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**UNITED NATIONS DISPUTE TRIBUNAL**

**Case No: UNDT/NE/2023/022**

**Judgment No: UNDT/2023/099**

**Date: 12 September 2023**

**Original: English**

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**Judge Sean Wallace**

**Nardi**

**Eric Muli, Officer in Charge**

**AFAZALI**

**v.**

**SECRETARY-GENERAL  
OF THE UNITED NATIONS**

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**1 The Applicant is a former Field Security Guard at the G-3 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 2 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**

**4 The Applicant joined the Organization on 4 October 2004 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 17 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, annex 1.

<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 DMSFC 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** DMSFC 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 DMSFC. 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**



the Applicant's SOA and suspended the contested decision

17 On 6 October 2022, the Respondent appealed Order No 142 (NEI/2022), on the ground that the UNDT had exceeded its competence<sup>11</sup>

18 On 10 October 2022, OIOS informed the Office of Human Resources ("OHR") of a revised estimate of the potential financial loss caused by the Applicant in the amount of USD1,85800 instead of USD13,01779 as initially estimated<sup>12</sup> The following day on 11 October 2022, OHR instructed MONUSCO to release the Applicant's P.35 and PF.4 forms<sup>13</sup>

19 On 13 October 2022, OHR recommended to the USG/DMSFC to release the Applicant's final entitlements The following day on 14 October 2022, the USG/DMSFC instructed MONUSCO to release the Applicant's final entitlements exceeding the revised estimated loss<sup>14</sup>

20 On 17 October 2022, the Applicant filed a motion for execution of Order No 142 (NEI/2022).

21 On 18 October 2022, the Applicant was informed that OIOS had revised the estimation of the possible maximum loss and the new estimated amount was only USD1240013 instead of USD14,45870<sup>15</sup>

22 On 19 October 2022, the Respondent filed a reply challenging the motion for execution of Order No 142 (NEI/2022) on the ground that the matter was not because instructions to process the Applicant's P.35 and PF.4 forms had been given on 11 October 2022<sup>16</sup>

23 On 24 October 2022, the United Nations Joint Staff Pension Fund ("UNJSPF")

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<sup>11</sup> Ibid, annex 6

<sup>12</sup> Ibid, annex 7

<sup>13</sup> Ibid, annex 8

<sup>14</sup> Reply, annex 7

<sup>15</sup> Application para 18 Reply, para 14

<sup>16</sup> Ibid, annex 9



**to resort to borrowing USD900000 at 3% of monthly compounded interest which resulted in a financial loss of USD1,43345 as payment of interest on this loan**

**29**

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 Kelenie 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 Kelenie office and was only interviewed as a subject 11 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 ongoing. Therefore, no factual finding was ever made to establish that the Applicant currently is or was ever indebted to the Organization.

33 The Applicant avers that the Respondent has failed to establish that the



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

**36 Relying on the jurisprudence of this Tribunal<sup>19</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 decision. Therefore, his**





44 In *Azar*<sup>24</sup>, UNDI noted that there should be

a sufficient level of probability of the indebtedness, the value of it estimated and the notice given to the separating staff member; in order to enable him/her to take an informed decision whether to offer a kind of surety in exchange of the release of the documents while the determination is being made.

45 In view of the above cited jurisprudence, the Respondent maintains that these conditions were not in the present case before the contested decision was taken. The indebtedness of the Applicant had a high level of probability in light of the information available to the Organization. The value of the indebtedness was estimated by OIOS, the competent investigating entity. The Applicant was also on notice, con-

**49** Furthermore, the rules do not specify an exact date at which a former staff member's pension entitlements have to be disbursed. UNSPF does not and cannot process pension entitlement claims on the date of a staff member's separation. The PF4 notification informing UNSPF about the separation of the former staff member only takes place after the check-out process at the mission is completed and the P-35 form is processed. This all naturally takes time.

**50** In line with *Ndindi* and considering the circumstances and the context of the present case, the total time used to protect the financial interest of the Organization of less than 45 months is not unreasonable and does not warrant compensation. The General Assembly has repeatedly "emphasized that the full recovery of the financial loss amount should be pursued and encourages the Secretary-General to strengthen his efforts to improve the quantification and the rate of recovery losses".<sup>26</sup>

**51.**



received by UNSPF on 24 October 2022. The contested decision thus caused the processing of the P.35 form to take at most one to two months longer in comparison with the processing time for separating staff members not accused of fraud.

56 On whether the Applicant is entitled to interest payment for the loan he took, the Respondent submits that the Applicant failed to disclose this loan previously, in his SOA application on 29 September 2022.<sup>29</sup> 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.” He repeated this in his motion for execution on 17 October 2022: “The Applicant and their families [sic] continue to face immense financial distress and are struggling to survive.” In his current application, he claims to have paid during this time every month USD 633.20 to USD 737.70 for food<sup>30</sup> as part of his total expenses of USD 8,468.00. In this situation, 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.

57 The Respondent further argues that 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 20 June 2022, two months 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 USD 1,433,456.<sup>31</sup> The contested decision did not cause the Applicant to enter into this loan agreement.

58 Along the same lines, the Applicant’s PF.4 notification was received by UNSPF on 24 October 2022, but the Applicant claims reimbursement of interest payments made on his loan until 20 November 2022.<sup>31</sup> The contested decision had no effect during the last month of the Applicant’s loan. The Applicant has no right to

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<sup>29</sup> Application, annex 5 (SOA application).

<sup>30</sup> Ibid, annex 13.

<sup>31</sup> Ibid, annex 13.





to support the claim<sup>37</sup>



and describing the Applicant's "possible maximum USD liability" as USD1301779<sup>47</sup>

**71** That email is also revealing in that it contains this quotation

**The list below in our email is incorrect and shows XXXXXXXXXX is part of my large CIGNA investigation, this person does not appear in my case spreadsheet or within GoCase (that I could find).<sup>48</sup>**

**72** 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

**73** Indeed



report' amounts to no more than "trust me, judge" and certainly does not count as evidence

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

82. The Respondent argues that the Organization is entitled to rely on the OIOS Memorandum assessment of the financial loss (referencing Loto 2022 UNAT-



**obvious**

**89**

i,

93 In this case, the Applicant's date of separation was 30 June 2022. However, the pension paperwork was not received at UNISPF until almost four months later, 24 October 2022.

94 To be sure, ST/AI/155/Rev.2 does authorize the USG/DMSFC 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.

95 Both this Tribunal and UNAT have consistently determined that appropriate remedy for delays in paying monetary entitlements is the award of damages. Azar t m% UNDI/2021/125 para 31, Kings UNDI/2017/043 para 49, Johnson UNDI/2011/144 para 40b, Massi UNDI/2016/100 para 79. Warren 2010 UNAT-059, Landli 2010 UNAT-088. That interest has been calculated at the US prime rate from the date on which the entitlement was due until the date of payment. Id

96 Since the award does not show entitlement to the date of the payment given the reasonable% le dvy t



and whose PF.4 forms were released throughout the months of August and September 2022<sup>56</sup>

99 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 struggles 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 is nearly half the 35 months that the Respondent now claims to be acceptable.

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that the loan and interest were paid back on 2 November 2022.<sup>57</sup> However, the Tribunal does not give these documents any credibility.

104 Firstly, the loan was taken out on 20 June 2022, which was prior to both the Applicant's separation and the Organization's decision to delay his entitlements. Thus, the loan cannot be the result of the contested decision.

105 In addition, the loan agreement carries a notary seal indicating that the agreement was signed on 8 December 2022, which is almost six months after the loan was allegedly taken out and two weeks after the loan was repaid with interest. There would be no purpose to notarizing the agreement at that time. These dates make the documents suspect.

106 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.

107 In addition, the Applicant seeks moral damages alleging that

**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 Applicant's inability to provide these basic essential needs for his family harms their physical and mental health, as well as his. It has caused him severe 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.<sup>58</sup>**

108 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 facts causing harm to the victim's personality rights or dignity..." Kallon 2017 UNAT-742, para 60. See also Civic 2020 UNAT-1069, para 77. That

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<sup>57</sup> Application Annex 13

<sup>58</sup> Application, para 49

**evidence may take many different forms. *Id***

**109 The only evidence that the Applicant presented, beyond the allegation in his application quoted above, is a chat summarizing his expenses, with supporting documents (lease, school transportation agreement, school receipts, and utility bills)<sup>59</sup> and an email from the MONUSCO Director of Mission Support.<sup>60</sup>**

**110 The lease and transportation agreement has similar notay issues as discussed above regarding the management. In addition, the utility bills are for addresses other than that of the leased property, and the electric bill is not in the name of either the Applicant or his purported landlord. Again, the Tribunal does not give any weight to these suspect documents.**

**111 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 rent, pay school fees or buy food.” *Id* This evidence is insufficient to award moral damages.**

**112 First, it is not evident that the Applicant was one of the former staff members the author met with and was referring to as “desperate”. Moreover, even if he was one of the people under discussion, there is no evidence that the Applicant was unable to pay rent, pay school fees or buy food. In fact, the allegations of the Applicant (which are not evidence, of course) do not refer to any of these specific financial difficulties. His documentation indicates that he did pay school tuition and school transportation.**

**113 Moreover, there is no evidence to support the claim that he and his family suffered “physical and mental health” harm or were “deprived of receiving proper medical care”. Awarding moral damages on that basis would require evidence about what the physical and mental health harms were, how they were related to the delayed processing of his pension, what treatments were needed, and how the lack of treatment**

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<sup>59</sup> Application annex 13

<sup>60</sup> *Ibid* annex 2

