



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LUTTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPEAL AGAINST A
DISCIPLINARY MEASURE**

Counsel for Applicant:
Esther Shamash, OSLA.

Counsel for Respondent:
Stephen Margetts, ALU/OHRM.

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

1. *Employment History*

1.1 The Applicant joined the Organization in July 1989 as a Security Officer. He currently holds a permanent appointment as a Fire Lieutenant with the United Nations Office at Nairobi (UNON). Since April 2007, the Applicant had been on assignment with the United Nations Operations in Cote d'Ivoire (UNOCI) as a Fire Marshall at the G-6 level. He returned to UNON on 2 May 2009.

2. *Background and Facts*

2.1 On Sunday, 11 November 2007, at or around 2200 hours, the Applicant was involved in a traffic accident in Abidjan, Cote d'Ivoire while driving an official UN vehicle bearing license plate UN53794. It was alleged that the Applicant was driving under the influence of alcohol at the time of the accident.

2.2 An Ivorian Police Officer who was in charge of the investigation by local authorities attended the scene of the accident. The Duty Officer of UNOCI's Special Investigation Unit (SIU) also attended the scene of the accident and accompanied the Applicant to the police station where the latter was questioned by the local authorities.

2.3 An investigation into this incident was conducted by SIU which submitted its investigation report No. SIU/AR/134/07 on 19 November 2007. The relevant parts of the report are summarized as follows:

“a. On 11 November 2007 at about 2200 hours, the Applicant was involved in a major traffic accident with a taxi near his local residence. The Applicant swerved into the taxi's lane while attempting to avoid a pothole, which then caused a "head on collision”;

b. The collision then propelled the taxi into the gate of a nearby property. The accident caused extensive damage to the taxi, but only minimal damages to the UN vehicle, namely a cracked windshield, front left bumper dents, and a broken left fog light lens;

c. After the accident, the taxi driver complained of back, hand and leg pains;

d. based on multiple witnesses' statements, the Applicant was observed at the time of the accident as:

- i. incoherent while answering questions;
 - ii. incapable of filling out the UNOCI Drivers' Accident Report;
 - iii. unsteady on his feet, and
 - iv. noisy and smelling strongly of alcohol;
- e. After staying at the police station, where he appeared to `sober up,' the Applicant was allowed to return to his residence, escorted by an officer from the Security Intervention Team; and
- f. It was concluded by the SIU that the Applicant had been operating a UN vehicle while intoxicated, which subsequently caused a major traffic accident resulting in extensive vehicular damages. This conclusion was based on witness observations and accepted international standards for law enforcement agents determining "sobriety status" in cases of impaired drunk driving."

2.4 On 29 November 2007, the Chief Transport Officer informed the Applicant via memorandum that his UNOCI Driving Permit and Privileges were suspended pending the outcome of the official security investigation.

3. *Charges and the Applicant's comments on the Charges*

3.1 By a memorandum dated 16 April 2008, the Director, Department of Field Support ("Director/DFS") referred the case to the Office of Human Resources Management (OHRM) for appropriate action. OHRM decided to file charges against the Applicant and the Applicant was informed of the charges on 29 April 2008, his right to submit comments in response to the charges and his right to secure the assistance of counsel.

3.2 The evidence of the Applicant as it appears in a statement dated 7 July 2008, in his response to the allegations dated 2 December 2008 and during the hearing on 12 February 2010, amounts to the following:

- (i) During his nineteen years with the Organization, he had never been charged with any misconduct.

(ii) On the night of Sunday, 11 November 2007, as he drove home from the office, a taxi heading in the opposite direction at a high speed suddenly veered from its side of the road and ran into his path. As he did not have enough time to react, there was a collision on the left side of the vehicle that sent the taxi into the gate of a property nearby.

(iii) On the day of the accident, he had worked late. After leaving the office, he had been driving up to a distance of approximately two kilometers to his residence when a taxi coming in the opposite direction changed course and collided against his vehicle. There was a pothole in the middle of the road. Many local residents immediately came on the scene of the accident and there was a conversation. The locals became violent and they tried to mob him. Conversation was difficult due to a language problem as they were French speaking and he spoke English. After a few minutes, another UN staff member arrived at the spot. The local police and the UN Security Investigation Team also arrived at the spot. The Applicant was told to drive to the police station to give a statement. He told the police he would give his statement the next day but as the police insisted, he wrote down something. He could not see properly as his glasses had been damaged during the collision when he hit the wind shield.

(iv) The facts gathered by the investigation team are extremely inadequate and prove nothing. They include no supporting evidence such as photographs or measurements of the accident site but only rough sketches of the scene.

(v) The damage on the motor vehicles was inconsistent with the allegation that there was a head on collision. The damage to the UN vehicle was on the left side of the hood, namely the left headlight area, as that was consistent with the damage to the taxi cab. If there had been a head on collision, the taxi cab would not have continued from the point of impact at an angle to hit a gate.

(vi) Another UN staff member who arrived at the scene shortly after the accident provided a statement and a sketch of the final position of the vehicles

after the impact and the sketch showed the UN vehicle on the correct side of the road.

(vii) In regard to the allegation that he was incoherent, unsteady and unable to write down his account of the accident, this type of behaviour is commonly associated with the shock of being involved in an accident. Matters were made worse by the fact that no one on the scene (including the SIU officer, the Police, and the locals) could speak English.

(viii) He was officially diagnosed with diabetes type 2 in 1996 and he did report this fact to the Administration. His supervisor also knew about his condition and he always carries a card evidencing his diabetic condition which he showed to the Tribunal. His condition requires that he takes insulin and alcohol intake is strictly prohibited. His doctor advised him that alcohol consumption would seriously affect his nerves and might result in cardiac problems. At the time of the accident he was wearing a diabetic card together with his UN driver's card, which states that if someone finds the cardholder behaving oddly, he must be taken to the nearest hospital.

(ix) No tests were done at the scene of the accident or at the Police station to prove intoxication or was a doctor called. He was allowed to drive the UN vehicle in question to the Police station for questioning, and afterwards to his residence. UNOCI policy clearly states that driving under the influence of drugs or alcohol is punishable by immediate withdrawal of driving privileges at the roadside. If he was indeed intoxicated, he would not have been allowed to continue to operate a vehicle, and his licence would have been taken immediately, not days after the accident.

(x) Nothing was done to check whether he was under the influence of alcohol. To a question that the police had stated he felt better, the Applicant explained that about fifteen minutes after reaching the police station he went to the glove box of his car to take some sweets to improve his sugar level as

he was feeling shaky. The car was parked very near the station. He was allowed to drive home after writing down his statement.

(xi) He became tongue-tied, was not steady in his speech at the time of the accident and was uncomfortable and feeling bad. As people were raising their voices when he tried to give explanations, he became irritated. To the suggestion that the police had stated that he was incoherent, incapable of writing, unsteady on his feet and noisy, the Applicant answered that he was talking in a loud voice and was using signs and that he did raise his voice due to a communication problem. He conceded that he was angry.

(xii) He could not remember whether he was unsteady on his feet. He was not behaving abnormally and was trying to speak as clearly as he could to the police and the native population. His behaviour was "ok", his speech was coherent and he was steady on his feet. When asked to explain a statement in his response to the charges where he attributes his conduct to shock, he answered that it was due to shock and impairment on account of his diabetic condition. When told that the SIU stated he smelled of alcohol he answered he was not aware of that.

(xiii) The charge of causing a 'major' traffic accident was unfounded. The records from the Chief Transport Office in UNOCI showed there was no 'major' accident reported in November 2007, only minor ones. A 'major' traffic accident is one defined by UNOCI in an 18 November 2006 memorandum as "causing death/injury or major vehicular damage."

(xiv) The Mission Administration deducted US\$ 939.49 from his Mission Subsistence Allowance (MSA) for the damages caused to the UN vehicle before a hearing on the matter had even happened and that no receipts for auto service have been produced by the Mission Administration despite his multiple requests. He was merely informed by a memorandum dated 8 June 2008 that the funds would be withheld from his MSA.

(xv) Other staff members in UNOCI have been involved in fatal accidents yet matters were resolved at the mission level and their licenses were reinstated and it is unfair and discriminatory that he should be singled out for a minor accident with unfounded allegations that the Administration was unable to prove.

(xvi) His character has been defamed due to the unfounded charge of driving under the influence of alcohol and that he has been greatly embarrassed.

4. Administrative Decision and JDC Review

4.1 In a memorandum dated 14 January 2008, the Applicant was informed that his UNOCI Driving Permit and driving privileges had been permanently withdrawn based upon the findings of the security investigation and final report. By another memorandum dated 23 September 2008, the case was referred to a Joint Disciplinary Committee (JDC) for advice as to what disciplinary measures, if any, should be taken in connection with the case.

4.2 An ad hoc JDC Panel (“the Panel”) was established on 19 March 2009 to review this case. The Panel held a hearing and two sessions respectively on 8 April and 15 April 2009. The Panel had at its disposal the written presentations submitted by the parties and the statements made during the Panel’s hearing. The Secretary-General was represented by Mr. Dietrich, and the Applicant was represented by a member of the now defunct Panel of Counsel.

4.3 The Panel submitted its report on 16 June 2009. Its conclusions and recommendations read as follows:

“Conclusions and Recommendations

31. Having reviewed the facts in light of UNAT Judgment No. 1090, the Panel concluded that there was no adequate evidence that the Applicant was driving under the influence of alcohol on the day of the accident. Having so concluded, the Panel could not find that the Applicant breached his duty to exercise reasonable care while driving the UN vehicle. The Panel further concluded that the general charge alleging that the

Applicant acted in a manner unbecoming to a UN staff member was not adequately substantiated by the available evidence.

32. Based on the foregoing conclusions, the Panel unanimously recommended that all charges against the Applicant be dropped.”

4.4 On 24 June 2009, the Deputy Secretary-General informed the Applicant that,

“[w]ith respect to the charge of driving under the influence of alcohol, the JDC considered that based on the jurisprudence of the UNAT, this charge was not substantiated by adequate evidence. The JDC found that absent a breathalyzer test, the Administration could not determine adequately the level of alcohol, if any, that you had allegedly consumed, or the level of your alleged impairment while driving the UN vehicle. The JDC noted that after the accident, despite your alleged impairment, you were allowed to drive the same UN vehicle, first to the police station and later, from the police station to your residence. The JDC also noted that your general behaviour could have been affected by the shock of the accident, coupled with your diabetic condition, and the fact that you had difficulties communicating with the police investigators who did not understand English.

With respect to the charge of failing to exercise reasonable care, the JDC noted the Administration’s clarification that this charge was based on the primary charge of driving under the influence of alcohol. Having found that there was no sufficient evidence of “drunk-driving”, the JDC concluded that this charge was not sufficiently substantiated by the Administration. With respect to the charge that you acted in a manner unbecoming of an international civil servant, the JDC, after examining the totality of the circumstances in this case could not find adequate evidence to support this charge.

Based on the foregoing, the JDC concluded that there was not adequate evidence that you were driving under the influence of alcohol on the day of the accident. Having so concluded, the JDC could not find that you had breached your duty to exercise reasonable care while driving the UN vehicle. The JDC further concluded that the general charge alleging that you acted in a manner unbecoming to a UN staff member was not adequately substantiated by the evidence. Consequently, the JDC unanimously recommended that all the charges against you be dropped.

The Secretary-General has considered your case in the light of the JDC's report, as well as the entire record and totality of the circumstances. The Secretary-General accepts the findings and conclusion of the JDC. Accordingly, the Secretary-General has decided to accept the JDC's recommendation and will take no further action with respect to this matter.”

4.5 The Applicant was also informed that in accordance with staff rule 110.4(d), he could appeal the decision directly to the Administrative Tribunal or, as a result of the reforms to the United Nations internal justice system, to the newly established United Nations Dispute Tribunal.

4.6 On 24 September 2009, the Applicant filed this Application with the Nairobi UNDT. On 24 October 2009, the Respondent filed a Motion requesting for extension of the time limit to file a Reply. On 3 November 2009, the Tribunal issued UNDT Judgment Number 2009/059 in which the Respondent “was enjoined to submit a proper application requesting the Tribunal that he should be allowed to take part in the proceedings”. On 13 November 2009, the Respondent filed a joint application for permission to take part in the proceedings and a motion for belated filing of a Reply which was granted by Order of the Tribunal on 10 December 2009. The Respondent’s Reply was filed on 15 December 2009. The Tribunal held a hearing on 12 February 2010.

4.7 The Parties filed their closing submissions on 22 February 2010. On 23 February 2010, the Applicant’s Counsel filed a Motion to Strike from the Record certain statements in the Respondent’s closing submissions. On 24 February 2010, the Respondent agreed to strike out the said statements from his closing submissions.

5. *Applicant’s Submissions*

5.1 The Applicant’s principal contentions are the following:

- (i) It was an abuse of discretion on the part of the Administration to bring charges against him based on unsubstantiated evidence and, as a result

thereof, both substantive and procedural irregularities were committed in charging him with misconduct.

(ii) The failure of the Administration to carefully investigate the facts of his case demonstrated negligence in the conduct of the investigation. The reliance by the Administration upon the findings of the procedurally defective investigation denied the Applicant due process. As a result of the substantive and procedural irregularities committed by the Administration in relying upon the flawed findings and conclusions contained in the SIU investigation report, the Applicant submits that he suffered material, professional and moral damage.

(iii) As a result of the withdrawal of the UNOCI driving permit and privileges, he had to perform his duties, including responding to calls at night, without the aid of UN furnished transport and at his own expense until his departure from UNOCI on 2 May 2009 – a period of 17 months and twenty one days.

(iv) His career advancement and mobility was impeded in that when he applied for the post of Fire Safety Assistant at the FSL 4/FSL 5 level with UNTSO, he was informed by the UNOCI Personnel Officer for international recruitment that owing to the charges against him, he could not be considered for a position until the matter was resolved and that even though he was qualified for the post, he was never afforded an opportunity for consideration.

(v) Owing to the stigma caused by being perceived as irresponsible for having been allegedly drunk while driving, and thereby allegedly causing an accident, he was subjected to a great deal of anxiety and stress as well as professional humiliation during the long period of time between the date he was charged and the time of the determination of the case.

- (vi) An amount of \$939.49 was deducted from his MSA in reimbursement for the repairs to the UN vehicle. This deduction was made prior to the final decision on his case and although all charges against him were eventually dropped, the Administration has failed to reimburse the deducted amount despite repeated requests.

5.2 In light of the foregoing, the Applicant requests the Tribunal that:

- (i) He be reimbursed the amount of \$939.49 deducted from his MSA.
- (ii) He be compensated for transportation allowance based on the official UNOCI monthly rate for transportation allowance per kilometer for the period between 14 May 2007 to 2 May 2009 since he was wrongfully deprived of the use of a UN vehicle which he required to enable him to properly carry out his functions.
- (iii) He be compensated in an amount deemed by the Tribunal to be appropriate to compensate him for the impediment to his career advancement, as well as moral and professional damage caused by the charges being negligently and wrongfully leveled against him, and for such a protracted period of time.

6. *Respondent's Submissions*

6.1 The Respondent's principal contentions are the following:

- (i) The Respondent did not abuse his discretionary authority by charging the Applicant with misconduct. The Secretary-General, on the basis of his own examination of the facts and evidence contained in the investigation report, properly exercised his authority when he charged the Applicant with misconduct.
- (ii) Additional photographic evidence of the accident, which showed extensive vehicular damage were also considered. It was in this context

that the Administration charged the Applicant with misconduct and that even though the Respondent was aware of the principle articulated in *Berg*¹, that a charge of driving under the influence of alcohol cannot be sustained in the absence of a breathalyzer test, the Respondent was faced with an abundance of evidence in the investigation report which indicated that the Applicant was under the influence of alcohol at the time of the accident. It was therefore incumbent on the Administration in the face of this evidence, which indicated that the alleged misconduct was well founded, to pursue this matter further pursuant to paragraph 6 of *ST/AI/371- Revised Disciplinary Measures and Procedures*.

(iii) The Applicant's due process rights were respected throughout the entire disciplinary process. Former staff rule 110.4, governing the disciplinary proceedings, was designed to ensure that due process protection is afforded to staff members who are suspected of having engaged in misconduct and that in this case, the Applicant was given the opportunity to know and respond to the allegations against him during the course of the investigation. He was also given the opportunity to comment on the charges against him.

(iv) The Applicant has not presented any evidence to show that the investigation process was flawed. While a breathalyzer test was not administered on the Applicant, the physical evidence observed at the scene and statements provided by Officers at the scene all show that he was at fault for having caused the accident. On the basis of the other witnesses' observations, the Applicant was incoherent while giving answers to questions put to him by both SIU personnel and local traffic police investigator.

6.2 In view of the foregoing, the Respondent requests the Tribunal to find that the Secretary-General did not abuse his discretionary authority in this case and that

¹ United Nations Administrative Tribunal Judgment No. 1090, (2002).

the Respondent observed due process and acted in good faith at all times. The Respondent requests the Tribunal to reject the Applicant's pleas in their entirety.

7. Considerations

7.1 The Investigation

7.1.1 At the investigation stage, the evidence that was relied on to establish that the Applicant was driving under the influence of intoxicating liquor was not based on any scientific examination but emanated from the impression formed by investigators who saw the Applicant immediately after the accident. The Tribunal has set out a verbatim translation of a number of statements recorded in French by the investigators with the original in French being appended in footnotes.

7.1.2 An SIU Security Officer ("SIU 1") stated in a statement recorded on 19 November 2007, that the Applicant on being interrogated by the police was not in a normal state. He was giving incoherent answers and he appeared to be under the influence of alcohol. He asked the Applicant to write down the circumstances of the accident but he was unable to do so². It is to be noted that the Security Intervention Team (SIT) Officer said that the Applicant appeared to be under the influence of alcohol ("*il semblait être en prise sous l'effet de l'alcool*").

7.1.3 An SIT Officer ("SIT 1") stated in a statement recorded on 16 November 2007 that the Applicant was asked to write down the circumstances of the accident but he could hardly read what he had written³. He further stated that the Applicant was in a very advanced state of drunkenness, it was the first information that he obtained from the

² « Ce dernier (Applicant) était interrogé sur l'accident par la police, mais son état n'était pas serein puisqu'il ne donnait pas des réponses cohérentes, il semblait être en prise sous l'effet de l'alcool. J'ai personnellement demandé à [Applicant] de remplir son narratif concernant l'accident, il a été incapable de rédiger correctement les faits. »

³ « Mais à peine on pouvait lire ce qu'il écrivait ».

Chief of his group and to ascertain that fact, he approached the Applicant to talk to him and in fact he smelled of alcohol, presumably it was liqueur⁴.

7.1.4 Another SIT Officer (“SIT 2”) stated in a statement recorded on 16 November 2007, that after the examination of the spot of the accident, he asked his colleague SIT 1 to accompany the Applicant to the police station on board the UN vehicle involved in the accident. He added that it was heartbreaking to see how difficult it was for the Applicant to manoeuvre his vehicle. Once they reached the police station his colleague told him that it was with much difficulty that they managed to get to the station because the staff member was not driving in a straight forward manner⁵.

7.1.5 SIT 2 accompanied the Applicant in the UN vehicle to his residence. SIT 2 stated in an undated statement that on the return trip they were very scared on account of the manner of driving of the staff member. He would just speed up when asked to slow down⁶. He also added that the Applicant was talking incoherently and had even forgotten his mobile phone number.

7.1.6 A third SIT Officer (“SIT 3”) stated in a statement recorded on 16 November 2007, that when he went to the spot of the accident, the driver (Applicant) smelled of alcohol when he was talking⁷. He added that on the way to the police station the Applicant who was still under the influence of alcohol was driving badly⁸.

7.2 The recommendation that disciplinary proceedings be initiated against the Applicant

7.2.1 It was based on the evidence gathered in the course of the investigation which consisted of the statements of the SIT Officers and the damage to the two vehicles that

⁴ « Il faut noter que Me [Applicant] était dans un état d'ébriété très avancée, c'est le premier renseignement que le chef de groupe m'a donné et pour le vérifier je me suis rapproché de lui pour dialoguer effectivement il se dégageait une odeur d'alcool de la bouche sûrement de la liqueur ».

⁵ « Mais c'est avec un pincement au coeur que je le voyais manoeuvrer difficilement son véhicule. Arrivé au commissariat, mon collègue m'a laissé entendre que c'est avec beaucoup de difficulté qu'ils ont pu atteindre le poste de police parce que le staff dans sa conduite serpentait... »

⁶ « Mais là, c'est avec beaucoup de peur qu'on a pu atteindre son domicile parce qu'en cours de route le staff accélère au moment je lui disais de ralentir ».

⁷ « C'est que le chauffeur de la UN sentait la boisson sur lui (quand il parlait) ».

⁸ « Le chauffeur encore dans l'état d'ivresse conduisait mal ».

the Director/DFS recommended that disciplinary proceedings be initiated against the Applicant. The pieces of evidence on which the Director/DFS relied upon were that the Applicant was incoherent in his answers to questions; he was unsteady while standing on his feet; he was boisterous and had a strong smell of alcohol in his breath; he was incapable of writing in the UNOCI Motor Vehicle Accident Report Form given to him by the duty officer from the SIU; and his handwriting differed in written statements given by him on the day of the accident and subsequently. All these elements amounted to *a range of concurrent facts* that the Applicant was driving under the influence of alcohol. The OHRM filed charges of misconduct against the Applicant based on the facts presented by the Director/DFS. OHRM added that the conclusion that the Applicant was driving under the influence of alcohol was *reached by reference to internationally accepted standards used by law enforcement agents (including United Nations security personnel)*.

7.2.2 The procedure for initiating an investigation for the purposes of disciplinary proceedings is set out in an Administrative instruction⁹. It is the responsibility of the head of office or responsible officer to undertake a preliminary investigation where there is reason to believe that a staff member has engaged in unsatisfactory conduct¹⁰. *If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of the office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management¹¹*. On the basis of the evidence presented it is then up to the Assistant Secretary-General (“ASG/OHRM”), on behalf of the Secretary General, to decide whether the matter should be pursued¹².

7.2.3 In a criminal matter, what is required at the investigation stage is a prima facie case that a suspect has committed an offence. In other words, there must be grounded suspicion, reasonable suspicion or probable cause that a suspect has committed an offence. In disciplinary cases, the standard of proof required to establish a charge is not as high as that of the beyond reasonable doubt standard obtaining in criminal matters.

⁹ ST/AI/371, 2 August 1991.

¹⁰ ST/AI/371, 2 August 1991, Section 2.

¹¹ ST/AI/371, 2 August 1991, Section 3.

¹² ST/AI/371, 2 August 1991, Section 5.

What then should be standard of the evidence that should satisfy a head of office or a responsible officer that a report of misconduct is well founded?

7.2.4 The provisions contained in the Administrative instruction indicate that it is for the head of office or the responsible officer to decide whether evidence revealed by the investigation *appears to indicate that the report of misconduct is well founded*. The head of office or responsible officer is vested with a wide discretion at this initial stage. That discretion, however, is to be exercised judiciously in the light of what the investigation has revealed. The discretion cannot and should not be used capriciously. It is incumbent on the person vested with that discretion to scrutinise the evidence carefully before deciding whether any act of misconduct as defined has been committed¹³. A judicious exercise of the discretion requires a proper analysis of the meaning of the words *appears to indicate that the report of misconduct is well founded* in regard to the evidence.

7.2.5 The European Court of Human Rights has stated that *having reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence*.¹⁴ It is the view of the Tribunal that the same approach should be adopted in the exercise of the discretion given to the head of office or the responsible officer in determining whether the report of misconduct is well founded following the investigation. The words *well founded* can be assimilated to grounded suspicion, reasonable suspicion or probable cause. The decision of the head of office or the responsible officer is not the end of the matter. When the ASG/OHRM receives the report, it is for him/her to decide whether the matter should be pursued on the basis of the evidence presented. The ASG/OHRM is also vested with a discretion that should be exercised judiciously. He/she cannot be seen rubber stamping the decision of the head of office or responsible officer.

¹³ ST/AI/371, 2 August 1991, Section 2.

¹⁴ Fox, Campbell and Hartley v. United Kingdom, (1990) 13 EHRR 157, para.32.

7.3. *International standards for law enforcement agents determining "sobriety status" in cases of impaired drunk driving*

7.3.1 Since the Respondent made reference to “internationally accepted standards used by law enforcement agents (including United Nations security personnel) to determine sobriety status” in charging the Applicant with misconduct, the Tribunal made an Order on 16 March 2010 directing the Respondent to file the said International Standards with the UNDT Registry. In response to the Order, on 19 March 2010, the Respondent filed a response informing the Tribunal, inter alia, as follows:

“Upon receipt of the Order efforts have been made to contact [] the Officer-in-Charge of the SIU at the time the report was prepared in order to verify which documentation was referred to during the course of preparation of the report. Unfortunately [] is currently absent on mission and was unable to assist in locating all relevant documentation. However, in []’s absence the UNOCI mission were able to locate the approved UNOCI Mission's Special Investigations Unit Standard Operating Procedures regarding investigations and ingredients of Common Offenses which were used by the investigators at the time of the preparation of the report as the basis for determining and/or observing indicia of alcohol impairment. The relevant extracts identified by the mission are appended as Annex I.”

7.3.2 The “Annex I” referred to by the Respondent contains extracts from the UNOCI Special Investigations Unit’s Standard Operations Procedures. The relevant parts of the SOPs are reproduced below:

“(ix) Impaired Driving.

Impaired driving is driving under the influence of alcohol or drugs, or driving without proper control of the vehicle. Impaired driving is considered a serious offence in the mission and driving under the influence of alcohol and or drugs is not tolerated. To assist in controlling incidents of this nature the UN have adopted the Ivorian Legal limit of 0.6 microgram's of alcohol per 100 milliliters of breath.

The breath test is followed by a blood test for evidentiary purposes, however both tests are purely voluntary, under no circumstances can a person suspected of impaired driving be ordered or forced to submit to the test.

To prove this offence it is necessary to establish:

- a) The person was drunk;
- b) Was in control of a motor vehicle;
- c) Was over the legal limit if they submit to the test;
- d) If they do not submit to a test, the Security Officers observations regarding the person's appearance and actions that brought the incident to his notice should be given as expert opinion. The expert proofs are:
 - Breath smelled strongly of alcohol;
 - Speech was slurred;
 - Eyes were glazed or bloodshot;
 - Unsteady on their feet; and
 - Belligerent, abusive or uncooperative.

(x) In all cases of Impaired driving Security Officers are empowered to temporarily withdraw ONUCI driving permits of both Military/UNPOL and Civilian personnel. They may also confiscate the keys and impound the vehicle. They can also withdraw ONUCI driving permits for the following additional traffic offences:

- a) Impaired driving through physical exhaustion such as sickness or tiredness;
- b) Reckless and dangerous driving; and
- c) Leaving the scene of a traffic accident without acceptable reason “

7.3.3 The Tribunal notes that the breath test followed by a blood test are to be carried out in cases of driving under the influence of alcohol as set out in the UNOCI SOPs. There is no evidence before the Tribunal and there was none either presented to the Director of Field Service on whether the Applicant was asked to submit to such tests. Secondly, according to the same SOPs, if the driver does not submit to a test the observations recording the person's “appearance and actions that brought the incident to his notice should be given as expert opinion.” The expert proofs are:

“Breath smelled strongly of alcohol; - Speech was slurred; - Eyes were glazed or bloodshot; - Unsteady on their feet; and -Belligerent, abusive or uncooperative.”

The SIU investigators concluded, from what appears to be their subjective observations, that the Applicant was indeed intoxicated at the time of the accident. As the Applicant was under shock and is diabetic, it would have been appropriate to test his behaviour in the light of that health condition.

7.3.4 The Tribunal takes note of the principle enunciated in *Berg*, that is, that a charge of driving under the influence of alcohol cannot be sustained in the absence of breathalyzer test. In the Tribunal’s view, in addition to a breathalyzer test, other tests such as a blood analysis test (blood alcohol concentration test), urine analysis and overall behaviour may be utilized provided that in the latter case those behaviours tested comply with international standards.

7.3.5 At the time of the accident, what the investigators were relying on first and foremost was the smell of alcohol coming from the Applicant. No evidence was led to establish whether the investigators were experts at detecting the smell of alcohol consumed. It never occurred to the investigators that there may be many substances that have a similar smell to that of alcohol that people consume. None of the investigators who first encountered the Applicant was asked about his expertise on the smell of alcohol. It was a case of once the smell of alcohol was detected, there could not be any other avenues to be explored except to pin down the Applicant to drunken driving.

7.3.6 Secondly, a smell of alcohol by itself, if proved by cogent evidence, cannot establish in an irrefutable way that a person was under the influence of alcohol. The investigators sought to link that alcohol smell to the incoherent behaviour of the Applicant on the day of the accident, his unsteadiness on his feet; his illegible handwriting; his loud voice; his manner of driving to the police station after the accident. A look at the statements the Applicant wrote on 11 November 2007 and 15 November 2007 shows that his handwriting is not the same. At the hearing on 12 February 2010, the Applicant explained this difference by stating that on 11 November 2007 he had no glasses whereas he had them on 15 November 2007.

7.3.7 The Tribunal notes with concern that the SIU investigators allowed the Applicant to drive to the police station in spite of his alleged drunken condition. It was precisely because of his condition related to alleged consumption of alcohol that the Applicant was charged with misconduct. By allowing a person in his condition to drive the investigators exercised poor judgment. In this respect, the Tribunal refers to the Special Investigations Unit's Standard Operations Procedures ("SOP") annexed to the Respondent's submission of 19 March 2010 (See paragraph 7.3.2 below) which states, inter alia, that,

"in all cases of Impaired driving Security Officers are empowered to temporarily withdraw ONUCI driving permits of both Military/UNPOL and Civilian personnel. They may also confiscate the keys and impound the vehicle."

By their actions, the SIU investigators acted in blatant breach of the UNOCI SOPs and undermined their own impression that the Applicant was drunk at the time of the accident.

7.3.8 The Applicant stated that he has been a diabetic for several years. After the accident, he was under shock and there were many people around him trying to be aggressive. There was a communication barrier as they were French speaking whereas he speaks English. He was wearing a diabetic card. It never occurred to the investigators to investigate whether the behaviour of the Applicant could be due to any factors other than the alleged smell of alcohol that they conclusively construed as a drunken condition. No doctor was called to examine the Applicant on his drunken condition according to the well established practice of the UN. . To say the least, the investigation was conducted in an unprofessional manner and did not meet any of the well recognized international norms of fairness in investigations. In the course of investigations, the rules of fairness should also be complied with and this requires the gathering of all relevant facts whether incriminating or exculpatory.

7.3.9 On the evidence available, it was wrong for the responsible officer to have recommended further action against the Applicant. It was also unfortunate that OHRM went along with that recommendation without ascertaining the evidence available and

thus giving the clear impression that they simply endorsed, not to say rubberstamped, the decision of the responsible officer.

7.4. *The circumstances of the accident*

7.4.1 According to the SIU's Final Report (see paragraph 2.3 above), the Applicant is alleged to have swerved into the taxi's lane while attempting to avoid a pothole, which then caused a head on collision. A sketch of the accident scene prepared by a SIU Officer was annexed to the Report. The diagram shows the UN vehicle on the left hand side of the road and in a head on collision with the taxi. A sketch of the accident scene prepared by the UN staff member who arrived on the scene shortly after the accident (see paragraph 3.2(vi) above shows that the UN vehicle was in its correct right hand side of the road. The left side damage to the motor vehicles is inconsistent with the Respondent's allegation that there was a head on collision. The Tribunal is of the opinion that it was indeed the taxi that left its own right hand side of the road to collide with the UN vehicle.

8. *Findings*

8.1 In light of the foregoing, the Tribunal makes the following findings:

- (i) That the SIU investigation was conducted poorly and did not meet any of the well recognized international norms of fairness in investigations.
- (ii) The Administration failed to comply with the international standards for determining sobriety status.
- (iii) It was wrong for the responsible officer to have recommended further action. It was also unfortunate that OHRM went along with that recommendation without ascertaining the evidence available.
- (iv) That the Applicant was not responsible for causing the accident.
- (v) The disciplinary measures imposed on the Applicant were therefore unjustified and disproportionate.

9. Remedy

9.1 In view of the Tribunal's findings, the Parties are directed to provide written submissions as to the appropriate relief that should be ordered by or before close of business Friday, 9 April 2010.

(Signed)

Judge Vinod Boolell

Dated this 31st day of March 2010

Entered in the Register on this 31st day of March 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi