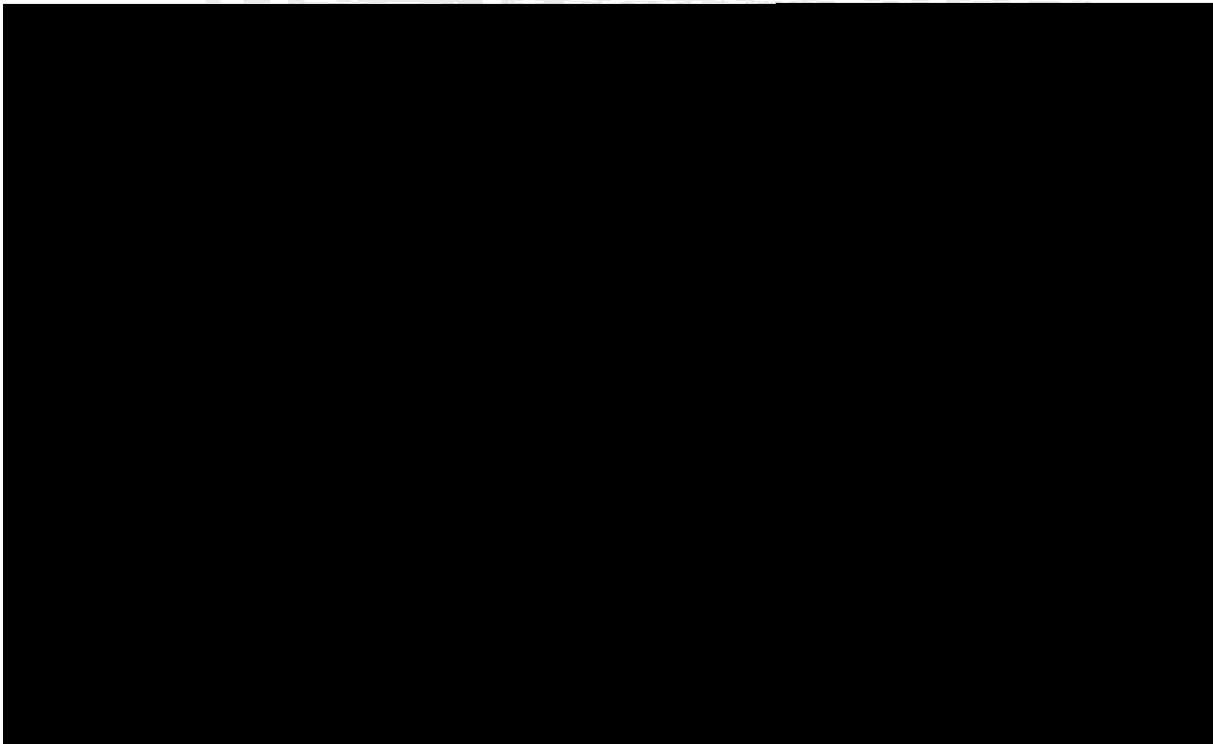




Judgment No. 2017-UNAT-738



JUDGE RICHARD LUSSICK , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/177, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 26 September 2016, in the case of *Bertrand v. Secretary-General of the United Nations*. Mr. Peter Jassen Bertrand filed his appeal on 7 November 2016. The Secretary-General filed his answer on 10 January 2017.

#### Facts and Procedure

2. Mr. Bertrand first joined the United Nations in August 2007. In 2014, he was assigned to the Close Protection Unit, Security Section, United Nations Stabilization Mission in Haiti (MINUSTAH), as an FS-4 level Security Officer. He served in that capacity until he was separated on 16 February 2016 upon the imposition of a disciplinary sanction, which was based on a finding that Mr. Bertrand had engaged in misconduct on 14 September 2015.

3. The following facts regarding the incident

... [Mr. Bertrand] ... waited at the Executive Villa restaurant for approximately 50 minutes for his food to arrive as there was some mix-up in the kitchen. While he waited, the MP5 submachine gun remained in the trunk of the vehicle. He ate quickly and then decided that he needed to get food for the following day, in case he was called during the night. He left the Executive Villa at about 8:30 p.m. and went straight to a 5 Coins Restaurant on Route des Frères. As he was unable to get food there, he called another 5 Coins Restaurant, on Carrefour Fleuriot, to place an order. He went there at around 8:50 p.m. to pick up the food that he ordered. [Mr. Bertrand] ... was aware that the second 5 Coins Restaurant was, security-wise, “not a good place to be during the night, really.” He parked his car in front of the restaurant. When he parked the vehicle, he did the same thing as he had in front of the Executive Villa restaurant—he went out, pressed the duffle bag with the MP5 submachine gun against his body so no one could see what was inside, went to the back of the vehicle, and put it in the trunk. [Mr. Bertrand] was inside the 5 Coins Restaurant for about four minutes. [I]n addition to the MP5 submachine gun and [60 rounds of] ammunition, he was mindful that his own vehicle could also be stolen, which is why, while he waited, he occasionally looked outside at his car and saw nothing suspicious. After [Mr. Bertrand] obtained the food and went back to the vehicle, he noticed that one of the rear windows was broken and that the duffle bag was missing. [Mr. Bertrand] promptly reported the incident. The stolen items were not recovered despite [his] efforts.

4. By memorandum dated 13 November 2015, Mr. Bertrand was informed of the allegations of misconduct against him, including that he had violated Staff Regulation 1.2(q); Staff Rule 1.7; Section 17(c) of MINUSTAH Internal Circular No. DMS/011/2015 (Use of MINUSTAH Vehicles); and Annexes B, D, and E of the Standard Operating Procedure (SOP) 002-2008, MINUSTAH Security Section Weapons Policy (25 July 2008) (MINUSTAH Weapons Policy). Mr. Bertrand was asked to respond to the allegations and was informed that he could avail himself of the assistance of the Office of Staff Legal Assistance or an outside counsel.

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with compensation in lieu of notice and with termination indemnity, pursuant to Staff Rule 10.2(a)(viii).

7. The relevant portions of the 12 February 2016 letter were as follows?

I write to convey the outcome of the disciplinary process initiated by allegations of misconduct dated 13 November 2015, in which it was alleged that, on 14 September 2015, you left a handheld radio and a submachine gun with two magazines and approximately 60 rounds of ammunition, all of which were UN property and had been issued to you in your role as Security Officer, unattended in a UN vehicle that you had been operating and that these items were stolen and have not been recovered. ...

In your Comments, you stated that upon completion of your round of duty on 14 September 2015, you chose not to leave the items at issue at MINUSTAH Headquarters and chose to take them with you so as to reduce your commute to work the following morning by at least 45 minutes. You explained that you had to report for duty at the residence of the Special Representative for the Secretary-General (SRSG) on the following morning and you explained that had you left the

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You stated that while you recognized the gravity of your conduct, you did “not believe that it was a deviation so flagrant or outrageous that it constituted a wilful and extreme or reckless failure to abide by the reasonable person standard.” ... You also stated that this was “the sole blemish on an otherwise spotless record” and that your conduct was negligent but not grossly so.

Based on the entire dossier, the Under-Secretary-General for Management has concluded that it is established, by clear and convincing evidence, that on 14 September 2015, you left a handheld radio and a submachine gun with two magazines and approximately 60 rounds of ammunition, all of which were UN property and had been issued to you in your role as Security Officer, unattended in a UN vehicle that you had been operating and that these items were stolen and were not recovered.

Despite your contentions that your conduct amounted to negligence, the fact remains that you did not comply with policies regarding property of the Organization, which you acknowledged having received, read, and understood, and your failure to comply with these policies resulted in the loss of a deadly weapon with ammunition in an area that you knew to be extremely volatile with a recent history of violence. The fact that a semi-automatic weapon and corresponding ammunition is no longer in the control of the Organization and that this has occurred as a Security Officer’s attempt to reduce his commute time is unconscionable.

The Under-Secretary-General for Management has further concluded that your actions were wilful, namely your failing to store the MP5 according to the MINUSTAH Security Section Weapons Policy at

The Under-Secretary-General for Management has decided to, pursuant to Staff Rule 10.1(b), require that you reimburse the Organization in an amount equivalent to USD 669.05, the full assessed value of the loss to the Organization attributable to the items lost and impose on you 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) with effect from your receipt of this letter.

In accordance with Staff Rule 10.3(c), you may submit an application challenging the imposition of this disciplinary measure directly to the UNDT, in accordance with Chapter XI of the Staff Rules.

8. On 16 February 2016, Mr. Bertrand was separated from the Organization with compensation in lieu of notice and with termination indemnity.

9. On 12 May 2016, Mr. Bertrand filed an application with the Dispute Tribunal contesting the imposition of the disciplinary sanction on the ground that it was “unduly harsh, absurd and disproportionate because the Administration failed to consider relevant mitigating factors”.<sup>3</sup> He neither disputed the facts on which the disciplinary measure was based nor the conclusion that they constituted misconduct. Mr. Bertrand sought retroactive reinstatement and requested that the disciplinary sanction imposed be replaced with a written censure or, alternatively, he be paid one year’s net base salary.

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The Secretary-General's Answer

17. The Secretary-General submits that the UNDT correctly determined that the imposed disciplinary sanction was within the range of reasonable disciplinary options available to the Administration, was based on reasonable conclusions regarding Mr. Bertrand's misconduct, and was, therefore, proportionate. Contrary to Mr. Bertrand's assertions, the UNDT correctly applied the applicable regulatory framework and carefully considered the evidence and other information before it, including the surrounding circumstances, the information provided by Mr. Bertrand, and relevant mitigating factors.

18. Mr. Bertrand has not established any errors warranting reversal of the impugned Judgment. Mr. Bertrand advances arguments similar to those raised before the UNDT. They are without merit and constitute an attempt to reargue his case.

19. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgment and dismiss the appeal in its entirety.

Considerations

*Preliminary matter*

20. We deal first with a preliminary matter. Mr. Bertrand has requested an oral hearing for the reason that "[f]acts are in dispute and [the] decision may have an important impact on the career and life of [Mr. Bertrand]". We note that he submitted to the UNDT that he was not contesting the facts on which the disciplinary measure was based or the determination that such facts legally amounted to misconduct. He submitted to the UNDT that the sole issue for determination was whether the imposed disciplinary measure was proportionate to the misconduct. We consider that the submissions of the parties adequately set out the questions to be decided on appeal. An oral hearing would therefore not assist in the expeditious and fair disposal of the case.<sup>7</sup> Mr. Bertrand's request is accordingly refused.

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<sup>7</sup> Article 18(1) of the Rules of Procedure of the Appeals Tribunal; see also *Choi v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-651, para. 17.





26. Firstly, he submits that the UNDT erred in finding that he had not exercised reasonable care with regard to the weapon by expecting the same standard of care from him as from the Operations Response Unit supervisor.

27. There is nothing in the UNDT Judgment which could support this submission. The UNDT made no such comparison. The UNDT identified as instances of Mr. Bertrand's lack of reasonable care, his actions in driving home with the MP5 submachine gun in his car when he did not have any specific security duty that night, and creating a situation where the weapon was left unattended.

28. Mr. Bertrand further submits that it was not clear to the UNDT whether he was on duty or off duty that night, and therefore it erred in concluding that he should not have driven home with the MP5 machine gun in his car as he was not performing any specific security duty that night. We find this submission to be quite disingenuous in view of the evidence produced to the UNDT. The UNDT found that the suggestion that Mr. Bertrand was on duty that night: <sup>10</sup>

... was contradicted by [Mr. Bertrand's] own oral evidence and Mr. Reischoffer's testimony, and is also contrary to the record before the Tribunal. For example, at para. 29 of [Mr. Bertrand's] own response to the allegations of misconduct, dated 28 December 2015, he stated that “[u]pon completion of my round of duty on 14 September 2015 at Mission HQ [Headquarters], I chose not to leave the items at issue at HQ, but to take them with me” (emphasis added). The finding that [Mr. Bertrand] was off duty at the time of the incident was also included in the letter of 12 February 2016, which finding [Mr. Bertrand] did not dispute.

In our view, the UNDT's finding that Mr. Bertrand was not on duty at the relevant time was fully supported by the facts and was not in error.

29. Mr. Bertrand also takes issue with the UNDT's finding that his actions that led to the loss of such a dangerous weapon resulted in a serious breach of trust between him and the Organization. Mr. Bertrand “strongly disagrees with the finding of the UNDT when it suggests that [he] had the intention to cause loss or at least foresaw the loss of the property”. He argues that the UNDT erred in failing to address the proposition that “the intention or *mens rea* ... should have been a major consideration before any sanction was imposed and in considering the appropriate sanction.”

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<sup>10</sup> *Ibid.*, para. 42 (emphasis in original).

30. We reject this submission as being entirely without merit. The UNDT did not suggest that Mr. Bertrand intended to cause the loss or foresaw the loss, nor does the doctrine of *mens rea* have any application to this case.

31. Finally, Mr. Bertrand claims that “the imposed sanction i.e. separation from service with compensation in lieu of notice and with termination indemnity is disproportionate, unduly harsh, and absurd”. He further submits that the UNDT did not give sufficient weight to the mitigating factors, such as his long unblemished service record and his performance in difficult situations. He also claims that the UNDT erred in not taking into account his admission of the allegations of misconduct, his cooperation throughout the process, and that he had no intention to cause the loss of the Organization’s property, but that it was an unfortunate incident for which he had shown remorse.

32. The jurisprudence of the Appeals Tribunal has been consistently clear in

34. We find that the UNDT was correct in its conclusion that the Secretary-General did not overlook the relevant mitigating factors. It found that the record established that the Administration took into account Mr. Bertrand's difficult and stressful work environment and his good service record. It also noted that he had admitted the gravity of his conduct and that he was not contesting the facts on which the disciplinary measure was based.

35. The Appeals Tribunal held in *Agel* that the level of sanction falls within the remit of the Administration and can only be reviewed in cases of "obvious absurdity and flagrant arbitrariness".<sup>12</sup> No obvious absurdity or flagrant arbitrariness has been demonstrated in the present case. Notwithstanding the seriousness of Mr. Bertrand's misconduct, it is clear that the Administration gave fair and proper consideration to the mitigating factors by imposing the sanction of separation from service with compensation in lieu of notice, rather than the severest sanction of summary dismissal.

36. We find that Mr. Bertrand has not demonstrated any error by the UNDT on the issue of

Original and Authoritative Version: English

Dated this 31<sup>st</sup> day of March 2017 in Nairobi, Kenya.

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