Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

Introduction

1. The Applicant is a former staff member of the United Nations

relevant forms[6]

following the completion of the Applicant's check-out procedure at the Mission-level, the final pay was processed and released to the Applicant in February 2020. The payment includes the Applicant's final salary of March 2019 and then outstanding education grant claims; therefore, the application in this case is now moot.[30]

allowances" and "compensation for financial and psychological losses.[33] His request was found not receivable. Upon the Applicant's insistence that the request went beyond the disciplinary measure, he was invited to make a more specific submission on a proper form, which he did on 18 June 2019, asking for release of his March 2019 earnings, including March 2019 salary and retroactive boarding claims. As a result, management evaluation advised the Applicant to contact MINUSMA HR to determine if a decision had in fact been taken not to pay his earnings and boarding claims.[34] No formal management evaluation has ever been issued, which, unfortunately, is not an isolated instance of the Management Evaluation Unit ("MEU") foregoing their review in cases involving complex fact-finding and calculations.[35]

15. The Tribunal informed the parties during the 5 November 2019 CMD that its review of this application would be limited to the decision to withhold the Applicant's "salary and allowances since March 2019". The Tribunal deemed the other claims listed in the Applicant's original request for management evaluation to be subsumed by his challenge against the separation decision or unrelated to an administrative decision in the sense of art. 2 of the UNDT Statute.

BNP Paribas in France. It is apparent from the documents submitted by the Applicant that the onerousness caused by the transfer to BNP Paribas in France consisted in exposing him to execution by another debtor, that is, the Bank itself. On the facts presented to the Tribunal, however, this mistake did not cause financial damage to the Applicant: it resulted in a reduction of his personal liabilities while the Applicant does not show that the funds would have been used in any profitable way. Finally, the Applicant had had opportunity (at least from February till June 2020) to authorize the return of the funds to the Organization, and thus undo the consequences of the irregularity, which he ignored. In these circumstances, the Tribunal concludes that the irregularity concerning the identity of the designated account does not obliterate the fact that the Organization discharged its final payment obligation toward the Applicant.

Calculation of payments

20. The Applicant submits, and not without a reason, that the final pay slip is incomprehensible to a lay person. The Tribunal recalls that the Applicant had indeed requested explanation of the figures, which he, nevertheless, never obtained, as the payroll officer made it dependent on the Applicant's issuance of a debit authorization for BNP Paribas in France to return the funds to the Organization.[45] Before the Tribunal, the Applicant specifically questioned having ever received the payment of USD15,000 on account of boarding expenses of three of his children for the school year 2017-2018 which had been included in his March pay slip but then withheld, and the position titled "Miscellaneous Deductions". [46]

21. After a round of clarifications requested by the Tribunal, the Respondent submitted that, following the Applicant's separation, his leaves and absences had been reviewed, revealing days of absences for which he had not provided acceptable justification. Unaccounted absences exceeded the Applicant's leave balance, which resulted in the Applicant having a negative leave balance at the time of his separation. Negative leave balances are normally accounted for by placing the staff member on

[45] Respondent's submission pursuant to Order No. 27 (NBI/2021), annex R/27 (email from Payroll Section/UNHQ to the Applicant seeking debit authorization for return of funds).
[46] Applicant's submission in response to Order No. 39 (NBI/2021).

(education grant advance recovery) in the deductions of the February 2020 pay slip.[54]

27. In summing up, the position "EG Claim" in the February 2020 final pay slip – USD56,779.26 is equivalent to the 2018-2019 school year's education grant payment of USD65,901.42 minus the recovery of USD9,122.16 resulting from the retroactive SLWOP with respect to the 2017-2018 school year.[55]

28. In regard to the position described as "salary adjustment" in the final pay slip, the Respondent explains that deductions including "Salary Adjustment" of (minus) USD30,848.96 refers to the Applicant's March 2019 pay. The reason why this amount shows up in the February 2020 final pay slip is connected to the withholding of the Applicant's March 2019 salary at the time of his separation, in view of the potential overpayments that needed to be recovered. By adding the (minus) USD30,848.96 in the February 2020 final pay slip, the withheld March 2019 pay was released to the Applicant. This amount includes the USD15,000 claimed by him on account of boarding expenses. [56]

29. Regarding the position titled "Umoja Fnd Miscellaneous Deduction" of USD4,349.79, which was questioned by the Applicant, the Respondent explained that they related to the advances paid to the Applicant in 2014 totaling USD4,349.79 (USD2,384.94 + USD1,964.85) with respect to two mission projects for which the Applicant did not submit any accountability reports. The advances were not resolved by the time of the Applicant's separation. Hence in February 2020, the advances were deducted from the final pay.

30. The Respondent, moreover, presented a detailed calculation of the remaining

entitlement as SLWOP and prorating payments accordingly is a correct practice and is undisputed. However, the calculation of amounts by which specific earnings are decreased is conditioned upon a proper record of absences. The issue is contentious and will be discussed below.

Calculation of absences

32. Pursuant to Orders Nos. 069 and 075 (NBI/2021), on 14 April 2021, the Respondent filed submissions and documentation in relation to the Applicant's absences. The Applicant filed a response on the same day. The facts below are based on the Respondent's submission of 14 April 2021.

33. After a review of the Applicant's absences recorded in Umoja, MINUSMA HR wrote to the Applicant on 24 October 2018 requesting that he provide justification for his absences for the following days, which were not accounted for in Umoja: 1 to 16 July 2017; 26 to 28 September 2017; 11 to 17 January 2018; 27 April 2018; 7 to 31 May 2018; 1 to 13 June 2018; 13 to 19 July 2018; 30 July 2018; and 2 to 18 October 2018. The Applicant was informed that if he failed to provide justification, his absences would be recorded as annual leave or SLWOP should he not have enough annual leave days.[58]

34. The Applicant provided the following justification, which did not address all the dates raised in the 24 October 2018 communication: 1 to 16 July 2017 - he was on certified sick leave ("CSL"); 29 April to 6 May 2018 – he was on Rest & Recuperation ("R&R") break; 5 to 13 June 2018 – he was on CSL; 13 to 19 July 2018 – he was on CSL; 30 July 2018 – he returned to his duty station in Mali; 4 to 18 October 2018 – he was on annual leave.[59] He did not provide justification for the other days when again asked to do so on 19 November 2018.[60]

35. On 3 May 2019, the Regional Service Centre Entebbe ("RSCE") informed the Applicant that unless he provided an explanation for a rejected sick leave request for 7

[58] Respondent's submission of pursuant to Order Nos. 69 and 75, annex R/44.
[59] Respondent's submission of pursuant to Order Nos. 69 and 75, annex R/45.
[60] Ibid.

May to 12 June 2018, those 27 days of absence would be converted to SLWOP. The Applicant explained that his request for CSL was rejected by the Medical Unit because he had submitted his medical documents late. The RSCE subsequently converted the 27 days to SLWOP.[61]

36. On 11 May 2019, MINUSMA HR requested that the following 33 days of absence be recorded in Umoja as SLWOP: 1 to 16 July 2017 (3 to 14 July 2017 without weekends); 26 to 28 September 2017; 11 to 17 January 2018; 27 April 2018; 30 July 2018; and 2 to 18 October 2018.[62] The Tribunal notes that while these dates include weekends, the weekends were not included in the 33 days of absences.

37. The Respondent explained in his submission that the newly recorded days of SLWOP (i.e. 27 days of rejected sick leave and 33 days of other absences) retroactively reduced the Applicant's annual leave balance in Umoja and this resulted in the Applicant having an insufficient leave balance to cover two instances of annual leave. Specifically, the Applicant did not have enough days to cover his annual leave from 4 to 21 September 2017 because of the retroactive SLWOP for the period of 3 to 14 July 2017 thus this leave was converted into SLWOP. Similarly, the period of 11-14 January 2019 (2 days) was originally recorded as annual leave but changed to SLWOP because the Applicant lacked sufficient leave balance after the retroactive SLWOP as recorded. This resulted in the Applicant having a negative leave balance at the time of his separation from service.

38. In support of his 14 April 2021 submission, the Applicant submitted medical certificates for April and June 2017, 4 July 2017, 29 May 2018 and an undated certificate he claims was given to him in July 2018. He submitted that these certificates had been approved by the MINUSMA Medical and HR Units. He did not provide any explanations for the other absences alleged by the Respondent.

39. The Tribunal recalls that ST/AI/2005/3 (Sick leave) governs staff members' entitlement to sick leave. Section 1.2 of this administrative instruction stipulates that

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unless uncertified sick leave ("USL") is permitted, sick leave must be supported by a medical certificate or report from a licensed medical practitioner. Section 2.2 of ST/AI/2005/3/Amend. 1 allows the local personnel office to approve up to 20 days of CSL after the staff member has submitted "a certificate from a licensed medical practitioner indicating the date or dates of absence from duty by reason of illness, injury or incapacitation, without identification of diagnosis, or upon submission by the staff member of form MS.40, duly completed and signed by the attending physician". Under section 2.4(b) of ST/AI/2005/3, a medical report is not required if a staff member claims sick leave for half a day owing to a visit to a licensed medical practitioner and submits a medical certificate indicating that the staff member consulted the doctor or dentist. Under section 2.5 of ST/AI/2005/3, if a staff member fails to submit a medical certificate or the sick leave is not certified by a designated medical officer, the absence may be treated as either an unauthorized absence or SLWOP.[63] Section 2.5(a) goes on to say that "if the staff member belatedly submits the required medical certificate or report and establishes to the Secretary-General's satisfaction that the late submission was attributable to circumstances beyond his or her control, the absence may be charged to sick leave upon certification by the Medical Director or designated medical officer."

40. For the reasons expanded on in the ensuing paragraphs, the Tribunal finds that the Respondent properly placed the Applicant on SLWOP for his unauthorized absences on: 1 to 16 July 2017 (3 to 14 July 2017 without weekends); 26 to 28 September 2017; 11 to 17 January 2018; 27 April 2018; 30 July 2018; and 2 to 18 October 2018 in accordance with section 2.5 of ST/AI/2005/3.

41. The Tribunal finds that the Applicant failed to provide justification for his absence from 26 to 28 September 2017, 11 to 17 January 2018, and 27 April 2018. Regarding 30 July 2018, since he told MINUSMA HR that he had returned to his duty station on 30 July 2018, the Tribunal concludes that the Applicant was absent from

[63] The AI is outdated with respect to the types of appointment to which it refers. The Tribunal considers, nevertheless, that it retains validity as *lex anterior specialis* in relation to the amended staff rules 4.11 and 6.2.

work on this day.

42. The Tribunal examined the adequacy of the Applicant's medical certificates against the requirements of sections 1.2 and 2.4(b) of ST/AI/2005/3. It notes that while they attest to ailments, none of them indicates the date or dates of absence from duty by reason of illness, injury or incapacitation. Moreover, the Tribunal finds that the April and June 2017 medical certificates submitted by the Applicant are irrelevant to the proceedings since his attendance during those months are not at issue. The Tribunal also finds that the medical certificates of 29 May 2018 are valueless because they fall within the 7 May to 12 June 2018 period of absence that the Medical Director refused to certify as sick leave due to the Applicant's tardy compliance with section 2.1 of ST/AI/2005/3.

43. The Tribunal further finds that the Applicant erroneously relied on the 4 July 2017 medical certificate, which was a digital X-ray report. That medical certificate did not meet the requirements of section 2.2 of ST/AI/2005/3/Amend. 1, in that it did not indicate the dates of the Applicant's absence from duty as 3 to 14 July 2017 or his inability to perform his duties due to illness. The Tribunal finds that this medical certificate, at best, might have been satisfactory under section 2.4(b) of ST/AI/2005/3 to excuse the Applicant from work on half day on 4 July 2017, had it been timely requested as such. This the Applicant did not do. Consequently, the Applicant failed to provide satisfactory evidence of certified sick leave for the period 3 to 14 July 2017.

44. Lastly, the Tribunal finds that the Applicant's absences between 2 and 18 October 2018 were unauthorized because, while the Applicant claimed to have been on annual leave during this period, he does not rebut the failure to record this leave in Umoja. The Tribunal notes, moreover, that given the Applicant's insufficient balance of annual leave, the mere fact of non-recording in Umoja was not decisive for the issue

required, and to supply the necessary information and proof. Once the process is triggered, however, as many times stressed by the Tribunal, the primary responsibility for effecting timely and accurate payment of entitlements due to staff members rests with the United Nations Administration. For this purpose, the United Nations maintains a dedicated bureaucratic apparatus which is supposed to handle those payments professionally in both substantive and formal sense. A staff member, in this particular relation, is in a position of a consumer vis-à-vis a professional agent: the consumer chooses the moment to request action; the agent has to act promptly from the moment the agency has been seised of the case. It is not to be required of a staff member to be constantly monitoring, following-up, reminding, verifying and nagging. As noted by UNAT in *Ahmed*, "the Appeals Tribunal is mindful of the fact that staff members are unlikely to be conversant with separation formalities".[69] This implies the administration's duty to inform a staff member of information or proof that is missing.

48. In the context of separation payments, the Tribunal agrees that the processing of separation payments can reasonably be expected to start once the check-out is completed. This was, the Tribunal takes it, the understanding of the Separation Memorandum by both parties. In the Applicant's case, which was marred by unauthorized absences and multiple reasons for deductions, clearance may have required more time, and, indeed, took four months. This said, the Tribunal has doubts as to the normative validity of the statement about 8-12 weeks processing time after the clearance. The Respondent does not demonstrate that such period would have been a standard approved above the Mission level, expressed in guidelines, and/or resulting from any analysis of a median time needed for processing such payments, in consideration of relevant parameters of written rules and good practice. Rather, it appears chosen by the author of the Separation Memorandum, i.e., Chief Human

49. The Tribunal considers, in any event, that reasonableness of processing time is to be adjudged by objective factors. These factors comprise factual complexity and particulars of financial and administrative processing, including all necessary levels of approval; generally, off-cycle payments may require more time than the regular ones. Accepting that the calculations in the Applicant's case were complicated, on the record before the Tribunal, however, there is a conspicuous gap in administrative activity between September and December 2019, which resumed only after the Applicant wrote to the Secretary-General. While Chief Human Resources of MINUSMA assured that the payments were on their way, this was inaccurate – possibly it was only then that the administration started looking into the case again and found a missing P.45 form, this raising a question why the form had not been requested of the Applicant earlier, during the check-out process. Be it as it may, the Tribunal considers that the missing form regarding education grant of one child did not objectively prevent timely calculations and disbursement of the remaining entitlements. Especially when a staff member is separated abruptly, as the Applicant was, he or she should be able to expect payment within a given timeframe. In the Applicant's case, an additional onus was posed by the fact that his March 2019 salary had been withheld, which mandated acting promptly. Altogether, six months to effect separation payments is *prima facie* unreasonable, whereas the Respondent failed to persuade the Tribunal why the operation could not have been concluded within the announced 8-12 weeks. The Tribunal accordingly considers that the payments were in arrears since mid-November 2019 until the date of payment in February 2020.

Damages

50. As concerns the claimed financial damage, the Tribunal finds that no miscalculation in the separation payments was proven to the Applicant's detriment. To the contrary – several went to his undue advantage: failure to recover the education grant overpayment of EUR13,079.95 (USD14,746.28)[71]; failure to recover the cost of the lost laptop estimated at USD500.00[72]; and possible miscalculation of adjustment of

[71] Para. 9 above.
[72] Fn 7 above.

education grant on account of SLWOP.[73] Accordingly, no underpayment was proven, which renders the application moot.

51. To the extent the Applicant seeks to derive compensation for lateness of payments, the Tribunal recalls the seminal holding of the Appeals Tribunal in *Warren*:

> Notwithstanding the absence of express power of the UNDT and the Appeals Tribunal in their respective statutes to award interest, the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. In many cases, interest will be by definition part of compensation. To say that the tribunals have no jurisdiction to order the payment of interest would in many cases mean that the staff member could not be placed in the same position, and that therefore proper "compensation" could not be awarded.[74]

52. As shown by the above, in the absence of a material rule providing for an automatic interest accrual on a late payment arising from a statutory or contractual obligation – thus combining compensatory, punitive and preventive function - the Appeals Tribunal interpreted the Tribunals' authority to grant interest from a right to compensation. In the first scenario, for the award of interest it would suffice to show the delay. In the construct adopted by the Appeals Tribunal, it is moreover necessary to show that a financial loss persists.

53. In the Applicant's case there is no financial loss resulting from the late processing of separation payments because the delay in disbursing the earnings was accompanied by a delay in effecting deductions. The deductions equal nearly 45% of the earnings. Among them, those for unaccounted absences were due as early as at the end of 2017 and 2018, the resulting decrease in education grant – by the end of 2018, and those for two mission projects for which no accountability reports were submitted – since the end of 2014. Throughout these periods the corresponding funds were in the Applicant's disposal and, hypothetically, capable of bringing interest. As such, the Tribunal concludes that no compensation is due. This finding follows independently

[73] Fn 52 above.
[74] *Warren* 2010-UNAT-059 at para 10; *Iannelli* 2010-UNAT-093.

from the matter of recoveries that have not been implemented and remain outstanding.

54. The Applicant advances a claim for non-financial damages. While he alleges moral and physical suffering, no connection has been demonstrated with the question of payments, temporal or otherwise.

Conclusion

55. The Applicant failed to demonstrate any outstanding financial claim regarding separation payments; neither a damage

JUDGMENT

56. The application is dismissed.

(*Signed*)

Judge Agnieszka Klonowiecka-Milart

Dated this 17th day of May 2021

Entered in the Register on this 17th day of May 2021

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi