



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/027

Judgment No.: UNDT/2023/104

Date: 12 September 2023

Original: English

**Before:** Judge Sean Wallace

**Registry:** Nairobi

**Registrar:** Eric Muli, Officer-in-Charge

NGOIE MWENGE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**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 Transport Assistant, at the G-4 level, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), based in the Kalemie duty station.<sup>1</sup>

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 investigations against him for possible fraud by the Office of Internal Oversight Services (“OIOS”).

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

## **Factual and procedural background**

4. The Applicant joined the Organization on 12 September 2011 working with MONUSCO. His duty station was Kalemie.<sup>2</sup>

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 28 June 2022, the Applicant was interviewed by the OIOS as a subject of possible unsatisfactory conduct.<sup>3</sup>

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<sup>1</sup> Application, para. 7.

<sup>2</sup> *Ibid.*

<sup>3</sup> Application, para. 6.

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

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.<sup>4</sup> 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.”<sup>5</sup>

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.

12. On 19 August 2022, Mr. Jacob Mogen, the Head of 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 investigations. Alternatively, given the desperation of the affected staff

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<sup>4</sup> *Ibid.*, annex 2, p. 6.

<sup>5</sup> *Ibid.*, p.5.

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.<sup>6</sup> In this report, 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.<sup>7</sup>

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 USD7,689.00 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”).<sup>8</sup>

15. On 9 September 2022, the Applicant filed a management evaluation request of the contested decision.<sup>9</sup> Further, on 12 September 2022, he filed an application for suspension of action (“SOA”) of the contested decision.<sup>10</sup>

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<sup>6</sup> Reply, annex 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> Application, annex 3.

<sup>9</sup> *Ibid.*, annex 4.

<sup>10</sup> *Ibid.*, annex.

16. On 12 September 2022, OIOS informed the Office of Human Resources (“OHR”) that the final entitlements of the Applicant in the amount of USD7,887.25 were sufficient to cover the estimated financial loss.<sup>11</sup>

17. On 28 September 2022, the Administration informed the Applicant that, the USG/DMSPC had decided, subject to the withdrawal of his SOA application, to thereafter release his P.35 form, considering that his final entitlements of USD7,887.25, were sufficient to cover the estimated financial loss of the Organization, amounting to USD7,689.00.<sup>12</sup>

18. On 29 September 2022, the Applicant filed his notice of withdrawal of his SOA application in reliance of the Administration’s undertaking that his P.35 form would be released upon the withdrawal of his application.<sup>13</sup>

19. On the same day, the Tribunal issued Order No. 136 (NBI/2022), accepting the Applicant’s notice of withdrawal of the SOA and closed the case.

20. On 3 October 2022, OHR instructed MONUSCO to release the P.35 form of the Applicant.<sup>14</sup>

21. On 11 November 2022, the United Nations Joint Staff Pension Fund (“UNJSPF”) received the Applicant’s PF.4 notification.<sup>15</sup>

22. On 1 December 2022, the Management Evaluation Unit (“MEU”) issued its decision and recommended granting the Applicant interest at the United States prime interest rate on the one-time withdrawal of his pension fund amount for a period of two months. The MEU recommended denying the payment of moral damages.<sup>16</sup>

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<sup>11</sup> *Ibid.*, annex 7.

<sup>12</sup> *Ibid.*, annex 6.

<sup>13</sup> *Ibid.*, annex 7.

<sup>14</sup> Reply, annex 6.

<sup>15</sup> Application, annex 9; Reply, para. 15.

<sup>16</sup> Application, annex 10.

23. The MEU recommendation for the payment of interest is yet to be implemented, which the Respondent attributes to the lack of cooperation on the side of the Applicant.<sup>17</sup>

### **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 financial compensation and moral 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 since separating from MONUSCO until the payment of his pension benefits, he and his family faced immense financial distress and struggled to survive. For over four months, the Applicant was unable to provide the basic essential needs such as food and housing for his family. Consequently, he had to resort to borrowing USD6,000.00 with an interest of USD1,800.00, which resulted in a financial loss for him.<sup>18</sup>

26. The Applicant, thus, avers that his inability to provide these basic essential needs for his family harmed their physical and mental health, as well as his. Without any medical insurance and money to pay for treatments, the Applicant and his family

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<sup>17</sup> Reply, para. 18.

<sup>18</sup> Application, annex 11, application, para. 27.

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.

27. From a legal point of view, the Applicant contends that the contested decision was unlawful. He maintains that he was never indebted to the Organization in the amount of USD7,689.00, as claimed in the USG/DMSPC's letter of 22 August 2022. To date, neither OIOS nor the Respondent provided any explanation as to how they arrived at this speculated amount to be 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.

28. The Applicant further submits 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, 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.

29. 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 OIOS on 1 June 2022, along with the rest of the separating national staff members of the Kalemie office and was only interviewed as a subject two 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.

30. The Applicant avers that the Respondent has failed 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.

31. 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.

32. In view of the foregoing and relying on *Azar*<sup>19</sup>, the Applicant submits that he should be paid interest at 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.*

33. Relying on the jurisprudence of this Tribunal<sup>20</sup>, 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

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<sup>19</sup> *Azar* UNDT/2021/125 (not appealed).

<sup>20</sup> *Kings* UNDT/2017/043, para 45; *Massi* UNDT/2016/100, para. 69; and *Chacon Gomez* UNDT/2017/096.



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.<sup>21</sup>

34. 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.

35. The Applicant asserts that the claim for moral damages is appropriate in this case even in the absence of additional medical documentation. In *Civic*<sup>22</sup>, the United Nations Appeals Tribunal ("UNAT") ruled that the testimony of staff members 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 for one's health.

36. 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;

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<sup>21</sup> Application, para. 49; application, annex 2, pages 3-4.

<sup>22</sup> *Civic* 2020-UNAT-1069.

- b. USD1,800.00 for the financial loss that he incurred due to the delay in the payment of his pension benefits occasioned by the contested decision; and
- c. USD5,000 in compensation for moral damages for the pain and suffering caused by the contested decision.

*Respondent's submissions*

*On whether the Organization's decision to delay the issuance of the Applicant's P.35 form was lawful.*

37. The Respondent's case is that the contested decision was made in good faith and compensation was offered for the delay caused. The Applicant wrongly asserts that "the Administration arbitrarily withheld his final entitlements and pension benefits for no valid reason." To the contrary, the Organization acted in good faith and in the belief of a reasonable basis and informed the Applicant about its reasoning in the contested decision. Further, the Applicant had already been interviewed by OIOS before he separated from the Organization on 30 June 2022 and was well aware of the serious fraud allegations against him.

38. The Respondent acknowledges a wrong insofar as the Organization could and should have verified and established at the outset that the Applicant's final entitlements were sufficient to cover the estimated financial loss caused by his alleged medical insurance fraud. The Organization failed to do so (timely). As noted, the Respondent would have remedied this wrong already had the Applicant cooperated.

39. The Respondent maintains that the OIOS conducted its investigation into the Applicant's misconduct under high time pressure and ensured that the Applicant was properly heard before sending a memorandum to OHR on 21 July 2022 recommending that consideration be given to withholding his separation entitlements, if the Organization wished to recover reimbursements made to these staff members under the MIP. In addition, OIOS received information on the Applicant's claims from the Fraud

Investigation Unit (“FIU”) of Cigna, the administrator of the MIP, concluding that the Applicant had been unduly reimbursed.

40. The available information indicated that the Applicant submitted false claims to Cigna for a total of USD46,546.38. These claims involved 38 hospital admissions of the Applicant and his insured dependents. During six 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.

41. Cigna prevented a major part of the financial loss to the Organization by not reimbursing the full amount of USD46,546.38. The decision of the Administration to delay the P.35 form was in hindsight unnecessary because withholding part of the Applicant’s final entitlements would have sufficed to safeguard the Administration’s financial interests. Nevertheless, the Respondent re-emphasizes that throughout the decision making and correcting process, the Organization demonstrated commitment and good faith in handling the matter. The aim of the Organization has always been solely to ensure recovery of its financial losses for which the Organization is accountable to its Member States and which is repeatedly emphasized by the General Assembly.

42. For future reference, the Organization is committed to ensuring that the information regarding a staff member’s final entitlements is verified before deciding to withhold final entitlements and to delay the issuance of the P.35 form.

43. The Respondent further emphasizes that there was no inordinate delay, in addition to the two months established by MEU. In *Nchimbi*<sup>23</sup>, 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 unreasonable in view of the Organization’s obligation “to

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<sup>23</sup> *Nchimbi* 2018-UNAT-815, paras. 27-28.

*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.

45. In line with *Nchimbi*, the time used from OHR’s instruction to MONUSCO on 3 October 2022 to issue the P.35 form of the Applicant until its receipt by UNJSPF on 11 November 2022—30-five weeks—is not unreasonable and does not warrant compensation. MONUSCO forwarded the instructions to issue the Applicant’s P.35 form to the RSCE. The RSCE updated MONUSCO and OHR regularly on the progress in implementing this request, in particular the efforts in reconciling all outstanding obligations and technical problems that it encountered.<sup>24</sup> Due to the remote cooperation between RSCE and MONUSCO in managing the check-out process of separating staff members, including the issuance of P.35 forms, the process is more complex than in duty stations that handle the check-out process entirely themselves. For instance, after the processing of the P.35 form, RSCE submits the form first to MONUSCO before the PF.4 notification is then sent by MONUSCO to the pension fund. This careful process naturally takes more time.

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

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<sup>24</sup> Reply, annex 7; reply, para. 25.

*Whether financial compensation and moral damages should be awarded to the Applicant.*

47. The Respondent's position is that there is no basis for an award of damages beyond the MEU recommendation.

48. The Respondent argues that according to *Fosse*<sup>25</sup> and *Rehman*<sup>26</sup>, 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. Regarding the Applicant's claim for interest on the one-time pension withdrawal settlement at the US prime rate from the date of his separation, the Respondent states that any interest payment could only accrue from the time that the Applicant would have normally received his pension benefits without any undue delay caused by the contested decision. As noted, the Organization's rules do not specify an exact timeline within which a former staff member's check-out process needs to be completed, final entitlements have to be paid, and the PF.4 notification has to be received by the pension fund. The completion of the P.35 form involves multiple steps and liaising with different offices and units within the Organization to ensure that all outstanding claims and obligations are settled. Therefore, UNJSPF does not receive notification to process a separating staff member's pension entitlement claims on the date of a staff member's separation.

50. A comparison with other former staff members who separated from the same duty station on 30 June 2022 shows that their PF.4 notifications were sent to UNJSPF

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<sup>25</sup> *Fosse* 2022-UNAT-1305, para. 52.

<sup>26</sup> *Rehman* 2018-UNAT-882, para. 17-18.

in the months of August and September 2022. The Applicant's PF.4 notification was received by UNJSPF on 11 November 2022. The contested decision thus caused the processing of the P.35 form to take about two months longer in comparison with the processing time for separating staff members not accused of fraud.

51. This has also been confirmed by the MEU in its evaluation of the Applicant's request and recommendation on compensation. The Respondent is ready to pay the Applicant interest at the US prime interest rate on the one-time withdrawal of his pension fund amount for a period of two months as soon as the Applicant grants UNJSPF authorization to disclose the final amount of his pension withdrawal settlement.

52. Regarding the Applicant's claim for an interest on his personal loan, the Respondent argues that the Applicant failed to disclose this loan previously, in his SOA application on 12 September 2022. Instead, he dramatically asserted that he was at that time "*unable to provide the basic essential needs such as food and housing for his family.*" But only one of two things can be true: either the Applicant lied in his SOA application that he had no money for food and housing, or he is now lying about his purported loan. Either way, the credibility of the Applicant undermines his claim for damages.

53. Further, there is no nexus with the contested decision, which did not cause the Applicant to take the purported loan. The contested decision was only made on 22 August 2022, whereas the purported loan was taken out on 24 July 2022, one month before the contested decision. Accordingly, by the time of the contested decision, the Applicant had already entered into binding obligations to repay the loan with the interest of USD1,800. The contested decision did not cause the Applicant to enter into this loan agreement. The causal link between the alleged wrong – the contested decision – and the purported damage is missing. Further, the purported loan document does not specify the duration of the loan, the due date of the payment, proper identification of the creditor and the debtor. The document states a fixed interest amount of USD1,800.00 which would be due irrespective of the length of the loan

which raises doubts as to the authenticity of this loan agreement. Further, the Applicant does not submit any form of evidence that he in fact paid this interest amount. He failed to provide adequate evidence that he had these expenses.

54. On the moral damages prong, the Respondent opines that the Applicant has failed to provide any evidence of actual moral harm. The Applicant's mere averment of such purported harm is not sufficient. Relying on *Kabede*<sup>27</sup>, the Respondent emphasizes that specific evidence in support of his claim for moral damages is required,<sup>28</sup> which he failed to provide. The Applicant's reference to *Civic*<sup>29</sup> is misplaced and misrepresents the 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*"<sup>30</sup> 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.

55. The Respondent contends that there are multiple indications of forgery of evidence in this case. Citing *Maruschak*<sup>31</sup>, the Respondent stresses that forgeries perpetrated by the Applicant may deprive him of remedies even if it is established that the contested decision was wrong.

56. In view of the foregoing, the Respondent requests the Tribunal to reject the application regarding any damages claim exceeding an interest payment at the US prime interest rate on the Applicant's pension withdrawal for a period of two months.

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<sup>27</sup> *Kabede* 2028-UNAT-874, para. 22

<sup>28</sup> *Ibid.*, para. 22.

<sup>29</sup> Application, para. 50.

<sup>30</sup> *Civic* 2020-UNAT-1069, para. 77.

<sup>31</sup> *Maruschak* 2022-UNAT-1282, para. 22.

## Considerations

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

57. As noted above, this is one of ten 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 decision was made on 22 August 2022.

58. 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....<sup>32</sup>

59. 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.”<sup>33</sup>

60. 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.<sup>34</sup>

61. Under the Cigna exercise, the flagged files were “systematically monitored since being flagged.”<sup>35</sup> It is unclear in the record as to what that systematic monitoring

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<sup>32</sup> Reply, annex 1j, p.3.

<sup>33</sup> *Id.* (Emphasis added).

<sup>34</sup> *Id.*, annex 1, para. 1.

<sup>35</sup> *Id.*



consisted of for the years before Applicant's separation, but a summary chart for the Applicant listed the following:

Amount at Risk USD46,546.38

Amount Contradicting Sick Leave Registrations USD7,786.99

Total Amount to Be Recovered USD5,803.24.<sup>36</sup>

62. The amounts at issue are inconsistent, or at least evolving. As noted above, the Cigna chart showed that the amount at risk was USD46,546.38, while the amount contradicting sick leave registration was USD7,786.99 and the total amount to be recovered was USD5,803.24 (nearly 12.5% 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 USD7,689.00.<sup>37</sup>

63. 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).<sup>38</sup>

64. 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.

65. 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 two and a half years since OIOS was first notified of the allegations of possible fraud and began to 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..."<sup>39</sup> Despite the OIOS

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<sup>36</sup> *Id.*, annex 10j.

<sup>37</sup> *Id.*, annex 4, p.1.

<sup>38</sup> *Id.*

<sup>39</sup> Application, annex 3, p.1.

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,”<sup>40</sup> no report has been presented to the Tribunal.

66. 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.

67. 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 weeks before the Applicant’s separation on 20 June 2022. OIOS interviewed the Applicant about the possible fraud allegations two 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.

68. 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.

69. 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.

70. 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

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<sup>40</sup> Reply, annex 1, p.2.

systematic monitoring disclosed. Unlike in other of the related cases, the record in this case does not even indicate when the Applicant's file was flagged for monitoring.

71. The second black box is what information was transmitted from Cigna to OIOS. The Respondent claims that "OIOS received information on the Applicant's claims from Cigna's FIU, the administrator of the MIP, concluding that the Applicant had been unduly reimbursed."<sup>41</sup> However, there is nothing in the file indicating what that information was and how it led to the conclusion that the Applicant had been unduly reimbursed.

72. 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.

73. The OIOS Memorandum and assessment of the financial loss in this case consists of a single conclusory statement "(OIOS) received allegations of possible medical insurance provider (MIP) fraud..."<sup>42</sup> And the assessment of financial loss is merely another conclusory statement that "Possible maximum USD liability for the Applicant" was USD7,689.00."<sup>43</sup>

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

75. 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.<sup>44</sup> In examining this directive, the Dispute Tribunal has held that the power relates to "a stated indebtedness...a financial obligation, the

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<sup>41</sup> Reply, para. 20.

<sup>42</sup> *Id.*, annex R-1.

<sup>43</sup> *Id.*, annex R-4.

<sup>44</sup> See, application, para. 12.

extent of which is defined, albeit may be disputed.”<sup>45</sup> ST/AI/15/Rev.2 may not be used “to secure a merely possible [obligation], akin to a bail.”<sup>46</sup> 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 documents while the determination is being made. Obviously, moreover, the Administration must act swiftly.”<sup>47</sup>

76. 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.

77. The Respondent states that since the Applicant had been interviewed (two days before his separation), he “was well aware of the serious fraud allegations against him.” 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 any kind of surety.

78. 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.

79. Most importantly, the Respondent has “acknowledge[d] a wrong insofar as the Organization could and should have verified and established at the outset that the

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<sup>45</sup> *Azar* UNDT/2021/125, para. 20 (Not appealed).

<sup>46</sup> *Id.*, para. 21.

<sup>47</sup> *Id.*

Applicant's final entitlements were sufficient to cover the estimated financial loss caused by his alleged medical insurance fraud. The Organization failed to do so (timely)."<sup>48</sup>

80. Further, the Respondent admits that its "decision of the Administration to delay the P.35 form was in hindsight unnecessary because withholding part of the Applicant's final entitlements would have sufficed to safeguard the Administration's financial interests."<sup>49</sup>

81. These admissions, along with the lack of any reliable evidence (at least presented to the Tribunal) that the Applicant was indebted to the Organization, confirm that the decision to withhold Applicant's pension paperwork was arbitrary, capricious, and unlawful.

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

82. 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. Specifically, he requests that the Tribunal order the 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;
- b. USD1,800.00 for the financial loss he incurred due to the delay in the payment of his pension benefits occasioned by the contested decision; and
- c. USD5,000 in compensation for moral damages for the pain and suffering caused by the contested decision.

83. 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

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<sup>48</sup> Reply, para. 19.

<sup>49</sup> Id., para. 22.

“Executive or administrative officers will be responsible for... (b) completing form P.35, normally one month in advance of the last regular working day...”<sup>50</sup> The effective date is to be the date of separation.<sup>51</sup>

84. 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]”.<sup>52</sup>

85. In this case, the Applicant’s date of separation was 30 June 2022. However, the pension paperwork was not received at UNJSPF until four and a half months later, 11 November 2022.<sup>53</sup>

86. 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.

87. Both this Tribunal and UNAT have consistently determined that appropriate remedy for delays in paying monetary entitlements is the award of damages.<sup>54</sup> That interest has been calculated at the US prime rate from the date on which the entitlement was due until the date of payment.<sup>55</sup>

88. 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.

89. 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.”<sup>56</sup> From that he argues that the date the pension paperwork would normally

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<sup>50</sup> See, ST/AI/155/Rev.2, para.5(b).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, at p.4, para. 10(d).

<sup>53</sup> Application, annex 9; Reply, para. 30.

<sup>54</sup> *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.

<sup>55</sup> *Id.*

<sup>56</sup> Reply, para. 29.

be received by UNJSPF should include “the acceptable administrative processing timeframe of around 3.5 months.”<sup>57</sup>

90. 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.”<sup>58</sup>

91. 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 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 less than the nearly four months that occurred in this case.

92. 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.

93. 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.

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<sup>57</sup> *Id.*

<sup>58</sup> Application, annex 12, p.2.

94. 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.

95. The Applicant also seeks compensation for interest payments he allegedly made pursuant to a loan taken out on 24 July 2022.<sup>59</sup> In support of this claim, he submits a handwritten "Acte de Reconnaissance" document.<sup>60</sup> However, the Tribunal is not persuaded by this claim.

96. First, the document is dated 24 July 2022, but it carries a notary seal indicating that the agreement was signed on 7 December 2022, which is over four months after the loan was allegedly taken out. This makes the document suspect.

97. Second, the document merely recounts that the loan carries interest of USD1800 without specifying any terms of repayment. Is the principal of USD6000 plus interest of USD1800 due a week after the loan, or 10 years later? Any legitimate loan would make that clear.

98. Third, the loan was taken out nearly a month before the decision to withhold Applicant's pension paperwork and before the Applicant would have received his pension funds had the paperwork not be withheld. Thus, the loan cannot have been the result of the decision to withhold his pension paperwork.

99. Finally, the existence of a loan on 24 July 2022 contradicts the Applicant's claim six weeks later that "he was unable to provide the basic essential needs such as food and housing for his family."<sup>61</sup> As the Respondent points out, either the Applicant lied about not having money for food and housing or he is now lying about obtaining a loan to pay for these expenses. Either way, the Tribunal finds him not to be credible.

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<sup>59</sup> Application, para 27.

<sup>60</sup> Application, annex 11.

<sup>61</sup> Application, annex 5, para. 18 (SOA).



100. The Tribunal also notes that it is awarding interest at the US prime rate for the delay. Thus, the Applicant is not entitled to additional interest on this suspicious loan.

101. 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.”<sup>62</sup>

102. 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 existence of factors causing harm to the victim’s personality rights or dignity...”<sup>63</sup> That evidence may take many different forms.<sup>64</sup>

103. The Applicant claims that “[w]ithout any medical insurance and money to pay for treatments, him and his family were also deprived of receiving proper medical care to address their physical and psychological distress.”<sup>65</sup> 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.”<sup>66</sup> This evidence is insufficient to award moral damages.

104. 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. Moreover, the Applicant’s evidence indicates that school fees and utility bills were being paid.<sup>67</sup>

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<sup>62</sup> Application, para. 48.

<sup>63</sup> *Kallon* 2017-UNAT-742, para. 60; See also *Civic* 2020-UNAT-1069, para. 77.

<sup>64</sup> *Id.*

<sup>65</sup> Application, para. 48.

<sup>66</sup> *Id.*, annex 2.

<sup>67</sup> *Id.*, annex 11.

105. 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.

106. 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.

### **Conclusion**

107. In light of the Tribunal's findings, the application succeeds in part.

108. The decision to delay issuance of pension paperwork is found to be unlawful.

109. 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.

110. The Applicant's claim for other financial and moral damages is denied.

111. All other Applicant's claims are denied.

*(Signed)*

Judge Sean Wallace

Dated this 12<sup>th</sup> day of September 2023

Entered in the Register on this 12<sup>th</sup> day of September 2023

*(Signed)*

Eric Muli, Officer-in-Charge, Nairobi