	Case No.:	UNDT/NBI/2016/024
UNITED NATIONS DISPUTE TRIBUNAL	Judgment No.:	UNDT/2019/112
	Date:	19 June 2019
	Original:	English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CLARKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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Applicant claimed that the debt had been negotiated down to a much smaller amount. He questioned the remaining titles.

7. On 20 November 2017, the Tribunal issued Order No. 198 (NBI/2017) requiring the Respondent's responses to several questions and to provide supporting evidence on matters of contention. The Respondent filed the response on 30 November 2017. The Applicant provided his comments on 7 December 2017. On this occasion, he articulated additional claims falling under the general category of final entitlements.

8. On 25 February 2019, the Tribunal issued Order No. 024 (NBI/2019) requiring the parties, *inter alia*, to file amended pleadings setting out: (a) which payments due to the Applicant were effected and on what date and what delay, if any, is being claimed; (b) which claims remained outstanding; and (c), among the latter, for which debts the payments were withheld and on what basis. The Tribunal requested the parties to supply documentary evidence and indicate what facts in contention between them were to be proven through hearing of evidence from persons. The parties filed the said pleadings on 8 and 19 March 2019. A hearing was not requested.

9. Given the incompleteness of the Respondent's submissions, the Tribunal sought further clarification in Order No. 058 (NBI/2019), whereby it inquired about calculation of the Applicant's final pay and the basis for withholding or deducting from it. The Respondent filed the requested submission on 24 May 2019, where it was ascertained, among other, that no deductions on account of indebtedness had yet been made and that the withholding on account of private legal obligations was no longer maintained. The Respondent also offered the payment of the relocation grant, repatriation travel and associated cost of excess baggage, if such were proven.

10. The Applicant filed his comments on 31 May 2019, where he maintained reservations as to the calculation of the final salary, albeit on a different ground than before, and reiterated some of his previous claims. He provided a proof of return travel,

11. By Order No. 068 (NBI/2019), in response to the Applicant's reservations with respect to danger allowance, the Tribunal sought further explanation of the calculation of the final salary, which the Respondent provided on 14 June 2019.

12. Further below the Tribunal will summarise facts and submissions pertinent to discrete segments: the separation entitlements, the withholding of payments and the Applicant's other financial claims. Facts described below, unless otherwise indicated, are either undisputed or result unambiguously from the submitted documents.

II. Facts related to separation

13. By letter dated 19 March 2015, the Applicant was notified that his appointment would not be renewed beyond 31 March 2015 and received instructions for check-out. These instructions informed, among other, that the Applicant would be required to travel to Entebbe for three days and, accordingly, would be entitled to DSA for this period.[1]

14. As part of the check

upheld the decision not to renew the Applicant's appointment.[5]

16. On 9 May 2015, the MONUSCO Director of Mission Support (DMS) informed the Applicant that in light of the result of the management evaluation, the decision to separate him would be effective immediately. He also informed the Applicant that, in accordance with staff rule 9.11(b), he would be paid for the additional days required to complete his check-out formalities and authorized travel to his place of entitlement to return travel.[6]

17. On 12 May 2015, the Applicant was medically evacuated to Entebbe, Uganda, under admittedly dramatic circumstances the details of which are in contention between the parties.[7] However, according to an email dated 11 May 2015 from the MONUSCO Kalemie Head of Office to the MONUSCO DMS, the Applicant had injured himself; moreover, his behaviour necessitated his emergency medical evacuation to Entebbe as he was deemed to be a serious danger to himself and to the people around him including his wife and children.[8]

18. Following his release from the Entebbe hospital on 18 May 2015, the Applicant undertook to complete his check out in Entebbe. The check-out form demonstrates that most of the sections cleared him during the period from 27 May to 7 June 2015 and one section, personnel, on 25 June 2015.[9] Email exchanges submitted by the Applicant demonstrate that the Applicant's attendance records were filled already on 13 May 2015, when the Applicant was still in the hospital. The question, however, surfaced again in June and remained unresolved till September 2015, while the Applicant each time requested that the attendance records be printed out and signed again by the person

[5] Application – Annex 3 at page 53.
[6] Application – Annex 3 at page 60. The Respondent later informed the Tribunal that there was no legal authority for the DMS' assertion that the Applicant would be paid for "additional days" required to complete checkout formalities but that that this should be understood to the effect that the separation date would take into account a period necessary to complete the checkout.
[7] Application – Annex 3 at page 85, para. 4 of the Applicant's comments on the Respondent's submission pursuant to Order No. 198 (NBI/2017) and Amended application dated 8 March 2019 at para. 52; of the chronology of the Applicant's case – attachment 2 of the MER
[8] Ibid., at page 61.
[9] Application – Annex 3 at page 38

22. During the case management discussion of 13 December 2016, the Applicant informed the Tribunal that, in October 2015, he received a payment of USD2,460, for which no explanation was ever proffered, despite his queries. Counsel for the Respondent informed the Tribunal that the Respondent was not aware of the reason for such payment. This position remained unchanged and no explanation has been furnished about the title for such a payment until the closure of the proceedings.

23. On 24 December 2015, the Applicant's Counsel addressed a letter to the Under Secretary-General for Field Support (USG/DFS) bringing the Applicant's predicament to his attention.

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this payment was described as "Net Salary Apportionment" and is broken down including: (a) repatriation grant in the amount USD 20,753.98; (b) annual

payment of danger pay for April and May 2015 has been included.[25]

30. The Organization's der

his request for confirmation of the completeness of the process in his email to the CICO handler on 25 June 2015.

33. Instead of remaining at the CICO office, his check-out file was taken to Goma by his initial CICO handler. She then went on leave without completing the process including deciding on his repatriation and entitlements. This led to the unnecessary delays.

34. It is clear that once he was removed from the DRC, the Administration had little interest or incentive in assisting him. It was not until he filed his appeal and had Counsel address the matter to Headquarters that action occurred.

35. Regarding the Respondent's claim that there was a delay in receiving proof of relocation for the purpose of repatriation grant as late as 3 December 2015, the Applicant posits that it is dubious since on request from HR Entebbe in August 2015, he had forwarded a notarized proof of relocation and had sent both the proof and his United Nations Laissez-Passer (UNLP) in a sealed envelope in August 2015 via the same MONUSCO mail/pouch system. That it took four months to document receipt is inexplicable.[28] The Applicant submits an email dated 11 August 2015 from a MONUSCO HR Assistant reminding him to send his proof of relocation and his UNLP as evidence that he submitted the said documents.

36. The separation documents needed to process his pension were received at the Pension Fund on 5 February 2016, over eight months after his separation from service.

flight from Entebbe, Uganda to Monrovia, Liberia on 19 May 2018.

The Respondent's case

38. The application, insofar as it relates to the payment of the Applicant's repatriation grant and final pay, is moot as these have now been paid. Consequently, there is no longer an administrative decision that is allegedly in non-compliance with his terms of appointment or the contract of employment as stipulated art. 2.1(a) of the Dispute Tribunal's Statute. The Applicant has now been provided with the relief that he sought. The final pay underwent a final audit. It is likely that the Applicant's latest salaries had been withheld prior to his evacuation, which is a standard procedure on separation. This said, the final salary had been calculated without any deductions for debts. A position "salary adjustment" in the payslip denotes money credited to the Applicant, and not deducted from him.

39. The Applicant's official date of separation was 13 May 2015. This date was determined unilaterally by the Administration to accommodate the Applicant's medical evacuation on 12 May 2015. The Applicant was paid salary until 13 May 2015. The Respondent agrees that the Applicant i

jurisdiction to hear this aspect of the application.

41. In the alternative, the Respondent submits on the merits that the Applicant has provided no authority for the proposition that he is entitled to receive DSA for the period after his separation from service. Under staff rule 7.10, DSA is paid to serving staff members. The Applicant ceased to be a staff member on 13 May 2015. The Applicant is therefore not entitled to payment of DSA for the eight months he claims to have spent in Uganda following his separation from service.

42. Upon his separation from service, the Applicant was entitled to payment of repatriation grant under staff rule 3.19, removal costs or relocation grant under ST/AI/2015/1 (Excess baggage, shipments and insurance) and repatriation travel under staff rule 7.1(a)(iv). The repatriation grant was paid to the Applicant on 16 February 2016, rendering the application moot in this respect.

43. In relation to the non-payment of his relocation grant or repatriation travel, the initial position of the Respondent was that no final administrative decision had been taken regarding his relocation grant or repatriation travel and these payments were being withheld. The Respondent changed his position on 24 May 2019 to the effect that the claim could be satisfied, however, the Respondent could not locate the form through which the claim for relocation grant would have been raised. The Respondent currently concedes to pay both the relocation grant, the repatriation travel cost and the excess baggage, the latter two upon a proof that such costs had indeed been incurred within the timeline stipulated by the staff rules.

44. The Applicant is responsible for the delays in processing his separation entitlements.

45. The standard processing time for separation payments is between six and eight weeks and, on average, check-out should be completed within one to three working days. The Applicant's check-out process was initiated on 27 March 2015 but was put on hold pending the Applicant's request for management evaluation of the decision not

stabilization period. Accordingly, there were limited or no transactions executed in Umoja or the previous system, IMIS.

49. PAs were raised by the RSCE on 11 May 2015 and sent to the Field Personnel Division (FPD) of the Department of Field Support (DFS) for final audit and approval. RSCE did not have delegated authority to approve PAs. FPD gave approval on 7 August 2015. Corrections were made on 20 January 2016 to correct the Applicant's end of service date.

50.

53. The Applicant is not entitled to termination indemnity because his appointment was not terminated.

IV. Facts related to withholding of payments

54. On 5 June 2014, the Chief, Conduct and Discipline, MONUSCO wrote to the Applicant to notify him of an outstanding private legal obligation and queried again on 20 January 2015. The matter concerned a judgment issued by the Tribunal in Kalemie in the Applicant's absence, whereby the Applicant had been obliged to pay Ms. Fidèle N. USD51,000. The judgment had become executable as to the sum of USD2,100 and the bailiff of the Tribunal had addressed MONUSCO with a request to seize the Applicant's remuneration.[35]

55. On 28 May 2015, the Applicant authorised a deduction from his final payments the amount of USD6,800 owed to Ms. Francine N.K.[36] This authorisation was subsequently withdrawn by memoranda from the Applicant dated December 2017 and January 2018, addressed to the Tribunal and to the Finance Section

The Respondent's case

57. In 2017, the Respondent maintained that the Organization would withhold the remuneration owed for 1-31 May 2015 and the Applicant's relocation grant and travel to satisfy his outstanding debts to the Organization and private legal obligations in accordance with section 6 of ST/AI/2000/12. Specifically:

had not been authorised in accordance with staff rule 3.18(c).

60. Only the debt to the Organization, admitted by the Applicant, is currently maintained. It has not, however, been deducted from the Applicant's emoluments.

The Applicant's case

61. The Applicant submits that t

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V. Applicant's other claims against the Organization

Applicant's case

66. The Applicant alleges that he had lost USD21,000 in personal effects during the medical evacuation. While he was in the custody of MONUSCO officials, his office premises were broken into and his safety deposit box with USD21,000 in cash was taken. This amount had been intended to meet his outstanding obligations prior to leaving the mission. The Organization's responsibility is entailed for this amount.

67. The Applicant avers that the Organization owes him USD5,600 reimbursement for his residential security guards. The claim was the subject of his request for payment of all his final entitlements. In the Applicant's submission of 17 February 2017, he annexed the proof of payment for the period from November 2014 till May 2015, together with his generic request for reimbursement form, received by the MONUSCO Security Section on 24 December 2014, which annotates at the bottom

was incurred throughout the overall period from March 2014 to May 2015. Any further reimbursement must be predicated on the Applicant's providing proof of payment.

69. The Organization does not owe the Applicant USD21,000 for destruction and theft of his private property. The Applicant has not provided any evidence that he has made a claim under ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service). Any loss or damage to his property has not been established, and any such claim is not properly before the Dispute Tribunal.

VI. Remedies

The Applicant's case

70. By way of summary, the Applicant submits that the following entitlements have still not been addressed:

a. Unpaid Repatriation travel expenses.

i. Repatriation travel – USD1,645.

ii. Excess baggage – USD500.

iii. Unaccompanied shipment of personal effects – USD 10,000.

b. Reimbursement of claim for residential security costs – USD5,600.

c. Recovery for damage and loss of personal property – USD21,000.

d. Balance of unpaid final remuneration – Unknown and to be determined by the Respondent.

e. Outstanding certificate of service.

71. The Applicant further submits claims in connection with the egregious mishandling of his medical evacuation to Uganda and failure to regularize his separation from service in a timely manner:

a. Damages in connection with forced transport to Uganda and 8 months separation awaiting repatriation including subsistence while stranded in Uganda awaiting processing – USD150,000.

b. Legal and other costs due to abuse of process – USD100,000.

c. Compensation for the delay in paying all the above – one year's net base salary.

d. Compensation for moral damages including all the (Post Traumatic Stress Disorder) – two years' net base salary.

72. The Applicant confirms receipt of a lump sum payment of USD41,231.52 in 2016 representing his repatriation grant and final pay but he was not provided with a breakdown in calculations that could be verified. His pension has also been processed after delays of over a year.

73. The Applicant acknowledges indebtedness of USD8,216 to the Organization.

Respondent's case

74. Article 10.5(b) of the Dispute Tribunal's Statute provides that compensation for harm may only be awarded where supported by evidence. The onus is on the applicant to substantiate the pecuniary and/or non-pecuniary damage that he claims to have suffered because of the Administration violating his rights. The Applicant has failed to provide any evidence beyond that he has suffered pecuniary loss.

75. Even if the Dispute Tribunal finds that there has been a fundamental breach of the Applicant's rights, moral harm cannot be presumed. The Applicant must provide evidence of harm. In the absence of any such evidence, no compensation should be awarded.

VII. Considerations

Receivability

76. The Tribunal agrees with the Respondent that the application is moot regarding the repatriation grant. As concerns other "separation entitlements" encompassed by the payslip from February 2016, the Tribunal does not find the application moot regarding the Applicant's final pay. In this respect, the Applicant signalled in the application that he does not understand the payslip. Indeed, the payslip is not clear (including that it read that the salary was for October 2015, i.e., after the Applicant's separation),

cannot, therefore, be encompassed by default by the notion of "separation payments".

79. For similar reasons the Tribunal finds the application to be irreceivable regarding the claim for reimbursement of the cost of security services from November 2014 till May 2015. This claim does not expressly form part of the application. 3413( )- [(3413((.4981 0

81. As concerns the Applicant's claim for remuneration, including the DSA, for the time spent in Entebbe following his evacuation, the Tribunal notes confusion occasioned by the message which informed that the decision to separate the Applicant would be effective immediately, however, he would be paid for the additional days required to complete his check-out formalities. The two propositions included in the message can only be reconciled if interpreted that the date of the Applicant's separation would be fixed so as to include the days required to check-out. This interpretation would be also consistent with the instruction that the Applicant had received earlier, as well as with the gist of ST/AI/155/Rev.2 (Personnel payroll clearance action), which clearly indicates that separation formalities are a process to be undertaken by staff members, and not by former staff members who have already separated. Clearly, the Applicant could not be "paid" without remaining a staff member. Accordingly, the date of separation should include the minimum time required of the staff member to personally attend the relevant offices.

82. This had not happened in the Applicant's case, with the matter apparently having been complicated by his medical evacuation, and the Respondent undertaking instead a rather grotesque effort to check the Applicant out of his sick-bed. Whereas before the Tribunal the Respondent admitted that the Applicant was owed salary for the period of his hospitalization 13-18 May 2015, which is appropriate, the Tribunal moreover finds that the Respondent also owes the Applicant remuneration for the minimum time required to complete his check-out. In accordance with the instruction that the Applicant received beforehand, and consistent with the Respondent's position before the Tribunal as to how much time is needed, it would mean three days for which the Respondent owes the salary and the DSA for Entebbe, i.e., 19-21 May 2016 (all being working days). The Applicant did not show that any additional time would have been practically necessary; the record[50], on the other hand, shows that indeed he had completed most of his check-out errands during the period of three days at the end of May 2015.

[50] Reply, annex 4.

83. The claim for costs of his stay in Entebbe for any period exceeding the days necessary for check-out is unfounded. Even accepting the Applicant's contention that he had not received the May 2015 email requesting his decision about the return travel, the Applicant, having received detailed check-out instruction, and a similar enquiry earlier in March, was put on notice of the travel issue as such. Moreover, having corresponded and, admittedly, visited RSCE offices repeatedly, he had enough opportunity to address the return travel entitlement or, more generally, issues related to his alleged "being stranded". In his June 2015 email where he inquires about whether he had completed all the necessary formalities, the Applicant does not mention either the return travel or any predicament occasioned by a stay in Entebbe. Neither does the issue arise in the later October and November email correspondence from the Applicant. The Applicant, moreover, offered no explanation why, given the alleged expense entailed, he had rather stayed in Entebbe for a protracted period of time instead of flying home, which he could have done at the expense of approximately USD 600-700. As such, it is apparent that if indeed the Applicant had extended his stayed in Entebbe for several months – or, as per the latest submission 0.0 0.0p.-21 12.0 Tf 0.0 0.0 0.0 rg 0.9981

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(see also paras. 94 and 95 below).

86. With respect to the claim for excess baggage, according to staff rule 7.15, the cost of excess baggage is subject to reimbursement. To date, the Applicant has not submitted proof of having borne such an expense.

Responsibility for delays in processing entitlements

87. The Tribunal takes as a premise that the standard processing time for separation payments is from eight to twelve weeks from the receipt of all completed forms until the final pay.[51] It recalls that the process commenced already in March 2015 and by the end of June 2015 the Applicant was n BT /F1 1(d)] TJ ET Q q BT /F1 12.0 Tf 0.0 0.0 0.0 rg 0.99

foreseen and avoided and the burden of it must, to some extent, be shared between the Organization and the individual staff members. While it would be unacceptable to sweepingly excuse the suspending of payment of entitlements for the whole period of Umoja implementation, some delay, especially in effecting off-cycle payments, may have been inevitable and would need to be absorbed by the individuals concerned. The Tribunal would be reluctant not to justify an additional, beyond the strict black-out or freeze periods, delay, if such argument were *prima facie* made by the Respondent upon concrete facts. This, however, has not been done. Neither was the onset of Umoja ever indicated as reason for delaying the payments in the correspondence that the Applicant exchanged with the Respondent in October and November 2015.

92. The above remarks are, however, of a limited import for the issue at hand. Given the responsibility of the Respondent for the fact that the calculation of the Applicant's final pay had not been concluded before the launch of Umoja in mid October, the Respondent is responsible for the entire period of delay. The Respondent was thus in arrears from the end of September 2015 until 15 February 2016, the date of effecting the final pay for most of its components.

93. The Tribunal, on the other hand, finds no undue delay in processing the repatriation grant. It is recalled that, according to staff rule 3.19, to be eligible for a repatriation grant, a staff member had to meet the conditions set forth in both annex IV and staff rule 3.19. Thus, a failure to meet the requirements precludes the staff member from being eligible for a repatriation grant. The Applicant did not demonstrate in any way that he had submitted a proof of relocation prior to December 2015, specifically, as it is alleged, that he did it sometime after the reminder email of August. The Applicant's mere assertion does not suffice.

94. Likewise, the Tribunal finds no grounds to attribute to the Respondent responsibility in not effecting the return travel entitlement. The Tribunal agrees that a return travel cannot be arranged without the cooperation from the staff member. It can be reasonably expected of a staff member to trigger the process and to supply the necessary information, specifically, the destination and date of the travel. While the

Respondent had asked the Applicant about his preference with respect to his return travel in March 2015 and May 2015, even if indeed the Applicant would have not received the May email, there was no reason on the part of the Respondent to rush the process without the impulse from the Applicant, considering that, according to staff rule 7.3(c), entitlement to return travel would not cease until two years of the date of separation. Notably, notwithstanding that the Applicant maintained email communication with the Respondent through November 2015, a claim for return travel was not articulated before the filing of the memorandum to the USG/FSD of 24 December 2015, where the Applicant was represented by counsel. In February 2016, the Respondent once again asked the Applicant whether he wished his ticket issued. The management evaluation reiterated on 27 April 2016 that in order to pay the repatriation travel a filing of documents was required. The Applicant did not act upon this information.

95. The Tribunal appreciates that the Respondent subsequently changed his position to stating that his payment would be withheld. In the situation of dispute, however, since the Applicant

deductions and withholding that may be levied upon them by way of discrete administrative decisions taken pursuant to applicable procedures.

Damages

97. The claim for damages equalling USD150,000 for "subsistence while stranded in Uganda awaiting processing" is rejected for reasons stated in para. 83 above.

98. While the A

Tribunal recalls the Appeals Tribunal holding in *Kallon* that for a breach or infringement to give rise to moral damages, especially in a contractual setting, where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances.[55] In the present case, there are numerous irregularities in the processing of the Applicant's entitlements (misplacement of personnel attendance records, inability to "locate" the form where the Applicant chose his relocation grant, inability to account for the payment effected in October 2015, confusion about withholding of payments) that could amount to "peculiar circumstances". The Tribunal is mindful, however, that the Appeals Tribunal ruled that for the proof of a moral damage an applicant's testimony alone does not suffice and corroborating evidence is necessary.[56] In this regard, the Tribunal, is not satisfied that the medical certificate supplied by the Applicant with his MER[57] proves moral damage in causal relation with the impugned decision. The Tribunal considers that a delay in payment as such, albeit annoying and unjustified, is unlikely to lead to a post-traumatic stress disorder. The certificate produced by the Applicant does not connect the diagnosis with delay in payments; rather, it refers to the history of injury to a forearm, intoxicati

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(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 19th day of June 2019

Entered in the Register on this 19th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi