
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/022

Judgment No.: UNDT/2023/099

Date: 12 September 2023

Original: English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Eric Muli, Officer-in-Charge

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- report was copied to other senior management officers of the United Nations.⁶ 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.⁷

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 USD13,017.79 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.

investigations, and the disciplinary process”); and

(b) Delay the issuance of your personnel payroll clearance action form 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.2⁸

15. On 21 September 2022, the Applicant filed a management evaluation request of the contested decision.⁹ Further, on 29 September 2022, he filed an application for suspension of action of the contested decision.¹⁰

16. By Order No. 142 (NBI/2022) issued on 5 October 2022, the Tribunal granted

⁶ Reply, annex 1.

⁷ *Ibid.*

⁸ Application, annex 3.

⁹ *Ibid.*, annex 4.

¹⁰ *Ibid.*, annex 5; application para. 15.

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

18. On 10 October 2022, OIOS informed OHR of a revised estimate of the potential financial loss caused by the Applicant in the amount of USD1,858.00 instead of USD13,017.79 as initially estimated.¹² The following day on 11 October 2022, OHR instructed MONUSCO to release the P.35 and PF.4 forms.¹³

19. On 13 October 2022, OHR recommended to the USG/DMSPC to release the 2022, the US entitlements exceeding the revised estimated loss.¹⁴

20. On 17 October 2022, the Applicant filed a motion for execution of Order No. 142 (NBI/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 USD124.0013 instead of USD14,458.70.¹⁵

22. On 19 October 2022, the Respondent filed a reply challenging the motion for execution of Order No. 142 (NBI/2022) on the ground that the matter was moot because October 2022.¹⁶

23. On 24 October 2022, the

¹¹ *Ibid.*, annex 6.

¹² *Ibid.*, annex 7.

¹³ *Ibid.*, annex 8.

¹⁴ Reply, annex 7.

¹⁵ Application, para. 18; Reply, para. 14.

¹⁶ *Ibid.*, annex 9.

.4 notification.

24. On 25 October 2022, the UNDT issued Order No. 154 (NBI/2022) dismissing the motion for execution of Order No. 142 (NBI/2022) as being moot as there was no longer any aspect of the SOA to be enforced.

25. On 26 October 2022, the Applicant received his final entitlements in the amount of USD5,200.00

26. On 1 December 2022, the Management Evaluation Unit upheld the contested decision.¹⁷

Issues for determination

27. The Tribunal will determine:

a. whether the

to resort to borrowing USD9,000.00 at 3% of monthly compounded interest which resulted in a financial loss of USD1,433.45 as payment of interest on this loan.

29. 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 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.

30. 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 USD13,017.79

further affirmed that there is no need for medical expertise to conclude that continuous

39. 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;
- b. USD1,433.45 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.

40. The Respondent contends that the contested decision was reasonable. The Applicant had already been interviewed by OIOS before he separated from the Organization on 30 June 2022. He was well aware of the serious fraud allegations against him. Therefore, the contested decision was also reasonable pending the OIOS investigation. The Organization must be able to rely on the OIOS Memorandum and interests from fraud.

The OIOS is an independent investigating entity, and it only initiates an investigation following a preliminary assessment indicating that such is warranted. In this regard, it should be noted that when OIOS issued its memorandum and financial loss estimate, OIOS had already interviewed the Applicant. In addition, OIOS had a reasoned report

administrator of the medical insurance, concluding that the Applicant had been unduly reimbursed.

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 the set conditions were met 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, considering that he was informed of the investigation and interviewed prior to his separation on 30 June 2022.

46. Furthermore, the contested decision was necessary, as indicated. The D7,076.81 were insufficient to cover his estimated indebtedness to the Organization of USD13,017.79 In those circumstances, it was for the Applicant to decide whether to offer surety in exchange of the release of his P.35 form while the investigation was ongoing. He did not do so.

47. Had the associated PF.4 notification to UNJSPF, the Organization would have irreversibly lost any surety to ensure full recovery of the then estimated financial loss.

48. The Respondent further emphasizes that there was no inordinate delay in the present case. In *Nchimbi*²⁴, UNAT held that a delay of 3.5 months in processing a staff -out and submitting the separation forms to UNJSPF is not *to ensure proper governance within the Organization and accountability for its property* (Emphasis added).

49. Furthermore, the rules do not specify an exact date at which a former staff UNJSPF does not and cannot

²⁴ *Nchimbi* 2018-UNAT-815, paras. 27-28.

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

53. The Respondent argues that according to *Fosse*²⁶ and *Rehman*²⁷, 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 , 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.

54.

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 2022.²⁸ Instead, he dramatically asserted that he was

unable to

compensation for interest allegedly paid by him after the contested decision did not have any further effect.

59. In addition, the interest rate of this purported loan is exceptionally high, effectively 42.58% per year. According to his payroll records, the Applicant has an [redacted] as well as the Trust Merchant Bank SARL. The Applicant thus had access to the formal banking sector, which offers loans at usual market rates. By entering into the purported loan agreement at an extortionist rate, the Applicant violated his duty to mitigate his loss.

60. Regardless of the above, the very premise of this claim is not credible. The [redacted] D1,900, which he avers to substantiate the need to take out a loan of USD9,000, contain several irregularities and generally appear to be inflated. It is also not plausible that the Applicant would not have any savings from his almost 20 years of service with the Organization.³¹ In fact, his Statement of Earnings and Deductions indicates that from his monthly salary he had USD1,340.06 deposited to his Congolese bank account for his living expenses, while USD 700 was deposited every month to his UNFCU account.³² These

61. On the moral damages prong, the Respondent opines that the Applicant has failed to provide any evidence of actual moral damage. The Respondent's contention of such purported harm is not sufficient. Relying on *Kabede*³³, the Respondent emphasizes that specific evidence in support of his claim for moral damages is required,³⁴ [redacted] reliance to *Civic*³⁵ is [redacted]. Also, in *Civic*, the UNAT [redacted] corroborating evidence, other than the staff member's testimony, is needed

³¹ Application, annex 1.

³² Reply, annex 12.

³³ *Kabede* 2028-UNAT-874, para. 22

³⁴ *Ibid.*, para. 22.

³⁵ Application, para. 50.

75.

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.

contradictory and unreliable.

82. The Respondent argues that the Organization is entitled to rely on the OIOS Memorandum and assessment of the financial loss (referencing *Loto* 2022-UNAT-1292, para 80). However, the memorandum in this case consists of a single conclusory

fraud ⁵¹ And the assessment of financial loss is merely another conclusory statement

52

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

84. This is in marked contrast to the evidence provided to the Organization in *Loto*.

provided a

detailed description of the unsatisfactory conduct, the names of the implicated staff member(s), and specifics as to where and when the unsatisfactory conduct occurred

These documents, supported by the information obtained by OIOS during the

inv

said

caused harm to the Applicant.

114. 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

115.

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

117. The Respondent shall pay to the Applicant four months of inte