



Before: Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Introduction

1. By application registered under Case No. UNDT/GVA/2021/024, the Applicant contests “the decision not to implement the recommendations of the Alternate Chair of the Ethics Panel, the decision not to provide interim protection measures, [and] the decision to refer her retaliation case for investigation by [the Office of Internal Oversight Service (“OIOS”)]”.

2. For the reasons outlined below, the Tribunal rejects the application in its entirety.

Facts

Background facts (2015-2016 requests for protection against retaliation (“PaR”))

3. On 15 July 2016, the Applicant requested protection against retaliation to the United Nations Ethics Office (“Ethics Office” or “UNEO”) under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

4. By a strictly confidential memorandum of 7 October 2016, the Ethics Office informed the Applicant of its determination that:

a. Some of the activities that she had engaged in did constitute protected activities under ST/SGB/2005/21, but that most did not; and

b. There was no *prima facie* case that the protected activities were a contributing factor in causing the alleged retaliation.

5. On 13 October 2016, the Director, UNEO, upon the Applicant’s request, agreed to reopen the Applicant’s request for protection against retaliation.

6. On 30 January 2017, the Applicant’s case was referred to the then Alternate Chair (“2017 Alternate Chair”) of the Ethics Panel of the United Nations (“EPUN”) under ST/SGB/2017/2 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) (“new policy”), which had entered into force on 20 January 2017.

7. By memorandum dated 10 April 2017, the 2017 Alternate Chair, EPUN, communicated her findings to the Applicant. She *inter alia* agreed with the previous decision of 7 October 2016 from the Director, UNEO, (see para. 4 above). Concerning information sharing with a Member State, the 2017 Alternate Chair, EPUN, concluded that the Applicant's allegations against the Chief, Human Rights Council Branch ("HRCB"), Office of the United Nations High Commissioner for Human Rights ("OHCHR"), did not constitute reports of misconduct as the conduct "was within the authority of the staff member, well-known to senior leaders in OHCHR" and did not lead to any investigation.

8. On 27 April 2017, pursuant to the new policy, the Applicant requested a second review of her request for protection against retaliation. The Applicant's request was assigned to the then Second Alternate Chair of the EPUN ("2017 Second Alternate Chair").

9. In her report dated 27 February 2018, the 2017 Second Alternate Chair found no case of retaliation. However, she made a number of recommendations, including that the Applicant and OHCHR engage in "a comprehensive ad hoc mediation".

10. On 11 September 2018, the Applicant filed an application before this Tribunal challenging "the procedure by which her [July 2016] request for protection from retaliation was processed, the failure to protect her from retaliation and the failure to follow up on Ethics Office recommendations subsequent to her request for protection from retaliation". The UNDT adjudicated this matter by Judgment *Reilly* UNDT/2020/097, which the UNAT affirmed in *Reilly* 2021-UNAT-1079.

Facts directly relevant to the instant case

11. On 14 August 2019, a former UN staff member, made a complaint for misconduct against the former Deputy High Commissioner ("the former DHC"), OHCHR, to the High Commissioner, OHCHR. The Applicant was named in the complaint as a co-researcher of the supporting information and co-filer of it.

12. On 10 September 2019, the Applicant filed with OIOS a complaint for misconduct against the former DHC, OHCHR, on the same grounds as the above-mentioned 14 August 2019 complaint.

13. In October 2019, the Applicant was transferred from HRCB, OHCHR, to a P-3 post in the Human Rights Economic and Social Issues Section, OHCHR.

14. On 3 October 2019, following the above-mentioned complaints, the Applicant filed a request for protection against retaliation with the Ethics Office. She indicated in her request her belief that “the entire EPUN ... has a clear conflict of interest” and requested “immediate external referral of [her] complaint”.

15. On 5 October 2019, the Ethics Office communicated to the Applicant that it did not consider itself conflicted to address her request.

16. On 25 October 2019, the Ethics Office communicated to the Applicant that it found the report against the former DHC, OHCHR, to be a protected activity but that it did not find a *prima facie* link to the transfer decision complained of (“first determination”).

17. On the same day, the Applicant requested a review of the first determination to the then Alternate Chair, EPUN, who retired at the end of November 2019.

18. On 13 December 2019, the new Alternate Chair, EPUN (“December 2019 Alternate Chair”), informed the Applicant of the decision to reassign her case to the Ethics Adviser, UNFPA. The Applicant objected to this reassignment.

19. On 6 February 2020, the Chef de Cabinet updated the Secretary-General’s delegation of authority to the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) concerning certain decisions and actions pursuant to *inter alia* ST/SGB/2017/2/Rev.1.

20. On 13 February 2020, the Ethics Adviser, UNFPA, communicated to the Applicant that she had unilaterally closed the case due to the latter’s refusal to consent that the case be assigned to her.

21. On 12 March 2020, the December 2019 Alternate Chair, informed the Applicant that her request for review would be passed onto the new Alternate Chair (the “March 2020 Alternate Chair”), EPUN, namely the then Director, UNEO, Office of the United Nations High Commissioner for Refugees.

22. On 27 July 2020, the March 2020 Alternate Chair issued his report.

23. On 28 July 2020 the Director, UNEO, communicated the March 2020 Alternate Chair’s report and recommendations to the Chef de Cabinet.

24. By note dated 30 July 2020, the Chef the Cabinet:

a. Informed the USG/DMSPC that she had written to the then High Commissioner, OHCHR, to let her know the outcome of the March 2020 Alternate Chair’s review, and that OHCHR would need to review the recommendations therein; and

b. Requested the advice of the USG/DMSPC on the matter.

25. By note dated 21 September 2020, the USG/DMSPC responded to the Chef the Cabinet. The note reads in its relevant part as follows:

5. Pursuant to the instrument of delegation of authority issued by the Secretary-General and conveyed to me by note from you dated 6 February 2020, I am vested with authority to decide on appropriate measures to take in respect of recommendations under the [Protection Against Retaliation] Policy. Given the foregoing however, I do not accept the recommendations made by the Alternate Chair in this matter.

6. Accordingly, I will inform the Director, UNEO that the Administration is not prepared to implement the recommendations of the [March 2020 Alternate Chair]. Additionally, I will ask whether the Director, UNEO intends to transmit this matter for investigation to OIOS for review as is provided in the [Protection Against Retaliation] Policy.

26. On the same day, the USG/DMSPC addressed a note to the Director, UNEO, to inform the Ethics Office that the Organization would not implement the recommendations of the March 2020 Alternate Chair. One of the reasons that the USG/DMSPC cited in support of this decision was that the March 2020 Alternate Chair “exceeded his mandate in carrying out his review and making his findings”.

27. By note dated 5 October 2020, the Director, UNEO, *inter alia* informed the Chef the Cabinet that he believed there was “at least an appearance of conflict of interest in OIOS conducting an investigation into the Applicant’s request for protection against retaliation”. Consequently, he recommended to the Secretary-General “that the complaint be referred to an alternative investigating mechanism, in accordance with section 8.2 of ST/SGB/2017/2/Rev.1”.

28. By memorandum also dated 5 October 2020, the Director, UNEO, *inter alia* communicated to the Applicant:

- a. The Organization’s decision not to implement the recommendations of the March 2020 Alternate Chair;
- b. His decision to recommend to the Secretary-General to refer her complaint to an alternative investigative mechanism instead of to OIOS; and
- c. That the UNEO would contact her “to determine whether appropriate measures to safeguard [her] interests should be recommended to the Secretary-General, pending completion of the investigation”.

29. By note dated 16 October 2020, the USG/DMSPC responded to the above-mentioned 5 October 2020 note of the Director, UNEO, to the Chef the Cabinet concerning the referral to an alternative investigating mechanism. In her note, the USG/DMSPC, *inter alia*:

- a. Confirmed having the delegation of authority to decide on such recommendation; and
- b. Conveyed the decision to have the Ethics Office refer the matter to OIOS instead of an alternative investigating mechanism.

30. By email of 23 October 2020, the UNEO wrote to the Applicant indicating *inter alia* that:

- a. They had not reached out to her regarding interim protection measures due to the Applicant having claimed a conflict of interest on the part of the UNEO in treating the case; and
- b. That the matter would not be referred to an alternative investigative mechanism but to OIOS for investigation.

31. By note dated 26 October 2020 to the USG/DMSPC, the Ethics Office *inter alia*:

- a. Acknowledged receipt of the USG/DMSPC's above-mentioned note of 16 October 2020;
- b. Confirmed that pursuant to said 16 October 2020 note, the matter would be referred to OIOS; and
- c. Requested a decision of the USG/DMSPC on the March 2020 Alternate Chair's recommendation related to interim protection measures for the Applicant, which was not addressed in her 21 September 2020 note to the Chef the Cabinet (see para. 25 above).

32. By memorandum also of 26 October 2020, the Ethics Office referred the Applicant's case to OIOS for investigation.

Procedural history

33. On 3 December 2020, the Applicant requested management evaluation "of the decision not to implement Ethics Office recommendations for protection from retaliation and in relation to the treatment of her request for protection from retaliation".

34. On 16 April 2021, the Applicant filed the application referred to in para. 1 above.

35. On 26 May 2021, the Respondent filed his reply, *inter alia*, contesting the receivability of part of the application.

36. Following the completion of two appeals of the Applicant before the United Nations Appeals Tribunal (“Appeals Tribunal” or “UNAT”), the instant case was assigned to the undersigned Judge on 3 April 2023.

37. Pursuant to Order No. 27 (GVA/2023) of 5 April 2023:

- a. The Applicant filed a rejoinder on 21 April 2023; and
- b. The Tribunal held a case management discussion (“CMD”), on 26 April 2023, which concerned the instant case and Case No. UNDT/GVA/2021/054 (Reilly).

38. At the CMD, the Tribunal acknowledged that the factual background of the two cases is closely intertwined. Consequently, it instructed the parties that evidence in one case could be brought forward in the other without having to refile it in whichever case it was missing.

39. In response to Order No. 48 (GVA/2023) issued after the CMD, the Respondent filed, on 24 May 2023, documents/communications concerning the 27 July 2020 review conducted by the March 2020 Alternate Chair. Nine of the documents that the Respondent filed were submitted *ex parte* (i.e., annexes II(a), II(b), III, IV, V, VI, IX, X and XI).

40. By Order No. 54 (GVA/2023) of 26 May 2023, the Tribunal, *inter alia*:

- a. Shared with the Applicant the above-mentioned *ex parte* annexes on an under seal basis; and
- b. Gave the Applicant the opportunity to supplement her 21 April 2023 rejoinder.

41. On 15 June 2023, in response to Orders No. 48 (GVA/2023) and No. 54 (GVA/2023), the Applicant supplemented her rejoinder. In her submission, the Applicant indicated that although she stood ready to provide oral evidence, she considered that adjudication of her matter on the papers was sufficient.

42. By Order No. 92 (GVA/2023) of 3 August 2023, the Tribunal:
- a. Ordered the Respondent to file an additional document related to the delegated authority of the USG/DMSPC to decide on appropriate measures to take in respect of recommendations under ST/SGB/2017/2/Rev.1;
 - b. Gave the Applicant the opportunity to submit comments, if any, on the above-mentioned Respondent's filing; and
 - c. Ordered the parties to file their respective closing submission.
43. On 7 August 2023, the Respondent filed the document referred to in para. 42.a above.
44. On 30 August 2023, the Applicant filed comments on the document that the Respondent filed on 7 August 2023.
45. On 8 September 2023, the parties filed closing submissions.

Consideration

Receivability and scope of judicial review

46. The Respondent argues that part of the application is not receivable. He submits that determinations and recommendations of the Ethics Office do not constitute administrative decisions and are not subject to challenge under Chapter XI of the Staff Rules pursuant to Section 10.3 of ST/AI/2017/2/Rev.1. He also alludes to the jurisprudence of the Appeals Tribunal on this issue and specifically refers to Judgment *Reilly* 2021-UNAT-1079.
47. The Tribunal recalls that it is obliged to interpret and identify what the “contested decision” is according to the applicable law. In *Massabni* 2012-UNAT-238 (para. 25), the Appeals Tribunal held that

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 parties' contentions.

48. The above jurisprudence requires that the Tribunal considers the application, the applicable legal framework, and the features of the internal legal system as a whole to ensure a harmonious and coherent case law.

49. It is settled law and undisputed in this case, that recommendations of the Ethics Office do not constitute administrative decisions subject to challenge. From its examination of the parties' submissions, the Tribunal determines that the Applicant is contesting the Organization's decisions to:

- a. Not to implement the recommendations of the March 2020 Alternate Chair;
- b. Not to provide interim protection measures; and
- c. Refer the matter to OIOS for investigation.

50. The Respondent's objection to the receivability of certain aspects of the application ignores the crucial fact that the inactions and actions in issue fall in the ambit of the Respondent's statutory responsibilities, rather than those of the Ethics Office. The inactions and actions in issue are therefore accountable on the Respondent and not the Ethics Office. The legal position propounded by the Respondent is correct, but the jurisprudence sought to be relied on is inapplicable to the facts of the case.

51. The foregoing interpretation is further supported by sec.10.1 of ST/SGB/2017/2/Rev.1, which provides that the action or non-action of the Administration on a recommendation from the Ethics Office under section 8 will constitute a contestable administrative decision under chapter XI of the Staff Rules if it has direct legal consequences affecting the terms and conditions of appointment of the complainant.

52. The Tribunal therefore finds that the application is receivable insofar as it challenges the above-mentioned three decisions.

Merits

The decision not to implement the March 2020 Alternate Chair's recommendations

53. When judging the validity of the exercise of discretion in administrative matters, the role of the Tribunal is limited to determining if “the decision is legal, rational, procedurally correct and proportionate”. In so doing, the Tribunal is barred from considering the correctness of the choice of the decision-maker, and from substituting its own decision for that of the decision-maker (see *Sanwidi* 2010-UNAT-084 (para. 40)).

54. The Applicant *inter alia* challenges the legality of the decision not to implement the recommendations of the March 2020 Alternate Chair.

The Respondent's arguments

55. The Respondent maintains that the impugned decision was premised on the fact that the report and recommendations, which were rejected, were based on a flawed review process. The flaws forming the basis for rejecting the report were that the March 2020 Alternate Chair:

- a. Acted outside the scope of his mandate;
- b. Did not follow the procedure set forth in ST/SGB/2017/2/Rev.1; and
- c. Issued remedial/corrective recommendations that were premature. Such recommendations could only be made following an investigation and a conclusion that retaliation had occurred (section 8.5 of ST/SGB/2017/2/Rev.1).

56. The Respondent asserts that the impugned decision was not arbitrarily arrived at and represents a proper exercise of discretion.

57. To determine whether or not the impugned decision was arbitrary, the Tribunal will examine the grounds on which it was based.

Whether the March 2020 Alternate Chair acted outside the scope of his mandate.

58. That the Applicant's 3 October 2019 PaR request related to her reports about the academic qualifications of the former DHC, OHCHR, is common cause.

59. Yet, as the Applicant states, rather than looking exclusively at her protected activity in relation to reporting the above misconduct, the March 2020 Alternate Chair looked at her original report concerning the practice of OHCHR of confirming names of human rights activists attending the Human Rights Council sessions and the Chinese Government ("the practice").

60. The Applicant does not, however, accept that any act or omission on the part of the March 2020 Alternate Chair rendered his decision *ultra vires*. She contends that it was reasonable in the circumstances to assess her situation against the full factual matrix of her employment with OHCHR. She adds that should any procedural error be found, that alone would not ordinarily be sufficient to render the March 2020 Alternate Chair's decision unlawful. She explains that though the 3 October 2019 PaR request addressed a report against the former DHC, OHCHR, regarding falsifying her academic credentials, that request explicitly and unambiguously situated that issue within a pattern of retaliation following her complaint regarding the practice, which, in her view, was contrary to the rules of the Council and created a significant risk of harm.

61. The Tribunal recalls that for the Applicant to have her complaint re-assessed by the March 2020 Alternate Chair, she invoked sec. 9.1 of ST/SGB/2017/2/Rev.1, which provides as follows (emphasis added):

If, following a determination by the Ethics Office ... that there is no *prima facie* case of retaliation or threat of retaliation, the complainant wishes to have **the matter reviewed further**, he or she may, within 30 days of notification of the determination, refer the matter, in writing, to the alternate Chair of the Ethics Panel of the United Nations.

62. The usage of the phrase “the matter reviewed further” in sec. 9.1, implies that sec. 9.1 is meant to afford a complainant an opportunity to have a matter that had been examined by the Ethics Office with negative results re-assessed at a different level.

63. The law, therefore, envisages referral and re-assessment of the same matter, in this case, the alleged falsification of academic qualifications by the former DHC, OHCHR, to an Alternate Chair.

64. The Applicant was indeed alive to this fact, which is why she only cited the misconduct/wrongdoing of “falsification/ misrepresentation of academic qualifications”, by “[the then] Deputy High Commissioner for Human Rights, OHCHR” as the matter she sought to be re-assessed by the Alternate Chair (see annex 2 to the application).

65. When the March 2020 Alternate Chair *prima facie* assessed new matters in this case, including reports made by the Applicant dating from 2013, he gave those new matters a first, rather than a second determination. This was not the intention of the law maker.

66. The Applicant’s argument that the request explicitly and unambiguously situated that issue within a pattern of retaliation is not sustainable. The referral was unambiguous about the matter which was sought to be assessed. Contrary to the Applicant’s argument, it was not reasonable to assess her situation against the full factual matrix of her employment with OHCHR since that would offend the law.

67. The Applicant does not dispute the fact that the issue of the practice of giving activists’ names to the Chinese government was not included in her referral to the March 2020 Alternate Chair. Her assertion that the assessment of new matters was reasonable in the circumstances is, therefore, not tenable.

68. Based on the available evidence, the Tribunal is persuaded about the validity of the Respondent’s first ground for declining to implement the recommendations of the March 2020 Alternate Chair, namely that the latter acted outside the scope of

his mandate when he examined matters that were not part of the Applicant's referral.

Whether the March 2020 Alternate Chair did not follow the procedure set forth in ST/SGB/2017/2/Rev.1

69. The Respondent contends that the March 2020 Alternate Chair did not seek any comments from the Administration, and that he relied entirely on the Applicant's version of events, most of which were not even the subject of the PaR request.

70. The Applicant advances several arguments over this issue. First, she points out that the Respondent does not provide evidence to support this assertion.

71. The Tribunal, however, fully agrees with the Respondent's explanation that had the March 2020 Alternate Chair sought such input, this fact would have been reflected in his report. It is not. The Applicant's suggestion that the requisite input might have been sought from the Secretary-General is defeated by the same explanation. The March 2020 Alternate Chair's report does not reflect that as well.

72. Second, the Applicant contends that the Administration deliberately chose not to seek comments from the March 2020 Alternate Chair regarding the purported deficiencies in his report. Since the March 2020 Alternate Chair issued a report that represents what he did and by implication excludes what he did not do, the Administration was not under any obligation to look beyond the report to gain understanding of what took place during the re-assessment.

73. The Applicant cites sec. 9.2 of ST/SGB/2017/2/Rev.1 for the argument that the law does not put any limitation on the recommendations that might be made by an Alternate Chair, and that the only requirement is that the Alternate Chair's recommendations will be implemented.

74. This argument ignores the fact that the law specifies the reviewable subject matter at the Alternate Chair's level, i.e., the same matter which the Ethics Office will have firstly reviewed. Logically, any recommendations would be directly relevant to that subject matter. It is inconceivable, therefore, that in a structured

review process, as the one under sec 9.2 of ST/SGB/2017/2/Rev.1, an Alternate Chair's mandate to issue recommendations would be unrestricted in the way the Applicant suggests. This argument is rejected.

75. Based on the available evidence, the Tribunal is persuaded by the Respondent's second ground for declining to implement the recommendations of the March 2020 Alternate Chair, namely that the latter did not follow the procedure set forth in ST/SGB/2017/2/Rev.1, more specifically sec. 9.2, when he did not seek comments from the Administration.

Whether the March 2020 Alternate Chair's recommendations were premature since they were remedial/corrective in nature and could only be made following an investigation and a conclusion that retaliation has occurred (section 8.5 of ST/SGB/2017/2/Rev.1)

76. The Applicant does not contest, and the Tribunal fully agrees with the Respondent's submission, that the March 2020 Alternate Chair's recommendations offend section 8.5 of ST/SGB/2017/2/Rev.1, for the following reasons.

77. Under the law, when a *prima facie* case is found by an Alternate Chair, the matter is sent to the Ethics Office with a recommendation that it be referred for investigation, as per Section 9.2 of ST/SGB/2017/2/Rev.1. No remedial and corrective recommendations can be made, even less, implemented in the absence of an investigation. (Section 8.5 of ST/SGB/2017/2/Rev.1).

78. In the Tribunal's view, the March 2020 Alternate Chair's recommendations, for example, that the Applicant be placed on a roster at a higher level, were remedial/corrective in nature. They were premature since no investigation had been conducted and no Ethics Office determination of the occurrence of retaliation had been made.

79. Consequently, the Tribunal is persuaded by the Respondent's third ground for declining to implement the recommendations of the March 2020 Alternate Chair, namely that the latter's recommendations were premature since retaliation had not been established following an investigation.

The Applicant's arguments

80. On her part, the Applicant raises several challenges against the decision not to implement the recommendations of the March 2020 Alternate Chair. The Tribunal will examine them below.

Conflicts of interest

81. The Applicant asserts that the decision not to implement the Alternate Chair's recommendations is vitiated by conflicts of interest.

82. According to her, the USG/DMSPC and the Chef de Cabinet were instrumental in arranging the actions that were identified by the March 2020 Alternate Chair as retaliatory (i.e., the Applicant's transfer and deprivation of functions). Further, that in an email addressed to OIOS, copied to the USG/DMSPC on 10 December 2020, she had named the USG/DMSPC as the primary retaliator.

83. The Applicant maintains that the full report of both the UNEO and the March 2020 Alternate Chair were, however, transmitted to the USG/DMSPC, yet it makes a *prima facie* finding that the Applicant's transfer was part of a pattern of retaliation. In the Applicant's view, the USG/DMSPC was therefore, able to realise that her involvement in the Applicant's transfer had been identified as a retaliatory act. The Applicant concludes that consequently, the USG/DMSPC made decisions about the investigation of something she had done and that this would meet any definition of a conflict of interest.

84. The Applicant further argues that it was a conflict of interest when the Ethics Office forwarded the report to the Chef the Cabinet finding that her specific actions were retaliatory and then asking whether she would like to take action to correct them.

85. The Tribunal, however, agrees with the Respondent that it was proper for the Ethics Office to transmit the entire file, including the initial determination to the Chef the Cabinet. The initial Ethics Office's determination was referred to in the March 2020 Alternate Chair's report. It was procedurally proper for the Ethics Office to provide the Chef de Cabinet with the relevant information to consider

whether it would accept the recommendations, albeit it having been an unusual situation where the March 2020 Alternate Chair conditioned the referral of the matter to OIOS on the Administration's implementation of his recommendations.

86. The Applicant's argument that that was made to "prejudice" her before the Chef de Cabinet, or that it would have negatively interfered with the contested decisions is speculative.

87. There is therefore no evidence upon which the Tribunal may base a conclusion that the decision not to implement the March 2020 Alternate Chair's recommendations is vitiated by conflicts of interest.

88. Turning to the issue of the Applicant's transfer, the decision-makers' involvement in that decision is not disputed. The Applicant argues that the roles of the USG/DMSPC and the Chef the Cabinet were "instrumental" in the transfer. The Respondent, however, suggests that their roles in the decision were peripheral. The Tribunal does not find any evidence that the USG/DMSPC and the Chef de Cabinet were "instrumental" in the Applicant's transfer.

89. As annex 17 to her application, the Applicant produced the Respondent's answer to her appeal before UNAT against *Reilly* UNDT/2020/097. Para. 10 of the Respondent's answer, on which the Applicant partly bases her assertion states that:

The attempts to mediate the dispute with the aid of the United Nations Ombudsman were unsuccessful. Notwithstanding, the United Nations Chef de Cabinet, the High Commissioner for Human Rights, the Assistant Secretary-General for Human Resources Management, and their respective staff, collaborated to reassign the Appellant to suitable positions. Accordingly, from 1 May 2018 to 30 September 2019, the [Applicant] was temporarily assigned to the OHCHR Rule of Law and Democracy Section at the P-4 level. The [Applicant] was then placed, for six days, on special leave with full pay, following which, on 6 October 2019, she was laterally transferred from her previous post to a new position at the Development and Economic and Social Issues Branch of OHCHR. (Footnote omitted)

90. There is nothing in the above excerpt supporting the assertion that either officer was instrumental in the Applicant's transfer.

91. The Tribunal further notes that the relevant part of *Reilly* UNDT/2020/097, on which the Applicant also relied, reads as follows:

112. [The current Chief of Human Resources, OHCHR described [at the oral hearing on the merits], in a clear and objective way, the several attempts made by her office to find the Applicant an alternative position outside the reporting line of her former supervisor. She also clarified that the Applicant decided, on her own volition, to apply for a temporary position in OHCHR's Office in Mauritania through "Rapid Response".

113. Contrary to what was argued by the Applicant, the suggestion that the Applicant could be assigned to the post in Mauritania Office came from the head of said office and not from OHCHR in Geneva, which never imposed that solution on her.

...

116. Furthermore, the current Chief of Human Resources, OHCHR, explained that she was working then with the ASG, OHRM, who was also in contact with the Applicant, to identify alternative positions for her according to her competencies and preferred areas of work.

117. The witness confirmed that she and the Applicant exchanged numerous emails and phone calls, and, on an occasion, she even printed and showed the Applicant a list of all funded posts that were available at the time. She mentioned that the Applicant was assigned to a P-4 position, in Geneva, for four months.

118. The current Chief of Human Resources, OHCHR, also clarified that the Applicant was on Special Leave with Full Pay ("SLWFP") for several months and on short-term assignments. She also mentioned that it was the then ASG, OHRM, who, exceptionally, authorized the extension of the Applicant's SLWFP due to her health condition.

...

120. According to the evidence available on file, during the Applicant's temporary assignment against a P-4 position with the Rule of Law and Democracy Section, OHCHR (1 May 2018 to 30 September 2019), numerous communications between the Applicant and OHCHR took place in connection with the search for a new position.

121. The Tribunal notes, however, that the most relevant exchanges concerning the identification of a suitable position for the Applicant started as of 21 September 2019. The Applicant was offered two Human Rights Officer positions at the P-3 level in OHCHR: one in the Special Procedures Branch/Sustainable Human Development Section, and another in the Human Rights and Economic and Social Issues Section.

122. The exchanges concerning the identification of a suitable position for the Applicant led to an email of 7 October 2019 from the current Chief of Human Resources, OHCHR, to the Applicant informing her of the decision to transfer her. It relevantly reads as follows:

We have taken note of your email and noted that you have not expressed any preference regarding the two offers. The two offers were suitable and commensurate to your grade and skills. Therefore, we will proceed to your lateral transfer to the P-3 position in the Human Rights and Economic and Social issues section, Thematic Engagement, Special Procedures and Right to Development Division (see TOR attached), effective 7 October 2019. This is a transfer under the authority of the [High Commissioner], in an effort to find a viable, long-term solution to a situation of longstanding concerns. (emphasis in the original).

123. The Tribunal is of the view that the evidence produced before it, clearly shows that the Secretary-General, through the ASG, OHRM and OHCHR, has made all possible attempts to keep the Applicant working in suitable positions, in Geneva, outside the reporting lines of her former supervisor.

92. Again, there is nothing in the foregoing excerpts supportive of the Applicant's assertion that the USG/DMSPC and the Chef de Cabinet were "instrumental" in arranging her transfer and deprivation of functions.

93. On the contrary, all the available information and evidence indicate that the decision to transfer the Applicant was made collaboratively and in good faith. The fact that the transfer was made under the authority of the High Commissioner, which is the Respondent's position, is testified to by the Chief of Human Resources, OHCHR (para. 122 of *Reilly* UNDT/2020/097). This galvanises the Respondent's

explanation that the USG/DMSPC was not involved in the process, but that she was merely kept informed.

94. The Tribunal has considered the Applicant's submission that the decision-makers were conflicted, since they neither asked the March 2020 Alternate Chair to re-assess the matter nor to clarify whether he had obtained the Administration's input, which were better options in the Applicant's view. Like the impugned decision, however, all the options advanced by the Applicant have no legal basis. The decision-maker was under no legal obligation to opt for a particular remedy. The fact that one remedy was preferred over the rest cannot ground the conclusion that the decision-maker was conflicted.

95. Conflict of interest will arise if there is a "reasonable apprehension of bias or self-interest". Additionally, the existence of a conflict of interest is an objective fact and does not depend on any particular intention or motive. (*Messinger* UNDT/2010/116, para. 48).

96. Based on the available evidence, the issue of whether the nature and extent of the involvement of the USG/DMSPC and the Chef de Cabinet in the Applicant's transfer causes reasonable apprehension of bias or self-interest must be answered in the negative. The Applicant's assertion that the USG/DMSPC and the Chef de Cabinet were conflicted when they made the decision not to implement the March 2020 Alternate Chair's recommendations is not supported by evidence and must therefore fail.

Alleged *ultra vires* acts

97. The Applicant claims that the treatment of her case has been marred by *ultra vires* acts both in terms of individuals acting outside their delegated authority and actions taken or procedures adopted that are not permitted under the promulgated rules.

98. The Tribunal recalls that the USG/DMSPC made all the three contested decisions (see para. 49 above).

99. The Applicant maintains that the reading/understanding of the USG/DMSPC of her delegated authority when she communicated with the Chef de Cabinet by Note of 21 September 2020, whereby she concluded that she “[is] vested with authority to decide on appropriate measures to take in respect of recommendations under the Protection Against Retaliation Policy [(ST/SGB/2017/2/Rev.1)]” is not correct and constitutes an expansion of the scope of her delegation, which she cannot do.

100. The Applicant states that the USG/DMSPC did not have authority to decide:

- a. Whether to accept the recommendations of the March 2020 Alternate Chair and to limit the scope of investigation from that described in the March 2020 Alternate Chair’s report, and
- b. On the referral of the complaint for investigation, since the Applicant’s request for protection against retaliation related to a complaint about and retaliation by the former DHC, OHCHR, who was at the level of an Assistant Secretary-General (“ASG”).

101. ST/SGB/2017/2/Rev.1 requires that if there is a finding of *prima facie* retaliation, the matter be referred to OIOS. The referral is not conditioned on the Organization accepting an Alternate Chair’s recommendations.

102. Sec. 8 of ST/SGB/2017/2/Rev.1, which deals with situations where there has been a finding of *prima facie* retaliation, contemplates only three scenarios requiring the decision of the Secretary-General:

- a. Sec. 8.2, concerning the referral to an Alternative Investigative Mechanism (“AIM”) instead of OIOS;
- b. Sec. 8.3, concerning taking appropriate measures to safeguard the interests of a complainant pending completion of an investigation; and
- c. Sec. 8.8, which relates to deciding on recommendations of the Ethics Office after an OIOS or AIM investigation if the Ethics Office is not satisfied with the response of the head of department or office concerned.

103. It should be clarified that the above first two scenarios are explicitly covered by the 6 February 2020 delegation of authority to the USG/DMSPC. (see paras. 43 and 25 above).

104. Since ST/SGB/2017/2/Rev.1 does not envisage a situation in which a decision must be taken to accept or reject the recommendations of an Alternate Chair, the delegation of authority document, understandably, does not cover such situation. The report of the March 2020 Alternate Chair therefore presented a novel issue.

105. Since what is lacking is an enabling legal provision relating to this novel issue, the Applicant's assertion that the USG/DMSPC did not have delegated authority is misleading.

106. Considering the lacuna in the law, the issue of delegation or none-delegation of the relevant authority does not arise. In the Tribunal's view, the narrative that the USG/DMSPC did not have delegated authority to decide whether to accept the recommendations of the March 2020 Alternate Chair is fallacious.

107. While the correct narrative is that the USG/DMSPC acted without legal authority, the Tribunal does not agree that the absence of such authority is sufficient to vitiate the decision in the circumstances of this case.

108. First, the fact that the March 2020 Alternate Chair only made recommendations and not directives is not lost to the Tribunal. By their very nature, the recommendations could be accepted or rejected. In rejecting them, the Organization only exercised its discretion.

109. Secondly, recalling that the grounds upon which the decision to reject the recommendations are valid, vitiation of the impugned decision will only aid a violation of the law, which the Tribunal is not prepared to do.

110. The Applicant seeks to rely on UNAT jurisprudence for the position that

[t]he requirement of authority is a fundamental precept of the principle of legality of the Administration. The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorized by law. It is central to the conception of

the constitutional order that administrators in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. (*Appellant* 2021-UNAT-1157, para. 49 and *Fogarty* 2021-UNAT-1117, para. 30)

111. As has been noted, the USG/DMSPC acted without legal backing/authority. The Tribunal however determines that the principle relied on by the Applicant is not meant to be applied in a way that would enforce an illegality, which would happen if the Tribunal granted the order sought by the Applicant.

112. The circumstances of this case are that, on the one hand, the March 2020 Alternate Chair's recommendations were rejected on valid grounds. On the other hand, the decision to reject the recommendation was taken without legal basis.

113. Under circumstances such as these, which require the balancing of conflicting interests, the principles of equity would support the Organization's decision not to accept the March 2020 Alternate Chair's recommendations. The maxim of equity that there is no wrong without a remedy ("*ubi jus ibi remedium*") would support a decision to uphold the impugned decision. (see *Leo Feist v. Young*, 138F.2d 972 (7thCir.1943)).¹

114. The decision to uphold the impugned decision is galvanised by the fact that the Applicant's legally bestowed right to have her complaint reviewed was respected to the full extent. She was availed an opportunity to exhaust all the legal options in the review process and her complaint was finally referred for investigation by OIOS. The fact that she deems the result of the review to be unfavourable does not support a decision to aid the enforcement of an illegality. The Applicant cannot seek to right a wrong visited on her (if at all) through the implementation of an illegality, and cannot claim to have been prejudiced by the decision to right a wrong. The Tribunal is therefore not persuaded that the Applicant suffered or will suffer any injustice on account of the failure to implement the March 2020 Alternate Chair's recommendations.

¹ <https://law.justia.com/cases/federal/appellate-courts/F2/138/972/1481734>.

115. Considering that the decision-maker found that the March 2020 Alternate Chair's report and recommendations were flawed, the impugned decision was not arbitrarily arrived at. It therefore represents a proper exercise of discretion.

116. Based on the principles of equity referenced above, the Tribunal rejects the suggestion that the lack of authority of the USG/DMSPC vitiates the decision. The Applicant has failed to prove that the impugned decision was irrational, unreasonable, or unfair in any manner. The decision is therefore upheld.

The decision not to provide interim protection measures

117. This decision falls under sec. 8.3 of ST/SGB/2017/2/Rev.1 and the matter is covered by the 6 February 2020 delegation of authority. The USG/DMSPC therefore had the authority to make that decision on behalf of the Secretary-General.

118. As has been found above, the USG/DMSPC identified several flaws in the report of the March 2020 Alternate Chair. Based on that fact, she concluded that the report and its recommendations could not be accepted.

119. The Tribunal is therefore satisfied that the decision-maker has demonstrated that the decision was not arbitrary. There is moreover no evidence that in making the decision, the USG/DMSPC was conflicted. The Tribunal finds that the exercise of discretion was reasonable.

120. The Applicant challenges the above decision on the ground that the Ethics Office had a conflict of interest in handling her case. She explains that during the treatment of a previous request for protection from retaliation, the Ethics Office report regarding a *prima facie* finding was leaked and published online. When the Applicant mentioned to OHCHR management that the leak had exposed her to a greater risk of retaliation, the Director of the Ethics Office commented that this was an "unfounded assertion" that was "clearly prejudicial to the reputation of [that] Office", and that, consequently, the Ethics Office was placed in a position of conflict of interest in reviewing the Applicant's complaint (Annex 16).

121. The Applicant mentions that since at that time the conflict of interest related to the office and not to an individual, that conflict of interest endures in relation to the second request for protection from retaliation. She argues that the fact that conflicts of interest are described as “actual” “potential” or “apparent” means that there is no degree to which a conflict of interest might be tolerated if it were considered minimal or reduced. Conflict of interest is not an issue of degree. It follows that any confusion as to whether the conflict of interest declared in relation to the first complaint had endured must resolve in the Applicant’s favour.

122. The Tribunal is, however, not confused about whether the conflict of interest declared in relation to the first complaint had endured. There is therefore nothing to be resolved in the Applicant’s favour. The Applicant’s arguments by which she seeks to link a decision taken on the basis of different facts and under different circumstances from the impugned decision are pure speculation.

123. The Ethics Office rightly determined that it had no conflict of interest in handling the Applicant’s October 2019 PaR request. The fact that they recused themselves in 2017, in an unrelated PaR request and under different circumstances, cannot be basis for the assertion that there is a conflict of interest in the Ethics Office handling the Applicant’s 2019 case. Similarly, the mere existence of a previous case with the UNDT, in which the Applicant challenged the reviews and recommendations of the Director of the Ethics Office (which is the other argument she advances), does not render the Director unable to perform her duties.

124. The challenge against the decision not to provide interim protection measures therefore fails.

The decision to refer the matter to OIOS for investigation.

125. The Applicant raised three issues in this regard:

- a. That the USG/DMSPC did not have the authority to decide whether the matter was to be referred to OIOS or to an AIM;

- b. That OIOS was conflicted; and
- c. That OIOS had the obligation to investigate.

Whether the USG/DMSPC had the authority to decide if the matter was to be referred to OIOS or to an AIM.

126. The 6 February 2020 delegation of authority (see para. 19 above) provides that the USG/DMSPC can decide: “on action in response to the recommendation of the Ethics Office to refer a complaint to an alternative investigating mechanism, where an allegation of retaliation is **reported by or against** a staff member up to and including the D-2 level” (emphasis added).

127. The Applicant argues that the

[u]se of the phrase “by or against” plainly indicates that it is not exclusively the level of the individual by whom the request was made that limits the delegation but also the level of the person against whom the allegation of retaliation was made. [Her] allegation of retaliation was against [an ASG]. This clearly meant [that the] delegation of authority [of the USG/DMSPC] did not apply to [her] case.

128. The Applicant claims that the USG/DMSPC had authority to decide on referral for investigation by an AIM only for complaints “reported by or against a staff member up to and including the D-2 level”, which prevents her from deciding on the referral at stake, which involved an ASG.

129. The Applicant is partially right. The answer to the issue of whether the USG/DMSPC has delegation of authority is not exclusively dependent on the level of the complainant. The use of the word “or” in the delegation of authority (see para. 126 above) implies that the requisite conditions are not cumulative as suggested by the Applicant (see para. 127 above).

130. The determination of whether the USG/DMSPC had delegation of authority requires answering at least one of two questions: a) whether the allegation of retaliation is reported by a staff member below or equal to the D-2 level; b) whether

the allegation of retaliation is reported against a staff member below or equal to the D-2 level.

131. While a negative determination of either question requires the resolution of the second question, the determination of either question in the affirmative would support a conclusion that the USG/DMSPC has delegated authority in the matter.

132. In the Applicant's case, the question of whether the allegation of retaliation is reported *against* a staff member below or equal to the D-2 level must be answered in the negative. It follows that the second question needs to be asked, namely whether the allegation of retaliation is reported *by* a staff member below or equal to the D-2 level. The Applicant meets that condition and, as a result, the USG/DMSPC had the delegation of authority to decide on the matter.

133. The only scenario where the USG/DMSPC would not have delegated authority is if both questions are answered in the negative.

134. The Applicant's challenge to the delegation of authority of the USG/DMSPC to decide on the referral to an AIM is, therefore, rejected.

Whether OIOS was conflicted

135. The assertion that OIOS was conflicted is premised on information in a memorandum by the Director, UNEO, to the Applicant dated 5 October 2020, communicating the decision of the Administration not to implement the recommendations of the Alternate Chair (annexes 11 and 12 to the application). In the memorandum, it was indicated that OIOS had a conflict of interest in conducting the investigation.

136. According to the Applicant, this resulted from the fact she had provided an audio recording of the Director of the Investigations Division of OIOS describing to colleagues the mechanism by which that office allegedly subverts the protection from retaliation policy. The Director, UNEO, therefore, recommended the complaint be referred to an AIM.

137. The Tribunal has read the transcript of the audio recording (annex 8 to the application and annex 23 to the Applicant's rejoinder) and found nothing suggestive of subversion of the protection from retaliation policy by OIOS or its Director. On the contrary, and as was explained, the discussion related to strengthening PaR investigations.

138. That the allegation was picked up by the media, and that a staff member of the Investigations Division of OIOS wondered whether retaliation would not be investigated, is not supportive of a conclusion that OIOS was conflicted.

139. It is on record that the USG/DMSPC considered that the appearance of a conflict of interest in OIOS conducting the investigation was "an insufficient basis on which to refer the matter to an AIM" (see para. 4 of the 16 October 2020 document referred to in para. 29 above). The decision-maker therefore reasonably exercised her discretion, and the decision was not arbitrary.

140. The opinion of the Director, UNEO, that OIOS had a conflict of interest in conducting the investigation does not confirm that the conflict indeed existed. It was a mere opinion.

141. The Tribunal is satisfied with the decision-maker's rationale and therefore upholds the impugned decision.

Whether OIOS had the obligation to investigate

142. The Applicant further argues that the decision of the Director of the Investigations Division of OIOS not to investigate upon referral of the March 2020 Alternate Chair's report was *ultra vires*. She maintains that nothing in the promulgated rules gives OIOS discretion not to investigate. OIOS was, in her view, obliged under the rules to investigate, and its refusal to do so was *ultra vires*.

143. The Tribunal finds that this argument is not relevant for its examination of the decision to refer the matter to OIOS. It may be relevant for what transpire after that decision was made, which the Tribunal is considering in a subsequent case to the instant one, namely Case No. UNDT/GVA/2021/054 (Reilly).

144. The Tribunal will, therefore, not entertain the Applicant's argument in the context of the instant application.

Remedies

145. With findings that the decisions not to implement the recommendations of the March 2020 Alternate Chair, not to provide interim protection measures, and to refer the Applicant's retaliation case for investigation by OIOS were not arbitrary and represented reasonable exercise of discretion, the Applicant is not entitled to any of the remedies she seeks.

Conclusion

146. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Margaret Tibulya

Dated this 7th day of November 2023

Entered in the Register on this 7th day of November 2023

(Signed)

René M. Vargas M., Registrar, Geneva