

UNDT/2019/030/Corr. 1, Turkey

UNAT Held or UNDT Pronouncements

Considering that the sanctioning decision relied heavily on the finding that the Applicant had had five times over the limit established by the SOP from 2012, the interpretation of the reading of the breathalyser remained an issue. In this respect, the Tribunal was not satisfied that the evidence was clear and convincing. The Respondent rejected an explanation offered by the Military Police officer in charge of administering blood tests that the breathalyzer had recalculated the contents of alcohol found in the exhaled breath (BrAC) to relative alcohol contents in blood (BAC) and displayed the latter. The Respondent did not attempt to inquire any further to clarify at the source the apparent contradiction in the information obtained, i.e., that if the numerical result were to be related to units expressed as mg/100ml in blood (BAC), it would be beyond the range demonstrable by the breathalyser moreover, that BAC of above 0.45 typically results in death. Had the Applicant indeed exhibited such high level of intoxication, he would not have been easily discharged from the hospital and he would not have seemed “ok” and could normally converse and interact with Mr. Hakizimana. Also, other persons who had seen the Applicant would have likely noticed more symptoms than the smell of alcohol. The available account of the Applicant’s physical condition, his admission to having had three to four vodka based cocktails and the passage of time between the alcohol consumption and the testing, a more plausible explanation seems to be that the results pertained to 1.05 promille, an equivalent of 0.105 mg/100ml (BAC). This level of alcohol would also be consistent with the impairment of motor coordination and loss of good judgment, impairment of vision and reaction time, leading to the accident, as well as with the fact that all persons interacting with the Applicant after his accident could smell that he had been consuming alcohol. The zero-alcohol standard did not allow driving after consuming any unit of alcohol. Driving after consuming several vodka-based cocktails was an obvious violation of either standard. As such, the Tribunal had no doubts that the Applicant’s act amounted to misconduct. The Applicant disregarded the formal rules as well as the common-sense safety considerations. He rejected available alternatives, such as availing

himself of the bus provided, asking a colleague for a ride or, ultimately, walking down to the meeting point with his son at Naquora Old Camp. The argument that he did not want to abandon the car out of concern for the United Nations property is untenable rather, this conduct shows that he was acting for his own convenience. On the other hand, it is undisputed and credible that the Applicant had no intention of driving the United Nations car anywhere beyond the gate of the Naquora Old Camp. As such, his misconduct was to take place for a very short time, exclusively on an internal road, inaccessible by the public and in the conditions of low traffic after working hours on a Friday afternoon. The latter circumstances also mitigate the objective element of the misconduct, consisting in endangering the lives of others, the United Nations property and the Organization's reputation. As regards the Organization's reputation, the Tribunal recalled that the accident took 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. Drunk driving must be seriously repressed and that general deterrence is an important goal in disciplinary regime. However, absent a clear written pronouncement on the same, any violation of a zero-alcohol standard should not result in separation in a situation – which goes to the question of the Respondent's consistency – directly in the wake of the previous, far more tolerant Organization's policy.

Decision Contested or Judgment/Order Appealed

The Applicant contested the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity for having driven a United Nations vehicle while under the influence of alcohol.

Legal Principle(s)

The zero-alcohol standard amounts to misconduct, the Tribunal considered that, indeed, any such act would legitimately constitute a prohibited conduct. The questions whether to prosecute it as misconduct and what consequences are appropriate, are determined with a wide margin of discretion by the Administration. Reasonableness of the exercise of this discretion depends on the specific facts, including the mens rea, and the scale of the breach. As a general principle, labour

discipline is perceived as the individual employee's obligation to comply with lawful orders/instructions of the employer and the administration, applicable on the basis of the employment contract. Head of Mission memos and Standard Operating Procedures are not issued in a legal void. Rather, by determining what is to be understood as "driving under the influence of alcohol", they provided the needed crystallisation of a general norm readily expressed in the administrative issuance. The zero-alcohol standard regarding driving of United Nations vehicles has a legitimate basis in concerns about safety of its personnel and other persons, the Organization's liability toward these persons, and protecting its property and its reputation. United Nations missions and offices operate in different contexts, in terms of the mandate, security and relations with the host country, etc. Different theatre-specific restrictions may therefore be imposed, like curfew, designation of off-limits areas or ban on alcohol consumption at work premises. Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct. Other factors to be considered in assessing the proportionality of a sanction include the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. Drunk driving in the United Nations context justifies a severe disciplinary measure and not just a withdrawal of the driving license.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

The impugned decision was rescinded and the disciplinary measure of separation with the relevant indemnities was 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 amongst other reliefs.

Full judgment

[Full judgment](#)

Applicants/Appellants

Turkey

Entity

UNIFIL

Case Number(s)

UNDT/NBI/2017/034

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

25 Feb 2019

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Applicable Law

Administrative Instructions

- ST/AI/2010/6
- ST/AI/371

Staff Regulations

- Regulation 10.1

Staff Rules

- Rule 1.2
- Rule 10.1
- Rule 10.3