the Secretary-General of UNMIK (SRSG), on becoming aware of the applicant's external employment contract, sought legal advice about its propriety and was informed that the applicant had violated UN staff regulations. On 31 May 2007, several officials met with the applicant and he was informed of the investigation concerning the contract and asked to provide a copy of the contract and to prepare a defence in writing. On the same day, the applicant's personal assistant filed a request for the applicant to travel to Greece. The relevant UN official confirmed that there were no objections from Mission management and approved his travel. On 1 June 2007 the applicant was informed that he had been placed on special leave and that a formal investigation for possible conflict of interest had been initiated.

5. It is a very live question whether there was a proper basis for commencing such an investigation and it also appears that the requirements for so doing were not followed and the rights of the applicant were ignored. If this were so, it obviously raises the question why the requirements were departed from and thus whether it was retaliatory. The applicant then took his belongings from his office, having earlier informed management that he was vacating, made an image of the hard drive of his office computer (which, in the circumstances was a perfectly reasonable precaution), placed them in his vehicle and left Pristina for the Kosovar/Greek border. There then followed a number of apparently high-handed, perhaps unlawful, certainly extraordinary, actions to detain the applicant and search his vehicle and his home. A poster containing his photograph was placed at the entrances of UNMIK headquarters to ensure that he would not be allowed to enter and "Do not cross" tape was placed on his office for some considerable time, long after investigations had concluded that there was no wrongdoing on the applicant's part. Not surprisingly, all these actions had a predictable and, it might have been, intended devastating effect upon the applicant's reputation, magnified by widespread publicity. Other seriously adverse administrative actions were taken against him.

6. On 3 June 2007 the applicant filed a formal complaint of retaliation under ST/SGB/2005/21 with the Ethics Office. This was a detailed document, which set out clearly the commencement and course of his differences about corporate governance with senior officials, commencing in September 2006 with his supervisor, the Political Deputy of the SRSG and later involving the Legal Advisor which, it would be reasonable to infer, also involved the SRSG and very likely other senior officials. The Ethics Office concluded that he had engaged in a "protected activity" (pursuant to ST/SGB/2005/21, discussed below) and that a *prima facie* case of retaliation against him had been made out. On 29 July 2007 the Ethics Office referred the case to OIOS for investigation, which reported on 8 April 2008 that there had been no retaliation because the decision to close the applicant's office and the non-extension of his contract preceded his cooperation with OIOS, and because the initiation of the preliminary investigation into the applicant's possible conflict of interest was duly authorized and warranted, the investigative steps were lawful and not influenced by the persons against whom the applicant had complained. Some mild criticisms were made of certain "shortcomings".

7. In a letter of 21 April 2008, the Director gave the applicant a summary of the findings of the investigation and concluded as follows –

> As a consequence of OIOS' detailed and thorough investigation of this matter, which entailed interviews with UNMIK staff, review of telephone and e-mail records during the relevant time periods, OIOS's conclusion is that the alleged retaliatory acts, although having been found to be disproportionate in relation to the conflict of interest issue, are in no way linked to the protected activities. There, therefore, cannot be a finding of retaliation in this case.

Instruments

8. Article 2.1 of the Statute of the United Nations Dispute Tribunal defines the jurisdiction of the Tribunal:

> The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3,

paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

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

…

9. The appointment and terms of reference of the Office of the Ombudsman and the Ombudsman are defined in ST/SGB/2002/12:

Section 1

Establishment of the Office of the Ombudsman

The Office of the Ombudsman is established in the Office of the Secretary-General to make available the services of an impartial and independent person to address the employment-related problems of staff members. The Ombudsman shall be guided by the Charter, the Staff Regulations and the Staff Rules, as well as by the principles of justice and fairness.

Section 2

Appointment of the Ombudsman

2.1 The Ombudsman shall be appointed by the Secretary-General at Headquarters at the Assistant Secretary-General level, after consultation with the staff.

2.2 The Ombudsman shall serve for a non-renewable five-year term and shall be ineligible for any other appointment in the United Nations after expiration of the term.

Section 3

Terms of reference of the Ombudsman

3.1 The Ombudsman shall have direct access to the Secretary-General, as needed, for the performance of his or her functions.

3.2 In the performance of his or her duties, the Ombudsman shall be independent of any United Nations organ or official.

3.3 The Ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality…

3.4 The Ombudsman shall have access to all records concerning staff…

> 3.5 The Ombudsman shall not be compelled by any United Nations official to testify about concerns brought to his or her attention.
>
> 3.6 The Ombudsman shall have authority to consider conflicts of any nature related to employment by the United Nations…
>
> 3.7 The Ombudsman may hear any of the parties involved in a conflict…
>
> 3.8 The Ombudsman shall remain neutral…
>
> 3.9 The Ombudsman may, at his or her discretion, decline to consider conflicts…
>
> 3.10 The Ombudsman may request the Joint Appeals Board to extend the normal time limit for filing an appeal…
>
> 3.11 The Ombudsman shall provide reports regularly to the Secretary-General…
>
> …

10. The procedures involving protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigation are defined in ST/SGB/2005/21 (although the Ethics Office tasked with administering these procedures is created in the following bulletin):

> **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.
>
> 1.2 It is also the duty of staff members to cooperate with duly authorized audits and investigations. An individual who cooperates in good faith with an audit or investigation has the right to be protected against retaliation.
>
> 1.3 Retaliation against individuals who have reported misconduct or who have cooperated with audits or investigations violates the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view.
>
> 1.4 Retaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in

an activity protected by the present policy. When established, retaliation is by itself misconduct.

…

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.

…

5.5 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.

…

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.

…

11. The Ethics Office is established and its terms of reference created in ST/SGB/2005/22:

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.

An appeal is instituted

12. On 21 May 2008 the applicant requested the Secretary-General to review what he described as "the administrative decision [of the Director, conveyed in the letter of 21 April 2008]…regarding the OIOS investigation into my complaint of retaliation". The applicant claimed that "the investigation by [the Director] and his resulting conclusions are seriously flawed", as set out in an attached letter of 21 May 2008 to the Director. The applicant laboured under the substantial handicap of not having been given a copy of the report and, accordingly, being unable to subject it to any critical analysis. Be that as it may, the material set out in the letter to the Director of 21 May 2008, directly or indirectly either contradicted findings in the report or showed why they were unreasonable. It is unnecessary for present purposes to deal

with these matters. It is enough to state that, if reasonably based, they amounted to a comprehensive refutation of the accuracy and sufficiency of the investigation and the investigators' conclusions. Implicitly, real questions were raised as to the soundness of the judgment of the investigators, both legal (which, at all events, they were in all likelihood not qualified to answer) and factual. It would follow, of course, that there was no sufficient basis for any recommendations to the Secretary-General and the decision that the investigation and the report was adequate was wrong and should be reviewed and corrected. It is plain that the Director disregarded the applicant's submission although it is difficult to see any justification for his decision to do so. It is true that he had already decided that there was no retaliation but there was no legal reason why this decision could not be revisited in light of the applicant's arguments. I am at somewhat of a loss to understand why, at all events, the partial disclosure of the content of the report made in the Director's ultimate letter to the applicant was not made before his decision. It strikes me as at least arguably unreasonable to omit this step in light of the functions of the Ethics Office to protect staff members from retaliation. However, this is a matter for the trial and does not require present determination.

13. In response to the applicant's request for administrative review the Administration took the point that "the memorandum of 21 April 2008 from the Ethics Office does not contain an administrative decision", citing a decision of the United Nations Administrative Tribunal (UNAT), and explained that "the Ethics Office's action…is to make a recommendation and is not a decision which is subject to appeal". The response did not deal with any of the submissions made by the applicant as to the facts which, if true (and there was good reason for thinking at least that they might well have been true), undermined the adequacy of the investigation and the reasonableness of the conclusions in the report sent to the Ethics Office upon which the decision that there was no retaliation was entirely based.

14. The Director's letter of 21 April 2008 was little more than a summary of the findings of the investigators and does not demonstrate that there was an independent

analysis of the report to examine whether indeed it reflected an adequate investigation and sound judgment such as to justify the complete reliance placed on it by the Director, let alone consideration of its contents in light of the matters raised by the applicant. In short, the so-called administrative review ignored a fundamental part of the applicant's case, namely that the decision to accept the investigation report as a proper basis for the recommendation was wrong, because it focused on an irrelevant issue that had not even been raised by the applicant. The review was significantly incomplete and far less than that to which the applicant was entitled.

15. In the incomplete statement of appeal of 26 August 2008 the applicant's attorney succinctly described the impugned decision as the "findings of … the Ethics Office of no retaliation". The complete statement of appeal identifies the contested decision as –

> Determination of 21 April 2008 by the UN Ethics Office that [the] applicant … was not the subject of retaliation for reporting the misconduct of his superiors pursuant to ST/SGB/2005/21, Section 1(1.1) (whistleblowing).

The ensuing discussion, of course, was hampered by the applicant's inability to analyse the report, but nevertheless covered the ground sufficiently to raise substantial doubts about the investigation and the report along the lines which I have previously identified. I am unable to see how it could have been reasonably thought that the applicant was attempting to appeal the recommendation made by the Director.

16. In its reply, the respondent again argued that the Director's letter "did not constitute an administrative decision", a case which had not been made by the applicant. It was submitted, in the alternative, that the course of action taken by the Ethics Office was proper. But there was no discussion of the extensive factual matters raised by the applicant, let alone the debatable legal conclusions stated in the investigators' report and summarized in the Director's letter. The question whether there was an adequate basis for the decision of the Director as identified in the memorandum of appeal was ignored.

The respondent's submissions to the Tribunal

17. An "administrative decision" within the meaning of the Statute must be made on behalf of the Secretary-General within former Staff Regulation 11.1 (ST/SGB/2001/8). The Ethics Office has "independent status" (par 161(d) A/RES/60/1) reporting directly to the Secretary-General in relation to the discharge of its mandated responsibilities which are advisory in nature and therefore do not entail the ability of its Director to make administrative decisions on behalf of the Secretary-General. The functions conferred on the Office by ST/SGB/2005/21 in relation to retaliation do not involve the making of administrative decisions. The Director's communication to the applicant, based on the OIOS report, that there had been no retaliation is not an administrative decision within the meaning of former Staff Regulation 11.1. Since there is no decision-making power, it follows that no administrative decision can be taken.

18. The Ethics Office is relevantly identical to that of the Ombudsman which is not part of the hierarchical structure of the Administration and is an intermediary rather than a decision-maker, its lack of decision-making power demonstrated by its inability to impose a binding solution upon a conflict between the Organization and a staff member; the refusal by the Ethics Office to find retaliation was not made by the Administration and did not have direct legal consequences: Perez Soto (2007) UNAT 1359. Amongst other things, the decision must be made by the Administration and produce direct legal consequences to the legal order: *Andronov* (2004) UNAT 1157.

The applicant's submissions to the Tribunal

19. The applicant had a legal right to be protected from retaliation. This right required a sufficient and adequate investigation. He also had a right to a decision by the Ethics Office concerning him being subjected to retaliation and to the benefit of recommendations that the Ethics Office should have made pursuant to its duty under section 6.1 of ST/SGB/2005/21 "aimed at correcting negative consequences suffered as a result of the retaliatory action", in particular, those which followed from the

adverse publicity and the non-renewal of his contract. The decision of the Director that there was no retaliation on the basis of the investigation report, which must have been seriously flawed, deprived him of these rights, which were part of his contract of employment.

Discussion

20. The Ethics Office cannot in any meaningful sense be regarded as analogous to the Ombudsman. ST/SGB/2005/21 and ST/SGB/2005/22 establish the Ethics Office, "reporting directly to the Secretary-General", and giving it certain responsibilities. The Ombudsman provides reports to the Secretary-General but is "independent of any United Nations organ or official". The Ombudsman is an identifiable individual to whom the functions and responsibilities of his office are specifically assigned. The head of the Ethics Office is the Director but, so far from being independent, he or she "will be accountable to the Secretary-General in the performance of his or her functions". Nor is the Office given any independence. To the contrary, each person in the Office is responsible ultimately to the Secretary-General.

21. The assignment of functions and responsibilities to the "Ethics Office" rather than an identifiable individual is a recipe for confusion, exemplified by sec 3.3 of ST/SGB/2005/22 which refers to not requiring the Ethics Office to testify: no "Office" can testify for obvious reasons. This solecism was a deliberate rather than accidental choice but it is difficult to see what practical or useful purpose it serves. The section would probably be interpreted as meaning that no one who was a part of the Ethics Office at any relevant time can be asked to testify in respect of the specified matters but why was this not simply stated? A more significant problem is posed by the conferring of responsibilities on the Ethics Office rather than any identified person. By parity of reasoning, does this mean that the responsibilities are to be discharged, under the supervision of the Director, by each member of the Office or all members of the Office jointly or by the Director as head of the Office? If not, then the meaning of "Ethics Office" in sec 3.3 of ST/SGB/2005/22 differs from that,

for example, in sec 3.1 of ST/SGB/2005/22, let alone its meaning in ST/SGB/2005/21. Not only must management attempt to identify who actually is (or are) accountable for the functions committed to it but, more to the point, so must the Tribunal. Undertaking intellectual acrobatics is fun for solving cryptic crosswords but resolving the questions of legal rights and obligations should not require them. It involves fudging boundaries, filling gaps, re-constructing language and deriving conclusions that far too much depend upon the accidental mind-set of a particular judge of the Tribunal. This is one of a number of unfortunate examples of bad drafting. It does not need a degree in management to understand that significant responsibilities must be conferred in such a way as to make it completely clear who is charged with undertaking them.

22. The Ethics Office "reports directly to the Secretary-General" and the head of the office is appointed by and is accountable to the Secretary-General in the performance of his or her functions: secs 1.1 and 2 of ST/SGB/2005/22. The head of the Office, no doubt, is responsible for its proper functioning, yet he or she is not the Office and does not embody or stand for the Office, in marked contrast with the Ombudsman who, it could fairly be said, holds the office of Ombudsman, using the term "office" in its narrow and more precise sense. This is of more than mere theoretical significance as one comes to consider the responsibilities that are entrusted to the Office as such, in particular, the responsibility to decide whether retaliation occurred and the ensuing recommendations.

23. As to the respondent's reliance on A/RES/60/1, although the recommendations of the General Assembly must be given serious consideration, the request that the Secretary-General "submit details on an ethics office with independent status" does not usefully inform the question here in issue or assist in interpreting and applying the provisions of ST/SGB/2005/21, which must, of course, be regarded as accepted by the General Assembly as fulfilling its request, else it would not have approved it.

24. On the other hand, although 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. The knowledge of the investigators that their work will be examined by an independent and critical eye will encourage thoroughness, fairness and

accuracy. It will also give to staff members who fear retaliation or have suffered it, confidence that they will be protected or the situation made good and give malefactors good reason to fear that they will be found out.

26. In *Andronov* (2004) UNAT 1157, the UN Administrative Tribunal said –

> There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is 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.

Although, with respect, one could take issue with the claimed universality of the definition it is of course true that an administrative act is not necessarily an administrative decision. However, the question is not so much how to define the term "administrative decision", but whether any particular decision can be made the subject of judicial proceedings. The concluding sentence of the quoted paragraph is intended, therefore, to describe those administrative decisions capable of being litigated in the UN internal justice system.

27. It is not surprising that administrative law analogues have been used for the purpose of determining the duties of a manager or the administration in respect of decisions affecting staff members. After all, the legal instruments that govern the operations of the Organization may be regarded as analogous to the statutes and subsidiary instruments conferring decision-making powers on government officials in a State and the rules of administrative law have been developed to ensure that those officials do not exceed or misuse their legal authority. However, the relationship between the subject and the State is in no sense the same as the relationship between a staff member and the Organization. The latter is governed entirely by the contract of employment which incorporates the various legal instruments concerning the

Organization's operations in so far as they impinge upon the staff member's position as employee, together with such rights and obligations which are implied by virtue of the contract and by virtue of the contract alone, and of course, art 2.1(a) of the Statute. On the other hand, the former relationship is governed by the constitutional laws of the State which are not based in any way upon notions of contractual rights and obligations. Amongst other differences, a contractual obligation is not discretionary unless the discretion is conferred, either explicitly or implicitly, by the terms of the contract, nor is any policy consideration relevant unless it is part of the terms of the contract. Indeed, it is quite possible that the proper construction of the contract will lead to unfortunate consequences from the point of view of the satisfactory conduct of important operations of the Organization. But a contract is a contract and the legal obligations it imposes must first be ascertained and, secondly, be enforced regardless of other consequences. The Statute does not give the Tribunal discretion to disregard contractual rights and obligations in favour of notions of policy. Nor do the notions of administrative law cover the same ground as contract law. For example, the implicit requirement of mutual good faith in the performance of the contract is entirely contractual or at least quasi-contractual, and the nature and extent of obligations attaching to the creation of legitimate expectations and the consequences of misrepresentations by persons with ostensible authority are dealt with significantly differently in the two systems. It follows that reference to administrative law doctrines is unnecessary and liable to be confusing.

28. The question whether the correctness or propriety of a decision is within the jurisdiction of the Tribunal to determine is an essentially simple one: does the decision of the Administration breach a contractual right of the staff member. The words "administrative" and "decision" are words in ordinary parlance. It is unnecessary (and therefore inappropriate) to understand them in any special or technical sense. In ordinary language "administrative" is an adjective applying to some act done in the course of managing the affairs of an entity and a "decision" is a determination or conclusion. In the present context, therefore, an "administrative decision" is a determination or conclusion made in the course of managing the affairs

of the UN. By virtue of the interaction between the rules relating to review of administrative decisions and management evaluation on the one hand and, on the other, the ability to apply to the Tribunal for a decision, the decision must also be one that is capable of being corrected by the Secretary-General pursuant to his or her powers under art 97 of the Charter as "chief administrative officer" of the Organization. As will be seen, however, this does not necessarily mean that the impugned decision must be one that can be made by the Secretary-General.

29. Whether a decision is capable of being litigated in the internal justice system, including, of course, the Tribunal, is governed, as I have already mentioned, by the Statute and depends upon whether it is asserted to be in breach of the staff member's contract of employment, which includes the legal instruments governing the operations of the Organization. Those instruments provide, amongst other things, for particular processes to be followed in order to make certain decisions. Those processes might be explicit or implied as a condition of the contract. The requirement of fair dealing is an example of the latter. It is necessarily implied in the instruments governing management of the UN that a decision maker must, when making a decision, take into account only relevant matters, ignore irrelevant matters and act reasonably upon a sufficient basis. (It is also conventionally said that he or she must not be actuated or influenced by ulterior motives or act on the basis of a substantial error of fact but these are examples of irrelevancies rather than distinct notions.) As these obligations are implicit in the instruments that form part of the contract of employment, a failure to comply with them will constitute a breach of the contract of employment of a staff member in respect of whom the flawed decision has been made. Although, as is obvious, these notions are very similar to those which are a part of administrative law, there is no need to import administrative law notions into the litigation undertaken to enforce them as a part of an employment contract. All relevant questions are entirely enveloped in the issues of contractual rights and obligations. Whatever might have been the position before the creation of the Tribunal, the explicit terms of the Statute make the position plain: any decision which itself constituted or was made in a way that constituted a breach of a contract between

the UN and a staff member fall within the jurisdiction of the Tribunal under article 2.1(a) of its Statute if this decision is capable of being affected or changed by the Secretary-General. This is so, not by virtue of any administrative law considerations but by a straightforward interpretation of the instruments forming part of the contract.

30. Of course, whether an *act* alleged to constitute a breach of the contract of employment is administrative in character and is a decision are jurisdictional facts which the Tribunal is empowered to determine and its findings in those respects are valid and *intra vires*, even if it ultimately holds that there was no decision or that, if there were one, it was not administrative. The distinction between an "act" and a "decision" is clear enough; an act will usually be preceded by a decision to perform it. But not every decision is administrative in character. Thus, the decision by a manager to sexually harass a staff member will not be an administrative decision, although it may attract disciplinary measures. On the other hand, a decision made in relation to the staff member's employment, say, in relation to work allocation, transfer, promotion etc, in furtherance of sexual harassment is necessarily administrative in character and thus within the Tribunal's jurisdiction to consider. This is not dissimilar to the approach of the International Labour Organization Administrative Tribunal in Judgment 1203, *Horsman, Koper, McNeill and Petitfils*, cited with approval by Laker J in *Planas* UNDT/2009/086 at [11]ff.

31. It will often be the case that following the administrative law path, as it were, will lead to the same conclusion as the contractual law path. The former path (if I may take the metaphor somewhat further) is, however, often winding and badly marked, whilst the latter is relatively straightforward and well marked. If the *Andronov* formula indeed correctly stated the administrative law, then its liability to confuse with unnecessary complexity is obvious. Thus, it really does not matter whether a decision is unilateral or joint, nor does it matter how many individuals are affected: if the decision is in breach of an explicit or implicit term of the staff member's contract, these considerations are irrelevant; and the only "direct legal

consequence" (to take the third *Andronov* requirement) that matters is the breach of the contract.

32. The beginning and the end of this discussion, however, is art 2.1(a) of the Tribunal's Statute itself, which confers jurisdiction in respect of an "administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment … [including] all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance".

33. I have some difficulty in understanding the respondent's submission as to the significance of former regulation 11.1 for determining what decisions can be litigated but I assume that the argument is that the necessary prerequisite to appealing under old staff rule 111.2 was the request for administrative review which required a response from the Secretary-General, which implies that the impugned decision is one which the Secretary-General could do something about. Accordingly, the only decisions capable of being appealed to the Joint Appeals Board and, hence, the Tribunal, are those capable of being reviewed by the Secretary-General. Accepting this to be so, the Ethics Office reports directly to the Secretary-General (sec 1.1 of ST/SGB/2005/22) and the Director is specifically made "accountable" to the Secretary-General in respect of the exercise of his or her functions. This does not mean, however, that the Secretary-General can make the relevant decisions. This function is conferred on the Ethics Office and not on him. However, he has the power to require that the decisions be made in accordance with the authority conferred and in compliance with the relevant bulletins. If, therefore, he is satisfied that this has not been done, he must have authority to require that it be done. This follows from the functions conferred on him by secs 1 and 2 of ST/SGB/2005/22. Accordingly, the decisions in question fall into the class in respect of which administrative review can be requested and, for that matter, management evaluation under rule 11.2 of ST/SGB/2009/7.

34. Both parties have assumed that the relevant decision, though, in terms, required to be that of the Ethics Office, was in law able to be that of the Director

(though I observe that the letter of 21 April 2008 to the applicant was coy as to who had actually evaluated the investigator's report and decided that there was no retaliation). Accepting the parties' assumption as correct for the present, the Director was bound, by exercising his own judgment, to make a decision as to whether there had been retaliation against the applicant, since without doing so, he could not have determined whether to exercise the powers conferred by sec 6 of ST/SGB/2005/21. Furthermore, if there were a decision that retaliation was established those powers must have been exercised reasonably and properly having regard to the purpose for which they were conferred. Accordingly, the decision as to what recommendations were made would be an administrative decision, though it could not directly be made by the Secretary-General. Here, it would have been inevitable that the (Director of the) Ethics Office would have recommended that steps be taken "correcting [the] negative consequences suffered" by the applicant. The applicant had a right to the advantage that such a recommendation would have given. Moreover, the recommendation would have required due and proper consideration by the "head of department or office concerned" and carried the concomitant likelihood that it would have been accepted to a greater or lesser extent. The decision as to implementation of the recommendations would also be an administrative decision which, of course, would be entirely under the ultimate control of the Secretary-General. This process was mandated by ST/SGB/2005/21, incorporated into the applicant's contract with the UN, and the failure, if any, to comply with it was a breach of that contract.

35. It was the bounden duty of the Director, therefore, to carefully assess the adequacy of the investigation report, draw reasonable conclusions from the facts disclosed in it and consider all significant matters that reasonably impinged upon the question whether retaliation had occurred. The letter of 21 April 2008, at least arguably, appears to disclose that there was no independent consideration of the conclusions rightly to be drawn from the investigation. It may be, as well, that the applicant had a right to be heard on an adverse investigation report before a decision was made, but I will leave this question for later determination. On the face of it, at least, a rational decision-maker would seek a response from someone in the

applicant's position before making a final decision that no retaliation occurred, having regard to the vital importance of a correct decision, not only in the interests of the staff member, but also the manifest interests of the Organization. Even a latent error in the investigation report, for example, one exposed by the applicant's response, may, if it were significant, vitiate the decision which would (on this hypothesis) be based upon a significant error of fact. This is not to apply administrative law rules (though they might be identically expressed) but to state what follows from the importation into the applicant's contract the terms of the applicable bulletins; the right to a decision that is properly founded is a contractual right of the staff member.

36. Whether, indeed, the Director's decision complied with the requirements of the Bulletins is a matter for the substantive hearing and will depend upon the evidence tendered and relied on by the parties. I feel bound to say, however, in fairness to the applicant and because of comments made by me to his counsel during the hearing of this preliminary point that, having carefully considered the material that was provided by him to the Ethics Office and the letter of the Director of 21 April 2008, there are a number of troubling matters that raise concerns about the adequacy of the investigation and the correctness of the Director's approach. Of course, this is only a tentative view and a final determination of these matters must await consideration of the whole of the evidence and the submissions of the parties.

Conclusion

37. The decision of the Director that retaliation did not occur is an administrative decision for the purposes of art 2.1(a) of the Statute and, accordingly, the application is receivable. It follows that the applicant and his legal adviser should have access to the report and accordingly, I order that a copy of it be made available within seven days of the applicant and his legal adviser first entering into an appropriate confidentiality agreement.

(*Signed*)

Judge Adams

Dated this 3rd day of February 2010