



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

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

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

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 subm

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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

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 in subordination, 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

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

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