



**JUDGE MARY FAHERTY, PRESIDING.**

1. On 21 June 2012, the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York rendered Judgment No. UNDT/2012/092 (Judgment on Liability). On 15 March 2013, it issued Judgment No. UNDT/2013/053 (Judgment on Relief). The two Judgments are related to the case of Wasserstrom v. Secretary-General of the United Nations . On 14 May 2013, the Secretary-General of the United Nations filed two separate appeals with the United Nations Appeals Tribunal (Appeals Tribunal) against the above-referenced UNDT Judgments, to which Mr. James Wasserstrom answered on 12 July 2013 and 15 July 2013, respectively. Also on 14 May 2013, Mr. Wasserstrom filed an appeal against Judgment on Relief, to which the Secretary-General answered on 15 July 2013. For reasons of judicial economy, all three appeals have been consolidated. In Order No. 187 (2014), the Appeals Tribunal granted an oral hearing which duly took place on 19 June 2014.

**Facts and Procedure**

2. The following findings of fact, which are taken from Judgment No. UNDT/2012/092, are not contested:<sup>1</sup>

... The Applicant, the former Head of the Office for the Coordination of Oversight of Publicly Owned Enterprises (“(O)POEs”) in the United Nations Interim Administration Mission in Kosovo (“UNMIK”), complained to the Ethics Office that he had been retaliated against for whistleblowing pursuant to ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) dated 19 December 2005.

...

... 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. ...

... He alleged that UNMIK senior officials retaliated against him because he

unauthorized and unwarranted investigation against him in the course of which he was treated in a manner that was appalling and in breach of his rights to due process.

interests. However, ID/OIOS found no evidence that these activities would have been retaliatory within the meaning of [ST/SGB/2005/21] .[2]

... 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

... In response to Mr. Benson's letter dated 21 April 2008 the Applicant identified, by letter dated 21 [M]ay 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.

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

... 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".

3. Mr. Wasserstrom appealed. There was a preliminary issue as to whether the decision

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2014-UNAT-457

Judgment on Liability

**The Secretary-General's Appeal**

6. The Secretary-General clarifies that he has filed this appeal against not only Judgment on Liability, but also Order No. 19 (NY/2010) that the Dispute Tribunal issued on 3 February 2010. In respect of Judgment on Liability, the Secretary-General clarifies that his appeal is directed at the Dispute Tribunal's conclusion that the Ethics Office's determination of no retaliation constituted an administrative decision that fell within its jurisdiction, but not at the Dispute Tribunal's conclusions that the closure of OPOE and the non-renewal of Mr. Wasserstrom's assignment with UNMIK did not co

There was therefore clear and convincing evidence that in October 2006 UNMIK would have taken the same decision to close OPOE and not to renew Mr. Wasserstrom's assignment with UNMIK.

9. The Secretary-General requests that the Appeals Tribunal vacate both UNDT Order No. 19 (NY/2010) and the UNDT Judgment on Liability.

**Mr. Wasserstrom's Answer**

10. Mr. Wasserstrom requests that the three appeals that have been filed in the case of Wasserstrom v. Secretary-General of the United Nations be consolidated as they arise from the same case and a common set of facts.

11. The Dispute Tribunal correctly found in both Order No. 19 (NY/2010) and Judgment on Liability that his application was receivable. He maintains that, contrary to the assertions made by the Secretary-General, the function of the Ethics Office is elementally different from that of the Ombudsman. There is no authority or precedent that insulates decisions of the Ethics Office from judicial review.

12. The Dispute Tribunal correctly found that the Ethics Office's failure to examine the annexes to the OIOS investigation report had a material impact on its determination of no retaliation.

13. The actions of the FIU, international prosecutors and judges are attributable to the UNMIK senior management.

Judgment on Relief

**The Secretary-General's Appeal**

14. The Dispute Tribunal erred in awarding damages for the actions and omissions of the Ethics Office, as it did not have jurisdiction over such matters. He reiterates that the Ethics Office is independent from the Secretary-General and it is not capable of making an administrative decision within the meaning of Article 2 of the UNDT Statute; it has the authority to make only recommendations to the Organization that are not binding.





22. Contrary to the Secretary-General's claim, which is made for the first time on appeal, that Mr. Wasserstrom had not requested management evaluation of the UNMIK actions, he filed an appeal with the former Joint Appeals Board

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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

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.

The Secretary-General’s appeal against the award of costs

42. From the extensive procedural facts and the posture of the Secretary-General, his refusal to comply with the production or discovery orders issued by the UNDT was deliberate and longstanding and delayed the proceedings; thus, it was frivolous and vexatious. The UNDT therefore exercised its discretion correctly in awarding costs against the Secretary-General for abuse of the judicial process. In the circumstances, the Appeals Tribunal unanimously affirms the award of costs in the amount of USD 15,000 against the Secretary-General.

### **Judgment**

43. The Appeals Tribunal, by majority with Judge Faherty dissenting, decides that in light of the UNDT’s erroneous receipt of Mr. Wasserstrom’s application, the Judgment on Liability is reversed, and the Judgment on Relief is vacated. However, the award of USD 15,000 costs against the Secretary-General is unanimously upheld.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

Entered in the Register on 29<sup>th</sup> day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar

**Judge Faherty’s Dissenting Opinion on the Receivability Issue**

Did the UNDT err in law in finding Mr. Wasserstrom’s application receivable?

1. The preliminary issue in this case is whether the UNDT correctly found that the Ethics Office’s decision of no retaliation was an administrative decision and thus subject to judicial review.
2. Article 2 of the UNDT Statute provides that the UNDT “shall be competent to hear and pass judgement on an application filed by an individual, ... against ... (a) ... an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.
3. It also establishes that “[t]he terms ‘contract’ and ‘terms of appointment’ include all pertinent regulations and rules and all relevant

7. The procedure for invoking protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations is defined in ST/SGB/2005/21.

8. Section 1 provides:

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.

9. Section 2 defines the scope of the Bulletin in the following terms:

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.

2.2 The present bulletin is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance, non-extension or termination of appointment. However,

the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity referred to in section 2.1 above.



14. Section 5.7 provides that:

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.

15. Where retaliation is established, the scope of the Ethics Office's authority to act is set out in section 6 of the Bulletin as follows:

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 Tc(2f4)7.4(liaTc.24(ere8( a-mo.0005 Tc(.9(2083 acb)3)5.4(e)-2.4s(a)7.2(a)6.1islifild)5.6n wi)7(a

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entitlements. Nowhere in the Bulletin is it a prerequisite, for the Ethics Office to admit a complaint or, for example, where retaliation is established, for it to recommend rescission or reinstatement, that the staff member was obliged to request administrative review of the retaliatory action.

23. While, as recognised in the Bulletin, it is open to staff members to request administrative review/management evaluation of an action or actions they consider retaliatory, the absence of such a step is not a bar to invoking the protections of ST/SGB/2005/21.

24. Section 6.3 of the Bulletin sets out the position as follows:

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.

25. In my view, the inclusion of that provision is not dispositive of the majority opinion in this appeal that Mr. Wasserstrom should have sought administrative review of the actions he complained of or that he cannot challenge his UNMIK termination by impugning the Ethics Office's findings. In particular, the word "may" in the above-quoted provision demonstrates that no logical or reasonable reading of ST/SGB/2005/21 makes it a pre-condition, for the initiation of a claim of retaliation, that a staff member must have sought administrative review of the actions claimed as retaliatory including where the staff member's complaint concerns wrongful/retaliatory termination of a post, assignment or secondment. Nor do the circumstances in this case permiconcerns wcas9-4.6(a6.9(eUa9(e)3f831 OyatinS.b-

policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations”, a reference to the powers given to that office under ST/SGB/2005/21, as already considered in this dissenting opinion.

27. I find therefore there is no prohibition on Mr. Wasserstrom’s entitlement to pursue a case before the Ethics Office or on his entitlement to judicially challenge a finding of no retaliation on the basis that he did not seek administrative review of his complaints. Accordingly, I would not deem his application as not receivable on this basis. Furthermore, I am satisfied that the 21

**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.

31. The Secretary-General argues that the Ethics Office is limited to making recommendations to him and the Organization. Therefore, he contends that the Ethics Office's finding of no retaliation was not a decision and submits that the legal basis for this argument lies in the decision of the Appeals Tribunal in Koda.<sup>9</sup> He argues that in Koda, the Appeals Tribunal distinguished between acts and omissions of independent entities and administrative decisions taken by the Secretary-General based on those acts and omissions. He submits that any appealable decision Mr. Wasserstrom could have is on the basis of an action taken by the Secretary-General "based on" the Ethics Office's recommendations. He likens the Ethics Office to that of the Ombudsman and relies on the decision of the former Administrative Tribunal in Perez-Soto which held that the Ombudsman only has authority to make recommendations and that therefore, the "conclusion that the Ombudsman cannot take

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<sup>9</sup> Koda v. Secretary-General of the United Nations , Judgment No. 2011-UNAT-130.

a decision, whether explicit or implicit, leads unavoidably to the fact that no appeal of her actions, advice, views, proposals, recommendations, or lack thereof is possible”.<sup>10</sup>

32. I find no merit in this argument. A comparative analysis of ST/SGB/2002/12 entitled “Office of the Ombudsman – appointment and terms of reference of the Ombudsman” and ST/SGB/2005/22 does not bear out the Secretary-General’s argument. Accordingly, I uphold the Dispute Tribunal’s finding that “[t]he Ethics Office cannot in any meaningful sense be regarded as analogous to the Ombudsman”.<sup>11</sup> The decision in Perez-Soto, which at most would have been persuasive, is of no assistance on the issue.

33. The Secretary-General maintains that as an “independent” entity, the Ethics Office cannot be amenable to him. He draws attention to General Assembly resolution 60/1 which “request[ed] the Secretary-General to submit details on an ethics office with independent status”. He cites the General Assembly mandate as binding on his office and states that he took action to establish the Ethics Office in a manner that would be consistent with its

37. In that case, the Appeals Tribunal found:

OIOS operates under the “authority” of the Secretary-General, but has “operational independence”. As to the issues of budget and oversight functions in general, the General Assembly resolution calls for the Secretary-General’s involvement. Further, the Secretary-General is charged with ensuring that “procedures are also in place” to protect fairness and due-process rights of staff members. It seems that the drafters of this legislation sought to both establish the “operational independence” of OIOS and keep it in an administrative framework. We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-General’s administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.<sup>14</sup>

38. Accordingly, the Appeals Tribunal held that “[t]o the extent that any OIOS decisions are used to affect an employee’s terms or contract of employment, OIOS’ report may be impugned”.<sup>15</sup>

39. The principle underlying our ruling in Koda is that notwithstanding an entity’s operational independence, once it is part of the Secretariat, any decision capable of affecting an employee’s terms of employment and conditions of service “may be impugned”. As the Ethics Office’s finding of no retaliation affected Mr. Wasserstrom’s terms of employment and condition of service, I see no basis to insulate the Ethics Office from the test which the Appeals Tribunal applied in Koda. <sup>16</sup>

40. Arriving at the aforesaid conclusion, I also place particular reliance, while accepting and acknowledging the “operational” independence of the Ethics Office, on sections 1 and 2 of ST/SGB/2005/22 and, in particular, section 5.7 of ST/SGB/2005/21 which provides:

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





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Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.

(Signed)

Judge Faherty

Entered in the Register on 29<sup>th</sup> day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar