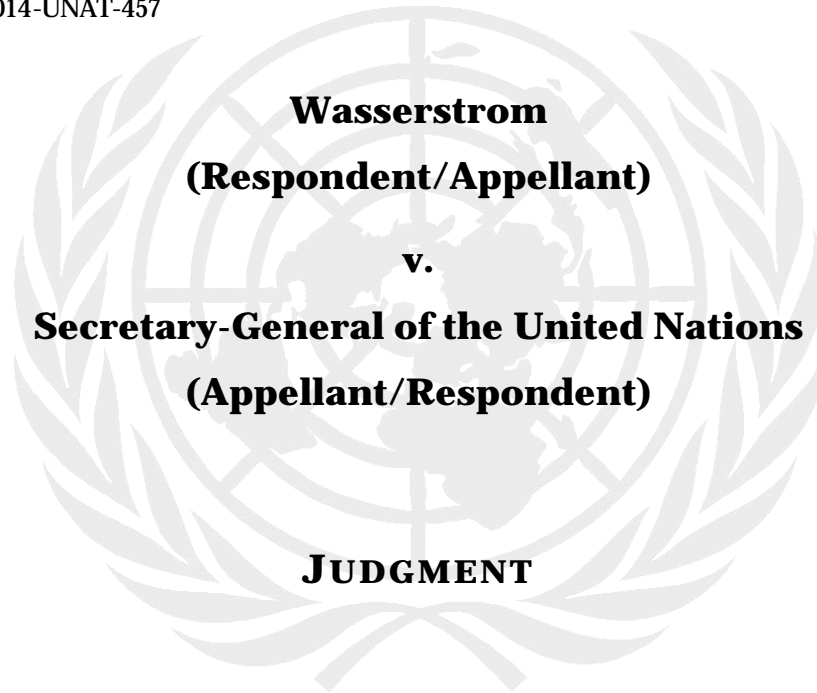




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-457



**Wasserstrom
(Respondent/Appellant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Inés Weinberg de Roca
Judge Rosalyn Chapman

Case Nos.: 2013-481, 2013-482 & 2013-483

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Mr. Wasserstrom: Mary Dorman

Counsel for Secretary-General: Rupa Mitra

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:¹

... 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 reported misconduct to, and cooperated with, the United Nations Office of Internal Oversight Services (“OIOS”). The acts of alleged retaliation against him were the closure of his office, ending his assignment with UNMIK and commencing an

¹ See Judgment No. UNDT/2012/092, paras. 1- 12. One paragraph has been relocated for easier reading.

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.

... By letter dated 29 July 2007, the Ethics Office provided its review of the Applicant's complaint and found that there was a *prima facie* case of retaliation against him. They expressed their findings as follows:

The question for the Ethics Office is whether there is a *prima facie* case that the decisions and actions taken by UNMIK vis-à-vis [the Applicant] constitute retaliation. Following its preliminary review of the matter, the Ethics Office finds that the actions taken by UNMIK against [the Applicant] were disproportionate to the alleged wrongdoing and are linked to his cooperation with OIOS. Thus, the protected activity was a contributing factor to the retaliatory actions.

The Ethics Office therefore finds a *prima facie* case of retaliation as per Section 5 of ST/SGB/2005/21.

... In accordance with the prescribed procedures, the Ethics Office submitted the case to [the Investigations Division (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. Rucker, Schook and Borg Olivier interfered in or otherwise influenced the decisions taken by the international prosecutor and the pre-trial judge in this case.

... 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 [his] 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) *appeared to be excessive* considering the administrative nature of his reported possible conflict of

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 of 21 April 2008 taken by the Director of the Ethics Office was an "administrative decision" within the meaning of Article 2(1)(a) of the UNDT Statute. In Order No. 19 (NY/2010) dated 3 February 2010, the Dispute Tribunal determined that the decision by the Director of the Ethics Office that retaliation did not occur was an administrative decision and accordingly,

^[2] The Secretary-General's Bulletin ST/SGB/2005/21 is entitled "Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations" (Bulletin).

Mr. Wasserstrom's application was receivable. The Secretary-General appealed UNDT Order No. 19 (NY/2010). In Judgment No. 2010-UNAT-060 dated 1 July 2010, the Appeals Tribunal dismissed the Secretary-General's interlocutory appeal as not receivable. The Appeals Tribunal was of the view that the question of whether the Director's decision constituted an appealable administrative decision went directly to the merits of the case, which could not be decided before the Dispute Tribunal rendered a judgment on the merits.

4. In Judgment on Liability, the Dispute Tribunal upheld Mr. Wasserstrom's complaint of retaliation. The UNDT concluded that the Ethics Office had failed to carry out an independent and proper review of the OIOS investigation report by not making further inquiries into the factual inconsistencies in the investigation report and its annexes, and that its uncritical acceptance of the OIOS conclusion of no retaliation was an error in law.

5. In Judgment on Relief, the Dispute Tribunal dismissed Mr. Wasserstrom's claims regarding compensation for lost earnings and associated benefits, as that was not the case that was brought up in his UNDT application and the United Nations Development Programme (UNDP), his parent agency, was not a party to the UNDT proceedings. While the UNDT found that Mr. Wasserstrom had engaged in protected activity and that he was subsequently subject to "insensitive and degrading treatment", it did not find a sufficiency of evidence to support his assertion that the closure of OPOE and the ending of his assignment with UNMIK were acts of retaliation. The Dispute Tribunal, however, found that the failure of the Ethics Office to properly and diligently examine OIOS' investigation report violated Mr. Wasserstrom's right to a fair and competent consideration of facts, denied him a remedy, compelled him to institute the UNDT proceedings and caused him "severe distress and public humiliation". As compensation for those "non-pecuniary damages at the extreme top of the end of the scale", the Dispute Tribunal awarded Mr. Wasserstrom the sum of USD 50,000. In addition, the Dispute Tribunal ordered the Secretary-General to pay Mr. Wasserstrom the sum of USD 15,000 as a contribution towards the latter's costs for having to challenge the Secretary-General's position on disclosure, as it found that the Secretary-General had "deliberately and persistently refus[ed], without good cause, to abide by the Orders of the [Dispute] Tribunal", and engaged in "a manifest abuse of proceedings".

*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 constitute retaliation, which, in the view of the Secretary-General, were correct and should remain undisturbed.

7. The Secretary-General submits that the UNDT erred in finding that Mr. Wasserstrom's application challenging the Ethics Office's determination of no retaliation was receivable. He is of the opinion that the Ethics Office's conclusion was not a decision taken by the Administration and it did not carry direct legal consequences for the terms and conditions of Mr. Wasserstrom's appointment. In this connection, the Secretary-General refers to this Tribunal's jurisprudence on independent entities such as OIOS in *Koda*³ in support of his position that the acts and omissions of the Ethics Office do not constitute administrative decisions falling within the competence of the Dispute Tribunal, although actions taken by the Administration based on the Ethics Office's recommendations would be appealable administrative decisions. He also refers to the jurisprudence of the former Administrative Tribunal in *Perez-Soto* concerning the Ombudsman's Office.⁴

8. The Secretary-General also submits that the Dispute Tribunal erred in finding 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. He contends that even if the Ethics Office had reviewed the annexes to the OIOS investigation report, its determination that the conduct of the Financial Investigation Unit (FIU), UNMIK, during its investigation did not constitute retaliation would have remained unchanged. In this connection, the Secretary-General notes that the decision to close OPOE was made in October 2006 based on an earlier recommendation made in July 2005, and that Mr. Wasserstrom made reports of misconduct from February to May 2007.

³ *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130.

⁴ Former Administrative Tribunal Judgment No. 1359 (2007).

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.

15. The Dispute Tribunal erred in awarding Mr. Wasserstrom damages for the actions taken during the FIU investigation by the international prosecutors and international judges over which UNMIK had no control.

16. The Dispute Tribunal erred in awarding Mr. Wasserstrom damages for actions of UNMIK (such as being stopped at the Greek border, the taking away of his passport and his United Nations ground pass, armed escort back to his apartment, the searches of his car and residence without a proper warrant, the sealing off of his office and the cordoning off of his office with crime scene tape and the use of posters in barring him from UNMIK facilities as well as the lack of advice on his right to representation) that were never the subject of management evaluation, and were thus outside the scope of the UNDT's jurisdiction. The Secretary-General recalls that Mr. Wasserstrom contested only the adequacy of the Ethics Office's review of those UNMIK actions.

17. In respect of the UNDT's award of costs for abuse of process, the Secretary-General submits that this was an error in law. In his view, the filing of an appeal of an issue that had not yet been settled cannot constitute an abuse of process. When a party is ordered by the UNDT to disclose confidential documents, that party may opt for the non-disclosure of those documents, and the UNDT may draw whatever inferences are reasonable from such non-disclosure, rather than finding a manifest abuse of process, as the Dispute Tribunal did in the present case.

18. The Secretary-General requests that the Appeals Tribunal vacate the Judgment on Relief in its entirety.

Mr. Wasserstrom's Answer

19. The Dispute Tribunal correctly awarded damages for the actions or omissions of the Ethics Office.

20. There was no error in the Dispute Tribunal's review of his complaint of retaliation.

21. The UNDT correctly awarded damages for actions of the international prosecutor and international judge.

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 in October 2008, thus satisfying all the administrative conditions precedent prior to his case being transferred to the Dispute Tribunal.

23. The Dispute Tribunal correctly awarded costs against the Secretary-General for abuse of process.

Mr. Wasserstrom's Appeal

24. Mr. Wasserstrom clarifies that he is appealing only the portion of the Judgment on Relief that found that the abolition of his post and non-renewal of his contract were not retaliatory, and the consequent failure to award him compensation for his wrongful termination.

25. The Dispute Tribunal violated its procedure and scope of authority by reversing *sua sponte* its previous finding in the Judgment on Liability, which upheld his complaint of retaliation in its entirety, including his claim that his position had been unlawfully abolished in retaliation for whistleblowing, in contravention of Article 12 of the UNDT Statute.

26. The Dispute Tribunal's findings that the timing of the closure of OPOE and the abolition of his post were not retaliatory are errors of fact and law, unsupported by substantial evidence in the record and are manifestly unreasonable.

27. The decision to abolish Mr. Wasserstrom's post was taken by UNMIK and not UNDP. Thus, in his view, the suggestion by the Dispute Tribunal that his claim in this regard should have been brought against UNDP "is a smokescreen, as illustrated by the [Dispute] Tribunal's own contradictory and confusing findings" in the Judgment on Relief.

28. Mr. Wasserstrom requests that, given the findings in the Judgment on Liability that the acts of retaliation against him were so egregious, the Appeals Tribunal award him two years' net base salary, an amount contemplated in the Statute of the Appeals Tribunal, as standard compensation for wrongful termination. In his view, there is no justification to deviate downwards from that figure. Mr. Wasserstrom also requests that, given that the harm inflicted upon him was so extreme, the Appeals Tribunal award him the full value of his lost emoluments, in addition to his salary and the attendant moral damages arising from the abolition of his post and non-renewal of his contract.

The Secretary-General's Answer

29. Contrary to Mr. Wasserstrom's submissions, the Dispute Tribunal did not reverse its previous findings. The Secretary-General notes that the UNDT never held that the closure of OPOE and the ending of his UNMIK assignment on secondment were retaliatory or that his case was one of termination of employment. He also notes that the Dispute Tribunal never found that Mr. Wasserstrom's 10 October 2006 communication was a protected act.

30. Mr. Wasserstrom has failed to show that the Dispute Tribunal committed any error when it rejected his claims that the closure of OPOE and the ending of his UNMIK assignment were retaliatory and when it rejected his claims for compensation as a result of the ending of his UNDP appointment.

31. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Wasserstrom's appeal of the Judgment on Relief in its entirety.

Considerations

The receivability issue

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

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

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

a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the

administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.⁵

35. The key characteristic of an administrative decision subject to judicial review is that the decision must “produce[] direct legal consequences” affecting a staff member’s terms or conditions of appointment. “What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.”⁶

36. Mr. Wasserstrom’s contract expired on 30 June 2007. Prior to that, on 24 May 2007, he signed an employment agreement with the Post and Telecommunications of Kosovo Joint Stock Company and Pristina International Airport Joint Stock Company. This employment agreement was concluded without Mr. Wasserstrom seeking a prior advisory opinion about whether signing the contract would constitute a conflict of interest. It was therefore appropriate for his supervisors to question the propriety of him entering into a lucrative agreement with two publicly owned enterprises which he was charged with overseeing.

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

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

39. Mr. Wasserstrom was granted special leave with pay and protected status as a “whistleblower” pending investigation by OIOS (Bulletin, Section 5.6). After the completion of

⁵ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V. See *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-365; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313; *Al-Surkhi et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-304.

⁶ *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18, citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.

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 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

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

(Signed)

Weicheng Lin, Registrar

Judge Faherty's Dissenting Opinion on the Receptability 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 administrative issuances in force at the time of alleged non-compliance". Thus, whether or not the UNDT may receive an application from a staff member will in the first instance lead the UNDT to consider whether there has been an administrative decision which affects a staff member's contract of employment or terms of appointment.

4. As the Appeals Tribunal has held in *Andati-Amwayi*, "[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision".⁷

5. The primary basis for the Secretary-General's appeal in the present case is that the fundamental nature of the entity in question, that is, the Ethics Office, and its relationship with the Secretary-General is such that it removes the actions of the Ethics Office from the scope of judicial review.

6. Before considering the Secretary-General's argument, it is necessary to set out in some detail the administrative provisions under consideration in this appeal.

⁷ *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 19.

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.

2.3 The transmission or dissemination of unsubstantiated rumours is not a protected activity. Making a report or providing information that is intentionally false or misleading constitutes misconduct and may result in disciplinary or other appropriate action.

10. Section 3 provides that reports of misconduct should be made through the established internal mechanisms including “to the Office of Internal Oversight Services [OIOS]”.

11. Section 5 designates the Ethics Office as the authority to which individuals who believe that retaliatory action has been taken against them should forward all information and documentation.

12. Section 5.2 outlines the functions of the Ethics Office in this regard in the following terms:

- (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.

Section 5.5 provides:

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. ...

13. Once a *prima facie* case has been established, the protections which the Ethics Office may afford a complainant are as follows:

Pending the completion of the investigation, the Ethics Office may recommend that the Secretary-General take appropriate measures to safeguard the interests of the complainant, including but not limited to temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant within or outside the complainant’s office or placement of the complainant on special leave with full pay.⁸

⁸ Section 5.6, ST/SGB/2005/21.

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 the Ethics Office not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the Secretary-General. The Secretary-General will provide a written response on the recommendations of the Ethics Office to the Ethics Office and the department or office concerned within a reasonable period of time.

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

16. Once promulgated in 2005, ST/SGB/2005/21 was imported into the terms of appointment and conditions of service of the United Nations staff members.

17. A plain reading of the Bulletin demonstrates that individuals, including staff members, covered by the Bulletin have a duty to report in good faith any breach of the Organization's Regulations and Rules. This duty is mirrored by the statutory protection and remedies set out in the Bulletin to aid and support staff members who believe retaliatory action has been taken against them for their having reported misconduct or cooperated with a duly authorized audit or investigation.

18. Mr. Wasserstrom invoked the process set out in ST/SGB/2005/21 on 3 June 2007 when he lodged a complaint with the Ethics Office of retaliatory action by UNMIK. As recorded in the OIOS Report of 8 April 2008, he claimed that as a consequence of his cooperation with OIOS, after reporting misconduct to it, senior UNMIK officials retaliated against him by terminating his UNMIK employment contract; closing OPOE and commencing an unauthorized and unwarranted investigation against him. The Ethics Office concluded that by submitting a report of misconduct to OIOS and cooperating with the duly authorized audit, Mr. Wasserstrom engaged in a “protected activity” within the meaning of section 2 of the Bulletin.

19. On 12 July 2007, pursuant to its mandate under Section 5.5 of ST/SGB/2005/21, the Ethics Office referred a case of reported retaliation against Mr. Wasserstrom to the ID/OIOS for investigation. Moreover, on the same date, in accordance with section 5.6 of the Bulletin, the Ethics Office recommended that Mr. Wasserstrom’s special leave with full pay be extended until the OIOS investigation was completed, a recommendation acted on by the Administration.

20. It has not been suggested that the preliminary investigation conducted by the Ethics Office prior to the referral to OIOS did not meet the standard set out in Section 5 of the Bulletin. The Ethics Office’s preliminary report found a *prima facie* case of retaliation, stating that “the actions taken by UNMIK against Mr. Wasserstrom were disproportionate to [his] alleged wrongdoing and are linked to his cooperation with OIOS”.

21. Other than what is contained in section 1.4, the Bulletin does not list the specific nature of likely retaliatory actions but it is logical and reasonable to assume that because the range of recommendations open to the Ethics Office, once retaliation is found, includes reinstatement, the Ethics Office can adjudicate on an alleged retaliatory termination of a post, assignment or secondment.

22. The provisions of Sections 5.1, 5.5 and 5.6 of ST/SGB/2005/21, when read together with the provisions of section 6.1, provides the Ethics Office with the power to admit, investigate and determine retaliation complaints and to recommend, in cases where retaliation is established, *inter alia*, the rescission of the retaliatory decision and/or reinstatement of the individual concerned. This power, in turn, confers on staff members believing themselves to have been retaliated against both substantive and procedural

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 permit a conclusion that simply because his complaints include an allegation of wrongful termination of his UNMIK post, he is not entitled to have the Ethics Office's finding of no retaliation judicially scrutinised.

26. That there is no statutory obligation on a staff member who invokes the intervention of the Ethics Office to firstly seek administrative review is, to my mind, further underscored by the provisions of Section 3.2 of ST/SGB/2005/22, which provides that "[t]he Ethics Office will not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances, with the exception of certain functions assigned to the Ethics Office under section 3.1(b)". Pursuant to the latter subsection, the Ethics Office is given the task of "[u]ndertaking 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”, 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 April 2008 finding by the Ethics Office of no retaliation had a direct consequence for Mr. Wasserstrom’s terms of employment and conditions of service because that finding brought the complaint he had initiated pursuant to ST/SGB/2005/21 to an end and thus prevented him, rightly or wrongly (and this is a matter for consideration on the merits), from pursuing or being afforded any of the remedies provided for in Section 6.1 of ST/SGB/2005/21. Thus, the Ethics Office’s determination of no retaliation clearly and unequivocally impacted on Mr. Wasserstrom’s terms and conditions of employment.

28. I turn now to the Secretary-General’s primary legal arguments on receivability. The question to be determined in the context of the legal argument is whether the Ethics Office’s finding of no retaliation constituted an “administrative decision” capable of being brought within the scope of judicial review. The requirement that the determination affected Mr. Wasserstrom’s terms of employment and conditions of service has been satisfied. The issue is whether it is a decision taken by the Administration.

29. To address this question, one must look to the nature of the Ethics Office itself and its place within the framework of the Organization.

30. ST/SGB/2005/22 provides, *inter alia*, as follows:

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.

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*.⁹ 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

⁹ *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”.¹⁰

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”.¹¹ 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 independent status, including stating in his report to the General Assembly that the Ethics Office would be “located outside the Executive Office of the Secretary-General in order to guarantee its independence”.¹²

34. In resolution 60/254, the General Assembly endorsed the responsibilities of the Ethics Office “as outlined by the Secretary-General in his report and as established by the Secretary-General’s bulletin”.¹³

35. Notwithstanding the arguments set out above, I do not consider them to be dispositive of the issue particularly when the provisions of ST/SGB/2005/21 and ST/SGB/2005/22 are read together.

36. The question of whether the “independence” of the Ethics Office is such that it prevents a judicial review of its findings is more properly addressed by considering the ruling of the Appeals Tribunal in *Koda*.

¹⁰ Former Administrative Tribunal Judgment No. 1359 (2007) VI.

¹¹ UNDT Order No. 19 (NY/2010), para. 20.

¹² A/60/568, para. 22.

¹³ A/RES/60/254, para. 16(c).

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.¹⁴

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”.¹⁵

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*.¹⁶

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 Management. Those recommendations may include disciplinary actions to be taken against the retaliator.

¹⁴ *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130, para. 41.

¹⁵ *Ibid.*, para. 42.

¹⁶ Also see *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-135 for a discussion of the status of the Office of Staff Legal Assistance (OSLA) within the Organization.

41. Taking into consideration the entitlements provided to staff members pursuant to Sections 2, 5 and 6 of ST/SGB/2005/21, it is inconceivable that a finding of the Ethics Office pursuant to its statutory mandate can be otherwise than an “administrative decision” capable of review by the Dispute Tribunal. To hold otherwise would render nugatory the substantive protection and remedies afforded to staff members under ST/SGB/2005/21.

42. In all of those circumstances, I find that Mr. Wasserstrom’s application to the UNDT is receivable and I uphold the Dispute Tribunal’s determination in this regard, as reflected in UNDT Order No. 19 (NY/2010). As the decision of the Appeals Tribunal (by a majority) has deemed Mr. Wasserstrom’s application not receivable, any consideration by me of the Secretary-General’s appeals against UNDT Judgment No. UNDT/2012/092 and UNDT Judgment No. UNDT/2013/053 has been rendered moot,¹⁷ as is Mr. Wasserstrom’s appeal against UNDT Judgment No. UNDT/2013/053.

¹⁷ Save the Secretary-General’s appeal against the award of costs which the Appeals Tribunal unanimously dismisses.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Faherty

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

(Signed)

Weicheng Lin, Registrar