



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LANGUE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Sètondji Roland Adjovi

Counsel for the Respondent:
Miles Hastie, UNICEF

Introduction

1. The Applicant is a former Communication Specialist with the United Nations Children's Fund (UNICEF).
2. In her 8 March 2016 application, she is contesting the amount of separation entitlements she received following her resignation from the Organization.
3. The Respondent filed a reply on 30 March 2016.
4. The Tribunal held a case management discussion on 12 October 2017 and a hearing on the merits on 31 October 2017. During the hearing, the Tribunal received oral evidence from the Applicant.

Facts

5. The facts stated below are admitted and/or result from documents on file. Facts established upon the Applicant's testimony are qualified as such.
6. The Applicant joined UNICEF on 1 September 1999 on a fixed-term appointment. On 18 April 2012, she was granted a permanent appointment effective 30 June 2009.¹ She was a Communication Specialist at the rank of P-3 Step 13 when she separated from UNICEF on 19 October 2014.
7. In July 2013, the Applicant was granted special leave without pay (SLWOP) in order to undertake an advanced degree programme. She did not retain a lien against her post while on SLWOP.² The Applicant explained that she had been aware of the associated employment risk, she nevertheless had had no intent to remain or return to UNICEF Benin because of the intolerable working environment, where 7 out of 10 staff members had resigned and the Applicant had filed a complaint for

¹ Annex 2 to the application.

² Annex 4 to the application.

abuse of authority against the Country Representative which had eventually been settled within the Country Office.³

8. Once the training completed, the Applicant sought an extension of her SLWOP for another year in order to take another professional course and continue looking for positions matching her qualification and experience.⁴ She sought advice from UNICEF's Human Resources Division, applied for several positions within the Organization as early as January 2014 but was never shortlisted for any.⁵ Mainly, she applied for several positions at the P-4 and P-5 level.⁶ In October 2014, the Applicant got an opportunity for a job with Oxfam. She wrote to the Human Resources Department to seek approval to take up the position while on SLWOP but this was denied.⁷ She accepted the offer from Oxfam on 20 October 2014.

9. The Applicant sent her resignation by email on 28 October 2014 directed, among others, to the UNICEF Representative in Benin, the UNICEF Director of Human Resources and two other human resources officers.⁸ In December 2014, the Applicant inquired about the status of her separation entitlements and was asked by Christine Dolo, UNICEF Operations Manager in Cotonou, Benin, to reissue the letter of resignation so that the paperwork could be done internally because nobody could trace the initial resignation.⁹

10. On 24 December 2014, the Applicant reissued her resignation letter and sent it, on 26 December 2014, to Christopher Watson, Human Resources (HR) at UNICEF headquarters with a copy to Ms. Dolo.¹⁰ Her resignation was accepted on 13 January with an effective date of 19 October 2014.¹¹

³ Applicant, 31 October 2017 hearing.

⁴ Annexes 6A and 6B to the application.

⁵ Annex 7B to the application.

⁶ Annex 7 to the application and annex 6 to the reply.

⁷ Annex 10 to the application.

⁸ Annex 1 to the reply.

⁹ Application, para. 7; reply, para 16.

¹⁰ Annex 11 to the application.

¹¹ Annexes 12 and 13 to the application.

11. On 29 January 2015, the Applicant received an email informing her of her separation entitlements which covered travel (Cotonou – Yaoundé) with excess baggage; unaccompanied shipment; shipment insurance or equivalent in cash; repatriation grant; pension; travel lump sum option for her and one child; and accrued annual leave.¹²

12. Between February and April 2015, the Applicant corresponded with UNICEF on the matter of her separation entitlements and the necessary paperwork.

a. On 9 February 2015, she sent several documents to support her separation process namely: a lump sum request for travel and shipment; a payroll clearance action form; the United Nations pension fund form; the status report and request for payment of dependency benefits; and the exit questionnaire.¹³

b. On 17 February 2015, the Applicant transmitted a proof of residence document. Mr. Watson responded to the Applicant on the same day informing her that the proof of residency needed to be sent to New York.

c. On 27 February 2015, the Applicant was informed that she had failed to sign the documents. She transmitted the signed documents on 2 March 2015 indicating in her communication that she had made a mistake by failing to sign the said documents.

d. On 6 March 2015, UNICEF HR informed the Applicant that they had received her proof of residency but section one of the document required the UNICEF Representative's signature and that the form could not be processed until this happened.

e. On 11 March 2015, the Applicant informed UNICEF HR that she had sent all the requested originals using express delivery mail.

¹² Annex 13 to the application.

¹³ Annex 2 –reply.

f. On 31 March 2015, the Applicant wrote to Mr. Watson querying the separation process. She indicated that she had done all the paperwork and requested further guidance.

g. On 1 April 2015, the Applicant wrote to the UNICEF Deputy Director, Division of Human Resources Management (DHRM) requesting her assistance with the separation process. The Deputy Director/DHRM responded to the Applicant on 27 April 2015 and asked her UNICEF HR colleagues to provide an update and clarification to the Applicant.

h. On 28 April 2015, Maria Bergeron, UNICEF HR, informed the Applicant that they had been working on her separation case since December 2014 and that she would be paid for her annual leave balance and repatriation grant in two to three days.

i. On 5 May 2015, the Applicant received payments on account of unused leave and repatriation grant, from which a lion's share of USD19,539 was deducted for UNFCU, thus leaving USD4,961.66, and on 11 May 2015 she received USD718.90 as equivalent of repatriation travel.¹⁴

13. On 20 May, 28 July and 18 August 2015, the Applicant wrote to UNICEF HR officials, including the UNICEF Director, Human Resources and the Ethics Office, for clarification regarding her separation entitlements.¹⁵ She queried specifically about the lump-sum owed to her.¹⁶ On 20 August 2015, after the Applicant informed about engaging the formal justice mechanisms, the Director Human Resources informed that a travel lump sum of USD718.79 had been paid by the Benin Country Office and transferred to her account.¹⁷

14. On 14 September 2015, the Applicant again sought guidance about her entitlements, and asked about the nature of payments that she had received. She also

¹⁴ Annex 7 to the reply; annex 17 to the application.

¹⁵ Annexes 14, 15 and 16 to the application.

¹⁶ Annex 14 to the application.

¹⁷ Annex 16 to the application.

queried about termination indemnity.¹⁸ On 16 September 2015, she received a response acknowledging an oversight regarding the sum to be paid, namely, failure to pay her lump sum *en lieu* of unaccompanied shipment in the amount of USD15,000, due to an oversight by the Finance Unit.¹⁹ That email informed that the lump-sum of USD15,000 had been paid into her bank account.

15. By email dated 25 October 2015, the Applicant sought management evaluation of the decision to not pay her termination indemnity and compensation for delay in other payments.

16. In the management evaluation response dated 9 December 2015, the non-payment of the indemnity was upheld and the claim for payment for delay was rejected.²⁰

Applicant's case

17. On 16 September 2015, the administration only partially responded to her complaint. The administration did not address her claim for a separation indemnity and its silence therefore means denial. In addition, there was no consideration for the harm resulting from the delay, bearing in mind that it took almost a year from her initial resignation to have some of her entitlements enforced. The management evaluation failed to correct the situation.

18. The Applicant spent more than 15 years with UNICEF. For such long-serving staff, the separation indemnity is the deserved recognition. It is regrettable that, faced with the dilemma of getting back to work and earning her living after almost 18 months without income, UNICEF HR set her up for resignation knowing too well that she would lose and/or forfeit her termination of service benefits.

¹⁸ Annex 17 to the application

¹⁹ Annex 17 to the application.

²⁰ Annex 20 to the application.

19. The aim of a HR department is not only to implement the relevant rules but also to advise the staff as to their rights and interests. In this case, the UNICEF Administration failed her as a staff member whom it should have advised to safeguard her interests. Fairness would have required them to negotiate her departure instead of portraying the situation as they did, that the only option for her to take up the job at Oxfam was to resign.

20. It is a well-established practice for international organizations to negotiate with long-serving staff their separation with full benefits. The Applicant has been discriminated against and forced to resign quickly in order not to lose the opportunity that she had to return to an employment condition.

21. Moreover, for a staff member with a permanent appointment, the Organization had an obligation to assist her in identifying a position which could suit her qualifications and experience, especially when the Organization has developed a programme for other staff members to acquire similar academic qualification. In her case, nothing was done and even when she had identified positions and applied, she was not given any chance and/or considered.

22. The payment of her entitlements was heavily and unduly delayed. She resigned in October 2014 but it took until May and September 2015 (8-11 months) for the administration to pay the entitlements that it concluded she should have. This delay prevented her from meeting her financial obligations on a daily basis and needs to be compensated.

23. UNICEF Administration has ignored such harm while the management evaluation has blamed it on her, stating that she should have sent a reminder earlier to the Administration. The Applicant did send a reminder when she was asked to submit a new letter of resignation. In those conditions, she would not have thought that the Administration would forget about her financial entitlements to that extent. The Applicant submits that there was an ill motive behind the way she was managed.

24. In response to Order No. 171 (NBI/2017) which required the Applicant to file submissions substantiating her claims for damages caused by the delay in the payments made to her, the Applicant submits that during the period of delay she was only able to pay small amounts on account of her education loan. On 30 December 2015, the bank deducted from the relocation grant what she owed in the amount of over USD12,000. Had the UNICEF Administration paid what was due to her at a reasonable time after her separation, she would have been able to reimburse her loan and not wait until December 2015 for that.

25. In response to Order No. 190 (NBI/2017), by which the Applicant was requested to demonstrate that she had been charged any penalties for late payment of the loan as opposed to the regular contractual interest rate, the Applicant submitted that she “has not been able to obtain any detail from the Bank about interest and penalties charged during the period of the delay”, however, “it will be reasonable to deduct that the total interest charged in 2015 is in part due to the late payment by the Respondent”. She was therefore requesting that, since the payment by the Respondent was late by eight months, the Respondent should pay 66% of the interest charged by the bank on the amount of USD 1,069.93, *i.e.*, USD706.

26. In view of the foregoing, the Applicant seeks from the Tribunal to grant her full separation indemnity as envisaged under staff rule 9.8 and an appropriate compensation for the delay in paying her entitlements (at least one month’s salary), plus interest at the applicable interest rate of 5% or more as the Tribunal may deem fit, from the time the compensation was due to the time it is paid in full.

Respondent’s case

The Applicant’s claim for separation indemnity

27. According to staff rule 9.2(a), a resignation is a separation initiated by the staff member. A termination, in contrast, is a separation initiated by the Secretary-General in accordance with staff rule 9.2(b). Thus, resignations are not terminations.

Termination indemnity may only be paid to staff members whose contracts have been terminated, not staff who resigned, such a payment is unavailable under the Staff Regulations and Rules.

28. The Respondent denies that it “set up” the Applicant for resignation, during a protracted period of unpaid leave or that the Applicant has been “discriminated against and forced to resign quickly”.

29. The grant and extension of SLWOP was made expressly upon the condition that there would be no guarantee of active service without competition for a post. The terms of the leave were agreed and not contested. The Applicant made no inquiries concerning termination indemnity before tendering her resignation. In any event, the Applicant did not seek management evaluation of any decision that ostensibly compelled her to resign within 60 days of any such decision.

30. The Applicant had eight months remaining in the period of SLWOP that she requested when she sought to separate. The Applicant sought paid work elsewhere and took up the paid work before receipt of UNICEF’s response concerning her request to participate in outside activities. UNICEF did not state that she was required to resign as she could have declined the Oxfam position and remained at UNICEF.

31. The Respondent denies that “nothing was done” to assist the Applicant to find a position in active service. When the Applicant relinquished a lien on her post, pursuant to the agreed terms of the SLWOP, the Respondent was under no obligation to put the Applicant back into active service. The Applicant did not seek management evaluation of any non-selection decisions. In any event, the Applicant identifies no defects in any of these selection or HR processes.

The Applicant’s claim for compensation for harm suffered because of delay

32. The Respondent admits and apologizes for oversight and delay in processing the Applicant’s unaccompanied shipment allowance. The Respondent, however, disputes the balance of the Applicant’s characterization of the delay.

33. As concerns salary in lieu of annual leave and repatriation grant, the Applicant was paid within approximately two months of receipt of the Applicant's documentation. Thus, there was no undue delay on the part of the Respondent in processing these amounts.

34. In response to Order No. 171 (NBI/2017), by which the Tribunal directed the Respondent to provide evidence of the legality or reasonableness of the time frame within which it processed the separation payments of the Applicant, the Respondent submits that in the absence of rules imposing timelines for such processing, its obligation was to process payment within a "reasonable" period, the reasonableness of which can be adjudged by a number of factors, including the reasons for the processing time, the time for processing comparable cases, and whether the delay was of payment of a principal and recurring payment on an expected schedule, like salary, or a more irregular transaction. The reasonableness of the Administration's processing time may be generally compared to the alacrity displayed by the staff member, for example, a delay by UNICEF of six weeks may not be reasonably compensable if the staff member took six weeks to submit paperwork.

35. The Respondent submits that UNICEF's newly-established General Shared Services Center which was created to, *inter alia*, accelerate the processing of benefits, reflects a targeted processing time of 40 workdays (20 Human Resources, 20 payroll) for 90% of cases. UNICEF does not have a similar document reflecting separation payment processing times in early 2015 but they were comparable.

36. The Respondent submits that following her receipt of separation instructions on 29 January 2015, the last document was received from the Applicant on 13 March 2015, 32 workdays later. Payments were processed on 5 May 2015 and 11 May 2015: These dates are 38 and 42 workdays, respectively, from 13 March 2015.

37. For any significant or undue delay, the presumptive compensation is US prime rate interest at and from the date the payment was properly paid, to the date of payment. As such, the Respondent concedes to pay the Applicant interest at the US

prime rate then in effect (3.25%) upon the unaccompanied shipment amount (USD15,000) from the date it should have been processed, at the same time as her other benefits, on 5 May 2015, until the date of payment (16 September 2015), being USD178.97. The Respondent also conceded, as a gesture of goodwill rather than as coming from a principled position, to pay the similar interest for the period from 29 January 2015 to the date of each payment in respect of each of the separation entitlements. UNICEF will further pay interest upon that interest from the date it was owed (i.e. each principal sum was paid, but interest was not) until the date of the Dispute Tribunal hearing on 31 October 2017, totaling USD212.36.

38. Additional compensation requires proof of harm and proof of mitigation of loss by promptly and specifically alerting the Organization to impending losses or harm. The Applicant does not provide evidence of any further harm warranting compensation. There is no evidence concerning the Applicant's insolvency. The larger payments in question were intended to facilitate the Applicant's relocation but the Applicant had already voluntarily relocated during her SLWOP. The Respondent asserts that if the Applicant was facing impending consequential harm from payment delay following her resignation, she was required to reasonably mitigate these losses by at least notifying UNICEF of such harm, so that UNICEF could expedite payment.

39. For these reasons, and noting the payment of interest indicated above, the Respondent requests the Tribunal to dismiss the application in its entirety.

Considerations.

Termination indemnity

40. Based on the material available to the Tribunal, the issue of payment of termination indemnity had not ever been brought up by the Applicant until her email of 14 September 2015 and then of 25 October 2015, by which she requested it as part of management evaluation. The Applicant confirmed before the Tribunal that the idea of exploring such option had been presented to her only months after her separation.

Given that payment of termination indemnity had not been requested or discussed between the parties, both of whom at the relevant time operated on the basis that the Applicant was resigning from the Organization, the Tribunal does not find that the Administration has ever taken an implied decision not to pay the indemnity. Rather, this issue has never arisen prior to the Applicant's query in September 2015. The first decision refusing termination indemnity is explicit and is found in the response to management evaluation request. As such, the application in this respect is timely before the Tribunal.

41. The Tribunal agrees with the Respondent that under the United Nations Staff Regulations and Rules, termination indemnity may only be paid to staff members whose contracts have been terminated, not staff who resigned, moreover, that under the Staff Regulations and Rules, termination indemnity cannot be paid in the case of resignation by way of "deserved recognition" for lengthy service. Concerning the issue whether the matter of termination indemnity could be subject to negotiations, as posited by the Applicant, the Tribunal notes that UNAT in *Ahmed* endorsed - albeit not without raising an eyebrow - a claim for such a payment outside the applicable rules where explicit written commitment to that effect had been made by the administration.²¹ No such commitment was made in the present case.

42. The Tribunal is not persuaded by the Applicant's argument that staff rule 9.2(b) should nevertheless apply to her case because her resignation was not genuine and the Administration had set her up for resignation. Rather, it is apparent to the Tribunal that the Applicant's resignation was situational and a consequence of a combination of earlier decisions taken by the Applicant and the external factors. The Applicant had taken SLWOP with a career move in mind and subsequently extended it for another year with the same goal. In doing so, she had accepted the risks associated with severing the lien on her post at Benin, that is, that she would have to separate unless she secured another United Nations employment. Whereas the Applicant was not successful in her job applications with the United Nations, it must

²¹ 2013-UNAT-386, at paras. 21 and 23.

be noted that she had defined her preferences narrowly, applying mainly for posts outside her practical experience to-date and above her grade. On her own admission²², she was *a limine* rejecting a return to UNICEF Benin; was not, at least initially, even looking for posts in the central and western African region; and she was not, until recently before resignation, looking for jobs in communications and in peacekeeping. Altogether, it seems to the Tribunal that the Applicant overestimated the power of her newly acquired diploma on the job market which proved more difficult than she had expected.

43. At the time of her resignation, however, the Applicant had eight months remaining in the period of SLWOP that she had requested and, in accordance with the agreed conditions of the SLWOP, she could have exhausted it till the end, while applying for jobs and eventually, if none were found, face termination with the attaching indemnity. She chose to accept an offer from Oxfam even before receipt of UNICEF's response concerning her request to participate in outside activity. The Applicant stated before the Tribunal that this move had been dictated by economic necessity. While the Tribunal does not doubt that economic factors played a role in her decision, what it finds relevant for the case, however, is that, as demonstrated by contemporaneous correspondence originating from the Applicant, she had had a concluded intent to take up the job with Oxfam.

44. The Applicant made no inquiries concerning termination indemnity before tendering her resignation. Rationally, this issue should have been considered by her at the time of requesting the SLWOP. Whether she was entirely unaware of it, or was, at the time, convinced that it was not applicable to her situation, is immaterial. The conditions under which the entitlement to termination indemnity applies are stated in her letter of appointment and are expressed in the Staff Rules; as such, they were fully accessible to the Applicant. The Tribunal, in any event, sees no grounds to construe a legal obligation on the part of the administration to offer termination as a mode of separation from service as an alternative to resignation when faced with a

²² Applicant's testimony on 31 October 2017.

firm resolution of the staff member to take up another employment, so that the staff member could both take up the employment and have termination indemnity available to him or her.

45. To the extent the Applicant invokes the Organization's duty of care over its permanent staff and alleges that, by not securing for her another employment on the one hand and refusing her permission to take the job with Oxfam on the other hand, it denied her right to education, the Tribunal considers that these concerns are valid; they, nevertheless, would have been relevant at the point of deciding on the severing of the Applicant's lien to the post in Benin. The Tribunal has no information whether relinquishing her lien on the post was agreed to autonomously by the Applicant or was an imposed condition in the administrative decision on granting her the SLWOP. Such decision, in any event, is currently outside the jurisdiction of the Tribunal.

Did the Organization comply with its duty of timely payment?

46. The Applicant's eligibility for the payment of a lump-sum *en lieu* of unaccompanied shipment under the above provisions is undisputed. There is also no dispute as to the amount due to the Applicant, as it is expressed as a fixed sum. The issues for determination are when the Applicant's entitlement became due and whether the delay in payment, if any, was attributable to a breach of the Organization's obligations. Finally, the Tribunal has to assess whether the Applicant suffered any material or moral harm and is entitled to compensation.

47. The Tribunal notes the existence of a general principle of due diligence and good faith towards staff members enshrined in the United Nations Charter. Specifically, as many times stressed by the Tribunal, the primary responsibility for effecting timely and accurate payment of entitlements due to staff members rests with the United Nations Administration. For this purpose, the United Nations maintains a dedicated bureaucratic apparatus which is supposed to handle those payments professionally in both substantive and formal sense.

48. In *Shashaa*²³, it was held that the employer can expect reasonable cooperation from the affected staff member. Cooperation which can be reasonably expected of a staff member is to trigger the process, where such impulse is required, and to supply the necessary information and proof. As noted by UNAT in *Ahmed*, “the Appeals Tribunal is mindful of the fact that staff members are unlikely to be conversant with separation formalities”.²⁴ It is, therefore, upon the Administration to instruct the staff member as to what documents are necessary and in what form. Once the process is triggered, on the other hand, in dealing with a bureaucracy that is presumed professional and whose acts are to be presumed regular, it is not to be required of a staff member to be constantly monitoring, following-up, reminding, verifying and nagging.

49. For the same reason, the Tribunal does not agree with a statement that “reasonableness of the Administration’s processing time may be generally compared to the alacrity displayed by the staff member” used to justify that “delay by UNICEF of six weeks may not be reasonably compensable if the staff member took six weeks to submit paperwork”. A staff member, in this particular relation, is in a position of a consumer vis-à-vis a professional agent: the consumer chooses the moment to request action; the agent has to act promptly from the moment the agency has been seised of the case. It is not for the administration to arbitrarily evaluate alacrity of the staff member.

50. Rather, reasonableness of processing time is to be adjudged by objective factors. The Tribunal agrees with the Respondent that these factors comprise particulars of financial and administrative processing, including all necessary levels of approval, and that off-cycle payments may require more time than the regular ones. With this respect, the Tribunal accepts that the standard devised by the General Shared Services Center relied upon by the Respondent is derived from analysis of a median time needed for processing such payments, in consideration of all relevant

²³ UNDT/2009/034.

²⁴ 2013-UNAT-386, at para. 21.

parameters of written rules and good practice. It also accepts that, as a matter of practice, the same standard was in place at the time relevant for the Applicant's claim. As such, the Tribunal accepts that either 40 or 42 days of processing of the Applicant separation entitlements would have been a reasonable time for effecting the payment.

51. Standard time to process payments runs from the moment where the administration would have had the information and documents required from the Applicant. There is evidence that UNICEF Administration was actively pursuing the separation process throughout February and March 2015. Given that the last document was received from the Applicant on 13 March 2015, the Tribunal accepts that processing during the period until 5 May 2015 was within norms. Subsequently, as the Administration admitted, the delay from May 2015 till 16 September 2015 was undue and clearly was not attributable to the Applicant; rather was it the fault of the Administration due to human oversight.

52. The Applicant complains that her explicit resignation notice was delivered on 28 October 2014, yet no action was taken by the UNICEF Administration until January 2015, and that only after her inquiry, which revealed that the resignation notice had been left unattended. In this regard, the Tribunal notes that, by the terms of the Applicant's permanent appointment, to which rules pertinent to continuing appointment applied under staff rule 13.1(a), her resignation was governed by staff rule 9.2. In the absence of a specific provision, therefore, she was obliged to tender her resignation in the written form and with a three-month notice. In this connection, the Tribunal notes that email notification does not comply with a requirement of a written notice and draws the Applicant's attention to the fact that this requirement serves, above all, to protect the staff member. The Administration could not act upon the Applicant's email of 28 October 2014. Moreover, even though that email would have been lost or misplaced, and it would have been indeed that only after the Applicant's intervention she was instructed about the appropriate form of the resignation, prompt action was taken immediately thereafter, whereupon the

Applicant's resignation was accepted mid-January 2015 and a letter containing instructions about the separation process was transmitted to her on 29 January 2015. The actions of the UNICEF Administration were all within the period of the applicable notice.

53. In conclusion, the Tribunal finds that the UNICEF Administration failed to fulfil its obligation to make a timely payment of the Applicant by making the payment of relocation grant four months after it should have been effected had normal workflows been respected, all despite the various follow-ups sent by the Applicant. The Tribunal, on the other hand, finds no fault in the prior actions of the UNICEF Administration.

Remedies

54. In light of the foregoing, the Tribunal has now to examine whether the Applicant is entitled to compensation for the undue delay in payment.

55. As concerns financial damage, the Tribunal recalls that according to the holding of the Appeals Tribunal in *Warren*:

Notwithstanding the absence of express power of the UNDT and the Appeals Tribunal in their respective statutes to award interest, the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. In many cases, interest will be by definition part of compensation. To say that the tribunals have no jurisdiction to order the payment of interest would in many cases mean that the staff member could not be placed in the same position, and that therefore proper "compensation" could not be awarded.²⁵

56. As proper compensation, UNAT applied the US prime rate as interest to the amounts due to the Applicant.

57. The Applicant's demand concerning higher interest rate (5% or more) does not indicate any legal basis. Factually, given that the Applicant's account is with the

²⁵ *Warren* 2010-UNAT-059 at para 10; also *Iannelli* 2010-UNAT-093.

UNFCU, interest at US prime rate is quite appropriate. Accordingly, the Tribunal will grant interest at the US prime rate for the periods of undue delay, which at the time was 3.25%.

58. It is undisputed that interest was due on the amount corresponding to the unaccompanied shipment lump sum of USD15,000 for the period of delay from 5 May till 16 September 2015 at the US prime rate; this has already been paid by the Respondent. As to the remaining part, the Tribunal appreciates the Respondent's readiness to pay interest calculated, as in the submission of 6 November 2017, as a gesture of goodwill and procedural efficiency and not as admission of regular processing time and liability.

59. While the Applicant claimed, in addition, that the Respondent's failure to make timely payments had entailed levying punitive interest on her education loan from UNFCU, she adduced no documents to demonstrate that any such interest had been charged, despite having been specifically requested to do so by the Tribunal. Contrary to the Applicant's claim that the totality of interest charged by the bank should be presumed to result from arrears on her side, such presumption is untenable - loans are granted by banks precisely in exchange of interest; without more, an interest charged on a loan is, in all likelihood, a regular contractual interest rate. The Tribunal notes, moreover, that UNFCU deducted their dues in May 2015, that is, before a delay in the payment by UNICEF occurred. The Tribunal, therefore, has no basis permitting it to accept, let alone anchor in time and quantify, any expense incurred by the Applicant toward UNFCU in causal relation with the arrears on the part of the Respondent.

60. In conclusion, the Tribunal considers that the material damage suffered is sufficiently compensated by the award of interest as stated above.

61. As concerns compensation for moral injury the Tribunal recalls UNAT's full bench holding in *Kallon* according to which proving moral injury requires showing beyond a balance of probabilities the existence of factors causing harm to the victim's

personality rights or dignity.²⁶ Among other, the loss of a positive state of emotional gratification or emotional balance is harm deserving of compensation.²⁷ 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.²⁸

62. The Tribunal finds that, although the matter at hand arises from a contractual setting, *i.e.*, payment of entitlements, the breach of the Applicant's right to timely payment was attended by peculiar features, rendering it capable of causing moral injury.

63. First, as pointed out by the Applicant, the delay was lengthy and unduly. The process took overall 11 months and the time used to make the last due payment exceeded three times the norm established by the Respondent. No explanation was given for the delay even though this was not an unusual or complicated operation for the administration, including that payment of a lump sum *en lieu* of unaccompanied shipment does not require calculation. A specific enquiry in this matter by the Applicant did not trigger a corrective response for four months.

64. Second, the delay was inflicted on the Applicant in the context of a relative vulnerability on her part, of which the Respondent was aware given the known indebtedness to UNFCU and that in her correspondence the Applicant had conveyed on several occasions the difficulties that she was facing. As the Applicant plausibly stated before the Tribunal, being a single mother, responsible, among other, for school fees of her daughter and payment of her education loan and having stayed for more than a year without income, she had found herself in a financial strain.

²⁶ *Kallon* 2017-UNAT-742 at para. 60

²⁷ *Ibid.*, at para. 61

²⁸ *Ibid.*, at para. 62

Separation entitlements for most of the employees constitute a significant position in the budget. For the Applicant, the shipment lump sum represented around five times her monthly salary with Oxfam. In this connection, the Respondent's argument that the purpose of the lump sum *en lieu* of unaccompanied shipment is to facilitate relocation and the delay in the case at hand had not impeded the Applicant's relocation, is irrelevant. Once the staff member has chosen the lump sum as the form of exercising the entitlement to unaccompanied shipment, the claim and its equivalent obligation on the part of the administration are transformed into a purely monetary one. As such, the right to compensation for the administration's failure to effect a timely payment turns on the showing of a financial and moral damage, *e.g.*, had the lack of timely payment impeded the Applicant in having her assets shipped, it could have occasioned a particular financial damage giving rise to compensation. This right, however, does not become moderated in relation to whether the staff member purported to spend the lump sum on shipping his/her assets or otherwise.

63. Thirdly, it is visible from the file that the Applicant did not receive diligent contractual consideration and cooperation. She spent significant time and effort following up on her claim, over a period of 11 months total, and five months repeatedly asking for clarifications and interventions with a number of individuals in the UNICEF Benin Office and in Headquarters in New York. The Administration never replied to her May 2015 query about the lump sum *en lieu* of unaccompanied shipment and eventually rendered this payment only after the Applicant had informed that she would turn to the formal justice system. Still, in August 2015 the Director of UNICEF Human Resources saw no irregularity in the separation payments, purportedly upon careful review of the Applicant's record, whereas in December 2015, in the management evaluation, the Deputy Executive Director denied any compensation, even the interest, and unapologetically imputed the effects of the delay to the Applicant's own conduct in her alleged lack of alacrity in alerting the administration of the failure to pay the lump sum, a claim which is as legally inaccurate as factually wrong.

64. The Tribunal recalls that, as confirmed by UNAT in *Kallon*, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. Circumstances of a certain case may permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant.²⁹ Further, UNAT in *Kallon* endorses after *Asariotis*³⁰ two types of situations giving rise to claim for compensation for moral injury: first, breach of a fundamental nature, whereupon occurrence of moral injury in the form of harm to *dignitas* is presumed, and second, where the nature of the breach is not automatically leading to a moral injury, or the injury is of such dimension or nature that would usually need to be proven through evidence of particular stress or anxiety. As further elaborated by UNAT:

The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.³¹

65. In accordance with the aforesaid, the Tribunal finds that the circumstances described above in relation to the Administration's conduct after 11 May 2015 demonstrate a pattern of neglect and a breach of contractual rights of a fundamental nature, and were such that normally cause distress exceeding the level of vexation

²⁹ *Kallon*, at para. 63 citing to *Massabni* 2012-UNAT-238.

³⁰ 2013-UNAT-309

³¹ *Ibid.*, at para. 65, citing to *Dia* 2014-UNAT-553.

and amounting to frustration, helplessness and indignity. This for the Applicant was compounded by anguish and uncertainty related to the financial aspects. Her correspondence with the Respondent reveals anxiety and indignation at the treatment that she considered unfair. It also reveals that her trust in the Organization was undermined to the point that she suspected that the Administration's reluctance to effect her payments was a form of harassment in retaliation for her earlier a complaint of abuse of office which she had made in 2013. In totality of these circumstances the Tribunal finds, based on the Applicant's testimony and correspondence, in light of common experience and common sense, that a moral injury of a mild degree has been sufficiently proven.

66. As factors mitigating the Applicant's moral injury, the Tribunal weighs in that at the core of it was the delay in payment of entitlements which has since been effected, that UNICEF HR official and the Counsel for the Respondent offered her apologies; and that before the Tribunal the Respondent demonstrated amenability to satisfy the claim for compensation for the delay. Considering the foregoing, and taking into account existing jurisprudence on comparable cases³², the Tribunal awards USD1,500 as compensation for the Applicant's moral injury.

Judgment

68. In view of the foregoing, the Tribunal awards the Applicant USD1,500 as compensation for moral damage.

69. This amount is to be paid within 60 days from the date the judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment.

70. All other claims are rejected.

³² *Kings* UNDT/2017/043; *Ho* 2017-UNAT-791.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 13th day of December 2017

Entered in the Register on this 13th day of December 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi