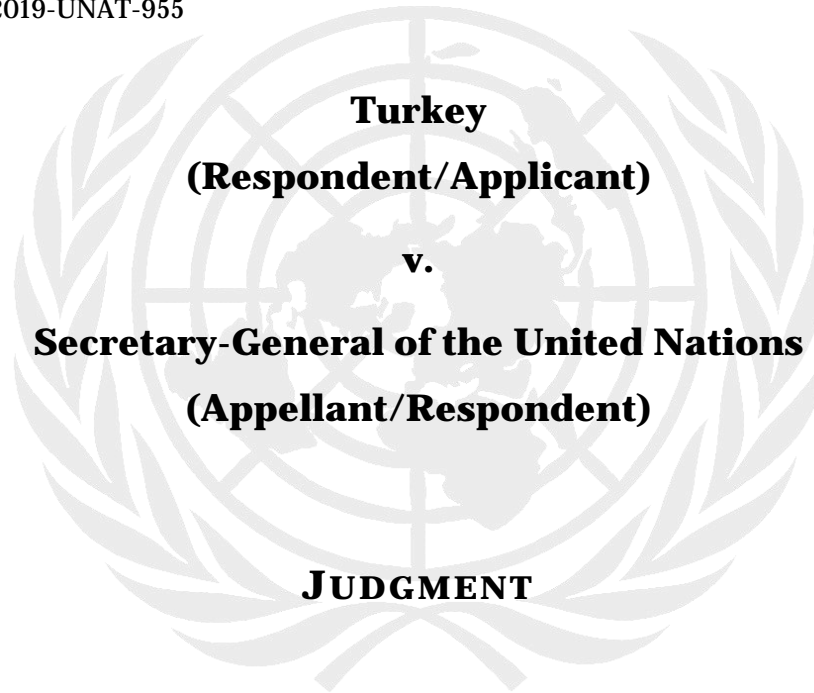




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-955



**Turkey
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Dimitrios Raikos Judge Kanwaldeep Sandhu
Case No.:	2019-1253
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Turkey: Mohamed Abdou, OSLA

Counsel for Secretary-General: Noam Wiener

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. This case arose from a traffic accident in 2016, in which Mr. Fadel Turkey was driving a vehicle belonging to the United Nations Interim Force in Lebanon (UNIFIL) while under the influence of alcohol, and for which he was separated from service. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that Mr. Turkey had committed the misconduct of driving under the influence of alcohol, but the disciplinary measure of separation from service imposed on him was disproportionate. It rescinded the decision of separation and ordered that Mr. Turkey be demoted by one grade and his UNIFIL driving permit be withdrawn for one year. The UNDT further ordered that Mr. Turkey be paid two years' net base salary if the Organization should elect not to reinstate him in service. We affirm.

Facts and Procedure

2. Mr. Turkey joined the Organization in 1984. In 2016, he was a Telecommunications Technical Assistant at the G-6 level under a temporary indefinite appointment with UNIFIL in Naqoura, Lebanon.

3. On the afternoon of 27 May 2016, Mr. Turkey attended a farewell party for a departing colleague at the UNIFIL base in Naqoura, during which he consumed three to four glasses of mixed alcoholic beverages. After the gathering, he drove a United Nations vehicle on an internal UNIFIL road of a few kilometers long towards the Naqoura Old Camp in order to fetch his private vehicle parked on the parking lot outside the camp across the street. The road surface condition was dry; it was still daylight. Approximately 1.7 kilometers down the road, Mr. Turkey lost control of the vehicle and veered off the road, knocking down a traffic sign and a traffic light, hitting a low wall bordering the road, going over it and crashing into a water trench. According to Mr. Turkey, he was looking at his ringing cell phone when all this happened, and he was not wearing his seatbelt. Mr. Turkey briefly lost consciousness. He did not make any phone call for emergency assistance.

4. About half an hour later, Mr. Hakizimana, an officer in the Office of the Deputy Force Commander, who did not attend the farewell party and was driving home on the same road, noticed Mr. Turkey's vehicle on the side of the road with Mr. Turkey standing by the door. He also saw two military officers one of whom was taking photographs of the accident scene. Mr. Hakizimana stopped to render assistance. Noticing Mr. Turkey had some bleeding just

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. Approximately five minutes after their arrival, two UNIFIL military police (MPs) arrived at the hospital and one of them administered a breathalyzer test on Mr. Turkey. According to a printout slip, the breathalyzer test showed a reading of a Blood Alcohol Level (BAL) of 1.05 mg/l in an auto mode. A FC20 breathalyzer manufactured by Lifeloc Technologies, Inc. was used for the test.

6. After Mr. Hakizimana had driven Mr. Turkey to the hospital, two UNIFIL MPs arrived at the accident scene and took photographs. Mr. Turkey’s vehicle sustained damages for which the repair cost was estimated at USD 200.75.

7. The Special Investigations Unit (SIU), UNIFIL, conducted an investigation and issued its investigation report on 2 June 2016. The SIU found that at the time of the accident, Mr. Turkey was operating a United Nations’ vehicle while intoxicated, as the breathalyzer test result that he took at the hospital showed a reading of his BAL at 1.05 mg/l, i.e. 0.105 mg/ml in excess of the level permitted (0.04 or 40 milligrams per 100 milliliters of blood), in contravention of UNIFIL’s Measures on the Operation of UNIFIL Vehicles (HOM POL 12-06 Amdt 2).

8. HOM POL 12-06 Amdt 2 was issued by UNIFIL’s Head of Mission (HOM) and Force Commander on 24 July 2012 as a standard operating procedure. Paragraphs 27 and 28 read:

It is strictly forbidden to operate any UNIFIL vehicle with a blood alcohol level (BAL) in excess of 0.04 (or 40 milligrams per 100 milliliters of blood) as determined by a breathalyzer or blood test.

Any authorized personnel member found operating any UNIFIL vehicle in excess of the permissible BAL level will be liable to administrative and/or disciplinary measures.

HOM POL 12-06 Amdt 2 goes on to list a series of sanctions. The sanction for operating any UNIFIL vehicle while having a BAL in excess of 0.04 (or 40 mg/100ml) is the withdrawal of the UNIFIL driving permit for 60 days with retesting required for the first violation, the withdrawal of the UNIFIL driving permit for 120 days with retesting required in addition to appropriate

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 perform any particular function or duty was an unacceptable behaviour. Moreover, he stressed that “[a]t all times, being intoxicated in public areas is not acceptable. ... In some cases a ‘zero-alcohol policy’ is required to be adopted.” He reiterated UNIFIL’s prohibition against consumption of alcohol and/or being under the influence while driving any United Nations vehicle among other things. The UNIFIL HOM and Force Commander concluded the inter-office memorandum by stating that he “trust[ed] that we will all regulate our daily conduct and behavior, as necessary, to ensure the fulfillment of UNIFIL’s mandated responsibilities and safeguard the image and credibility of the United Nations”. In that memorandum, the UNIFIL HOM and Force Commander did not refer to HOM POL 12-06 Amdt 2, nor did he spell out any sanctions for violations of the “zero-alcohol” policy.

10. On 27 June 2016, the Assistant Secretary-General for Field Support (ASG/DFS) referred Mr. Turkey’s case to the Office of Human Resources Management (OHRM) for appropriate disciplinary action. The referral memorandum stated, *inter alia*, that the MPs had administered a breathalyzer test to Mr. Turkey, which revealed the BAL at 1.05 mg/l, which showed that at the time of the accident Mr. Turkey was under the influence of alcohol. The ASG/DFS stated that DFS was of the view that there was *prima facie* evidence that Mr. Turkey had engaged in misconduct, and it therefore concurred with UNIFIL’s recommendation that Mr. Turkey be subject to appropriate disciplinary action.

11. Between 2 August and 11 October 2016, there were several exchanges of e-mails between the SIU/UNIFIL and the Administrative Law Section, OHRM (ALS/OHRM) as the latter office sought clarification regarding, *inter alia*, Mr. Turkey’s breathalyzer test results. It was not clear to ALS/OHRM, despite internet searches, whether the reading was for blood alcohol content

(BAC) or breath alcohol content (BrAC) and what the conversion ratio was in case of BrAC. The information from Lifeloc was that a reading of mg/l always corresponded to BrAC whereas a reading in mg/100ml was always associated with BAC. However, BAC needed conversion which depended on a country's partition ratio, and assuming the partition ratio for Lebanon was 2100:1, BrAC 1.05 mg/l would be equivalent to BAC 220.5 mg/100ml.

12. In an inter-office memorandum dated 12 October 2016, the SIU/UNIFIL submitted an addendum to its investigation report, clarifying that "the reading of 1.05 mg/l BrAC corresponds to 220.5 mg/100ml BAC".

13. In a memorandum dated 13 October 2016, OHRM sent Mr. Turkey allegations of misconduct, with attachments, charging him with "[driving] a United Nations vehicle while under the influence of alcohol", in violation of Staff Regulations 1.2(f) and 1.2(q) as well as paragraph 27 of HOM POL 12-06 Amdt 2 and paragraph 4 of the 26 November 2015 memorandum. Mr. Turkey was informed that the SIU investigation report and the DFS referral memorandum had incorrectly referred to 1.05 mg/l as a BAC, rather than as a BrAC. He was also informed that a representative of Lifeloc had confirmed that 1.05 mg/l was a BrAC measurement and it was equivalent to a BAC of 220.5 mg/100ml.

14. On 9 November 2016, Mr. Turkey provided his comments on the allegations of misconduct against him: "I fully accept the result of the [investigation] panel[.] I have already learned from this incident and I will prevent similar cases from happening again." On 11 November 2016, he provided additional comments: "After 32 years of service with UNIFIL and United Nations agencies in Beirut I have learned from this cases [sic] [M]y final comment[:] This is my only incident in 32 year[s]."

15. By letter dated 13 January 2017,¹ the Assistant Secretary-General for OHRM informed Mr. Turkey that the Under-Secretary-General for Management (USG/DM) had concluded that the allegations of misconduct against him had been established by clear and convincing evidence and he had decided to impose on Mr. Turkey 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 BrAC was 1.05 mg/l, which was equivalent to a BAC of 220.5 mg/100ml, which was well over the maximum tolerable limit of 40 mg/100ml

¹ The letter was erroneously dated 13 January 2016.

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 the UNIFIL vehicle.

16. The Dispute Tribunal heard the case from 22 to 26 June 2018 during which oral evidence was received from Mr. Turkey and Mr. Hakizimana. The Dispute Tribunal was not able to hear the MP who had administered the breathalyzer test on Mr. Turkey, or Major Arjun Singh, the military officer who had been on the scene of the vehicle accident, or Dr. Kathait who had treated Mr. Turkey at the UNIFIL hospital, because they all had left UNIFIL and were unavailable.

17. In Judgment No. UNDT/2019/030/Corr.1, the UNDT partially granted Mr. Turkey's application. It found that the facts were established that Mr. Turkey was under the influence of alcohol at the time of the accident, that his actions amounted to misconduct, but that the disciplinary measure imposed on Mr. Turkey was disproportionate. Considering that Mr. Turkey's driving took place for a very short time exclusively on an UNIFIL internal road, the actual damage to the UNIFIL vehicle was not significant, there was doubt surrounding the breathalyzer reading,² the relevant witnesses were not available for questioning, the 26 November 2015 memorandum pronounced a new standard (zero-alcohol policy) without an accompanying sanctioning regime informing that violation of it would be treated as serious misconduct leading to separation, the Dispute Tribunal found that the impugned decision "display[ed] imbalance between the adverse and beneficial effects" and bore "no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive

² 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 of BrAC, but did not attempt to clarify the information obtained. Relying generally on internet searches and a statement from a Lifeloc representative, the Administration chose the interpretation that 1.05 mg/l corresponded to BAC 220.5 mg/100ml, which was more than five times the UNIFIL limit of 40 mg/100ml, and took the contested decision on that basis. However, the UNDT was aware that BAC of above 0.45 typically resulted in death and that it would have required Mr. Turkey to consume a vast amount of alcohol to reach that level, which was not the case. The UNDT eventually discounted the Administration's interpretation of the breathalyzer result. In its opinion, a more plausible explanation of 1.05 mg/l reading pertained to 1.05 promille, an equivalent of 0.105 mg/100ml (BAC). That is about twice above the legal drunkenness in Lebanon (0.5 per cent), in contrast to the limit of 0.4 per cent under the 2012 HOM POL 12-06 Amdt 2 and the limit of 0.2 per cent under UNIFIL's 2015 zero-alcohol policy. The UNDT therefore concluded that "[a]ll these factual contradictions do not allow accepting the reading of the breathalyzer slip at the face value as BrAC" (Impugned Judgment, para. 74).

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 Appeals Tribunal in its jurisprudence. A determination by the Administration that a violation of strict prohibition against driving while under the influence of alcohol warranted separation from service is reasonable and cannot be characterized as flagrantly arbitrary. The fact that the Dispute Tribunal disagreed with the option chosen by the Secretary-General in Mr. Turkey’s case does not make the sanction arbitrary or disproportionate. The UNDT’s determination that the impugned decision displayed imbalance does not meet the threshold established by the Appeals Tribunal that the severity of a disciplinary measure can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness.

20. The UNDT erred in its assessment of the mitigating factors. Contrary to the Dispute Tribunal’s determination that Mr. Turkey’s length of service without ever violating discipline was exceptional, refraining from misconduct reflects the most basic and minimum standard; it is not an exceptional behavior. Thus, absence of prior misconduct should not be

³ Impugned Judgment, paras. 83 and 87.

given such weight that it renders the imposition of separation from service disproportionate. The Administration did take into account Mr. Turkey's admission to the misconduct and his 32 years of service without any prior misconduct. That was why the Administration did not impose a harsher disciplinary measure, such as dismissal without termination indemnity. The UNDT also erred in law by implicitly finding that the limited scope of potential damage or the absence of actual widespread damage constituted mitigating factors.

21. The UNDT erred in fact and law in finding that Mr. Turkey did not disregard safety considerations or former rules. It also erred in law in concluding that the absence of any specific provision informing staff that separation from service was a possible consequence of violating the prohibition on driving under the influence of alcohol precluded the imposition of that disciplinary measure. Administrative Instruction ST/AI/2010/6 (Road and driving safety) contains express provisions against driving under the influence of alcohol. This message was reinforced in the HOM POL 12-06 Amdt 2 and the 26 November 2015 memorandum. There is no requirement that all promulgation of policy be broadcast in the same manner as the campaign against sexual harassment. Mr. Turkey did not claim that he was not unacquainted with those UNIFIL issuances against drunk driving and he conceded that he had seen posters at UNIFIL publicizing its zero-tolerance driving policies. The Secretary-General has the discretion to take into consideration the circumstances of each case and determine the disciplinary measure that best fits the misconduct in question.

22. The Secretary-General requests that the Appeals Tribunal affirm the contested disciplinary measure imposed on Mr. Turkey and vacate the impugned Judgment in so far as it is inconsistent with the affirmation of the disciplinary measure.

Mr. Turkey's Answer

23. The UNDT's review of the contested decision fell within the parameters set by the Appeals Tribunal. The Dispute Tribunal reviewed the facts as alleged by the Administration and concluded that there was sufficient evidence of inebriation, but it rejected the Administration's assessment of the alcohol level in Mr. Turkey's blood and thought he had a much lower concentration. The Secretary-General does not challenge this specific finding, nor does he deny that Mr. Turkey's separation from service relied heavily on the inaccurate calculation of the alcohol level in his blood. Consequently, the Secretary-General may not take issue with the UNDT's review of the proportionality of the disciplinary sanction against Mr. Turkey.

24. The Dispute Tribunal correctly took issue with the manner in which the Secretary-General had decided to implement the “zero-tolerance” policy by suddenly shifting his practice without considering its impact on affected staff members, by considering any violation of the zero-tolerance standard as warranting separation without proper outreach and dissemination of information about the applicable sanctions in case of violation of the policy, in disregard of the principle of progressive or corrective discipline and graduation in sanction. The only available document outlining the sanctions was HOM POL 12-06 Amdt 2, which envisaged disciplinary proceedings only in respect of the second and third violations. The UNIFIL Administration’s failure to clarify what significantly more severe sanctions than those listed in HOM POL 12-06 Amdt 2 had been installed under the 2015 “zero-alcohol” policy meant that Mr. Turkey was left in the dark as to the possible consequences of his actions. The resulting sanction against Mr. Turkey was clearly unfair, arbitrary and disproportionate and its effects on Mr. Turkey were not corrective, but punitive.

25. The Dispute Tribunal did not err in finding that the absence of prior misconduct in Mr. Turkey’s 32 years of uninterrupted service should be given an important weight as a mitigating factor. The Secretary-General has failed to identify any error in the Dispute Tribunal’s analysis in relation to the short duration of Mr. Turkey’s use of the UNIFIL vehicle, the extent of the damage caused by Mr. Turkey, the potential risk for third parties, the reputation of the United Nations property and the Organization.

26. It is plainly incorrect for the Secretary-General to aver that the UNDT concluded that Mr. Turkey’s actions did not reflect a disregard for safety considerations and formal rules. The Dispute Tribunal precisely indicated that the most flagrant aspect of the present case was Mr. Turkey’s disregard for the formal rules and safety considerations. This is a clear misapprehension of the UNDT Judgment. Therefore, this line of the Secretary-General’s arguments should be dismissed.

27. Mr. Turkey requests that the Appeals Tribunal dismiss the appeal and uphold the impugned UNDT Judgment.

Considerations

28. The UNDT partially granted Mr. Turkey’s application. It decided that Mr. Turkey had been under the influence of alcohol at the time of the accident which amounted to misconduct, but that the disciplinary measure imposed on him was disproportionate.

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 of BrAC. However, relying generally on internet searches and a statement from a Lifeloc representative, the Administration took the contested disciplinary measure on the basis that 1.05 mg/l corresponded to BAC 220.5 mg/100ml, which was more than five times the UNIFIL limit of 40 mg/100ml.

34. The UNDT eventually discounted the Administration's interpretation of the breathalyzer result and considered as more plausible the explanation that the value of 1.05 mg/l pertained to an equivalent of 0.105 mg/100ml BAC.⁶

35. The UNDT noted that this value was about twice above the legal drunkenness in Lebanon (0.5 per cent) and also above the limit of 0.4 per cent under the 2012 HOM POL 12-06 Amdt 2 and the limit of 0.2 per cent under UNIFIL's 2015 zero-alcohol policy. It therefore confirmed that Mr. Turkey's act amounted to misconduct, but on a different and less problematic factual basis than that to which the disciplinary measure referred.⁷

36. By doing so, the UNDT did not exceed the scope of judicial review as defined by the Appeals Tribunal. It reviewed the facts as alleged by the Administration and concluded that there was sufficient evidence of inebriation but, regarding the level of alcohol which was an essential consideration for the imposition of a disciplinary sanction, it retained a much lower calculation.

Proportionality and assessment of the mitigating factors

37. The Secretary-General argues that the UNDT assessed the proportionality of the sanction and the mitigating factors in a way that exceeded the limits set by the Appeals Tribunal in its jurisprudence, and that it substituted his discretion with its own. The Secretary-General also argues that, considering the Charter of the United Nations that requires staff members of the Organization to demonstrate "the highest standards of efficiency, competence and integrity", refraining from misconduct reflects the minimum standard that staff members are expected

⁶ Impugned Judgment, para. 74.

⁷ *Ibid.*, para. 76.

to meet. Consequently, the absence of prior misconduct should not be given such weight that it renders the imposition of separation from service disproportionate.

38. In *Samandarov*, the Appeals Tribunal has clarified the scope of review when the proportionality of the sanction was discussed:⁸

... With regard to the discretion of the Secretary-General to impose a sanction, the UNDT noted that this discretion is not unfettered, in that there is a duty to act fairly and reasonably in terms of which the UNDT is permitted to interfere where the sanction is lacking in proportionality. The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.

... It is undeniably true that the Administration is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc. But due deference does not entail uncritical acquiescence. 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. ... 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.

... The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. ...

39. The UNDT correctly balanced the competing considerations and concluded reasonably that the imposition of the sanction of separation from service with compensation in lieu of notice and termination indemnity was disproportionate to the misconduct. The fact

⁸ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 23-25, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 39-40, 42 and 47; *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 20-21; *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 35.

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 the circumstance that Mr. Turkey had no intention to drive the vehicle outside the Camp, etc. These elements are compliant with the purpose of progressive or corrective discipline.

40. Considering, as submitted by the Secretary-General, that refraining from misconduct reflects the minimum standard that staff members are expected to meet does not mean that a period of 32 years of uninterrupted service without misconduct is not a significant mitigating factor. Mr. Turkey is correct in recalling that the constitutive elements of an offence must be considered separately from mitigating and aggravating factors and in pointing out that the Secretary-General’s argument conflates the constitutive elements of the offence including the “highest standards of efficiency, competence and integrity” with mitigating or aggravating factors.

Disregard for safety considerations or formal rules

41. Finally, the Secretary-General argues that the UNDT erred in finding that there was no formal rule on driving under the influence of alcohol, and that its assertion that driving a car after consuming three or four glasses of vodka did not constitute a flagrant disregard for safety considerations bore little relation to the risks associated with the operation of vehicles while under the influence of alcohol. The UNDT Judgment did not contain such an assertion or statement. On the contrary, the UNDT referred to the formal rules adopted to prohibit driving under the influence of alcohol¹⁰ and stated that Mr. Turkey had “disregarded the formal rules as well as the common-sense safety considerations”.¹¹ We must therefore conclude that the Secretary-General’s argument misapprehends the UNDT Judgment and must be dismissed.

⁹ Impugned Judgment, para. 80.

¹⁰ *Ibid.*, paras. 67-71, referring to Administrative Instruction ST/AI/2010/6 (Road and driving safety), HOM POL 12-06 Amdt 2, and the 26 November 2015 memorandum.

¹¹ Impugned Judgment, para. 79.

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 The UNDT also stated that the 26 November 2015 memorandum did not specify any new administrative sanctions for a violation of the “zero-alcohol” standard.¹³ In accordance with the purpose of progressive or corrective discipline, it was thus lawful and reasonable for the UNDT to state “that drunk driving must be seriously repressed”, but also not to accept “that, absent a clear written pronouncement on the same, any violation of a zero-alcohol standard should result in separation”.¹⁴ The Dispute Tribunal did not err in law in considering that the “zero-alcohol” standard did not preclude a less severe sanction than separation from service.

43. For the foregoing reasons, we find that the Secretary-General has failed to establish that the UNDT made an error of law or fact in its review of the disciplinary measure imposed on Mr. Turkey. It follows that the appeal must be dismissed.

¹² *Ibid.*, para. 67.

¹³ *Ibid.*, para. 69.

¹⁴ *Ibid.*, para. 84.

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