



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BIRYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Katya Melliush, UNON

Introduction

1. The Applicant is a staff member at the United Nations Office at Nairobi (UNON). He is a Security Officer in the Department of Safety and Security (DSS).

2. On 6 September 2014, the Applicant filed an Application with the Tribunal contesting “Procedural failure by the UNON Administration in placing Weapons Restriction”. The date on which the decision was made was stated to be October 2013 or thereabout. The Applicant states that he became aware of the decision on 14 July 2014.

Procedural history

3. On 7 October 2014, the Respondent filed his Reply.

4. On 13 October 2014, the Tribunal issued Order No. 225 (NBI/2014) requiring the Applicant to file his submissions in reply to the contents of annexes seven and nine to the Respondent’s Reply. Annex nine contained a 5 August 2014 response of the Officer-in-Charge of the Training Unit in UNON/DSS (Lieutenant W), to the Management Evaluation Unit’s (MEU) request for comments on the Applicant’s request for management evaluation. Annex seven of the Reply contained a response to the Application dated 16 September 2014 by the Deputy Chief of UNON/DSS.

5. The Parties were also required to advise the Tribunal if they wanted an oral hearing of this case or if they were amenable to the case being decided on the basis of their written pleadings.

6. The Applicant filed the said submissions on 17 October. He also indicated that the case could be determined on the basis of the written pleadings.

7. Counsel for the Respondent responded to Order No. 225 on 17 October and informed the Tribunal that the Respondent did not request an oral hearing.

8. In accordance with art. 16.1 of the Tribunal's Rules of Procedure, the Tribunal considers that an oral hearing is not required in determining this case and that it will rely on the Parties' pleadings and written submissions.

The Issues

9. In his Application, the Applicant requests the Tribunal:

- a. to find that the UNON Administration breached the procedure for issuing Weapons Restriction;
- b. to find that the Weapons Restriction is prejudicial to the fact-finding investigation; and
- c. to award him damages equivalent to six months' salary for the procedural failure.

10. The Tribunal finds that the principle issues in this case are factual: whether the Applicant was placed on Weapons Restriction in October 2013 and, if so, did the Administration follow the correct procedure.

Facts

11. Following an encounter between a DSS Inspector and the Applicant at UNON on 4 February 2013, the Inspector instructed the Applicant to return his assigned firearm to the UNON/DSS armoury. The Applicant complied with the instruction. The firearm has not been issued to him again. At the date of this judgment he remains in service as a Security Officer.

12. As submitted by the Respondent, the Applicant last attended the qualification exercise for firearms in March 2012. The Chief, UNON/DSS consequently authorized the Applicant to carry a weapon effective 24 March 2012. The host country permit was issued for the Applicant's assigned weapon on 27 May 2012 and carried an expiration date of 19 March 2013.

13. The Respondent further alleges that the Applicant has not attended the annual requalification exercise since March 2012 nor has he approached the

UNON armoury to withdraw his weapon since February 2013.

14. On 5 July 2014, the Chief, UNON/DSS published Daily Orders for UNON/DSS staff. The Orders included notice that UNON/DSS Team D (which included the Applicant) would be attending Active Shooter Training from 7 to 8 July 2014.

15. On 6 July 2014, the Applicant wrote to Lieutenant W, to inquire why he had not been issued with a firearm since 4 February 2013 when a DSS Inspector had ordered him to return it to the armoury.

16. By an email dated 13 July 2014, the Applicant requested management evaluation of a decision by the Chief, UNON/DSS, Lieutenant W and a DSS Inspector to place him on Weapons Restriction.

17. Under the heading in the request form, “When was the decision taken/when did you become aware of it”, the Applicant stated: 14 July 2014.

18. Under the heading “Background” the Applicant described the events of 4 February 2013 when he received a verbal instruction “to the effect that I should return my assigned firearm to the armoury”.

19. Lieutenant W responded to the Applicant’s 6 July memorandum on 14 July 2014 stating inter alia that the Applicant had failed to draw his weapon from 4 to 18 September 2013 and that he had enquired from the Applicant on 18 September 2014¹ why he had not been drawing his assigned firearm for duty. He noted that according to his weapons records, the Applicant did not attend the mandatory annual firearms requalification in October 2013 and that according to the United Nations Department of Safety and Security Manual of Instruction on Use of Force Equipment including Firearms² (the DSS Manual) a Weapons Restriction may be applied if there is a failure to maintain mandatory annual requalification. He also stated:

¹ This date appears to be an error and should read 2013.

² Revised on 2 May 2014.

Prior to October 2013 when you failed to attend the mandatory re-qualification training, I was unaware that you had been placed on weapon restriction as such action would have come from the Chief of Security being the only person authorised to place an officer on weapon restriction.

20. Lieutenant W told the Applicant that he would schedule the Applicant for a requalification exercise as soon as the availability of the shooting range was confirmed with the host country.

21. The Applicant responded to Lieutenant W on the same day. Inter alia, he asked the following questions:

a. Why, as weapons custodian, Lieutenant W had not inquired as to why the Applicant's firearm was returned at 1000 hours on 4 February 2013 before the expiry of the Applicant's tour of duty;

b. What was Lieutenant W's alleged inquiry about the Applicant's failure to draw his firearm on 18 September 2013 and his alleged response; and

c. Why, as weapons custodian, he took six months to inquire about why the Applicant's firearm was not being issued.

22. On 15 July 2014, the Chief, UNON/DSS published Daily Orders for UNON/DSS staff. Page four of the Daily Orders indicated that the Applicant, amongst other UNON/DSS staff members, had been scheduled for the annual firearms qualification training from 16 to 17 July 2014.

23. On 15 July 2014, the Applicant exchanged several emails with Lieutenant W regarding the proposed firearms qualification training. The Applicant indicated that he was expecting a response to his 14 July 2014 memorandum.

24. On 18 July 2014, the Chief, UNON/DSS revoked the Applicant's authorization to carry his service firearm pursuant to chapter two of paragraph 2.34 of the DSS Manual. The reason given was the Applicant's failure to attend the scheduled mandatory firearms training as stipulated in the DSS Manual.

25. On 5 August 2014, at the request of MEU, Lieutenant W sent a document to MEU with his comments and version of the facts about the allegations made by the Applicant. The Respondent submitted this document to the Tribunal as evidence in the present case.

26. In this document, Lieutenant W said that the Applicant was not placed under Weapons Restriction by the Chief, UNON/DSS between 4 February 2013 and 17 July 2014. From 4 February 2013 the Applicant did not go to the armoury to draw his assigned duty weapon. No instruction was given to Lieutenant W or to duty armourers not to issue the Applicant with his weapon. It was the Applicant's personal choice not to draw his assigned firearm.

27. Lieutenant W further stated that on 18 September 2013, he asked the Applicant why he had not been drawing his firearm for duty. In response the Applicant told him he had been dealing with officers above the Lieutenant's then rank of Sergeant. On the same day, Lieutenant W removed the Applicant's assigned pistol from the rack where it was held in general circulation and placed it in a safe at the Armoury for safe keeping until the Applicant decided to draw it for duty. This was normal practice.

28. The Applicant was placed on Weapons Restriction on 18 July 2014 due to his failure to attend the mandatory training in 2013 and 2014 in order for him to re-qualify to carry the weapon as required by the host government. This notification was given in writing from the Chief, UNON/DSS.

Applicant's submissions

29. The Applicant submitted that section 2.35 of the DSS Manual requires that in every case where a security official is placed on Weapons Restriction by the Chief Security Adviser (CSA), the Chief of Security (COS) or the Chief Security Officer (CSO), the concerned Security Official shall be notified in writing of the expected duration.

30. Section 2.36 provides that supervisors shall not use the duration of Weapons Restriction as a punishment for misconduct where normal investigative or disciplinary procedures are applicable.

31. UNON Administration violated these provisions by failing to notify him in writing as required prior to his requests for clarification.

32. The issuance of the Weapons Restriction [on 18 July 2014] was only provoked by his request for clarification on whether or not he was to attend the scheduled training since his weapons authorization card had long expired on 19 May 2013.

33. The withdrawal of his firearm is among the issues before a fact-finding Panel and therefore the Weapons Restriction is prejudicial to the fact-finding investigation and is aimed at subverting justice. In view of this procedural failure, the Organization is liable to pay him damages.

34. In response to Order No. 225, the Applicant submitted that in paragraph four of the memorandum dated 14 July 2014, Lieutenant W indicates that he knew that the Applicant had been placed on Weapons Restriction sometime in October 2013 but in the 5 August 2014 memorandum to the Chief of MEU, Lieutenant W states that the Applicant was not placed on Weapons Restriction between 4 February 2013 and 17 July 2014.

35. He further submitted that in paragraph five of the 5 August 2014 memorandum, Lieutenant W misleads the MEU that the Applicant's failure to draw his firearm was a personal choice yet the circumstances surrounding the withdrawal of the Applicant's firearm are well detailed in his complaint to the Director-General of UNON (DG).

36. Finally the Applicant submitted that in paragraph six of the 5 August 2014 memorandum, Lieutenant W alleged that he inquired of the Applicant why he had not been drawing his firearm and that the Applicant stated that he does not deal with Officers of the rank of Sergeant. This allegation is unfounded since Lieutenant W has not provided any evidence to support it.

Respondent's submissions

37. The Respondent submits that the Application is not receivable because it does not identify in a clear or concise manner the administrative decision he wishes to contest. Administrative decisions that are not precisely identified are not receivable.

38. There was no administrative decision taken on or before 14 July 2014 by the Chief, UNON/DSS, Lieutenant W and a DSS Inspector to place the Applicant on Weapons Restriction. The 14 July memorandum does not impose any Weapons Restriction but responds to the Applicant's request for advice as to whether he would be required to attend Active Shooter Training.

39. The Applicant refers to no circumstance which could reasonably lead to the conclusion that a Weapons Restriction was imposed on him on 14 July 2014. He presents no evidence that on that date he attempted to draw his weapon from the armoury and that his attempt was rejected.

40. The Applicant's claim lacks merit because, on 18 July 2014, the Chief, UNON/DSS placed him on Weapons Restriction due to his failure to abide by the mandatory annual re-qualification standard to maintain his firearm. This restriction was lawful and fully accords with the relevant procedures for the issuance and control of firearms in UNON. The relevant sections in the DSS Manual are sections 4.4, 4.16 and 4.20.

41. In addition to the DSS Manual, the UNON/DSS Standard Operating Procedure³ (SOP) regulates the carriage of firearms. Section 6 of the SOP provides that Security Officers are required to make every possible effort to maintain their Weapons Authorization Card and that all personnel are required to attend the annual Firearms Qualification Exercise. Failure to attend the exercise leads to revocation of firearms carry status and other relevant administrative procedures.

³ Approved 26 May 2012.

42. Section 12 of the SOP stipulates that members of the service are required to attend the Annual Firearms Qualification Exercise regularly to maintain their skill levels at arms, marksmanship and to help them achieve the required standard for a United Nations Firearms Permit.

43. At UNON, the host country's Firearms Bureau issues weapons permits to United Nations personnel on a yearly basis. The permits are processed in May and are valid for one year. The Chief, UNON/DSS issues a Weapons Authorization Card to security personnel who successfully pass the yearly qualification exercise for firearms. Both the host country permit and the United Nations Weapons Authorization Card must be valid in order for a Security Officer to be able to lawfully carry a firearm at UNON.

44. In order to comply with the host country laws and United Nations rules, UNON/DSS conducts a yearly qualification/requalification exercise for authorized security personnel. The exercise usually commences in October and ends in December. Operational requirements dictate how many security personnel can attend the course at any given time. The scheduling of the exercise also depends on the availability of the host country firing range. Depending on the operational needs of UNON/DSS, requalification exercises may also be scheduled during other periods.

45. Paragraph 2.34(c) of the DSS Manual provides that a security official may have a Weapons Restriction applied when there has been a failure to maintain mandatory annual requalification standards. On 18 July 2014, pursuant to this provision, the Chief, UNON/DSS, revoked the Applicant's authorization to carry his service weapon until such time as he rescheduled for a requalification exercise. In order to ensure compliance with the above and in accordance with standard procedures, the Applicant was requested to hand in his United Nations Weapons Authorization Card to the UNON armorer.

46. There is no basis to the Applicant's claim to have been placed on Weapons Restriction prior to 18 July 2014. Pursuant to section 2.34 of the DSS Manual, such a restriction would have been in writing. Irrespective of this restriction imposed by the Chief, UNON/DSS, the Applicant was not entitled to carry a

weapon. Host country laws and section 4.16 of the DSS Manual prohibited the Applicant from carrying a weapon without an up-to-date weapons qualification for that specific weapons system upon expiration of his host country weapons permit on 19 May 2013.

47. Despite filing a complaint of prohibited conduct, the Applicant is required to continue to adhere to all United Nations Rules and Regulations as well as host country laws.

48. The Applicant's claim with respect to interference with the fact-finding panel is frivolous. The Applicant provides no explanation as to how requalifying for his firearms credentials would impact on the fact-finding investigation or the outcome of that process. The formal procedures provided for under ST/SGB/2008/5 (Prohibition of discrimination, harassment, and abuse of authority) have no connection with United Nations policies on the carriage of firearms.

49. The Applicant's request for an award of monetary damages in the amount of six months' net base pay should be rejected. The Applicant has failed to establish any breach of his terms of appointment and has suffered no monetary loss as a result of the contested decision.

50. The Applicant's conduct warrants an award of costs under art. 10.6 of the Statute of the Dispute Tribunal. The pursuit of a vexatious and frivolous application constitutes a manifest abuse of proceedings. The Application has no reasonable chance of success and is a waste of the resources of the Organization and of the Dispute Tribunal.

Considerations

Receivability

51. To be receivable an application must identify an administrative decision that is alleged to be in non-compliance with the applicant's terms of appointment

or the contract of employment⁴ and the applicant must have requested management evaluation of the impugned decision within the correct time frames, assessed either by the date of the decision or the date when the decision was notified to him⁵.

52. In this case the Applicant identifies the administrative decision as “the procedural failure by the UNON administration in placing Weapons Restriction”. He alleged the decision was made on October 2013 or thereabout and was notified to him on 14 July 2014. The time for requesting management review therefore ran from 14 July. The Applicant requested management evaluation on 19 July 2014, well within the required time limit.

53. In his request for management evaluation, the Applicant identified the impugned decision as “the verbal instruction on 4 February 2013 to the effect that he should return his firearm to the armoury”. In the body of his Application to the Tribunal he refers to a decision made in October 2013 or thereabout. In the annexes to the Application he refers to the verbal instruction dated 4 February 2013 to return his weapon to the armoury.

54. In spite of the variation in dates of the alleged decision and the confused nature of his pleadings, it is possible to discern from the request to MEU and the Application that the gravamen of the Applicant’s challenge is the lawfulness of the instruction to return his weapon which, following communications with DSS in 2014, he came to understand was the placement of a Weapons Restriction on him.

55. The Tribunal is prepared to give the Applicant, who is unrepresented, the benefit of the doubt about the identification of the impugned decision in the interests of not depriving him of a full consideration of his claim on the merits.

56. The Tribunal finds that the Applicant has identified an administrative decision that he alleges not to be in compliance with his terms of employment and, based on the date which he alleges he was notified of that decision he has

⁴ Dispute Tribunal Statute, art. 2.1(a).

⁵ Ibid, art. 8.1.

complied with the time limits for requesting management review of that decision. The Application is therefore receivable.

Merits

57. The primary instrument relevant to the issues in the case is the DSS Manual. It defines the roles and responsibilities of officials in relation to firearms at United Nations duty stations, custody of weapons, certification and authority to carry firearms, and weapons administration including withdrawal of such authorisation.

58. The manual defines the “Armoury” as the secured location of the storage of United Nations weapons. The Armoury is overseen by a Weapons Custodian or Armoury Officer. DSS officers may only carry firearms and ammunition while they are on official duty unless especially authorised. When not in use on official duty, the weapons are stored at the armoury.

59. To carry a weapon on duty United Nations Security Officials must meet three conditions: to be certified after satisfactorily completing a required firearms course of technical competence⁶; to hold a valid host country firearms licence; and to be authorised by the CSA/COS/CSO. When these three conditions are met the CSA/COS/CSO is able to issue a Weapons Authorisation Card. Security officials must be in possession of a current Weapons Authorisation Card to carry a weapon. They will be armed while on duty unless instructed otherwise.

60. In specified circumstances, the CSA/COS/CSO may place restrictions on Security Officials carrying their weapon. In such a case the concerned Security Official shall be notified in writing of the expected duration⁷.

61. UNON Safety and Security Service’s SOP requires Security Officers to make every possible effort to maintain their Weapons Authorisation Card and refers to the firearms qualifications exercises. It notes that the authorisation to carry a United Nations firearm is a basic requirement as a Security Officer of UNON/DSS.

⁶ Para. 2.22 of the DSS Manual.

⁷ Para 2.34 DSS Manual.

62. The facts of the matter as presented by the Applicant do not support his contention that he had been placed on weapons restriction at the time he alleges. He relies on a statement by Lieutenant W in his letter dated 14 July 2014 as evidence that as of October 2013 Lieutenant W knew that a Weapons Restriction had been placed on the Applicant. An objective reading of that statement does not support this contention. Lieutenant W referred to Weapons Restriction in the context of his noting that the Applicant had failed to attend the mandatory annual re-qualification on October 2013 and that a Weapon Restriction may be applied in such circumstances.

63. Lieutenant W's statement neither confirmed that such a restriction had been placed on the Applicant in October 2013 nor purported to place such a restriction on him on 14 July 2014. As the Lieutenant stated, such a restriction could only have come from the Chief, UNON/DSS.

64. When the Applicant received the DSS Inspector's verbal instruction to return his firearm to the armoury in February 2013, he held a valid Weapons Authorisation Card. In compliance with the Inspector's instruction the Applicant placed the firearm into the custody of the armourer for safekeeping. He did not receive any notification from the Chief, UNON/DSS or any other person at that time that he was placed on a Weapons Restriction. No instruction was given to the armoury to prevent him from drawing the firearm while on duty.

65. The Tribunal is satisfied that the Applicant was not prevented from uplifting the firearm from the date he was instructed to return it to the armoury. It was available for him to collect. The Applicant did not rebut that evidence when given the opportunity by the Tribunal.

66. The Tribunal finds that there is no evidence that a Weapons Restriction was placed on the Applicant on 4 February 2013 or in October 2013. The question of weapons restriction did not arise until 18 July 2014 when, following the Applicant's refusal to attend a firearms training course, the Chief, UNON/DSS gave him written notice. The Tribunal also notes that the Applicant is still invited to attend that training.

Conclusion

67. The Application is dismissed.

Costs

68. The Tribunal has considered the Respondent's submission that these proceedings are vexatious and frivolous and constitute a manifest abuse of proceedings warranting an award of costs.

69. There is a fine line between proceedings that are unmeritorious and those that amount to an abuse of proceedings. In *Gehr* 2013-UNAT-294⁸, it was held that the fact that the application was moot was so obvious that no reasonable person could have arrived at any other conclusion and that the applicant had abused the appeals process by filing an appeal that was blatantly frivolous.

70. The present case was certainly unmeritorious but does not reach the high threshold of abuse of proceedings. There will be no award of costs against the Applicant in this case but he is on notice that if he files any applications following this judgment, which are deemed to be unmeritorious, he could be open to the allegation that he has abused the process.

(Signed)

Judge Coral Shaw

Dated this 10th day of December 2014

Entered in the Register on this 10th day of December 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁸ at para. 21.