



**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1090

Case No. 1185: BERG

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha Echols; Ms. Brigitte Stern;

Whereas at the request of Njål Berg, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 March 2001, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 26 April 2001 the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal:

"

...

11. ... *to find*:

(a) that the ad hoc Joint Disciplinary Committee's (JDC) findings ... [were] wrong and be reversed...

...

12. ... *to order*:
  - (a) that the written censure dated 11 July 2000 be withdrawn.
  - (b) that the demotion dated 11 July 2000 be revoked and that the Applicant be reinstated to the FS-4 level.
  - ...
  - (d) that the Applicant be awarded as costs the sum of \$7,500 in legal fees plus \$500 in expenses.
13. Further and in the alternative, ... *to order*:
  - (a) that the recommendations of the JDC were too severe ... and that the Secretary-General ... substitute a more lenient disciplinary measure."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2001 and periodically thereafter until 31 January 2002;

Whereas the Respondent filed his Answer on 31 January 2002;

Whereas the Applicant filed Written Observations on 10 July 2002;

Whereas on 19 September 2002, the Applicant submitted an additional communication;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on 31 August 1982 on a one-year fixed-term appointment as a Field Service Security Officer at the FS-2 level with the United Nations Truce Supervision Organization in Jerusalem. At the material time, the Applicant was a Procurement Assistant at the FS-4 level with the United Nations Peace Keeping Force in Cyprus (UNFICYP).

In 1995, the Secretary-General instructed the Applicant to undergo "treatment to eradicate his alcohol addiction" or face separation from service. The Applicant complied.

On 19 November 1998, the United Nations Military Police (UNMP), issued a report which stated that, on 8 November 1998, while driving his private car in the United Nations Protected Area in Nicosia, Cyprus, the Applicant failed to stop when requested to do so by the UNMP. The report further stated that, the Applicant had been observed driving at speeds of over 90 km/h and had subsequently lost control of his vehicle. Additionally, some of the UNMP officers reported observing signs indicating that the Applicant had consumed alcohol and that he "appeared to be drunk". This report was subsequently submitted to the Applicant, who denied the allegations therein on 3 December 1998.

On 4 August 1999, the Applicant was presented with allegations of misconduct and charged with driving dangerously while under the influence of alcohol and refusing to stop when requested to do so by the UNMP. On 9 September 1999 the Applicant replied to these charges.

On 6 March 2000, the Assistant Secretary-General for Human Resources Management referred the Applicant's case to an ad hoc JDC. On 23 June, the ad hoc JDC submitted its report. Its findings and measures read, in part, as follows:

## "FINDINGS

...

56. ... [T]he [ad hoc] JDC has found that [the Applicant] failed to meet the standards of conduct expected of international civil servants by failing to stop his automobile when requested to do so by the [UNMP] and by driving dangerously while apparently under the influence of alcohol and losing control of his vehicle.

...

58. The [ad hoc] JDC considers that the refusal by [the Applicant] to stop his vehicle constitutes a 'failure by a staff member to comply with his obligations under ... other administrative issuances' ... Moreover, driving under the influence of alcohol and speeding are found to be 'acts or behaviour that would discredit the United Nations' ...

...

## MEASURES

60. The [ad hoc] JDC wishes to advise the Secretary-General to apply disciplinary measures ... in the form of a written censure ... plus demotion of [the Applicant] ... by one grade ...

61. ... In reaching its findings ... the [ad hoc] JDC has *not* been influenced by any past events ... It does however consider that in deciding upon the measures which should be recommended following the findings in this case, weight should be given to the Secretary-General's previous instruction to [the Applicant] to take certain steps ... [to] ensure that he would not be involved in further incidents concerning alcohol and driving ... [T]he fact that [the Applicant] has not remedied this problem and has again engaged in similar conduct is of relevance in deciding upon the measures advised."

On 11 July 2000, the Under-Secretary-General for Management transmitted a copy of the [ad hoc] JDC report to the Applicant and informed him as follows:

"...

The Secretary-General has given careful consideration to the findings of the Committee and he is in agreement with these findings. He has concluded that your behaviour constituted misconduct within the meaning of Staff Rule 110.1. He has accordingly decided to accept the recommendation of the Committee and impose upon you the disciplinary measure of a written censure in accordance with Staff Rule 110.3(a)(i). This letter constitutes the written censure and is also to serve as a warning that any recurrence of such behaviour will not be tolerated. A copy of this letter will be placed in your official status file. The Secretary-General also accepts the Committee's recommendation for demotion by one grade to the FS-3 level, in accordance with Staff Rule 110.3(a)(vi)...

..."

On 26 April 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The findings and decisions of the ad hoc JDC are based on mistakes of fact and improper interpretation of the law.
2. The ad hoc JDC erred in its understanding of what constitutes misconduct.
3. The disciplinary process violated the Applicant's right to due process.
4. The penalty is disproportionate to the offence.

Whereas the Respondent's principal contentions are:

1. The Applicant's censure and demotion constitute a proper exercise of the Respondent's authority.
2. The Applicant failed to meet the standards of conduct required of international civil servants.
3. The Applicant failed to provide any substantive basis for his allegations of prejudice.

4. The ad hoc JDC report was based on established facts and is legally sound.
5. The Applicant was accorded full due process.

The Tribunal, having deliberated from 5 to 25 November 2002, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 11 July 2000, accepting the ad hoc JDC's recommendation and imposing upon him a written censure and a demotion by one grade, on the grounds of misconduct incompatible with the standard of conduct expected of a United Nations staff member. The Applicant claims that he did not violate the Staff Regulations and Rules and that the ad hoc JDC erred in its findings.

II. The Applicant began his career with the United Nations in 1982 as a Field Service Security Officer at the FS-2 level. In October 1994, he was transferred to the UNFICYP, where he served for six years. Prior to his demotion, the Applicant was a Procurement Assistant, at the FS-4 level.

In November 1998, the Applicant was notified that, according to the UNMP, on 8 November 1998, he had violated UNMP instructions and had been observed driving at excessive speeds and skidding off the road, colliding with an oil drum. The UNMP officers also reported that the Applicant showed signs of alcohol consumption.

On 3 December 1998, the Applicant denied that he was driving dangerously or intoxicated, though he admitted to consuming some alcohol at a United Nations function. He further indicated that when he was asked by the UNMP to take a breathalyser test, he refused to do so because he believed that the UNMP did not have jurisdiction over him and that if he did not rinse his mouth prior to taking the test, tobacco or food stains could alter the results. The Applicant also admitted that he might have been exceeding the speed limit, but denied seeing the two UNMP vehicles with their blue flashing lights following him.

On 6 March 2000, the Applicant's case was referred to an ad hoc JDC. The ad hoc JDC recommended that the Applicant be demoted by one grade to the FS-3 level and that a written censure be imposed on him. On 11 July 2000, the Applicant was informed that the Secretary-

General concurred with the ad hoc JDC's recommendations, which were to be implemented with immediate effect. This Application followed.

III. The Applicant claims that he did not violate the Staff Regulations and Rules and that the Respondent's decision, to demote him and to issue a written censure, was too severe. In his Application, he challenges the ad hoc JDC's findings and repeats his denial of the accusations, as he did on 3 December 1998. The Respondent claims that the Applicant's behaviour constituted misconduct within the meaning of staff rule 110.1 and the decision to demote him by one grade did not violate his rights. Based on the ad hoc JDC's findings, the Respondent further claims that the Applicant failed to meet the standards of conduct expected of international civil servants and consequently, the censure and demotion by one grade were a proper exercise of the Respondent's authority and discretionary powers.

IV. This case concerns the imposition of a disciplinary sanction. In its jurisprudence, the Tribunal has consistently held that the Secretary-General has wide discretionary powers in disciplinary matters, including the determination of what constitutes misconduct. The Tribunal has repeatedly affirmed that the United Nations Charter and the Staff Regulations vest in the Secretary-General the authority to determine whether a staff member has met the required standards of conduct. The choice of the disciplinary measure to be imposed, pursuant to Staff regulation 10.2, falls within the Secretary-General's discretionary powers. (Judgements No. 424, *Ying* (1988); No. 425, *Bruzual* (1988); No. 479, *Caine* (1990); No. 515, *Khan* (1991); and No. 542, *Pennacchi* (1991).)

However, this discretionary power is not unlimited; it is subject to the Tribunal's review, though the latter's competence to examine such decisions is limited to, amongst other criteria, determining whether the Respondent failed to accord due process to the affected staff member, whether the Secretary-General's actions were vitiated by prejudice, extraneous factors, significant procedural irregularity, or by a significant mistake of fact. (See Judgements No. 210, *Reid* (1976); No. 300, *Sheye* (1982); and No. 993, *Munansangu* (2001).)

In Judgement No. 941, *Kiwanuka* (1999), the Tribunal established some guiding criteria that must be met in order for a disciplinary measure not to be considered arbitrary. They are:

"(i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity ...; (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. This listing is not intended to be exhaustive."

If any of these criteria is not met, the Tribunal should then consider the disciplinary measure taken by the Administration as unjustified and consequently proceed to remedy it. (See Judgement No. 1011, *Iddi* (2001).)

V. The Tribunal finds that in this case, the Administration based its decision, at least partially, on unsubstantiated facts. The Tribunal has previously held that "disciplinary proceedings are not of a criminal nature, but rather they are administrative proceedings, regulated by the internal law of the Organization". (Judgement No. 1022, *Araim* (2001).) Consequently, the Administration is not required to prove its case beyond reasonable doubt, but only to present adequate evidence.

The ad hoc JDC found that the Applicant did not meet the standards of conduct expected of an international civil servant on three counts:

1. Failing to stop his car when requested to do so by the UNMP;
2. Driving at excessive speeds while being pursued by the UNMP and losing control of his vehicle;
3. Apparently driving under the influence of alcohol.

While there is no disagreement that the Applicant lost control of his vehicle, the other counts were strongly denied by the Applicant.

The Tribunal accepts the ad hoc JDC's conclusions regarding the Applicant's failure to stop his vehicle when requested to do so and regarding his driving at excessive speeds. The ad hoc JDC based these findings on adequate evidence, primarily the Applicant's acknowledgement that a vehicle approached him on the airport runway, which is a restricted area within the United Nations Protected Area, not commonly trafficked by civilian cars, especially not at night. Under the circumstances, the Applicant should have realized that this had to have been a UNMP vehicle. The ad hoc JDC also accepted the evidence given by the UNMP officers, that they used

blue lights to indicate their identity and to request the Applicant to stop. The ad hoc JDC preferred the UNMP testimony over that of the Applicant, rejecting his claim that he didn't recognize the UNMP and that they did not have their blue lights on. The ad hoc JDC also noted that the use of blue lights, as reported by the UNMP officers, was consistent with UNMP practice.

Likewise, as concerns the charge of speeding, the ad hoc JDC relied on adequate evidence to support their finding, primarily that of the officers who were driving behind the Applicant, as well as photographs, which indicated that the Applicant was unable to stop despite beginning to brake a considerable distance before the corner (thus the skid marks); and the photographs indicating his passage and braking beginning on the wrong side of the road as well as the car's final resting place, some distance beyond a ditch, which a braking car could have cleared only at high speeds. The Tribunal notes that these observations were supported by the ad hoc JDC's personal impressions from viewing the site.

However, as regards "driving while apparently under the influence of alcohol", the Tribunal finds that the ad hoc JDC did not base its finding on adequate evidence. The ad hoc JDC based this finding on documentation submitted, including the Applicant's admissions that he had consumed alcohol during the day, and accepted the officers' observations regarding the smell of alcohol on the Applicant's breath. The Tribunal notes that the ad hoc JDC did not make a finding as to the amount of alcohol the Applicant actually consumed, nor the level of his impairment while driving, but only that he was driving "while *apparently* under the influence of alcohol". (Emphasis added.)

The charge of driving while under the influence is a very serious one which, had it been proven, would have warranted severe disciplinary measures. The Tribunal cannot find that the Respondent met the burden of proof on this count. The smell of alcohol on the Applicant's breath, even combined with his admission to drinking earlier in the day and with some evidence of slurred speech, does not constitute "adequate evidence", sufficient to prove this charge. Additionally, since the Applicant was not required under the Organization's rules to take a breathalyser or a blood test, the fact that he refused to take one cannot be held against him. The Tribunal notes that the ad hoc JDC's finding was of driving while *apparently* under the influence, i.e., even the ad hoc JDC hesitated to unequivocally pronounce that the Applicant was indeed



intoxicated while he was driving. The Tribunal therefore concludes that the charge of driving while under the influence of alcohol has not been proven.

VI. In the conclusion of its report, the ad hoc JDC explains that in deciding the measures to be recommended, weight was given to "the Secretary-General's previous instruction to [the Applicant] to ... ensure that he would not be involved in further incidents concerning alcohol and driving" and that since the Applicant was once again involved in such a related incident, it would have a bearing on the measures to be taken. This clearly implies the reasoning behind the very severe disciplinary measures recommended by the ad hoc JDC and imposed by the Secretary-General on the Applicant. However, consequent to the finding that the charge of driving while under the influence of alcohol has not been proven, the very ground for suggesting a harsher penalty is no longer valid; there is no issue of engaging in conduct about which the Applicant had previously been warned.

VII. The Tribunal therefore finds that the disciplinary measures of written censure and one grade demotion which was not limited in time, imposed on the Applicant, were disproportionate to the proven, established facts, and "the grounds invoked by the Respondent to justify a more severe penalty ... are inappropriate" (see Judgement No. 525, Yougbaré (1991)). The Respondent's actions exceeded the scope of his broad discretionary powers.

VIII. Having reached the conclusion that discipline was justified but that a written censure plus a permanent demotion was disproportionate, the Tribunal must determine the proper remedy. This brings the Tribunal to an interpretation of its Statute that limits the options available and, in this particular case, leads to an anomalous result.

The Tribunal is bound by the language of article 10 of its Statute, which limits the relief it may offer to an order "rescinding ... the decision contested or the specific performance of the obligation invoked". The Tribunal notes its jurisprudence according to which, when ruling in disciplinary cases, the Tribunal will not substitute its own judgement about the appropriate disciplinary measure for that of the Secretary-General. (See *Ying, Khan, Pennacchi* and *Kiwanuka, ibid.*) Whichever of the two article 10 remedies is selected, the Tribunal must fix, as an alternative to compliance with the Order, an amount of compensation that may be paid by the

Secretary-General if he decides, "in the interest of the United Nations", that a monetary settlement of the dispute is preferable to carrying out the Order to rescind the decision in favor of a staff member or to perform the obligation resulting from a violation of the Organization's own rules and regulations. The Tribunal is aware that the Respondent frequently chooses to pay compensation instead of complying with the Order, a result the Tribunal questions under the special circumstances of this case.

The Tribunal does not believe that justice requires that the demotion be completely undone. Also, under the circumstances of this case, when discipline was proper, it seems anomalous to offer compensation to the Applicant. Compensation is not part of a just and proportionate result, given the circumstances of the Applicant's behavior. While the Tribunal is reluctant to award any compensation in the present case, it is left with no alternative. Were it not constrained as described, the Tribunal would find that the conduct at issue, and justice, warrant an Order that the Secretary-General impose a penalty of one grade demotion for a period of not more than two years, after which the Applicant would be reinstated in his previous grade, thereby affecting his income and career for a specific period of time rather than his entire professional future.

IX. For the foregoing reasons, the Tribunal:

1. Decides that the penalty of a written censure is within the Secretary-General's discretion;
2. Decides that the penalty of demotion by one grade, without any time-limit, is a disproportionate penalty; and therefore
3. Orders that the Applicant be given priority consideration for any position at the FS-4 level for which he applies and for which he is qualified;
4. Orders that the Applicant be given as compensation, on a monthly basis, an amount equivalent to the difference between the remuneration he receives at his present grade and the remuneration he would have received at the level he held prior to his demotion, starting on the date of circulation of this Judgement, until such time as he is promoted;
5. Rejects all other pleas.

(Signatures)

Mayer GABAY  
President

Marsha ECHOLS  
Member

Brigitte STERN  
Member

New York, 25 November 2002

Maritza STRUYVENBERG  
Executive Secretary