

Transcript of recording detailing UN failure to apply whistleblower protection policy, December 2018

Ben Swanson, Director of Investigations, UN Office of Internal Oversight Services (OIOS): Retaliation. So, we've all been involved in retaliation investigations and we've seen what they actually consist of. 24 cases since 1st January 2016, so that's like 8 a year. On average, I think that's 8.5 months, which is twice as long as it should take. And of all of the ones that we have investigated, there's only 2 where there's proposed, but not yet implemented, disciplinary action. All the other 22 cases we either didn't find retaliation or ALS [*Administrative Law Section*] didn't take any disciplinary steps. Now, some of you would be aware of this, but what we did was, we thought... this is this whole thing of retaliation has got the potential to cause us massive, massive problems if we get it wrong, so we had a look at what we were doing and why we were doing it the way that we were doing it and what we were doing was opening an investigation because that's what that says and it was taking a long time because some of them are horribly complicated and some of them are just so trivial that they're not worth investing any time in them. So, we were of the opinion that we weren't using the, the ST/AI [*the policy*] properly or more flexibly or more imaginatively and what we trialled was the process of we get the stuff comes in from the ethics office. We then write to the subject and - I'm paraphrasing here - saying, "Look the Ethics office have said that you've, prima facie you've have retaliated. Therefore you're guilty of retaliation against staff member A. Here's all the material, here is the ST/AI [*the policy*]. **Write back to us in 10 days and tell us why you haven't been, why you're not guilty of retaliation**" and we've managed to cut the time down from 247 days down to about 45 because they write back straight away and they invariably say "I didn't know anything about a protected act and this is nonsense. All I did was send out an email telling people to behave themselves." Then we sort of make the judgment. Is it worth getting 64 gigabytes of emails to prove that they hadn't only sent the email out or do we take their word, their sworn word, for it. And then say, "**Well Ethics Office, there is never, ever going to be any sanction imposed for this retaliatory act or whatever it was called and we're not going to do anything else.**" And the ethics office. Effectively. We're doing the ethics office's job and they've swallowed it up and they have accepted it, and like I say we've done with them two now. I think we've got another two in the pipeline and it's working quite nicely. That brings the figures down, **that gets the Americans off the UN's back, which means they don't reduce their contribution.** And it's all managed within OSSS, so it saves the investigators the trouble and I have to say everybody's happy. What happens when we get one where it's come back and there clearly is retaliation and there clearly is sanctionable behaviour. **We will treat that as an abuse of authority investigation** and leave the retaliation aspect to the ethics office. You look inquisical [*sic*]?

OIOS Investigator: Particularly about that last point, **we are not going to investigate retaliation then?**

Swanson: As misconduct, as an abuse of authority. So because what's happening is that **ALS, because of the reversal of burden of proof. They, you'll understand this with your background, they don't like the fact that puts it on to the "defendant" if you like. They think it's an abuse of their... so they're not taking any action.**

OIOS Investigator 2: That's what the Ethics SGB [*the policy*] asks, the reverse of the burden of the proof whether ALS likes it or not.

Swanson: Yeah, but in determining misconduct.

OIOS Investigator 2: No no, I'm talking about retaliation being prima facie established, the burden is reversed

Swanson: Yeah, that's what we're saying. We're saying yeah, we're saying you're guilty of retaliation. Prove that you're not, and the ones that we've had, have been able to quite easily to prove that they're not.

OIOS Investigator 2: I'm a bit confused about ALS position here.

Swanson: When the way we've been doing it traditionally, we've been doing the big investigation report and it goes to the Ethics Office and then it goes to ALS, and ALS are looking at the actual conduct, saying well this is not sanctionable plus we don't like it's, it's, it might be for determining misconduct, they don't like the reversal of the burden of proof because it ceases to be you're innocent until proven guilty

OIOS Investigator 2: You know, I'm a great admirer of ALS but what I'm saying the ST/SGB per se says when established it is misconduct. Unless they changed it, it's unambiguous, unless my memory fails me miserably. It IS saying that. It constitutes serious misconduct.

Swanson: I'm only telling you what they've told me, which is that **the reversal of the burden of proof (OIOS Investigator 2: It's creative law), in terms of dealing with an offending staff member it's causing a problem because they're guilty. So, that's retaliation.**

OIOS Investigator: And when you say we this is a **collaborative with the Ethics Office and all the parties**, Because we haven't seen these cases in New York tested elsewhere

Swanson: We're doing it in OSSS. Which relieves the burden quite massively for you.

OIOS Investigator: But not if it's ultimately investigated?

Swanson: If it's ultimately investigated. Yeah, we're collapsing, it's a numbers game because we're probably collapse it for maybe a year down to less than one a year on the way things are going at the moment.

OIOS Investigator 3: But can I check something with you. With the Ethics Office, we get their allegation cases only where they only find prima facie, right, on the cases that are submitted to them. But then we've become a kind of the mailbox where, like, we're doing we're doing their job. Where we are reaching out to the subject of the claims of retaliating against and then that person provides something and then we're pushing it onto the ethics office which completely contradicts what they the Ethics Office found in the first place. So how do they reconcile because

Swanson: They could do all this themselves, but they won't because they don't want to be seen to be talking or taking the side or accepting what invariably is what the manager says. So we are doing their job, we are doing their job, but the alternative is going back to those 240 day-long investigations of 64 gigabytes of emails, the dozens of interviews and zero outcome.

OIOS Investigator 3: It's not maybe in this context, but the complainant being entitled to a report. Does this apply to retaliation cases or are we shifting in that direction?

Swanson: We just bunged it all back on the Ethics office

OIOS Investigator 3: So if the complainant is not happy with our decision to accept the word of the perpetrator, then they will be challenging, or is this challengeable?

Swanson: The ethics office **when we went through this of the trial the ethics office they sort of gave us pointers that we now know that we have to cover. But it works a treat!!!**