



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-197

Kamunyi
(Appellant/Respondent on Cross-Appeal)
v.
Secretary-General of the United Nations
(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal

Judgment No.: 2012-UNAT-194

Date: 16 March 2012

Registrar: Weicheng Lin

Counsel for Appellant/Respondent on Cross-Appeal: James Ochieng' Oduol

Counsel for Respondent/Appellant on Cross-Appeal: John Stompor

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Anthony Kamunyi on 31 January 2011 against Judgment No. UNDT/2010/214 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) on 16 December 2010. The Secretary-General filed an answer and a cross-appeal on 18 March 2011. On 3 May 2011, Mr. Kamunyi filed an answer to the cross-appeal.

2. The UNDT Judgment under appeal examines several administrative decisions. Both parties appeal the Judgment on different grounds.

3. The Appeals Tribunal rejects Mr. Kamunyi's appeal in its entirety. It holds that it is within the Administration's discretion to reassign a staff member to a different post at the same level and that such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member. In the present case, the UNDT correctly held that Mr. Kamunyi's reassignment was lawful. The Appeals Tribunal further holds that the UNDT rightfully rejected Mr. Kamunyi's request for legal costs as no legal costs are due to a party when the opposing party has not abused the process.

4. Turning to the Secretary-General's cross-appeal, the Appeals Tribunal holds that the UNDT erred in finding that the reprimand imposed on Mr. Kamunyi for insubordination by refusing to hand over his private firearm was unreasonable and unlawful. Therefore, the Appeals Tribunal vacates the UNDT Judgment in part and reduces the compensation to be awarded to Mr. Kamunyi to the amount of two years' of his current net base salary.

Facts and Procedure

5. In 2004, Mr. Kamunyi joined the United Nations Office at Nairobi (UNON) as a Security Officer at the G-3 level. He was later promoted to the G-4 level.

6. On the night of 16 May 2006, Mr. Kamunyi was driving along Thika Road when the electrics of his car failed. When he pulled his car over to examine the problem, three men accosted him, one of whom was armed with a rifle. Mr. Kamunyi was carrying his private firearm, which he threw into a nearby flower nursery, and he escaped. He then called a

friend who alerted the police. The police rang Mr. Kamunyi on his mobile phone, went to the scene of the incident and assisted him with searching for his private firearm.

7. On 19 May 2006, the Executive Director of the United Nations Human Settlements Programme (UN-HABITAT), who was also the Acting UNON Director-General, received an email message warning her of an internal plot to kill her, involving “exiting of a weapon, bullet-proof vest and ammunition from the security”.

8. On 20 May 2006, an inventory of all weapons and ammunitions in the Armoury of the UNON Security and Safety Service (UNON/SSS) showed that there were no weapons missing. However, on 22 May 2006, it was confirmed that a United Nations firearm was missing.

9. On 24 May 2006, the Kenyan Police informed UNON/SSS that a United Nations firearm had been found along Thika Road, close to the location where they had encountered Mr. Kamunyi on the night of 16 May 2006. After checking the serial number, it was confirmed to be the United Nations firearm that was missing from the UNON Armoury. The Kenyan Police informed UNON/SSS that they thought that there might be a connection between Mr. Kamunyi and the missing United Nations firearm. The Kenyan Police believed that Mr. Kamunyi might have been in possession of both his and the Organization’s firearm on the night of 16 May 2006 and wanted to interview him in this regard.

10. On 26 May 2006, Mr. Kamunyi carried his private firearm to a meeting with the UNON/SSS Chief and two investigators looking into the reported plot against the UN-HABITAT Executive Director. The UNON/SSS Chief instructed Mr. Kamunyi to hand over his private firearm, but Mr. Kamunyi refused to do so. As a result of his refusal, the UNON/SSS Chief ordered him to leave the premises and to hand over his ground pass.

11. On 29 May 2006, the UNON Armourer reported the loss of the United Nations firearm to the Kenyan Diplomatic Police Unit. That same day, the Chief of UNON’s Human Resources Management Service wrote to Mr. Kamunyi to inform him that he had been placed on Special Leave With Full Pay (SLWFP).

12. Also on 29 May 2006, the Kenyan Diplomatic Police wrote to the Chief, UNON/SSS, seeking a waiver of Mr. Kamunyi’s privileges and immunities as a United Nations staff member so that he could be questioned about the missing firearm. Following a meeting

between the Police Commissioner and the Chief, UNON/SSS, Mr. Kamunyi was arrested by the Kenyan police on 9 June 2006, and held in custody until 12 June 2006. On 5 December 2006, the Kenyan police reported to the UNON/SSS Chief that they did not find anything tangible incriminating him.

13. Following these events, the Investigations Division, Office of Internal Oversight Services (OIOS) opened two internal investigations; the first into the lack of controls in the UNON Armoury and related misconduct by senior staff members including the UNON/SSS Chief; and the second into allegations of misconduct by Mr. Kamunyi arising from the alleged plot against the UN-HABITAT Executive Director and the suspicion that Mr. Kamunyi had been involved in the theft of the missing firearm.

14. On 12 November 2007, the investigators concluded that the evidence was insufficient to make a conclusive finding that Mr. Kamunyi had authored the e-mail message to the UN-HABITAT Executive Director, but found that he was possibly involved in the theft of the United Nations firearm. It further concluded that Mr. Kamunyi's refusal to hand over his private firearm did not meet the standards of competence and integrity required of United Nations staff members.

15. Based on the OIOS report, Mr. Kamunyi was formally charged, on 24 January 2008, with misconduct for refusing to hand over his private firearm. Mr. Kamunyi responded to the charges on 15 February 2008.

16. Mr. Kamunyi was suspended from duty with pay on 4 February 2008. On 16 July 2008, the Officer-in-Charge of the Office of Human Resources Management (OHRM) wrote to Mr. Kamunyi to inform him that his case would not be pursued as a disciplinary matter, and that he should report to work. However, she reprimanded Mr. Kamunyi for his failure to comply with his supervisor's instruction to hand over his private firearm. Mr. Kamunyi was also informed that he was reassigned to a position with UNON Conference Services.

17. On 16 December 2010, the UNDT rendered Judgment No. UNDT/2010/214. It found that Mr. Kamunyi's suspension from his position as a Security Officer and his barring from the UNON premises from May 2006 to January 2008 were unlawful and amounted to an indefinite and veiled disciplinary measure. The UNDT found that UNON failed to follow

the procedures set out with respect to the handling of the request for the waiver of Mr. Kamunyi's immunity and his subsequent arrest and detention by the Kenyan police. The UNDT found that Mr. Kamunyi had been unlawfully placed on SLWFP prior to being formally charged with misconduct on 24 January 2008.

18. The UNDT found that the reprimand imposed on Mr. Kamunyi for his refusal to hand over a loaded firearm to his supervisor was unlawful. The reprimand was based on a finding of insubordination, which the UNDT found to be incorrect on both questions of fact and law. It however found that Mr. Kamunyi had not been denied due process in relation to the charge of insubordination.

19. Finally, the UNDT found that the transfer of Mr. Kamunyi to another area of work upon his return was a lawful exercise of the Secretary-General's discretion.

20. The UNDT ordered the rescission of the decision to suspend Mr. Kamunyi and place him on SLWFP for one year and eight months; and the rescission of the decision to reprimand him for insubordination. The UNDT ordered the Secretary-General to pay Mr. Kamunyi compensation under Article 10(5)(b) of the UNDT Statute in the amount of two years and six months of his current net base salary. It did not grant Mr. Kamunyi's request for an award of legal costs.

Submissions

Mr. Kamunyi's Appeal

21. Mr. Kamunyi alleges that the UNDT erred in fact in upholding the decision to transfer him from UNON/DSS to UNON Conference Services. He submits that the decision was "without [respect for] due process", "arbitrary, prejudicial", "clearly based on wrong facts, extraneous considerations, factors and findings", and disproportionate in the circumstances of the case.

22. Mr. Kamunyi further challenges the UNDT's decision not to award legal costs. He submits that he succeeded with his application before the UNDT on several grounds and was therefore entitled to costs. He also submits that his badge and ground pass had been confiscated and that, therefore, he no longer had access to the Office of Staff Legal Assistance.

Secretary-General's Answer and Cross-Appeal

23. The Secretary-General contends that the Dispute Tribunal correctly concluded that the reassignment of Mr. Kamunyi to another area of work was a lawful exercise of his discretion. He further contends that the UNDT correctly concluded that Mr. Kamunyi was not entitled to legal costs and that he had failed to establish any errors warranting a reversal of this conclusion.

24. In his cross-appeal, the Secretary-General claims that the UNDT erred in law in finding that the instruction of the Chief, UNON/SSS that Mr. Kamunyi hand over his private firearm was unlawful. Under Section 6.28 of the United Nations Field Security Handbook (Field Security Handbook), "privately owned firearms shall not be carried ... into United Nations offices...". Under Section 2 of ST/AI/309/Rev.2, "[s]ecurity officers are authorized ... to seize property if they have a reason to believe that any person is carrying an unauthorized weapon". The Secretary-General further claims that the UNDT erred in relying on Kenyan law to find that Mr. Kamunyi was reasonable in refusing to comply with the instruction to hand over his private firearm while on the Organization's premises. Under the Headquarters Agreement, Kenyan law does not apply on the UNON premises when they conflict with administrative issuances of the Organization.

25. The Secretary-General next submits that the UNDT erred in finding that the instruction that Mr. Kamunyi hand over his private firearm was unreasonable. The Field Security Handbook, which forbids the carrying of privately owned firearms, provides that compliance with such policy is mandatory. Furthermore, Staff Rule 101.2(b) provides that "[s]taff members shall follow the directions and instructions properly issued by the Secretary-General and their supervisors". Section 1 of ST/AI/309/Rev.2 further provides that "[a]ll persons on the premises are expected to comply with the directions that may be issued by the security officers in the performance of their functions". As a UNON Security Officer, Mr. Kamunyi should have been acquainted with these provisions. Also, the circumstances of the security situation at the time, as well as the circumstances of the encounter between the UNON/SSS Chief and Mr. Kamunyi, support the reasonableness of the instruction.

26. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Kamunyi's appeal in its entirety, set aside the Dispute Tribunal's order rescinding the reprimand of Mr. Kamunyi and modify the UNDT's order to pay compensation in view of the validity of the reprimand.

Mr. Kamunyi's Answer to Secretary-General's Cross-Appeal

27. Mr. Kamunyi submits that the Secretary-General's cross-appeal is out of time since it did not comply with the time limit stipulated in Article 9(4) of the Rules of Procedure of the Appeals Tribunal (Rules). Furthermore, the Secretary-General failed to file, under Article 7 of the Rules, a timely "substantive" appeal. The Secretary-General's cross-appeal is therefore not receivable.

28. Mr. Kamunyi further submits that the UNDT correctly found that the instruction that Mr. Kamunyi hand over his private firearm was unlawful and unreasonable. In particular, he submits that Section 6.28 of the Field Security Handbook requires due observance of the laws of the host country as to the use of firearms. The Kenyan Firearms Act provides that only a licensed officer or other authorized person could require him to hand over his private firearm. The Chief, UNON/SSS, was not an authorized person under the Kenyan Firearms Act. The OIOS investigation report recognized that the Kenyan Firearms Act applied to Mr. Kamunyi.

29. Mr. Kamunyi produced the Standing Operating Procedures (SOP) dated 19 October 2005 signed by the Chief, UNON/SSS, as the policy in place at the material time. The SOP "did not regulate the carrying of private weapons by staff members and more so security staff who were licensed by the host country within the United Nations Complex". The document United Nations Mission Firearms Policy dated 3 September 2009, which the UNON/SSS Chief produced, was not in place at the material time.

30. The OIOS report, on which the UNDT relied, found that there was no policy concerning the storage of private firearms in the UNON Armoury. A firearms control register was maintained for individual security officers who carried personal firearms. Mr. Kamunyi had been authorized by the UNON Armourer to deposit his privately owned firearm for safe-keeping while at work; and the Chief, UNON/SSS was aware of and officially acknowledged the arrangement. Furthermore, Mr. Kamunyi's firearm was neither the

property of the Organization nor unauthorized property within the meaning of ST/AI/309/Rev.2.

31. The charge of insubordination arose out of “an act of conspiracy” against Mr. Kamunyi since the Chief, UNON/SSS, had instructed the UNON Armourer not to open the Armoury on the material day. Mr. Kamunyi finally submits that it was contradictory not to pursue an alleged act of insubordination as a disciplinary matter, but to proceed to reprimand him on the basis of the same facts.

Considerations

32. At the outset, the Appeals Tribunal rejects the Appellant’s submission that the Secretary-General’s cross-appeal is time-barred. The Rules of Procedure’s time limit for filing a cross-appeal was amended to 45 days by the Appeals Tribunal in plenary meeting on 28 October 2010 to adjust the time limit for filing a cross-appeal to the time limit for filing a respondent’s answer to an appeal. The amended time limit was in place when the Secretary-General filed the cross-appeal within the 45-day time limit. It is therefore timely.

33. Both parties challenge the UNDT Judgment in part.

34. Mr. Kamunyi alleges that the UNDT erred in upholding the decision to transfer him from UNON/DSS to UNON Conference Services; and in rejecting his request for legal costs.

35. Considering that Mr. Kamunyi was transferred to a position which was at the same level as his own, and due to the difficulties surrounding Mr. Kamunyi’s returning to the same place of work where the relationship with management was not easy, it was a valid exercise of the Administration’s discretion to assign him to a different place of work, without economical prejudice to the staff member. The decision is also reasonable, given the circumstances of the case. There were no - and there are no - grounds to rescind it or to award compensation. It was taken according to Staff Regulation 1.2(c) and ST/AI/2006/3 applicable at the time.¹

36. Similarly, the UNDT did not err in rejecting Mr. Kamunyi’s request for legal costs as no legal costs are due to a party when the opposing party has not abused the process.

¹ Cf. *Allen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-187.

37. Turning to the Secretary-General's cross-appeal, the Appeals Tribunal finds that the UNDT erred in law in finding that the instruction of the Chief, UNON/SSS, that Mr. Kamunyi hand over his private firearm was unreasonable and unlawful, in finding that the refusal did not constitute insubordination, in finding the reprimand was unlawful, and in rescinding it.

38. Under Section 6.28 of the Field Security Handbook, it is forbidden to carry private weapons within the offices of the United Nations. Under Section 2 of ST/AI/309/Rev.2., security officers are authorized to seize property if they have a reason to believe that a person is carrying an unauthorized weapon. The UNDT erred in relying on Kenyan law to find that Mr. Kamunyi's refusal to comply with the instruction to hand over his private firearm while on the Organization's premises was reasonable. National laws cannot apply when, as in the present case, they contradict specific administrative regulations of the United Nations. Even if Mr. Kamunyi thought that the request was unlawful, he had to comply with it. It was up to him to subsequently challenge the order through administrative proceedings. Security and safety were involved so he should have complied with the instruction. From the foregoing, Mr. Kamunyi was in fact insubordinate when he refused a direct order. Consequently, the reprimand he received was lawful and its rescission and the respective compensation must be vacated.

39. The UNDT awarded compensation in the amount of two years and six months' net base salary, without differentiating between the three violations. A review of the UNDT's reasoning reveals that the violations which affected Mr. Kamunyi the most were the ones related to his one year and eight months' suspension, the forced SLWFP for around a month and a half, and the irregular handling of the request for a waiver of his immunity and his arrest. Compared to these issues, which are not under appeal, the reprimand and its consequences must be considered the least important when assessing the amount of compensation that must be set aside. The Appeals Tribunal reduces the compensation awarded by the UNDT to the amount of two years' net base salary.

Judgment

40. For the foregoing reasons, the Appeals Tribunal dismisses Mr. Kamunyi's appeal in its entirety. The Appeals Tribunal allows the Secretary-General's cross-appeal in part and

affirms the reprimand of Mr. Kamunyi while reducing the compensation owed to him to two years of his current net base salary.

Original and Authoritative Version: English

Dated this 16th day of March 2012 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

Entered in the Register on this 7th day of May 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar