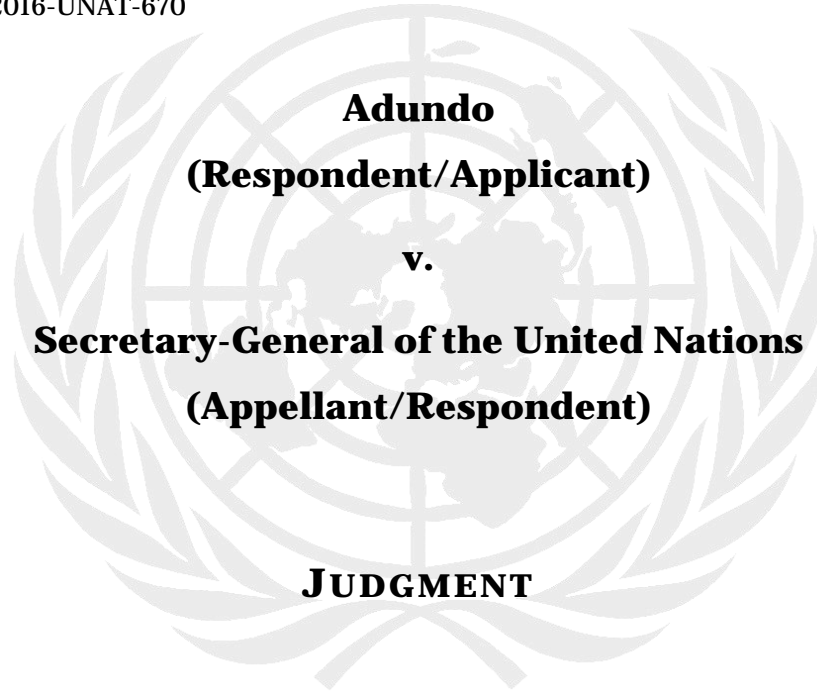




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-670



**Adundo
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Rosalyn Chapman Judge Richard Lussick
Case No.:	2016-881
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Mr. Adundo:	Didier Sepho, Esq.
Counsel for Secretary-General:	Rupa Mitra

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by the Secretary-General of the United Nations of Judgment No. UNDT/2015/107, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 6 November 2015, in the case of *Adundo v. Secretary-General of the United Nations*. On 4 January 2016, the Secretary-General filed the appeal, and on 5 March 2016, Mr. Deogracious Bwire Adundo filed his answer to the appeal.

Facts and Procedure

2. The Dispute Tribunal made the following factual findings:¹

... [Mr. Adundo is] a Security Officer at the S-2 level with the Security and Safety Service (“SSS”), Department of Safety and Security (“DSS”) ...

...

... On 8 July 2014, [Mr. Adundo] was assigned to Post 33—General Assembly/Visitors Area—at the United Nations Headquarters in New York.

... Lieutenant Glenn Roberts, a Senior Security Officer and front line supervisor, reported that he witnessed [Mr. Adundo’s] absence from the Post for approximately three minutes. He prepared and signed an SSS In-Service Performance Record document that day. The subject line of the document reads: “RE: Dereliction of Duty; Post 33”.

... The In-Service Performance Record appears to be a *pro forma* document that allows the SSS to establish a written record of the Service’s efforts to correct performance issues through one of four methods: verbal counselling, formal counselling, a Performance Notice, or a Notice of Counsel.

...

... On 10 July 2014, Inspector Donald Patterson requested that [Mr. Adundo] sign the Notice of Counsel. [Mr. Adundo] refused.

... By email dated 11 July 2014 to Mr. Bryan Black, Assistant Chief, SSS, [Mr. Adundo] provided an explanation for his alleged dereliction of duty while stationed at Post 33. He stated that he heard strange sounds coming from the projector room adjacent to the auditorium and was verifying whether the machinery was running properly in accordance with his duties in regard[s] to fire, smoke detection and gas leakages. [Mr. Adundo] stated that neither Lieutenant Roberts

¹ Impugned Judgment, paras. 1, 4-6, and 8-15.

nor Inspector Patterson listened to his explanation or allowed him to view the video footage of the incident. [Mr. Adundo] further stated that he considered the Notice of Counsel an act of harassment and retaliation for previous proceedings that he [had] brought before [the Dispute] Tribunal. Finally, he requested that a transparent and independent body review the matter.

... On 21 July 2014, Mr. David Bonggi, Chief, SSS, requested that Special Assistant Noel Heffernan conduct an independent review of the events that gave rise to the issuance of the Notice of Counsel.

... [...] Mr. Heffernan concluded that the finding of dereliction of duty was reasonable in the circumstances, as [Mr. Adundo] had breached an operating procedure by leaving his post unmanned. Mr. Heffernan recommended that [Mr. Adundo] be given remedial instruction. He also suggested that consideration be given to downgrading the Notice of Counsel to a Performance Notice. Mr. Bonggi rejected [Mr. Heffernan's] suggestion in a hand written annotation on the memorandum the next day.

... On 13 August 2014, [Mr. Adundo] met with Mr. Black and was informed of the outcome of Mr. Heffernan's review and that he would be referred for retraining.

... On 14 August 2014, Mr. Bonggi issued Chief's Directive 2014-06 on Corrective Performance Training. The Directive stated that where an officer's performance caused a breach of security or unsafe conditions, the officer will not be reassigned to that post until retraining had been successfully completed.

... On 19 August 2014, [Mr. Adundo] received an official duty assignment for retraining. The same day Sergeant Ellis Maronie from the Training and Development Unit ("TDU") of SSS notified Mr. Mathew Sullivan, Inspector Operations, SSS, that [Mr. Adundo] had attended a TDU classroom that morning and stated that he was not going to take part in retraining because it would "serve as a sign of guilt" in relation to the Notice of Counsel. [Mr. Adundo] further stated that he was being harassed and that he had submitted a written rebuttal to the Notice of Counsel and was awaiting a written response. He would not take part in any retraining until he received such a response.

... By email dated 19 August 2014, Mr. Bonggi informed [Mr. Adundo] that his refusal of the direction from his chain of command to attend training called into question his fitness to be armed. Therefore, with immediate effect, he would be placed on weapons restriction and co-assigned under the direct supervision of a supervisor or Senior Security Officer. He was also informed that any allegation against a supervisor under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) could be submitted to the Head of Department.

3. Mr. Adundo filed an appeal with the UNDT contesting the decision to place him on weapons restriction and under the supervision of a Senior Security Officer. By consent of the parties, the UNDT determined the case on the basis of the documents on file.

4. The UNDT found that “the Notice of Counsel [was], for all practical purposes, extinguished”² as it did not form part of Mr. Adundo’s performance appraisal for the 2014-15 performance cycle and would not be referred to in subsequent performance appraisal reports. Nor was the Notice of Counsel placed on Mr. Adundo’s Official Status File. The [Dispute] Tribunal concluded that “the Notice of Counsel issued to [Mr. Adundo] has not, in and of itself, affected his legal rights. Nor has the decision to order him to attend retraining.”³

5. In relation to the decision to place Mr. Adundo on weapons restriction, the UNDT held that it was an appealable administrative decision because it:⁴

has direct legal consequences. [Mr. Adundo] is no longer authorized to carry a service weapon and this affects his ability to perform the full range of functions that he had hitherto been performing. The ambit of his duties and responsibilities has been circumscribed to a significant degree.

6. The UNDT rescinded the decision to place Mr. Adundo on weapons restriction as it found that Mr. Bongsi had failed to stipulate the expected duration of the restriction, as required by Section 2.35 of the United Nations Manual of Instruction on Use of Force Equipment, Including Firearms (DSS Weapons MOI). The UNDT went on to find:⁵

[The] imposition of a weapons restriction without limitation of time is not only wholly disproportionate but is inconsistent with sec. 2.36 of the DSS Weapons MOI, which provides that supervisors shall not use the duration of weapons restrictions as a punishment for misconduct where normal investigative or disciplinary procedures are applicable.

7. The UNDT ordered the Secretary-General to review the sanction in light of its Judgment and the requirements of the DSS Weapons MOI.

² *Ibid.*, para. 33.

³ *Ibid.*, para. 35.

⁴ *Ibid.*, para. 37.

⁵ *Ibid.*, para 45.

8. The UNDT awarded Mr. Adundo USD 5,000 in moral damages on the inference that “the imposition of a restriction on carrying a firearm, without limitation of time, has caused [Mr. Adundo] a significant degree of distress”.⁶

Submissions

The Secretary-General’s Appeal

9. The UNDT erred in finding that Mr. Adundo’s claim in regards to the weapons restriction was receivable. The imposition of the weapons restriction was a matter of managerial discretion and did not change Mr. Adundo’s terms of appointment or contract of employment, since he continued to be able to perform the duties that he was hired to perform.

10. Even if the claim were receivable, the UNDT erred in finding that the terms of the DSS Weapons MOI were binding and formed part of the terms and conditions of Mr. Adundo’s appointment. The Chief of the SSS was entitled to consult the DSS Weapons MOI but was not bound by the letter of its provisions when exercising his managerial discretion. The DSS Weapons MOI contains guidelines only.

11. Even if the DSS Weapons MOI were deemed to be a part of Mr. Adundo’s terms of appointment, the UNDT erred in finding that it had been violated. Mr. Adundo was informed in writing of the reason for the imposition of the weapons restriction and knew that it was within his power to cure the problem by attending the required training.

12. The UNDT erred on a matter of law and fact in finding that the weapons restriction was imposed as a punishment for Mr. Adundo, in violation of Section 2.36 of the DSS Weapons MOI. There was no evidence that the imposition of the measure was retaliatory or otherwise ill-motivated. The UNDT furthermore substituted its judgment for that of the Chief of the SSS, by stating how Mr. Adundo’s conduct should have been handled.

13. For the above reasons, the UNDT erred in ordering rescission of the decision to place Mr. Adundo on weapons restriction and in awarding moral damages. In relation to the latter point, the UNDT erred in law and exceeded its jurisdiction by awarding moral damages on

⁶ *Ibid.*, para. 55.

the basis of “appropriate inferences from the primary facts”⁷ without citing any evidence to support its findings.

14. Accordingly, the Secretary-General requests that the Appeals Tribunal vacate the UNDT’s Judgment, except for the findings that the Notice of Counsel and the order that Mr. Adundo undergo retraining were not unlawful.

Mr. Adundo’s Answer

15. The imposition of a weapons restriction is not a matter of managerial discretion but an administrative decision. The Appeals Tribunal recognized in *Luvai*⁸ that as a Security Officer has a license to bear firearms, a decision taken by the Administration which restricts this right is a challengeable administrative decision.

16. Contrary to the Secretary-General’s contention, the DSS Weapons MOI is part of the terms and conditions of a security officer’s appointment. Upon the delegation of authority from the Secretary-General, the Under-Secretary-General of the DSS authorizes the carriage of firearms by security officers. The use of firearms, the restriction and the revocation of the authorization to carry firearms are governed by the DSS Weapons MOI. The Secretary-General has failed to show that there is a higher norm in the United Nations legal framework governing the use of firearms and that the relevant sections of the DSS Weapons MOI were in conflict with such norms. As no other norm exists, the DSS Weapons MOI is applicable.

17. The duration of the weapons restriction was neither mentioned within the communications between the Chief of the SSS and Mr. Adundo, nor was it clear, specific or unambiguous. Additionally, the Secretary-General changed his position. First, the Secretary-General submitted to the UNDT that the weapons restriction was in force pending the outcome of an ongoing investigation. Subsequently, he claimed that the restriction would remain in force until Mr. Adundo was “ready to obey lawful commands”. The Secretary-General has failed to show that Mr. Adundo was informed of the duration of the weapons restriction.

⁷ *Ibid.*, para. 51.

⁸ *Luvai v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-417, para. 17.

18. As a result of Mr. Adundo's refusal to retrain pending an answer to his rebuttal of the Notice of Counsel, he has been targeted by the DSS twice. A fact-finding panel is still investigating the incident of 8 July 2014, and he has been placed on weapons restriction in the wake of that incident.

19. The Secretary-General has breached Mr. Adundo's right to bear a firearm which is a substantive entitlement of his employment contract. There is no obligation to produce evidence of harm. Consequently, the UNDT did not err in awarding him moral damages.

20. Mr. Adundo requests that the Appeals Tribunal dismiss the Secretary-General's appeal and uphold the UNDT Judgment.

Considerations

Did the UNDT err in finding Mr. Adundo's claim regarding being placed on weapons restriction receivable?

21. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and the Appeals Tribunal. In *Andati-Amwayi*, the seminal case on this issue, the Appeals Tribunal considered:⁹

What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

⁹ *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, paras. 17-19.

22. The Secretary-General submits the imposition of the weapons restriction was a matter of managerial discretion and did not change Mr. Adundo's terms of appointment or contract of employment, since he continued to be able to perform the duties that he was hired to perform.

23. The UNDT held that placing Mr. Adundo on a weapons restriction was an appealable administrative decision because it:¹⁰

has direct legal consequences. [Mr. Adundo] is no longer authorized to carry a service weapon and this affects his ability to perform the full range of functions that he had hitherto been performing. The ambit of his duties and responsibilities has been circumscribed to a significant degree.

24. We affirm the findings of the UNDT as Mr. Adundo's right to bear a firearm is a substantive entitlement of his contract as a security officer; the application was therefore receivable.

Did the UNDT err in finding that the DSS Weapons MOI was part of the terms of Mr. Adundo's appointment?

25. The Secretary-General argues further that even if the claim were receivable, the UNDT erred in finding that the terms of the DSS Weapons MOI were binding and formed part of the terms and conditions of Mr. Adundo's appointment.

26. The Appeals Tribunal notes that the use of firearms, the restriction and the revocation of the authorization to carry firearms are governed by the DSS Weapons MOI. The DSS Weapons MOI, being a manual of instructions in the United Nations legal framework, "is intended to provide guidance on all aspects pertaining to the management, issuance, carriage and use of equipment intended to be used by United Nations Security Officials when the use of force is justified and necessary in the pursuit of their duties".¹¹

27. In that respect, the DSS Weapons MOI does not have the legal force attributed to it by the UNDT.

¹⁰ Impugned Judgment, para. 37.

¹¹ United Nations Manual of Instruction on Use of Force Equipment, Including Firearms, para. 1.1.

28. Contrary to the findings by the UNDT that the guidelines were violated as the duration of the weapons restriction was not mentioned within the communications between the Chief of the SSS and Mr. Adundo, it was clear that the restriction would remain in force until Mr. Adundo was “ready to obey lawful commands”, which was for him to attend weapons training for a security breach.

29. Accordingly, we uphold the Secretary-General’s submission that the UNDT erred on a matter of law and fact in finding that the weapons restriction was imposed as a punishment for Mr. Adundo, in violation of Section 2.36 of the DSS Weapons MOI. There was no evidence that the imposition of the measure was retaliatory or otherwise ill-motivated. The UNDT erred furthermore by substituting its opinion for that of the Chief of the SSS, by stating how Mr. Adundo’s conduct should have been handled.

30. From the foregoing, the appeal succeeds.

Judgment

31. The appeal is allowed. Judgment No. UNDT/2015/107 is vacated.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar