

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1231

Case No. 1304

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Jacqueline R. Scott; Mr. Goh Joon Seng;

Whereas at the request of a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 March 2003 and once thereafter until 30 June 2003;

Whereas, on 30 June 2003, the Applicant filed an Application containing pleas which read as follows:

“II: PLEAS

...

8. ... [T]he Applicant respectfully requests the Tribunal to find that the termination of the Applicant's career as a Security Officer:

- (a) constituted a breach of the contract of employment between the Applicant and the Respondent;
- (b) contradicted the Staff Rules and Regulations;
- (c) was arbitrary and discriminatory in nature; and
- (d) caused financial loss as well as undue anxiety and stress to the Applicant.

9. Whereafter the Applicant respectfully requests the Administrative Tribunal to order:

- (a) that the Applicant be reinstated as a Security Officer; and
- (b) that the Applicant be paid damages equal to her loss of income resulting from her transfer to the General Service;

or:

- (c) that the Applicant be paid damages equal to her loss of income resulting from her transfer to the General Service, calculated from the date of her transfer up to her expected date of retirement, in addition to compensation for the unfair termination of her career as a Security Officer and the resulting pain and humiliation in the amount of two years' net base salary calculated on the basis of the [Applicant's] last annual remuneration prior to her transfer to the General Service."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 November 2003 and periodically thereafter until 30 September 2004;

Whereas, on 23 May 2005, the Tribunal posed questions to the Respondent;

Whereas the Applicant filed Written Observations on 31 May 2005;

Whereas, on 20 June 2005, the Respondent provided his answers to the Tribunal's questions;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"Employment History

... The [Applicant] first joined the service of the Organization on 19 September 1983 on a short-term appointment as a Security Officer at the S-1 level. On 22 November 1984, she was given a probationary appointment, which was converted to permanent on 1 October 1985. She was promoted to S-2 on 1 October 1984 and to S-3 on 1 July 1997.

Summary of the facts

... Although [the Applicant] had agreed in 1994 to carry a firearm on duty as a Security Officer, she informed her supervisor on 15 August 1997 that she could no longer reconcile the carrying of firearms with her religious convictions. On 11 March 1998, [the] Director, General Legal Division, [Office of Legal Affairs (OLA)], responding to a memorandum of 19 August 1997 from [the] Chief, Security and Safety Service [(SSS)], concerning [the Applicant's] notification, stated, '... we consider that [the Applicant], as a Security Officer at the S-3 level must not only be qualified to handle firearms but must, indeed, carry a firearm on duty when required'. In a memorandum dated 5 June 1998, [the Office of Human Resources Management (OHRM)] formally communicated the OLA opinion to the Applicant].

... Having successfully completed the training for Fire Officer, [the Applicant] attended the annual refresher courses for Fire Officers in 1997 and 1998. In 1999, although she applied to attend the refresher course, she was not invited to do so ...

... [The Applicant] submitted a request for assignment to the Fire Unit on 23 November 1999. There was no reply to, nor action taken on, this request.

... On 9 November 2000, [the] Chief, Cluster IV, Operational Services Division, ... OHRM, prepared a 'Note for the File' concerning the [Applicant's] case. She indicated that since March 1998, the ... case had been the subject of 'various discussions and meetings'[, and] also indicated that following two meetings held on 15 December 1999 and 16 February 2000 with the [Applicant], a conciliation session was convened in May 2000 'with a view to finding conciliatory means regarding the status' of the Appellant. She added:

'I met with the [Applicant] upon her return from leave in June 2000, to offer her the following two options:

- (a) Exceptional terms of agreed termination ...; or,
- (b) Her transfer to an area outside the Security and Safety Service under the following terms and conditions:
 - (i) The conversion of her status from the Security Service category to the General Service category ...;
 - ...
 - (v) The [Applicant's] contractual status will be reviewed one year from the date of transfer. ...'

... On 27 November 2000, [OHRM] ... informed the [Applicant] that the proposals offered ... were 'contingent upon her withdrawal of the appeal [she] had filed with the JAB'...

...

... An undated Memorandum of Understanding [(MOU)] was handed to the [Applicant] for her signature on 17 January 2001, the provisions of which read as follows:

'Given the agreement, on an exceptional basis, of the Organization to transfer me from the Security and Safety Service, I accept the following conditions in order to remain in the service of the United Nations:

- (a) I will be transferred from the Security Service category to the General Service category effective immediately;
- ...
- (c) The loss in income resulting from the conversion ... will be absorbed by me;
- ...

- (f) My contractual status will be reviewed one year from the date of transfer. ...;
- (g) The appeal I have filed with the Joint Appeals Board will be allowed to continue its course.’”

On 9 January 2001, the Applicant submitted an appeal to the JAB in New York requesting suspension of the administrative action outlined in the Memorandum of Understanding. In its report of 31 January, the JAB ‘unanimously recommended that the Administration maintain the status quo until the JAB has given the appeal a full and fair hearing on the merits’. On 6 February 2001, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had not accepted the JAB’s recommendation.

On 29 August 2001, the Applicant lodged an appeal with the JAB, which adopted its report on 29 August 2002. The majority report read, in part, as follows:

“Considerations

19. The Panel noted that, as early as 1989, [the] Appellant had stated that she had religious objections to ‘discharging or carrying of a weapon’ ...

Nevertheless, [the] Appellant sometime in 1994, agreed, in principle or in fact, to carry firearms. On 15 August 1997, [the] Appellant again informed her supervisor that she would no longer carry firearms. ...

...

22. On 16 June 1998 ... [the] Chief Fire Officer suggested ... that [the] Appellant, having successfully completed the fire suppression training programme in 1996 and refresher courses in 1997 and 1998, be transferred to the Fire Unit, where in certain cases, the requirement to carry firearms has already been waived. Despite [his] strong endorsement of her qualifications (and a gentle hint of gender discrimination), the Security Service and OHRM have pursued a course leading to the placement of a staff member in a post for which ... she is nearly totally untrained, instead of in a post for which she has received, at [United Nations’] expense, extensive training. The Panel is aware that it is not called upon to substitute its judgement for the managerial decisions made by the Secretary-General - or by those officials on whom he must rely. Nevertheless, it feels obliged to call to his attention the waste, not only of a virtually costless opportunity for a humane decision, but also of the resources of the Organization.

23. ... [T]he Panel believes that the right to appeal is a basic and inalienable one and that the personnel of OHRM should be so reminded.

24. The Panel was aware that the salary scales of the Security Service and the General Service (GS) are based on different sets of criteria. ... The Panel

decided to recommend that transitional arrangements be made to mitigate the impact on [the] Appellant's standard of living.

25. The Panel was also concerned with the terms of paragraph (f) of the MOU. Given the context of the proposed transfer, the requirement of a one-year review appears both arbitrary and threatening. ...

Recommendations

26. The majority of the Panel recommends to the Secretary-General that
- (a) should [the] Appellant be transferred to the GS category she be paid a personal transitional allowance, decreasing progressively from \$540 a month to zero over a period of three years.
 - (b) the review of her contractual status provided for under paragraph (f) of the MOU should take place after [the] Appellant would complete at least two years of service in the GS category,
 - (c) the terms of the MOU should be amended to conform with the above recommendations."

The dissenting member of the JAB, whilst agreeing with the considerations of the majority, recommended, inter alia, "that the staff member ... be transferred or reassigned to the Fire Unit".

On 23 September 2002, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General agrees with the Board that the requirement to bear arms does not violate your acquired rights. However, he regrets that he cannot agree with the recommendations of the majority and minority members of the Board. The minority member's recommendation cannot be accepted, as you cannot remain a Security Officer as long as you refuse to bear arms. Similarly, considerations of equal treatment and fairness preclude the acceptance of the majority's recommendation for a personal transitional allowance, as such an allowance would constitute unacceptable preferential treatment vis-à-vis the other staff in the General Service category, including the staff member who transferred out of the Security Service to the General Service category, as she also refused to carry a weapon. For the same reasons, the Secretary-General can also not accept the majority's recommendation that your contractual status should be reviewed at least two years following your transfer to the General Service category.

... As it is not in the interests of good administration that this matter continues unresolved indefinitely, the Secretary-General has decided to accord you a final opportunity for deciding between the two options that were offered to you in November 2000. You are accordingly requested to communicate to

OHRM your decision no later than one month from the day you receive this letter. Should you decline both options, or not communicate your decision to OHRM within the period of one month, the Administration will have no other option but to commence the procedures for terminating your appointment for failure to meet the performance standards required of a Security Officer.”

On 30 October 2002, the Applicant opted for a transfer to the General Service category, albeit noting “it has never been my wish to leave the Security Service and ... I opt for a transfer to the General Service only in order to protect my employment with the Organization”.

On 30 June 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. Her forced transfer to a General Service position had the character of a disciplinary sanction, without misconduct having ever been alleged.
2. No strict requirement to carry a firearm existed when the Applicant joined the Organization, thus it did not constitute a material condition of her employment contract.
3. Transferring the Applicant to the Fire Unit would have reconciled her acquired rights as well as the interests of the Organization.
4. The Applicant’s rights were infringed as she was subjected to arbitrary and discriminatory treatment.

Whereas the Respondent’s principal contentions are:

1. The obligation to bear firearms was an express requirement of the Applicant’s service as a United Nations Security and Safety Officer from the time she first entered the service of the Organization.
2. The Respondent’s decision to transfer the Applicant out of the SSS when she refused to carry a firearm was a valid exercise of the Respondent’s discretion.

The Tribunal, having deliberated from 21 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant appeals to the Tribunal following the cessation of her employment with the Security and Safety Service of the United Nations (SSS). She alleges that the Respondent violated her contractual rights of employment when he decided that she would no longer be able to serve in the SSS, offering her instead either early retirement with enhanced benefits or a transfer to a post at the General Service level. In addition, the Applicant alleges that the Respondent's decision contradicted the Staff Regulations and Rules; was arbitrary and discriminatory in nature; and caused financial loss, as well as undue stress and anxiety to the Applicant. The Respondent alleges that the Applicant's employment with the SSS was concluded because she was unable to perform her job as a Security Officer, given that the position required her to be willing and able to carry a firearm when required, and the Applicant refused, apparently on the grounds of religious conviction, to do so.

II. The Applicant argues that the requirement to carry firearms as part of her duties as a Security Officer was not within the terms of her employment, because, she alleges, at the time she was hired, there was no written requirement that she be obligated to carry a firearm in order to perform her duties as a Security Officer. The Respondent disagrees, alleging that the requirement to carry a firearm was indisputably within the terms and conditions of the Applicant's employment from the start of her service with the SSS, and that, *when required*, the Applicant was obligated to carry a firearm.

III. The Tribunal has previously held that the terms and conditions of employment are not necessarily limited to those set out in writing. Rather, the Tribunal has made clear that "the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances". (Judgement No. 376, *Shatby* (1986), quoting from Judgements No. 142, *Bahattacharyya* (1971) and No. 95, *Sikand* (1965).) In the instant case, the Tribunal finds that the terms and conditions of the Applicant's employment, including the requirement that she be willing and able to bear firearms when required, are set forth both in writing and in the "surrounding facts and circumstances", and that the Applicant's assertions that she had no idea that she would be required to carry a weapon as a term of her employment are disingenuous.

IV. The language of Section 5.06 of the Handbook of the Security and Safety Service, which the Applicant concedes was given to her at the time of her recruitment, sets forth the terms under which the carrying of firearms would be required, as in effect at the time of her employment. Section 5.06 specifically provides:

“Section 5.06 – Firearms – Issue and Control Procedures

(a) *Authority to Carry Firearms* – Personnel of the [SSS] who are authorized by the United Nations and who are issued firearms will carry such weapons only when they are on duty. Under normal circumstances, firearms will be carried by senior supervisory personnel, by investigators, by personnel on special assignment, and by security officers manning posts specially designated as armed posts.”

V. While the Tribunal recognizes that the language of Section 5.06 is necessarily broad in its scope, in order to give the Administration flexibility in the implementation and administration of its security functions, the provision is, nonetheless, clear in its express language and intent. The provision provides that SSS personnel “who are authorized by the United Nations and who are issued firearms *will* carry such weapons” (emphasis added). Thus, it was, or should have been, clear to the Applicant that if at any time she was authorized by the Organization to carry weapons and a weapon was issued to her, she could be required to carry a firearm. In fact, that would explain why the Applicant was required to, and did, receive training and qualify to responsibly use such firearms. The mere fact that she was not at all moments required to carry a weapon does not negate the Respondent’s inherent authority to require her to do so.

VI. In addition, the second sentence of Section 5.06 - listing officers who would carry firearms “under normal circumstances” - is further evidence that the Applicant could be called upon at any time in her employment to carry a weapon. While only certain officers were required to carry guns during “normal circumstances”, use of the term “under normal circumstances” implies that in other, less normal circumstances other officers would be called upon to carry a weapon. In our modern world, it is not beyond imagination to envision circumstances that a reasonable person might consider outside the bounds of “normal circumstances” that would necessitate a change or increase in the number of officers who would be required to carry weapons. There were no assurances or representations, either written or oral, given to the Applicant that

she would never be called upon to carry a gun. In fact, from the start, she was trained to carry a weapon and at various times in her career, did so.

VII. Finally, the language of Section 5.06 that requires officers “manning posts specially designated as armed posts” to carry weapons, is further evidence that the obligation to carry weapons was an obligation imposed upon all Security Officers, including the Applicant. By simply changing the designation of posts from unarmed to armed, the United Nations could change the identities and numbers of officers who would be required to carry weapons. Because there was no limitation by Section 5.06 on the Respondent as to which and how many posts could be designated armed or unarmed, every officer, including the Applicant, might be called upon to bear arms. For these reasons, the Tribunal finds that the obligation imposed upon the Applicant to carry a weapon when required, was indeed a term and condition of her contractual employment at the time of her hiring.

VIII. Notwithstanding the written terms and conditions of her employment, requiring her to carry a weapon when called upon to do so, the Tribunal finds that the Applicant knew or should have known, based on the very nature of her position as a Security Officer, that carrying a firearm, *when required*, was a condition of her employment. As a Security Officer, the Applicant was charged with the protection of persons and property at the United Nations Headquarters. While the Tribunal agrees that there might be circumstances when person and property could be protected without the necessity of firearms, the Tribunal can also reasonably envision other circumstances when firearms would be necessary. Since one cannot always predict in advance what will occur, it is reasonable that a staff member charged with such protection would expect at some point and in some circumstances to be required to carry a weapon.

IX. In further support of her Application, the Applicant also argues that, as a matter of policy, carrying a firearm is not a necessary prerequisite to performing services of security. She argues that at the time she entered the service of the United Nations, notions of security were different and that in some societies, even the police did not carry firearms. Therefore, argues the Applicant, the United Nations could allow officers who are unable or unwilling to carry weapons to remain with the SSS.

Such policy challenges, however, are inappropriately made to the Tribunal. The Applicant challenges the wisdom of the Respondent's decision to require his Security Officers to carry firearms, when requested, on the basis that security could be performed without the carrying of firearms. The decision regarding whether to require Security officers to carry firearms is a policy decision by the Secretary-General in the reasonable exercise of his discretion, based on his assessment of the security needs of the Organization and the most appropriate way to address those needs. As the Tribunal has previously held in Judgement No. 722, *Knight et al.* (1995), "[t]he Tribunal's function, as defined by its Statute, is to determine whether there has been non-observance of the terms of the employment [contract]". Moreover, the Tribunal recalls its Judgement No. 1145, *Tabari* (2003), in which it held

"Unlike a Staff Association or a Staff Union, neither a JAB nor the Tribunal is a vehicle available to a staff member to be used to lobby management or to seek to persuade management to effect what the staff member would perceive to be improvements in his working conditions or the terms of his employment, unless that staff member seeks to establish that the matter of which he complains arises from the non-observance of the terms of his appointment or that it arises from the infringement or denial of some employment right. Both the JAB and the Tribunal are parts of the justice system whose primary objective is to right employment wrongs and to provide remedies to staff members who establish that they have been wronged in relation to a condition of employment or been denied an employment right."

In sum, it is not the Tribunal's role to substitute its views for those of the Secretary-General or the General Assembly on how best to manage the Organization.

X. In light of the written policies requiring the Applicant to carry a gun when required, and in light of the nature of her job, it is unreasonable for the Applicant to have expected that she could remain in the SSS indefinitely while refusing to carry a firearm. It is exceptional that the Respondent was able to accommodate her refusal to carry firearms for as long as he did, given increasingly escalating security demands.

XI. The Tribunal now turns to the Applicant's allegations that the Respondent's decision to end her employment with the SSS was arbitrary and discriminatory. The Tribunal's jurisprudence recognizes the broad discretion enjoyed by the Secretary-General in matters of personnel, including the decision of whether to maintain a staff

member in the employ of the United Nations. As the Tribunal found in Judgement No. 1163, *Seaforth* (2003),

“the Respondent ... generally enjoys broad discretion in making decisions of this kind. Only where the Respondent’s discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation. (See Judgement No. 981, *Masri* (2000), para. VII.)”

The Tribunal recognizes that it is not within the purview of its authority to substitute its judgement for that of the Secretary-General in such matters, unless his decision is tainted by prejudice, bias, improper motive or other extraneous factors, or otherwise vitiated. (See Judgements No. 541, *Ibarria* (1991); No. 828, *Shamapande* (1997); No. 1131, *Saavedra* (2003); and, No. 1209, *El-Ansary* (2004).) Where such allegation against the Secretary-General is made, the staff member making such allegations has the burden of proof:

“The Tribunal has consistently held that the *onus probandi*, or burden of proof, is on the Applicant where allegations of extraneous motivation are made. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); and, No. 870, *Choudhury et al.* (1998).)” Judgement No. 1069, *Madarshahi* (2002).

The Applicant alleges that while her employment was ended because she refused, on religious grounds, to carry a firearm, other staff members were allowed to remain in the SSS, even though they also did not carry a firearm. She also alleges that the Respondent’s decision not to transfer her to the Fire Unit was discriminatory, in that other, male, applicants were instead transferred. The Applicant, however, has failed to adduce sufficient proof that she was a victim of discrimination, on the basis of religion or gender, either with respect to the weapons policy or with respect to her request to transfer to the Fire Unit.

XII. The Tribunal addresses first the Applicant’s contention that she was discriminated against *vis-à-vis* the requirement to carry weapons. In support of her position, the Applicant merely makes general allegations to the effect that she was discriminated against, while other staff members similarly situated were allowed to remain. She does not provide the names or positions of any specific individuals who she feels were similarly situated or who were treated differently. The Respondent, on

the other hand, provides very specific evidence that he has applied his policy – that all Security Officers be willing and able to be armed – consistently. The Respondent has made clear that all Security Officers are subject to the same weapons requirement, except in limited circumstances where a staff member might be temporarily unable to carry a gun. For example, the Respondent does temporarily excuse from the weapons requirement pregnant women who are placed on light duty and staff members who fail the qualification test to carry weapons. The mere fact that the Applicant and others were able, for extended periods, to maintain their positions in the SSS without having to carry guns, is simply a reflection of the largess of the Secretary-General to make allowances and accommodations for such individuals, allowances and accommodations which the Secretary-General had no legal obligation to make, but which were made solely at his discretion. Having no legal obligation to make such allowances, the Secretary-General was then free to cease making them, providing his decision to withdraw such allowances was not motivated by prejudice, bias, improper motive or other extraneous factors. For the reasons set forth above, the Tribunal finds no evidence of improper motivation with respect to the Respondent's decision to transfer the Applicant from the SSS.

XIII. The Tribunal now turns to the matter of the Applicant's request to transfer to the Fire Unit. The Applicant alleges that she was trained to perform the duties of the Fire Unit, that the head of the Fire Unit requested that she be transferred and that men were transferred to the Fire Unit instead. Again, the Applicant merely makes broad, sweeping allegations of discrimination, but does not produce the specific facts to substantiate her claims that the Secretary-General's decision not to transfer her to the Fire Unit was tainted by prejudice, bias or other extraneous motive. Given that the Fire Unit, at the time the Applicant's service in the SSS was ended, had been brought within the scope of the SSS, and that its officers would now be subject to the same requirement to carry weapons as were their counterparts in the other branches of the SSS, the Applicant ultimately would not have been able to remain in the service of the Fire Unit, because she refuses to carry a weapon. Finally, the only staff member who has been grandfathered with respect to the obligation to carry a weapon is an individual in the Fire Unit who came to that Unit as a Fire Officer, before the Unit was incorporated into the SSS. Since the terms and conditions of the Applicant's

employment included the obligation to carry firearms from the start, she cannot compare herself to this staff member, as they are not similarly situated.

XIV. For the foregoing reasons, the Tribunal rejects in its entirety the Application.

(Signatures)

Spyridon Flogaitis
Vice-President, presiding

Jacqueline R. Scott
Member

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary