



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/097

Judgment No.: UNDT/2020/165

Date: 10 September 2020

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PARIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Julia Kyung Min Lee, OSLA

Counsel for Respondent:

Isavella Vasilogeorgi, AAS/ALD/OHR

Miryoung An, AAS/ALD/OHR

Introduction

1. The Applicant served as a Security Officer at the United Nations Multidimensional Integrated Stabilisation Mission in Mali (“MINUSMA”). He held a fixed-term appointment at the FS-5 level and was based in Mopti. The Applicant’s appointment was due to expire on 30 June 2018, but he was anticipating renewal when he was separated from service on 27 June 2018.

2. On 18 September 2018, the Applicant challenged the Respondent’s decision to separate him from service with compensation *in lieu* of notice and termination indemnity in accordance with staff rule 10.2(a)(viii). The Respondent filed his reply to the application on 18 October 2018. The case was assigned to the instant Judge in March 2020.

3. During case management, the Tribunal expressed the view that an oral hearing was not required as there was no real dispute as to the facts of the case. Counsel for the Applicant disagreed, outlined the facts that were in dispute and sought to have witnesses heard at a hearing, which due to the current Covid-19 pandemic travel restrictions could only be conducted virtually. The matter was set for a hearing to be commenced in June 2020.

4. The scheduled hearing was postponed when a late request by the parties for translation services could not be fulfilled by the Tribunal, also due to the changes caused by the pandemic. Interpretation services were not available for remote hearings. The parties proposed various options and agreed between them to file written witness statements, interrogatories and responses so as to fully ventilate the evidence.

5. Sworn witness statements were filed with the evidence of three witnesses for the Respondent and two for the Applicant. The Respondent’s witnesses were MINUSMA staff: Investigator, Mr. William Bouchereau; Security Training Officer, Mr. Mohamed Mounib; and Officer-in-Charge of the Security Training and

Development Unit, Mr. Gregory Remeter. The Applicant filed his own sworn statement supported by that of Mr. Sory Ibrahima Sacko, Security Officer, SecuriCom.

6. The process of cross-examination by interrogatories and sworn answers concluded on 10 August 2020. The Tribunal then heard the parties' oral closing submissions on 1 September 2020.

Facts

7. On 24 October 2016, the Applicant purchased a Volkswagen Touareg carrying Burkina Faso license plate number 11 JM 7149 from Mr. Blaise Kiema, a United Nations staff member based in Mopti. The Applicant did not transfer the vehicle's registration into his name. The vehicle's insurance, which had been under the name of "Souley Ibrahim", had expired on 25 December 2015.

8. On 16 December 2016, the Applicant sent an e-mail to Mr. Remeter, in Mopti, informing him that he would stop in Bamako on the way to his leave destination, and that his personal holster was broken. He asked whether it would be possible to provide him with a normal holster, a tactical holster and a bag for the "Glock pistol 36" ("the Glock"). The same day, Mr. Remeter responded, stating that the Applicant should contact other staff to ascertain whether the items were available in Mopti. On 21 December 2016, the Applicant traveled from Mopti to Bamako, off duty, with the vehicle.

9. The Applicant was in possession of his service weapon, the Glock, which he said was for his protection even though he was not on duty. The Applicant arrived in Bamako at around 4.30 pm. *En route* to Faso Kanu where he was to stay with friends, later identified as the home of a Mr. Calice, the Applicant met a friend, later identified as Mr. Diallo, at a restaurant in B Hotel. He had two beers while at the hotel. He then spent some time at his friend's home in Faso Kanu.

10. As narrated by the Applicant, at around 9 p.m., in the Touareg, while *en route* to meet someone else at a restaurant called Hippodrome, he collided with a motorcycle at an intersection. He drove on for a short distance before parking on the right side of the street. He was surrounded by several motorcyclists who formed a hostile mob. They were hitting his vehicle, which prompted him to drive on, continuing for another 150 metres and then stopping again on the right side of the street. The motorcyclists, who had returned in even greater numbers, surrounded his vehicle, and started to hit it again. They also tried to open the doors; but the Applicant was locked in.

11. A motorcyclist, later identified as Mr. Sory Ibrahima Sacko, parked his motorcycle in front of the vehicle to prevent the Applicant from driving off. The Applicant did not feel safe. When he saw that the crowd was gathering stones, he started the vehicle and drove over the motorcycle that was blocking his way. He stopped again after around 100 metres. One of the motorcyclists identified himself as a police man and put himself between the Applicant and the crowd. The Applicant got out of the vehicle, and this motorcyclist was going to help him seek refuge in a house, but the house was locked. The Applicant believed that when leaving the vehicle, he had his service weapon in his holster on his right side.

12. At this point the motorcyclists had returned, and the Applicant was robbed of his belongings, including his money, watch, laptop, and his passport. Then a police patrol arrived and put the Applicant in a vehicle. One of the officers asked the Applicant to hand him his weapon. The Applicant did not; instead, he signaled to them that the firearm could be found with the other police officer who had helped him at first. They stated that this was not important as they had to get away from the scene. They then took the Applicant to the local police station. From there, the Applicant called Mr. Pathou Gangale, Chief/MINUSMA Operation Response Unit.

13. At around 10.00 p.m., the Special Investigation Unit (“SIU”) of MINUSMA was notified of a traffic accident involving two motorcyclists and the Applicant who was driving his newly purchased vehicle from Mopti to Bamako on his way on

annual leave. The initial report indicated that, following the incident, the Applicant was subject to an assault by an angry mob resulting in the loss of his service weapon, his United Nations-issued laptop and other personal effects.

14. At around 10.40 p.m., a MINUSMA Quick Reaction Team (“QRT”) arrived at the police station, followed by the MINUSMA SIU at 11.10 p.m. The Applicant cooperated with both the Mali Police and the QRT. He reported the loss of the weapon to the QRT. The QRT conducted an alcohol breathalyzer test at 11.17 p.m. The reading was 0.51 mg/l. Another test was conducted at 11.33 pm, with a reading of 0.5 mg/l.

15. Once the Applicant left the police station, he met with his friend Mr. Djibril Diallo, a member of the Mali Police, whom he had called while on the scene of the accident. He knew Mr. Diallo from when he had previously worked for the United Nations in Haiti. The Applicant showed him the site of the incident and explained the situation to him. Mr. Diallo told the Applicant to calm down and to return home, “Djibril ... *m'a dit de rentrez chez moi*”, while he would take care of the matter. A few hours later, in the early morning hours of 22 December 2016, Mr. Diallo called the Applicant and told him that he had retrieved the weapon as well as his knapsack with some other belongings. He returned these to the Applicant and that same morning the Applicant handed over the weapon to the MINUSMA authorities as he was due to fly to Miami.

16. On the day of handing over the weapon, the Applicant was interviewed by Mr. Bouchereau of the SIU. He did not then say where the weapon was found. In his account to the SIU he traced his activities from having lunch with a friend at around 4.30 p.m., to going to the home of another friend in Faso Kanu where he stayed and then he was heading out again around 9 p.m. to meet someone at Hippodrome when the accident occurred. In this first written SIU interview, just after the accident, the Applicant told the SIU that the first police officer he encountered while under attack by the crowd had asked him for his weapon. It was not then handed over, as at that time he was robbed of his weapon and other items.

17. From December 2016 to January 2017, an investigation was conducted by SIU investigators into the incident.

18. At an interview on 1 February 2017, the Applicant was asked by SIU investigator Bouchereau to explain why he at first advised the Mali Police patrol officers that his firearm was with the first police officer who arrived on the scene. He responded that when he walked out of the vehicle, the firearm was still on him. He said he did not know who took it from him but also answered that it was possible that he forgot the firearm at home i.e. the house of the friend where he rested before the incident. He however confirmed that “as far as [he] remember[ed], [his] weapon was with [him] when the accident occurred” and went missing with his money, jewelry and other items when he was attacked.

19. In an apparent *non sequitur* during the same interview, the Applicant was asked whether he booked a room in any Bamako hotel on 21 December 2016. He said he did, that it was Diallo who booked it for him and that he dropped his luggage there. They left from there to have the lunch at B Hotel restaurant.

20. A final investigation report was submitted on 10 February 2017, recommending further action against the Applicant for having failed to comply with Malian laws and United Nations rules and regulations.

21. The Applicant gave answers to a request for clarification by Davy Houngbedi, Chief Conduct and Discipline Team on 19 May 2017. By that time Mr. Diallo had also been interviewed. He had told the investigators that he met the Applicant that night; that the Applicant was accompanied by friends and he went out with them to pass the rest of the night. Diallo said he went to pick up things for the Applicant at his room. He was given a key to do so. The firearm was found in the Applicant’s room when Diallo had gone there, “*rendu chez lui a son domicile*”, to pick up things for the Applicant.

22. However, in a written question by Houngbedi to the Applicant he was asked why he said he lost the firearm when Diallo had said he found it in his hotel room.

In his written response, the Applicant made no reference to a hotel room. He said he was “choked[sic]” and scared that day, so he forgot he left the firearm “at home prior to [sic]” going to the B Hotel to eat with a friend. He also said he went “home” with Diallo that night and went straight to bed. To his surprise, in the morning Diallo handed him the firearm and didn’t tell him anything. He thought at the time that Diallo had retrieved it from the crowd. The Applicant says he found out some-time later from the SIU that the firearm was at home that night and he “didn’t loss it as I mentioned in my report [sic].”

23. On 21 July 2017, the Applicant’s case was referred to the Acting Assistant Secretary-General for the Office of Human Resources Management (“OHRM”) for possible disciplinary measures. On 22 November 2017, OHRM notified the Applicant of the letter of allegations against him. The allegations, in summary, were that he drove his new vehicle from Mopti to Bamako without registration and insurance, did not have clearance to leave Mopti, drove the vehicle in Bamako having consumed alcohol, did not stop after colliding with a motorcycle, ran over another motorcycle that was blocking his way, carried a service weapon without authorization while off-duty; all this after having consumed alcohol.

24. A response to the allegations was prepared by Counsel from the Office of Staff Legal Assistance (“OSLA”) on behalf of the Applicant on 7 February 2018. In this written response, Counsel for the Applicant stated that the firearm had not been stolen, as it was found in the Applicant’s room. He specified the type of room where it was found as a “hotel” room based on corroboration, he said, from the statement given by Mr. Diallo.

25. The Applicant received his sanction letter from the Respondent on 27 June 2018 (the letter was dated 21 June 2018). The letter stated that while most of the allegations of misconduct were found to have been proven, one allegation, that of leaving Mopti without clearance, was not. That allegation was dropped. As it relates to another, carrying the United Nations firearm while on vacation without permission,

mitigating factors were considered, namely that the Applicant may have been of the impression he had permission.

26. In the course of the proceedings before this Tribunal, the Respondent raised the point that should the Tribunal find that the firearm was left in the Applicant's room, that too was an offence under section 7.3 of the MINUSMA Standard Operating Procedure SOP/SEC-007/14 ("MINUSMA Weapons and Training SOP") of August 2014, which merited separation from service. The MINUSMA Weapons and Training SOP stipulates that "Security Officers will not leave their assigned firearms or other weapons at the place of residence or office."

Applicant's submissions

27. The Applicant's principal contentions may be summarized from his written and oral submissions as follows:

a. The decision to impose the sanction of separation from service was based on an improper assessment of the facts and specific circumstances of the case. The Respondent identified the Applicant's alleged possession of his service weapon after having consumed alcohol as the core of the case as to serious misconduct. However, the finding that the Applicant carried the firearm at the time of the accident was not based on any clear and convincing evidence. It was based on the beliefs of the Applicant at a time when he was in shock and his utterances thereafter.

b. The Respondent's finding that the Applicant carried the firearm at the time of the accident was also based on issues of credibility raised regarding the purported testimony by the Applicant and Diallo about the firearm being found in a hotel room. The Respondent's witness was questioned about where this was ever said by the Applicant and Diallo. It is the Applicant's submission that this aspect of the Respondent's case is based on a mis-

translation of the evidence that was on record before the Respondent when the sanction was imposed.

c. This mis-translation found its way into the investigative report and even Counsel for the Applicant followed it by referring to the room where the weapon was located as a hotel room. He did so in the Applicant's response to allegations as well as the application before the Tribunal. This was followed by erroneous attacks on the credibility of the evidence of both the Applicant and Diallo. At all times however, the Applicant and Diallo referred to the weapon being found where it was left as at a "domicile" or home.

d. According to the Applicant, the case, at its core, was one of a minor traffic accident. The charges set out in the sanction letter did not amount to misconduct. On a review of Malian Law there were no breaches and if properly interpreted the United Nations rules cited were also not breached.

e. The Respondent's investigation that led to the findings of misconduct was neither impartial nor fair. Witnesses with evidence relevant to the Applicant's version of events were not interviewed. Mr. Remeter, who the Applicant says approved his carrying of a firearm was not interviewed prior to imposition of the sanction.

f. Although the Respondent later presented Mr. Remeter as a witness in this case, the information he provided comprised mainly of legal submissions on interpretation of the rules governing weapon safety. The Applicant contends that this *ex post facto* testimony by Mr. Remeter should be discounted by the Tribunal as it adds nothing to the record of evidence, merely gives legal submissions and is too late. Nothing stated by Mr. Remeter was considered by the Respondent in coming to the sanction decision.

g. Additionally, the Applicant contends that the Respondent's investigation fell short in that there was no attempt to find out from him the name of the friend with whom he said he stayed in Bamako nor to interview

that person. Further no account was taken by the Respondent of the interview with Blaise Kiema which was favourable to the Applicant. It supported his position that he had breached no rules by relying on Mr. Remeter's email not requesting therefore a formal letter expressly permitting him to travel with the firearm.

h. The Applicant underscores that while he admitted to having two beers, the Respondent failed to establish by what standard it was being contended that he consumed alcohol to a considerable or excessive extent. No relevant standard that had been exceeded, whether in Malian Law or United Nations rules, was cited in the sanction letter. The MINUSMA Code of Conduct referred to by the Respondent makes it an offence to drive while intoxicated but does not define a level for intoxication.

i. Belatedly, after the Applicant's Counsel mentioned the United Nations Manual for Field Personnel in this application, the Respondent sought to rely on the standard therein. However, that standard applies only to staff members driving United Nations vehicles. Counsel cited the case of *Turkey 2019-UNAT-955*, at paragraph 42, where the United Nations Appeal's Tribunal ("UNAT/Appeals Tribunal") found that even in circumstances where there was a zero tolerance alcohol policy in the absence of clear provisions, there was no basis for separation from service.

j. The Applicant contends that it is apparent from language used in the sanction letter, such as "improbable" and "implausible" in describing the contention that the Applicant left the firearm at a hotel, the misconduct was not established to the correct standard of clear and convincing evidence. The standard of mere probability is not appropriate for making findings of misconduct that may result in separation from service. The Respondent further argues that had such a standard been sufficient, the case against finding the misconduct proven would still be stronger. It is more probable that the firearm was left in the bedroom rather than found elsewhere such as with

members of the hostile crowd. It is also implausible that if the Applicant had the firearm with him for protection at the time of the accident, he would not have brandished it or fired in the air it to scare off the hostile crowd.

k. According to the Applicant, the Respondent's introduction before the Tribunal of an "even if" position has been put forward at too late a stage to be considered as justifying the sanction imposed. This "even if" position is based on the Respondent's submission that a finding that the firearm was left in a bedroom provides a basis for the Tribunal to find that separation from service was justified. However, according to the Applicant it is too late for this to be considered by the Tribunal. The Respondent's clear finding leading to the decision being reviewed was that the Applicant was in possession of his firearm at the time of the accident after having consumed alcohol. Although the Applicant's case was that the firearm was not with him there was no finding of that fact by the Respondent.

l. Furthermore, the Applicant was never charged with an offence related to leaving the firearm in a bedroom. It would be procedurally unfair for the Applicant's sanction to be upheld based on an offence he was not charged with and had no opportunity to defend. The Respondent cited in support *Tshika* UNDT/2014/122 at para 119 and *Kamara* 2014-UNAT-398 where it was observed in *obiter dicta* at para 35 that a "sanction based on charges that are more numerous than those initially imposed would be illegal."

m. The sanction imposed was manifestly disproportionate, as at the centre, the matter concerned a minor traffic offence of colliding with two motorcyclists while driving without insurance. It was amicably resolved between the Applicant and the two cyclists. The Applicant was never charged by Mali Police. The United Nations was not brought into disrepute. The cases cited by the Respondent were entirely distinguishable as they involved *inter alia* driving United Nations vehicles, which the Applicant was not driving while drunk, which has not been proven in this case and driving with a

firearm which in the instant case no witness saw in the Applicant's possession.

n. The Applicant submits that the appropriate sanction for the minor traffic offence would have been a written censure.

o. On the issue of appropriate relief to be awarded, the Applicant contends that although his fixed-term appointment was ending when he was separated from service it was anticipated, based on his appraisal, that his contract would have been renewed for at least one year but for the Respondent's said decision. He has suffered greatly due to the absence of commensurate employment, to the point where his home was subject to foreclosure proceedings. Accordingly, the Applicant's case is that he should be reinstated or awarded compensation at two years net salary *in lieu* of reinstatement.

Respondent's submissions

28. The Respondent's principal contentions may be summarized from written and oral submissions, as follows:

a. The Respondent submits that the impugned decision was based on clear and convincing evidence that the Applicant's conduct amounted to serious misconduct in violation of staff regulations 1.2(b), 1.2(f) and 1.2(q); the MINUSMA Code of Conduct; sections 1.53 and 4.44(a) of the United Nations Department of Safety and Security Manual of Instruction on Use of Force Equipment Including Firearms of 2 May 2014 ("United Nations Firearms Manual"); and sections 3.2, 4.8.3, 4.9.1, and 4.9.10 of the MINUSMA Weapons and Training SOP.

b. The Respondent contends there is clear and convincing evidence of the findings of all aspects of misconduct made against the Applicant. There is no dispute that the Applicant failed to appropriately register his ownership and

insure his vehicle, that he consumed alcohol, namely two beers before driving, that the collisions occurred, and the Applicant did not stop immediately.

c. Further the Respondent contends that the alcohol consumed was excessive based on tests administered as well as observations noted on an impaired driving form. This was so, they say, regardless of the legal limit in Mali. The Applicant violated staff regulation 1.2(f) and the MINUSMA Code of Conduct by driving after having “drunk alcohol to a considerable level.”

d. The Respondent concedes that the Applicant may have felt threatened by the crowd after the accident but contends that this did not excuse his deliberately running over a motorcycle and failing to stop immediately.

e. As to possession of the firearm at the scene of the accident, the Respondent contends that there was ample evidence. Reliance is placed by the Respondent on the Applicant’s own statement on three occasions that as far as he was aware the firearm was with him at the time of the accident and was lost in the events that followed it. As to the point raised by the Applicant about mis-translations surrounding the word “hotel” in the record of the investigation and disciplinary proceedings, the Respondent says that that was not raised initially in the Application so it must not be considered.

f. The Respondent also contends that the finding regarding the firearm was well established because it would be improbable for the Applicant to have had his holster with ammunition and not also had his service weapon at the scene of the accident. Additionally, the Applicant had said in his interviews that he had the firearm with him for protection hence it would be improbable for him not to keep it on him. Furthermore, there is a strong assumption that as a trained security officer he would not breach the basic rule to keep one’s weapon with him.

g. The Respondent also focused on the points made by Counsel for the Applicant in the application about the firearm being found in a hotel room.

This was underscored in the Respondent's submissions as an issue of credibility since the Applicant was staying at a friend's home in Bamako. He gave no responses as to the name or location of a hotel room he had in Bamako and it is implausible that he would require a hotel room given his account that he was staying at a friend's house. Following this line of analysis, the Respondent also submits that the statement given by Diallo to the SIU gave no specifics about why it was necessary to take items for the Applicant "to the hotel room at 3am".

h. The Respondent contends that it is irrelevant that the motorcyclist interviewed that night did not say he saw the Applicant with a firearm. He may not have been focusing on that at the time. The Respondent further suggests adverse inferences should be drawn from the Applicant's belated naming of the friend he stayed with in Faso Kanu. This person was only named in 2020 in the Applicant's witness statement for the instant proceedings as a Mr. David Calice who was never called as a witness by the Applicant during the investigations.

i. All relevant circumstances were considered, and the Applicant's procedural fairness rights were respected throughout the investigation and disciplinary process.

j. The Respondent argues that the Applicant is wrong to characterize the sanction as based on traffic violations and minor damage to property. On the contrary, the core misconduct addressed was his driving after having consumed alcohol and while in possession of his service weapon. The Respondent says that this misconduct was proven and there are no mitigating factors.

k. Regarding proportionality of the sanction, the Respondent contends that the established facts constitute serious misconduct by a security officer expected to know the rules and set an example of compliance. Thus, the

severe sanction at the level of separation from service, with compensation *in lieu* of notice and separation indemnity, was justified. The Respondent cited cases 346, 350, 290 and 292 in the United Nations Office of Human Resources Compendium of Disciplinary Measures as similar instances where this level of sanction was imposed.

1. However, if the Tribunal finds that the misconduct was not sufficiently proven the Respondent argues that the relief to be awarded to the Applicant should be limited based on the fact that his fixed-term appointment was at an end with no entitlement to renewal.

Consideration

29. In reviewing the Secretary-General's exercise of discretion in this matter, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084, para. 40:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

30. In *Mbaigolem* 2018-UNAT-819, the Appeals Tribunal explained that in a disciplinary case, what is required is consideration of whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct and whether the sanction is proportionate to the offence. A *de novo* hearing into the findings on misconduct is not always necessary. It depends on the available evidence and the circumstances of the case.

Issues

31. There being no material dispute as to the facts on which the decision to impose the sanction was made, the issues articulated in the application as to the proportionality of the sanction imposed can be determined by a review from the record of:

- a. The material that was before the decision maker, the Under Secretary-General for the Department of Management, i.e the investigative report by SIU; the allegations set out in the 22 November 2017 letter; the Applicant's response denying the allegations; and the reasons for the decision as set out in the sanction letter of 21 June 2018 [Annex 5];¹ and
- b. The fairness or unfairness of the process followed by the ASG/OHRM in coming to the sanction decision.

Overview of the Investigation

32. As mentioned above, the nature of adjudication in this matter is a review of the separation decision, which was based on an investigation. The review therefore commences with observations on several salient points gleaned from the MINUSMA SIU's 10 February 2017 report which is at Annex 1 to the application. That report, upon which the sanction decision was founded, fully illustrates the nature of the situation in which the Applicant found himself, after a day of socializing during his Christmas holiday leave. He had spent time with a friend and was on the way to meet another around 10 p.m. on 21 December 2016, when the incident that resulted in his separation from service occurred.

33. The SIU report documents that the first alert as to trouble that night was not regarding any misconduct by the Applicant. The report indicates that the Mali Police received a report that the Applicant was a victim of aggression by a hostile crowd after a traffic accident in Bamako. The Applicant had complained that the crowd

¹ Annexes 1, 3, 4 and 5, respectively, to the application.

relieved him of his United Nations assigned service weapon, laptop and personal possessions. The focus of Malian police officers on the scene was to assure the Applicant's safety as a United Nations staff member. The Applicant's report about the hostile crowd is not in dispute. He said that after his minor accident with a motorcycle his vehicle was on the edge of the road and the crowd started knocking on it. They were gathering stones. He was afraid and attempted to escape them by moving off in the vehicle thereby hitting another motorcycle while reversing.

34. The Applicant was involved in a minor traffic accident, during his private time, in his own vehicle. It was the Applicant who contacted MINUSMA from the police station he was rescued to.

35. MINUSMA's QRT examined the Applicant for signs of being under the influence of alcohol. The examination form, known as the Impaired Driving Observation Report, was attached to the investigation report. Having been examined against approximately 19 indicators, the Applicant was found to be normal or in good condition. He was cooperative, non-aggressive, had normal speech, was not disorderly dressed and walked normally. The form also indicated that the Applicant's breath had a moderate smell of alcohol and his eyes were glazed; both were relevant to a finding of possible impairment. A blood alcohol test taken by the QRT indicated 0.51 mg/l.

36. There was also the insertion onto the form of some handwritten words in place of typed words on the form which were crossed off. These typed words read "The above-mentioned staff member was observed to be in a state of impairment while operating a UN vehicle:" The words "operating a UN vehicle" were crossed out and replaced in handwritten capital letters with "IN POSSESSION OF UN FIREARM". No witness has come forward to state that they personally observed the Applicant impaired and with the firearm or with the firearm at all at the scene of the incident.

37. Mr. Mounib was asked whether he admitted to writing the words “in possession of UN firearm”, whether he saw the Applicant with a firearm and what elements he relied on to sign off on the form that the Applicant was impaired. He said that he did not write the words, he only checked boxes on the form. As to the firearm, he said he did not see the Applicant with it, but he saw that he had a holster. His answer regarding the elements relied on to sign off that the Applicant was impaired was that the Applicant told him “he had a couple of drinks” and the firearm was stolen from him after the accident.

38. The Applicant in his initial statement to QRT said that he honestly volunteered to the Malian police officers on the scene his belief at the time as to having had his firearm with him and that it was taken by the first police officer who had tried to help him at the scene. He said he was still in a state of shock when he said this. However, shortly afterwards he contacted and met with his former United Nations colleague and current Mali police officer, Djibril Diallo, who calmed him down. Diallo promised to deal with everything. The Applicant decided to stay with friends for the night.

39. It is stated in the investigative report that the Applicant gave Diallo the key to “a hotel” they had booked, where he was also staying. The source of the information that the key was for a hotel is unclear. In all the Applicant’s statements, save for the response to allegations prepared by OSLA in February 2018, he did not say he gave Diallo keys to a hotel room. His statements only referred to handing him the keys to the room where he was staying and in context it was explained that that room was at a friend’s home in Faso Kanu. He asked Diallo to take some belongings there.

40. A short time later, according to Diallo he found the firearm and some other possessions in the Applicant’s room at his bedside where the Applicant had left them. Within a few hours, on the same morning after the incident, this was reported to the Mali Police and MINUSMA.

The allegations

41. Having reviewed the investigation, it is necessary to consider each of the allegations arising from it to determine whether there was sufficient factual basis before the Respondent for him to have arrived at the findings of misconduct and the sanction imposed.

42. Generally, while the February 2017 Investigation Report alleged failure to comply with both Malian laws and with United Nations rules and regulations, the November 2017 letter of allegations referred only to conduct that may be a violation of staff regulations 1.2(b) (failing to uphold the highest standards of integrity), 1.2(f) (failing to conduct himself in a manner befitting an international civil servant) and 1(q) (using a United Nations asset for a non-official purpose and failing to exercise care).²

43. One of the allegations in the allegation letter, that of leaving Mopti in the vehicle without clearance, was expressly dropped by the Respondent before imposing the sanction. The allegation was dropped because it was admitted that the Applicant's failure to obtain a security clearance for his trip from Mopti to Bamako did not rise to misconduct in light of the ambiguous language used in MINUSMA Administrative Instruction 012/2014 of 22 September 2014 in force at the relevant time.

44. The remaining allegations that the Respondent considered to have been proven, were that he acted as follows:

a. On 24 October 2016, he purchased a vehicle from Mr. Blaise Kiema but failed to change the ownership registration and obtain insurance for himself as a driver;

b. On the evening of 21 December 2016, at around 9 p.m., he drove his vehicle in Bamako after having consumed alcohol;

² Annexes 1 and 3, respectively, of the Application.

- c. He had a collision with a motorcycle yet failed to stop immediately;
- d. He ran over another person's motorcycle that was blocking his way;
- e. He carried his service weapon with him (in contravention of sections 1.53 and 4.44 (a) of the United Nations Firearms Manual, and sections 3.2, 4.8.3 , 4.9.1 , and 4.9.10 of the MINUSMA Weapons and Training SOP even though he was not on duty and had not obtained authorization to carry it off-duty. (The Respondent did however, also concede that the Applicant may have been under the impression that he had been authorized to carry his service weapon with him.)
- f. He carried his service weapon with him after having consumed alcohol.

Was there factual basis for the Respondent's conclusion that each allegation had been established?

45. Since termination was the possible outcome of the investigation, each allegation of misconduct had to be established by clear and convincing evidence; in other words, the truth of the facts asserted must have been highly probable. This was explained in *Molari* 2011-UNAT-164 referring to Chapter X of the staff rules and ST/AI/371 (Revised disciplinary measures and procedures). In determining this matter, the Tribunal has therefore considered each of the allegations and the facts, as expressed in the Respondent's records, upon which they were based.

46. The Tribunal's findings on this review commences with a consideration of the influence of alcohol on the Applicant, which is highlighted by the Respondent as a factor based on which the sanction must be at the severe end of the spectrum. The Applicant points out there is no rule regarding the offence cited in the sanction letter namely, driving after having consumed alcohol. The Applicant does however, acknowledge that the MINUSMA Code of Conduct prohibits driving while intoxicated.

47. The Respondent has neither cited a definition of intoxication in MINUSMA or United Nations rules nor established that the Applicant's level of 0.50 mg/l was beyond the approved limit. The Applicant suggests the United Nations Manual on Road Safety Management in the Field DPKO/DFS/2016.07 (“Manual on Road Safety”), at para 18, as authority that the Applicant’s blood level was within prescribed limits. However, the Manual measures for *blood* alcohol where 0.05 mg/l is within permissible range. The test done on the Applicant was only a measure of alcohol in the breath which was 0.51 mg/l.

48. The Respondent contends that this breath alcohol content is equivalent to 0.107g/dl which is double the 0.05 limit under section 18 of the Manual on Road Safety. No evidence was adduced to this effect, and it is unclear how the Respondent arrived at this figure. The question of whether the Manual on Road Safety applies to staff members when driving their privately owned vehicles, while on leave, was not properly addressed by the Respondent.

49. The specific allegation of driving after having consumed alcohol can only be a sanctionable offence if the Applicant was, in fact, intoxicated. The charge letter does not allege intoxication. There is no indication that the Mali Police considered this to be an issue for prosecution. Only MINUSMA QRT tested the Applicant’s alcohol level and assessed his appearance. The form recording the assessment shows only that there was a moderate smell of alcohol and his eyes seemed glazed. For all other signs of alcohol’s effects, the form was ticked with the answers “no”. The level of alcohol recorded was 0.50 in a breath test.

50. The only rule that was cited as applicable in this case referred to a *blood* alcohol level as a measure of intoxication. The Applicant was not subjected to a blood test. In these circumstances, the Tribunal finds that there was no clear or convincing evidence before the Respondent that the Applicant drove while intoxicated.

51. The Applicant was also alleged to have been in possession of his service weapon having consumed alcohol. Importantly, the fact of possession of the firearm at the time of the accident is disputed. There are no known eye witnesses. The handwritten words at the top of the Respondent's Impaired Driving Observation form that "The above-mentioned staff member was observed to be "IN POSSESSION OF UN FIREARM" remain unexplained.

52. It is well-established in cases such as *Liyanarachchige* 2010-UNAT-087 that,

In a system of administration of Justice governed by law, the presumption of innocence should be respected. Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

53. The burden of proving possession of the firearm at the accident scene in a clear and convincing manner to justify separation from employment was on the Respondent. The Respondent's conclusions are, however, expressly based not on clear on convincing evidence but on probability.

54. Firstly, this aspect of the Respondent's conclusions is based on the improbability that the Applicant could have been mistaken in at first believing he had his firearm with him, and it was stolen. Secondly, the Respondent contends that it is improbable that the Applicant would not have kept his weapon with him, thus it is not true that it was found in his bed room where he left it. These considerations of probabilities do not rise to the high level of probability for a clear and convincing case that the firearm was with the Applicant and he lost it at the time of the accident.

55. The Applicant had presented the Respondent with ironclad proof that he was mistaken about being in possession of the firearm, and losing it, when he was robbed of other items. In fact, the firearm was found not to have been lost at all. It was located in the Applicant's room within hours of the incident. The Applicant and Djibril Diallo corroborate each other in all aspects of the facts relevant to the whereabouts of the firearm.

56. In the Respondent's case, much is made of what they contend are inconsistencies in the Applicant's evidence in accounting for the missing firearm. This perceived inconsistency relates mainly to the contention in the investigation report that the Applicant's firearm and items were found in a hotel room. This according to the Respondent is inconsistent with the Applicant's case that he was staying with friends in Faso Kanu. Counsel for the Applicant on the other hand has highlighted in the interrogatories, as well as in oral closing submissions, that this aspect of the Respondent's case is based on a mistranslation of statements made by the Applicant and Diallo during the investigation.

57. The Respondent's contention that, as this issue of mistranslation was not previously raised, the Tribunal ought not to take it into account in reviewing the disciplinary decision, is without merit. In *Tshika* it was observed by Judge Boolell as follows:

70. The role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. The Tribunal is in no way bound by the findings of the JDC or the Secretary-General on the facts disclosed. ...

73. The Tribunal is entitled to examine the entire case before it. In other words, the Tribunal may consider not only the administrative decision of the Secretary General to impose a disciplinary measure but also examines the material placed before him on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and OHRM.

58. In the exercise of this role, the Tribunal notes that on a careful review of the statements made by the Applicant and Diallo themselves during the investigation, the Respondent should have observed that they did not say that the firearm was found in a hotel. The word "hotel room" only arose in the response to the allegations, and was quite clearly an error on the part of Counsel for the Applicant at the time. This does not detract from the fact that the Applicant and Diallo had been consistent when interviewed by the SIU in saying that the firearm was found in his bedroom. Indeed,

the information available to the Respondent at the time he decided on the sanction was that the firearm was found in the bedroom.

59. The Applicant's initial statement and that of Diallo were taken in French. The true meaning of what the Applicant and Diallo said about the type of room where the weapon was found was lost in translation.

60. Another point of inconsistency highlighted by the Respondent is that the Applicant gave different answers about where he went to sleep after the incident on the early morning of 22 December 2016. That was the morning when the firearm was found by the bedside in his room. It seems clear that the Applicant may, for some reason, have stayed in a hotel/motel that night. However, consistently from his very first statements after the incident, his "domicile" where his room was in Bamako was at his friend's house located in the Faso Kanu area.

61. The Applicant's inconsistency in saying where he went to sleep that night can reasonably have been considered puzzling in MINUSMA's investigation of the matter. However, where he slept bore no relevance to the consistent position that the firearm was found in his bedroom, which was not a hotel room. It was his room at his friend's home.

62. To come to a finding that the Applicant and Diallo were both untruthful in accounting for the whereabouts of the firearm during the short timeframe of around three hours in the early morning of 22 December 2016, after the Applicant left the police station, the Respondent needed to put forward a scenario other than that the firearm was found as alleged. No contrary version has been presented by the Respondent.

63. It is left to the imagination that the Respondent may be of the view that during the short time frame Diallo searched Bamako and retrieved the firearm from persons in a hostile mob who may have stolen it from the Applicant. That scenario defies logic. So that even if the test of mere probabilities expressly applied by the Respondent had been appropriate it is clearly highly probable that the Applicant was

mistaken due to his panicked state under attack from the mob when he first thought his firearm went missing. The Respondent accepts that he would have been in fear.

64. There seems to be no basis on which the Respondent could have found clear and convincing evidence that the Applicant had the firearm with him after he drank beer that night. This conclusion seems to be based on a hunch by the Respondent. No witness has come forward to say the Applicant was seen with the firearm at the scene of the accident. Instead the sole independent witness, Mr. Sory Ibrahima Sacko, has given sworn evidence in these proceedings that he did not see the Applicant with a firearm on the night of the accident, when after running over Sacko's motorcycle, he emerged from the vehicle. This is consistent with his statement during the investigation when he only said that he saw the mob take the Applicant's chain and bracelet. His ability to observe what the Applicant did have with him was not impaired as just after the accident he told the SIU what he saw stolen from the Applicant. He said, "*En depit de nos interventions, il a perdu un chain au cou et son bracelet.*"

65. There was no clear and convincing evidence that the Applicant was in possession of the firearm having consumed alcohol. This alleged conduct, and not the alleged traffic offences, is what the Respondent identifies as "the core conduct" of the Applicant as a security officer that merited disciplinary measures at the more severe end of the spectrum. It has not been proven.

66. The Respondent, *ex post facto*, raised a point however, that if the Applicant left the firearm in his hotel room that would also have been enough breach of the rules to merit the sanction. It is important to note however that the Applicant was not charged with that allegation and had no opportunity to respond to such an allegation. Accordingly, it would not be in keeping with procedural fairness for the Tribunal to now hold, that although there was insufficient evidence of the alleged possession of the firearm while consuming alcohol, instead his sanction was justified because he left the firearm in his hotel room. The cases of *Tshika* and *Kamara* cited by the Applicant are pertinent to this point.

67. The Applicant was also alleged to have run over the motorcycle that was blocking the way. There is no clear and convincing evidence that this was deliberate. Instead the first-hand evidence on the record suggests that this was self-defense under the duress of a mob attack. Not even the motorcycle owner is a witness against the Applicant who has settled the damages sustained. The motorcycle owner is a supporting witness for the Applicant. Mali Police did not prosecute the matter.

68. As it relates to the allegation that the Applicant failed to obtain clearance required for firearm possession while off duty, there was no clear and convincing proof for such a conclusion by the decision-makers. This is so because the Respondent's position was inconsistent, at one point expecting compliance with rules applicable while on duty for vehicle clearance and then applying rules for off duty to the firearm possession.

69. In any event the pre-leave email exchange between the Applicant and Mr. Remeter was evidence that the Applicant had implicit permission to leave with his firearm. Furthermore, there is no indication from the Respondent's sanction letter that due consideration was given to the relevant regulations supporting that a firearm could be kept while off duty due to prevailing security concerns. Blaise Kiema's evidence on this point appears to have been discounted in a manner that was not fair to the Applicant. The Weapons and Training SOP 3.2 cited in the allegation letter says that firearms may be required to be carried while off-duty, given the prevailing security conditions. The Respondent has however, admitted that the rules governing this issue lack clarity and that the Applicant may have had reason to believe he had implicit permission to carry the firearm while on leave.

Summary of Review

70. The Respondent duly allowed for the Applicant to submit a response to the investigation findings. Having received the response, the Applicant's points challenging the investigations findings were rejected as without merit and the

decision was made to impose the sanction of separation. This was done without sound basis in facts, proven clearly and convincingly.

71. The fulcrum around which all allegations against the Applicant spun was a situation where after a day spent with friends, during his private time on Christmas leave, he was the victim of an attack by an armed mob due to a minor traffic accident. Each spin-off allegation was either a private matter (e.g. driving his recently purchased private vehicle uninsured) or not clearly proven (e.g. that he was intoxicated and that he was in possession of his service firearm at the time of the accident.).

72. The Respondent from the outset drew unfair inferences against the Applicant characterizing him as uncooperative, in the February 2017 investigation report, for having led them down the wrong track and given inconsistent versions of the incident. This was mainly because at first, he reported his firearm was one of many items stolen from him by the angry mob that had pounded on his vehicle, blocked his way, hurled stones and removed him from the vehicle.

73. He later sought the help of a friend who calmed him down. That friend, Djibril Diallo, was asked to drop off things at his room in the home where he was staying, a friend's home in Faso Kanu, while the Applicant stayed the remainder of that night/early morning at a hotel elsewhere with friends. He gave Diallo the key to his room where the firearm was located.

74. The clear inference from all this is not of an uncooperative offender, but of a traumatized, confused victim who, as a staff member on holiday, had been robbed and faced physical danger to his person. Temporarily at the scene, when asked by the Malian plain clothes officer to hand over his firearm and realizing it was not with him, he may have thought it was stolen.

75. His early report of this as a fact to the MINUSMA QRT shows his honesty and that his first thought was to account for United Nations equipment. The fact that the firearm was found just a few hours later corroborates the current position of the

Applicant, that it was never lost. Even a few weeks later when he gave his second statement the Applicant still held honestly to the view that he believed he had his firearm with him during the incident. He did say it was possible he forgot he had left it in his room.

76. It is irrelevant that the Applicant did not want to say where the hotel room he booked was located. Also, it is not as implausible as is suggested by the Respondent, that he could have been staying with friends and also booked a hotel room. This was, after all, his private time. The Applicant eventually gave a reason for his varied sleeping arrangements, in answer to interrogatories during the hearing of this case.

77. There is no rule prohibiting United Nations staff from having a drink of alcohol. It cannot be an unusual or unexpected event for such persons to socialize during private time with friends while on holidays and this may include a social drink. What is prohibited in the MINUSMA Code of Conduct is driving while intoxicated. Intoxication is not defined by reference to a specific level of alcohol. The Applicant's alcohol level, if correctly assessed by the QRT, was within lawful range for many jurisdictions. The lawful range for Mali is not clear but what is clear is that the Applicant was not charged by the Mali Police. Thus, there was no clear or convincing evidence of intoxication while driving.

78. Further, if the firearm was never with the Applicant at the time of the accident, which was when he admits he had had two beers, he could not have breached the rule against having the firearm while consuming alcohol. The firearm was most probably left in his bedroom.

79. It has been conceded that there was no need for the Applicant to have security clearance to drive his private vehicle when he left for his private journey. In any event he had in fact made a request for clearance when he was going on leave.

80. On my review of the record, it is also evident that there was no requirement for permission to leave with the firearm. In any event permission was implicitly granted by Mr. Remeter to carry the firearm on the annual leave journey. It was

reasonable for the Applicant to have believed that Mr. Rementer understood from the 16 December 2016 email exchange between them that the Applicant intended to carry his firearm while on leave and needed a holster for that purpose.

81. There was no basis for sanctioning the Applicant for not stopping immediately after the first collision. By all accounts, his life was in severe danger from the angry mob. He had to be rescued by a police man in plain clothes. The Applicant points out that the sanction letter does not specify a local law or United Nations rule mandating immediately stopping after an accident. Additionally, there is a United Nations rule that mandates that staff should not stop when facing road rage - Manual on Road Safety, p.64. Furthermore, on the record before the Respondent, the vehicle did stop within “a stone’s throw” of the accident scene so there was no basis for a finding that he did not stop.

82. The Respondent has failed to substantiate the full extent of offences alleged. However, there remains the traffic offence of driving without insurance. The Applicant’s use of his private uninsured vehicle caused no harm to the Organization. He amicably settled the amount he had to pay to compensate the two Malians involved in the accident for their losses.

83. If, however, the Applicant’s accident had had more serious consequences this could have caused irreparable harm with no likely source of compensation to Malian citizens. The involvement of the Applicant, even while on leave, could have brought the Organization into disrepute. Accordingly, the Respondent’s decision to sanction the Applicant for operating his vehicle irresponsibly as a breach of staff regulation 1.2(f) which requires conduct in a manner befitting an international civil servant is one that cannot be re-visited by this Tribunal.

The Sanction

84. The questions that remain to be answered as to the sanction imposed are:

- a. Was it proportionate based on the standard of proof to which any or all allegations were proven?
- b. Was it comparatively proportionate based on similar cases?

85. The Applicant cites the Manual on Road Safety as providing sanctions for traffic violations similar to those in the instant case and termination is not envisaged as a possible sanction particularly for a first offence.

86. In light of the fact that the more serious aspects of the allegations were clearly not established the sanction of termination was disproportionate. It would have been more appropriate, to have imposed a sanction in line with those for minor traffic offences. This is so even taking into account the factor of the admitted conduct of leaving a firearm unattended in his bedroom. The Applicant was never charged with that conduct so though serious it cannot stand retroactively as a basis for termination.

Conclusion

87. The Application succeeds in part. The appropriate sanction to have been imposed based on the circumstances arising from the Applicant's unfortunate traffic accident and subsequent mob attack was not separation from service. A lesser sanction could have been imposed.

88. The contested decision is rescinded and the sanction imposed is set aside.

89. The Applicant is to be reinstated or paid compensation *in lieu* at the rate of one year's net base salary plus interest at the US Prime Rate, from the date of the filing of his application, to the date of this Judgment, to compensate for the two-year delay in concluding the determination.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 10th day of September 2020

Entered in the Register on this 10th day of September 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi