UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/024
Judgment No.: UNDT/2019/112
Date: 19 June 2019
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CLARKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Steven Dietrich, AAS/ALD/OHR

I. Introduction and procedural history

1. The Applicant is a former Administrative Assistant with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in Kalemie, Democratic Republic of the Congo (DRC).

2. In his application dated 24 March 2016, he is contesting the MONUSCO Administration's failure to "effect separation from service with full entitlements, shipment of personal effects and transport back to home country; delays in processing final pay including Daily Subsistence Allowance (DSA) for his required stay in Uganda and in forwarding separation documents to the Pension Fund".

3. The Respondent filed a reply on 27 April 2016, claiming irreceivability. The Respondent argued that, in part, the payments had already been made; as to the other part, no decision had yet been taken due to the Applicant's failure to submit the necessary documents. The Respondent's position was to later significantly evolve, through different submissions, as described *infra*.

4. The Tribunal held case management discussions on 13 December 2016 and on 7 November 2017.

5. On 14 December 2016, the Tribunal issued Order No. 501 (NBI/2016) which required the parties to respond to various questions concerning the alleged facts and articulation of the pleadings. The parties filed responses on 22 December 2016. On this occasion the Respondent came up with a list of six different grounds for withholding the Applicant's payments on account of indebtedness to the Organization and to private individuals under ST/AI/2000/12 (Private legal obligations of staff members).

6. On 17 February 2017, the Applicant made observations on the Respondent's submissions in response to Order No. 501 (NBI/2016) and provided additional documentation. The Applicant admitted the debt of USD8127 and USD89 to the Organization. As to one private debt subject to a judgment of a tribunal in Kalemie, the

Applicant claimed that the debt had been negotiated down to a much smaller amount. He questioned the remaining titles.

7. On 20 November 2017, the Tribunal issued Order No. 198 (NBI/2017) seeking the Respondent's responses to several questions and to provide supporting evidence on matters of contention. The Respondent filed the response on 30 November 2017. The Applicant provided his comments on 7 December 2017. On this occasion, he articulated additional claims falling under the general category of final entitlements.

8. On 25 February 2019, the Tribunal issued Order No. 024 (NBI/2019) requiring the parties, *inter alia*, to file amended pleadings setting out: (a) which payments due to the Applicant were effected and on what date and what delay, if any was being claimed; (b) which claims remained outstanding; and (c), among the latter, for which debts the payments were withheld and on what basis. The Tribunal requested the parties to supply documentary evidence and indicate what facts in contention between them were to be proven through hearing of evidence from persons. The parties filed the said pleadings on 8 and 19 March 2019. A hearing was not requested.

9. Given the incompleteness of the Respondent's submissions, the Tribunal sought further clarification in Order No. 058 (NBI/2019), whereby it inquired about calculation of the Applicant's final pay and the basis for withholding or deductions from it. The Respondent filed the requested submission on 24 May 2019, where it was ascertained, among other, that no deductions on account of indebtedness had yet been made and that the withholding on account of private legal obligations was no longer maintained. The Respondent also offered the payment of the relocation grant, repatriation travel and associated cost of excess baggage, if such were proven.

10. The Applicant filed his comments on 31 May 2019, where he maintained reservations as to the calculation of the final salary, albeit on a different ground than before, and reiterated some of his previous claims. He provided a proof of return travel, which he had arranged by himself in 2018.

11. By Order No. 068 (NBI/2019), in response to the Applicant's reservations with respect to danger allowance, the Tribunal sought further explanation of the calculation of the final salary, which the Respondent provided on 14 June 2019.

12. Further below the Tribunal will summarise facts and submissions as pertinent to discrete segments: the separation entitlements, the withholding of payments and the Applicant's other financial claims. Facts described below, unless otherwise indicated, are either undisputed or result unambiguously from the submitted documents.

II. Facts related to separation

13. By letter dated 19 March 2015, the Applicant was notified that his appointment would not be renewed beyond 31 March 2015 and received instructions for check-out. These instructions informed, among other, that the Applicant would be required to travel to Entebbe for three days and, accordingly, would be entitled to DSA for this period.[1]

14. As part of the check-out, on 27 March 2015, the Applicant submitted a request for relocation grant in the form of a lump-sum and instruction for final payments.[2] On the same day a Human Resources Assistant from the United Nations Regional Service Centre Entebbe (RSCE) sent two emails asking about his decision on repatriation travel.[3] The Applicant acknowledged receipt but there is no evidence that he responded to the questions about his travel arrangements. He inquired about the progress in processing the relocation grant on 30 March 2015.[4]

15. On 26 March 2015, the Applicant submitted a request for management evaluation of the decision not to renew his appointment. Pending the evaluation, his appointment was renewed on a monthly basis. On 8 May 2015, the Secretary-General

[1] Reply –Annex 1.
[2] Reply –Annex 2 and Applicant's comments pursuant to Order 060 NBI/2019, annex 2.
[3] Applicant's comments pursuant to Order 060 NBI/2019, annex 2
[4] Ibid.

upheld the decision not to renew the Applicant's appointment.[5]

16. On 9 May 2015, the MONUSCO Director of Mission Support (DMS) informed the Applicant that in light of the result of the management evaluation, the decision to separate him would be effective immediately. He also informed the Applicant that, in accordance with staff rule 9.11(b), he would be paid for the additional days required to complete his check-out formalities and authorized travel to his place of entitlement to return travel.[6]

17. On 12 May 2015, the Applicant was medically evacuated to Entebbe, Uganda, under admittedly dramatic circumstances the details of which are in contention between the parties.[7] However, according to an email dated 11 May 2015 from the MONUSCO Kalemie Head of Office to the MONUSCO DMS, the Applicant had injured himself; moreover, his behaviour necessitated his emergency medical evacuation to Entebbe as he was deemed to be a serious danger to himself and to the people around him including his wife and children.[8]

18. Following his release from the Entebbe hospital on 18 May 2015, the Applicant undertook to complete his check out in Entebbe. The check-out form demonstrates that most of the sections cleared him during the period from 27 May to 7 June 2015 and one section, personnel, on 25 June 2015.[9] Email exchanges submitted by the Applicant demonstrate that the Applicant's attendance record was filed already on 13 May 2015, when the Applicant was still in the hospital. The question, however, surfaced again in June and remained unresolved till September 2015, while the Applicant each time requested that the attendance records be printed out and signed again by the person

[5] Application – Annex 3 at page 53.
[6] Application – Annex 3 at page 60. The Respondent later informed the Tribunal that there was no legal authority for the DMS' assertion that the Applicant would be paid for "additional days" required to complete checkout formalities but that that this should be understood to the effect that the separation date would take into account a period necessary to complete the checkout.
[7] Application – Annex 3 at page 85; para. 4 of the Applicant's comments on the Respondent's submission pursuant to Order No. 198 (NBI/2017) and Amended application dated 8 March 2019 at para. 2; para. 5 of the chronology of the Applicant's case – attachment 2 of the MER.
[8] Ibid., at page 61.
[9] Application – Annex 3 at page 83.

responsible for their verification.[10] Other documentary evidence demonstrates that emails were sent to the Applicant in both March and in May 2015 querying about his decision on the return ticket[11]; moreover that on 26 May 2015 the Applicant called at the United Nations offices in person but left the premises without placing a disposition regarding this matter.[12] This notwithstanding, the Personnel Action (PA) required to initiate the clearance for final payments was raised on 11 May 2015.[13]

19. Further email exchanges between the Applicant and MONUSCO dated 25 June 2015 demonstrate that the Applicant was led to believe that he had fulfilled all the requirements necessary at his end to enable the processing of the separation entitlements whereas he would have been informed of any arising need to supply additional information.[14]

20. Thereafter, by 9 September 2015, the remaining following sections cleared the Applicant: (a) Human resources; (b) Finance; and (c) Travel[15] with 9 September 2015 being the date of completion of the check-out process admitted by the Respondent.[16] Clearing the travel, according to the Respondent, was delayed because of unsettled travel advances.[17] However, the submitted correspondence demonstrates that the question of travel advances remained alive between the parties until mid-October 2015[18] i.e., also after the completion of the checkout.

21. The Applicant resumed queries concerning his repatriation entitlements in October and November 2015. The documents made available to the Tribunal do not indicate that he received a merit-based response. [19]

[10] Attachment 2 to applicant's comments to Respondent's response to Order 198.
[11] Applicant's comments pursuant to Order 060 NBI/2019, annex 2.
[12] Amended reply – Annex 1 at page 9, para. 5 and annex 12 of the Respondent's response to Order No. 198 (NBI/2017).
[13] Reply – Annex 6.
[14] Application – Annex 3 at page 74.
[15] Respondent's response to Order No. 198 (NBI/2017) at para. 7.
[16] Ibid., at para. 4 and annex 11 to the reply.
[17] Ibid.
[18] Reply – Annex 7.
[19] Application – Annex 2, at pages 12- 20.

22. During the case management discussion of 13 December 2016, the Applicant informed the Tribunal that, in October 2015, he received a payment of USD2,460, for which no explanation was ever proffered, despite his queries. Counsel for the Respondent informed the Tribunal that the Respondent was not aware of the reason for such payment. This position remained unchanged and no explanation has been furnished about the title for such a payment until the closure of the proceedings.

23. On 24 December 2015, the Applicant's Counsel addressed a letter to the Under-Secretary-General for Field Support (USG/DFS) bringing the Applicant's predicament to his attention.

> I am writing on behalf of [Applicant], who separated from MONUSCO in May 2015. Since that time, [Applicant] has been residing in Entebbe awaiting the final processing of his separation from service after being medically evacuated. His final separation and repatriation were to be arranged by the RSCE, but for reasons that remain unclear, it has not taken place. [Applicant] has responded to all requests for information or documentation but to date there has been no travel authorization issued for his repatriation and no PF-4 or P. 35 forms provided so that he can access his pension funds…[20]

24. On 26 January 2016, the Applicant filed a management evaluation request (MER) for the "failure to effect separation from service with entitlements and refusal to issue travel authorization". The Applicant asserted that he was entitled to proper termination benefits including travel back to his home country and pension benefits that were being held up because of the failure of the mission to issue separation documentation.[21]

25. On 4 February 2016, the HR Officer once again asked the Applicant whether he wished his ticket issued.[22]

26. On 15 February 2016, the Applicant received a payment of USD41,231.52 into his bank account. According to the Applicant's Statement of Earnings and Deductions,

[20] Application – Annex 2, at page 24.
[21] Application – Annex 3, at page 26.
[22] Reply - Annex 8.

this payment was described as "Net Salary Apportionment" and is broken down including: (a) repatriation grant in the amount USD20,753.98; (b) annual leave balance in the amount of USD20,178.46; and (c) travel days in the amount of USD70.13. [23]

27. MEU responded to the Applicant on 16 February 2016 informing him as follows.

> We note that no administrative decision was taken not to pay your final (sic) and repatriation, and thus strictly speaking your request for management evaluation is not receivable. This notwithstanding please be advised […] that your final pay was approved in the amount of $41,231.52. The MEU considers that the approval of your final pay has rendered your request moot. We are proceeding to close your file on that basis.[24]

III. Submissions on **separation payments**

The Applicant's case

28. The Applicant maintains that, notwithstanding the payment of the Applicant's repatriation grant and final pay, the application is not moot because no attempt has been made to address any of the other outstanding issues including the Applicant's repatriation or the payment of DSA to which he was entitled while awaiting action. The payment he received in February 2016 of USD41,231.52 evidently does not include a number of entitlements associated with shipments of personal effects. Besides, he does not understand what is covered by it.

29. The Applicant averred that his salary had been withheld during March and April 2015 and it is unclear upon the payslip whether this has ever been restored. The latter contention was modified by the Applicant in his submission of 31 May 2019, where he admitted that the two months of withheld salary and mobility allowance had been paid in early May 2015 and were no longer being claimed. He, in turn, questioned whether

[23] Reply – Annex 9 and para. 2 of the Respondent's amended reply.
[24] Application – Annex 4 at page 137.

payment of danger pay for April and May 2015 has been included.[25]

30. The Organization's dereliction of its duty to repatriate him left him stranded in an unfamiliar country with no funds from May 2015. No financial support of any kind was paid to him during this period of delay while he remained in Entebbe on the Organization's instructions following his medical evacuation. Since no DSA was provided after he was medically evacuated to Entebbe, he found himself virtually destitute. Thus, the Organization incurred responsibility for paying the cost of his forced stay in Uganda. Whereas initially the Applicant maintained that he had to stay in Uganda for eight months [26], in the submission dated 31 May 2019 he stated that he had only managed to arrange his return to Liberia three years after his evacuation from MONUSCO, on 19 May 2018.[27]

31. No tickets were provided for his repatriation to Liberia. His MONUSCO email account was deleted and he did not receive certain communications from the Organization since his medical evacuation to Uganda on 12 May 2015. Hence, he was never advised about the offer to issue him a one-way ticket to his home country. It was not until 4 February 2016 that the matter was raised again.

32. His check-out process was initiated without his knowledge on 27 March 2015. He was able to take up his check-out only after his release from the hospital in Kampala. On 13 May 2015, while in hospital in Uganda, he was contacted by a former Human Resources (HR) Assistant asking him for his attendance records. On the same day, he requested his former Administrative Assistant to help and the documents were sent that same day and receipt was acknowledged. Nevertheless, in a follow up message, it was alleged that the documents had not been received. The Applicant's side of the check-out process confirmed that he commenced it on 27 May 2015 and completed it on 28 May 2015. He made numerous visits to the CICO office to make sure that there was nothing left undone in spite of his personal situation, followed by

[25] Applicant's comments pursuant to Order 060 NBI/2019, para. 2.
[26] Paragraph VIII(2) of the application.
[27] Applicant's comments pursuant to Order 060 NBI/2019 at para. 5 and annex 3.

his request for confirmation of the completeness of the process in his email to the CICO handler on 25 June 2015.

33. Instead of remaining at the CICO office, his check-out file was taken to Goma by his initial CICO handler. She then went on leave without completing the process including deciding on his repatriation and entitlements. This added to the unnecessary delays.

34. It is clear that once he was removed from the DRC, the Administration had little interest or incentive in assisting him. It was not until he filed his appeal and had Counsel address the matter to Headquarters that action occurred.

35. Regarding the Respondent's claim that there was a delay in receiving proof of relocation for the purpose of repatriation grant as late as 3 December 2015, the Applicant poses that it is dubious since on request from HR Entebbe in August 2015, he had forwarded a notarized proof of relocation and had sent both the proof and his United Nations Laissez-Passer (UNLP) in a sealed envelope in August 2015 via the same MONUSCO mail/pouch system. Why it took four months to document receipt is inexplicable.[28] The Applicant submits an email dated 11 August 2015 from a MONUSCO HR Assistant reminding him to send his proof of relocation and his UNLP as evidence that he submitted the said documents.

36. The separation documents needed to process his pension were received at the Pension Fund on 5 February 2016, over eight months after his separation from service. This delay exacerbated his status by preventing him from accessing his pension benefits and thus compounded his financial constraints.

37. The Organization still owes him USD10,000 relocation grant and other removal entitlements. The Applicant submitted a copy of a ticket and boarding passes for a

[28] Application – Annex 3 (request for management evaluation) at page 76 and para. 10 of the Applicant's comments on Respondent's submission pursuant to Order No. 198 (NBI/2017).

flight from Entebbe, Uganda to Monrovia, Liberia on 19 May 2018.[29]

The Respondent's case

38. The application, insofar as it relates to the payment of the Applicant's repatriation grant and final pay, is moot as these have now been paid. Consequently, there is no longer an administrative decision that is allegedly in non-compliance with his terms of appointment or the contract of employment as stipulated by art. 2.1(a) of the Dispute Tribunal's Statute. The Applicant has now been provided with the relief that he sought. The final pay underwent a final audit. It is likely that the Applicant's latest salaries had been withheld prior to his evacuation, which is a standard procedure on separation. This said, the final salary had been calculated without any deductions for debts. A position "salary adjustment" in the payslip denotes money credited to the Applicant, and not deducted from him.

39. The Applicant's official date of separation was 13 May 2015. This date was determined unilaterally by the Administration to accommodate the Applicant's medical evacuation on 12 May 2015. The Applicant was paid salary until 13 May 2015. The Respondent agrees that the Applicant is entitled to remuneration for the five days during which he was hospitalized in Uganda from 13-18 May 2015. His separation personnel action was processed erroneously without including these five days.

40. The application, insofar as it relates to the allegation of a failure to pay DSA during the Applicant's time in Uganda following his separation from service, is not receivable. The Applicant has failed to identify any administrative decision not to pay him DSA. Even if there has been such a decision, the Applicant has not requested management evaluation of that decision. The Applicant's request for management evaluation of 26 January 2016 is explicitly restricted to challenging the delays in processing his separation entitlements and no mention is made of any claim for DSA for his time in Uganda post September 2015. As such, the Dispute Tribunal has no

[29] Applicant's comments pursuant to Order 060 NBI/2019, annex 3.

jurisdiction to hear this aspect of the application.

41. In the alternative, the Respondent submits on the merits that the Applicant has provided no authority for the proposition that he is entitled to receive DSA for the period after his separation from service. Under staff rule 7.10, DSA is paid to serving staff members. The Applicant ceased to be a staff member on 13 May 2015. The Applicant is therefore not entitled to payment of DSA for the eight months he claims to have spent in Uganda following his separation from service.

42. Upon his separation from service, the Applicant was entitled to the payment of repatriation grant under staff rule 3.19, removal costs or relocation grant under ST/AI/2015/1 (Excess baggage, shipments and insurance) and repatriation travel under staff rule 7.1(a)(iv). The repatriation grant was paid to the Applicant on 16 February 2016, rendering the application moot in this respect.

43. In relation to the non-payment of his relocation grant or repatriation travel, the initial position of the Respondent was that no final administrative decision had been taken regarding his relocation grant or repatriation travel, as these payments were being withheld. The Respondent changed his position on 24 May 2019, to the effect that the claim could be satisfied, however, the Respondent could not locate a form through which the claim for relocation grant would have been raised. The Respondent currently concedes to pay both the relocation grant, the repatriation travel cost and the excess baggage, the latter two upon a proof that such cost had indeed been incurred within the timeline stipulated by the staff rules.

44. The Applicant is responsible for the delays in processing his separation entitlements.

45. The standard processing time for separation payments is between six and eight weeks and, on average, check-out should be completed within one to three working days. The Applicant's check-out process was initiated on 27 March 2015 but was put on hold pending the Applicant's request for management evaluation of the decision not

to renew his appointment and his authorized medical evacuation from Kalemie to Kampala. On 27 May 2015, the electronic check-out process in the Field Support Suite application (FSS) was resumed.

46. The Respondent did not know what the Applicant's immigration status in Uganda had been since 12 May 2015. However, the repatriation process requires a staff member to complete a check-out form indicating to which country they wish to be repatriated to if different from their country of nationality. The Applicant had not responded to any communications from the On-Boarding and Separation Service Line (OSSL) of the RSCE who are responsible for processing this entitlement. The Administration could not process the repatriation travel entitlement without the Applicant's cooperation.

47. On 29 May 2015, the Manager of OSSL of the RSCE sent an email to the Chief Human Resources Officer (CHRO) of MONUSCO, notifying her that the Applicant had not yet completed his clearance process in FSS. In the same email, it was noted that the Applicant had been physically in the RSCE on 26 May 2015. Although the Applicant was physically at the RSCE on 26 May 2015, he did not follow up with focal points from the sections of Human Resources, Finance and Travel, specifically, there was a need to clear travel advances[30]; moreover, the Applicant is also alleged to have missed some appointments to facilitate the process such as with Personnel Attendance.[31] The Applicant's time and attendance and annual leave balance were approved on 8 September 2015. This delayed the final verification to 9 September 2015.

48. Upon finalization of the check-out process on 9 September 2015, the Applicant's separation entitlements were not processed immediately because the RSCE had to devote almost all their resources to the transition to Umoja. The period from 9 October 2015 to 4 December 2015 was part of the Umoja deployment phase and

[30] Respondent's submission in response to Order No. 198 (NBI/2017) at paragraph 4 and annex 11 of the reply.
[31] Ibid.

stabilization period. Accordingly, there were limited or no transactions executed in Umoja or the previous system, IMIS.

49. PAs were raised by the RSCE on 11 May 2015 and sent to the Field Personnel Division (FPD) of the Department of Field Support (DFS) for final audit and approval. RSCE did not have delegated authority to approve PAs. FPD gave approval on 7 August 2015. Corrections were made on 20 January 2016 to correct the Applicant's end of service date.

50. Payroll disbursed the final pay on 2 February 2016, which was after the completion of the payroll audit of the Applicant's entire personnel records. Proof of Relocation is required for processing of the repatriation grant. This was only received by FPD on 3 December 2015. This delayed the release of the final separation payments, of which repatriation grant is a part.

51. On 11 February 2016, final pay for the Applicant was approved in the amount of USD41,231.52 and deposited into his Bank account on 15 February 2016. In response to the Tribunal's query, the Respondent explained that the final salary reflected in the payslip was the salary for May 2015 plus different components outstanding from previous months.[32] In response to a query regarding the danger pay, the Respondent submitted proof of financial transactions crediting the Applicant's account with danger pay for April and until 12 May 2015, i.e., the Applicant's departure from the Mission.[33]

52. The delay in processing the Applicant's relocation grant related to the potential withholding of his final entitlements under section 6 of ST/AI/2000/12 in the amount of USD6,800 owed by the Applicant to a third party. This outstanding debt was acknowledged by the Applicant in a note authorizing MONUSCO to deduct this amount from his final salaries or benefits.[34]

[32] Respondent's submission pursuant to Order No. 058 (NBI/2019), annexes 1 and 2.
[33] Respondent's response to Order No. 068 (NBI/2019).
[34] Reply, para. 24.

53. The Applicant is not entitled to termination indemnity because his appointment was not terminated.

IV. Facts related to withholding of payments

54. On 5 June 2014, the Chief, Conduct and Discipline, MONUSCO wrote to the Applicant to notify him of an outstanding private legal obligation and queried again on 20 January 2015. The matter concerned a judgment issued by the Tribunal in Kalemie in the Applicant's absence, whereby the Applicant had been obliged to pay Ms. Fidelie N. USD51,000. The judgment had become executable as to the sum of USD21,000 and the bailiff of the Tribunal had addressed MONUSCO with a request to seize the Applicant's remuneration.[35]

55. On 28 May 2015, the Applicant authorised a deduction from his final payments the amount of USD6,800 owed to Ms. Francine NK.[36] This authorisation was subsequently withdrawn by memoranda from the Applicant dated December 2017 and January 2018, addressed to the Tribunal and to the Finance Section of MONUSCO respectively. With the latter, the Applicant attached a copy of a hand-written note dated 13 February 2017 and signed with the name of Ms. Francine NK, which confirms the satisfaction of the claim.[37]

56. On 29 May 2015, the MONUSCO/CHRO notified the RSCE, on email, to withhold the Applicant's separation payments on account of his debt generally described as toward the Organization and private individuals.[38] The Respondent informed the Tribunal that he was unable to locate any communication informing the Applicant that payments owed to him would be withheld on account of outstanding debts. There is thus no evidence that the Applicant would have been so informed before the matter was brought up before this Tribunal.

[35] Respondent's submission pursuant to Order No 501 (NBI/2016), annex 4.
[36] Reply - Annex 10.
[37] Attachment 6 to the Applicant's comments on the Respondent's submission pursuant to Order No. 198 (NBI/2017).
[38] Respondent's submission pursuant to Order No. 198 (NBI/2017), at para. 6 and annex 12 of the reply.

The Respondent's case

57. In 2017, the Respondent maintained that the Organization would withhold the remuneration owed for 13-18 May 2015 and the Applicant's relocation grant and travel to satisfy his outstanding debts to the Organization and private legal obligations in accordance with section 6 of ST/AI/2000/12. Specifically:

a. Debt in the amount of USD51,000 to satisfy a judgment of the Tribunal de Grande Instance de Kalemie. The Applicant submits that this amount was negotiated down to USD7,560. However, the Applicant has not submitted any evidence from the Tribunal de Grande Instance de Kalemie to this effect;

b. Debt to the Organization in the amount of USD8,127 for the misappropriation of funds from the sale of United Nations bonded vehicles. The Applicant does not dispute this debt and has agreed to have this amount deducted from his final payment;

c. Private debt for security services for private residence in Kalemie in the amount of USD6,400;

d. Debt to the Organization for damaging United Nations property in the amount of USD89. The Applicant does not dispute this debt and has agreed to have this amount deducted from his final payment.

58. Initially, the Respondent put forth also

e. Debt owed to Ms. Francine NK in the amount of USD6,800;

f. Private debt to pay bills/rent in the amount of USD3,925 (MTS Case: MONUSCO 20141216-526);

These two last positions were subsequently dropped.

59. Eventually, on 24 May 2019, the Respondent informed the Tribunal that funds are no longer withheld to satisfy the Applicant's third-party debts as such deductions

had not been authorised in accordance with staff rule 3.18(c)(iii).

60. Only the debt to the Organization, admitted by the Applicant, is currently maintained. It has not, however, been deducted from the Applicant's emoluments.

The Applicant's case

61. The Applicant submits that the Respondent's internal communications of 2015 were not copied to him and, until the request from the Tribunal, the Respondent has never produced a consolidated list of outstanding debts that he claims should now be satisfied from his United Nations emoluments.

62. Regarding the Respondent's claim of lack of proof that his debt of USD6,800 to Francine NK was settled and paid, the Applicant attached a receipt acknowledging the payment and his further revocation of authorization to deduct the said payment from his final entitlements addressed to MONUSCO.[39]

63. The private debt for rental costs is USD2,100 and not USD3,925 as alleged by the Respondent. The balance of USD2,100 has since been paid and is not outstanding. The Applicant offered proof for the payment of USD2,100.

64. The debt based on the Judgment of the Tribunal de Grande Instance de Kalemie is not the final determination The Applicant engaged a local attorney to contest the judgment and make efforts to resolve the private dispute which was negotiated down to USD7,560. These developments were fully reported to the Conduct and Discipline Unit in MONUSCO but remained unresolved at the time of his separation from service.[40]

65. The Applicant does not dispute the money owed to the Organization, USD8,127 and USD89 and agrees to have that amount deducted from his final entitlements.[41]

[39] Paragraph 11 and annex 6 of the Applicant's comments on Respondent's submission pursuant to Order No. 198 (NBI/2017).
[40] Ibid. at para. 7 and annex 4.
[41] Paragraph VII (6) of the amended application dated 8 March 2019.

V. Applicant's other claims against the Organization

Applicant's case

66. The Applicant alleges that he had lost USD21,000 in personal effects during the medical evacuation. While he was in the custody of MONUSCO officials, his office premises were broken into and his safety deposit box with USD21,000 in cash was taken. This amount had been intended to meet his outstanding obligations prior to leaving the mission. The Organization's responsibility is entailed for this amount.

67. The Applicant avers that the Organization owes him USD5,600 reimbursement for his residential security guards. The claim was the subject of his request for payment of all his final entitlements. In the Applicant's submission of 17 February 2017, he annexed the proof of payment for the period from November 2014 till May 2015, together with his generic request for reimbursement form, received by the MONUSCO Security Section on 24 December 2014, which annotates at the bottom that "no separate monthly submission is required from the claimant".[42]

Respondent's case

68. The Applicant did not raise the issue of any outstanding residence security reimbursement during his check-out process. He has not requested management evaluation of any alleged decision not to reimburse him, nor does it form part of this Application. The Applicant had received reimbursement for security for the period from April 2014 through August 2014 in the amount of USD4,000[43], which was paid to him in March 2015.[44] The RSCE has no record of ever receiving the request, nor the proof, concerning the later period.[45] The Applicant, notwithstanding the reimbursement obtained, still owes to the security company USD4,800, a debt which

[42] Paragraph 9 of the Applicant's comments on Respondent's submission pursuant to Order No. 198 (NBI/2017) and para. 3 and annex 3 of the Applicant's submission pursuant to Order No. 032 (NBI/2017).
[43] Respondent's submission pursuant to Order No. 058 (NBI/2019), annex 7(a). Notably, the submission as such, in paragraph 7, does not represent the same information fully.
[44] Respondent's submission pursuant to Order No. 058 (NBI/2019), annex 7(b).
[45] Respondent's submission pursuant to Order No. 058 (NBI/2019), annex 7(a), p. 1.

was incurred throughout the overall period from March 2014 to May 2015. Any further reimbursement must be predicated on the Applicant's providing proof of payment.

69. The Organization does not owe the Applicant USD21,000 for destruction and theft of his private property. The Applicant has not provided any evidence that he has made a claim under ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service). Any loss or damage to his property has not been established, and any such claim is not properly before the Dispute Tribunal.

VI. Remedies

The Applicant's case

70. By way of summary, the Applicant submits that the following entitlements have still not been addressed:

a. Unpaid Repatriation travel expenses.

i. Repatriation travel - USD1,645.

ii. Excess baggage – USD500.

iii. Unaccompanied shipment of personal effects – USD 10,000.

b. Reimbursement of claim for residential security costs – USD5,600.

c. Recovery for damage and loss of personal property – USD21,000.

d. Balance of unpaid final remuneration – Unknown and to be determined by the Respondent.

e. Outstanding certificate of service.

71. The Applicant further submits claims in connection with the "egregious mishandling of his medical evacuation to Uganda and failure to regularize his separation from service in a timely manner:

a. Damages in connection with forced transport to Uganda and 8-months separation awaiting repatriation including subsistence while stranded in Uganda awaiting processing – USD150,000.

b. Legal and other costs due to abuse of process – USD100,000.

c. Compensation for the delay in paying all the above – one year's net base salary.

d. Compensation for moral damages including health (Post Traumatic Stress Disorder) – two years' net base salary.

72. The Applicant confirms receipt of a lump sum payment of USD41,231.52 in 2016 representing his repatriation grant and final pay but he was not provided with a breakdown in calculations that could be verified. His pension has also been processed after delays of over a year.

73. The Applicant acknowledges indebtedness of USD8,216 to the Organization.

Respondent's case

74. Article 10.5(b) of the Dispute Tribunal's Statute provides that compensation for harm may only be awarded where supported by evidence. The onus is on the applicant to substantiate the pecuniary and/or non-pecuniary damage that he claims to have suffered because of the Administration violating his rights. The Applicant has failed to provide any evidence beyond that he has suffered any pecuniary loss.

75. Even if the Dispute Tribunal finds that there has been a fundamental breach of the Applicant's rights, moral harm cannot be presumed. The Applicant must provide evidence of harm. In the absence of any such evidence, no compensation should be awarded.

VII. Considerations

Receivability

76. The Tribunal agrees with the Respondent that the application is moot regarding the repatriation grant. As concerns other "separation entitlements", encompassed by the payslip from February 2016, the Tribunal does not find the application moot regarding the Applicant's final pay. In this respect, the Applicant signalled in the application that he does not understand the payslip. Indeed, the payslip is not clear (including that it read that the salary was for October 2015, i.e., after the Applicant's separation), whereas the management evaluation response is hesitant as to whether the final pay had been processed or was still under consideration. It was only during the proceedings before the Tribunal that relevant issues became clarified.

77. To the extent the Respondent maintains that no "final" decision has been taken concerning the other separation payments (repatriation ticket, unaccompanied luggage and relocation grant) due to the Applicant, the Tribunal recalls that the Respondent did take a decision, communicated to the Applicant during the proceedings, about the withholding of these payments and that it formed the basis for the Respondent's refusal to satisfy the Applicant's claim. As such, it constituted a case to answer. Recently, the Respondent has expressed a conditional readiness to satisfy these claims, but as of the date of this judgment it did not happen. The application in this respect, therefore, was receivable and so remains at present.

78. Turning to the Applicant's claim for damages based upon an allegation that his property was destroyed and that his private safety deposit box containing USD21,000 in cash was lost[46], the Tribunal finds it irreceivable. The Applicant did not include this claim in his application. Moreover, in his MER, although the Applicant had narrated the underlying facts, he had, however, stated that he turned to a local court for redress. The Tribunal considers that such payment would not have been automatically included in a final pay, as the claim requires a request procedure that had not been initiated. It

[46] MER dated 26 January 2016, at para. 14.

cannot, therefore, be encompassed by default by the notion of "separation payments".

79. For similar reasons the Tribunal finds the application to be irreceivable regarding the claim for reimbursement of the cost of security services from November 2014 till May 2015. This claim does not expressly form part of the application or the MER. Even though this kind of payment could possibly be reflected in a payslip, it transpires from the submitted documents that the previous instalment had been processed by MONUSCO off-cycle. Whereas the form that the Applicant filed with MONUSCO in December 2014 and with the Tribunal in February 2017 announced that the payment would be through payroll, it also provided for it to be filed with RSCE Claims Unit whereas the claimant undertook to submit original invoices within six months from the date of the document, under the sanction of recovery of the reimbursement.[47] There is no record of the Applicant ever having filed the form and the proofs as required, considering, in particular, that the certification from the security company appears to be issued only in January 2017 and the invoices have not been attached.[48] The Administration, therefore, had no basis to act upon. The Tribunal accepts that no decision has been – or could have been - taken with this respect, neither became subject to management evaluation.

Correctness of separation payments

80. Regarding the Applicant's claim for the balance of his salary, the Tribunal is satisfied with the explanation provided by the Respondent and the calculation presented by him.[49] The Applicant, having admitted that he had previously received the salary for the preceding months, does not make any substantiated challenge to the calculation by the Respondent. Regarding the question of danger pay for April and May, upon the explanation and documents submitted by the Respondent on 14 June 2019, the Tribunal is satisfied that they have been properly calculated and paid.

[47] Annex 3 of the Applicant's submission pursuant to Order No. 032 (NBI/2017).
[48] Ibid.
[49] Respondent's submission pursuant to Order No. 58 (NBI/2019), annex 2.

81. As concerns the Applicant's claim for remuneration, including the DSA, for the time spent in Entebbe following his evacuation, the Tribunal notes confusion occasioned by the message which informed that the decision to separate the Applicant would be effective immediately, however, he would be paid for the additional days required to complete his check-out formalities. The two propositions included in the message can only be reconciled if interpreted that the date of the Applicant's separation would be fixed so as to include the days required to check-out. This interpretation would be also consistent with the instruction that the Applicant had received earlier, as well as with the gist of ST/AI/155/Rev.2 (Personnel payroll clearance action), which clearly indicates that separation formalities are a process to be undertaken by staff members, and not former staff members who have already separated. Clearly, the Applicant could not be "paid" without remaining a staff member. Accordingly, the date of separation should include the minimum time required of the staff member to personally attend the relevant offices.

82. This had not happened in the Applicant's case, with the matter apparently having been complicated by his medical evacuation, and the Respondent undertaking, instead, a rather grotesque effort to check the Applicant out of his sick-bed. Whereas before the Tribunal the Respondent admitted that the Applicant was owed salary for the period of his hospitalization 13-18 May 2015, which is appropriate, the Tribunal moreover finds that the Respondent also owes the Applicant remuneration for the minimum time required to complete his check-out. In accordance with the instruction that the Applicant received beforehand, and consistent with the Respondent's position before the Tribunal as to how much time is needed, it would mean three days for which the Respondent owes the salary and the DSA for Entebbe, i.e., 19-21 May 2016 (all being working days). The Applicant did not show that any additional time would have been practically necessary; the record, on the other hand[50], shows that indeed he had completed most of his check-out errands during the period of three days at the end of May 2015.

[50] Reply, annex 4.

83. The claim for costs of his stay in Entebbe for any period exceeding the days necessary for check-out is unfounded. Even accepting the Applicant's contention that he had not received the May 2015 email requesting his decision about the return travel, the Applicant, having received detailed check-out instruction, and a similar enquiry, earlier in March, was put on notice of the travel issue as such. Moreover, having corresponded and, admittedly, visited RSCE offices repeatedly, he had enough opportunity to address the return travel entitlement or, more generally, issues related to his alleged "being stranded". In his June 2015 email, where he inquires about whether he had completed all the necessary formalities, the Applicant does not mention either the return travel or any predicament occasioned by a stay in Entebbe. Neither does the issue arise in the later October and November email correspondence from the Applicant. The Applicant, moreover, offered no explanation why, given the alleged expense entailed, he had rather stayed in Entebbe for a protracted period of time instead of flying home, which he could have done at the expense of approximately USD600-700. As such, it is apparent that if indeed the Applicant had extended his stayed in Entebbe for several months – or, as per the latest submission by the Applicant, for three years - it would have been of his own choosing. However, there is no basis to remunerate the Applicant, pay him the DSA or compensate for any such period.

84. As concerns the relocation grant (a lump-sum alternative to unaccompanied shipment), the Applicant had articulated his claim already in March 2015 (para. 14 above). Having admitted that the withholding of payments had no proper basis, the Respondent is obliged to pay the relocation grant.

85. Regarding the claim for return travel, it was articulated in the December 2015 memorandum to the USG/DFS, and reiterated in the MER and in the application; as such, the claim was not belated at the date of the filing and until May 2017. To the extent, however, that the Applicant indicates as proof of his repatriation travel an airplane ticket for a flight undertaken in May 2018, the claim is precluded from being granted for the lapse of time foreseen in staff rule 7.3. This deadline, being established by the material law, takes effect notwithstanding the pendency of the present dispute

(see also paras. 94 and 95 below).

86. With respect to the claim for excess baggage, according to staff rule 7.15, the cost of excess baggage is subject to reimbursement. To date, the Applicant has not submitted proof of having borne such an expense.

Responsibility for delays in processing entitlements

87. The Tribunal takes as a premise that the standard processing time for separation payments is from eight to twelve weeks from the receipt of all completed forms until the final pay.[51] It recalls that the process commenced already in March 2015 and by the end of June 2015 the Applicant was left in a belief that at his end all the formalities needed at that stage were fulfilled and, indeed, by then he had been cleared by all sections except Finance, Travel and final verification by Personnel. Up to this point the process progressed satisfactorily and thus, by the standard adopted by the Respondent, should have been completed by the end of September 2015 at the latest. The Tribunal notes that there follows, however, a conspicuous period of inexplicable lack of any activity from 25 June until 9 September 2015, i.e., during ten of the twelve weeks that the Administration had in its disposal to process the final pay.

88. The Tribunal recalls that the Applicant filed disposition as to his relocation grant already in March 2015. The Tribunal is, moreover, satisfied that the Applicant's attendance records were filed timely (already in May 2015 during his stay at the hospital) and he is not responsible for delaying clearance by Personnel regarding time and attendance and annual leave balance until 8 September 2015. The Tribunal is not satisfied as to the claimed delaying factor being unsettled travel advances. In this regard, it is noted that, in accordance with ST/AI/155/Rev.2, in such situations a staff member is to be cleared with a remark. Indeed, eventually the Applicant was cleared with a remark and instruction to withhold a relevant amount on 9 September 2015. There is no apparent reason why the same could not have been done earlier.

[51] Respondent's annex 13 response to Order No. 198 (NBI/2017).

89. Regarding the private debt of USD6,800 owed to Ms. Francine NK, invoked by the Respondent as reason for the delay, it had been acknowledged by the Applicant on 28 May 2015 and, as such, could have been deducted. Other debts alleged during the proceedings are not invoked by the Respondent as reason for the delay. However, debts as to which there would have been a 'dispute' as per section 6 of ST/AI/2000/12 could have resulted either in a proper decision to withhold payments (notably, the question of honouring or not the judgment of the Tribunal in Kalemie had been pending since mid-2014), or in a decision that these claims would be subject to further consideration and, possibly, charged against the Applicant's pension. In any event, it is not attributable to the Applicant that the process was not completed by the end of September 2015.

90. The Respondent submits that the delay was a result of the deployment of a new management system, Umoja, for, *inter alia*, human resources and payroll, which was launched in RSCE in Entebbe and field missions during the period from mid-October 2015 till 4 December 2015. With this respect, the Tribunal echoes the UNDT in *Kings*[52] that the introduction of a new system can in no way justify a prolonged breach of an important contractual obligation. It is not a case of *force majeure*, since it was not an unforeseeable and irresistible event objectively preventing the taking of the required action. To the contrary, Umoja had been in preparation for several years and its deployment Secretariat-wide had been decided well in advance and the whole process was driven by the Organization's Management. In this connection, the Tribunal, moreover, notes that the Respondent's submission is inaccurate where he claims that the whole period was a "black-out" where no transactions were being processed. The documents accompanying the submission[53] show that the "black-out" or "payroll freeze" periods did not exceed a week; otherwise the transactions were to be conducted.

91. This said, in this Tribunal's opinion, given the complexity and the sheer scale of the operation, its exact impact on the timeliness of services could not have been

[52] UNDT/2017/043.
[53] Respondent's annexes 14 and 15 in response to Order No. 198 (NBI/2017).

foreseen and avoided and the burden of it must, to some extent, be shared between the Organization and the individual staff members. While it would be unacceptable to sweepingly excuse the suspending of payment of entitlements for the whole period of Umoja implementation, some delay, especially in effecting off-cycle payments, may have been inevitable and would need to be absorbed by the individuals concerned. The Tribunal would be reluctant not to justify an additional, beyond the strict black-out or freeze periods, delay, if such argument were *prima facie* made by the Respondent upon concrete facts. This, however, has not been done. Neither was the onset of Umoja ever indicated as reason for delaying the payments in the correspondence that the Applicant exchanged with the Respondent in October and November 2015.

92. The above remarks are, however, of a limited import for the issue at hand. Given the responsibility of the Respondent for the fact that the calculation of the Applicant's final pay had not been concluded before the launch of Umoja in mid-October, the Respondent is responsible for the entire period of delay. The Respondent was thus in arrears from the end of September 2015 until 15 February 2016, the date of effecting the final pay for most of its components.

93. The Tribunal, on the other hand, finds no undue delay in processing the repatriation grant. It is recalled that, according to staff rule 3.19, to be eligible for a repatriation grant, a staff member had to meet the conditions set forth in both annex IV and staff rule 3.19. Thus, a failure to meet the requirements precludes the staff member from being eligible for a repatriation grant. The Applicant did not demonstrate in any way that he had submitted a proof of relocation prior to December 2015; specifically, as it is alleged, that he did it sometime after the reminder email of August. The Applicant's mere assertion does not suffice.

94. Likewise, the Tribunal finds no grounds to attribute to the Respondent responsibility in not effecting the return travel entitlement. The Tribunal agrees that a return travel cannot be arranged without the cooperation from the staff member. It can be reasonably expected of a staff member to trigger the process and to supply the necessary information, specifically, the destination and date of the travel. While the

Respondent had asked the Applicant about his preference with respect to his return travel in March 2015 and May 2015, even if indeed the Applicant would have not received the May email, there was no reason on the part of the Respondent to rush the process without the impulse from the Applicant, considering that, according to staff rule 7.3(c), entitlement to return travel would not cease until two years of the date of separation. Notably, notwithstanding that the Applicant maintained email communication with the Respondent through November 2015, a claim for return travel was not articulated before the filing of the memorandum to the USG/FSD of 24 December 2015, where the Applicant was represented by counsel. In February 2016, the Respondent once again asked the Applicant whether he wished his ticket issued. The management evaluation reiterated on 27 April 2016 that in order to pay the repatriation travel a filing of documents was required. The Applicant did not act upon this information.

95. The Tribunal appreciates that the Respondent subsequently changed his position to stating that this payment would be withheld. In the situation of a dispute, however, since the Applicant decided to undertake the travel at his own expense, it was upon him to do so before the entitlement became extinguished. Since at all relevant times the Applicant was represented by Counsel, the Tribunal does not accept that the Respondent would be responsible for minding the deadline on behalf of the Applicant.

Withholding of payments

96. The question of withholding of payments has become moot in light of the Respondent's resignation from doing this at this point, as expressed in latest submission pursuant to Order No. 058 (NBI/2019). It is noted though, that the Applicant had acknowledged indebtedness to the Organization totalling USD8,216, and agreed to have the same deducted from his final payments. As such, pursuant to section 6.2 of ST/AI/2000/12, this amount may be not just withheld but deducted in priority over other debts from the final entitlements. The Tribunal accepts as true the Respondent's assertion that such deduction has not yet taken place. In any event, to the extent this Judgment grants certain claims of the Applicant, this is without prejudice to any future

deductions and withholding that may be levied upon them by way of discrete administrative decisions taken pursuant to applicable procedures.

Damages

97. The claim for damages equalling USD150,000 for "subsistence while stranded in Uganda awaiting processing" is rejected for reasons stated in para. 83 above.

98. While the Applicant claimed having suffered a financial damage amounting to one year's net base salary for the delay in payment of his entitlements, he adduced no evidence, documentary or otherwise, for any such loss. A delay per se does not permit to quantify his losses beyond the usually applicable prime US rate applicable as of the due date of payment until the payment is effected.[54] This is being granted to the Applicant for the delay in payment of his final entitlements for the period from 1 October 2015 till 15 February 2016, when the payments were effected, with respect to the amount of USD20,477.54 (i.e., the USD41,231.52, minus repatriation grant, USD20,753.98, the latter not being in arrears).

99. Regarding the relocation grant, an option indicated by the Applicant in March 2015, the delay is likewise from 1 October 2015 and is ongoing.

100. Regarding the delay in forwarding his separation documents to the Pension Fund, no facts or proofs were put forth before the Tribunal that would allow it to accept and quantify any financial loss on this score.

101. The Tribunal further finds that delay and lack of due process in communication of the withholding decision - which happened only during these proceedings - was an irregularity. The Applicant, however, did not adduce any evidence that he entailed financial damage, in particular that, having been properly informed of the withholding, he would have effectively rebutted the claim or settled the debt.

102. Finally, regarding the claim for two-year's base salary for moral damages, the

[54] *Warren* 2010-UNAT-059 at para. 18.

Tribunal recalls the Appeals Tribunal holding in *Kallon* that for a breach or infringement to give rise to moral damages, especially in a contractual setting, where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances.[55] In the present case there are numerous irregularities in the processing of the Applicant's entitlements (misplacement of personnel attendance records, inability to "locate" the form where the Applicant chose his relocation grant, inability to account for the payment effected in October 2015, confusion about withholding of payments), that could amount to "peculiar circumstances". The Tribunal is mindful, however, that the Appeals Tribunal ruled that for the proof of a moral damage an applicant's testimony alone does not suffice and corroborating evidence is necessary.[56] In this regard, the Tribunal, is not satisfied that the medical certificate supplied by the Applicant with his MER[57] proves moral damage in causal relation with the impugned decision. The Tribunal considers that a delay in payment as such, albeit annoying and unjustified, is unlikely to lead to a post-traumatic stress disorder. The certificate produced by the Applicant does not connect the diagnosis with delay in payments; rather, it refers to the history of injury to a forearm, intoxication and alcohol dependence problem and, in general terms "events in MONUSCO", which are not properly before the Tribunal. It was, moreover, issued in September 2015, before the delay occurred. Thus, moral damage has not been proven.

Costs

103. With respect to the Applicant's claim for "legal and other costs due to abuse of process" in the amount of USD100,000, the Tribunal notes, primarily, that the Applicant did not submit proof of having borne any costs of legal representation. Second, the amount requested is disproportional both to the extent in which the claims

[55] *Kallon* 2017-UNAT-742 , at para. 62.
[56] *Kallon*, ibid. at para. 79. See also *Kebede* 2018-UNAT-874 at para. 26.
[57] Annex 5 to MER.

were granted and to what could be regarded reasonable fees. As concerns the claim of abuse of process, the Tribunal finds that both parties fell short of articulating their positions and filing evidence timely and clearly, and shifted the burden of establishing relevant facts upon the Tribunal. Moreover, some of the Applicant's demands (such as for eight months of DSA and the other damages, assertion that he could not arrange return travel until 2018), are frivolous. As such, the Tribunal sees no grounds for granting the Applicant any costs for abuse of process.

JUDGMENT

104. The Respondent shall pay the Applicant:

a. his salary for the period 13- 21 May 2015;

b. DSA applicable for Entebbe for the period 19-21 May 2015; and

c. relocation grant of USD10,000.

All bearing interest pursuant to the prime US rate from 1 October 2015 until the day of payment.

105. By way of compensation for the delay in effecting the payment of the final salary, the Respondent shall pay the Applicant interest at the level of prime US rate on the amount of USD20,477.54 for the period from 1 October 2015 until 15 February 2016.

106. Additional five per cent shall be applied to the US prime interest rate 60 days from the date this Judgment becomes executable.

107. All other claims are dismissed as either being irreceivable or unfounded, as specified in the opinion *supra*.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 19th day of June 2019

Entered in the Register on this 19th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi