



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena KwakyeBerko

BIRYA

v.

SECRETARY GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Katya Melliush, UNON

Introduction

1.

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

The Issues

9. The legal issues arising for determination in this case are:
- a. whether the Application is receivable and, if so,
 - b. whether the Applicant is entitled to the relief he seeks, that is, a rescission of the reprimand he received from Lieutenant W.

Facts

10. The Applicant is a staff member at the United Nations Office at Nairobi (UNON). At the date of this judgment he remains in service as a Security Officer in the Department of Safety and Security (DSS)

11. Following an incident between a DSS Inspector and the Applicant at UNON on 4 February 2013, the Inspector instructed the Applicant to be assigned firearm to the UNON/DSS armoury. The Applicant complied with the instruction. He has not uplifted

2013 and that he had enquired from the Applicant on 18 September 2014 why he had not been drawing his assigned firearm for duty. He noted that according to his records, the Applicant did not attend the mandatory annual firearms requalification in October 2013 and that according to United Nations Department of Safety and Security Manual of Instruction on Use of Force Equipment including Firearms¹(the DSS Manual) a weapons restriction may be applied if there is a failure to maintain mandatory annual requalification.

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

16. The Applicant responded to Lieutenant W on the same day, 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.

17. 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.

18. On 15 July 2014, the Applicant exchanged several emails with Lieutenant W regarding the proposed firearms qualification training. Lieutenant W also sent an email to the four Security Officers scheduled for Annual weapon-requalification to advise of the time and location for the exercise and the dress code.

¹ Revised on 2 May 2014.

24. On 23 July 2014, Lieutenant W informed the Applicant that his explanation was not acceptable and issued him with a reprimand for failing to “obey a lawful instruction to attend mandatory training published in the Daily Orders by the Chief of Service”. The Applicant was also advised that he would be rescheduled for the training again based on the availability of the shooting range from the host Government and operational considerations.

25. On 24 July 2014, the Applicant informed Lieutenant W that he would be requesting a management evaluation and it would be pointless to reschedule a requalification exercise for him as he had not been informed of the reasons why his firearm had been withdrawn. He also wanted to know whether the firearm would be issued for operations, training, or requalification.

26.

28. The Applicant is well aware of the procedures for investigating complaints of prohibited conduct under ST/SGB/2008/5. He has previously filed such a claim against other superior officers concerning an alleged incident in February 2013. His failure to follow the procedures renders his claim of abuse of authority not receivable.

29. The Applicant seeks to broaden the contested decision in the Application as opposed to his request for management evaluation. The Dispute Tribunal must limit the scope of its review to the decision submitted to management evaluation. To the extent that the Applicant contests a decision that was not submitted for management evaluation, it is not receivable.

On the Merits

30. The Applicant is required to attend an annual firearms qualification exercise. In case No UNDT/NBI/2014/079, the Applicant challenged his placement on Weapons Restriction. The Respondent adopts and incorporates into his Reply in this case, the facts and arguments in his reply to the said case.

31. The Applicant was required to requalify annually to carry a firearm. As a consequence of his failure to requalify he was unable to carry a firearm and it was lawful and appropriate to place him on Weapons Restriction.

32. Pursuant to staff rule 1.2(a) and ST/SGB/2002/93 (status, basic rights and duties of United Nations staff members), staff members have an obligation to follow the directions and instructions properly issued by the Secretary-General and by their supervisors.

33. The Applicant is a junior Security Officer and is required to observe and

40. The Applicant is a frequent litigant. This is the fifth case he has filed before the Dispute Tribunal in a 17 month period. The sole purpose of the Application appears to carry out his threat against Lieutenant W.

Applicant's Submissions

Receivability

41. The Applicant submits that he had earlier submitted a complaint of prohibited conduct to the Administration which for close to two years is yet to be resolved. The submission by the Respondent that he should have pursued the same channel as his first complaint under ST/SGB/2008/5 is therefore "unfounded and aimed at misleading the Tribunal".

42.

On the Merits

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litigant to engage in that process

51. In *Nwuke* 2010 UNAT 099³, UNAT concluded that:

In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, the Appeals Tribunal ... when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can

believes that the procedure followed was improper. Such an appeal is to the Dispute Tribunal in the first instance.

56. This framework is directed to the finding investigation investigating and determining the factual matters alleged amount to prohibited conduct. A final decision on whether there has been prohibited conduct and the outcome of that finding is made only after that panel has reported its well settled jurisprudence that a review of the decision and/or outcome is not to be followed⁴

57. Until the circumstances of those allegations have been properly investigated under the process set out by the ST/SGB/2008/5 there is no decision for the Tribunal to review.

58. The Tribunal finds that ST/SGB/2008/5 provides comprehensive procedure, both informal and formal, to a person who alleges that he or she is a victim of prohibited conduct. Although the Applicant complained that the impugned decisions amounted to an abuse of authority, he did not challenge the procedures set up to address such allegations. Accordingly there is no decision made pursuant to the ST/SGB for the Tribunal to review.

Conclusion

59. The Application to the Tribunal is premature and is not receivable.

(Signed)

Judge Coral Shaw

Dated this 10th day of December 2014

⁴ See for example *Nwuke* 2010 UNAT-099 at para. 36.

Entered in the Register on the 16th day of December 2014

(Signed)

Abena Kwakye Berko, Registrar, Nairobi