

UNITED

1 The Applicant is a former Information Systems Assistant, at the G-5 level, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”).¹

2 On 2 March 2023, he challenged a decision dated 22 August 2022 by the Under Secretary General, Department of Management Strategy, Policy and Compliance (“USG/DMSPC”), to delay the issuance of his Personnel/Payroll Clearance Action

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8 On 30 June 2022, the Applicant separated from the Organization. His final entitlements, including his salary for the month of June 2022, were withheld by the Administration⁴

9 On 13 July 2022, Mr. Ebow Idun, the Chief, Human Resources, MONUSCO, wrote to DMSFC seeking advice on whether to release or withhold the final salary and entitlements to the staff members who separated from the Kalemie office, considering that there could be fraud cases against them⁵. This inquiry concerned the Applicant and other staff members who had separated from the Kalemie office on 30 June 2022. Ten cases are pending before this Tribunal on this issue.

10 DMSFC responded on the same day stating “we will review and revert shortly”.⁶

11 On 18 July 2022, Mr. Idun sent a follow-up email to DMSFC. He stated

Please note that the SRSG [Special Representative of the Secretary General] promised the separating staff that they would receive their final payments at the end of July 2022. All processes have been completed and payment is ready to be released. Grateful if you could urgently confirm the status so that we can revert to RSCE [Regional Service Centre Entebbe] to release the payments.⁷

12 On 19 August 2022, Mr. Jacob Mogen, the Head of Kalemie Field Office, wrote to Mr. Ebrima Ceesay, the Director of Mission Support (“DMS”) of MONUSCO about the pending payments. He wrote

As we just discussed over phone, about the 20 former staff members had a meeting with me yesterday (18 August 2022) regarding their pending payments because of ongoing investigations. They plantostage

investigations. Alternatively, given the desperation of the affected staff members, consider a compromise of making partial payments as the investigation continues⁸

13 On 21 July 2022, OIOS transmitted a report of possible fraud to the Special Representative of the Secretary General (“SRSG”) to MONUSCO. This report was copied to other senior management offices of the United Nations.⁹ In this report, the OIOS, among other, recommended that consideration be given to withholding the separation entitlements of the named staff members (including the Applicant), should the Organization wish to recover sums disbursed to the same persons through fraudulent medical claims submissions.¹⁰

14 Based on the OIOS report, on 22 August 2022, the USG/DMSPC took the contested decision. In communicating the decision to the Applicant, it was stated that the USG/DMSPC has decided to

(a) Withhold your final entitlements up to USD2,561,70 until the investigation has been concluded and the findings support the imposition of financial recovery pursuant to staff rule 101 (b), in accordance with section 96 of ST/AI/2017/1 (“Unsatisfactory conduct, investigations, and the disciplinary process”); and

(b) Delay the issuance of your personnel payroll clearance action form (“P.35”) until the investigation has been concluded and all indebtedness to the United Nations, including the possible financial loss of the Organization resulting from the alleged unsatisfactory conduct has been satisfactorily settled pursuant to paragraphs 11 and 12 of ST/AI/155/Rev.2 (“Personnel Payroll Clearance Action”).¹¹

15 On 9 September 2022, the Applicant filed a management evaluation request of the contested decision.¹² Further, on 12 September 2022, he filed an application for suspension of action (“SOA”) of the contested decision.¹³

⁸ *Ibid*, p 1

⁹ Reply, annex 1

¹⁰ *Ibid*

¹¹ Application, annex 3

¹² *Ibid*, annex 4

¹³ *Ibid*, annex 5

22 On 28 October 2022, the Applicant and the Administration reached an agreement that the Applicant could provide a surety so that the P. 35 form could be released and the associated PF.4 notification be sent to the pension fund¹⁸. The Applicant accepted to provide a surety payment of USD1,72906, the difference between his final entitlements and the re-estimated of the potential financial loss to be held in escrow pending the conclusion of the OIOS investigation and in the event that there are findings supporting the estimated potential liability for the Organization in exchange of releasing his PF.4 form.

23 On 1 November 2022, the Applicant transferred the amount of USD1,72906 to be held in escrow by the Administration¹⁹.

24 On 7 November 2022, the Administration confirmed that the payment was received and that they would instruct MONUSCO to release the PF.4 form to the pension.

25 On 17 November 2022, the Administration informed the Applicant that due to a step in merit which was not reflected, the amount of his final entitlement was in fact sufficient to cover the estimated loss of USD3,898 and that the paid amount of USD1,72906 would be refunded²⁰.

26 On 18 November 2022, UNSPF received the Applicant's PF.4 notification²¹.

27 On 1 December 2022, the Management Evaluation Unit ("MEU") upheld the contested decision²².

28 On 8 December 2022, the Applicant received his pension benefits of a withdrawal settlement in the amount of USD76,751.80 from the United Nations Joint

¹⁸ Reply, annex 4

¹⁹ Application, annex 10

²⁰ Ibid, annex 11

²¹ Ibid, annex 13

²² Ibid, annex 15

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pension benefit on time. His inability to provide these basic essential needs for his family harmed their physical and mental health, as well as his. Without any medical insurance and money to pay for treatments, the Applicant and his family were also deprived of receiving proper medical care to address their physical and psychological distress resulting from the unlawful withholding of his duly earned pension benefits.

33 The Applicant further contends that pursuant to staff rule 35, pensionable remuneration is among the allowances that United Nations staff members are entitled to receive, and the entitlement to receive a pension benefit vests in a participant on the day succeeding the last day of contributory service. Sections 5 and 10 of ST/AI/155/Rev.2 (Personnel payroll clearance action) require the Administration, among other things, to provide a staff member preparing to separate with a copy of ST/AI/155/Rev.2, completing form P.35 normally one month in advance of the last regular working day of the staff member; preparing the Pension Fund separation notification (PF.4) and sending it to the secretariat of UNDPF within three days of completion of the action.

34 The Applicant elaborates that he was not notified of any indebtedness to the Organization or called upon to settle any debt pursuant to ST/AI/155/Rev.2 prior to his

required authorization of the USG/DMSFC until 22 August 2022, almost two months after the Applicant's separation from service. Therefore, the Administration arbitrarily withheld the Applicant's final entitlements and pension benefits for no valid reason for over four months. Denying the Applicant his pension benefits for a prolonged period based on unfounded assumptions of indebtedness is in violation of ST/AI/155/Rev.2 and staff rule 35.

36 In view of the foregoing and relying on Aza²⁵, the Applicant submits that he should be paid interest at the US Prime Rate for the late payment of his pension benefits, i.e., from the date of his separation until the date UNSPF received his P.35 and PF.4 forms.

Issue II: Whether damages should be awarded to the Applicant

37 Relying on the jurisprudence of this Tribunal²⁶, the Applicant argues that he should be given financial compensation and moral damages. He contends that it is undisputed that he was never indebted to the Organization as claimed in the contested decision. Therefore, his pension benefits should never have been withheld from him. Since separating from MONUSCO, the Applicant and his family have faced immense financial distress and struggled to survive due to the unlawful retention of his pension benefits caused by the contested decision.

38 The Applicant's inability to provide the basic essential needs for his family harmed their physical and mental health, as well as his. The delay in paying his pension entitlements caused him severe financial hardship, stress, embarrassment and loss of self-esteem. Without any medical insurance and money to pay for treatments, the Applicant and his family were also deprived of receiving proper medical care to address their physical health. Physical health is a basic human right. Therefore,

39 The Applicant asserts that the claim for moral damages is appropriate in this case even in the absence of additional medical documentation. In *Civic*²⁷, the Appeals Tribunal ruled that the testimony of staff members themselves is sufficient in attesting the impact of Administration's illegal decision that led to disappointment, demoralization and anxiety, and negatively impact staff member's physical health to constitute compensable nonpecuniary damage. It is further affirmed that there is no need for medical expertise to conclude that continuous anxiety can be harmful to one's health.

40 By way of remedies, the Applicant requests

- a** Interest on the one-time pension withdrawal settlement at the US Prime Rate from the date of his separation until the date UNISPF received his P.35 and FF.4 forms; and
- b** USD 5,000 in compensation for moral damages for the pain and suffering caused by the contested decision.

Respondent's submissions

Issue I: Whether the Organization's decision to delay the issuance of the Applicant's P.35 form was lawful.

the delay in issuing the [P.35 form to the staff member] was consistent with the purpose of ST/AI/155 Rev.2 as “[i]t is easy to understand the difficulties of the payment and of the recovery after the staff member’s separation

45 In *Aza*²⁹, the UNDT noted that there should be

a sufficient level of probability of the indebtedness, the value of it estimated and the notice given to the separating staff member; in order to enable him/her to take an informed decision whether to offer a kind of surety in exchange of the release of the documents while the determination is being made

46 In view of the above cited jurisprudence, the Respondent maintains that these conditions were met in the present case before the contested decision was taken. The indebtedness of the Applicant had a high level of probability in light of the information available to the Organization. The value of the indebtedness was estimated by OIOS, the competent investigating entity. The Applicant was also on notice, considering that he was informed of the investigation and interviewed prior to his separation on 30 June 2022.

47 Furthermore, the contested decision was necessary, as indicated. The Applicant’s final entitlements of USD 2,163.94 were insufficient to cover his estimated indebtedness to the Organization of USD 22,534.70. In those circumstances, it was for the Applicant to decide whether to offer surety in exchange of the release of his P.35 form while the investigation was ongoing. He did not do so.

48 Had the Organization released the Applicant’s P.35 form and sent the associated PF.4 notification to UNSPF, the Organization would have inevitably lost any surety to ensure full recovery of the then estimated financial loss as the Applicant would have received a full payout of his withdrawal settlement in the amount of USD 76,751.84.

²⁹ *Aza*; *op cit*, para 22.

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documentation, such as a vehicle registration document. Second, the document does not identify the buyer of the car other than by the name. The document does not indicate any ID number, birthdate, address or telephone number of the buyer, which appears highly unusual. Third, only the signature of the purported seller was legalized on 12 December 2022 – long after the conclusion of the contract. The buyer's and witness' signature are not authenticated by any means and look strikingly similar. This undermines the credibility of the Applicant and his claim for damages.

57 The Respondent contends that there are multiple indications of forgery of evidence in this case. Citing *Mauschak*³², the Respondent stresses that forgeries perpetrated by the Applicant may deprive him of remedies even if it is established that the contested decision was wrong.

58 Based on the above, the Respondent requests the Tribunal to reject the application.

Issue E: Whether the Organization's decision to delay the issuance of the Applicant's P.35 form was lawful.

59 As noted above, this is one of 10 similar cases pending before the Tribunal arising from the Organization's decision to withhold final entitlements and the processing of pension paperwork for national staff whose appointments were not renewed due to the closure of the Kalemie duty station of MONUSCO in 2022. The contested decision was made on 22 August 2022.

60 The issue of fraud arose as a result of an exercise by the Organization's medical insurance provider, Cigna. According to the record:

As part of an overall DRC approach for the UN MIP medical plan, Cigna's Fraud Investigation Unit (FIU) has initiated a targeted exercise to flag and monitor individual files, where possible collusion and abuse

of the medical plan is suspected. Their individual files were identified on the basis of certain parameters...³³

61. The specific parameters used to flag files was redacted from the exhibit, so the Tribunal has no evidence about how files were identified as being cases “where possible collusion and abuse... is suspected”³⁴

62. By at least January 2021, Cigna reported these “allegations of possible medical insurance provider (“MIP”) fraud” to the Investigations Division of OIOS. As a result, OIOS began investigations into these allegations.

63. Under the Cigna exercise, the Applicant’s file was flagged on 10 October 2019 and “systematically monitored since being flagged”³⁵. It is unclear in the records as to what that systematic monitoring consisted of for the two and a half years before Applicant’s separation, but a summary chart for the Applicant listed the following:

Amount at Risk USD 213,088.63

Amount Controlling Sick Leave Registrations USD 22,733.64

Total Amount to Be Recovered USD 12,767.73³⁶

64. Interestingly, the chart also showed that “number of admissions: 186 (!!!!) admissions for 9 insured- feedback UN on sick leave request revealed that the staff member was on duty during 21 alleged admissions”³⁷. These numbers contradict the Cigna FIU report that said “Mr. [Mukwanba] was on duty during 13 of his alleged admissions”³⁸.

65. Similarly, the amounts at issue are inconsistent, or at least evasive. As noted above, the Cigna chart showed that the amount at risk was USD 213,088.63, while the amount controlling sick leave registration was USD 22,733.64, and the total amount to be recovered was USD 12,767.73 (nearly 6% of the total amount alleged to be “at

³³Reply, annex R 7, p3

³⁴Id (emphasis added).

³⁵Id

³⁶

any of the “evidence that OIOS has”, and it also describes confusion as to how was on the list to be investigated⁴⁴

70 In sum, the record in this case shows that nearly five years ago, Cigna “initiated a targeted exercise to flag and monitor individual files, where possible collusion and abuse of the medical plan is suspected”. This exercise used parameters which have not disclosed to the Tribunal.

71 Cigna reported the allegations to OIOS in January 2021, which began an investigation. Although the closure of the Kalamie office had been planned since 2020, OIOS claims that it only learned of the closure weeks before the Applicant’s separation on 20 June 2022. OIOS interviewed the Applicant about the possible fraud allegations days before his separation, but the record contains no evidence about that interview, what he was told about the allegations, the status of the investigation to that point, and his response.

72 On 21 July 2022, OIOS recommended withholding the Applicant’s separation entitlements and delaying issuance of his pension paperwork “should the Organization wish to recover sums from the Applicant.” And on 22 August 2022, the Organization adopted this recommendation in the disputed decision.

73 The record in this case lacks any evidence whatsoever of the nature of the alleged fraud, how the Organization suffered any financial loss, and how any alleged financial loss was calculated. The case consists of a series of black boxes.

74 The first black box is the Cigna exercise. The Tribunal has not been told what parameters were used in identifying cases to be examined, nor what the exercise and systematic monitoring disclosed.

75 The second black box is what information was transmitted from Cigna to OIOS. The Respondent claims that “OIOS had a reasoned report” from Cigna’s FIU, but

entitlements, during which he lost the use of that money. As a result, he is awarded four months of interest on that money at the US prime rate.

98 In addition, the Applicant seeks moral damages alleging that “the delay and continued failure to pay the Applicant’s pension payments has caused him severe financial hardship, stress, embarrassment and loss of self-esteem.”⁶¹

99 The Statute of this Tribunal expressly authorizes the award of “compensation for harm, supported by evidence...” (Article 10 section 5 (b)). The Applicant bears ‘the burden to adduce sufficient evidence proving beyond a balance of probabilities the existence of facts causing harm to the victim’s personality rights or dignity ...’ Kallon 2017 UNAT-742, para 60. See also Civic 2020 UNAT-1089, para 77. That evidence may take many different forms. *Id.*

100 The Applicant claims that he had to sell his motor vehicle and as evidence attaches a handwritten sale agreement.⁶² However, this document is suspect. Firstly, it purports to reflect a sale on 12/07/2022, but the agreement has a Notary stamp that is dated 12/12/2022, five months later. And, secondly, it makes no sense to notarize a document months after the pension paperwork had been received at UNSPF. In sum, this document is a fraud.

101 Even if it were not based on a fraudulent document, the Applicant’s claim for damages due to the sale of his vehicle is insufficient. The mere fact of selling property is not itself evidence of loss. The Applicant may have made a large profit as a result of the sale, in which case he was not damaged at all.

102 The Applicant also claims that the “[w]ithout infic

MONUSCO Director of Mission Support. The email mentions that the author had met with “about 20 former staff members ... regarding their pending final payments ... Clearly, these staff members are desperate as they cannot pay their rents, pay school fees or buy food”⁶¹. This evidence is insufficient to award moral damages.

103 First, it is not evident that the Applicant was one of the former staff members the author met with and was referring to as “desperate”. Moreover, even if he was one of the people under discussion, there is no evidence that the Applicant was unable to pay rent, pay school fees or buy food. In fact, the allegations of the Application (which are not evidence, of course) do not refer to any of these specific financial difficulties.

104 Even if it were accepted (without evidence) that the Applicant had no means to pay for medical care, awarding moral damages on that basis would require evidence about what the physical and psychological problems were, how they were related to the delayed processing of his pension, what treatments were needed, and how the lack of treatment caused harm to the Applicant.

105 No such evidence was presented by the Applicant and thus he failed to sustain his burden of both production and proof. As a result, the request for moral damages is denied.

106 In light of the Tribunal’s findings, the application succeeds in part.

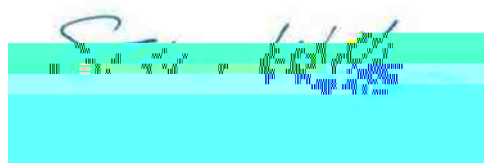
107 The decision to delay issuance of pension paperwork is found to be unlawful.

108 The Respondent shall pay to the Applicant four months of interest on the money that was due to him, calculated at the US prime rate.

109 The Applicant’s claim for other financial and moral damages is denied.

⁶¹ *Ibid*, annex 2

110 All other Applicants claims are denied



Judge Sean Wallace

Dated this 12th day of September 2023

Entered in the Register on this 12th day of September 2023



Eric Muli, Officer in Charge, Nairobi