



**Before:** Judge Margaret Tibulya

**Registry:** Geneva

**Registrar:** René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Jérôme Blanchard, LPAS, UNOG

## **Introduction**

1. The Applicant contests the “[d]ecision to revise [the] findings and recommendations of the Alternate Chair of the [Ethics Panel of the United Nations (“EPUN”)] in his preliminary assessment of the Applicant’s 3 October 2019 request for protection from retaliation”, and the “[i]mplied decision not to investigate on the basis of those findings and recommendations”.

2. For the reasons outlined below, this application is dismissed in its entirety.

## **Facts**

3. On 14 August 2019, a former staff member of the United Nations made a complaint for misconduct against the former Deputy High Commissioner (“the former DHC”), Office of the United Nations High Commissioner for Human Rights (“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.

4. On 10 September 2019, the Applicant filed with the Office of Internal Oversight Services (“OIOS”) a complaint for misconduct against the former DHC, OHCHR, on the same grounds as the above-mentioned 14 August 2019 complaint.

5. In October 2019 the Applicant was transferred from the Human Rights Council Branch, OHCHR, to a P-3 position in the Human Rights Economic and Social Issues Section, OHCHR.

6. On 3 October 2019, following the above-mentioned complaints, the Applicant filed a request for protection against retaliation with the United Nations Ethics Office (“Ethics Office” or “UNEO”). In her request, she expressed her belief that “the entire EPUN ... has a clear conflict of interest” and requested “immediate external referral of [her] complaint”.

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

8. 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”).
9. On the same day, the Applicant addressed a request for review of the first determination to the then Alternate Chair, EPUN, who retired at the end of November 2019.
10. 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.
11. On 13 February 2020, the Ethics Adviser, UNFPA, communicated to the Applicant that she had unilaterally closed the case due to the Applicant’s refusal to consent that the case be assigned to her.
12. 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.
13. On 27 July 2020, the March 2020 Alternate Chair issued his report.
14. On 28 July 2020 the Director, UNEO, communicated the March 2020 Alternate Chair’s report and recommendations to the Chef de Cabinet.
15. By note dated 30 July 2020, the Chef the Cabinet:
  - a. Informed the Under-Secretary-General for Management Strategy, Policy and Compliance (“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.

16. 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.

17. 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”.

18. 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 [(Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)]”.

19. By memorandum also dated 5 October 2020, the Director, UNEO, 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”.

20. By note dated 16 October 2020, the USG/DMSPC responded to the above-mentioned 5 October 2020 note that the Director, UNEO, addressed to the Chef the Cabinet concerning 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.

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

22. By memorandum of 26 October 2020, the Ethics Office referred the Applicant’s case to OIOS for investigation.

23. By memorandum dated 11 January 2021 to the Director, UNEO, the Director, Investigations Division (“ID”), OIOS, responded to the referral for investigation of the Applicant’s case. In his memorandum, the Director, ID, OIOS, *inter alia*:

a. Addressed the UNEO concerns of conflict of interest of OIOS;

b. Expressed his concerns on the Applicant’s matter and the referral to OIOS;

- c. Agreed with the determination of the USG/DMSPC that the March 2020 Alternate Chair exceeded his mandate in carrying out his review and making his findings; and
- d. Informed the UNEO that OIOS:
  - i. Considered the March 2020 Alternate Chair’s assessment to be *ultra vires* and that, as such, it could not “be used as the basis to initiate an OIOS investigation because the investigation itself would be based on an illegal premise”; and
  - ii. Would “not investigate the matter on the basis of the present [March 2020 Alternate Chair’s] determination” and considered the matter as closed.

24. In a memorandum dated 4 February 2021 to the Alternate Chair, EPUN, the Director, ID, OIOS, referring to the 26 October 2020 referral from the Ethics Office (see para. 22 above) and to his 11 January 2021 memorandum (see para. 23 above), stated, *inter alia*:

3. OIOS derives its authority to conduct [Protection Against Retaliation (“PaR”)] investigations from the PaR bulletin. It is therefore incumbent on both the UNEO and any subsequent review conducted by the Alternate Chair of the Ethics Panel of the United Nations (EPUN) to comply with the provisions of the PaR bulletin.

4. As more fully set out in the attached [11 January 2021] memorandum, the review conducted by the then Alternate Chair did not conform to the PaR bulletin’s legal framework. The determination went beyond the scope of Ms. Reilly’s 3 October 2019 PaR request and grounded its decision on a protected act that had already been excluded by the UNEO and two other EPUN Acting Chairs, the matter had also been adjudicated on by the United Nations Dispute Tribunal. The review also failed to seek comments from the Administration as required under the PaR bulletin.

5. Whilst OIOS is currently prevented from proceeding with its investigation, OIOS stands ready to carry out an investigation based on a determination linked to Ms. Reilly’s 3 October 2019 request for PaR and is made in full compliance with the requirements of the PaR bulletin.

25. On 16 April 2021, the Applicant filed a case before this Tribunal (Case No. UNDT/GVA/2021/024) concerning the failure of the Organization to implement the recommendations of the March 2020 Alternate Chair.

26. By email of 4 June 2021, the Alternate Chair, EPUN, informed the Applicant that “it was determined that the review of [her] matter conducted by the [March 2020] Alternate Chair was defective”, and that “to afford [her] with a review that is pursuant to the scope set out in ST/SGB/2017/2/Rev.1, [she] would conduct a new and independent review of the UNEO determination”.

27. By memorandum dated 30 July 2021, the Alternate Chair, EPUN, issued the result of her review concurring with the 25 October 2019 findings of the Ethics Office (see para. 8 above).

#### **Procedural history**

28. On 15 June 2021, the Applicant submitted a request for management evaluation.

29. On 17 September 2021, the Applicant filed the application referred to in para. 1 above.

30. On 22 October 2021, the Respondent filed his reply *inter alia* contesting the receivability of the application. The reply had two annexes filed *ex parte*, namely annexes six and seven, which the Tribunal shared with the Applicant on an under seal basis by Order No. 48 (GVA/2023) of 16 May 2023.

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

32. 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/2021/024 (Reilly).

33. 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.

34. 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).

35. 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.

36. 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.

37. 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.

38. On 7 August 2023, the Respondent filed the document referred to in para. 37.a above.

39. On 30 August 2023, the Applicant filed comments on the document that the Respondent filed on 7 August 2023.

40. On 8 September 2023, the parties filed closing submissions.

## **Consideration**

### *Receivability*

#### Decision to conduct a new review under sec. 9 of ST/SGB/2017/2/Rev.1

41. The Respondent maintains that the decision to overturn the March 2020 Alternate Chair's report and to provide a new and independent review of the UNEO determination was not made at the request of the Administration as the Applicant alleges. That decision does not, therefore, constitute an administrative decision in terms of art. 2 of the UNDT Statute. Citing *Reilly 2021-UNAT-1079*, the Respondent argues that the "Ethics Office is limited to making recommendations to the Administration", and that "its acts or determinations are without direct legal consequences and are thus not administrative decisions subject to judicial review".

42. On the other hand, the Applicant argues that the impugned decision was in fact taken at the instance of the Respondent. She illustrates this submission by the assertion that, first, the Administration expressed its disagreement with the March 2020 Alternate Chair's report. Then, OIOS agreed with that and, subsequently, OIOS unilaterally referred the matter back to the then Alternate Chair, EPUN. This, she argues, demonstrates that a review of the March 2020 Alternate Chair's review was requested by the Administration despite the absence of a legal mechanism for it.

43. It is common cause that the recommendations, acts, or determinations of the UNEO are without direct legal consequences and do not constitute administrative decisions. This is in keeping with sec. 10.3 of the ST/SGB/2017/2/Rev.1 which provides in no uncertain terms that “[r]ecommendations of the Ethics Office and the alternate Chair of the Ethics Panel under the present bulletin do not constitute administrative decisions and are not subject to challenge under chapter XI of the Staff Rules”.

44. The Appeals Tribunal has also held that “since the Ethics Office is limited to making recommendations to the Administration, its acts or determinations are without direct legal consequences and are thus not administrative decisions subject to judicial review” (see *Reilly* 2021-UNAT-1079, para. 35, footnote omitted).

45. The Applicant, however, suggests that the impugned decision was in fact made by the Administration and not the Ethics Office. The Tribunal is not persuaded by the argument that the Administration’s rejection of the report represents a request to the Ethics Office for review of the March 2020 Alternate Chair’s review, i.e., “a review of the review”, which is the argument the Applicant advances.

46. The mere rejection of a report by the Administration could not have been understood by the Ethics Office, which operates independent of the Administration, to represent a request to conduct a review of the review. There is no evidence to support that proposition.

47. On the contrary, available documentary evidence is that, within the applicable legal framework, exchanges took place between the Administration, the Ethics Office and OIOS concerning the acceptance or non-acceptance of the March 2020 Alternate Chair’s report and recommendations, and the Ethics Office’s referral of the Applicant’s matter to OIOS. These do not rise to the level of instructions from either the Administration or OIOS to the Ethics Office.

48. It is therefore clear that the impugned decision was taken by the Ethics Office. In keeping with established jurisprudence (*Reilly* 2021-UNAT-1079), said decision is not an administrative decision subject to judicial review.

49. The Tribunal therefore finds that the application is not receivable with respect to the 4 June 2021 decision to conduct a new review of the first determination of the Ethics Office (see para. 8 above) under sec. 9 of ST/SGB/2017/2/Rev.1.

Implied decision not to investigate the matter pursuant to the recommendation of the March 2020 Alternate Chair

50. The Tribunal fully agrees with the Applicant that she had a contractual right to an investigation under ST/SGB/2017/2/Rev.1, and that the decision not to investigate on the basis of the March 2020 Alternate Chair's findings and recommendations is reviewable. The Tribunals have long held that the decision not to investigate a complaint of harassment or abuse of authority and or the treatment of such complaint is a reviewable decision, specifically because the staff member has contractual rights in relation to such a complaint.

51. There is no dispute over the receivability of this aspect of the application. This notwithstanding, from its review of the case record, the Tribunal determines that the earliest that the Applicant could have known about the decision of OIOS not to investigate was 4 June 2021 (see para. 26 above). It follows that the Applicant's 15 June 2021 request for management evaluation, which referred to an implied decision not to investigate was timely.

52. The only issue for examination therefore relates to the validity of the exercise of discretion by OIOS in this case.

53. It is recalled that 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. On the one hand, the Applicant maintains that the decision was without basis since the policy allows no discretion in the matter. She explains that once the Alternate Chair has made a *prima facie* finding of retaliation, there is no procedure by which OIOS can decline to investigate nor seek further review.

55. On the other hand, the Respondent maintains that the decision not to investigate is lawful and proper since the March 2020 Alternate Chair's report and recommendations were flawed on the following grounds:

- a. The review was *ultra vires*;
- b. The March 2020 Alternate Chair did not seek comments from the Administration; and
- c. The March 2020 Alternate Chair's recommendations were premature and corrective in nature.

56. In Case No. UNDT/GVA/2021/024 (Reilly), the Applicant *inter alia* contested the decision not to implement the recommendations of the March 2020 Alternate Chair. She based her claim on the same arguments as in this case. The Tribunal, however, rejected those arguments and upheld the contested decision upon finding that the law does not provide for a situation in which a decision must be taken to accept or reject the recommendations of an Alternate Chair (see *Reilly* UNDT/2023/121).

57. In Case No. UNDT/GVA/2021/024 (Reilly), the Tribunal also found that the above lacuna was not sufficient to vitiate *inter alia* the decision not to implement the recommendations of the March 2020 Alternate Chair. The Tribunal's decision in said case was based on the following considerations:

- a. An Alternate Chair only makes recommendations that may/may not be accepted. In rejecting the recommendations, the Respondent only exercised his discretion;
- b. The grounds upon which the decision to reject the recommendations was based were found valid. Vitiating of the impugned decision would only aid a violation of the law, which the Tribunal was not prepared to do; and

c. 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)).<sup>1</sup>

58. Turning to this case, the Tribunal recalls that the decision of OIOS not to investigate was premised on *inter alia* the same reasons that the Organization advanced to support its decision not to implement the recommendations of the March 2020 Alternate Chair. Additionally, in its 11 January 2021 memorandum (see para. 23 above) OIOS indicated that:

[its] investigations must be lawfully authorized. UNEO referrals to OIOS for investigation under the PaR bulletin are premised on the existence of a *prima facie* assessment of retaliation which conforms to the bulletin's framework, and which sets the scope of a PaR investigation (footnote omitted). OIOS considers the EPUN assessment to be *ultra vires* and as such it cannot be used as the basis to initiate an OIOS investigation because the investigation itself would be based on an illegal premise.

59. OIOS was right in its reasoning. The Applicant's contention that the law does not allow OIOS discretion in the investigation decision ignores the fact that the same law specifies the reviewable subject matter at the Alternate Chair's level, i.e., the matter which the Ethics Office will have reviewed. Any recommendations would be directly relevant to that subject matter.

60. There is therefore an implied presumption of legality of process, which necessarily allows for a measure of discretion by the actors in the review process. It is inconceivable that in a structured review process, as the one under sec. 9.2 of ST/SGB/2017/2/Rev.1 is, an Alternate Chair's mandate to issue recommendations, including investigative ones, would be unrestricted in the way suggested by the Applicant. Requiring unquestionable compliance from actors with a flawed review process would be atrocious, and certainly against the letter of the law.

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

61. Since the March 2020 Alternate Chair’s report and recommendations, including one that “if the Administration chose not to follow these [recommendations] the matter should be referred to OIOS for investigation”, were validly rejected, the Tribunal finds that OIOS properly exercised its discretion in refusing to comply with the recommendation to investigate the Applicant’s matter because the latter arose from a flawed process.

62. Consequently, the Tribunal finds that the impugned decision of OIOS not to investigate the matter pursuant to the recommendation of the March 2020 Alternate Chair was rational and reasonable.

### **Conclusion**

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

*(Signed)*

Judge Margaret Tibulya

Dated this 7<sup>th</sup> day of November 2023

Entered in the Register on this 7<sup>th</sup> day of November 2023

*(Signed)*

René M. Vargas M., Registrar, Geneva