



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/028

Judgment No.: UNDT/2023/105

Date: 12 September 2023

Original: English

Before: Judge Sean Wallace
Registry: Nairobi
Registrar: Eric Muli, Officer-in-Charge

MUSELEMU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Kyung Min Lee, OSLA

Ana Giulia Stella, OSLA

Counsel for the Respondent:

Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Jacob van de Velden, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former Electrician, at G-4 level, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), based in Kalemie duty station.¹

2. On 3 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 Form (“P.35”) and the release of his Separation Notification Form (“PF.4”) until the conclusion of the investigations against him for possible fraud by the Office of Internal Oversight Services (“OIOS”).

3. The Respondent filed a reply on 11 April 2023 and requests the Tribunal to reject the application.

Factual and procedural background

4. The Applicant joined the Organization on 4 May 2004 working with MONUSCO. His duty station was Kalemie.²

5. On 11 April 2022, the Applicant was notified that his appointment would not be renewed beyond 30 June 2022 due to the closure of the Kalemie office.

6. In early June 2022, the Applicant was notified by OIOS that he had been identified as a subject of a possible unsatisfactory conduct involving medical insurance fraud.

7. On 20 June 2022, the Applicant was interviewed by the OIOS as a subject of possible unsatisfactory conduct.³

¹ Application, annex 1.

² *Ibid.*

³ Application, section II, para. 6.

8. On 30 June 2022, the Applicant separated from the Organization. His final entitlements, including the salary for the month of June 2022 were withheld by the Administration.⁴

9. On 13 July 2022, Mr. Ebow Idun, the Chief, Human Resources, MONUSCO, wrote to DMSPC 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 them.⁵ 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. DMSPC 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 DMSPC. 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 the 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 plan to stage a demonstration, but I urged them to remain patient because investigations take time. Clearly, these staff members are desperate as they cannot pay their rents, pay school fees and buy food. As we discussed, please try to reach out to the investigation team to hasten the

⁴ *Ibid.*, para. 7.

⁵ *Ibid.*, annex 2, p. 6.

⁶ *Ibid.*, p. 5.

⁷ *Ibid.*

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

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 officers of the United Nations.⁸ In this report, the OIOS 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 claim submissions.⁹

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 USD9,204.22 until the investigation has been concluded and the findings support the imposition of financial recovery pursuant to staff rule 10.1 (b), in accordance with section 9.6 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”).¹⁰

15. On 9 September 2022, the Applicant filed a management evaluation request of the contested decision.¹¹ Further, on 12 September 2022, he filed an application for suspension of action (“SOA”) of the contested decision.¹²

16. By Order No. 140 (NBI/2022) issued on 3 October 2022, the Tribunal granted

⁸ Reply, annex 1.

⁹ *Ibid.*

¹⁰ Application, annex 3.

¹¹ *Ibid.*, annex 4.

¹² *Ibid.*, annex 5.

the Applicant's SOA and suspended the contested decision.

17. On 5 October 2022, the Respondent appealed Order No. 140 (NBI/2022), on the ground that the UNDT had exceeded its competence.¹³

18. On 10 October 2022, OIOS informed the Office of Human Resources ("OHR") of a revised estimate of the potential financial loss caused by the Applicant in the amount of USD1,591.22 instead of USD9,204.22 as initially estimated.¹⁴ The following day on 11 October 2022, OHR instructed MONUSCO to release the Applicant's P.35 and PF.4 forms.¹⁵

19. On 17 October 2022, the Applicant filed a motion for execution of Order No. 140 (NBI/2022). On 19 October 2022, the Respondent filed a reply challenging the motion for execution of Order No. 140 (NBI/2022) on the ground that the matter was moot because instructions to process the Applicant's P.35 and PF.4 forms had been given on 11 October 2022.¹⁶

20. On 25 October 2022, UNDT issued Order No. 154 (NBI/2022) dismissing the motion for execution of Order No. 140 (NBI/2022) as being moot as there was no longer any aspect of the SOA to be enforced.

21. On 28 October 2022, the Applicant received his final entitlements in the amount of USD7,834.01.¹⁷

22. On 7 November 2022, the United Nations Joint Staff Pension Fund ("UNJSPF") received the Applicant's PF.4 notification.¹⁸

23. On 1 December 2022, the Management Evaluation Unit ("MEU") upheld the

¹³ *Ibid.*, annex 6.

¹⁴ Reply, annex 6

¹⁵ *Ibid.*, annex 7.

¹⁶ Application, annex 9.

¹⁷ *Ibid.*, para. 22.

¹⁸ *Ibid.*, annex 10.

contested decision.¹⁹

Issues for determination

24. The Tribunal will determine:
- a. whether the Organization's decision to delay the issuance of the Applicant's P.35 form was lawful; and
 - b. whether damages should be awarded to the Applicant to compensate for harm caused by the decision to delay the issuance of his separation information to the Pension Fund in a timely manner

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

Submissions

Applicant's submissions

25. The Applicant submits that he was never indebted to the Organization as claimed in the USG/DMSPC's letter of 22 August 2022 at the time of the contested decision. To date, neither OIOS nor the Respondent has provided any explanation as to how they arrived at this amount as the "estimated possible maximum financial loss" that the Organization should recover from him. Therefore, there was never any basis to justify withholding his P.35 and PF.4 forms, which prevented him from receiving his duly earned pension benefits.

26. The Applicant further contends that pursuant to staff rule 3.5, 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,

¹⁹ *Ibid.*, annex 12.

among others, 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 of the staff member, preparing the Pension Fund separation notification (PF.4) and sending it to the secretariat of UNJSPF within three days of completion of the action.

27. 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 separation from service. The Administration was fully aware that the Applicant would be separated from service on 30 June 2022 due to the closure of the Kalemie office, which had been planned since it was first announced in 2020. The Applicant was only notified that he was under investigation by the OIOS on 1 June 2022, along with the rest of the separating national staff members of the Kalemie office and was interviewed as a subject just 10 days before his separation date. The OIOS investigation was not concluded at the time of his separation from the Organization and to his knowledge, the investigation is still on-going. Therefore, no factual finding was ever made to establish that the Applicant currently is or was ever indebted to the Organization.

28. The Applicant avers that the Respondent has failed to establish any credible facts to establish that he was indebted to the Organization at the time of his separation from service that would justify the withholding of his P.35 form pursuant to sections 11 to 13 of ST/AI/155/Rev.2.

29. Furthermore, as tendered in evidence, the decision to withhold the Applicant's final entitlements and the delay in the issuance of the P.35 form did not have the required authorization of the USG/DMSPC 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 3.5.

30. In view of the foregoing and relying on *Azar*²⁰, 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 UNJSPF received his P.35 and PF.4 forms.

Issue II: Whether financial compensation and moral damages should be awarded to the Applicant.

31. Relying on the jurisprudence of this Tribunal²¹, 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. The despair faced by the Applicant is witnessed and corroborated by MONUSCO's own senior management.²²

32. 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 and psychological distress resulting from the unlawful withholding of his duly earned pension benefits.

33. The Applicant asserts that the claim for moral damages is appropriate in this case even in the absence of additional medical documentation. In *Civic*²³, the United Nations Appeals Tribunal ("UNAT") ruled that the testimony of staff members

²⁰ *Azar* UNDT/2021/125 (not appealed).

²¹ *Kings* UNDT/2017/043, para 45; *Massi* UNDT/2016/100, para. 69; and *Chacon Gomez* UNDT/2017/096.

²² Application, para. 48; Application, annex 2, pp. 3-4.

²³ *Civic* 2020-UNAT-1069.

themselves are 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 non-pecuniary 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.

34. 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 UNJSPF received his P.35 and PF.4 forms; and
- b. USD5,000 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.

35. The Respondent contends that the contested decision was reasonable. The Applicant had already been interviewed by OIOS before he separated from the Organization on 30 June 2022. He was well aware of the serious fraud allegations against him. Therefore, the contested decision was also reasonable pending the OIOS investigation. The Organization must be able to rely on the OIOS Memorandum and OIOS' assessment of the financial loss as it secures its financial interests from fraud. The OIOS is an independent investigating entity and it only initiates an investigation following a preliminary assessment indicating that such is warranted. In this regard, it should be noted that when OIOS issued its Memorandum and financial loss estimate, OIOS had already interviewed the Applicant. In addition, OIOS had a reasoned report on the Applicant's claims from the Fraud Investigation Unit ("FIU") of Cigna, the administrator of the medical insurance, concluding that the Applicant had been unduly reimbursed.

36. The available information indicated that the Applicant submitted false claims to Cigna for a total staggering amount of USD255,761.60. These claims involved 206 hospital admissions of the Applicant and his insured dependents. On at least 64 occasions, Cigna received invoices for overlapping or connecting admissions (i.e., admissions where the patient is simultaneously admitted in two hospitals or is hospitalized immediately after or shortly upon being discharged from another hospital). During the eight purported hospitalizations, the Applicant was at work according to his own UMOJA records, which are certified as true and accurate. These records established with a high probability the Applicant's misconduct.

37. Cigna prevented a major part of the financial loss to the Organization by not reimbursing the full amount of USD225,761.60. Nevertheless, as noted, OIOS estimated the financial loss to the Organization at USD9,204.22, which exceeded the Applicant's final entitlements of USD7,834.01. It would be inappropriate to second-guess OIOS' assessment now, with the benefit of hindsight, knowing that OIOS later revised its initial estimate of the financial loss to USD1,591.22 following its further review of the matter as the investigation progressed. This fact was unknown at the time of the contested decision and should not be held against the Organization; what matters is that the Organization acted immediately when this new information became available to the Organization. Besides, the evidence still indicates fraud by the Applicant and a high probability of financial loss, even with the adjusted estimate of the size of that financial loss.

38. In support of his case, the Respondent seeks to rely on *Aliko*²⁴, where UNAT held,

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.

²⁴ *Aliko* 2015-UNAT-539, para. 40.

39. In *Azar*²⁵, 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.

40. In view of the above cited jurisprudence, the Respondent maintains that the set 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.

41. Furthermore, the contested decision was necessary, as indicated. The Applicant's final entitlements of USD7,834.01 were insufficient to cover his estimated indebtedness to the Organization of USD9,204.22. 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.

42. Had the Organization released the Applicant's P.35 form and sent the associated PF.4 notification to UNJSPF, the Organization would have irreversibly 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 USD75,232.18.

43. The Respondent further emphasizes that there was no inordinate delay in the present case. In *Nchimbi*,²⁶ UNAT held that a delay of 3.5 months in processing a staff member's check-out and submitting the separation forms to UNJSPF is not

²⁵ *Azar*, *op.cit.*, para. 22.

²⁶ *Nchimbi* 2018-UNAT-815, paras. 27-28.

unreasonable in view of the Organization's obligation "*to ensure proper governance within the Organization and accountability for its property.*" [Emphasis added].

44. Furthermore, the rules do not specify an exact date at which a former staff member's pension entitlements have to be disbursed. UNJSPF does not and cannot process pension entitlement claims on the date of a staff member's separation. The PF.4 notification informing UNJSPF about the separation of the former staff member only takes place after the check-out process at the mission is completed and the P.35 form is processed. This all naturally takes time.

45. In line with *Nchimbi* and considering the circumstances and context of the present case, the total time used to protect the financial interest of the Organization of less than 4.5 months is not unreasonable and does not warrant compensation. The General Assembly has repeatedly "emphasized that the full recovery of the financial loss amount should be pursued and encourages the Secretary-General to strengthen his efforts to improve the quantification and the rate of recovery losses".²⁷

46. This mandate guided the Organization's efforts to ensure financial accountability of the separating staff members in the Kalemie office and at the same time to complete all administrative processes in a reasonable time frame. Throughout the decision-making processes and discussions with the Applicant, the Administration demonstrated commitment and good faith in handling the matter. The Administration took prompt action as soon as it received relevant information from OIOS that impacted the assessment of the financial interests of the Organization underlying the contested decision. In particular, the Administration gave instructions for the release of the P.35 form and associated PF.4 notification within a day of learning from OIOS about the revised amounts regarding the estimated financial loss caused by the possible misconduct of the Applicant.

²⁷ General Assembly Resolution, dated 31 March 2023, item 143 Human resources management, para. 74; *see also* Report of the Advisory Committee on Administrative and Budgetary Questions, A/77/730, dated 21 February 2023, para. 11.

47. Finally, the Respondent contends that, in view of the foregoing, the contested decision was reasonable and supported by an adequate legal basis.

Issue II: Whether financial compensation and moral damages should be awarded to the Applicant.

48. The Respondent argues that according to *Fosse*²⁸ and *Rehman*²⁹, there can be no remedy granted, without any evident legal wrong or any causal link between a wrong (an unlawful decision) and the alleged harm. Further, there can be “compensation for harm only if such harm is ‘supported’ by evidence”. It is, therefore, incumbent on the claimant to submit specific evidence. These requirements are not met in the present case. There is no legal wrong. The contested decision is reasonable and supported by an adequate legal basis. Further, the Applicant has failed to provide the specific evidence capable of sustaining an award of damages.

49. The Respondent opines that the Applicant’s reference to *Civic* is misplaced and misrepresents UNAT’s jurisprudence. Also, in *Civic*, the UNAT held that “corroborating evidence, other than the staff member’s testimony, is needed to support the claim”³⁰ of moral damages. In the absence of any evidence and reasonable factual basis for moral harm, the Applicant’s claim for moral damages must fail. Besides a lack of evidence of moral harm, the very premise of his claim is not credible. It cannot, without more, be assumed based on bare assertions that the Applicant lacked the financial means to provide food and shelter to his family and that his family struggled to survive. This applies *a fortiori* considering the Applicant’s 18 years of service with the Organization.

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

²⁸ *Fosse* 2022-UNAT-1305, para. 52.

²⁹ *Rehman* 2018-UNAT-882, para. 17-18.

³⁰ *Civic* 2020-UNAT-1069, para. 77.

Considerations

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

51. 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.

52. 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. The individual files were identified on the basis of certain parameters....”³¹

53. 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.”³²

54. 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.

55. Under the Cigna exercise, the Applicant’s file was flagged on 13 May 2019 and “systematically monitored since being flagged.”³³ It is unclear in the record as to what that systematic monitoring consisted of for the three years before the Applicant’s separation, but a summary chart for the Applicant listed the following:

³¹ Reply, annex 8j, p. 3.

³² *Id.* (Emphasis added).

³³ *Id.*

Amount at Risk USD255,761.60

Amount Contradicting Sick Leave Registrations USD9,445.30

Total Amount to Be Recovered USD4,421.66³⁴

56. Interestingly, the chart also showed that “number of admissions: 208 (!!!!) for 8 insured - feedback UN on sick leave request revealed that the sm [staff member] was on duty during 10 (!!!!) alleged admissions (+ 2 adm during annual leave).”³⁵ These numbers contradict the Cigna FIU report that said there were 206 admissions and that the Applicant “was on duty during 9 of his alleged admissions [sic].”³⁶

57. Similarly, the amounts at issue are inconsistent, or at least evolving. As noted above, the Cigna chart showed that the amount at risk was USD255,761.60, while the amount contradicting sick leave registration was USD9,445.30 and the total amount to be recovered was USD4,421.66 (almost 2% of the total amount alleged to be “at risk”). Yet another amount appears in an email referencing “the response from OIOS” and describing the Applicant’s “possible maximum USD liability” as USD9,204.22.³⁷

58. That email is also revealing in that it contains this quotation:

The list below in our email is incorrect and shows XXXXXXXXXXXX is part of my large CIGNA investigation; this person does not appear in my case spreadsheet or within GoCase (that I could find).³⁸

59. Although both the source and the subject of this confusion is unclear in the record, it appears that the OIOS investigation was riddled with problems.

60. Indeed, the record in this case is devoid of details about the investigation at all. Even today, we do not know what was investigated, whether the investigation was ever completed, and if so, what it found about the “possible fraud”. This absence of evidence is astounding years of systematic monitoring, the passage of almost two and a half years since OIOS was first notified of the allegations of possible fraud and began to

³⁴ Reply, annex 10

³⁵ *Id.*

³⁶ *Id.*, annex 8j, p.2.

³⁷ *Id.*, annex 4, p.1.

³⁸ *Id.*

investigate, and more than a year after the disputed decision to withhold the Applicant's separation entitlements and pension paperwork "until the investigation has been concluded and the findings support the imposition of financial recovery..."³⁹ Despite the OIOS promise giving rise to the decision that "[a]s per normal practice, OIOS will issue reports for each staff member at the completion of its investigations, with an indication of the quantified MIP fraud should this be established,"⁴⁰ no report has been presented to the Tribunal.

61. Perhaps the closest thing to an OIOS report in the record is an email dated 10 October 2022 from the Acting Deputy Director of the Africa Regional Office, Investigations Division of OIOS. That email says "Based on evidence OIOS has, these are the final amounts the reports will be recommending for recovery: Muselemu...Amount to be withheld USD1,591.22."⁴¹ The email does not describe any of the "evidence that OIOS has", and it also describes confusion as to who was on the list to be investigated.⁴²

62. 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 are not disclosed to the Tribunal.

63. Cigna reported the allegations to OIOS in January 2021, which began an investigation. Although the closure of the Kalemie office had been planned since 2020, OIOS claims that it only learned of the closure on 20 June 2022, weeks before the Applicant's separation. 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.

³⁹ Application, annex 3, p.1.

⁴⁰ Reply, annex 1.p.2.

⁴¹ Application annex 7

⁴² *Id.*

64. 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.

65. 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.

66. 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 over four years.

67. 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 "[s]ince the investigation is ongoing and for reasons of confidentiality, only the fact of this report can be shared at this moment".⁴³ Of course, the midst of litigation is the moment when all relevant evidence must be shared if it is to be considered by the Tribunal. Thus, the Respondent's claim that there was a "reasoned report" amounts to no more than "trust me, judge" and certainly does not count as evidence.

68. The third black box is the OIOS investigation. Again, the Tribunal was not told what evidence OIOS uncovered over the course of its two-and-a-half-year investigation. Indeed, the few crumbs of "evidence" that the Respondent produced in this case were contradictory and unreliable.

69. The Respondent argues that the Organization is entitled to rely on the OIOS Memorandum and assessment of the financial loss.⁴⁴ However, the memorandum in this case consists of a single conclusory statement "(OIOS) received allegations of possible medical insurance provider (MIP) fraud..."⁴⁵ And the assessment of financial

⁴³ Reply, para. 18 and note 22.

⁴⁴ *Ibid.*, para. 18 and note 20 (Referencing *Loto* 2022-UNAT-1292, para. 80.)

⁴⁵ *Ibid.*, annex 1

loss is merely another conclusory statement that “Possible maximum USD liability for the Applicant” was USD9,204.22.”⁴⁶

70. In essence, the USG/DMSPC was presented with the same paucity of evidence that was given to this Tribunal.

71. This is in marked contrast to the evidence provided to the Organization in *Loto*. There, UNAT observed that the OIOS memorandum and the Code Cable “provided a detailed description of the unsatisfactory conduct, the names of the implicated staff member(s), and specifics as to where and when the unsatisfactory conduct occurred.... These documents, supported by the information obtained by OIOS during the investigation, including Mr. Loto’s interview with OIOS, led the Administration to conclude that it was more likely than not (preponderance of evidence) that Mr. Loto had engaged in the above-described misconduct.”⁴⁷ Of course, here the Administration was given no evidence whatsoever, and certainly not the detailed description in *Loto*.

72. Moreover, the decision to delay issuance of the payroll clearance action form (“P.35”) was expressly taken pursuant to ST/AI/155/Rev.2. which authorizes the USG/DMSPC to refuse to issue the P.35 form until a staff member has settled all indebtedness to the United Nations.⁴⁸ In examining this directive, the Dispute Tribunal has held that the power relates to “a stated indebtedness...a financial obligation, the extent of which is defined, albeit may be disputed.”⁴⁹ ST/AI/15/Rev.2 may not be used “to secure a merely possible [obligation], akin to a bail.”⁵⁰ At the very least, “there must 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

⁴⁶ *Ibid.*, annex 4.

⁴⁷ *Loto* 2022-UNAT-1292, paras 80-81.

⁴⁸ Application, para. 12.

⁴⁹ *Azar* UNDT/2021/125, para. 20 (Not appealed).

⁵⁰ *Id.*, para. 21.

documents while the determination is being made. Obviously, moreover, the Administration must act swiftly.”⁵¹

73. In this case there is no evidence in the record to show the probability of indebtedness, nor the basis for estimating its value. Moreover, the record shows no specific notice given to the Applicant.

74. The Respondent says that since the Applicant had been interviewed (days before his separation), he “was well aware of the serious fraud allegations against him.”⁵² Again, the Respondent did not present any evidence to the Tribunal or to the USG/DMSPC regarding what was told to the Applicant when he was interviewed. Thus, there is no indication that he was given sufficient notice to make an informed decision about whether to offer a kind of surety.

75. Finally, the Administration certainly did not act swiftly in this case. OIOS was notified of the allegations a year and a half before the Applicant was separated when his duty station closed. It interviewed the Applicant days prior to his separation and then waited three more weeks before recommending that the pension paperwork be delayed. The USG/DMSPC, in turn waited another month before making the decision. And, of course, a final investigation report has yet to be completed in the subsequent year. This is hardly the swift action by the Administration that *Azar* said should be obvious.

76. In conclusion, in the absence of any evidence to support the Administration’s decision, the Tribunal must find that the decision was arbitrary, capricious, and unlawful.

⁵¹ *Id.*

⁵² Reply, para. 17.

Issue II: Whether financial compensation and moral damages should be awarded to the Applicant.

77. The Applicant claimed that he should be given financial compensation and moral damages as a result of the wrongful decision to delay issuance of his pension paperwork until 7 November 2022. Specifically, he requests that the Tribunal order Respondent to pay:

- a. Interest on the one-time pension withdrawal settlement at the US Prime Rate from the date of his separation until the date UNJSPF received his P.35 and PF.4 forms; and
- b. USD5,000 in compensation for moral damages for the pain and suffering caused by the Contested Decision.

78. ST/AI/155/Rev.2 sets out a precise and orderly process for personnel payroll clearance actions upon the separation of a staff member. It expressly provides that “Executive or administrative officers will be responsible for... (b) completing form P.35, normally one month in advance of the last regular working day...”⁵³ The effective date is to be the date of separation.⁵⁴

79. Then the Office of Programme Planning; Budget and Finance is responsible for preparing and “sending the Pension Fund separation notification (PF/4) to the Secretariat of the UNJSPF within three days of the completion of the [P.35]”.⁵⁵

80. In this case, the Applicant’s date of separation was 30 June 2022. However, the pension paperwork was not received at UNJSPF until four months later, 7 November 2022.⁵⁶

⁵³ See ST/AI/155/Rev.2, p.2, para 5(b).

⁵⁴ *Id.*

⁵⁵ *Id.*, p.4, para. 10(d).

⁵⁶ Application, annex 13.

81. To be sure, ST/AI/155/Rev.2 does authorize the USG/DMSPC to delay issuance of the pension paperwork under certain circumstances. However, as explained above, those circumstances were not present in this case and the delay was improper.

82. Both this Tribunal and UNAT have consistently determined that appropriate remedy for delays in paying monetary entitlements is the award of damages.⁵⁷ That interest has been calculated at the US prime rate from the date on which the entitlement was due until the date of payment.⁵⁸

83. Since the record does not show either the due date or the payment date, the reasonable dates to use in this case are the date the pensions paperwork was due to UNJSPF and the date it was received.

84. The Respondent accurately points out that the Organization's "rules do not specify an exact date at which a former staff member's pension entitlements have to be disbursed."⁵⁹ From that he argues that the date the pension paperwork would normally be received by UNJSPF should include "the acceptable administrative processing timeframe of around 3.5 months."⁶⁰

85. The only evidence cited for an acceptable processing timeframe is the MEU recommendation to grant two months of interest to other Kalemie staff members whose pension paperwork was improperly delayed. According to the MEU two months "represents the approximate period of delay vis-à-vis other former staff members who separated from the same duty station on 30 June 2022, and whose PF.4 forms were released throughout the months of August and September 2022."⁶¹

86. However, this vague statement does not give any real insight into an acceptable processing time. It is unclear, for example, if all but a few forms were released on 1

⁵⁷ *Azar* UNDT/2021/125 para. 31; *Kings* UNDT/2017/043, para.49; *Johnson* UNDT/2011/144, para 40(b); *Massi* UNDT/2016/100, para. 79; *Warren* 2010-UNAT-059; *Ianelli* 2010-UNAT-093.

⁵⁸ *Id.*

⁵⁹ Reply, para. 27.

⁶⁰ *Ibid.*, para. 34.

⁶¹ Application, annex 12, p.2.

August and the stragglers in September. Nor is it clear if there were particular processing problems for any of these other staff members. What is clear, however, is that MEU's approximation of two months is less than the 3.5 months that the Respondent now claims to be acceptable, and just half of the four months that occurred in this case.

87. We also know that ST/AI/155/Rev.2 contemplates a much speedier process. It directs executive and administrative officers to complete form P.35 "normally one month in advance of the last regular working day...", which implies that one month is normally how long the process should take. "Normally" recognizes that some unique situations may require the process to begin earlier or later, but no evidence was presented of such unique circumstances in this case.

88. Accordingly, it is reasonable to conclude that the pension paperwork should be sent to UNJSPF around the date of the staff member's separation. Indeed, it would be unfair for the Organization to benefit (at the expense of the staff member) for any institutional inefficiencies, whether for this particular duty station or in general.

89. The four-month delay in submitting the pension paperwork to UNJSPF necessarily resulted in a four-month delay in the Applicant's receipt of his pension 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.

90. 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."⁶²

91. 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

⁶² Application, para. 49.

existence of factors causing harm to the victim's personality rights or dignity...."⁶³
That evidence may take many different forms.⁶⁴

92. The Applicant claims that “[w]ithout 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.”⁶⁵ Again, there is no evidence of this beyond his mere statement and an email from the 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.”⁶⁶ This evidence is insufficient to award moral damages.

93. First, it is not even clear 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.

94. 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.

95. 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.

⁶³ *Kallon* 2017 UNAT-742, para. 60. See also *Civic* 2020-UNAT-1069, para. 77.

⁶⁴ *Id.*

⁶⁵ Application, para. 49.

⁶⁶ *Ibid.*, annex 2.

Conclusion

96. In light of the Tribunal's findings, the application succeeds in part.
97. The decision to delay issuance of pension paperwork is found to be unlawful.
98. 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.
99. The Applicant's claim for other financial and moral damages is denied.
100. All other Applicant's claims are denied.

(Signed)

Judge Sean Wallace

Dated this 12th day of September 2023

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

(Signed)

Eric Muli, Officer-in-Charge, Nairobi