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UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2022/079

Order No.: 137 (NBI/2022)

Date: 29 September 2022

Original: English

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**Before:**

## **Background**

1. On 12 September 2022, the Tribunal received an application for suspension of action (“SOA”) from the Applicant, a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). The Applicant is challenging a decision made on 22 August 2022 to delay the issuance of his payroll clearance action form until the conclusion of investigations by the Office of Internal Oversight Services (“OIOS”) against him for possible fraud.
2. The application was served on the Respondent on 13 September 2022 with a deadline to file a reply by 5.00 p.m. (Nairobi time) on Thursday, 15 September 2022.
3. On 14 September 2022, the Respondent addressed an email to the Registry requesting the Tribunal to suspend the proceedings for one week on the ground that, the parties were exploring an amicable resolution of these matters. The Respondent further submitted that the request was made with the agreement of the Applicant pursuant to art. 10(1) of the UNDT Statute.
4. The Respondent’s request was granted pursuant to Order No. 127 (NBI/2022).
5. On 21 September 2022, Counsel for the Respondent informed the Tribunal that the efforts of pursuing an amicable solution were not successful.
6. The Respondent filed a reply on 22 September 2022.
7. On 28 September 2022, the Applicant filed a motion seeking leave to respond to the reply.

## **Facts**

8. The Applicant joined MONUSCO in the Kalemie duty station on 4 May 2009. On 11 April 2022, the Applicant received notice of non-renewal of his fixed-term

appointment beyond 30 June 2022 due to the “dry cut” of his post caused by the closure of the Kalemie office that had been planned since 2020.<sup>1</sup>

9. On 30 June 2022, the Applicant separated from MONUSCO due to the abolition of his post. The Applicant was at the time of his separation being investigated for false claims worth approximately USD14,631.14 and KES801,956.98 under the Medical Insurance Plan (“MIP”).<sup>2</sup>

10. On 23 August 2022, the Applicant received by email a letter from Ms. Martha Helena Lopez, Assistant Secretary-General for Human Resources at the Department of Management, Strategy and Policy and Compliance (“DMSPC”) dated 22 August 2022, stating that his final entitlements of up to USD14,631.14 and KES801,956.98 would be withheld until the conclusion of the investigation against him by the OIOS and that the Administration would delay the issuance of his personnel payroll clearance action form P.35 until the investigation has been concluded, and all indebtedness to the United Nations had been settled.<sup>3</sup>

11. The Applicant requested for management evaluation of the decision on 9 September 2022.<sup>4</sup>

## **Submissions**

### *Current submissions*

12. The Applicant’s case is summarized below.

- a. Citing, *Azar* UNDT/2021/125, the Applicant submits that the purpose behind the practice of withholding pension payment under ST/AI/155/Rev.2 (Personnel payroll clearance action) i

Joint Staff Pension Fund (“UNJSPF”) in cases that concern a state of only a hypothetical indebtedness to the Organization which has not been determined and quantified at the time of separation of a staff member.

b. It is unlawful for the Administration to delay the release of the P.35 form to the UNJSPF even if an applicant had resigned while an investigation against him was ongoing if he was not notified of any indebtedness to the Organization or called upon to settle it, as required by ST/AI/155/Rev.2.

c. The Applicant 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 the OIOS on 1 June 2022 and was only interviewed as a subject nine days before his separation date.

d. The OIOS’s 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 has been made to establish that the Applicant currently is or was ever indebted to the Organization. Moreover, 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 Under-Secretary-General for Management, Strategy and Policy and Compliance (“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 since 30 June 2022.

e. The Applicant was not told how long it would take for the OIOS to complete its investigation in his case, therefore, his final entitlements and

pension benefits are withheld indefinitely. Since the OIOS only appears to have begun its investigation around June 2022 against all of the national staff members in the Kalemie office, as evidenced in MONUSCO's internal emails, it would likely take several months or years before the OIOS concludes its investigation. Denying the Applicant his pension benefits for a prolonged period of time based on unfounded assumptions of indebtedness is in violation of ST/AI/155/Rev.2 and staff rule 3.5.

f. There can be no serious dispute as to the urgency of the present request for a suspension of the contested decision. The contested decision is being implemented indefinitely. If a suspension of action is not granted, the withholding of his pension will continue to have a legal effect on the Applicant.



staff member's final separation entitlements, until the investigation has been concluded and the findings support the imposition of financial recovery pursuant to staff rule 10.1(b); and by refusing to issue the P.35 form or delaying its issuance.

f. The withholding by the Organization of the estimated financial loss of approximately USD21,286.58 against the Applicant's final entitlements of USD9,336.21 was insufficient and did not suffice to cover his estimated indebtedness to the Organization. Further, the decision to delay his P.35 form was made at an appropriately high level, i.e., the USG/DMSPC.

g. The estimated financial loss of the Organization and the Applicant's corresponding indebtedness of the Applicant had a sufficient level of probability, in view of the information reported by the FIU and referred to OIOS for investigation, OIOS' decision to investigate the matter and its communication to the Office of Human Resources ("OHR") of the estimated financial loss of the Organization that might need to be recovered. In those circumstances, the decision to delay issuance of the P.35 form was *prima facie* lawful and, is

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decision was communicated to him and almost 11 weeks after his separation on 30 June 2022.

m. The Applicant erroneously asserts that the contested decision is being implemented indefinitely. As set out in the letter to the Applicant communicating the USG/DMSPC's decision, the delay of the Applicant's P.35 form is a temporary (administrative) measure. This measure lasts only "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 [if any] has been satisfactorily settled." If no misconduct is established, the withheld final entitlements will be paid to the Applicant and his P.35 form will be issued.

**Applicant's motion for leave to respond to the reply**

14. In his motion dated 28 September 2022, the Applicant makes the following submissions.

a. A decision with continuous legal effects is only implemented when it has been entirely implemented. The Respondent has not provided any information on when the OIOS investigation would be concluded; therefore, the contested







situations where execution against the salary and entitlements is impossible or insufficient. For this reason, in accordance with section 12, it must be decided on at an appropriately high level, that is the USG/Management”.

23. Having in mind the above recalled principles, the Tribunal will examine the case at hand.

24. The Tribunal preliminarily notes that at the moment there is no evidence of any misconduct by the Applicant nor of damage caused to the Administration, but only a pending investigation whose outcome is still uncertain.

25. The identification of the Applicant as a subject of a possible unsatisfactory conduct involving claims for reimbursement of health treatment is generic and remains, even after the reply, unsubstantiated.

26. The Respondent has only provided an UMOJA screenshot showing a period of leave, a Cigna document showing hospitalization in the same period and an email asserting (generically) a possible “maximum liability” of the Applicant. It results from the records in no way that the Applicant’s claims for reimbursement to Cigna were false, nor is it clear health3607.08(da)48age caus

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Entered in the Register on this 29<sup>th</sup> day of September 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi