

UNDT/2015/110, Nguyen-Kropp

UNAT Held or UNDT Pronouncements

The Tribunal was not persuaded by the Respondent's submission that because the Ethics Office is independent, its acts and/or omissions are not subject to judicial review. However, the Tribunal found that, given the current state of the jurisprudence, it had 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 the applications are not administrative decisions subject to judicial review.

Decision Contested or Judgment/Order Appealed

Two investigators from the Office of Internal Oversight Services contested: (a) decisions of the Ethics Office regarding the expertise, selection process and Terms of Reference of an alternative investigating panel ("AIP") set up to investigate their complaints of retaliation; (b) the decision of the Ethics Office Director that retaliation had not been established; and (c) the decision of the Ethics Office Director not to provide the Applicants with a copy of the AIP report.

Legal Principle(s)

On the nature of the decision taken by the Ethics Office in these cases and Wasserstrom 2014-UNAT-457 It is difficult to reconcile the finding of the Appeals Tribunal in Wasserstrom 2014-UNAT-457 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(2) and 5.8 of ST/SGB/2005/21, and the Organization's own reference to the Ethics Office making "final determination[s]" on the website of the Ethics Office. 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 cases, the "independent analysis" of the Ethics Office resulted in a final 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 Administration in that it was the Organization's final decision on the matter. On whether acts or omissions of the Ethics Office can be reviewed by the Dispute Tribunal Having considered the role and functions of the Ethics Office in relation to retaliation complaints, the Tribunal is not persuaded by the Respondent's submission that, because the Ethics Office is independent, the acts or omissions of the Ethics Office "cannot be attributed to the Organization", and therefore cannot be reviewed by the Dispute Tribunal. The Director of the Ethics Office is appointed by Secretary-General and makes determinations on the rights of staff members under a bulletin—ST/SGB/2005/21—promulgated by the Secretary-General. Regardless of whether the Ethics Office has operational independence, the Tribunal cannot see how a final decision on the rights of staff members under a United Nations policy, taken by a staff member of the United Nations Secretariat, cannot be attributable to the Organization. Conclusion With respect, this Tribunal agrees with the conclusion of Judge Faherty, set out in her dissenting opinion in Wasserstrom. 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. 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 are not administrative decisions subject to judicial review. Ultimately, the questions raised in this judgment are ones of policy that should be decided by the Secretary-General, as the chief administrative officer of the Organization (art. 97 of the United Nations Charter), in consultation with Member States. The stated purpose of the Organization's policy on retaliation is to ensure that 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. If final decisions by the Ethics Office determining that retaliation has not occurred in a particular case are to remain immune from judicial review and scrutiny, the United Nations' policy on retaliation should clearly state this. The Tribunal invites Member States and the Secretary-General to make their intentions clear in this regard in any amendments to ST/SGB/2005/21.

Outcome

Dismissed as not receivable

Full judgment

[Full judgment](#)

Applicants/Appellants

Nguyen-Kropp

Entity

OIOS

Case Number(s)

UNDT/NY/2011/054

UNDT/NY/2011/055

Tribunal

UNDT

Registry

New York

Date of Judgement

11 Nov 2015

Duty Judge

Judge Meeran

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Ethics office

Retaliation

Investigation

Standard of review (judicial)

Applicable Law

Secretary-General's bulletins

- ST/SGB/2002/12
- ST/SGB/2005/21
- ST/SGB/2005/22
- ST/SGB/2008/5

Staff Rules

- Rule 11.2

UNDT RoP

- Article 16.1

UNDT Statute

UNAT Statute

- Article 2.1(a)

Related Judgments and Orders

UNDT/2011/063

UNDT/2012/092

UNDT/2013/176

2010-UNAT-060

2014-UNAT-457

2015-UNAT-509

2014-UNAT-444

2012-UNAT-238

2011-UNAT-130