

1 The Applicant is a former Construction and Maintenance Worker, at the G-5 level, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), based in the Kalemie duty station¹

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 May 2009 working with MONUSCO. His duty station was Kalemie²

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 earlier hearings as held in Kp/22,

possible unsatisfactory conduct.³

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.⁴ 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 The DMSFC responded on the same day stating “we will review and revert shortly”.⁵

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 completed and payment is ready to be released. Grateful if you could

discussed, please try to reach out to the investigation team to hasten the investigations. Alternatively, given the desperation of the affected staff 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-General (“SRSG”) to MONUSCO. This report was copied to other senior management offices 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 USD14,631.14 and KSH801,956.98 until the investigation has been concluded and the findings support the imposition of financial recovery pursuant to staff rule 101 (b), in accordance with section 96 of ST/AI/2017/1 (“Unsatisfactory conduct, investigations, and the disciplinary process”); and

(b) Delay the issuance of your personnel payroll clearance action form (“P-35”) 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.2 (“Personnel Payroll Clearance Action”).⁸

15 On 9 September 2022, the Applicant filed an management evaluation request of the contested decision.⁹ Further, on 12 September 2022, he filed an application for suspension of action (“SOA”) of the contested decision.¹⁰

⁶ Reply, annex 1.

⁷ Ibid.

⁸ Application, annex 3.

⁹ Ibid, annex 4.

¹⁰ Ibid, annex 5 application para 15.

longer any aspect of the SOA to be enforced

24 On 26 October 2022, the Applicant received his final entitlements in the amount of USD 7,986.98

25 On 1 December 2022, the Management Evaluation Unit (“MEU”) upheld the contested decision¹⁶

26 The Tribunal will determine

a whether the Organization’s decision to delay the issuance of the Applicant’s P.35 form was lawful; and

b whether financial compensation and moral damages should be awarded to the Applicant to compensate for harm caused by the decision to delay the issuance of his separation information to the Pension Fund in a timely manner

Issue I: Whether the Organization’s decision to delay the issuance of the Applicant’s P.35 form was lawful.

Applicant’s submissions

27 The Applicant submits that since separating from MONUSCO until the payment of his pension benefits, he and his family faced immense financial distress and struggled to survive. For over four months, the Applicant was unable to provide the basic essential needs such as food and housing for his family. Consequently, he had to resort to borrowing USD 9,500.00 at 5% of monthly compounded interest which resulted in a financial loss of USD 1,425 as payment of interest on this loan

¹⁶ *Ibid*, annex 12

notified that he was under investigation by the OIOS on 1 June 2022, along with the rest of the separating national staff members of the Kalemie office and was only interviewed as a subject just 9 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.

32 The Applicant avers that the Respondent has failed to establish any credible facts to establish that he was indebted to the Organization at the time of his separation from service that would justify the withholding of his P-35 form pursuant to sections 11 to 13 of ST/AI/155 Rev.2.

33 Furthermore, as tendered in evidence, 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 USG/DMSFC 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 for over four months. Denying the Applicant his pension benefits for a prolonged period based on unfounded assumptions of indebtedness is in violation of ST/AI/155 Rev.2 and staff rule 35.

34 In view of the foregoing and relying on *Azar*¹⁷, the Applicant submits that he should be paid interest at US Prime Rate for the late payment of his pension benefits, i.e., from the date of his separation until the date UNSPF received his P-35 and PF-4 forms.

¹⁷ *Azar* UNDI/2021/125 (not appealed).

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

35 Relying on the jurisprudence of this Tribunal¹⁸, 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 pension benefits should never have been withheld from him. Since separating from MONUSCO, 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 despair faced by the Applicant is witnessed and corroborated by MONUSCO's own senior management.¹⁹

36 The Applicant's inability to provide the basic essential needs for his family harmed their physical and mental health, as well as his. The delay in paying his pension entitlements caused him severe financial hardship, 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.

37 The Applicant asserts that the claim for moral damages is appropriate in this case even in the absence of additional medical documentation. In *Civic*²⁰, the United Nations Appeals Tribunal ("UNAT"), ruled that the testimony of staff members themselves are sufficient in attesting the impact of Administration's illegal decision that led to disappointment, demoralization and anxiety, and negatively impact staff member's physical health to constitute compensable nonpecuniary damage. It is

¹⁸ *Kings* UNDT/2017/043, para 45; *Massi* UNDT/2016/100, para 69; and *Claron Gomez* UNDT/2017/086.

¹⁹ Application, para 49; application, annex 2, pages 3-4.

²⁰ *Civic* 2020 UNAT 1069.

further affirmed that there is no need for medical expertise to conclude that continuous anxiety can be harmful for one's health

38 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 UNSPF received his P.35 and PF.4 forms

43 In *Azar*²², 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.

44 In view of the above cited jurisprudence, the Respondent maintains that these conditions were met in the present case before the contested decision was taken. The

48 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 provide information on when the pension entitlements will be disbursed.

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

52 The Respondent argues that according to Fosse²⁵ and Rehman²⁶, 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 “compensation for harm only if such harm is ‘supported by evidence.’” It is, 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.

53 Regarding the Applicant’s claim for interest on the one-time pension withdrawal settlement at the US prime rate from the date of his separation, the Respondent states that any interest payment could only accrue from the time that the Applicant would have normally received his pension benefits without any undue delay caused by the contested decision. As noted, the Organization’s rules do not specify an exact timeline within which a former staff member’s check-out process needs to be completed, final entitlements have to be paid, and the PF-4 notification has to be received by the pension fund. The completion of the P-35 form involves multiple steps and liaising with different offices and units within the Organization to ensure that all outstanding claims and obligations are settled. Therefore, UNSPF does not receive notification to process a separating staff member’s pension entitlement claims on the date of a staff member’s separation.

54 A comparison with other former staff members who separated from the same duty station on 30 June 2022 shows that their PF-4 notifications were sent to UNSPF in the months of August and September 2022. The Applicant’s PF-4 notification was received by UNSPF on 25 October 2022. The contested decision thus caused the

²⁵ Fosse 2022 UNAT 1305 para 52

²⁶ Rehman 2018 UNAT 882 para 17-18

processing of the P.35 form to take less than four months longer in comparison with the processing time for separating staff members has not accused of fraud

55 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 12 September 2022²⁷. 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 USD900 for food²⁸ as part of his total expenses of USD9,128.19. 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.

56 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 10 August 2022, almost two weeks 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 a high interest rate. The contested decision did not cause the Applicant to enter into this loan agreement. The causal link between the contested decision and the purported damage is missing²⁹.

57 Along the same lines, the Applicant's PF.4 notification was received by UNSPF on 25 October 2022, but the Applicant claims reimbursement of interest payments on his loan in the amount of USD1,425.00. He does not explain how this amount is calculated, but this amount exceeds the interest due by 25 October 2022. The

²⁷ Application, annex 5 (SOA application).

²⁸ Ibid, annex 13.

²⁹ Reply, para 39.

Applicant has no right to compensation for interest allegedly paid by him after the contested decision did not have any further effect

58 In addition, the interest rate of this purported loan is exceptionally high,

perpetrated by the Applicant may deprive him of remedies even if it is established that the contested decision was wrong

62 Finally, the Respondent requests the Tribunal to reject the application

Issue I: Whether the Organization's decision to delay the issuance of the Applicant's P.35 form was lawful.

63 As noted above, this is one of 10 similar cases pending before the Tribunal arising from the Organization's decision to withhold final entitlements and the processing of pension paperwork for national staff whose appointments were not renewed due to the closure of the Kalemie duty station of MONUSCO in 2022. The contested decision was made on 22 August 2022.

64 The issue of fraud arose as a result of an exercise by the Organization's medical insurance provider, Cigna. According to the record,

65 As part of an overall DRC approach for the UNMIP medical plan, Cigna's FIU has initiated a targeted exercise to flag and monitor individual files, where possible collusion and abuse of the medical plan is suspected. The individual files were identified on the basis of certain parameters...³⁶

66 The specific parameters used to flag files was redacted from the exhibit, so the Tribunal has no evidence about how files were identified as being cases "where possible collusion and abuse... is suspected".³⁷

67 By at least January 2021, Cigna reported these "allegations of possible medical insurance provider ("MP") fraud" to the Investigations Division of OIOS. As a result, OIOS began investigations into these allegations.

³⁶ Reply, annex R 9, p 3

³⁷ Id (emphasis added).

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

72 Indeed, the record in this case is devoid of details about the investigation at all. Even today, we do not know what was investigated, whether the investigation was ever completed, and if so, what it found about the “possible fraud”. This absence of evidence is astounding given three years of systematic monitoring, the passage of almost two and a half years since OIOS was first notified of the allegations of possible fraud and began to investigate, and more than a year after the disputed decision to withhold the

maximum liability... Below is a table indicating the new amounts to be withheld from the respective former staff members” That table indicates that the possible maximum liability in USD for the Applicant is “1,332,18”⁴⁷

75 In sum, the record in this case shows that nearly three years ago, Cigna “initiated a targeted exercise to flag and monitor individual files, where possible collusion and abuse of the medical plan is suspected”. This exercise used parameters which are not disclosed to the Tribunal.

76 Cigna reported the allegations to OIOS in January 2021, which began an investigation. Although the closure of the Kalamie office had been planned since 2020, OIOS claims that it learned of the closure weeks before the Applicant’s separation on 20 June 2022. OIOS interviewed the Applicant about the possible fraud allegations days before his separation, but the record contains no evidence about that interview, what he was told about the allegations, the status of the investigation at that point, and his response.

77 On 21 July 2022, OIOS recommended withholding the Applicant’s separation entitlements and delaying issuance of his pension paperwork “should the Organization wish to recover sums from the Applicant.” And on 22 August 2022, the Organization adopted this recommendation in the disputed decision.

78 The record in this case lacks any evidence whatsoever of the nature of the alleged fraud, how the Organization suffered any financial loss, and how any alleged financial loss was calculated. The case consists of a series of black boxes.

79 The first black box is the Cigna exercise. The Tribunal has not been told what parameters were used in identifying cases to be examined, nor what the exercise and systematic monitoring disclosed.

⁴⁷ *Ibid*, annex R 9 p 1.

80 The second blackbox is what information was transmitted from Cigrato OIOS. The Respondent claims that “OIOS had a reasoned report” from Cigrato FIU, but

had engaged in the above described misconduct.”⁵¹ Of course, here the Administration was given evidence whatsoever, and certainly not the detailed description in Loto

85 Moreover, the decision to delay issue P.35 form was expressly taken pursuant to ST/AI/15/Rev.2 which authorizes the USG/DMSPC to refuse to issue the said form until a staff member has settled all indebtedness to the United Nations. (See application para 12). In examining this directive, the Dispute Tribunal has held that the power relates to “a stated indebtedness . . . a financial obligation, the extent of which is defined albeit may be disputed”⁵² ST/AI/15/Rev.2 may not be used “to secure a merely possible [obligation], akin to a bail.”⁵³ At the very least, “there must 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. Obviously, moreover, the Administration must act swiftly.”⁵⁴

86 In this case there is no evidence in the record to show the probability of the

his duty station closed. It interviewed the Applicant days prior to his separation and then waited another month before recommending that the pension paperwork be

P.35 normally one month in advance of the last regular working day ...” See ST/AI/155/Rev.2 p 2, para 5(b). The effective date is to be the date of separation. Id

92 The Office of Programme Planning, Budget and Finance is responsible for preparing and “sending the Pension Fund separation notification (PF/4) to the Secretariat of the UNSPF within three days of the completion of the [P.35]”. Id at p 4, para 10(c).

93 In this case, the Applicant’s date of separation was 30 June 2022. However, the pension paperwork was not received at UNSPF until nearly four months later, 25 October 2022.⁵⁵

94 To be sure, ST/AI/155/Rev.2 does authorize the USG/DMSPC 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.⁵⁶ That interest has been calculated at the US prime rate from the date on which the entitlement was due until the date of payment.⁵⁷

96 Since the record does not show either the due date or the payment date, the reasonable dates to use in this case are the date the pension paperwork was due to UNSPF and the date it was received.

97 The Respondent accurately points out that the Organization’s “rules do not specify an exact date at which a former staff member’s pension entitlements have to be disbursed.”⁵⁸ From that he argues that the date the pension paperwork would normally

⁵⁵Application, annex 10

⁵⁶Azarve 6

hereceived by UNSPF should include “the acceptable administrative processing time frame of around 35 months”⁵⁹

98 The only evidence cited for an acceptable processing time frame is the MEU recommendation to grant two months of interest to other Kalemie staff members whose pension paperwork was improperly delayed. According to the MEU, two months “represents the approximate period of delay vis à vis other former staff members who separated from the same duty station on 30 June 2022, and whose PF-4 forms were released throughout the months of August and September 2022”⁶⁰

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 stragglers 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 of two months is less than the 35 months that the Respondent now claims to be acceptable, and less than half of the four months that occurred in this case.

100 We also know that ST/AI/155/Rev.2 contemplates a much speedier process. It directs executive and administrative offices to complete form P.35 “normally one month in advance of the last regular working day...”, which implies that one month is normally how long the process should take. “Normally” recognizes that some unique situations may require the process to begin earlier or later; but no evidence was presented of such unique circumstances in this case.

101 Accordingly, it is reasonable to conclude that the pension paperwork should be sent to UNSPF around the date of the staff member’s separation. Indeed, it would be unfair for the Organization to benefit (at the expense of the staff member) for any institutional inefficiencies, whether for this particular duty station or in general.

102 The four month delay in submitting the pension paperwork to UNSEF necessarily resulted in a four month delay in the Applicant's receipt of his pension entitlements, during which he lost the use of that money. As a result, he is awarded four months of interest on that money at the US prime rate

103 In addition, the Applicant claims that he "incurred additional loss of USD1,425 which he paid in interest on the USD9,500 loan that he had to take out to survive"⁶¹ To support this he submits a hand written paper ("Dehaged unpet") purporting to evidence of a loan for USD9,500 to be repaid after three months along with interest of 5% per month⁶² However, the Tribunal does not give this document any credibility.

104 First, the Applicant's signature on this paper was dated 10 August 2022, but it carries a notary seal indicating that the agreement was signed on 8 December 2022, which is almost four months after the loan was allegedly taken out. The notarization was also about a month after the loan was repaid with interest. There would be no purpose to notarizing the loan paperwork after the loan was repaid. These dates make the document suspect.

105 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.

106 Finally, the Applicant seeks moral damages alleging that the delay and continued failure to pay his pension payments caused him and his family "immense financial distress and [they] struggled to survive"⁶³ He also claims that it caused him stress, embarrassment and loss of self-esteem⁶⁴

107 The Statute of this Tribunal expressly authorizes the award of "compensation for moral damage caused by the institution"

the existence of factors causing harm to the victim's personality rights or dignity..."⁶⁵
That evidence may take many different forms⁶⁶

108 The Applicant also claims that he "[w]ithout 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"⁶⁷ Again, there is no evidence of this beyond his mere statement and an email from the MONUSCO Director of Mission Support. 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 rents, pay school fees or buy food"⁶⁸ This evidence is insufficient to award moral damages.

109 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 in the record that the Applicant was unable to pay rent, pay school fees or buy food. In fact, the allegations of the Application (which are not evidence, of course) do not refer to any of these specific financial difficulties. In fact, the Applicant submits paperwork indicating that he was paying school fees and utility bills.⁶⁹

110 Even if it were accepted (without evidence) that the Applicant had no means to pay for medical care, awarding moral damages on that basis would require evidence about what the physical and psychological problems were, how they were related to the delayed processing of his pension, what treatments were needed, and how the lack of treatment caused harm to the Applicant.

111. 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

⁶⁵ Kallon 2017 UNAT 742, para 60. See also Civic 2020 UNAT 1069, para 77.

⁶⁶ *Ibid*.

⁶⁷ Application, para 49.

⁶⁸ *Ibid*, annex 2.

⁶⁹ *Ibid*, annex 13.

denied

112 In light of the Tribunal's findings, the application succeeds in part

113 The decision today issued on pension paperwork is found to be unlawful.

114 The Respondent shall publish a statement of reasons for the decision of the Tribunal.