
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 Maclellan, OSLA

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

cpflqt dgkpi wpgt vjg kphnwgpeg qh cneqjqn cpf fkuvkpiwkujgf cu uvtkevgt vjcp ödgpki kpvqzkecvgfö0 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 Naqora 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. Vjg Crrnkecpvøu eqmgciwg, Ot0 Okmg Jcmk|kocpc, ycu rcuukpi d{ cpf 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

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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 Cr rnkcepvøu dtgcvjcn{|gt vguv 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:

kp vjku ecug, yg wpfgtuvcpf vjcv]Cr rnkcepvøu_ dtgcvjcn{|gt vguv tguwnvgf
in a reading of 1.04 mg/l [í] However, we are unclear whether the
reading was for blood or breath alcohol content. If it was the blood,
the num

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 the breathalyzer) stated that the device used to measure 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 file (DCE) are:

16. Unsatisfied with the response, on the same day Mr. Cristiano Papille, Legal Counsel, UNIFIL, requested that the OIC provide additional clarification.

The OIC stated that the device used to measure 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) 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.

The OIC stated that the device used to measure 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) is capable of providing a measurement in breath units, but it does not appear that the units in this particular case were actually expressed in breath units. The device used to measure 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) 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 BAC, this would be more than twice the amount that would typically be expected to result in death.

The OIC stated that the device used to measure 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) 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 OIC/Military Police stated that the device used to measure 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) is capable of providing a measurement in breath units.

used in the SOP yields as follows: $1.05 \text{ mg}/1000\text{ml} = 0.105 \text{ mg}/100\text{ml}$
= 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 havkpi tgictf vq vjg HEøu fktgevkxg qh
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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. $1.05 \times 210 = 220.5$ 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 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 ó 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 ó 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? ó The calibration record for the breathalyzer used in this case is not available.

d. Was it subsequently calibrated or tested? By whom? ó 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 not 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 ó See above.

g. How many Lifeloc FC20 breathalyzers does UNFIL have? The

¹² Annex R-7 to the reply.

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allegations of misconduct and the ASG/OJTO. 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 disciplinary case defective.

47. The HOM memo and the SOP are at the bottom of the 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

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 *o cpwhcevwgtøu o cpwcn0 Kv ku wpmpqyp y jkej o qfg kv ycu kp* 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 *Crrnkecpvøu jgcnvj eqpfkvkqpu qh jkij dnqqf rtguuwtg*, 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 WPFV142321274*, *vjg Crrnkecpvøu cf o kuukqpu* 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 of the case.

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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 not

b.

g. Other evidence demonstrates the reliability of the breathalyzer machine and reading. Together with vjg Crrnkecpvøu cf okuukqp vjcv jg jcf consumed multiple alcoholic beverages with little or no food, the medical report together with the statements of Mr. Hakizimana and Major Singh as to vjg Crrnkecpvøu eqpfkvkqp cv vjg vkog qh vjg kpekfgpv rtqxkfg engct cpf eqpxkpekpi gxkfgpeg qh vjg Crrnkecpvøu gzeguukxg eqpuw orvkqp qh cneqjqn prior to driving UNIFIL 2683.

57. With regard to the Applicapvøu eqpvgpvkqpu cdqww vjg dtgcvjcn{|gt vguv tguwnv, 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

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may set different limits, the United Nations follows the highest standards. A zero-tolerance policy is 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 regarding 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 assertion that the sanction imposed was unfair 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 individual circumstances of each case. Even if the fact 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.

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. Vjg Crrnkecpvøu rtqegfwtcn hcktpguu tkijvu ygtg respected throughout the investigation and disciplinary process.

64. Compensation is not appropriate.

a. Vjg Crrnkecpvøu tgswguv hqt eqo rgpucvkqp ujqwnf dg tglgevgf ukpeg vjg ucpevkqp korqugf qp jko hgmn ygnn ykvjqp vjg Cfo kpkuvtcvkqpøu fkuetgvkqpø Kp an{ ecug, vjg Crrnkecpvøu tgswguv vq dg eqo rgpucvgf kp vjg coqwpv qh vjtggo qp vjuø pgv dcug ucnet{ hqt oqtcn kplwt{, uvtguu, tgrwvcvkqpcn cpf ectggt 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 SR%\$7163SF1TAY0X)

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 hierarchy of administrative issuances, the Tribunal recalls that, as a general principle, 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 the failure to comply with such prohibition is a disciplinary offence. The Tribunal finds that the HOM memo and the SOPs were not issued in a legal void. Rather, by determining 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>.

correspondence¹⁸, among units of measmondEETBT1

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 vehicle. 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. 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 Respondent's prior conduct, lack of disciplinary violations, length of service and early admission

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

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

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi