



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

BIRYA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Katya Melliush, UNON

## **Introduction**

1. On 14 October 2014, the Applicant filed an Application with the Tribunal alleging abuse of authority by the UNON Administration. He submits that the issues for the Tribunal to resolve are:

- a. Whether a Reprimand issued to him was lawful; and
- b. Whether the instruction to “attend the weapons Re-Qualification without stating the terms of issuance of the firearm given the prevailing circumstances was properly issued”.

2. He states that the decisions were dated 23 July 2014. He requests the Tribunal to rescind the decision to reprimand him and “seeks any other orders including costs that the Tribunal may wish to protect Justice”.

## **Procedural history**

3. On 14 October and 17 November 2014, the Respondent filed a Reply and Amended Reply, respectively, with leave of the Tribunal (pursuant to Order No. 253 (NBI/2014)). The Respondent submitted, *inter alia*, that the Application is not receivable *ratione materiae*.

4. On 21 October 2014, the Tribunal issued Order No. 229 (NBI/2014) requiring the Applicant to file submissions on the receivability of his Application.

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 28 October. He also indicated that the case can be determined on the basis of the written pleadings.

7. Counsel for the Respondent also responded to Order No. 229 on 28 October and informed the Tribunal that the Respondent would not be requesting for an oral hearing.

8. The Tribunal, in accordance with art. 16.1 of its Rules of Procedure, 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. 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 return his assigned firearm to the UNON/DSS armoury. The Applicant complied with the instruction. He has not uplifted his firearm since that time. The circumstances concerning this are outlined in Judgment No. UNDT/2014/092. The firearm has not been issued to him again.

12. 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.

13. 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.

14. Lieutenant W responded to the Applicant 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 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 the United Nations Department of Safety and Security Manual of Instruction on Use of Force Equipment including Firearms<sup>1</sup> (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. 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.

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.

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<sup>1</sup> Revised on 2 May 2014.

In the same email he issued an instruction for the firearms for the four participants to be prepared. The Applicant was listed as one of the participants and was sent this email. The Applicant replied:

In response to your email Sir, kindly be advised that I am still waiting for your response to my yesterday's memo **before** you schedule me for the Re-Qualification exercise.

Hope this time you will remember to reply in time.

19. 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 training in respect of firearms as stipulated in the DSS Manual.

20. On 21 July 2014, Lieutenant W wrote to the Applicant. He said:

This note to file refers to your failure to attend a mandatory security officers training on UN use of Force Policy and Firearms RE-Qualification.

21. The said note to file set out the facts relating to the matter. It referred to the UNON/DSS Standard Operating Procedure<sup>2</sup> (SOP) relating to security training and the DSS manual and told the Applicant that in his case these requirements had not been met fully. It also asked for an explanation of the reason for failing to attend the scheduled duty training no later than the close of business 23 July 2014.

22. In a lengthy reply the same day, the Applicant said that he had sought but not received clarifications about whether he should attend the training as he had never been issued with his duly assigned firearm. He asked for answers to these questions so he could reply to the note to file.

23. The Applicant further stated:

I am **shocked** you are the **same person** writing to me on "**an alleged failure to attend a mandatory training**". Such a move to the least constitute **abuse of authority** and **impunity**.(sic)

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<sup>2</sup> Approved 26 May 2012.

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 that 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 re-qualification.

26. The Applicant filed a management evaluation request on 26 July 2014. He described the contested decisions as,

a. Abuse of authority by Lieutenant W in his capacity as Officer-in-Charge of UNON/DSS Training and Development Unit. In the background to the request, he stated that the instruction to attend the training without giving clear details on the reasons for the training was prejudicial and amounts to impunity and abuse of authority. Going further to issue a reprimand is the height of impunity and abuse of authority.

b. Failure by Lieutenant W in his capacity as the UNON/DSS Weapon’s Custodian to advise on the terms of issuance or withdrawal of his firearm.

### **Respondent’s submissions**

#### *Receivability*

27. The Applicant’s claim of abuse of authority is not receivable. He had raised a claim of abuse of authority and had not exhausted the relevant internal remedies provided for in ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority).

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 these 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 firearm 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/2002/13 (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 respect instructions issued by Lieutenant W. The Applicant is also required to follow the instructions contained in the Daily Order from the Chief, UNON/DSS. The Applicant disobeyed the Daily Order of 15 July 2014 as well as an email from Lieutenant W instructing him to attend an annual requalification exercise.

34. The Applicant's insubordination was lawfully and appropriately addressed. Lieutenant W's correspondence to the Applicant on 23 July 2014

issuing a reprimand was a managerial measure to correct an identified shortcoming.

35. It is undisputed that the Applicant did not follow the instructions of the Chief, UNON/DSS or of the Officer-in-Charge of the Staff Training and Development Unit. Nor is it disputed that the Applicant failed to meet his obligation to requalify to carry a firearm on annual basis. The Applicant's original justification for these failings was that Lieutenant W did not respond to a series of evolving questions concerning alleged unrelated events.

36. The Applicant's original justification was a mere pretence. The Applicant now states in his Application that Lieutenant W could not have lawfully issued him the instruction to attend the training because such an instruction could only be properly issued after the fact-finding panel has published its report.

37. The Applicant's two contradictory explanations for failing to attend the requalification exercise do not assist him. In accordance with staff rule 1.2(a) he is required to comply with the instructions even if he is of the view that the instructions are unlawful. The Applicant's obligation to attend the training was independent of the instructions from the Chief, UNON/DSS and of Lieutenant W. All Security Officers are required to attend the minimum required sessions every year.

38. The Applicant's claim with respect to interference with the fact-finding panel are frivolous. There is no basis in fact or law for this claim. The Applicant provides no explanation as to how requalifying for his firearms credentials would impact on the fact-finding investigation or on the outcome of that process. The Staff Rules do not grant the Applicant the right to ignore an instruction by virtue of lodging a harassment complaint.

39. 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.



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. The impunity by the Respondent was further demonstrated when the MEU failed to issue a report within the required timelines and did not advise him that there would be a delay in the issuance of its report.

43. Pursuant to paragraph 2.2 of ST/SGB/2008/5, the Administration has a duty to provide effective remedies in relation to complaints of prohibited conduct where prevention has failed. A 22-month delay in resolving a harassment complaint cannot be considered to be effective.

44. Lieutenant W was the UNON/DSS Weapons Custodian when the DSS Inspector directed him to return his weapon to the armoury on 4 February 2013. He obeyed the instruction and later challenged it in his complaint to the Director-General of UNON which to date the Administration has refused to resolve, effectively shielding itself from liability.

45. The instruction to attend the training was only issued after his request for clarification as to whether the firearm would be issued for the training. He did not receive an answer as to whether the firearm illegally withdrawn by the DSS Inspector would be issued for the training, requalification or operations.

*On the Merits*

46. Given the circumstances surrounding the withdrawal of his firearm, the instruction to attend the training/requalification without clearly stating whether the firearm would be issued either for the training, operations or requalification purposes only was prejudicial to the fact-finding investigation.

47. Such an instruction can only properly be issued after the fact-finding panel has published its report. Going further to issue a reprimand is “the height of impunity and abuse of authority”.

**Considerations****Receivability**

48. The Tribunal is satisfied that the two alleged contested decisions identified in the Application were included in the Applicant’s request for management evaluation. He alleged to both the MEU and the Tribunal that the reprimand issued by Lieutenant W was an abuse of authority as was the Lieutenant’s failure to advise the terms of issuance of his assigned firearm. In the present Application to the Tribunal, he did not pursue the question of the withdrawal of the firearm that he had raised with the MEU.

49. The Application meets the first requirement for receivability. However, the question remains as to whether the Application exhausted all internal remedies before making his application to the Tribunal and if not whether that renders his application non-receivable.

50. In general administrative law a court may require an applicant to exhaust internal remedies available to him or her before undertaking a judicial review of the contested decision. This requirement is not absolute in all cases as it depends on a number of factors. Pragmatically, using internal remedies can result in faster and more comprehensive resolution of the contested issues and reduce demand on the formal system of justice. On the other hand, the failure to submit to internal remedies should not be an automatic barrier to access to the formal system of justice unless there is an adequate internal process and a requirement for the

litigant to engage in that process.

51. In *Nwuke* 2010-UNAT 099<sup>3</sup>, 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 also determine the legality of the conduct of the investigation.

52. This statement followed a review of the remedies available to an applicant under ST/SGB/2008/5 and in the context that the Dispute Tribunal had found that that the *Nwuke* application was not receivable. It is not a definitive statement that it is mandatory for the SGB processes to be exhausted before an applicant may proceed to the Tribunal. Nor does it expressly state that in cases where this has not happened the Tribunal has no jurisdiction to entertain a claim. As the Statute of the Tribunal is silent on this point the decision turns on the regime and nature of internal remedies available in any given situation.

53. In this case the Applicant alleges that two specific acts of an individual amounted to an abuse of authority. Where an individual believes he or she is the victim of prohibited conduct (which includes abuse of authority), ST/SGB/2008/5 provides for informal and formal processes.

54. Staff members are responsible for familiarizing themselves with the Organisation's policy on prohibited conduct and the various options and internal channels available for addressing such conduct (para. 4.5).

55. Where informal resolution under the ST/SGB is not desired or appropriate the aggrieved individual may submit a written complaint to the head of department. Then follows a series of steps leading, where appropriate, to a fact-finding investigation and outcomes based on those findings. Para 5.20 provides for an appeal pursuant to Chapter XI of the Staff rules if an aggrieved individual

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<sup>3</sup> At para. 6.

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 fact-finding investigation investigating and determining the factual matters alleged to 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. It is well settled jurisprudence that a review of the decision and/or outcome is limited to the process followed<sup>4</sup>.

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 procedures, 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 invoke 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 10<sup>th</sup> day of December 2014

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<sup>4</sup> See for example *Nwuke* 2010-UNAT-099 at para. 36.

Entered in the Register on this 10<sup>th</sup> day of December 2014

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi