



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2022/079

Order No.: 137 (NBI/2022)

Date: 29 September 2022

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUTOMBO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:
Julia Kyung Min Lee, OSLA

Counsel for the Respondent:
Jacob van de Velden, DAS/ALD/OHR, UN Secretariat
Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Background

1. On 12 September 2022, the Tribunal received an application for suspension of action (“SOA”) from the Applicant, a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). The Applicant is challenging a decision made on 22 August 2022 to delay the issuance of his payroll clearance action form until the conclusion of investigations by the Office of Internal Oversight Services (“OIOS”) against him for possible fraud.

2. The application was served on the Respondent on 13 September 2022 with a deadline to file a reply by 5.00 p.m. (Nairobi time) on Thursday, 15 September 2022.

3. On 14 September 2022, the Respondent addressed an email to the Registry requesting the Tribunal to suspend the proceedings for one week on the ground that, the parties were exploring an amicable resolution of these matters. The Respondent further submitted that the request was made with the agreement of the Applicant pursuant to art. 10(1) of the UNDT Statute.

4. The Respondent’s request was granted pursuant to Order No. 127 (NBI/2022).

5. On 21 September 2022, Counsel for the Respondent informed the Tribunal that the efforts of pursuing an amicable solution were not successful.

6. The Respondent filed a reply on 22 September 2022.

7. On 28 September 2022, the Applicant filed a motion seeking leave to respond to the reply.

Facts

8. The Applicant joined MONUSCO in the Kalemie duty station on 4 May 2009. On 11 April 2022, the Applicant received notice of non-renewal of his fixed-term

appointment beyond 30 June 2022 due to the “dry cut” of his post caused by the closure of the Kalemie office that had been planned since 2020.¹

9. On 30 June 2022, the Applicant separated from MONUSCO due to the abolition of his post. The Applicant was at the time of his separation being investigated for false claims worth approximately USD14,631.14 and KES801,956.98 under the Medical Insurance Plan (“MIP”).²

10. On 23 August 2022, the Applicant received by email a letter from Ms. Martha Helena Lopez, Assistant Secretary-General for Human Resources at the Department of Management, Strategy and Policy and Compliance (“DMSPC”) dated 22 August 2022, stating that his final entitlements of up to USD14,631.14 and KES801,956.98 would be withheld until the conclusion of the investigation against him by the OIOS and that the Administration would delay the issuance of his personnel payroll clearance action form P.35 until the investigation has been concluded, and all indebtedness to the United Nations had been settled.³

11. The Applicant requested for management evaluation of the decision on 9 September 2022.⁴

Submissions

Applicant’s submissions

12. The Applicant’s case is summarized below.

- a. Citing, *Azar* UNDT/2021/125, the Applicant submits that the purpose behind the practice of withholding pension payment under ST/AI/155/Rev.2 (Personnel payroll clearance action) is not akin to a bail and the Administration cannot rely on it to withhold notification to the United Nations

¹ Application, paras. VII(1) and (2).

² *Ibid.*, para. VII(5) and reply, para. 7.

³ Application, annex 3.

⁴ *Ibid.*, annex 5.

Joint Staff Pension Fund (“UNJSPF”) in cases that concern a state of only a hypothetical indebtedness to the Organization which has not been determined and quantified at the time of separation of a staff member.

b. It is unlawful for the Administration to delay the release of the P.35 form to the UNJSPF even if an applicant had resigned while an investigation against him was ongoing if he was not notified of any indebtedness to the Organization or called upon to settle it, as required by ST/AI/155/Rev.2.

c. The Applicant 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 and was only interviewed as a subject nine days before his separation date.

d. The OIOS’s 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 has been made to establish that the Applicant currently is or was ever indebted to the Organization. Moreover, 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 Under-Secretary-General for Management, Strategy and Policy and Compliance (“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 since 30 June 2022.

e. The Applicant was not told how long it would take for the OIOS to complete its investigation in his case, therefore, his final entitlements and

pension benefits are withheld indefinitely. Since the OIOS only appears to have begun its investigation around June 2022 against all of the national staff members in the Kalemie office, as evidenced in MONUSCO's internal emails, it would likely take several months or years before the OIOS concludes its investigation. Denying the Applicant his pension benefits for a prolonged period of time based on unfounded assumptions of indebtedness is in violation of ST/AI/155/Rev.2 and staff rule 3.5.

f. There can be no serious dispute as to the urgency of the present request for a suspension of the contested decision. The contested decision is being implemented indefinitely. If a suspension of action is not granted, the withholding of his pension will continue to have a legal effect on the Applicant.

g. The contested decision causes irreparable harm because since separating from MONUSCO, the Applicant and his family have been facing immense financial distress and have been struggling to survive. The Applicant is unable to provide the basic essential needs such as food and housing for his family. The Applicant's inability to provide these basic essential needs for his family harms their physical and mental health, as well as his. The harm caused to the Applicant's health and the health of his family is an irreparable harm that cannot be considered as mere economic loss.

Respondent's submissions

13. The following is a summary of the Respondent's case.

a. Granting the application would irreversibly undermine the Organization's recovery of the financial loss caused by the Applicant's possible serious misconduct which is being investigated. Such final relief is not appropriate in a suspension of action application. It would not maintain a status quo, but effectively modify it. The UNAT has acknowledged the difficulties of recovery after the staff member's separation faced by the

Organization in its interpretation of the purpose of ST/AI/155/Rev.2 as being also aimed at securing such financial recovery of losses of the Organization due to the staff members' misconduct. Unlike private creditors, the Organization has no option to pursue former staff members through national courts for financial losses that are finally established after their separation.

b. The Applicant effectively seeks a priority hearing of his request for management evaluation and his possible UNDT appeal and the decision on the merits thereof, and to obtain final relief in the form of a summary judgment in his favor. Such a result would exceed the Tribunal's powers in the context of this suspension of action application. As such, the application is not receivable *ratione materiae*. The present suspension of action application should not be allowed to thwart the Organization's recovery.

c. The Applicant wrongly asserts that the Administration arbitrarily withheld his final entitlements and pension benefits for no valid reason since 30 June 2022. The Organization had very good reason to withhold the Applicant's final entitlements and delay the issuance of his P.35 form.

d. The Applicant was at the time of his separation being investigated for false claims worth USD14,631.14 and KES801,956.98 under the MIP, including for 11 purported hospitalizations while the Applicant was at work according to his own UMOJA records. The Fraud Investigation Unit ('FIU') of Cigna, the administrator of the MIP, reported on these and other irregularities and concluded that the claims of the Applicant had been unduly reimbursed. On 21 July 2022, OIOS estimated the financial loss of the Organization at an amount of USD14,631.14 and KES801,956.98. OIOS interviewed the Applicant as a subject on 22 June 2022.

e. Against this background, the Organization appropriately used its only two legal means to secure recovery of its estimated financial loss by: withholding the estimated financial loss suffered by the Organization from the

staff member's final separation entitlements, until the investigation has been concluded and the findings support the imposition of financial recovery pursuant to staff rule 10.1(b); and by refusing to issue the P.35 form or delaying its issuance.

f. The withholding by the Organization of the estimated financial loss of approximately USD21,286.58 against the Applicant's final entitlements of USD9,336.21 was insufficient and did not suffice to cover his estimated indebtedness to the Organization. Further, the decision to delay his P.35 form was made at an appropriately high level, i.e., the USG/DMSPC.

g. The estimated financial loss of the Organization and the Applicant's corresponding indebtedness of the Applicant had a sufficient level of probability, in view of the information reported by the FIU and referred to OIOS for investigation, OIOS' decision to investigate the matter and its communication to the Office of Human Resources ("OHR") of the estimated financial loss of the Organization that might need to be recovered. In those circumstances, the decision to delay issuance of the P.35 form was *prima facie* lawful and, is in fact, entirely reasonable.

h. The Applicant has not shown irreparable damage from the delayed issuance of his P.35 form. Mere economic loss is not enough. After more than 13 years of service with the Organization, it cannot, without more, be assumed based on bare assertions that the Applicant would lack the financial means to provide food and shelter to his family and that the Applicant faces "immense financial distress" that would cause him and his family to struggle to survive. Any other harm that the Applicant asserts in his application, such as the purported mental health impact, has equally not been substantiated in any way. Such assertions, without more, are inadequate to show damage, let alone irreparable damage caused by the contested decision.

i. By its very nature, this measure is temporary; it is without prejudice to the Applicant's rights – his P.35 form will be issued if the investigation is concluded without the finding of any misconduct or financial loss, and the Applicant will be able to receive his full pension benefits. Against this background, the Applicant has failed to show a negative impact, if any, that could not be remedied.

j. Any negative impact, if any, is self-inflicted. The Organization has agreed to issue P.35 forms, subject to sufficient surety being provided to ensure recovery of its estimated loss, in the form of a payment of the difference between the estimated financial loss and the final entitlements from the Applicant's pension benefits (a so-called "split-payment"), which the UNJSPF can only make with the agreement of the Applicant. Had the Applicant agreed to the offer, he would have received USD44,439.80 from the UNJSPF now. It would have been reasonable for him to accept the offer of the Organization, if the Applicant was indeed unable to provide his family the essentials for survival as he claims in his application.

k. In his application, the Applicant refers to the "continuing legal effect" of the contested decision. This understanding of "particular urgency" in art. 2(2) of the Tribunal's Statute is erroneous. The UNDT has held that if an applicant seeks the Tribunal's assistance on urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The required urgency should involve an acute threat. Moreover, self-created urgency does not satisfy the requirements for suspension of action.

l. The Applicant has failed to demonstrate the required urgency. The Applicant has also failed to show the timeliness of his actions. The Applicant sought management evaluation only two and a half weeks after the contested

decision was communicated to him and almost 11 weeks after his separation on 30 June 2022.

m. The Applicant erroneously asserts that the contested decision is being implemented indefinitely. As set out in the letter to the Applicant communicating the USG/DMSPC's decision, the delay of the Applicant's P.35 form is a temporary (administrative) measure. This measure lasts only "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 [if any] has been satisfactorily settled." If no misconduct is established, the withheld final entitlements will be paid to the Applicant and his P.35 form will be issued.

Applicant's motion for leave to respond to the reply

14. In his motion dated 28 September 2022, the Applicant makes the following submissions.

a. A decision with continuous legal effects is only implemented when it has been entirely implemented. The Respondent has not provided any information on when the OIOS investigation would be concluded; therefore, the contested decision continues to have continuing legal effect on the Applicant for an indefinite time. As such, his application for suspension of action is receivable.

b. This is the first time that he is being provided with annexes R/2 to R/4 filed with the reply. This is the first time that the Applicant is being made aware that the OIOS's investigation against him is largely, if not solely, based on the alleged discrepancy between his UMOJA records and his medical records.

c. The Respondent has not even provided one medical invoice to support his arguments. The Respondent has not provided any evidence that can

reasonably lead to any factual finding that the Applicant submitted false claims under the MIP or that he was indebted to the Organization. The spreadsheet attached in annex R/3 is incomprehensible to the Applicant and does not support the Administration's position that the Applicant submitted fraudulent medical claims to Cigna. It can also be speculated that the Applicant's UMOJA records contained administrative errors.

d. Citing *Songa* UNDT/NY/2021/032, the Applicant submits that facts resulting from a deficient investigation could not be relied upon, where an applicant was not given an opportunity to rebut the allegations or point to exculpatory evidence. As such, the Respondent has failed to establish any credible facts to establish that the Applicant 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 and this Tribunal's ruling in *Azar*.

e. The Applicant agreed to enter into amicable settlement discussions with the Respondent in good faith and understood that all communications exchanged in those discussions would be absolutely privileged and confidential. The Applicant refused to accept the Respondent's offer because he did not believe that it was in his interest to do so. The Applicant is surprised to read the disclosure by the Respondent of privileged and confidential communication made during settlement discussions. The Respondent's further reference to informal settlement negotiations in other cases pending before this Tribunal in similar matters is also inappropriate. The Respondent's submissions are also in violation of art. 15(7) of the Dispute Tribunal's Rules of Procedure. Therefore, the Respondent's submissions contained in paragraphs 18 and 19 of his reply should be completely rejected.

f. It has been almost four months since the Applicant had any income to support his family. The despair faced by the Applicant is witnessed and corroborated by MONUSCO's own senior management. The Organization is

in no position to make patronizing comments on how the Applicant should have planned financially for the past 13 years of service to avoid the unexpected and unlawful withholding of his pension entitlements. The Applicant and his family have struggled to survive for far too long without any income and urgently need access to his duly earned pension entitlements.

Considerations

15. The Organization has an obligation to pay the corresponding salary to each staff member in consideration of the work performed, which is the obvious primary duty of any employer towards its employees. This finding is supported by the fact that the salary rate is one of the very few elements of the conditions of service specified in the United Nations letters of appointment (see para. (a)(v) of Annex II to the Staff Regulations and Rules), and the determination of the salary scales and components is the subject of numerous Staff Regulations and Rules (notably, but not limited to, Annex 1 to the Staff Regulations and Rules).

16. The Applicant, separated more than three months ago, has a right (certain and executable) to receive the final salary and entitlements due to separated staff members.

17. In addition, 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 provide that the Administration is responsible for “providing 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.”

18. In Judgment No. 2021-UNAT-1104, *Azar*, as to withholding of payments to the staff member and to not forwarding the documentation to the pension fund, the

United Nations Appeals Tribunal (“UNAT”), stressed (para. 33) that “[c]onsiderations such as proportionality of its exercise, both as to the amounts withheld and the length of their retention are open to judicial review of these administrative decisions and there may well be other grounds of challenge to them”.

19. In *Azar* UNDT/2021/125 (not appealed), the UNDT examined the question of the lawfulness of the withholding of a staff member’s pension payments and the Administration’s decision to not forward the personnel payroll clearance action form to the pension fund pursuant to sections 11 to 13 of ST/AI/155/Rev.2. The Dispute Tribunal stressed that the Administration could not rely on it to withhold notification to UNJSPF in cases that concern “a hypothetical indebtedness to the Organization, which was not determined and quantified at the time of separation, and, as later demonstrated, remained undetermined”.

20. UNDT ruled that it was unlawful for the Administration to delay the release of the P.35 form to the UNJSPF even if the applicant had resigned while an investigation against him was ongoing because he “was not notified of any indebtedness to the Organization or called upon to settle it, as required by ST/AI/155/Rev.2.”

21. It further examined the issue 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, observing that this “purpose does not transpire from the rule” and that “[i]f 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.” (para. 21).

22. The Tribunal also added that the withholding of the notification to UNJSPF “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. Having in mind the above recalled principles, the Tribunal will examine the case at hand.

24. The Tribunal preliminarily notes that at the moment there is no evidence of any misconduct by the Applicant nor of damage caused to the Administration, but only a pending investigation whose outcome is still uncertain.

25. The identification of the Applicant as a subject of a possible unsatisfactory conduct involving claims for reimbursement of health treatment is generic and remains, even after the reply, unsubstantiated.

26. The Respondent has only provided an UMOJA screenshot showing a period of leave, a Cigna document showing hospitalization in the same period and an email asserting (generically) a possible “maximum liability” of the Applicant. It results from the records in no way that the Applicant’s claims for reimbursement to Cigna were false, nor is it clear at all if and how the alleged fraud by the Applicant could have been perpetrated and with which concrete consequences.

27. Being that the Applicant’s debt is hypothetical and undetermined, the Respondent has not given any explanation as to how the Administration or the OIOS estimated the possible maximum financial loss that the Organization should recover from the Applicant, nor has it submitted any investigation report or any kind of evidence to support its pretention (not even a summary explaining how the debt arose).Therefore, no factual finding has been made to establish that the Applicant currently is or, better, before separation was indebted to the Organization.

28. Recalling the *Azar* criteria, it is worth noting that the withholding of the wage is persisting for three months, and that there are no exceptional situations justifying

the withholding of release of the P.35 form, given the slight difference between the alleged loss and the debt by the Administration.

29. Nor has the Administration given any indication about the difficulties it would incur in recovering its debt with ordinary means other than withholding of wages and the release of the P.35 form; indeed, once assessed and calculated, the Administration's credit would be owed by a person who, being at least a pensioner, would have means to solve his financial debts. The Administration is therefore not entitled to withhold the emoluments it owes to its separated staff member.

30. Under the first prong of the tripartite test in granting an SOA, the Tribunal finds that the contested decision appears to be *prima facie* unlawful.

31. The Administration is arbitrarily withholding (without any indication of the length of the withholding) the Applicant's final entitlements and pension benefits. Since separating from MONUSCO, the Applicant has had no more benefit of a salary nor has he received the pension which he is entitled to, and, such as any worker deprived of his usual economic support, he is facing financial distress and probably struggles to satisfy his and his family basic needs, with any consequence on the serenity of his life. The matter is therefore urgent too and it may cause irreparable harm to the Applicant.

ORDER

32. The application for suspension of action of the MONUSCO Administration's decision to delay the issuance of the Applicant's P.35 form pending management evaluation is granted.

(Signed)

Judge Francesco Buffa

Dated this 29th day of September 2022

Entered in the Register on this 29th day of September 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi