



Before: Judge Sean Wallace

Registry: Nairobi

Registrar: René M. Vargas M., Officer-in-Charge

BUBEGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Ana Giulia Stella, OSLA

Counsel for the Respondent:

Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Introduction

1. This is the most recent of many cases arising from allegations of medical insurance fraud at the United Nations Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) that the United Nations Dispute Tribunal (“the Tribunal”) is called to adjudicate by means of an Order or a Judgment.¹
2. The Applicant is a former staff member of MONUSCO having joined in 2006.
3. On 11 April 2024, the Applicant filed an application for suspension of action pending management evaluation (“SOA”) with the Tribunal sitting in Nairobi. He seeks to suspend the decisions dated 24 January 2024 and 5 April 2024 to delay the issuance of his personnel payroll clearance action form (“P.35 form”) and his separation notification (“PF.4 form”) to the United Nations Joint Staff Pension Fund (“UNJSPF”).
4. On 16 April 2024, the Respondent filed a reply submitting that the application is not receivable *ratione materiae* and that it also lacks merit.
5. On 17 April 2024, the Applicant filed his response to the reply pursuant to the Tribunal’s directions.

Background

6. In September 2019, the administrator of the United Nations Medical Insurance Plan (MIP) inquired of the Applicant regarding certain claims that he had made between 2015 and 2019.

¹ See, e.g., *Mutombo* Order No. 137 (NBI/2022); *Asumani* Order No. 138 (NBI/2022), *Kabila et al.* Order No. 140 (NBI/2022); *Afazali* Order No. 142 (NBI/2022); *Bisimwa* UNDT/2023/096; *Kalambi* UNDT/2023/097; *Kawende* UNDT/2023/098; *Afazali* UNDT/2023/099; *Mukwamba* UNDT/2023/100; *Mutombo* UNDT/2023/101; *Amisi* UNDT/2023/102; *Kabila* UNDT/2023/103; and *Muselemu* UNDT/2023/105.

7. Two years later, in September 2021, the Applicant was interviewed by the Office of Internal Oversight Services (“OIOS”) regarding possible unsatisfactory conduct as a result of these claims.

8. On 31 December 2023, the Applicant separated from service at the age of 65 following 17 years of service at MONUSCO. At the time of his separation, he alleges that his final entitlements were withheld, along with his pension benefits as the Administration withheld release of his P.35 and PF.4 forms.

9. On 24 January 2023, in response to a query from the Applicant, MONUSCO Human Resources confirmed by email that the Applicant’s final payment processing was put on hold “because there is a medical insurance fraud by [him] pending investigation which involves a hypothetical indebtedness amount of USD23,677.19”. MONUSCO promised to keep the Applicant posted as soon as there was any update in the case.

10. On 29 February 2024, the Applicant requested management evaluation of the decision to withhold his final entitlements.

11. By email dated 1 March 2024, the Director, Administrative Law Division, Office of Human Resources, Department of Management Strategy, Policy and Compliance (“ALD/OHR/DMSPC”), advised the Applicant of 15 suspicious hospitalization claims, dating from 29 May 2015 to 31 March 2019, and seeking his comments.

12. On 5 April 2024, the Assistant Secretary General, Human Resources, DMSPC (“ASG/HR/DMSPC”) wrote to the Applicant:

We are referring to the investigation of [OIOS] of possible unsatisfactory conduct, in which you have been interviewed as a subject. ... The above investigation had not been concluded at the time of your separation. Your possible unsatisfactory conduct might have caused a financial loss to the Organization. OIOS determined as the estimated financial loss an amount of US\$ 23,677.19. ... Your final separation entitlements amount to US\$ 5,654.74.

13. The ASG/HR/DMSPC recounted that “against this background,” the Under-Secretary-General, DMSPC “(USG/DMSPC”), had decided to withhold the Applicant’s final separation entitlements in their entirety and to delay issuance of his P.35 form “until the investigation has been concluded and all indebtedness to the United Nations ... has been satisfactorily settled”.

14. On 11 April 2024, the Applicant filed the application for suspension of action pending management evaluation referred to in para. 3 above.

Consideration

15. Article. 2.2 of the UNDT Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

16. Thus, for an SOA to succeed, an applicant must show that all the following conditions have been met: (i) the decision appears to be unlawful on its face; (ii) there is particular urgency; and (iii) implementation of the decision would cause irreparable damage to the applicant.

Unlawfulness of the contested decision

17. As to unlawfulness of the decision, it is clear that the 24 January 2024 decision by MONUSCO Human Resources is incontrovertibly unlawful because the authority to withhold the P.35 form is expressly delegated solely to the USG/DMSPC (see ST/AI/155/Rev.2 (Personnel Payroll Clearance Action), para. 12, and ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), sec. 9.6.

18. The subsequent decision of the USG/DMSPC (affirming the initial decision) on 5 April 2024 was done by the authorized person, but this decision is expressly premised on the existence of an ongoing investigation, pursuant to sec. 9.6 of ST/AI/2017/1.

19. The chronology of events shows that inquiries into the Applicant's medical claims began nearly five years ago. OIOS interviewed the Applicant regarding possible unsatisfactory conduct in this regard in September 2021. Yet, the record shows no further investigative activity for the ensuing years until the Applicant retired. This raises a legitimate question as to whether, in April 2024, there was a genuine investigation ongoing that would justify withholding the Applicant's entitlements until the investigation was concluded. If there was no ongoing investigation, then the 5 April 2024 decision was unlawful under ST/AI/2017/1.

20. To the extent that the 5 April 2024 decision is premised on ST/AI/155/Rev.2, that instruction requires "a stated indebtedness and a staff member's refusal to settle the debt" (see *Azar*, UNDT/2021/125, para.20). At the very least "there must [be] a sufficient level of probability of the indebtedness, the value of it estimated and notice given to the separating staff member ... [In addition] the Administration must act swiftly" (*Id.* para. 21).²

21. The record shows that the first notice to the Applicant of a specific indebtedness was on 24 January 2024, after he had separated and then was given only in response to his queries. That notice merely references a "pending investigation which involves a hypothetical indebtedness amount of USD23,677.19". There was no explanation as to the probability of this hypothetical indebtedness nor how its value was estimated.

² The Tribunal notes that the Respondent includes this quotation in para. 20 of his reply but omits the final requirement that "the Administration must act swiftly". This omission seems to be a tacit admission that the Administration has failed to act swiftly in this case.

22. Then by email of 1 March 2024, while the management evaluation was ongoing, the Administration advised the Applicant of 15 questioned hospitalization claims and said that the dates of the claims did not accord with Umoja absence and car logger records. That email gave the Applicant two weeks to comment.

23. Even if the 1 March 2024 email complied with the notice requirement, it is clear that the Administration was not acting swiftly in this matter.

24. On this record, the Applicant has demonstrated at least “an arguable case of unlawfulness, notwithstanding that this case may be open to doubt” *Corna* Order No. 80 (GVA/2010), citing *Buckley* UNDT/2009/064 and *Miyazaki* UNDT/2009/076.

Urgency

25. The Tribunal finds that this is a case of urgency since the Applicant has been denied thousands of dollars in earned entitlements and benefits for months since he retired from the Organization.

Irreparable damage

26. The Tribunal finds that the application flounders on the requirement of irreparable damage. As the Applicant acknowledges at para. 27 of his application, “mere economic loss only is not enough to satisfy the requirement of irreparable damage”. The decision to withhold his entitlements is the quintessential case of economic loss. The consequential damages that he claims as a result of this economic loss (his alleged inability to pay for food, housing and education) are all damages that may be recovered should the Applicant prevail in a merits case challenging the lawfulness of the contested decisions.

27. The Applicant relies on other Orders from this Tribunal granting suspension of action in similar MONUSCO cases. However, those Orders do not fully analyze the irreparable harm prong and thus are unpersuasive to the undersigned on that issue.

28. Accordingly, as one of the requirements for suspension of action is not met, the application for suspension of action must fail.³

Additional considerations

29. The facts of this case, and the plethora of similar cases in this Tribunal arising from alleged medical insurance fraud in MONUSCO, raise troubling concerns about how these allegations are being handled by the Organization.

30. As noted above, the allegations in this case arose sometime in 2019, prompting a query to the Applicant. Other than a brief spurt of activity in 2021 including an interview with the Applicant, it seems there was virtually no investigation of the allegations for over four years. The same thing seems to have happened in numerous other cases that ultimately made their way to the Tribunal's docket.

31. It appears that OIOS/MONUSCO frequently do not bring these MIP fraud investigations to conclusion, neither clearing the innocent nor charging the guilty. Instead, the investigations languish inactive for years. Then when the involved staff member separates from service, the Administration grabs the departing staff member's final entitlements under the guise of a pending investigation. At that point the staff members are left without access to their earned entitlements and with no other choice than to file with the Tribunal.

32. If this appearance is true, it is an unfair state of affairs to both the Organization and the staff members. If the investigations were concluded and allegations disproven, the staff member could have the cloud of suspicion lifted and would receive their entitlements and pension without delay upon separation. If the investigations were concluded and the allegations proven, the Organization could bring disciplinary actions against the staff members and/or arrange repayment at a time when the staff members

³ The other grounds that the Respondent argues for denial of the SOA are thus deemed moot.

are employed and thus with income to make such repayments. In either case, failing to conclude the investigations harms both the Organization and its staff members.

33. In the limited context of an SOA there is insufficient evidence to refer the matter to the Secretary-General for enforcement of accountability. However, should such a case come before the Tribunal on the merits, the undersigned judge would expect the Respondent to produce evidence of legitimate investigative activity over the years in question, along with details about all the MIP fraud cases handled by OIOS/MONUSCO in this manner including the ultimate resolution of those allegations. If that evidence confirms the suspicions that have arisen in this case (and prior cases), a referral for accountability might be issued.

34. Of course, such a referral is not the wish of this Tribunal (nor one imagines would it be desired by the involved authorities). However, it seems clear that the previous rulings of the Tribunal (see footnote 1 above) have not resulted in any management changes as of yet.

35. Accordingly, the Registrar of the Tribunal's Registry at Nairobi is directed to deliver copies of this Order to the Under-Secretary-General for Internal Oversight Services, the Special Representative of the Secretary-General in the Democratic Republic of the Congo and Head of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, the USG/DMSPC, and the ASG/HR/DMSPC to insure that they are personally aware of the concerns described herein.

Conclusion

36. For the reasons set forth above, it is ORDERED THAT:

- a. The application for suspension of action pending management evaluation is denied; and

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Order No. 46 (NBI/2024)

b. The Registrar of the Tribunal's Registry at Nairobi shall act pursuant to para. 35 above.

(Signed)

Judge Sean Wallace

Dated this 18th day of April 2024

Entered in the Register on this 18th day of April 2024

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi