



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LUTTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPEAL AGAINST A
DISCIPLINARY MEASURE**

Counsel for Applicant:

Esther Shamash, OSLA.

Counsel for Respondent:

Stephen Margetts, ALU/OHRM.

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

1. *Employment History*

1.1 The Applicant joined the Organization in July 1989 as a Security Officer. He currently holds a permanent appointment as a Fire Lieutenant with the United Nations Office at Nairobi (UNON). Since April 2007, the Applicant had been on assignment with the United Nations Operations in Cote d'Ivoire (UNOCI) as a Fire Marshall at the G-6 level. He returned to UNON on 2 May 2009.

2. *Background and Facts*

2.1 On Sunday, 11 November 2007, at or around 2200 hours, the Applicant was involved in a traffic accident in Abidjan, Cote d'Ivoire while driving an official UN vehicle bearing license plate UN53794. It was alleged that the Applicant was driving under the influence of alcohol at the time of the accident.

2.2 An Ivorian Police Officer who was in charge of the investigation by local authorities attended the scene of the accident. The Duty Officer of UNOCI's Special Investigation Unit (SIU) also attended the scene of the accident and accompanied the Applicant to the police station where the latter was questioned by the local authorities.

2.3 An investigation into this incident was conducted by SIU which submitted its investigation report No. SIU/AR/134/07 on 19 November 2007. The relevant parts of the report are summarized as follows:

“a. On 11 November 2007 at about 2200 hours, the Applicant was involved in a major traffic accident with a taxi near his local residence. The Applicant swerved into the taxi's lane while attempting to avoid a pothole, which then caused a "head on collision”;

b. The collision then propelled the taxi into the gate of a nearby property. The accident caused extensive damage to the taxi, but only minimal damages to the UN vehicle, namely a cracked windshield, front left bumper dents, and a broken left fog light lens;

c. After the accident, the taxi driver complained of back, hand and leg pains;

d. based on multiple witnesses' statements, the Applicant was observed at the time of the accident as:

- i. incoherent while answering questions;
 - ii. incapable of filling out the UNOCI Drivers' Accident Report;
 - iii. unsteady on his feet, and
 - iv. noisy and smelling strongly of alcohol;
- e. After staying at the police station, where he appeared to `sober up,' the Applicant was allowed to return to his residence, escorted by an officer from the Security Intervention Team; and
- f. It was concluded by the SIU that the Applicant had been operating a UN vehicle while intoxicated, which subsequently caused a major traffic accident resulting in extensive vehicular damages. This conclusion was based on witness observations and accepted

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after the impact and the sketch showed the UN vehicle on the correct side of the road.

(vii) In regard to the allegation that he was incoherent, unsteady and unable to write down his account of the accident, this type of behaviour is commonly associated with the shock of being involved in an accident. Matters were made

he was feeling shaky. The car was parked very near the station. He was allowed to drive home after writing down his statement.

(xi) He became tongue-tied, was not steady in his speech at the time of the accident and was uncomfortable and feeling bad. As people were raising their voices when he tried to give explanations, he became irritated. To the suggestion that the police had stated that he was incoherent, incapable of writing, unsteady on his feet and noisy, the Applicant answered that he was talking in a loud voice and was using signs and that he did raise his voice due to a communication problem. He conceded that he was angry.

(xii) He could not remember whether he was unsteady on his feet. He was not behaving abnormally and was trying to speak as clearly as he could to

(xv) Other staff members in UNOCI have been involved in fatal accidents yet matters were resolved at the mission level and their licenses were reinstated and it is unfair and discriminatory that he should be singled out for a minor accident with unfounded allegations that the Administration was unable to prove.

(xvi) His character has been defamed due to the unfounded charge of driving under the influence of alcohol and that he has been greatly embarrassed.

4. Administrative Decision and JDC Review

4.1 In a memorandum dated 14 January 2008, the Applicant was informed that his UNOCI Driving Permit and driving privileges had been permanently withdrawn based upon the findings of the security investigation and final report. By another memorandum dated 23 September 2008, the case was referred to a Joint Disciplinary Committee (JDC) for advice as to what disciplinary measures, if any, should be taken in connection with the case.

4.2 An ad hoc JDC Panel (“the Panel”) was established on 19 March 2009 to review this case. The Panel held a hearing and two sessions respectively on 8 April and 15 April 2009. The Panel had at its disposal the written presentations submitted by the parties and the statements made during the Panel’s hearing. The Secretary-General was represented by Mr. Dietrich, and the Applicant was represented by a member of the now defunct Panel of Counsel.

4.3 The Panel submitted its report on 16 June 2009. Its conclusions and recommendations read as follows:

“Conclusions and Recommendations

31. Having reviewed the facts in light of UNAT Judgment No. 1090, the Panel concluded that there was no adequate evidence that the Applicant was driving under the influence of alcohol on the day of the accident. Having so concluded, the Panel could not find that the Applicant breached his duty to exercise reasonable care while driving the UN vehicle. The Panel further concluded that the general charge alleging that the

Applicant acted in a manner unbecoming to a UN staff member was not adequately substantiated by the available evidence.

32. Based on the foregoing conclusions, the Panel unanimously recommended that all charges against the Applicant be dropped.”

4.4 On 24 June 2009, the Deputy Secretary-General informed the Applicant that, “[w]ith respect to the charge of driving under the influence of alcohol, the JDC considered that based on the jurisprudence of the UNAT, this charge was not

thereof, both substantive and procedural irregularities were committed in charging him with misconduct.

(ii) The failure of the Administration to carefully investigate the facts of his case demonstrated negligence in the conduct of the investigation. The reliance by the Administration upon the findings of the procedurally defective investigation denied the Applicant due process. As a result of the substantive and procedural irregularities committed by the Administration in relying upon the flawed findings and conclusions contained in the SIU investigation report, the Applicant submits that he suffered material, professional and moral damage.

(iii) As a result of the withdrawal of the UNOCI driving permit and privileges, he had to perform his duties, including responding to calls at night, without the aid of UN furnished transport and at his own expense until his departure from UNOCI on 2 May 2009 – a period of 17 months and twenty one days.

(iv) His career advancement and mobility was impeded in that when he applied for the post of Fire Safety Assistant at the FSL 4/FSL 5 level with UNTSO, he was informed by the UNOCI Personnel Officer for international recruitment that owing to the charges against him, he could not be considered for a position until the matter was resolved and that even though he was qualified for the post, he was never afforded an opportunity for consideration.

(v) Owing to the stigma caused by being perceived as irresponsible for having been allegedly drunk

that the Administration charged the Applicant with misconduct and that even though the Respondent was aware of the principle articulated in *Berg*¹, that a charge of driving under the influence of alcohol cannot be sustained in the absence of a breathalyzer test, the Respondent was faced with an abundance of evidence in the investigation report which indicated that the Applicant was under the influence of alcohol at the time of the

the Respondent observed due process and acted in good faith at all times. The Respondent requests the Tribunal to reject the Applicant's pleas in their entirety.

7. Considerations

7.1 The Investigation

7.1.1 At the investigation stage, the evidence that was relied on to establish that the Applicant was driving under the influence of intoxicating liquor was not based on any scientific examination but emanated from the impression formed by investigators who saw the Applicant immediately after the accident. The Tribunal has set out a verbatim translation of a number of statements recorded in French by investigators with the original in French being appended in footnotes.

7.1.2 An SIU Security Officer ("SIU 1") stated in a statement recorded on 19 November 2007, that the Applicant on being interrogated by the police was not in a normal state. He was giving incoherent answers and he appeared to be under the influence of alcohol. He asked the Applicant to write down the circumstances of the accident but he was unable to do so.² It is to be noted that the Security Intervention Team

Chief of his group and to ascertain that fact, he approached the Applicant to talk to him and in fact he smelled of alcohol, presumably it was liqueur⁴.

7.1.4 Another SIT Officer (“SIT 2”) stated in a statement recorded on 16 November 2007, that after the examination of the spot of the accident, he asked his colleague SIT 1 to accompany the Applicant to the police station on board the UN vehicle involved in the accident. He added that it was heartbreaking to see how difficult it was for the Applicant to manoeuvre his vehicle. Once they reached the police station his colleague told him that it was with much difficulty that they managed to get to the station because the staff member was not driving in a straight forward manner⁵.

7.1.5 SIT 2 accompanied the Applicant in the UN vehicle to his residence. SIT 2 stated in an undated statement that on the return trip they were very scared on account of the manner of driving of the staff member. He would just speed up when asked to slow down⁶. He also added that the Applicant was talking incoherently and had even forgotten his mobile phone number.

7.1.6 A third SIT Officer (“SIT 3”) stated in a statement recorded on 16 November 2007, that when he went to the spot of the accident, the driver (Applicant) smelled of alcohol when he was talking⁷. He added that on the way to the police station the Applicant who was still under the influence of alcohol was driving badly⁸.

7.2 The recommendation that disciplinary proceedings be initiated against the Applicant

7.2.1 It was based on the evidence gathered in the course of the investigation which consisted of the statements of the SIT Officers and the damage to the two vehicles that

⁴ « Il faut noter que Me [Applicant] était dans un état d'ébriété très avancée, c'est le premier renseignement que le chef de groupe m'a donné et pour le vérifier je me suis rapproché de lui pour dialoguer effectivement il se dégageait une odeur d'alcool de la bouche sûrement de la liqueur ».

⁵ « Mais c'est avec un pincement au coeur que je le voyais manoeuvrer difficilement son véhicule. Arrivé au

the Director/DFS recommended that disciplinary proceedings be initiated against the Applicant. The pieces of evidence on which the Director/DFS relied upon were that the Applicant was incoherent in his answers to questions; he was unsteady while standing on his feet; he was boisterous and had a strong smell of alcohol in his breath; he was

What then should be standard of the evidence that should satisfy a head of office or a responsible officer that a report of misconduct is well founded?

7.2.4 The provisions contained in the Administrative instruction indicate that it is for the head of office or the responsible officer to decide whether evidence revealed by the investigation *appears to indicate that the report of misconduct is well founded*. The head of office or responsible officer is vested with a wide discretion at this initial stage. That discretion, however, is to be exercised judiciously in the light of what the investigation has revealed. The discretion cannot and should not be used capriciously. It is incumbent on the person vested with that discretion to scrutinise the evidence carefully before deciding whether any act of misconduct as defined has been committed¹³. A judicious exercise of the discretion requires a proper analysis of the meaning of the words *appears to indicate that the report of misconduct is well founded* in regard to the evidence.

7.2.5 The European Court of Human Rights has stated that *having reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence*.¹⁴ It is the view of the Tribunal that the same approach should be adopted in the exercise of the discretion given to the head of office or the responsible officer in determining whether the report of misconduct is well founded following the investigation. The words *well founded* can be assimilated to grounded suspicion, reasonable suspicion or probable cause. The decision of the head of office or the responsible officer is not the end of the matter. When the ASG/OHRM receives the report, it is for him/her to decide whether the matter should be pursued on the basis of the evidence presented. The ASG/OHRM is also vested with a discretion that should be exercised judiciously. He/she cannot be seen rubber stamping the decision of the head of office or responsible officer.

¹³ ST/AI/371, 2 August 1991, Section 2.

¹⁴ Fox, Campbell and Hartley v. United Kingdom, (1990) 13 EHRR 157, para.32.

7.3. International standards for law enforcement agents determining "sobriety status" in cases of impaired drunk driving

7.3.1 Since the Respondent made reference to “internationally accepted standards used by law enforcement agents (including United Nations security personnel) to determine sobriety status” in charging the Applicant with

- a) The person was drunk;
- b) Was in control of a motor vehicle;
- c) Was over the legal limit if they submit to the test;

“Breath smelled strongly of alcohol; - Speech was slurred; - Eyes were glazed or bloodshot; - Unsteady on their feet; and -Belligerent, abusive or uncooperative.”

The SIU investigators concluded, from what appears to be their subjective observations, that the Applicant was indeed intoxicated at the time of the accident. As the Applicant was under shock and is diabetic, it would have been appropriate to test his behaviour in the light of that health condition.

7.3.4 The Tribunal takes note of the principle enunciated in *Berg*, that is, that a charge of driving under the influence of alcohol cannot be sustained in the absence of breathalyzer test. In the Tribunal’s view, in addition to a breathalyzer test, other tests such as a blood analysis test (blood alcohol concentration test), urine analysis and overall behaviour may be utilized provided that in the latter case those behaviours tested comply with international standards.

7.3.5 At the time of the accident, what the investigators were relying on first and foremost was the smell of alcohol coming from the Applicant. No evidence was led to establish whether the investigators were experts at detecting the smell of alcohol consumed. It never occurred to the investigators that there may be many substances that have a similar smell to that of alcohol that people consume. None of the investigators who first encountered the Applicant was asked about his expertise on the smell of alcohol. It was a case of once the smell of alcohol was detected, there could not be any other avenues to be explored except to pin down the Applicant to drunken driving.

7.3.6 Secondly, a smell of alcohol by itself, if proved by cogent evidence, cannot establish in an irrefutable way that a person was under the influence of alcohol. The investigators sought to link that alcohol smell to the incoherent behaviour of the Applicant on the day of the accident, his unsteadiness on his feet; his illegible handwriting; his loud voice; his manner of driving to the police station after the accident. A look at the statements the Applicant wrote on 11 November 2007 and 15 November 2007 shows that his handwriting is not the same. At the hearing on 12 February 2010, the Applicant explained this difference by stating that on 11 November 2007 he had no glasses whereas he had them on 15 November 2007.

7.3.7 The Tribunal notes with concern that the SIU investigators allowed the Applicant to drive to the police station in spite of his alleged drunken condition. It was precisely because of his condition related to alleged consumption of alcohol that the Applicant was charged with misconduct. By allowing a person in his condition to drive the investigators exercised poor judgment. In this respect, the Tribunal refers to the Special Investigations Unit's Standard Operations Procedures ("SOP") annexed to the Respondent's submission of 19 March 2010 (See paragraph 7.3.2 below) which states, inter alia, that,

"in all cases of Impaired driving Security Officers are empowered to temporarily withdraw ONUCI driving permits of both Military/UNPOL and Civilian personnel. They may also confiscate the keys and impound the vehicle."

By their actions, the SIU investigators acted in blatant breach of the UNOCI SOPs and undermined their own impression that the Applicant was drunk at the time of the accident.

7.3.8 The Applicant stated that he has been

9. Remedy

9.1 In view of the Tribunal's findings, the Parties are directed to provide written submissions as to the appropriate relief that should be ordered by or before close of business Friday, 9 April 2010.

(Signed)

Judge Vinod Boolell

Dated this 31st day of March 2010

Entered in the Register on this 31st day of March 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi