



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NSENGIYUMVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Mr. Matthias Schuster, AAS/ALD/OHR

Ms. Nicola Esti Caon, AAS/ALD/OHR

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former Security Officer who served with the United Nations Multidimensional Integrated Stabilization Mission (MINUSCA) in Bossangoa, Central African Republic (CAR). He filed the current application on 25 July 2017 challenging the Respondent's decision to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, in accordance with staff rule 10.2(a)(viii) ("Contested Decision"). The Applicant seeks: reinstatement, a continuous appointment, a promotion and an award of USD5,000,000.

2. The Respondent filed his reply on 23 August 2017.

3. Pursuant to Order No. 153 (NBI/2017), the Applicant provided a response to the Respondent's reply, and additional documentary evidence on 27 September 2017.

4. The Tribunal held a hearing from 7 to 9 January 2020 and took evidence from Mr. Timothy Headington, then MINUSCA Chief Security Adviser ("CSA"), Mr. Mohamed Zerouali, MINUSCA Security Officer, and the Applicant.

BACKGROUND

5. The Applicant commenced service with MINUSCA on 7 June 2008 as a Security Officer at the FS-4 level. He was serving on a fixed-term appointment as a Security Officer at the FS-5/10 level at the time of his separation from service on 1 June 2017.

Facts relating to Saturday, 16 July 2016

6. At approximately 1130 hours on 16 July 2016, the Applicant drove UN-27282 to Nouvel Horizon bar in Bangui, CAR and parked the vehicle on a nearby street.

Starting at around 13.00 at the latest¹, he was served several alcoholic beverages until about 1700 hours.² The Applicant's itemized bill included: four stout beers; one litre of wine; four "booster" mixed spirits drinks; one bottle of Isenbeck brand beer; two Castel brand beers; one "33" brand beer; and two juices.³ The Applicant acknowledged drinking one carton of wine and some beers.⁴

7. According to patrons of Nouvel Horizon, the Applicant had been consuming large amounts of alcohol, then started making "martial arts" gestures toward another customer who also appeared drunk, thus provoking a prolonged verbal dispute and then a physical confrontation involving pushing of tables and breaking of beer bottles. Whereas only some witnesses confirm that the Applicant grabbed a broken beer bottle as weapon⁵, it was undisputedly necessary for the witnesses to intervene by physically separating the adversaries. One Mr. Regis Grebambi was injured as he attempted to stop the altercation. Mr. Grebambi claims that it was the Applicant who caused his injury and identified the Applicant in a photographic array.⁶ Other witnesses remember that the injury came from the other adversary, however, they confirmed the Applicant's role as a party to the altercation. The Applicant was escorted out by one of them.⁷

8. The Applicant was stopped by the local police, Force d'Intervention du Corps Urbain ("FICU"), at approximately 1745 hours and was questioned for being involved in a fight and injuring someone at Nouvel Horizon. The FICU confiscated a military knife from the Applicant, who refused to identify himself. Since there was no written complaint against him, the FICU released him and he took a motorbike back to the

¹ There are reports of the applicant starting as early as 1100 hours, undisputedly the Applicant stopped driving UN-27282 at 1130 hours, as evidenced by the car log (Respondent's reply, annex 3, page 146).

² Reply, annex 3, pages 70-76 (written statements of Messrs. Wilfred Daitomba Gbada, Aimé Mbadoua and Zougbadia Debonneur).

³ Ibid. page 149.

⁴ Ibid. (transcript of the Applicant's statement of 18 July 2016), p.125.

⁵ Ibid. pages 43-48, 65-66, 80-81 and 83-84 (written statement of Messrs. Regis Grebambi, Christian Damoino, Vincent Peniel Toute and Monlas-Nzaye Heritier).

⁶ Ibid. pages 43-48 (written statement of Mr. Regis Grebambi), 49-60

⁷ pages 70-76 (written statements of Messrs. Wilfred Daitomba Gbada, Aimé Mbadoua and Zougbadia Debonneur)

town.⁸ He then proceeded to another bar within the same area and continued drinking.⁹ The Applicant acknowledged that he had a few beers at the second bar but did not consider himself to be drunk.¹⁰

9. At approximately 2030 hours the MINUSCA Security Duty Officer (“SDO”) Eugenio was informed by the MINUSCA Radio room that UN-27282 had been left unattended on Avenue David Dacko. He patrolled the area but could not find the vehicle. The Radio room called him again at 2225 hours to report that UN-27282 was still parked on the street. SDO Eugenio and a UN Police (UNPOL) patrol found UN-27282 parked and unattended on a street near the bar at approximately 2255 hours.¹¹ It was at this time that SDO Eugenio learned that the driver of UN-27282 had been under the influence of alcohol, had gotten involved in a fight and had been detained briefly by the police earlier that day and released. SDO Eugenio was unaware that the Applicant was the driver of UN-27282. Between 2320 hours and 0700 hours on 17 July 2016, SDO Eugenio discovered that the Applicant had been the driver of UN-27282 and tried unsuccessfully to locate him.¹²

10. The Applicant was again arrested by the FICU between 2311 and 2328 hours in front of a supermarket because he appeared to be extremely drunk. He spent the night at the Section des Recherches and Investigations (“SRI”) at the Police Gendarmerie Headquarters in Bangui. The Applicant did not identify himself until the morning of 17 July 2016. He was released at approximately 0740 hours that morning.¹³

Facts relating to Sunday, 17 July 2016

11. Mr. Zerouali, the SDO on 17 July 2016, took over duty at 0700 from the outgoing SDO, Mr. Eugenio. Mr. Eugenio reported to him that the Applicant had been

⁸ Ibid. pages 142-143 (Note to file: Notes of SIU meetings with FICU).

⁹ Respondent’s reply, annex 2, page 3.

¹⁰ Ibid. page 126 (transcript of the Applicant’s statement of 18 July 2016).

¹¹ Ibid. pages 39-42 and 86-88.

¹² Ibid. pages 40-41.

¹³ Ibid. pages 142-143 (Note to file: Notes of SIU meetings with FICU).

involved in a fight the day before and had disappeared after leaving his car close to a bar in an unsecured area. Messrs. Zerouali and Eugenio were unable to locate the Applicant at his residence or reach him by phone.¹⁴

12. Mr. Headington received a report of the events of 16 July at approximately 0800 hours on 17 July 2016 from one of his deputy chief security advisers.¹⁵ He instructed the Chief of the MINUSCA Special Investigations Unit (“SIU”), Mr. Issoufou, to call the Applicant in for an immediate interview and to provide a statement about the incidents of 16 July 2016.¹⁶

13. The Applicant collected UN-27282 from the vicinity of Nouvel Horizon at approximately 0815 hours and was stopped at approximately 0830 hours by Messrs. Zerouali and Issoufou, and asked to go to the SIU office to give a statement regarding the events of 16 July 2016. He advised that he would give a statement on Monday, 18 July 2016, and drove off¹⁷, allegedly to the stadium to exercise.¹⁸ Mr. Headington instructed that the Applicant had to be located immediately thus Mr. Zerouali and the Deputy CSA called his number severally without success. Mr. Zerouali and an SIU Investigator went to the Applicant’s residence but he was not there. They proceeded to the Nouvel Horizon bar in order to initiate investigative actions. Mr. Zerouali found an angry group of bar employees and their associates who complained about MINUSCA staff. Mr. Zerouali worked towards calming them down so that the SIU Investigator could do his job.¹⁹

14. In light of the reports that he had received regarding the Applicant on 16 and 17 July, Mr. Headington called the Deputy Director of Mission Support (DDMS) at 2016 hours to request the revocation of the Applicant’s driving permit. The DDMS

¹⁴ Oral evidence given by Mr. Zerouali on 8 January 2020.

¹⁵ Oral evidence given by Mr. Headington on 7 January 2020.

¹⁶ Oral evidence given by Mr. Zerouali on 8 January 2020.

¹⁷ Ibid., page 89 (statement of Mr. Zerouali) and his oral evidence on 8 January 2020.

¹⁸ Ibid. page 125 (summary of audio recording of Applicant’s 18 July 2016 interview) and his oral evidence on 9 January 2020..

¹⁹ Mr. Zerouali’s oral evidence 8 January 2020.

confirmed the revocation via email at 2104 hours on 17 July 2016.²⁰ Mr. Zerouali obtained a spare key to the UN-27282 from the MINUSCA Chief Transport Officer in order to recover the car when found.²¹

15. The Applicant was nowhere to be found until past curfew which started at 2200 hrs. Mr. Zerouali found UN-27282 in the bar's parking lot at approximately 2215 hours and called Mr. Headington, who advised he would be coming over. Soon after Mr. Headington's arrival, they noticed that the Applicant had exited the bar and had the car running. Mr. Zerouali attempted to stop the Applicant: he displayed his badge and raised his arm in a gesture used in traffic regulation, but the Applicant ignored this and drove off, nearly hitting him.²² Messrs. Headington and Zerouali followed the Applicant in their cars, with Mr. Headington's siren and blue and red strobe lights on. The Applicant did not stop but drove away erratically at high speed, heading in a direction opposite to his accommodation. At a certain point, when Mr. Zerouali was driving alongside, the Applicant blocked his way, nearly forcing him into a roadside ditch.²³ He stopped briefly after Messrs. Headington and Zerouali boxed him in from the front and back, but then he reversed UN-27282 into Mr. Headington's vehicle, mounted the pavement to cut the corner of the street near a roundabout, and sped off again.²⁴

16. Messrs. Headington and Zerouali pursued the Applicant until he encountered an armed Gendarmerie checkpoint, which caused him to stop. For about 15 minutes the Applicant ignored their gestures for him to step out of the vehicle, he kept the doors locked and turned the music up. Mr. Zerouali went to fetch the spare key to gain access into the vehicle from the passenger's side, while Mr. Headington tried to negotiate with

²⁰ Ibid. page 92 (statement of Mr. Headington) and oral evidence given by Mr. Zerouali on 8 January 2020.

²¹ Ibid. page 89 (statement of Mr. Zerouali) and page 92 (statement of Mr. Headington) and their oral evidence on 8 and 7 January, respectively.

²² Mr. Zerouali oral evidence on 8 January 2020

²³ Mr. Zerouali's oral evidence 8 January 2020

²⁴ Ibid. page 90 (statement of Mr. Zerouali) and page 93 (statement of Mr. Headington) and their oral evidence on 8 and 7 January respectively.

Applicant on the other side. Mr. Zerouali unlocked the passenger's door and managed to turn off the engine. The Applicant was then moved to Mr. Zerouali's vehicle. The incident attracted a lot of attention from the police that manned the checkpoint.²⁵

17. Mr. Headington and Mr. Zerouali describe the Applicant's poise at this point as "catatonic" or "resigned". Mr. Headington, moreover, supplied that the Applicant was drunk because he smelled very strongly of alcohol, his speech was slurred and he was unsteady on his feet.²⁶ Mr. Zerouali does not confirm this; he, however reports the Applicant addressing him to the effect of "help me brother as I am finished".²⁷

18. Mr. Headington and Mr. Zerouali first drove the Applicant to his residence but then Mr. Headington decided to take him to the MINUSCA Level II Hospital to prevent him from being a risk to himself and others. On arrival, the Applicant refused to take any tests or treatment. The Doctor's opinion was that the Applicant was drunk but since he was refusing treatment, he asked them to leave. When Mr. Headington told the Applicant that they had been asked to leave, he became "bellicose and verbally aggressive". Mr. Zerouali confirms that the Applicant refused to take tests or treatment and that his behavior changed into quarrelsome and verbally aggressive toward Mr. Headington. While Mr. Headington did not explain to Mr. Zerouali the reason for bringing the Applicant in the hospital, in Mr. Zerouali's opinion testing the blood alcohol content ("BAC") would have been appropriate under the circumstances.²⁸

19. After consultations between Mr. Headington and the United Nations Deputy Police Commissioner regarding suitable holding facilities for the Applicant so he would not harm himself or others, the Cameroonian Formed Police Unit ("FPU") was called upon to house the Applicant overnight. The Applicant refused to go. Mr. Headington told him that "he could walk through the hospital exit or be carried but either way he was leaving". Five FPU members arrived at 2325 hours but since the

²⁵ Ibid. page 90 (statement of Mr. Zerouali) and page 93 (statement of Mr. Headington) and their oral evidence on 8 and 7 January respectively.

²⁶ Oral evidence on 8 and 7 January respectively

²⁷ Oral evidence of Mr. Zerouali on 8 January 2020

²⁸ Oral evidence of Mr. Zerouali 8 January 2020.

Applicant was “a big and powerfully built man”, Mr. Headington requested more manpower in the event that non-deadly force was needed to move him. Four additional FPU members arrived at midnight with an Armoured Personnel Carrier (“APC”). Since the Applicant refused to move, the nine FPU members picked up the plastic chair he was sitting in and carried it to the APC. He was kicking, screaming, shouting and resisting strongly. Mr. Headington’s evidence was that the FPU members were not violent with the Applicant nor did they use any restraining devices on him.²⁹

Facts relating to Monday, 18 and 19 July 2016

20. Mr. Headington was informed by the Chief of SIU at 0742 hours that the Applicant had not been placed in a cell by the FPU but had been provided with a bed and a chair. He was informed at 0751 hours that the Applicant had been released by the FPU and had left on a moto-taxi. Three security officers subsequently went to the Applicant’s residence and transported him to the MINUSCA logistics base and then to the Headquarters. The Applicant called Mr. Headington at 1715 hours but Mr. Headington refused to talk to him and hung up. The Applicant then sent three text messages at 1720 hours to Mr. Headington that read “*Sir, as I am very sick in the body and psychologically very sick and hurt due to physical brutalization done on me last night in the clinic in HQ by FPUS in your presence. I officially request medical leave back home in Kigali. I have spoken to medical clinic as well and I will speak with if you give me a chance*”. Mr. Headington did not respond.³⁰

21. The Applicant was placed on Administrative Leave with Full Pay (“ALWFP”) and sent home on 19 July 2016.

SUBMISSIONS

Respondent’s case

²⁹ See also Ibid. pages 94-95 and pages 121-122 (statement of Oyono Mendoula, Commander FPU).

³⁰ Ibid.

22. The Respondent's case is that the Applicant engaged in disorderly conduct at the Nouvel Horizon bar in Bangui, Central African Republic, on 16 July 2016 and that on 17 July 2016 he: drove UN-27282 after having consumed alcohol, operated UN-27282 in a manner that was dangerous to the public and without reasonable care, and that he failed to stop driving UN-27282 when instructed to do so by representatives from MINUSCA Security. The Respondent submits that the Applicant violated staff regulations 1.2(a), (b), (f) and (q) and that his behavior risked bringing disrepute to the mission and the Organization with regard to the population served by the mission.

23. Additionally, the Respondent requests that the Tribunal take note of the fact that the Applicant had previously been issued with a formal reprimand in connection with similar incidents as to the current one being: in 2009, he drove a United Nations vehicle after curfew hours, at excessive speeds and while under the influence of alcohol behaving in a disorderly way in public. On 28 July 2011, he was given a written censure for driving a United Nations vehicle at excessive speeds and outside curfew hours.

Applicant's case

24. It is noted that on 14 February 2017, the Applicant responded to allegations of misconduct by admitting to all therein as "correct" and to his guilt, save that he was not the one who launched the attack on 16 July. He specifically acknowledged that he was drunk at the time of the incident.³¹ Likewise, in his application of 25 July 2017, the Applicant acknowledged having committed misconduct.³² During the Case Management Discussion and oral hearing, however, his contention was that these admissions should be related to a much narrower narrative. The Applicant's version(s) of events will follow below.

25. Regarding the incident at Nouvel Horizon a bar on 16 July 2016, according to the Applicant's statement of 18 July 2016, he arrived at the bar between 1300 and 1330

³¹ Reply, annex R7 (Applicant's email to the Assistant Secretary-General for Human Resources Management).

³² Application, page 9

hours and left around 1900/1930 hours. During this time, he acknowledged having consumed one carton of wine and some beers. The Nouvel Horizon was busy but there was no “heated discussion” at any point. He claims he was arrested by the police only when he was leaving the second bar. Only in their detention did he learn that some boys had been fighting and one stabbed the other.³³ In his supplementary statement on 26 July 2016, the Applicant admits that a fight ensued, but it was behind his back, where one boy hit the other with something sharp, maybe trying to attack the Applicant or maybe they were gendarmes in civilian attires who wanted to provoke him, as they often act against MINUSCA personnel.³⁴

26. Before the Tribunal, the Applicant confirmed having driven UN-27282 to the vicinity of Nouvel Horizon, with the aim of drinking alcohol. He then spent several hours doing so; he, however, maintains that he was not drunk, i.e., “was in control”. Regarding the altercation, he commenced by presenting his role as passive in the face of aggression, subsequently admitted though that he had entered a verbal altercation with a drunk client of the bar and had made hand gestures suggesting that his adversary should leave, which agitated the latter. The Applicant maintains that it was his attacker who had knocked over the table and reached for a broken beer bottle and thus needed to be restrained. The Applicant admitted that he had been escorted out of the bar by others but claims that it was for his protection. The Applicant claims that all witnesses who accused him of aggressive behavior should be denied credence; only the waiters are credible. He nevertheless concedes that, to the extent of the admitted facts, his behavior constituted misconduct, as he should not have acted in an antagonizing manner, either verbally or by gestures.

27. According to the Applicant, he was arrested by the FICU at approximately 1930 hours and detained until morning. He denies that the FICU detained him initially at 1745 hours; released him; arrested him again at 2311 hours and released him the next

³³ Respondent’s reply, annex 3, (transcript of the Applicant’s statement of 18 July 2016) pages 123-126.

³⁴ Ibid., (Applicant’s email to Marc Etienney of 26 July 2016) p.158

morning.³⁵ In his supplementary statement on 26 July 2016, in relation to this earlier incident, the Applicant admits that the gendarmes “gave him a ride because he did not want to stay there”.³⁶ The same version was presented in the hearing. The Applicant testified, in addition, that after the first encounter with the local police he continued drinking until a colleague took him close to “Corail” bar. By the time of his second pick up by the police, he was severely intoxicated and could not even remember where he had left the car. The police took him to the station, ignored his invocation of United Nations staff status and made him spend the night on the floor. In the morning, a police officer told him that a person had been injured the other night at “Nouvel Horizon”. The police dropped him by his vehicle, UN-27282. There were many FPU and the boy who had been injured in the previous evening’s incident, who commented that, despite pressure to blame the Applicant for his injury, he had told the truth, i.e., that it had been the other person.

28. Regarding the events on 17 July 2016, the Applicant told the investigators that after exercising in the morning he had stayed at a restaurant until 2200 hours and had a few beers. Upon exiting he saw “many many” UN cars, who were blaring their horns and tried to stop him. He drove off and would not stop because he was scared. He admitted to having escaped and, at a certain point, reversed into another MINUSCA vehicle, all because he was scared. Confronted with information that there had only been two cars following him, he insisted there were ten of them. When he stopped, he voluntarily unlocked the vehicle.³⁷

29. At the hearing the Applicant confirmed that when the MINUSCA Security officers approached him in the morning for a statement regarding the incident at “Novel Horizon”, he refused because in his opinion the proper course of action would have been for him to file an incident report on Monday; besides, the officers were not insistent. The Applicant further gave different accounts as to his subsequent

³⁵ Ibid., (transcript of the Applicant’s statement of 18 July 2016) page 126

³⁶ Ibid., (Applicant’s email to Marc Etienney) p.158

³⁷ Ibid.,(transcript of the Applicant’s statement of 18 July 2016), pages 126-127

whereabouts: according to his testimony, after exercising at the stadium he had a meal and consumed one bottle of alcoholic drink, although he did not remember of what sort. Subsequently, he went to a local guest house where he rested and pondered about how to proceed regarding the incident from the night before. He did not go to his residence because he did not want to be found by the Chief Security Adviser, Mr. Headington. He went there only briefly after 2100 hours, but then decided to go out to a restaurant “SICA 1” to get something to eat. At SICA he instantly became alerted that Mr. Headington could be after him, so he rushed out to the vehicle. He does not even remember whether he consumed any food or drinks.

30. The Applicant’s testimony is inconsistent regarding the reason for not stopping at Mr. Zeroulai’s signs to stop. He first stated that he “had thought” that there were many United Nations cars, which made him scared. Then, he maintained that he drove off because the two officers had not set up a formal checkpoint and he feared Mr. Headington would mistreat or even kill him, while Mr. Zerouali was following the latter’s instructions at all times. Hence, he kept escaping them until he encountered law enforcement officials, i.e., the Gendarmerie checkpoint, where he felt safe. The Applicant denies that he drove in a dangerous manner. Before the Tribunal he admitted he may have bumped into Mr. Headington’s car when reversing, in his closing statement his version is that it was his vehicle that was bumped. The Applicant insists that he opened his car window, as such Mr. Zerouali could reach inside and turn it off. He, however, admitted that in order to get into the car it was necessary to use the spare key and open the door at the passenger’s side.

31. The Applicant denies that he drove without a driver’s permit, as at the time he was not aware of the withdrawal. He also disputes that at that time he was drunk. He denies that he was aggressive and disturbing others when at the medical facility. He confirms that he refused treatment or blood tests, the reason for it having been that he was not sick and he feared that he would be killed. He confirmed that at the time MINUSCA had a zero-tolerance alcohol policy when it comes to driving United Nations vehicles.

32. The Applicant contends that the CSA allowed the Cameroonian FPU to attack him brutally at the Level II hospital and as a result, he sustained injuries. Further, he takes issue with his placement on ALWFP, for which the formalities were done *ex post* his removal from the mission.

33. The Applicant admits to having violated the curfew and urges the Tribunal to consider his allegations of harassment, discrimination and abuse of authority as mitigating factors with respect to the proportionality of the sanction.

Considerations

34. The issues the Tribunal will examine in the present matter are as follows³⁸:

- a. Whether the facts on which the disciplinary measures were based have been established;
- b. Whether the established facts legally amount to misconduct under the United Nations Regulations and Rules;
- c. Whether the disciplinary measures imposed are proportionate to the offence; and
- d. Whether there were any substantive or procedural irregularities that would vitiate the disciplinary process.

Have the facts on which the disciplinary measures were based been established?

Incident of 16 July 2016 (“Nouvel Horizon” bar)

³⁸ *Mahdi* 2010-UNAT-018; *Haniya* 2010-UNAT-024; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098.

35. In light of the existing evidence and the difficulties and resources involved in locating the eye-witnesses more than three years after the incident, the Tribunal concurred with the Respondent that their testimony was not required and that the Tribunal could place reliance on the record before it.³⁹ This consideration was especially valid given the initial admission of the Applicant to the core facts in his multiple responses to the allegations of misconduct, where the only circumstance that he questioned was that he had been the one attacked and not the attacker. The Applicant did not request the hearing of any of the witnesses.

36. The investigative record consists of sworn statements of eye-witnesses who, notwithstanding different details noticed, all confirmed that the Applicant, having been severely intoxicated, got involved in an altercation where he and his adversary needed to be separated by others. Corroborating evidence consists of reports of the incident obtained by SIU from the UNPOL patrol and from a MINUSCA staff member working for the Security Pass and ID Unit, a note of the meeting between the SIU and the local police. The Applicant's contention is that the injured person, Mr. Regis Grebambi, told him that he had been incited by others to give an incriminating statement. While this is possible, including any motivation anti-MINUSCA or in order to claim compensation, the relevance of this issue is limited. There were other witnesses interviewed in the investigation, who supplied that the injury had been caused by the Applicant's adversary, which demonstrates that the interviewed individuals could testify freely and were not forced to give incriminating evidence. However, contrary to the Applicant's claims in his multiple replies to the allegations of misconduct and at the case management discussion on 21 October 2019, it was not alleged that he had assaulted another person; it was alleged that he had engaged in disorderly conduct through his involvement in the altercation. To this effect, the coherence of the investigative record is satisfying. Notably, both waiters indicated by the Applicant as the only credible persons, confirm that after the Applicant had made unfriendly gestures toward another customer, the dispute developed up to a point that there was a need of separating the

³⁹ See *Nadasan* 2019-UNAT-918, para. 39-40.

adversaries. Other witnesses confirm a much more aggressive stance taken by the Applicant, including that he knocked the table over and reached for a piece of a broken bottle.

37. Similarly, the Applicant's insistence on the fact that he had been detained by the police only once, late in the evening, whereas after exiting the Nouvel Horizon bar he had only got a ride from the gendarmerie, is not credible in light of the record on file and inconsistent with the Applicant's conviction, expressed in the same statement given in the investigation, that gendarmes may have provoked the bar fight, motivated by their dislike for MINUSCA personnel. Contradictions, erratic narration and common-sense implausibility may be to some extent attributed to the fact that, having been heavily intoxicated, the Applicant does not even remember what had happened. In any event, they render the Applicant not credible. Moreover, the admitted fact that he spent most of the next day hiding from Chief Security Adviser is indicative of his consciousness of guilt. In conclusion, the Tribunal is satisfied that the Applicant rendered himself publicly drunk over several hours, embroiled in a bar fight and was twice detained by the local police.

Incident of 17 July 2016

38. With respect to the events of 17 July 2017, the investigative record has been supplemented by the testimony of Messrs. Headington and Zerouali before the Tribunal. The Tribunal finds these testimonies credible, notwithstanding differences as to perception whether the Applicant was visibly drunk. The issue, repeatedly brought up by the Applicant, as to whether he had been dropped at his residence and then taken to the hospital, has been clarified to the effect that the officers first had headed to the Applicant's residence but upon arrival at the compound Mr. Headington had directed that the Applicant be taken to the hospital instead. The Tribunal, in any event, does not find it relevant.

39. On the totality of the evidence, the Tribunal is satisfied that in the course of 17 July 2016 the Applicant: went out to SICA 1 after curfew; refused to stop when

signaled by MINUSCA Security officers, including his superior; drove in a dangerous manner; and again, refused to stop and exit the vehicle.

40. Further, the Tribunal is satisfied that the Applicant drove the United Nations vehicle after consuming alcohol. The Applicant admitted to as much as having had one drink at lunch, and, in the evening, two or three beers at “SICA 1”, which combined with the previous evening’s libation, had clearly rendered him legally drunk as per MINUSCA’s zero-tolerance policy. While in his latest version presented at the hearing the Applicant does not any more remember having drunk two to three beers and claims that he had had no time for this, it is not credible. On Mr. Zerouali’s account, he had spotted the Applicant’s car by SICA 1; called on Mr. Headington; waited until the latter arrived; and only after that the Applicant emerged from the bar. Thus, the Applicant, as previously stated by him, had spent enough time in the bar to consume drinks. The Applicant’s escape and subsequent refusal to undergo a blood test, moreover, speak to his disfavor.

41. The Applicant’s explanations about the motive for his escape, shifting from claiming that there were ten United Nations cars flashing lights to claiming that he feared a lone confrontation with Mr. Headington and Mr. Zerouali, make no sense, either way.

Do the established facts legally amount to misconduct under the United Nations Regulations and Rules?

42. The Tribunal concurs that the established facts legally amount to misconduct. The Applicant’s actions, which included publicly getting himself drunk, becoming embroiled in a bar fight and being detained for drunkenness were unbecoming of an international civil servant, in violation of staff regulation 1.2(f). The Applicant also violated staff regulation 1.2(q) through his failure to operate his vehicle with reasonable care, and staff rule 1.2(a) through his failure to follow the instructions issued on behalf of the Secretary-General as communicated by Messrs. Headington and Zerouali to stop and exit his vehicle. The Tribunal does not find a factual basis in the conduct charged

for qualifying it as lack of integrity, in violation of Staff Regulation 1.2(b)⁴⁰, which, however, has no impact on the extent and seriousness of the misconduct.

Was the disciplinary measure imposed proportionate to the offence?

43. The Tribunal recalls that, as elaborated by the Appeals Tribunal, proportionality is a jural postulate or ordering principle requiring teleological application, which derives from the postulate of reasonableness of all administrative decisions. In other words, it is necessary that the sanction bear a rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline.⁴¹ Noting the Respondent's persistent reliance on his wide discretion in meting out disciplinary sanctions, this Tribunal reiterates that the proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result.⁴² Accordingly, where the Respondent resorts to separating a staff member, it must be shown why the staff member's remaining in service was not a viable option.

44. The Tribunal does not find the imposed measure to be disproportionate. The Applicant, as a MINUSCA Security Officer, was held to an elevated standard of conduct with respect to security and safety. Whereas his conduct, in addition to formally breaching the rules, was irresponsible and dangerous. It tied up MINUSCA Security for over 24 hours in searching for the Applicant and the car that he was using. It put in peril the Applicant's own safety as well as the safety of others and United Nations property. It undermined MINUSCA's and the Organization's reputation in the eyes of the host country population. This constituted serious misconduct.

⁴⁰ It is noted that the Applicant, having been informed in the morning of 17 July from three independent sources: the SRI, the participants in the altercation and the MINUSCA Security, that there was investigation into the incident at "Nouvel Horizon" which had caused an injury, refused to cooperate with the investigation by avoiding being contacted by MINUSCA Security, culminating in the car chase later that night. This part of the incident, however, did not form part of the allegation of misconduct.

⁴¹ *Samandarov* 2018-UNAT-859, para 24-25.

⁴² *Ibid.* para 23 and 25.

45. The Applicant's conduct over the course of two days displayed, moreover, a patent and persistent disregard for the Organization's rules on safety and discipline. In addition, it is recalled that the Applicant had received a written reprimand in 2009 and a written censure in 2011 for similar conduct (misuse of United Nations vehicles and disorderly conduct). The attitude represented by the Applicant and the futility of previously applied discipline are irreconcilable with him remaining in service. The Tribunal concurs, therefore, that the overriding objective of the disciplinary measure in this case was in individual prevention, i.e., to have the Applicant removed from the Organization.

46. The Applicant's full admission during the disciplinary process was considered in mitigation; it is noted, however, that the Applicant had initially refused to cooperate with the investigation and largely withdrew his admission before the Tribunal. The Tribunal further concurs with the Respondent that the Applicant's alleged difficult relationship with Mr. Headington and his allegations of mistreatment after the incident of 17 July 2016 were not mitigating factors as, even if true, they would not justify the Applicant's conduct. In conclusion, the Tribunal fails to see any mitigating circumstances.

Were there any substantive or procedural irregularities that would vitiate the disciplinary process?

47. The Applicant alleges that he was mistreated by the FPU after the incident of 17 July 2016; he, moreover, takes issue with expediting him out of the Mission on ALWFP without a priori drawn documents. The Tribunal notes that no administrative decision implicit in these actions has been properly put before the Tribunal. In turn, the Applicant's argument at the hearing that the summary of his audio-recorded interview was incorrect, and his claim in his closing submissions that the investigators omitted or distorted what he had stated are belied by the content of the digitally recorded interview, which corresponds to the summary on the record, and which the Applicant had not challenged before. In conclusion, the Tribunal finds no procedural violation that would have bearing on the impugned decision.

CONCLUSION

48. Absent illegality of the contested decision, the measure imposed is upheld whereas the claim for compensation has no basis.

JUDGMENT

49. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 16th day of January 2020

Entered in the Register on this 16th day of January 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi