



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-955



**Turkey
(Respondent/Applicant)**

v.

Secretary-General of the United Nations

Counsel for Mr. Turkey: Mohamed Abdou, OSLA

Counsel for Secretary-General: Noam Wiener

above his right ear, Mr. Hakizimana volunteered to take him to the UNIFIL hospital. Along the way, Mr. Hakizimana observed that Mr. Turkey “had been consuming alcohol”. At the hospital, Mr. Turkey was attended by a military doctor. The document prepared by the doctor indicated that “[o]n examination smelling of alcohol ... abrasion over [right] pinna, no other obvious injury present and [impression:] alcohol abuse & [presumably, road traffic accident (RTA)]”.

5.

disciplinary action for the second violation, and the permanent withdrawal of the UNIFIL driving permit in addition to appropriate disciplinary action for the third and any subsequent violation. HOM POL 12-06 Amdt 2 warns, in paragraph 49, that “[t]he sanctions are considered as minimum measures. There may be circumstances (in view of nature of the violation and other relevant factors) where the [the Director of Mission Support (DMS)] may impose a more severe administrative sanction.”

9. In an inter-office memorandum of one and a half pages, dated 26 November 2015, addressed to all UNIFIL personnel among others (26 November 2015 memorandum), the UNIFIL HOM and Force Commander referred to alcohol use and stressed that consumption of alcohol that might negatively impact the image and reputation of UNIFIL and the Organization or the ability of a member of UNIFIL to p (t) 2 8 8 1 . 4 (I) 2 u (f) - 3 y i m p o s U N I F 2 8 5 (t) 2 1

set forth in paragraph 27 of HOM POL 12-06 Amdt 2. The letter continued that Mr. Turkey's actions violated Staff Regulations 1.2(f) and 1.2(q) as well as paragraph 27 of HOM POL 12-06 Admt 2 and paragraph 4 of the 26 November 2015 memorandum, and that such misconduct warranted a severe sanction of the cessation of the employment relationship. In addition, the USG/DM decided to recover from Mr. Turkey USD 200.75 representing the cost of the damage to

or corrective discipline”.³ The imbalance was even more pronounced if Mr. Turkey’s length of service without any disciplinary violations, his early admission to the misconduct and his display of a genuine remorse were to be taken into account. The UNDT also noted that Mr. Turkey was a stateless person and had contracted service-incurred malaria. The Dispute Tribunal consequently rescinded the sanction of separation from service with compensation in lieu of notice and termination indemnity and imposed the sanction of demotion by one grade with deferral of eligibility for promotion for two years and withdrawal of his UNIFIL driving permit for one year. The UNDT further ordered that, as a consequence of reinstatement, Mr. Turkey should be paid the lost salary with interest from the date of separation to the date of reinstatement. Should the Organization elect not to reinstate Mr. Turkey, the UNDT ordered that he be paid two years’ net base salary with interest.

18. On 26 April 2019, the Secretary-General appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal). Mr. Turkey filed his answer on 1 July 2019.

Submissions

The Secretary-General’s Appeal

19. The Dispute Tribunal’s review and rescission of the disciplinary sanction against Mr. Turkey was inconsistent with the limits set by

THE UNITED NATIONS APPEALS TRIBUNAL

29. The Dispute Tribunal consequently rescinded the sanction of separation from service with compensation in lieu of notice and termination indemnity and imposed the sanctions of demotion by one grade with deferment of eligibility for promotion for two years and withdrawal of Mr. Turkey's UNIFIL driving permit for one year.

The scope of judicial review

30. The Secretary-General argues that the UNDT's review and rescission of the disciplinary sanction are inconsistent with the limits set by the Appeals Tribunal in its jurisprudence.

31. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:⁴

[w]hen 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.

32. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal. As set out in *Mizyed* and others,⁵

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".

⁴ *Cobarrubias v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-510, para. 19, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

⁵ *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29, which in turn quoted *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

Clear and convincing evidence of misconduct

33. In the present case, it was not clear whether the face value of the breathalyzer of 1.05 mg/l referred to BrAC or to BAC. The UNDT noted that the Administration had initially doubted the accuracy and soundness of the explanation as to what 1.05 mg/l meant in terms

to meet. Consequently, the absence of prior miscon

that the consumption of alcohol was less, and the level of inebriation was lower, than suggested by the disciplinary decision was a relevant consideration to which the UNDT attached appropriate weight. In addition, the UNDT did not misdirect itself in accepting, as mitigating factors, the absence of prior misconduct, the length of service, the fact that the “misconduct [took] place for a very short time”,⁹

42. With regard to the standard of “zero-alcohol”, the UNDT stated that, by determining what was to be understood as “driving under the influence of alcohol”, the 26 November 2015 memorandum and HOM POL 12-06 Amdt 2 provided clarifications and had to be taken into consideration.¹²

Judgment

44. The appeal is dismissed, and Judgment No. UNDT/2019/030/Corr.1 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Neven, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Sandhu

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar