

Case Nos.: UNDT/NBI/2022/093

UNITED NATIONS DISPUTE TRIBUNAL

Background

1. On 29 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 Respondent filed a reply on 3 October 2022.

3. On 3 October 2022, the Applicant filed a motion seeking leave to respond to the reply.

Facts

4. The Applicant joined MONUSCO in the Kalemie duty station on 4 October 2004. 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 2020.¹

5. 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 USD13,017.79 under the Medical Insurance Plan (“MIP”).²

6. 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

¹ Application, paras. VII(1) and (2).

² *Ibid.*, para. VII(5) and reply, para. 7.

2022, stating that his final entitlements of up to USD13,017.79 would be withh

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 three 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 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 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.

to survive. Proof is required but has not been provided. This applies *a fortiori* considering the Applicant's 18 years of service with the Organization. Any other harm that the Applicant asserts in his application, such as the purported mental health impact, has equally not been substantiated. Such bare assertions are inadequate to show damage, let alone irreparable damage.

k. By its very nature, the contested decision is temporary; it is without prejudice to the Applicant's rights – his P.35 form will be issued if the investigation is concluded without the finding of any misconduct or financial loss, and the Applicant will be able to receive his full pension benefits. Against this background, the Applicant has failed to show a negative impact, if any, that could not be remedied.

l. In his application, the Applicant refers to the “continuing legal effect” of the contested decision. This understanding of “particular urgency” in art. 2(2) of the Tribunal's Statute is erroneous. The

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

10. In his motion dated 3 October 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 decision continues to have a continuing legal effect on the Applicant for an indefinite time. As such, his application for suspension of action is receivable.

b. This is the first time that he is being provided with annexes R/2 to R/4 filed with the reply. This is the first time that the Applicant is being made aware that the OIOS's investigation against him is largely, if not solely, based on the alleged discrepancy between his UMOJA records and his medical records.

c. The Respondent has not even provided one medical invoice to support his arguments. The Respondent has not provided any evidence that can reasonably lead to any factual finding that the Applicant submitted false claims under the MIP or that he was indebted to the Organization. The spreadsheet attached in annex R/3 is incomprehensible to the Applicant and

receiving any salary since May 2022 there is urgency in terms of the Applicant's ability to provide for the needs of himself and his family members.

Irreparable Harm

18. The Tribunal underscored in *Asumani* at paragraph 17 that the obligation to pay salary for work performed is “the obvious primary duty of any employer towards its employee.” Furthermore, “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”.

19. In *Jaen* Order No. 29 (NY/2011), the Tribunal observed that “if the only way for the Tribunal to ensure that certain rights are truly respected is to grant interim relief, then the requirement of irreparable damage will be satisfied.” In this context and considering the circumstances of inability of the Applicant to provide for himself and his family for a period of several months, it is the finding of this Tribunal that irreparable harm has also been established.

ORDER

20. The application for suspension of action of the MONUSCO Administration's decision to delay the issuance of the Applicant's P.35 form pending management evaluation is granted.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 5th day of October 2022

Entered in the Register on this 5th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi