

Introduction

1. This is a consolidated judgment on two separate, but similar, applications filed on 29 June 2011 by two investigators Ms. Nguyen-Kropp and Mr. Postica from the Investigations Division of the Office of Internal Oversight Services

Though these cases have not, to date, been consolidated, both the parties and the Tribunal have treated this as one combined proceeding since at least 2014. This is evident from the fact that both the Applicants and the Respondent have filed numerous submissions regarding one consolidated matter before the Tribunal. Both Applicants made similar claims. They are represented by Mr. Thad M. Guyer of the Government Accountability Project organization. These cases are now formally subject to an order for combined proceedings.

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

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

the 2 May 2011 determination by Ms. Joan Elise Dubinsky, Director of the UN Ethics Office, that retaliation was not established in [their] case. [The Applicants also challenge] the process that led to this decision, specifically in connection to the appointment of an Alternative Investigating Panel to investigate the retaliation against [them]. [They challenge] the expertise, selection process and Terms of Reference of this

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each of [their] allegations.

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

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

6. The Respondent states that judgments of the Tribunal are made with a view to protecting personal data, and made

The United Nations Tribunal U3/147/ier0c33 453.07 Tm

9. On 23 August 2010, Ms. Edwards wrote to Ms. Dubinsky to provide further

10. By interoffice memoranda dated 6 October 2010, the Applicants were advised that the Ethics Office had completed its preliminary review of their complaints and determined that there was a *prima facie* case of retaliation. They were further informed that:

As per Section 5.10 of ST/SGB/2005/21, the Ethics Office is in the process of appointing an Alternative Investigating Panel. This Panel will conduct an investigation to establish whether the detrimental actions taken against [the Applicants] constitute retaliation and

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

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

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

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

Ms. Edwards further stated:

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

14. In an evasive response, dated

were selected on the basis of their professionalism and experience, and will conduct

Cases No. UNDT/NY/2011/054

UNDT/NY/2011/055

Judgment No. UNDT/2015/110/Corr.2

Cases No. UNDT/NY/2011/054

UNDT/NY/2011/055

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

Cases No. UNDT/NY/2011/054

UNDT/NY/2011/055

Judgment No. UNDT/2015

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

Submissions after *Wasserstrom* 2014-UNAT-457

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

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

49. On 10 November 2014, the Respondent filed a re BDC BTE[(-)]50 0 1 161.78 /op>BDi2ng0 0 1 3

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

52. By Order No. 330 (NY/2014), dated 9 December 2014, the Applicants were ordered to file a concise statement of the nature of their claim, including the further

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shall normally be held in cases involving an appeal against a disciplinary measure. Other than this guidance, the decision whether to hold oral hearings in a particular

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

Scope of the cases

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

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

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

Cases No.

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

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

Article 8

1. An application shall be receivable if:

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

71. Staff rule 11.2 provides:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment ... shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative

(c) A request for management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

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

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

OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days.

5.7 Once the Ethics Office has received the investigation report, it will inform in writing the complainant of the outcome of the investigation and make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management. Those recommendations may include disciplinary actions to be taken against the retaliator.

5.8 If the Ethics Office finds that there is no credible case of retaliation or threat of retaliation but finds that there is an interpersonal problem within a particular office, it will advise the complainant of the existence of the Office of the Ombudsman and the other informal mechanisms of conflict resolution in the Organization.

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

Section 6

Protection of the person who suffered retaliation

6.1 If retaliation against an individual is establishe

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

6.3 The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding.

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

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

2 May 2011 and 23 May 2011 referred to as decisions (b) and (c) in para. 65

clearly fall within this definition. The only remaining queonly maTtd2r0 089 663.34 Tm[(The)5()-39(only

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

82. In his replies to the applications, the Secretary-General did not submit that the applications were not receivable, *ratione materiae*, because the Applicants had not requested management evaluation. Instead, he submitted that the matters

the Secretary-General. Accordingly, the actions or omissions of the Ethics Office cannot be attributed to the Organization and therefore do not constitute administrative decisions. The Respondent submits that the Ethics Office is limited to making recommendations to the Secretary-General and the Administration, which are not binding. Since the recommendations of the Ethics Office do not have direct effect, the Ethics Office do not constitute administrative decisions.

85. The Applicants submit that in accordance with sec. 6.3 of ST/SGB/2005/21, which states that the procedures under that bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms, they are entitled to seek judicial review of the decisions of the Ethics Office. They further submit that they have suffered direct legal consequences as a result of the contested decisions in that they have been denied the right to be protected from retaliation. The failure to provide them protection from retaliation resulted from a flawed and inadequate investigation and misapplication of the burden of proof provided for under ST/SGB/2005/21.

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

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

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

Cases No. UNDT/NY/2011/054

UNDT/NY/2011/055

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

91. The Ombudsman has direct access to the Secretary-General but is independent of any United Nations organ or official. The Director of the Ethics Office, on the other hand, reports directly to and is *accountable* to the Secretary-General. ST/SGB/2002/12 explicitly states that the Ombudsman has no decision-making powers; there is no corresponding provision in ST/SGB/2005/22 and, indeed, ST/SGB/2005/21 states that one of the responsibilities of the Ethics Office is to make *prima facie* case of retaliation.

Whether in law or practice (or both), it seems that the Ethics Office also has decision-making responsibilities following the receipt of an investigation report. This will be discussed further below.

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

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

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

Cases No. UNDT/NY/2011/054

UNDT/NY/2011/055

mechanism (the AIP in these cases)

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

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

101. The role and functions of the Ethics Office in responding to complaints of retaliation are set out in secs. 5 and 6 of ST/SGB/2005/21, which are reproduced,

insofar as they are relevant to the present case.

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

105. *the Ethics Office finds* that there is no and informal mechanisms of conflict resolution in the Organization. Section 5.8 therefore indicates that the Ethics Office has the power to make its own finding as to whether or not retaliation has been established.

106. This is reflected in a statement by the Organization on the website of the Ethics Office which, in a secti

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

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

s investigation report, the Ethics Office conducted an *independent analysis* of the report and all investigation case materials, and concluded pursuant to Section 2.2 of ST/SGB/200S/21 that the Administration had proven by clear and convincing evidence that the actions in question were not taken in

Section 6.3 of [ST/SGB/2005/21], Mr. Wasserstrom was not precluded from raising retaliatory motives in a challenge to the non-renewal of his appointment or to other actions taken by the

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

Hence, the Secretary-

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

111. It is clear that under secs. 6.1 and 6.2 of ST/SGB/2005/21, the Ethics Office is limited to making recommendations *once retaliation had been established*. It cannot order or oblige the Administration to take any specific actions. However, it seems apparent that the Ethics Office also has a decision-making role in that it makes the determination as to whether retaliation has in fact been established. In the present

determination that retaliation had not been established. The Ethics Office determined that the Applicants did not have the right to be protected under sec. 1.2 of ST/SGB/2005/21 because no retaliation had occurred. In this sense, the Ethics Office was making a final administrative decision, which affected the rights of the Applicants under their terms of appointment and contract of employment, and which was binding on the Admini decision on the matter.

112.

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

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

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

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

Observations

122. As stated above, as a first instance tribunal, the Dispute Tribunal is bound by the precedent of the Appeals Tribunal. However, ultimately, the questions raised in this judgment are ones of policy th227.57 10i

Cases No. UNDT/NY/2011/054

UNDT/NY/2011/055

Judgment No. UNDT/2015/110/Corr.2

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 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

[T]he Secretariat initiated an external expert review of its protection against retaliation policy in 2012-2013. Completed in the 2013-2014 reporting cycle, the expert review makes several recommendations, pursuant to emerging global best practices and considering the intent and purpose of the policy as originally formulated. Following receipt of the finalized review, the Ethics Office, in consultation with the Department of Management, the Office of Legal Affairs and OIOS, prepared a proposal on a revised protection against retaliation policy. The proposal is under review by the Executive Office of the Secretary-General. Thereafter, proposed amendments to the text of the Secretary-
Human Resources Management and submitted for consultations in

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

129.

275.

-General considers that it may be helpful for

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

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

Judgment

137. The applications are rejected.

138.