



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/005/
R-1
Judgment No.: UNDT/2021/125
Date: 1 November 2021
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AZAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Jonathan W. Croft, AAS/ALD/OHR, UN Secretariat
Jacob van de Velden, AAS/ALD/OHR, UN Secretariat

INTRODUCTION

1. The Applicant is a former staff member of United Nations Interim Force in Lebanon (“UNIFIL”). He filed an application on 28 January 2019 challenging: (i) the withholding of his final entitlements to cover indebtedness to the Organization in accordance with staff rule 3.18(c)(ii); and (ii) withholding of the issuance of any notification to the pension fund of his separation until he had satisfactorily settled all indebtedness to the Organization in accordance with paragraph 12 of ST/AI/155/Rev.2 (Personnel payroll clearance action) (“contested decision”). During the proceedings before the UNDT, in the face of the fact that the Administration satisfied his claims, the Applicant articulated a claim to have his pension recalculated and to be compensated for the delay.

2. On 5 May 2020, the Dispute Tribunal dismissed the application as moot.¹

3. On appeal, the United Nations Appeals Tribunal (“UNAT”) upheld the Dispute Tribunal’s refusal to examine and correct the amount of pension payments being made to the Applicant because the Applicant had not sought management evaluation of the claim. UNAT found, however, that UNDT’s dismissal of the Applicant’s claim for compensation for delay in making his pension payments, was an error. Consequently, UNAT remanded the case back to UNDT to determine the Applicant’s claims for compensation for wrongful retention by the Respondent of his entitlements upon his resignation.² The Appeals Tribunal instructed the Dispute Tribunal to examine: the question of the lawfulness of the withholding of the payments and to not forward the documentation to the pension fund, taking into consideration the amounts withheld and the length of their retention.

¹ *Azar* UNDT/2020/067.

² *Azar* 2021-UNAT-1104.

FACTS AND SUBMISSIONS

4. The fact described below are uncontested, unless otherwise indicated, and/or result from documents.

5. In the period from November 2016 to September 2018, the Applicant had three disciplinary cases. In May 2017, he was disciplined following a finding that he had used his position with the Organization to obtain loans from one or more staff members of the Organization, including a staff member whom he had been purportedly assisting in obtaining medical care for the staff member's daughter suffering from a terminal illness. In July 2018, he was invited to respond to allegations that he had failed to comply with the disciplinary measure imposed on him in May 2017, in that he failed to reimburse the extorted amounts.³ In July 2018, the Applicant was investigated regarding a new set of allegations that he had engaged in unauthorized outside activities by working for the Alexandre Nehme Medical Centre ("ANMC") from November 2016 until November 2017, while employed by UNIFIL.⁴ When interviewed as subject on 6 July 2018, the Applicant admitted that during the relevant period he had been working as the General Manager at ANMC for a monthly salary of USD1,000.⁵ The Special Investigations Unit ("SIU") investigation concluded that the Applicant had engaged in unauthorized outside activity and that he had taken 165.5 days of certified sick leave, uncertified sick leave, annual leave and paternity leave, during the same period, in addition to 11 days of unauthorized leave at an estimated cost of USD29,000 to the Organization.⁶

6. Prior to the conclusion of the disciplinary process, the Applicant resigned from the Organization effective 1 September 2018.⁷ He was paid his August 2018 salary but a final annual leave computation of 11 days was withheld, because the SIU

³ Respondent's response to Order No. 167, annex R/5.

⁴ Ibid., annex R/6.

⁵ Ibid.

⁶ Ibid., annex R/11.

⁷ Ibid., annex R/7.

investigation had established that he had taken 11 days' unauthorized leave.⁸ Upon the Applicant's query, he was informed on 10 October 2018 that ongoing investigation into the allegation of misconduct required determination whether the case posed a risk of financial liability toward the Organization.⁹ Having established that the United Nations Joint Staff Pension Fund ("UNJSPF") did not obtain the notification of his separation on 22 October, the Applicant sought management evaluation of the decision to withhold his separation entitlements and notification on 29 October 2018.¹⁰

7. By a memorandum dated 9 November 2018, the Applicant was informed that the Under-Secretary-General for Management ("USG/Management") had decided to authorize the withholding of his final entitlements to cover any indebtedness to the Organization and to withhold the issuance of any notification to the pension fund of his separation until he had settled all indebtedness to the Organization.¹¹ He was invited to provide comments on the findings of the investigation report and his indebtedness to the Organization. In his comments dated 3 December 2018, the Applicant accepted that he engaged in unauthorized outside activities when he worked for ANMC and indicated his willingness to reimburse the Organization for any unauthorized absences that he had taken; he, however, disputed the decision to withhold the notification related to his pension entitlements.¹²

8. By memorandum dated 5 December 2018, the Chief, Human Resources Section ("Chief HRS"), UNIFIL, requested that the Applicant settle indebtedness to the Organization equal to 165.5 days' leave taken by the Applicant whilst he was engaged in unauthorized outside activity.¹³ This memorandum was retracted on 13 December 2018 by the Chief HRS.¹⁴

⁸ Ibid., para. 14.

⁹ Reply, annex R/4 (management evaluation request) and its annex C.

¹⁰ Respondent's response to Order No. 167, annex R/10.

¹¹ Ibid., annex R/11.

¹² Respondent's response to Order No. 167, annex R/12.

¹³ Ibid., annex R/13.

¹⁴ Ibid., annex R/14.

9. In a management evaluation response dated 5 February 2019, the administration decided to uphold the decision to withhold the Applicant's final separation entitlement, including withholding the issuance of relevant documentation to the pension fund.¹⁵

10. By memorandum dated 1 March 2019, UNIFIL advised the Applicant that the 11 days of unauthorized leave would be recovered as an overpayment¹⁶ and informed him that once he had settled his indebtedness to the Organization, any outstanding payments would be made to him and the relevant document would be released to the UNJSPF.¹⁷ The Applicant settled his indebtedness to the Organization of USD1,195 on 9 March 2019¹⁸ and on 11 March 2019, the Organization instructed that the Applicant's final payments be processed and that the P.35 form be released to the UNJSPF.¹⁹ The Applicant's final remaining emoluments, in the net amount of LBP2,961,318.03, were paid on 26 March 2019.²⁰ He received his full and final pension settlement, a one-time withdrawal, on 23 May 2019.²¹

11. On 19 August 2021, the Tribunal directed the Respondent to file submissions in line with the United Nations Appeals Tribunal's ("UNAT") decision.²² The Respondent filed the submissions on 2 September 2021.

SUBMISSIONS

*The Applicant*²³

12. The Applicant asserts that he should be compensated for the nine-month delay between his separation and the payment of his pension benefits because the delay has

¹⁵ Ibid., annex R/15.

¹⁶ Staff rule 3.18(c)(ii) and ST/AI/2009/1 ("Recovery of overpayments made to staff members")

¹⁷ Respondent's response to Order No. 167, annex R/16.

¹⁸ Ibid., annex R/17.

¹⁹ Ibid., annex R/18.

²⁰ Ibid., annex R/22.

²¹ Ibid., annex R/19.

²² Order No. 167 (NBI/2021).

²³ See the Applicant's 15 October 2021 response to the Respondent's 2 September 2021 response to Order No. 167.

caused him and his family immense financial distress. He was not informed by UNIFIL during his check out process that there was a case against him, and his entitlements would be withheld. UNIFIL's failure to inform him of this new case against him during his check out was occasioned by a conspiracy between his supervisor, the Chief of Human Resources, and the Chief of Conduct and Discipline to ruin his life. He contests the computation of his pension benefit and the amount paid to him in May 2019; and refutes the Respondent's allegation that he "resigned due to the allegations" because he resigned due to ill health.

*The Respondent*²⁴

13. The contested decision was lawful because the Organization complied fully with staff rule 3.18(c)(ii), paragraph 9 of ST/AI/2009/1 (Recovery of overpayments made to staff members), and paragraphs 11, 12 and 13 of ST/AI/155/Rev.2. At the time of the Applicant's separation, UNIFIL was in receipt of information indicating that he had engaged in unauthorized outside activities while being employed by the Organization. He had taken 165.5 days of leave whilst engaged in the unauthorized outside activity, which could have constituted an overpayment to him, resulting in a significant indebtedness to the Organization. UNAT has confirmed that in such circumstances, it is lawful for the Organization to use a staff member's pending entitlements to recover indebtedness to the Organization and that the Organization may also withhold the notification to the UNJSPF.²⁵

14. The Respondent submits that the contested decision was proper and reasonable. As evinced by the chronology of events, the Organization was diligent in its handling of the matter and the Applicant was involved in each step of the process. The pending investigation was not conveyed to the then Office of Human Resources Management ("OHRM") until late October 2018 and the Applicant was promptly invited to provide comments in November 2018 which he did in December 2018. The Applicant initiated the management evaluation process which had to run its course. After a careful

²⁴ See the Respondent's 2 September 2021 response to Order No. 167 (NBI/2021).

²⁵ *Aliko* 2015-UNAT-539, paras. 37, 42, 43.

consideration of the dossier, the Organization reduced the original figure of more than 165 days of leave owed to 11 days. Immediately after the Applicant settled his debt, the Organization instructed that the Applicant's final payments be processed and that the P.35 form be released to the UNJSPF. The Applicant received a full and final one-time withdrawal from the UNJSPF on 23 May 2019.

15. With respect to the value of the Applicant's pension, the Respondent submits that in 2019, the Applicant elected to receive a one-time withdrawal settlement under article 31 of the UNJSPF Fund Regulations. The amount of this settlement was USD68,445.55. This figure was not dependent on interest. Accordingly, there was no financial loss in this respect to the Applicant. The Applicant has not substantiated any harm in this respect. It was established by the Organization and communicated to the Applicant in May 2019, that his pension settlement had been overpaid by USD8,526.20 due to an administrative oversight. Nonetheless, the Organization did not pursue recovery action, given the hardship that the Applicant had expressed in his e-mail communications. Accordingly, the Applicant has already received more than he is entitled to from the Organization.

16. The Applicant's claim for compensation should be rejected because any argument that he faced financial obstacles because of unreasonable delay in his receipt of the pension settlement, is without merit. The Applicant resigned from service with the Organization effective 1 September 2018, while he still had a fixed-term contract until 30 June 2019. Any predicament he faced was therefore self-inflicted, having resigned in the face of three investigations into serious, integrity-related misconduct for which he could have been separated without termination indemnity, had he not resigned.

CONSIDERATIONS

17. The formal basis for the impugned decision indicated by the Respondent are paragraphs 11, 12 and 13 of ST/AI/155/Rev.2.

18. According to section 11, "[s]taff members separating from service, in

accordance with their contractual obligations to the United Nations are responsible for: (a) Settling all indebtedness to the United Nations”. Section 12 allows the USG/Management to refuse or delay the release of the P.35 form until the settlement of the staff member’s indebtedness, and inform the staff members of the possibility of delays in the separation procedure and payments due to them in cases where the quoted requirement is not fulfilled. Section 13 states that “the non-issuance of a P.35 form will prevent them from receiving their pension benefits” and that a failure to comply with section 11 “may result in the suspension of the separation procedure, which may delay any payments otherwise due to the staff member”.

19. In *Aliko* the Appeals Tribunal found that UNOPS’ refusal to issue the PF.4 form when Mr. Aliko had failed to settle all indebtedness with the United Nations was consistent with the purpose of ST/AI/155/Rev.2.²⁶

20. Whereas neither *Aliko* nor *Azar*²⁷ take issue with the Respondent augmenting the higher statutory acts, i.e., Staff Rules and UNJSPF Regulations, by granting himself the power to withhold separation notification, clearly, however, situations contemplated in ST/AI/155/Rev.2, as well as in *Aliko*, concern a stated indebtedness and a staff member’s refusal to settle the debt. The purpose of ST/AI/155/Rev.2, thus, is to enforce compliance with a financial obligation, the extent of which is defined, albeit may be disputed. A separating staff member is put before the alternative between paying or having his pension disbursement delayed, while he can dispute the obligation in the appropriate fora.

21. Conversely, the present case concerns a withholding of notification to UNJSPF imposed in a state of only a hypothetical indebtedness to the Organization, which was not determined and quantified at the time of separation, and, as later demonstrated, remained undetermined until March 2019. The legality question arising is whether the practice under ST/AI/155/Rev.2 may legitimately serve not to enforce a concrete obligation, but to secure a merely possible one, akin to a bail. This purpose does not

²⁶ *Aliko*, 2015-UNAT-539, para. 42.

²⁷ *Azar* 2021-UNAT-1104, which mandated the present review.

transpire from ST/AI/155/Rev.2. If the question, however, were to be answered in the positive, there must 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. Obviously, moreover, the Administration must act swiftly.

22. It further results from staff rule 3.18(c)(ii) and ST/AI/2009/1 that the main tool for recovery of money owed to the Organization is offsetting against a staff member's salary and entitlements. It is more effective and quantifiable and does not undermine the provisional function of the entitlement as does withholding of the notification to UNJSPF. The latter, therefore, is rather an extraordinary measure, the resort to which should be reserved to situations where execution against the salary and entitlements is impossible or insufficient. For this reason, in accordance with section 12, it must be decided on at an appropriately high level, that is the USG/Management.

23. Turning back to the facts of the case, at the time of his separation in September 2018, the Applicant had already admitted to his unauthorized and remunerated outside activity on 6 July 2018²⁸, the investigative report had been finalized by SIU on 23 July 2018²⁹ and the Applicant had given notice of his resignation on 13 August 2018.³⁰ As admitted by the Respondent³¹, at this point the Administration had available to it all the information upon which it would later issue a decision authorizing the withholding notification to UNJSPF. Yet, the Applicant was unreservedly cleared for check-out³² and paid his August 2018 salary.³³ This raises the question why the salary was not withheld in the first place; instead, the Administration resorted to withholding of the pension notification.

24. Importantly, however, the Applicant was not notified of any indebtedness to

²⁸ Respondent's 2 September 2021 response to Order No. 167 (NBI/2021), annex R/6, 2 July 2018 interview by SIU.

²⁹ Ibid. R/8.

³⁰ Ibid R/7.

³¹ Ibid. para. 29.

³² Reply, Annex 4 Management Evaluation Request and its annex B.

³³ Respondent's 2 September 2021 response to Order No. 167 (NBI/2021), para. 14.

the Organization or called upon to settle it, as required by ST/AI/155/Rev.2. Whereas it is plausible that the matter of the withholding of notification to UNJSPF required processing, including a decision on the appropriately high level, the question arising is why the withholding of separation notification was not requested earlier, as soon as the Applicant notified of his resignation. It also demonstrates that the initial withholding did not have the required authorization in the USG/Management's decision; rather, it was applied in an arbitrary and obscure fashion, with the Applicant learning of it only by the fact that the pension was not forthcoming.³⁴ It was not until 9 November 2018 that the withholding decision was properly notified to the Applicant and he was invited to respond on the question of indebtedness.

25. Regarding the Respondent's averment that there had not been undue delay and that the administration acted diligently, the Tribunal notes that the following facts are relevant for the pace of the process:

13 August 2018– the Applicant notifies of his resignation.

6 September 2018 –the Applicant's check-out is completed.

10 October, 22 October 2018– upon his query, the Applicant is informed that his notification to the UNJSPF had not been sent out and the matter is under consideration.

29 October 2018 – the Applicant files a management evaluation request.

9 November 2018 – the Applicant is informed of the outcome of the investigation and of a decision that notification to the UNJSPF would be withheld pending repayment of indebtedness to the Organization; he is invited to provide comments.

3 December 2018 – the Applicant provides his comments.

5 December, 13 December 2018 – issuance and subsequent retraction of a call to settle indebtedness of USD29,000.

28 January 2019- the Applicant files an application with the UNDT.

5 February 2019 – the withholding of the issuance of notification to the UNJSPF is upheld by the Management Evaluation Unit.

1 March 2019 – the original figure of more than 165 days of leave owed is reduced to 11 days of unauthorized leave

³⁴ Reply, annex R/4 (management evaluation request).

9 March 2019 – the Applicant settled his debt to the Organization.

11 March 2019 – the administration instructs that the Applicant’s final payments be processed and that the P.35 form be released to the UNJSPF.

23 May 2019 – The Applicant receives a full and final one-time withdrawal from the UNJSPF.

26. The Tribunal finds that, whereas the period of considering the Applicant’s claim is regularly punctuated by one action or another, the actions of the administration are exclusively reactive to the Applicant’s complaints. It is apparent, starting with the irregularity of not informing the Applicant of the withholding decision for two months following his separation, that the Administration had not seriously undertaken to establish the legal basis for, and, accordingly, the value of, the claimed overpayment. As stated by the Respondent, “at the time of the Applicant’s separation, the Organization was in receipt of information [...] [about] 165.5 days of leave, which could have constituted an overpayment to him.” Yet, at no point did the administration present the Applicant with a reasoned calculation of his actual indebtedness.³⁵ It should have been obvious to the administration that undertaking unauthorized employment or occupation during a leave, albeit constituting a violation of Staff Rules, does not necessarily create overpayment. Annual leave and paternity leave are accrued by the virtue of work rendered and fathering a child, respectively. A staff member may be disciplined for improperly using these entitlements while engaging in unauthorised activities; absent, however, a legal authorization to withdraw the entitlement in such a situation, this does not mean that the staff member was overpaid. The situation is different with sick leave, which is contingent upon inability to render work for health reasons. Undertaking occupation or employment while on sick leave may indicate that there was no genuine inability to render work, accordingly, the sick leave might have been undue.

27. Instead of making the relevant determination, the administration flouted figures from both ends of the spectrum, from the equivalent of all the leave taken to

³⁵ This issue is avoided in both the 9 November 2018 decision and the 5 February 2019 management evaluation, which operate only with the number of leave days and its value.

the 11 days of unauthorized leave, which had been known from the beginning. Eventually, this gives the impression that the administration capitulated in the face of evidentiary difficulty and enforcement futility of the case. The Tribunal appreciates that sorting out the relevant issues across different offices could have required some time; not sorting it out over the period of six months, 1 September 2018 - 1 March 2019, was, by and large, excessive for the application of ST/AI/155/Rev.2.

28. To the extent the Respondent justifies this period by submission of the investigation report only in late October 2018, the Applicant is not responsible for this delay. He cooperated with the investigation and the investigation report was finalised by the SIU in July 2018. Regarding the Respondent's argument that the Applicant initiated the management evaluation process which had to run its course, the Tribunal agrees with it in principle. This, argument however, does not justify the fact that management evaluation due mid-December 2018 was issued only on 5 February 2019, seven weeks past the statutory deadline, and yet did not calculate the alleged overpayment. Finally, to the extent the Respondent attributes the lengthiness of the process to "careful consideration of the Dossier, including the Applicant's comments from December 2018 and his submissions made and conveyed as a result of the Management Evaluation process"³⁶, this does not explain why a careful consideration, including asking the Applicant's comments as needed, was not done earlier, given that the administration had actual knowledge of the relevant facts in September 2018. A review of the Applicant's comments does not disclose any information that would not have transpired from the investigative report and the Applicant's data in the possession of the HR; other than this, the Applicant's comments are focused on arguing illegality of the application of ST/AI/155/Rev.2.

29. In conclusion, the withholding of the Applicant's separation of the notification was irregular and not proportionate. It was applied without sufficient determination of the basis and value of the alleged overpayment, as well as for an excessive period of time. Procedural irregularity and unjustified delay occurred between 6 September

³⁶ Respondent's 2 September 2021 response to Order No. 167 (NBI/2021), para. 34.

2018, when the withholding commenced, and 9 November 2018 when the Applicant was notified of the withholding decision. Moreover, accepting that management evaluation time would normally be accounted for in the processing time, another unjustified delay occurred between 13 December 2018, when management evaluation was due, and 5 February 2019 when it was issued. These two periods, totalling 119 days³⁷, define the deferment for which the administration is liable. The period from 1 March 2019 to the release of the notification is too brief to be material for the question of proportionality; besides, it is obvious that both parties promptly discharged their mutual responsibilities rendering the main issue moot. The administration, in turn, is not responsible for the processing of pension by the UNJSPF, which is an independent inter-agency entity and operates under its own Regulations as approved by the General Assembly and, in accordance with its governance structure, is administered by the United Nations Joint Staff Pension Board.³⁸

30. Regarding compensation, it is not quite clear from the Applicant's submissions whether he claims compensation for a financial loss or moral harm, or both. However, the compensation for moral harm is not due. The 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.³⁹ The case at bar does not demonstrate peculiar features in the infringing conduct, in particular, it does not evince improper motive on the part of Administration. Awarding damages for moral harm would be moreover inappropriate in the face of the Applicant abusing his entitlements.⁴⁰

31. As concerns financial damage resulting from a breach of contract, such as inordinate delay in processing entitlements, liability of the Administration does not

³⁷ 6 Sept 2018 to 9 Nov 2018 = 64 days and 13 Dec 2018 to 5 Feb 2019 = 55 days.

³⁸ See <https://www.unjspf.org/history-of-the-fund/>

³⁹ *Kallon* 2017-UNAT-742, at para. 62.

⁴⁰ See *Amarah* 2019-UNAT-898; *Yakovlev* UNDT/2014/040.

turn on the morality of the Applicant's conduct, the latter relevant only in as much as it contributed to the delay. The question, therefore, is about the Applicant's patrimonial injury resulting from the undue delay in obtaining this pension money. As put forth by the Respondent and uncontested, the figure of the Applicant's one-time pension withdrawal was not dependent on interest, which effectively means that, during the nine months of wait, the Applicant's money at UNJSPF was not producing any interest. As the Applicant does not demonstrate any other specific financial loss suffered, a delay *per se* does not permit to quantify his losses beyond the usually applicable United States prime rate.⁴¹ As discussed *supra*, if not for the delay the Applicant could have reasonably received his pension 119 days earlier than 23 May 2019, that is, on 24 January 2019. The interest on the value of his one-time pension withdrawal is granted accordingly.

32. The award is without prejudice to the Respondent's right to offset it against any unexpired overpayment that benefited the Applicant, be it on account of leave or pension overpayment. In the present case, the mere email mention of pension overpayment put forth by the Respondent⁴², which is disputed by the Applicant⁴³, does not allow the Tribunal to accept the counterclaim as proven and, consequently, to find that a set-off has been effective. A counterclaim is, however, only a procedural defence and rejecting it by the Tribunal does not produce *res judicata* regarding the substantive being of the debt. The parties may address any issues relevant to the pension outside the scope of these proceedings.

33. The Applicant's contention about improper calculation of his pension is not receivable, as confirmed by the Appeals Tribunal.⁴⁴

JUDGMENT

34. The application is granted in that the Respondent will pay the Applicant the US prime interest rate on USD68,445.55 as applicable during the period from 24 January

⁴¹ *Warren* 2010-UNAT-059 at para. 18.

⁴² *Supra*, para. 11.

⁴³ *Supra*, para.12.

⁴⁴ 2021-UNAT-1104 at para. 34.

2019 to 23 May 2019.

35. The interest is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

36. All other pleas are dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart

Dated this 1st day of November 2021

Entered in the Register on this 1st day of November 2021

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi