UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/034
Judgment No.: UNDT/2019/030/Corr. 1
Date: 25 February 2019
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TURKEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Marisa Maclennan, OSLA

Counsel for the Respondent:
Susan Maddox, AAS/ALD/OHR, UN Secretariat
Matthias Schuster, AAS/ALD/OHR, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant is a former Telecommunications Technical Assistant with the United Nations Interim Force in Lebanon (UNIFIL).

2. In his application dated 31 March 2017, he is contesting the Under-Secretary-General for Management's (USG/DM) decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity for having driven a United Nations vehicle while under the influence of alcohol.

3. The Respondent filed a reply to the application on 2 May 2017.

Facts and procedure

4. Facts outlined below are uncontested.

5. Drinking and driving at UNIFIL was regulated by the issuances of the Head of Mission (HOM). A Standard Operating Procedure (SOP) created in 2012 by then Force Commander and HOM, Major General Serra, set forth a tolerable blood alcohol limit at 0.04 (or 40 milligrams per 100 milliliters of blood). The SOP contains a sanctions table, listed by offence and number of violations. Specifically, driving a United Nations vehicle with alcohol content exceeding the norm of .04 resulted for the first violation in "Withdrawal of UNIFIL DP for 60 days. Retesting required" and only for second and third violations, in addition to the withdrawal of the driving permit, foresaw forwarding the case for disciplinary action.[1]

6. In November 2015, then Force Commander and HOM, Major General Portolano, issued a memorandum on the use of alcohol by UNIFIL personnel. It set forth a "zero-alcohol policy" regarding, *inter alia*, driving any United Nations vehicle. The "zero-alcohol policy" was described as a prohibition against consuming

[1] Application – Annex B at page 93.

and/or being under the influence of alcohol and distinguished as stricter than "being intoxicated". The new policy was broadcast twice by email to all staff as well as popularised by posters. The HOM memo, however, does not contain any information about consequences for violations of the provision.[2]

7. On the afternoon of Friday, 27 May 2016, the Applicant attended a party at the so called Green Hill Camp of the UNIFIL compound. There, he consumed several alcoholic drinks. After the gathering, he drove a United Nations vehicle, registration number UNIFIL 2683, on an internal UNIFIL road stretching over a few kilometres from the Green Hill Camp towards the Naquora Old Camp. While driving, he lost control of the vehicle which went off the road and over a ditch. The Applicant was unconscious for a short time after the accident.[3]

8. The Applicant's colleague, Mr. Mike Hakizimana, was passing by and stopped to render assistance. A military police officer, Major Arjun Singh, also responded to the scene shortly thereafter. Mr. Hakizimana accompanied the Applicant to the UNIFIL hospital where he was evaluated by Dr. Vijay Kathait. Dr. Kathait noted that the Applicant smelled of alcohol, had an abrasion over his right pinna and no other obvious injury.[4] The Applicant was given some pain medication and was discharged on the same day. The Applicant later started experiencing pain in his neck and shoulder and had some scratches on his right knee.[5]

9. The UNIFIL vehicle that the Applicant was driving sustained a burst front right tire, a cracked side mirror and damage to the cover and cushion stabilizing bars. A traffic sign and light installed on the side of the road were also knocked down. The estimated cost of repairs of the vehicle was USD200.75.[6]

10. While the Applicant was staying at the hospital, a military police officer

[2] Application – Annex B at page 91.
[3] Annex R-1 to the reply – SIU Investigation report at page 9 of 71, para. 2.7.9.
[4] Ibid., at para. 2.4 at page 9 of 71.
[5] Ibid., at para. 5.1.3 at page 16 of 71.
[6] Ibid., at para. 5.1.7.

arrived and administered to him a breathalyzer test. According to the test slip included in the Special Investigations Unit (SIU) investigation file, the units were determined in mg/l. The result shown was 1.05.[7]

11. An investigation into the matter was commenced by SIU/UNIFIL. The SIU issued its investigation report on 2 June 2016 and an addendum to the investigation report on 12 October 2016.[8]

12. On 27 June 2016, the Assistant Secretary-General for Field Support (ASG/DFS) referred the investigation report to the Office of Human Resources Management (OHRM) for appropriate action. The referral memorandum stated, *inter alia*, that the military police administered a breathalyzer test to the Applicant which revealed a *blood* alcohol level of 1.05 mg/l.

13. Between 2 August and 11 October 2016, there were several exchanges of emails between UNIFIL/SIU and the Administrative Law Section, OHRM (ALS/OHRM) as the latter office sought clarification regarding, *inter alia*, the Applicant's breathalyzer test results.[9] They are reproduced below to the relevant extent.

14. On 2 August 2016, Mr. Ozden Innes, Associate Legal Officer, ALS/OHRM sought clarification from UNIFIL/SIU:

> In this case, we understand that [Applicant's] breathalyzer test resulted in a reading of 1.04 mg/l […] However, we are unclear whether the reading was for blood or breath alcohol content. If it was the blood, the number is well below the tolerable alcohol limit to operate a UNIFIL vehicle. If it was the breath content, then depending on the conversion ratio method that is used from breath to blood alcohol content, [Applicant] may have been about five times over the permissible limit.
>
> Could you kindly provide details as to whether the reading from the breathalyzer refers to breath or blood alcohol content; and, if the

[7] Annex R-1 to the reply at page 24 of 71.
[8] Annex R-1 and R1-bis to the reply.
[9] Annex B to the application at pages 80 to 90.

> reading is in breath units, also provide a conversion to estimated blood content?

15. On 2 September 2016, Ms. Wanda Carter, UNIFIL Conduct and Discipline Officer responded to ALS/OHRM stating, inter alia, that the stated alcohol level of 1.05 mg/l represented the blood alcohol content:

> Per clarification from the OIC, Military Police, Trafficking (officer in charge of administering blood tests): "So breathalyzer uses the contents of alcohol found in the exhaled breath to recalculate its relative alcohol contents in blood and displays out the Blood Alcohol Content (BAC). So the results which was attached in the referred case is a blood alcohol content (BAC)."

16. Unsatisfied with the response, on the same day Mr. Cristiano Papille, Legal Officer, ALS/OHRM, responded to Ms. Carter's email seeking additional clarification.

> The breathalyzer printouts states that the units were "mg/l" (Annex C). A basic internet search shows that the units "mg/l" are typically associated with breath alcohol measurements, and not with blood alcohol measurements, which more typically are expressed in BAC or in mg/100ml. It would appear unusual for the breathalyzer to output a measurement in non-standard units.
>
> While the product website for the breathalyzer used in this case […] states that it is capable of providing an output in "BAC" units, it does not appear that the units in this particular case were actually expressed in "BAC" for two reasons. First, the product website shows that it has a detection range of 0 to 0.600 BAC. In other words, this device is incapable of detecting a level of 1.05 BAC. Second, according to the chart provided by the OIC/Military Police, a BAC of above 0.45 typically results in death. If in fact [the Applicant's] BAC was 1.05, this would be more than twice the amount that would typically be expected to result in death.
>
> If we use the units shown on the breathalyzer printout ("mg/l") and if in fact this corresponds to a blood measurement as stated by the OIC/Military Police, this would be far below the limit expressed in the SOP. In particular, the prohibition contained in para. 27 of SOP HOM-POL 12-02 AMD 2 refers to a blood alcohol limit of 0.04, which the same SOP states corresponds to "40 milligrams per 100 millilitres of blood". Converting the breathalyzer measurement to the same units

> used in the SOP yields as follows: 1.05 mg/1000ml = 0.105 mg/l 00ml = 0.105 milligrams per 100 millilitres of blood. This is nearly 400 times less than the stipulated limit (and nit twice the limit as stated in para. 9 of the code cable). Even having regard to the FC's directive of 26 November 2015 ("Use of Alcohol by UNIFIL and UNTSO OGL Personnel", which prohibits "consumption and/or being under the influence of alcohol […] while driving any UN vehicle", we would need to establish that the staff member was under the influence of alcohol while driving (there is no evidence that he consumed alcohol while driving). If Mr. Turkey was indeed 400 times below the limited stipulated in the SOP, it would be very difficult to establish that he was "under the influence".

17. On 7 September 2016, Ms. Carter responded as follows:

> As you noted the BAC is stated on mg/100 ml. Under the SOP, the 0.04 BAC corresponds to 0.04 mg/100ml (despite an erroneous attempt at conversion). As your calculations show, the 1.05 mg/l is equivalent to 0.105 mg/100ml, which is more than twice the limit (four cents vs ten and one half cents).
>
> You should note that the breathalyzer results are calculated as 1.05 mg/l – not 1.05 BAC. The BAC, expressed in mg/ml would still be 0.105 mg/ml.

18. Mr. Papile responded on the same day indicating that he was still confused and required further clarification.

> … In your e-mail, you indicated that the breathalyzer reading of 1.05 mg/l corresponds to 0.105 mg/ml. In fact, the measurement of 1.05 mg/l corresponds 0.105mg/100ml, or 0.00105 mg/ml. As previously stated, however, this is well below the limit expressed in the SOP, which is 40mg/100ml. I spent some time on the LifeLoc website and looked through the training videos for the device that was used in this case. I could not find clarification about the units in which the reading is expressed. To clear this off definitively, it may be helpful for investigators to obtain clarification directly from the manufacturers of the device as to what the reading means. Investigators could, for example, provide the manufacturers with a printout from the device and ask for clarification as to how it should be interpreted and what the reading corresponds to in BAC and mg/100ml of blood.

19. As suggested by Mr. Papile, clarification was sought from the Lifeloc company on 9 September 2016 and on 11 October 2016, Mr. Mark Lary of Lifeloc

responded to Ms. Zrazenka Vujanovic, Officer-in-Charge, UNIFIL/SIU as follows:

> A reading of mg/l is always a breath alcohol reading or BrAC. Since you want a reading in mg/100ml which is a blood alcohol reading, the conversion is as follows. 1.05 x 210 = 220.5 mg/100 ml. Now this assumes that your partition ratio used in the country you are in is 2100:1. If your partition ratio is different that number would change

20. On 19 October 2016, OHRM requested the Applicant to respond to formal allegations of misconduct, specifically, the allegation that on 27 May 2016 he engaged in misconduct by driving a United Nations vehicle under the influence of alcohol and that while he was at the hospital, the military police administered a breathalyzer test to him which revealed a *breath* alcohol level of 1.05 mg/l. He was further informed that a representative of the breathalyzer manufacturer had confirmed that this measurement was equivalent to a blood alcohol content of 220.5 mg/100ml.[10]

21. The Applicant submitted his comments on the allegations on 9 and 11 November 2016.[11]

22. By letter dated 13 January 2017, the Applicant was informed that the USG/DM had concluded that the allegations of misconduct against him had been established by clear and convincing evidence and had decided to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity in accordance with staff rule 10.2(a)(viii). The letter specified that the result of the breathalyzer test administered to him within 40 minutes of the accident showed that his breath alcohol content was 1.05 mg/l and that this measurement was equivalent to a blood alcohol content of 220.5 mg/100ml which was well over the maximum tolerable limit of 40 mg/100ml set by paragraph 27 of the Standard Operating Procedures (SOP), Measures on the Operation of UNIFIL

[10] Annex R-4 to the reply.
[11] Annexes R-5 and R-6 to the reply.

Vehicles Amendment 2, HOM POL 12-06 dated 24 July 2012.[12]

23. On 10 March 2017, Counsel for the Applicant addressed a memorandum titled "Discovery request in the case of Fadel Turkey" to the Respondent seeking discovery of certain information/documents in relation to this case. The undated response by the Respondent to the discovery request is reproduced below.

> 1. Annex C (page 24 of 71)
>
> a. Name of operator – The testing was conducted by Cpl. Mjwahuzi DD (Tanzania - MI 391443), whose tour of duty ended on 6 March 2017).
>
> b. Maintenance logs for Lifeloc FC20 breathalyzer – The maintenance logs for the breathalyzer could not be found due to the end of tour of the contingent battalion which had control of the log.
>
> c. When was the last time this machine was calibrated before it was used on Mr. Turkey? Who performed the calibration? – The calibration record for the breathalyzer used in this case is not available.
>
> d. Was it subsequently calibrated or tested? By whom? – There is no record of when the breathalyzer was calibrated. However, the protocol is that the machine is calibrated on an annual basis, in line with the manufacturer recommendation.
>
> e. Whether training exists for SUI (sic) or military police in operation of Lifeloc FC20 breathalyzer, and if so, information or documents about such training. With respect to Military Police members, they are trained prior to deployment on the various activities and equipment to be used in the mission area.
>
> Upon arrival in the mission, the officers are re-instructed on how to operate the breathalyzer before the start of operation. The trainings are conducted by the Peace Keeping Training Center in Tanzania, and the records are not available in the Mission area. With respect to the Special Investigations Unit, the investigators are not trained on this machine, as they do no use this type of breathalyzer.
>
> f. Information as to whether the operator underwent specific training in the use and operation of the Lifeloc FC20 breathalyzer, and if so, evidence of this training – See above.
>
> g. How many Lifeloc FC20 breathalyzers does UNFIL have? The

[12] Annex R-7 to the reply.

Tanzanian Contingent has 20 breathalyzers.

h. When was it last used before it was used on Mr. Fadel? There is no record of this information.

i. Who wrote handwritten notes on page 24? The handwritten notes on page 24 were made by the RCDS reviewing officer. However, the notes were not made on the document, but on a sticky note, which was inadvertently entered into the system. The original Investigation Report did not have this notation. It has been uploaded onto MTS. Also, the color copy of the document is present in MTS, and the sticky note is clearly visible.

j. Whether there were any results or readings before or after this one? If so, please provide. There is no record of this information.

k. Was the machine in Auto, Manual, and Passive mode at the time it was used on the Applicant? As indicated on the face of the test results, the breathalyzer was set to "Auto".

2. Annex E

a. Name of doctor who saw the Applicant at the UNIFIL hospital – The attending physician for Mr. Turkey on 27 May 2017 was Dr. Vhijay [S]ingh Kathait.

b. Any and all associated medical records – The only record of Mr. Turkey's visit is the consultation form, which has been previously provided.

c. Confirmation that no blood test was done at the UNIFIL hospital or elsewhere on the day of the accident – It is confirmed that no blood or urine test was performed on Mr. Turkey by the MPs or the hospital with respect to this incident.

3. Interviews of the Applicant

a. Any and all audio recordings of interview with the Applicant – With respect to both the SIU and the Military Police, no audio recordings were made of any interview of the Applicant.

24. The Tribunal heard the case from 22-26 June 2018 during which oral evidence was received from the Applicant and Mr. Hakizimana. Faced with the dispute about the blood alcohol content attributed to the Applicant, and with the unavailability of the military police officer who administered it due to his departure from the Mission, the Tribunal had sought to hear the evidence of Major Arjun Singh and of Dr. Kathait to establish the Applicant's condition at the time of the accident, but these witnesses had also left the Mission and were unavailable. For the policies and practice

regarding drinking and driving at the United Nations, the Tribunal sought evidence from Mr. Mathew Sanidas, Chief, Human Resources Policy Service (HRPS), OHRM.

25. The Applicant had initially insisted on an Arabic simultaneous interpreter but he and his Counsel subsequently agreed to have an interpreter seated beside him in the hearing providing consecutive translation. Ultimately, the Applicant stated at the hearing that he had no issues regarding the sufficiency of this translation or any other fair trial issues regarding the proceedings.

26. The parties filed their closing submissions on 13 August 2018.

Evidence adduced at the hearing

Mr. Sanidas

27. The determination of sanctions is done on a case by case basis as it is a discretionary exercise of the Secretary-General's authority. In this case, they looked at all the facts surrounding the case including the Applicant's admissions, the statements of witnesses, the hospital doctor, the breathalyzer results. There were mitigating factors, including that the Applicant had a long history in the Organization. Separation from service was by far not the most severe sanction and was in line with past practice of the United Nations in similar cases. The gravity of the offence in this case did not warrant any lesser sanction.

28. The Applicant's behaviour is not tolerated within the United Nations Secretariat or within the missions. As staff are all international civil servants, they are held to the highest standards. ST/AI/2010/6 (Road and driving safety) prohibits staff from driving under the influence. Field missions would have embarked on a campaign for staff who drive United Nations vehicles. A second communication on zero tolerance for driving under the influence of alcohol was made known to staff.

29. When a staff member using a United Nations vehicle acts improperly, this impacts on the reputation of the Organization. The only thing the Organization has is

its reputation, especially in peacekeeping situations.

30. He could not recall the uncertainty about the reading of the breathalyzer test. There was a lot of back and forth. The difference between the two readings was minimal. However, even if the level of alcohol detected in the Applicant had been much lower, the case would have entailed separation.

The Applicant

31. There had never been any prior disciplinary or administrative measures against him. The records and files are available to show that his performance was very good and he was recently promoted in 2012, from level 5 to 6. The Organization treated him like a criminal despite 32 years of service He believes that he should have been given a second chance.

32. He is legally a stateless person from Palestine, married with four children, aged from 14-24. Three of his children live at home with him and he has one grandchild. After separation from the service of the Organization, he is living as a Palestinian refugee in Lebanon with no health insurance. Since his separation he has not been able to get medical insurance despite suffering from some medical ailments. Medical services for the Palestinian refugees are said to be of a poor quality.

33. He has no income since the termination of his appointment and he has not been able to get a job. All he has is his termination indemnity and he is awaiting his pension payments which will start next year. He only had two years and three months left to retirement when he was separated. He has no savings and his children have been forced to go to the United Nations Relief and Works Agency (UNRWA) school because it is free. Before, they were in a private school.

34. He has been driving since he was 18 years old and did not often drink and drive. He would usually take a beer - but not liquor - during lunchtime and happy hour. He is of a strong build (125 kg) and can have four to five beers without feeling affected by alcohol. Many United Nations staff would drink and drive.

35. He was aware of the zero tolerance posters on the wall on drunk driving but he was not sure what they meant. As he used the United Nations vehicle daily, it was important for him to know the memos concerning driving. He, however, was not aware of some memos. No one ever commented on the zero-tolerance policy to him.

36. On the day in question, which was a Friday, he was invited by the office to attend the gathering. He was not sure what the spirit content was in the alcohol that he consumed and how it would affect him. He fixed the first two drinks for himself but the third one was made for him. He did not feel impaired. After the fourth glass, he decided to go back. The road to the old camp is 3.5 kilometres long, hilly with lots of curves. There is not much traffic on that road in the afternoon since only United Nations vehicles are allowed inside. He was planning to go to Beirut on that day. His son was to meet him outside the gate and drive them. He drove off the road when he answered his phone, as his son was calling him.

37. He had not taken the staff bus because the bus provided took staff to Beirut. Whereas he lives in South Lebanon and his private car was outside the United Nations compound. He attended the party using the United Nations vehicle but his plan was to use his private car afterwards.

38. Throughout last year, he has made no formal application for work because he would be asked where he was working before and this would not look good.

Mr. Hakizimana

39. He has worked with the Applicant since 2004. Regarding the incident in question, it was a Friday evening between 5.30 and 6.00 p.m. He did not attend the party.

40. He was on his way home when he saw a UNIFIL vehicle on the side of the road. He found the Applicant in the vehicle bleeding from the right ear. Two Indian officers were taking photographs and one was on the phone. He asked them why they did not take the Applicant to hospital. They said they were waiting for military police.

The first thing he asked the Applicant is if he was okay. The Applicant could stand and was having back pain. His assumption was that the Applicant had been drinking alcohol.

41. He took the decision to take the Applicant to the UNIFIL hospital inside the camp and waited outside. After an hour, he was told that the Applicant was okay The Applicant told him that he had been working that day and was tired after laying fibre cables. The Applicant was fine when they spoke, able to converse clearly. He took the Applicant home.

42. The distance between where the farewell party was held and the old camp is approximately two or three kilometres,

43. UNIFIL Security asked him if he had noticed that the Applicant had been consuming alcohol. He told them "possibly" but that he had not been with the Applicant. Rather, he told the SIU investigators that the Applicant had been consuming alcohol based on the smell of alcohol.

44. He knows the mission's policy on drink driving. Every mission has the same policy, no drunk driving. There is a policy and communication from the transport section and from mission officers. He could not recall any posters on rules to be observed when driving. It was also not permitted to talk on the phone when driving.

Applicant's case

45. The Applicant avers that the use of contradictory standards compounded with doubt surrounding the breathalyser test created a flaw in the overall procedure and this flaw seriously affected his rights in: 1) the determination of whether misconduct had occurred, and 2) the receiving of a fair and proportionate sanction.

Unfairness in unclear standards

46. The Force Commander's memo to the ASG/DFS, the OHRM Chief's

allegations of misconduct and the ASG/OHRM's sanction letter all contain reference to both the SOP and HOM Memo. Proper procedure in the second phase of his disciplinary case was breached because the SOP and Head of Mission (HOM) memorandum provide conflicting standards for driving under the influence of alcohol. The SOP, created in 2012 by then Force Commander Serra, set forth a blood alcohol limit of .04 (or 40 milligrams per 100 milliliters of blood). The SOP contains a sanctions table, listed by offence, and number of violations, and clearly favours progressive discipline. The HOM memo, in turn, does not contain any information about consequences for violations of the provision. It does not mention the prior SOP, what effect it has on the prior SOP, and how to interpret in the event of conflict of provisions. Therefore, the reliance on both these documents renders the procedure of the second phase of the Applicant's disciplinary case defective.

47. The HOM memo and the SOP are at the bottom of the Organization's hierarchy of legislation and they lack the legal authority of properly promulgated administrative issuances; they are not required to be followed, they are merely guidelines.

48. The HOM memo is only addressed to UNIFIL staff and the United Nations Truce Supervision Organization (UNTSO) Observer group Lebanon (OGL). It raises the question as to whether this standard is more strict or severe as compared to other missions or offices in the United Nations system. Fundamental fairness would dictate that the Applicant cannot be held to a standard which is not the same for all United Nations staff members.

49. The facts were not established by clear and convincing evidence.

a. The alleged facts were not established by clear and convincing evidence because there is doubt as to the accuracy and veracity of the breathalyzer machine and reading: 1) whether the breathalyzer machine used produced a result in breath or blood alcohol content; 2) what the correct expression of that result is in milligrams per milliliters of blood; 3) whether

the machine itself was reliable and working properly; and 4) whether other factors would impact the reading, such as underlying medical conditions of the Applicant.

b. Although the Lifeloc Technologies, Inc. user manual for the model FC20 indicates it gives results in the 0.00 to 0.60 BAC range, the printout of the Applicant's result states "Units: mg/l." It is also unknown whether this is expressed as breath alcohol content which needs to be converted, or blood alcohol content.

c. From the correspondence included in the annexes to the addendum to the investigation report, there was considerable confusion and doubt between the Conduct and Discipline Unit, the investigator, and the Administrative Law Unit as to whether the results on the Applicant's test was breath or blood alcohol and what the result translated to in terms of blood alcohol. The addendum dated 12 October 2016 appeared to conclude that the breathalyzer results were in breath alcohol and that the reading of 1.05 mg/l corresponded to a blood alcohol measurement of 220.5mg/100ml BAC.

d. A widely-used partition ratio of breath alcohol to blood alcohol is 2100 to 1. However, it is unknown what the correct ratio is for Lebanon, or to which standard the United Nations adheres. This doubt is illustrated by the Force Commander's referral to the Applicant's Blood Alcohol Level (BAL) in his memo to the ASG/OHRM as "105mg/ml" while the Chief/HRMS used the addendum results in his 13 October allegations of misconduct letter. Furthermore, the Lifeloc Manual for the model FC20 also indicates a range of accuracy of plus or minus 0.05% for BAC readings of .100 to .400. This illustrates that the margin for error could also explain a higher reading than what actually occurred.

e. Because no police, doctors, or investigators subsequently performed any blood or urine tests, the breathalyzer results could not be confirmed by

direct tests which give blood alcohol results.

f. No information has been provided to the Applicant to assess the reliability and functioning of the FC20 breathalyzer used on the Applicant. It is unknown whether it underwent routine calibrations, as recommended in the manufacturer's manual. It is unknown which mode it was in when it was used; auto or manual. It is unknown when it was last tested and/or used, and whether the military police officer who used the machine was trained in how to operate and test the machine, or ensure the batteries were working properly. It is not clear who was the military police officer who conducted the breathalyzer test on the Applicant and whether the military police officer properly administered the test so as to eliminate mouth alcohol contamination or burping, which would also skew the results.

g. Despite the doubt about the results of the test, the Administration relied on it to the exclusion of other evidence. No investigation was conducted to ensure that the results were not contaminated by other factors, such as the Applicant's health conditions of high blood pressure, high cholesterol, and diabetes.

h. If the Applicant was truly over four times the limit, there would have been further objective evidence of his intoxication in addition to the smell of alcohol, as described by the United Nations Doctor, or the smell and statement by Military Police Officer Singh that the Applicant appeared intoxicated. No witness provided evidence that the Applicant was unsteady on his feet, had slurred speech, glassy eyes, sleepiness, incontinence or disorientation: clinical signs which may indicated severe intoxication. If the Applicant had been four times over the limit, he would not have been discharged so easily from the UNIFIL hospital.

i. Like the case of *Lutta* UNDT/2010/052, the Applicant's admissions and witness observations cannot be adequate evidence in the face of the issues

with the breathalyzer test. What the clear and convincing standard of proof entails in cases where the facts are to be established exclusively on the credibility of the parties, requires the decision-maker to be satisfied that the totality of the evidence, including any credibility analysis to clearly and convincingly demonstrate that the alleged conduct took place. If the Tribunal rejects the breathalyzer evidence as unreliable or not having met the clear and convincing standard, then the remainder of the facts cannot establish a violation of driving under the influence.

50. The sanction was not proportionate because the Administration did not consider the unique facts of his case.

a. Upon questioning by Counsel for the Applicant, Mr. Sanidas could not articulate whether zero-tolerance meant generally imposing punishment in all drinking and driving cases where the requisite standard was met, or whether it meant imposing separation in all cases. This troubling answer is emblematic of the reactionary and heavy-handed approach that the Administration took in this case, not considering the specific facts at hand. Rather, the Organization was more concerned with adhering to an undefined policy and upholding a reputation to be tough on this type of misconduct.

b. Thus, the decision to separate the Applicant was flawed because it essentially amounted to strict liability. As soon as the Administration knew his was a drinking and driving case, and they believed they had a reliable breathalyzer result, they were going to impose the sanction of separation. Mr. Sanidas talked about the gravity of the offense but was unable to confirm that he himself knew of the particular facts of the Applicant's background, or that he had been aware of the email exchanges regarding lack of clarity in the breathalyzer results.

c. Also illustrative of a mechanical response by the Administration, was the fact that the Respondent continually referred to the great risk presented by

the Applicant's action in this case. However, the sanction meted out should be based on actual harm and facts, not the risk or consideration of what could have happened.

d. In this case, there was only USD200 of material damage to the United Nations vehicle. No other person or staff member was injured, besides the minor injuries sustained by the Applicant. Testimony showed that at the time of the accident there was no other traffic on the mission road, and that the road itself is only open to base traffic, not to the community at large. Testimony was given that the road was windy and steep.

e. It is also unknown whether the Administration considered at all the Applicant's prior service in hardship duty stations and missions, his being stricken with malaria multiple times, including hospitalization, and his service during the war in Lebanon in 2006, when his home was destroyed by an Israeli rocket.

f. Mr. Sanidas' signed the allegations memorandum which was prepared by a Legal Officer and the Legal Officer would have been the one to review the facts. He also reviewed the sanction memorandum which was signed by Ms. Wamuyu Wainaina, ASG/OHRM. It is unclear how much of the factual review by the decision makers was delegated to others. This would essentially distance the authorized decision makers from the relevant and material facts and give rise to a disconnect between the particular facts of the case and the proportionality of the sanction issued.

51. The sanction was not proportionate because the Administration did not appropriately consider all relevant and mitigating factors. In the January 2017 sanction letter, the ASG/OHRM states that the Applicant's full and early admission to the alleged misconduct and the fact that he had been in service with the Organization for 32 years operated as mitigating factors. However, these were not given adequate weight. The Applicant's prior service at hardship duty stations was not considered.

His thrice service-incurred malaria was not considered. His continued service during the 2006 war in Lebanon was not considered.

52. The sanction was not proportionate because the Administration did not consider the recommendation in the 2012 SOP.

a. Material to the consideration of proportionality of the sanction in this case is consideration of the treatment of the Applicant vis-à-vis other staff members and other cases of drinking and driving, as well as the Organization's own materials on recommendation for similar violations.

b. Mr. Sanidas could not answer the Tribunal's questions about the specific engagement of this SOP or articulate a consistent practice of SOPs at missions. Indeed, Mr. Sanidas' testimony revealed that only those cases referred to Headquarters by the missions were considered by OHRM, thus suggesting that there was no discernible policy about when or how to refer cases, or the number of cases which occur at the mission level which are neither disciplined nor investigated. It could very well be that the SOP recommendation is used in other UNIFIL cases not referred to Headquarters; this raises the fairness of the Applicant's Headquarters issued sanction in relation to treatment of other staff members.

c. Both the Applicant and Mr. Hakizimana testified about the common occurrence of mission staff members driving after consuming alcohol. Not all these cases are referred to Headquarters and this reveals not only a disregard for using and following the mission SOPs, but a lack of clarity and equality in how drinking and driving cases are dealt with system-wide. Even if the SOP does not rise to the level of legal weight as a Staff Regulation and Rule, there is no need to have it if it does not guide or inform the Organization's actions, or if it can be only selectively followed.

53. The sanction was not proportionate because a lesser sanction would have been

more appropriate.

a. The Tribunal should examine, according to *Sanwidi* 2010-UNAT-084, whether the objective of the Administration's action is sufficiently important, whether the action is rationally connected to the objective, and whether the action goes beyond what is necessary to achieve the objective.

b. The Organization could have retained him in service and still advanced the important objective of punishing his conduct, deterring other conduct, and even promoting a policy of zero tolerance. This could have been achieved with a lesser sanction. The Organization could have taken away the Applicant's driving permit temporarily or permanently; it could have required him to undergo training and/or counselling with regarding to alcohol abuse; it could have imposed a sanction of demotion, deferral of promotion, and/or a fine, as per the sanction available under staff rule 10.2(a) for example.

c. The jurisprudence of the United Nations formal internal justice system has also clarified that the Organization has a duty of care towards its staff members. If the Organization believed that the Applicant had an alcohol problem, or was a risk to others, instead of casting him out, it had a duty to assist and support him. Currently, staff counsellors across the United Nations system help staff members with drug, alcohol, or mental health issues. The Organization did not offer such assistance to the Applicant.

54. The Applicant submits that he is entitled to moral damages as per the Appeals Tribunal's holdings in *Kallon* 2017-UNAT-742 and *Asariotis* 2013-UNAT-309.

a. At the close of the hearing in this case, the Tribunal expressed doubt as to whether, in the context of an administrative case which concerned a disciplinary proceeding and sanction, moral damages could be warranted when the erroneous sanction could be rescinded and corrected.

b. The Applicant submits that judicial correction of an unlawful or

disproportionate disciplinary sanction should not exclude the possibility of awarding moral damages. Reinstatement or a financial award for the contractual value or duration cannot completely compensate an Applicant for the harm done. The International Labour Organization Administrative Tribunal has awarded moral damages in cases where a disciplinary sanction was found unlawful and reinstatement was ordered and in cases where a disciplinary matter was remitted to the appropriate body. Also, in the Philippines an employee is entitled to moral damages, notwithstanding correction of the disciplinary measure, when the employer acted: a) in bad faith or fraud; b) in a manner oppressive to labor; or c) in a manner contrary to morals, good customs, or public policy.

c. Therefore, it would be just to consider that the principles in *Asariotis* should equally apply to those cases where the adverse administrative decision is a disciplinary one.

d. If the Tribunal finds that the Organization's imposition of separation with termination indemnity and compensation in lieu of notice was disproportionate, the Applicant requests that the court award moral damages for the breach committed by the Organization of the Applicant's rights as a staff member, as well for the evidence of the harm, anxiety and stress suffered by him.

e. In his pleadings and at the hearing, the Tribunal heard evidence of the harm, anxiety and stress suffered by the Applicant as a result of his separation, less than two years before his retirement. The Applicant submits that his separation itself represents harm in the *res ipsa loquitor* sense; he went from working, to not working; the loss of his employment cannot simply be valued in monetary sense. It has obvious permanent effects.

f. While the Respondent will try and argue that the Applicant did not avail himself of UNRWA medical care and diligent efforts to gain

employment, it is important to consider the context of these claims and that the duty to mitigate is not absolute; nor does its part or entire failure relieve the Organization of its breach in the first place. The fact remains that the Applicant's separation stripped him of his benefits, including health insurance for his entire family. It is also unrealistic to expect a man of the Applicant's age, who was fired from the United Nations, to obtain employment by conventional applications. His testimony at the hearing also noted that he searched informally for work, to no avail.

g. Notwithstanding the lump sum of notice and half termination indemnity upon his separation, the Applicant suffered the loss of steady income, pension contributions, and the status of being a working man for his family. He testified about his multiple ongoing health problems, for which he must pay out of pocket, as well as having to support three of his children still living at home. He also stated that he had to move two children from private to public schools.

h. All this considered, in the event that the Tribunal finds that a sanction less than separation was appropriate, the Applicant submits that the amount of compensation in lieu of specific performance should be set at two years' net base salary. Although the Tribunal has evidence that the Applicant's early retirement was less than two years away, it is not certain that he would have opted for this decision. Indeed, with the equivalent a continuing or permanent appointment, the Applicant could have continued working until age 62, or nine years after his separation in 2017. Therefore, the maximum award is the only monetary compensation which can come close to recognizing the loss of the right to future employment.

55. The Applicant prays the Tribunal to grant him the following remedies:

a. To rescind the imposed sanction;

b. To substitute the imposed sanction with a lesser sanction and order his reinstatement or, in the alternative to reinstatement, order compensation in the amount of two years' net base salary; and,

c. To award three months' net base salary in moral damages.

Respondent's case

56. The facts on which the disciplinary measure was based are established by clear and convincing evidence.

a. The Applicant's statement given to the investigators in which he admitted that, prior to the accident, he was at a farewell gathering at the ICTS offices during which he consumed multiple alcoholic beverages.

b. Major Singh's statement that when he helped the Applicant to get out of the vehicle after the accident he smelled of alcohol and appeared intoxicated.

c. Mr. Hakizimana's statement that when he took the Applicant to the UNIFIL hospital he could observe that the Applicant had been consuming alcohol.

d. The results of the breathalyzer test administered at 6.42 p.m. which measured a breath alcohol level of 1.05 mg/l. This measurement was equivalent to a blood alcohol content of 220.5 mg/100ml.

e. The medical report prepared by the attending physician at the UNIFIL hospital which indicates that the Applicant smelled of alcohol.

f. The Applicant's comments on the allegations in which he stated that he fully accepted the result of the panel, that he had learnt from the incident and that he would prevent similar cases from happening again.

g. Other evidence demonstrates the reliability of the breathalyzer machine and reading. Together with the Applicant's admission that he had consumed multiple alcoholic beverages with little or no food, the medical report together with the statements of Mr. Hakizimana and Major Singh as to the Applicant's condition at the time of the incident provide clear and convincing evidence of the Applicant's excessive consumption of alcohol prior to driving UNIFIL 2683.

57. With regard to the Applicant's contentions about the breathalyzer test result, the Respondent submits as follows:

a. The breathalyzer test administered to the Applicant revealed a breath alcohol level of 1.05 mg/l. A representative of the breathalyzer manufacturer confirmed that this measurement was equivalent to a blood alcohol content of 220.5 mg/100ml.

b. The Applicant claimed that the Lifeloc Manual for the model FC20 indicates a margin for error which could explain the higher reading result in his case, however, the result of the breathalyzer test administered to the Applicant was so high that the possible margin for error plus or minus 0.005% would not change the result that the Applicant had been four times over the limit.

c. The Applicant stated that a widely-used partition ratio of breath alcohol to blood ratio is 2100 to 1 and claims that the relevant ratio for Lebanon or the standard to which the United Nations adheres is not known. Worldwide there is a very limited variance in the conversion factor applied to convert between breath alcohol values and blood alcohol values. A basic internet search reveals that worldwide, the conversion factor varies between 2000:1 and 2300:1. Regardless of which factor is applied the Applicant was substantially over any permissible legal limits.

d. Contrary to the Applicant's claim that no blood test to confirm the breathalyzer results was performed, as the driver of the UNIFIL vehicle and pursuant to paragraph 14 of the SOP, he was the one required to request a blood test to verify the result of the breathalyzer test but he failed to do so.

e. The breathalyzer test was administered to the Applicant at the hospital only 40 minutes after the incident. The manufacturer's manual specifies annual recalibrations and the Military Police recalibrate the devices assigned to them although no specific information about recalibration is available with respect to the device used to obtain the result from the Applicant.

f. The Applicant's claims that no investigation was conducted to ensure that the results were not contaminated by health factors such as high blood pressure, high cholesterol or diabetes but at no point during the investigation process or in his comments to the allegations did he contend that illness or other medical condition could have impacted the result of the breathalyzer test. To the contrary, the Applicant accepted the result of the investigation.

58. The imposed sanction fell within the Administration's discretion.

a. The Appeals Tribunal has consistently held that the Dispute Tribunal owes deference to the Secretary-General's determination of the appropriate disciplinary measure.

b. The sanction imposed on the Applicant was neither blatantly illegal, arbitrary or discriminatory nor otherwise abusive or excessive. The Applicant's assertion at the hearing that the Administration applied a strict liability standard when imposing the sanction, without considering the facts of the case, is incorrect. The Administration considered the specific circumstances of the Applicant's case when deciding on the appropriate disciplinary measure.

59. The Applicant's actions constituted serious misconduct.

a. After having several alcoholic drinks at an office party on 27 May 2016, the Applicant drove a United Nations vehicle under the influence of alcohol. Driving while under the influence of alcohol was a serious lapse of the conduct expected of international civil servants. The Applicant put his own life and that of others at risk. This is evidenced by the fact that he lost control over his vehicle and crashed it against the side of the road. Moreover, the Applicant's actions could have seriously compromised the reputation of UNIFIL and the Organization.

b. Mr. Sanidas testified that the United Nations is careful to protect its reputation as an organization that holds its staff to the highest standards in the many volatile situations in which it serves. This applies especially in the context of the Organization's peacekeeping and peacebuilding activities, including those performed by UNIFIL. Misconduct by the Organization's staff members has a direct impact on its ability to carry out its mandate.

c. It is irrelevant that the Applicant drove on a road within the UNIFIL compound. As the Applicant and his former colleague, Mr. Hakizimana, testified, the road on which the Applicant drove was used by United Nations employees in their own cars, by other United Nations vehicles and by contingent military. Driving under the influence of alcohol created a real risk to these individuals and the Organization's reputation.

d. The Applicant engaged in highly risky behavior. By his own admission, he was not used to drinking hard liquor. He had been tired that day, yet he still chose to have four drinks of vodka mixed with orange juice. Two of these drinks were not prepared by himself; he could not know the precise quantity of alcohol that he drank. Even though there was a shuttle bus for employees, he decided not to use it. Instead he chose to drive himself.

e. UNIFIL, like other missions, has a zero-tolerance policy for driving United Nations vehicles under the influence of alcohol. While some countries

may set different limits, the United Nations follows the highest standards. A zero-tolerance policy is the best way to safeguard the Organization's interests. Mr. Hakizimana testified that, when working in UNIFIL, he was aware of the policy, which he explained was the norm in all the missions in which he had worked. He confirmed that such a policy would have been communicated through e-mails and other forms of communication, such as awareness campaigns.

f. The Applicant conceded that he had seen posters at UNIFIL addressing the Mission's zero-tolerance driving policies. He also testified that he may have received e-mails in this regard but that he probably did not read them. Ignorance of the relevant regulations is not an excuse. Having been permitted to drive a United Nations vehicle, the Applicant should have familiarized himself with the policies applicable to its operation and comply with them. His failure to do so does not render his misconduct less serious, or the sanction imposed less appropriate.

g. The Applicant's claim that he was singled out and treated unfairly is incorrect and speculative. The Applicant was unable to make anything but vague assertions in this regard; he did not point to any specific case, either at UNIFIL or elsewhere, where a staff member was caught driving under the influence of alcohol and not sanctioned by the Administration. Mr. Sanidas testified that all cases of misconduct referred to OHRM are treated in the same manner, taking into account the Organization's past practice and the individual circumstances of each case. Even if the Applicant's argument that other staff members were driving after consuming alcohol was accepted, the impossibility to conduct controls on every United Nations car and driver in each of the many places where the United Nations operates does not prevent the Administration from imposing an appropriate sanction on those who are found to have driven under the influence of alcohol.

60. The Administration considered all mitigating circumstances.

a. The Administration considered the Applicant's full and early admission of his misconduct and his long service with the Organization as mitigating factors. His assignments in hardship duty stations was not considered to be a further mitigating factor. As noted by the Tribunal, the Applicant was paid additional allowances and received rest and recuperation leave during these times to compensate for the difficult living conditions.

b. Contrary to the Applicant's arguments, the Administration was not required to consider his personal circumstances, such as his age and closeness to retirement. Making the imposition of disciplinary sanctions dependent on a staff member's personal situation would lead to unequal treatment based on criteria extraneous to the staff member's role within the Organization. This would have the potential to undermine one of the aims of the disciplinary process—to ensure compliance with the Staff Regulations and Rules throughout the Organization by all staff member, regardless of their background and personal circumstances.

61. The imposed disciplinary measure was not the most severe sanction available.

a. Although the Applicant was separated from service, he was granted compensation in lieu of notice as well as termination indemnity. Therefore, the disciplinary measure imposed on the Applicant was not the most severe sanction available to the Administration, i.e. dismissal, pursuant to staff rule 10.2(a)(ix), or separation from service, with compensation in lieu of notice, and without termination indemnity, pursuant to staff rule 10.2(a)(viii). The sanction imposed on the Applicant accounted for the existence of the abovementioned mitigating factors and resulted in significant final payments to the Applicant.

b. The Applicant stated at the hearing that the amount disbursed to him

upon separation exceeded his annual salary.

62. To ensure consistency in its administrative action, the Respondent considered the sanctions he imposed in recent past disciplinary cases where the misconduct was similar in nature to that of the Applicant.

63. The Applicant's procedural fairness rights were respected throughout the investigation and disciplinary process.

64. Compensation is not appropriate.

a. The Applicant's request for compensation should be rejected since the sanction imposed on him fell well within the Administration's discretion. In any case, the Applicant's request to be compensated in the amount of three months' net base salary for moral injury, stress, reputational and career damage is not supported by evidence, as required under art. 10.5(b) of the UNDT Statute.

b. Moreover, the Applicant has failed to mitigate any damages he suffered. He alleged that he suffered from medical issues because of his separation from service. However, he testified that some of his medical issues were already present before he lost his employment with the Organization. While he stated that since his separation he has seen a doctor twice in relation to what he referred to as depression, he did not provide any specific details about his condition, any course of treatment and any purported link to the sanction.

c. The Applicant's claim that he has incurred high medical costs since losing his United Nations-subsidized health insurance is not substantiated. Moreover, the Applicant conceded at the hearing that having the status of a Palestinian refugee, he is entitled to healthcare provided by UNRWA. According to its website, UNRWA operates 28 primary health care facilities, which provide access to Palestinian refugees. The Applicant could not explain

why he has not availed himself of such services, other than stating that he had heard they were lacking in quality.

d. The Applicant also conceded that apart from making some informal inquiries he has not sought alternative suitable employment since his separation. While he stated that it would be difficult to find a job considering his age and his status as a Palestinian refugee, he confirmed that he had not actively looked for a job even though he possesses relevant technical skills and speaks at least three languages.

e. Even if the Tribunal were to find that the Applicant's sanction was disproportionate, no compensation would be due on that account alone. As the Tribunal noted at the hearing, the correction of a sanction through the legal process remedies the error of the Administration. There is no room for further damages.

65. For the foregoing reasons, the Respondent requests that the application be dismissed in its entirety.

Considerations

Whether unclear standards preclude attributing misconduct

66. At the outset, it is noted that staff rule 10.1 broadly defines misconduct as "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant". Whereas staff rule 1.2, staff regulation 10.1 and ST/AI/371 give guidance as to specific instances of prohibited conduct and acts that may entail disciplinary measures, determination of what constitutes misconduct may be done with a degree of discretion, in consideration of the gravity of the act, circumstances surrounding it and circumstances particular to the staff member concerned. Likewise, the administration exercises discretion in deciding whether the

given misconduct should attract a disciplinary measure or administrative reprimand.

67. Regarding the argument that the HOM memo and the SOP are at the bottom of the Organization's hierarchy of legislation and lack the legal authority of properly promulgated administrative issuances, the Tribunal recalls that, as a general principle, labour discipline is perceived as the individual employee's obligation to comply with lawful orders/instructions of the employer and the administration, applicable on the basis of the employment contract. Specifically, the prohibition of drinking and driving of United Nations vehicles is expressed at a higher level of normative acts. The ST/AI/2010/6 provides at Section 3 that "drivers of United Nations vehicles are strictly prohibited from driving under the influence of substances that negatively affect their driving ability, including alcohol, drugs, narcotics, psychotropics, chemical substances and medicines", while Section 5 provides that "[f]ailure to comply with the provisions of the present instruction […] may lead to the institution of disciplinary proceedings against the staff member(s) concerned." As such, the HOM memo and the SOPs were not issued in a legal void. Rather, by determining what is to be understood as "driving under the influence of alcohol", they provided the needed crystallisation of a general norm readily expressed in the administrative issuance.

68. Determinations provided in the SOP and the HOM memorandum as to the allowed alcohol content in drivers were neither absurd nor arbitrary. For comparison, whereas it is true that different state systems accept different levels, usually from 0.02 to 0.15% (or from 20 to 150mg/100ml) in blood, there are also those that have zero-alcohol standard, which, practically, may be equal to the 0.02 level, the latter, for evidentiary reasons, crediting the value of 0.01 on account of possible physiological content of alcohol in human blood and 0.01 on account of error of measurement.[13] Such standard may reflect imperatives of religion but most often reflects the danger posed by drunk driving in the conditions of generally increased intensity of traffic, in some countries (e.g., in Poland), coupled with a policy against wide-spread alcohol

[13] World Health Organization data repository, http://apps.who.int/gho/data/view.main.54600.

abuse. It is also often applied to professional and commercial drivers.[14] The Tribunal finds that the zero-alcohol standard regarding driving of United Nations vehicles has a legitimate basis in concerns about safety of its personnel and other persons, the Organization's liability toward these persons, and protecting its property and its reputation.

69. As concerns the averment that the HOM memo did not determine its relation to the SOP, and thus that their dispositions are "contradictory", the Tribunal notes that both are acts of the Head of Mission, while the headings under which they were issued are immaterial for the question of their validity or hierarchy. To the extent that both acts contain norms regulating the same matter, the relation between them is to be governed by the primacy of "*lex posterior*"; thus, the previously tolerated level of alcohol was replaced with the "zero-alcohol" standard. While it is true that the HOM memo does not specify administrative sanctions for violating this standard, it clearly pronounces that its "zero-alcohol policy" establishes, among other, a prohibition of driving under the influence of alcohol. There is currently no dispute that the standard was not effectively promulgated; in any event, this fact is evidenced by records of two email broadcast to all staff, the testimony of Mr. Hakizimana and the Applicant's admission that he had seen posters about the same. The Applicant's argument, therefore, on the score of the lack of "ascertainable law" as to the prohibition of drunk driving, cannot be accepted.

70. Turning to the argument that the Applicant cannot be held to a standard which is not the same for all staff members in the United Nations missions and offices, as far as the matter concerns the drinking and driving policy, the Tribunal disagrees. It notes that United Nations missions and offices operate in different contexts, in terms of the mandate, security and relations with the host country, etc. Different theatre-specific restrictions may therefore be imposed, like curfew, designation of off-limits areas or ban on alcohol consumption at work premises. As concerns driving United Nations vehicles, moreover, Mr. Sanidas testified that the zero-alcohol policy is

[14] Ibid.

currently introduced world-wide in missions. As such, the argument on the score of uneven standard must be rejected as well.

71. In accordance with the aforesaid, regarding the question raised by the Applicant whether just any technical violation of the zero-alcohol standard amounts to misconduct, the Tribunal considers that, indeed, any such act would legitimately constitute a prohibited conduct. The questions whether to prosecute it as misconduct and what consequences are appropriate, are determined with a wide margin of discretion by the Administration. Reasonableness of the exercise of this discretion depends on the specific facts, including the *mens rea*, and the scale of the breach. These aspects are discussed below.

Whether facts were established by clear and convincing evidence

72. A large scope of the relevant facts is undisputed. The Applicant's admission in the hearing (in addition to that given in the investigation) that at the party he had had three to four vodka-based cocktails, allows the Tribunal to accept that at the time of the accident he had been under the influence of alcohol and renders practically immaterial the questions about pre-existing medical condition, calibration of the breathalyser, training of the policeman administering the test. This said, considering that the sanctioning decision relies heavily on the finding that the Applicant had had five times over the limit established by the SOP from 2012, the interpretation of the reading of the breathalyser remains an issue. In this respect, the Tribunal is not satisfied that the evidence is clear and convincing.

73. The Tribunal notes that the Respondent rejected an explanation offered by the Military Police officer in charge of administering blood tests that the breathalyzer had recalculated the contents of alcohol found in the exhaled breath (BrAC) to relative alcohol contents in blood (BAC) and displayed the latter. Indeed, the manufacturer's website informs that the breathalyzer has such a function. The Respondent did not attempt to inquire any further to clarify at the source the apparent contradiction in the information obtained, i.e., that if the numerical result were to be related to units

expressed as mg/100ml in blood (BAC), it would be beyond the range demonstrable by the breathalyser; moreover, that BAC of above 0.45 typically results in death.[15] Instead, the Respondent accepted from the breathalyser manufacturer that "mg/l is always a reading of BrAC", and, thus, that the reading 1.05 pertained to mg/l BrAC, which corresponded to a blood alcohol content of 220.5mg/100ml (BAC). The Respondent, while generally relying on internet searches, ignored, however, information that this content of alcohol typically causes severe impairment of mental, physical and sensory functions ranging from loss of orientation, impossibility to autonomously walk or stand, vomiting and blackouts to a total loss of motor function control.[16] The Tribunal observes that this level of drunkenness would call in question the Applicant's ability to drive in the first place and his capability of acting with discernment and thus his responsibility. With the actual number of drinks consumed by the Applicant and alcohol content in them being unknown, still, given the Applicant's body weight, 125 kg, and a relatively short duration of the party, it would have required a vast amount of alcohol to arrive at this level.[17] It is also dubious that the Applicant's departure from the party in this state would have remained unnoticed by the other participants. Moreover, the Tribunal agrees that had the Applicant indeed exhibited such high level of intoxication, he would not have been easily discharged from the hospital and he would not have seemed "ok" and could normally converse and interact with Mr. Hakizimana. Also, other persons who had seen the Applicant would have likely noticed more symptoms than the smell of alcohol.

74. All these factual contradictions do not allow accepting the reading of the breathalyzer slip at the face value as BrAC and the Respondent rightly commenced by doubting it. The Respondent's ultimate choice of interpretation of the breathalyzer's reading, however, seems to assume that the expression of alcohol content is either in mg/l or mg/100ml. This is incorrect. As it can be seen readily on relevant websites, including one used as reference in the Respondent's

[15] Respondent's annex R1 at page 79; https://www.lifeloc.com/
[16] Ibid.
[17] For simulation of alcohol content, see for e.g., at www.alcoholhelpcenter.net

correspondence[18], among units of measurements are also those popular in Europe, which are grams of alcohol per one litre of blood, *promille w/v* [‰ *w/v*] and *g*rams of alcohol per one kilogram of blood, *promille w/v* [‰ *w/w*], with the likely range being from 0.00 to 6.00. Considering the Military Police's insistence that the breathalyzer displayed results in blood, the available account of the Applicant's physical condition, his admission to having had three to four vodka based cocktails and the passage of time between the alcohol consumption and the testing, a more plausible explanation seems to be that the results pertained to 1.05 *promille*, an equivalent of 0.105 mg/100ml (BAC). This level of alcohol would also be consistent with the impairment of motor coordination and loss of good judgment, impairment of vision and reaction time[19], leading to the accident, as well as with the fact that all persons interacting with the Applicant after his accident could smell that he had been consuming alcohol.

75. At this point, however, given the unavailability of witnesses who administered the test and who interacted with the Applicant at the time of the accident it was impossible for the Tribunal to verify this hypothesis. However, accepting it as more favourable for the Applicant, it would still amount to legal drunkenness in Lebanon (with the limit being 0.5‰; previously 0.8‰), to a violation of the SOP limit (having been the equivalent of 0.4‰) and the zero-alcohol standard (even if, for evidentiary reasons, accepted as 0.2‰).

76. Notwithstanding the breathalyzer reading, in practical terms, the SOP standard allowed a person of the Applicant's posture to drive after a pint of beer or a glass of wine. The zero-alcohol standard does not allow driving after consuming any unit of alcohol. Driving after consuming several vodka-based cocktails was an obvious violation of either standard. As such, the Tribunal has no doubts that the Applicant's act amounted to misconduct.

[18] Reply - Annex R-1 p 79; https://www.lionlaboratories.com/testing-for-alcohol/alcohol-measurement-units/
[19] Ibid.

Proportionality of sanction

77. As determined by staff rule 10.3(b) "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". Furthermore, the Appeals Tribunal, indicated that other factors to be considered in assessing the proportionality of a sanction include the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.[20]

78. The gravity of the misconduct is related to the subjective element, being a faulty state of mind, and to the objective dangerousness of the conduct, including the rank of the norm breached, the degree of the breach and any negative consequences entailed by it.

79. The gravity of the subjective element in the present case consists in consuming strong alcohol while having the plan of subsequently driving a United Nations vehicle, conduct which might be contrasted with a hypothetical of, *e.g.*, forgetting about a beer taken at lunch or misjudging the effect of alcohol consumption on the previous day. The Applicant disregarded the formal rules as well as the common-sense safety considerations. He rejected available alternatives, such as availing himself of the bus provided (even if the bus was destined for Beirut, why not ask to be dropped off at the compound's gate), asking a colleague for a ride or, ultimately, walking down to the meeting point with his son at Naquora Old Camp. The argument that he did not want to abandon the car out of concern for the United Nations property is untenable; rather, this conduct shows that he was acting for his own convenience.

80. On the other hand, it is undisputed and credible that the Applicant had no intention of driving the United Nations car anywhere beyond the gate of the Naquora Old Camp. As such, his misconduct was to take place for a very short time, exclusively on an internal road, inaccessible by the public and in the conditions of

[20] *Rajan* 2017-UNAT-781 at para. 48.

low traffic after working hours on a Friday afternoon. The latter circumstances also mitigate the objective element of the misconduct, consisting in endangering the lives of others, the United Nations property and the Organization's reputation. The Tribunal agrees with the Respondent that the fact that the accident happened on a route well familiar to the Applicant and that its consequences could have been much more serious demonstrates the danger posed by this conduct. The actual damage, however, caused to the United Nations vehicle and the road sign was not significant, reversible and its equivalent of USD200 has been surely recovered from the Applicant. As regards the Organization's reputation, the Tribunal recalls that in this instance, the accident taking place in the United Nations compound, not involving members of the local population nor any greater number of United Nations personnel, the actual damage was contained.

81. The Tribunal finds that the Respondent correctly identified mitigating circumstances related to the Applicant's prior conduct, lack of disciplinary violations, length of service and early admission. The Tribunal notes, nevertheless that the Applicant's length of service without ever violating the discipline was exceptional and, given the doubt surrounding the breathalyzer reading, his admission was crucial to the determination of misconduct. Consistent in admitting to his conduct, the Applicant displayed a genuine remorse.

82. As regards other personal circumstances of the Applicant, Mr. Sanidas confirmed that neither the Applicant's status as stateless person nor his family situation and health condition including service-incurred malaria were taken under consideration. The Tribunal does not find support in the Appeals Tribunal's jurisprudence for considering them highly relevant for meting out the disciplinary sanction, even where they would have had impact on the *mens rea* element.[21] Limited impact of personal circumstances is due to the fact that disciplinary liability – as opposed to criminal liability - is a contractual one, hence once the misconduct as such has been found incompatible with the status of a civil servant, the corrective function

[21] *Ouriques* 2017-UNAT-745, para. 20.

of the sanction becomes immaterial and personal circumstances play a role only within measures accompanying the separation. As long as the conduct is not of such nature, however, these considerations should not be entirely ruled out, especially given that the Organization has a duty of care toward its employees.

83. On a related plane, it is recalled that the Appeals Tribunal pronounced that while the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.[22] In relation to the previously expressed standard, i.e., that the Tribunals intervene in the disciplinary measures only where they would be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in severity, [23] the Appeals Tribunal clarified that the ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. An excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline.[24]

84. In the present case, as borne out by the impugned decision and the testimony of Mr. Sanidas, the main goal of the sanction was to affirm the non-tolerance for drunk driving as unbecoming an international civil servant, general deterrence and protecting the reputation of the Organization. The Tribunal accepts that drunk driving must be seriously repressed and that general deterrence is an important goal in disciplinary regime. It, however, cannot accept that, absent a clear written

[22] *Samandarov* 2018-UNAT-859, para 24.
[23] E.g., *Portillo Moya* 2015-UNAT-523 at para. 21.
[24] *Samandarov, ibid.* para 25.

pronouncement on the same, any violation of a zero-alcohol standard should result in separation in a situation – which goes to the question of the Respondent's consistency - directly in the wake of the previous, far more tolerant Organization's policy.

85. As shown by the scatter of permissible alcohol levels in different countries, there is no universally accepted value. Moral judgments and punitive policies also differ. With a significant change of the approach, it takes time and an information campaign for the new policy to settle and ultimately become internalized as behavioral norm. The Tribunal agrees with the Applicant that the promulgation of the Organization's policy against drunk driving was flawed to the extent that, while it pronounced a new standard, it did not inform the staff that the violation of it would be treated as serious misconduct leading to separation, which would be a drastic aggravation compared with the previous policy, by far more lenient to first-time offenders and applying progressive discipline. Only six months earlier, a similar offender would have been risking not more than his driving permit. Lack of information in this instance may be contrasted, for example, with the Organization's campaign against sexual abuse, where information and prevention are being carried out parallel with the sanctioning policy, or with information provided on official United Nations forms about the responsibility for supplying fraudulent data, or information on the use of information technology displayed on every computer. Failure to so inform the staff and resort to separation as a means of affirming the new standard, is the principal concern affecting the fairness of disciplinary measure in the present case.

86. The Tribunal considered that, indeed, three similar cases from the period from mid-2015 to mid-2017 resulted in separation.[25] It notes, nevertheless, that these other cases apparently involved: physical assault upon another staff member; carrying a service weapon, involvement of local authorities and contravention of the staff member's core duties as a security guard; disruptive behaviour at a local bar;

[25] Compendium of disciplinary measures – Practice of the Secretary General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2017. Office of Human Resources Management, (10 September 2018).

endangering the public and failure to stop when instructed to do so by Security Officers; previous sanction for disorderly conduct. The present case does not have such traits, the most flagrant one being disregard for the formal rules as well as for safety considerations. This, however, was a one-time indiscretion, which did not occasion any serious damage and, given a lack of proper information on the policy, does not necessarily disqualify the Applicant as an international civil servant at the position which he had held. There is no reason to believe that the conduct would be repeated. On the other hand, the mitigating circumstances are robust and the consequences of the separation for the Applicant are particularly grave.

87. In the totality of circumstances, in the Tribunal's opinion the impugned decision displays imbalance between the adverse and beneficial effects. The Tribunal agrees that drunk driving in the United Nations context justifies a severe disciplinary measure and not just a withdrawal of the driving license. There is, however, no indication that the desired result, this being affirming the standard, general deterrence and protecting the Organization's reputation, could not have been attained without separating the Applicant. As such, the Tribunal considers that demotion by one grade with deferral of promotion plus withdrawal of the driving license for one year satisfies the criteria of balance, necessity and suitability implied in the proportionality principle. The impugned decision is amended accordingly.

88. As concerns the claim for compensation for moral damages, the Tribunal is of the opinion that, absent a patent violation of the Applicant's rights in the administrative phase, or exoneration of the Applicant as the outcome of the UNDT proceedings, the correction introduced by this judgment satisfies legitimate claims on the part of the Applicant and compensation for moral damages is not warranted.

Conclusion

89. In view of the foregoing:

a. The application is partially granted;

b. The impugned decision is hereby rescinded and the disciplinary measure of separation with the relevant indemnities is replaced with demotion by one grade with deferral of eligibility for promotion for two years and withdrawal of the United Nations driving permit for one year;

c. The Organization shall retroactively place the Applicant at his position at one grade lower than he held prior to the imposition of the rescinded disciplinary measure;

d. The Organization shall pay the Applicant the loss of net salary that he suffered as a result of the separation, at the level determined pursuant to point c) above, with interest on at the current US Prime Rate from the date of the separation to the date of reinstatement; this compensation shall not exceed the worth of two-year net salary.

e. Should the Organization elect not to restore the Applicant in service, compensation to be paid is fixed at two years' net base salary at the rate in effect on the date of the Applicant's separation from service, with interest at the current US Prime Rate from the date of the service of this Judgment.

f. All other claims are dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 25th day of February 2019

Entered in the Register on this 25th day of February 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi