Case No

Original: English

Facts

The Applicant's case before the Ethics Office

5. In a letter dated 3 June 2007, the Applicant lodged his complaint with Mr. Robert Benson, former Director of the Ethics Office. He provided necessary background information as well as a comprehensive account describing the events which he claimed gave him the necessary protection, as a whistleblower, against retaliation, or, as it is referred to in some national jurisdictions, victimization. The Tribunal considers it best to present the Applicant's case in his own words with the appropriate emphases as they appear in the original:

Origins and Mandate of the Office for Coordination of Oversight of

Olivier, and the Head of Pillar IV at the time, Mr. Nikolaus Lambsdorff, were clear that line or executive responsibilities were not to be part of OPOE's mandate. OPOE deliberately has no separate legal basis; it has no legal, regulatory, enforcement or executive authority of its own. It is not established by Regulation or Administrative Direction. It cannot "direct" or "instruct;" it can only "urge" and "ask." It has only the power of persuasion.

… Over the years from 2003, OPOE has been involved in supporting management reform, improvements to the regulatory environment in Kosovo, and in supporting investigations of various kinds. Incorporation of the POEs into Joint Stock Companies was one such initiative, an effort largely completed by late 2005. After incorporation, OPOE has been observing Board meetings of the new companies, to monitor these new Boards as they exercise oversight over the POEs, providing opinions on issues of concern, directly or through the OPOE chain of command. Because of the limits of [reference is made to "the QPQ", but the Tribunal is unaware of the meaning of this abbreviation] mandate these opinions have no legal force and are in no way binding, though they can be influential.

<u>Evolution of the Current Issue</u>

… In September 2006, I met with my supervisor, Mr. Steven Schook, [Principal Deputy Special Representative of the Secretary-General ("PDSRSG")], to discuss the work of OPOE for the coming year. In that conversation, he asked me to pick one priority for OPOE to work on until the close of UNMIK. I chose improving corporate governance at the POE Board level. He agreed, and asked me to provide him with a background paper on that subject, so he could better understand the work of OPOE. He also mentioned that there were those who did not like OPOE because of its perceived power, and that I should "keep my ear to the ground." On 10 October 2006, I sent Mr. Schook the paper by email … .

… Ten days later, I became aware that one of the Kosovo Government Ministers, Mr. Ethem [Ç]eku, Minister for Energy and Mining, had presented the SRSG with a paper in which he asked to be allowed to take over the Board of the Kosovo electricity utility, KEK. <u>This went directly against the independence of the POEs, and opened</u>

the door to political interference in decision making. It was contrary to the paper I had presented to Mr. Schook only days earlier.

… On 6 November 2006, I wrote to Mr. Schook raising these concerns, and asking for his and the SRSG's intervention, copying the latter, to ensure that Mr. [Ç]eku was not allowed summarily to take over the KEK Board. …

… Sometime in mid November, I was called to see Mr. Schook. In regard to my approach to corporate governance, to which Mr. S[c]hook had agreed in September, he said, "I don't buy any of this bullshit … Politicians everywhere control these things." I disagreed - politicians everywhere do not control publicly owned enterprises and when enterprises do succumb to political control it is seen as an aberration to be corrected, not imitated. I, however, did understand from this meeting that I would find no support from PDSRSG Schook on what we previously had agreed would be my Office's priority until the end of the Mission.

… I should point out that during this period, from end September, one of my two Professional staff left, and although I was told I could replace him, it never materialized. In December, my other international staff member was also cut as of end January, which left me with only one local staff member. I took this as a sign that I was being deliberately weakened and isolated.

… Seeing that my superiors were unsupportive on this matter, I then turned my attention to the Ahtissari Settlement Agreement, to try to get language in the Agreement that would protect the gains we had made with the POEs to remain independent and free of politicalTtecfl413-0.0019 T4w 0 -

Kosovo. He concluded that conversation with, "Sorry your issues are not front burner for me."

… Now with no international staff, and with this attitude of my supervisors, it was clear from that moment that I was operating in a very hostile work environment.

… I also began to hear worrying rumours about corruption in connection with the proposed new power plant and mine, known as Kosovo C, over time a multibillion euro project. The Steering Committee for that project is chaired by the Minister of Energy and Mining Eth[e]m [Ç]eku, and Mr. Schook is a member of the Committee. The rumours concerned the payment of what was called a "facilitation fee" in the hundreds of millions of euros to a local partner should that bidder win the tender. Part of that payoff was rumoured to be going to Minister [Ç]eku and to Mr. Schook, among others. I began to wonder about the connection between the takeover of the KEK Board by Minister [Ç]eku, which seemed to be inevitable, supported by PDSRSG S[c]hook, as well as SRSG R[ü]cker, and about the Kosovo C project. I brought these concerns to the attention of a number of individuals, including OIOS.

… While only a formal investigation can determine if PDSRSG Steven Schook and SRSG Joachim R[ü]cker are guilty of fraud, conspiracy and accepting bribes in the form of "kick-backs", the perception of corruption clearly exits for both Schook and R[ü]cker.

… I should note that the World Bank expressed concerns in January, March, and April in separate letters to the Minister along similar lines. They objected to his push for "early action for a negotiated settlement with a single bidder," and tried to walk away from the project in April. They were convinced to remain engaged by a number of stakeholders, including Mr. Schook.

… In March 2007, as I had hoped, the Ahtissari Settlement Agreement made clear, that the POEs should be "independent," governed by "international principles of corporate governance and liberalization." This was a victory of sorts. At the same time, however, the Government had nominated 16 individuals to serve on POE board, 14 of whom were blatantly either not qualified or not independent (i.e., "engaged in political activity" and one was on a terrorist watch-list) and in violation of laws, the KTA Code of Corporate Governance and the proposed Settlement Agreement. The KEK Board would be

… In early May 2007, I became aware of a document prepared by UNMIK's Office for Strategy Coordination in April 2007, which [was] called the "Transition Planning and Implementation Report" … in which my Office, OPOE, was shown with the notation, "Decision taken to close down OPOE from June 30 [2007]." … I was never consulted on this action, nor was I given a copy of the document. (It was leaked to me.) OPOE is the only office under the SRSG's umbrella to be closed at 30 June 2007. On 7 May 2007, I was sent my "Completion of UNMIK Assignment" letter … .

… Such was the desire to close OPOE for getting in the way that even the single local staff member in the Office was terminated, despite normal practice of redeploying such staff elsewhere in the Mission. This took place despite the fact that he is one of very few Kosovars, and probably unique among UNMIK staff to hold a Master's degree in Criminal Justice from a [United States] university, a fact known to UNMIK Personnel.

… In addition, OIOS has sent in an End-of-Mandate Audit, very extensive, with which I have cooperating extensively, indicating areas for the Audit team's exploration. I have no doubt UNMIK's senior staff are convinced I am somehow driving it.

… When I learned of my non-extension, I agreed to work with the Managing Directors of PTK [Post and Telecommunications of Kosovo] and Pristina International Airport, to work with them directly in corporate governance, development and accountability. We signed a contract on 24 May 2007, which I disclosed formally to UNMIK on 30 May 2007. …

… The SRSG was furious. He told me he would consult with UNMIK's Legal Advisor "to arrange for my earlier departure." He is also making every effort to force the cancellation of my new contract.

… On 29 May, the SRSG initiated an investigation into misconduct in connection with my new job, an investigation which is both administrative and criminal in nature. As of 31 May 2007, he has arranged for OHRM to relieve me of my responsibilities and place me on Special Leave With Full Pay during the investigatory period … This has all been accelerated because my contract ends on 30 June. I am very concerned that they will punish me with trumped up charges. As of to day, they are stopping my UN email account, reclaiming my computer, and are taking back my UN vehicle.

7. In accordance with the prescribed procedures, the Ethics Office submitted the case to ID/OIOS to be investigated. By a memorandum dated 29 July 2008, ID/OIOS forwarded its investigation report dated 8 April 2008 ("the Investigation Report"), together with a number of annexes summarising the interviews conducted with various individuals as well as some written documentation ("the Annexes"), to Mr. Benson. In the Investigation Report (totalling 22 pages), ID/OIOS concluded that (emphasis added):

> … [T]he closure of OPOE and the non-extension of [the Applicant's] contract with UNMIK was made prior to [the Applicant's] cooperation with OIOS and therefore cannot be considered as retaliation.
>
> … [T]he initiation of the preliminary investigation into [the Applicant's] possible conflict of interest was duly authorized and warranted. *The investigative steps taken during this investigation were all within the jurisdiction and under supervision of the international prosecutor and the pre-trial judge*. ID/OIOS found no evidence that Messrs. Rücker, Schook and Borg Olivier interfered in or otherwise influenced the decisions taken by the international prosecutor and the pre-trial judge in this case.

8. However, ID/OIOS also found that (emphasis added):

> … Some of the actions (i.e. seizure [of the Applicant's] national passport at the Kosovo border with the aim to restrict his movement, searches of this private vehicle and residence, placement of a poster with his photograph at the entrances of UNMIK [headquarters] to prevent his entry as well as visibly sealing off his office for an extensive period of time) *miran*

9. By letter dated 21 April 2008 to the Applicant, Mr. Benson summarised the main findings of the Investigation Report and concluded, on behalf of the Ethics Office, that:

> As a consequence of OIOS' detailed and thorough investigation of this matter, which entailed interviews with UNMIK staff, review of telephone and email records during the relevant time periods, OIOS' … conclusion is that the alleged retaliatory acts[,] although having 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

10. In response to Mr. Benson's letter dated 21 April 2008 the Applicant identified,by letter dated 21 may 2008, a number of what he considered to be mistakes in the Investigation Report and in Mr. Benson's letter. He requested the Ethics Office to continue its investigation of his allegations of retaliation in light of "the misstatements of facts" and noted that:

> Your memorandum confirms "excesses"; "investigative failures"; "confusions" and acts against me that are "disproportionate" in relation to the charges against me on the part of UNMIK Department of Justice, its Financial Investigations Unit, Office of Legal Affairs, Division of Administration and Security Service. Each of these offices report to the SRSG. It is incomprehensible that the calculated serial reprisals against me are the result of anything but a plan of retaliation.

11. On 21 May 2008, the Applicant also requested administrative review of Mr. Benson's decision of 21 April 2008 to dismiss his compliant.

12. By letter dated 3 June 2008, Ms. Susan John, then Ethics Officer, replied to the Applicant's 21 May 2008 letter to Mr. Benson stating that ST/SGB/2005/21 does not "envisage any further action by the Ethics Office or by any other office on a case after the outcome of the investigation has been communicated to the complainant in a case where retaliation has not been established".

Subsequent procedural history

13. There followed a number of procedural matters both before and after the case was transferred, on 1 July 2009, to the Dispute Tribunal. It is not necessary to traverse those matters which relate to an issue of receivability and important questions of disclosure of relevant documents which were the subject of several Orders by His Honour, Judge Adams, who had conduct of this case before his term of office ended. Counsel for th

that they were to be treated in strict confidence and not be shared with third parties and that they only be used in connection with preparing their closing submission.

The applicable law

23. In summary, the essential elements of ST/SGB/2005/21, which provides protection against retaliation, include the following:

a. At the relevant time, the staff member must entertain a belief, based on reasonable grounds, that there is an actual or potential breach of the Organization's regulations and rules;

b. The staff member must report such actual or anticipated breach through the established mechanisms which, as in this case, include OIOS and the Ethics Office;

c. The report should not consist merely of the dissemination of unsubstantiated rumours and must be made in good faith;

d. At the time that the report is made, it must have been based on a reasonable belief, formed on reasonable grounds, even if it is subsequently proven to have been mistaken;

e. The making of such reports is regarded as protected activity;

f. If a staff member has engaged in a protected activity, it is strictly prohibited to retaliate against that individual by any direct or indirect detrimental action recommended, threatened or taken against her/him;

The Applicant's submissions

24. The Applicant identifies the protected activities that he engaged in as follows:

a. Prioritizing the issue of good corporate governance, including requesting senior UNMIK officials to intervene to prevent a political takeover of the KEK's Board by the then Minister for Energy and Mining of Kosovo and seeking senior UNMIK officials' support to oppose proposed legislation that would compromise good governance;

b. Reporting his increasing concerns over corporate governance issues to OIOS; and

c. Reporting to OIOS a possible kickback scheme concerning a proposed new power plant and mine in Kosovo, involving high-level local politicians and senior UNMIK officials;

25. The Applicant contends that the following actions amounted to retaliatory activities and a breach of his rights to due process:

a. The OPOE was closed and his contract with UNMIK was not renewed;

b. The investigations into his alleged offence of signing an employment contract to work for the Managing Dir

d. His passport was taken away;

e. He was escorted back to his apartment under armed escort;

f. His car and his home were searched without a proper warrant;

g. His United Nations ground pass was taken away;

h. His office at the United Nations was cordoned off with crime scene tape;

i. Wanted posters with his name were put upatio

b. The Investigation Report was complete, comprehensive and unequivocal in finding that the Applicant was *not subjected to* retaliatory treatment in that:

i. The decision to close the OPOE was effectively made on 13 October 2006 when the SRSG directed that the rationale set out in a restructuring report concerning UNMIK prepared in March 2005, the so-called "Harston Report", be applied in the budget submission for 2007-2008. The Applicant misrepresented an entry into a matrix that was prepared in May and June 2006 as a decision not to close his office and that it superceded a recommendation from the Harston Report, when this entry was in reality merely a talking point inserted by the Applicant himself;

ii. The SRSG's decision to initiate an investigation into the Applicant's new employment contract to work for the Managing Directors of PTK and Pristina International Airport was appropriate in that it was reasonable to suspect criminality in circumstances where an official procures a highly lucrative contract from a company over which he exercised oversight responsibility;

iii. The Applicant was stopped and searched because he had acted suspiciously, removing boxes and an image of his hard-drive, and driving to the border;

c. The senior management of UNMIK was not involved in the conduct of the investigation, including securing his office with crime tape, displaying posters with his photo and excluding him from the UNMIK premises, which were conducted by other United Nations units, namely the Financial Investigations Unit, the Director of Administration of UNMIK and OHRM, respectively;

d.

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

30. The evidence given by Mr. Benson and Ms. John clearly indicated that it was part of their duty not simply to rubberstamp the Investigation Report and recommendation by OIOS, but to carry out an independent review of the Report. In answer to the specific question put by the Tribunal, as to whether it was open to the Ethics Office, at this stage of the review, to require of OIOS that they should address any inconsistencies or whether further enquiries should be made, Mr. Benson answered in the affirmative.

31. In his evidence before the tribunal, Mr. Benson admitted that, when reaching his conclusion, he had only read the Investigation Report and not the Annexes. He explained that he did not consider the Annexes because, based on the findings of the Investigation Report, he found no reason to do so. In response to a question from the Tribunal he stated that, had he found the Investigation Report inadequate, he would have returned the matter to ID/OIOS for further investigations. His evidence was confirmed by the testimony of Ms. John.

32. It is necessary for the Tribunal to consider whether or not any reasonable reviewer properly directing her/himself to the questions of fact and law would have seen it as part of their duty to examine the Annexes and/or requested ID/OIOS to make further enquires. In particular, did the Ethics Office fail to carry out a proper review of the complaint as required under ST/SGB/2005/21? Did they simply adopt the conclusions of the Investigation Report and its recommendations without properly assessing it, and without considering the Annexes to see whether they were consistent with the Report and recommendations?

Key documents in the case

33. The key documents in this case are the following:

a. The Applicant's complaint dated 3 June 2007 to Mr. Benson;

b. The Ethics Office's letter dated 29 July 2007 expressing a finding of *prima facie* retaliation and making a formal referral to ID/OIOS for investigation.

c. The Investigation Report and recommendations dated 8 April 2008 together with the Annexes, including the recording of the evidence obtained from each of the witnesses interviewed by OIOS;

d. The letter dated 21 April 2008 from Mr. Benson, the Director of the Ethics Office to the Applicant;

e. The letter dated 21 May 2008 from the Applicant to Mr. Benson; and

f. The letter dated 3 June 2008 from Ms. Johns to the Applicant.

The Applicant's reporting of potential misconduct—the protected activities

34. ST/SGB/2005/21, sec. 2.1(a) requires any report of potential misconduct to be made in good faith. Neither OIOS nor the Ethics Office questioned the Applicant's good faith. The Tribunal finds, after examining all the documents, and having heard and seen the Applicant give evidence, that, at all material times, he acted in good faith, even if it could be said that he was or may have been mistaken. He had reasonable grounds to entertain a suspicion of possible misconduct or

Factual inconsistencies in the Annexes

40. It is necessary to address the response made by the Ethics Office that there was no indication in the Investigation Report, based on its factual findings, to suggest that there was a need for further enquiry or examination by OIOS.

41. The Tribunal took the opportunity of studying the Annexes and found that, in a number of material respects, the witnesses' responses called for either further enquiry or a proper explanation from the Administration. Alternatively, faced with certain discrepancies, it could not reasonably be argued that the Administration discharged its burden of proof by clear and convincing evidence. Such a requirement cannot be satisfied by evidence which appears to conflict in material respects. For instance, the Tribunal discovered the following matters which emerge from an examination of the individual reports of the OIOS interviews with various individuals:

a. There was a fundamental conflict of evidence between Judge Peralta, Chief International Judge, and Mr. Borg Olivier. In particular, Judge Peralta denied issuing a search warrant saying that he did not do so and would not have done so in the circumstances;

b. Several witnesses testified to the fact that investigations into conflicts of interest were administrative by the nature and not criminal;

c. One witness described the searches of the Applicant's car and apartment as being quite Draconian. Similar sentiments were expressed by other witnesses; inBo6nesses eC .72aBBox TD/terest D/txpressed by f 7 9 tereethexpressed es eC

d. There was a consistent pattern in the evidence of several witnesses that the circumstances in which the Applicant found himself did not warrant the kind of treatment to which he was subjected to, in particular, they felt that the manner of his treatment was wholly unjustified for what was in essence an administrative issue and not a criminal matter;

e. Mr. Borg Olivier reported to the Office of the Chief Criminal Prosecutor what he considered as suspicious behavior on the part of the applicant removing boxes from his office and placing them in his car. The very act of making such a report is indicative of the fact that he considered it an appropriate matter for the prosecuting authorities.In the circumstances he would have known that, as a senior staff member, the Applicant was entitled to immunity from prosecution absent a waiver of immunity by the Secretary-General. It is clear that Mr. Borg Olivier made no effort to consider the Applicant's rights to due process. This question seems to have escaped the attention of the Ethics Office. A reasonable decision-making authority would have identified Mr. Borg Olivier's conduct as a legitimate matter for further enquiry.

42. In light of the factual inconsistencies in the Investigation Report and the Annexes, the Ethics Office should have instituted further enquiries which were material to the question that they had to determine.

The investigation of the Applicant

43. It would also have been appropriate for the Ethics Office to have questioned ID/OIOS' finding in the Investigation Report that the "[t]he investigative steps taken during this investigation were all within the jurisdiction and under supervision of the

international prosecutor and the pre-trial judge". It is not clear to the Tribunal from where the international prosecutor and the pre-trial judge should have derived such authority and on what basis they could have considered that it was appropriate to treat the Applicant as if he had somehow been deprived of his fundamental rights to due process.

44. The Security Council resolution that established UNMIK (S/RES/1244 (1999)) provides that the international civil presence, of which the international prosecutor and the pre-trial judge were components, were to maintain "civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel a0034w -28.61 -1.7 an[(dend hu[(re n)-2(ntal(seal ara..00l(

authority to initiate an investigation of the Applicant and to ascertain, at the very least, how or why and for what reason the international prosecutor could have acted with such callous disregard of the Applicant's right to due process.

The excessive nature of the actions taken against the Applicant

46. The Investigation Report made a critical comment about the way in which the Applicant was treated, but nevertheless

48. The Tribunal finds that the Ethics Office should have taken note of the fact that, as the principal agency promoting the observance of human rights norms and practices and respect for the rule of law, the United Nations could not,and would not, have countenanced or condoned such humiliating and degrading treatment of a member of its own staff. Accordingly, faced with the clear finding of detrimental treatment being meted out to the Applicant and having regard to its finding of *prima facie* retaliation, the Ethics Office should have pursued further enquiries to ascertain the reasons for such treatment. Without having done so, their finding that the treatment was not retaliatory is fundamentally flawed.

Conclusion

49. Given the burden of proof on the Administration to establish by "clear and convincing evidence" that there was no retaliation pursuant to sec. 2.2 of ST/SGB/2005/21, and given some of the unresolved questions arising from the Investigation Report and the Annexes, any reasonable reviewer would have examined the Annexes and/or would have sent the Investigation Report back to ID/OIOS for further investigations and/or clarification. The Ethics Office failed to do so, and the Respondent is consequently liable for its failures and/or omissions.

50. The Applicant's complaint is upheld.

51. The parties are invited to settle the issue of remedy failing which the Tribunal will hold a hearing on a date to be fixed, in October 2012, to determine the appropriate remedy to be afforded to the Applicant and to hear any other application that may be made, as indicated at the hearing on the merits. In this event, the parties are to inform the Tribunal on or before 1 August 2012 whether they intend calling any witnesses and producing any documents and, if so, identifying them and providing an estimate of the length of the hearing.

(*Signed*)

Judge Goolam Meeran

Dated this 21st day of June 2012

Entered in the Register on this 21st day of June 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York