



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2022/093

Order No.: 142 (NBI/2022)

Date: 5 October 2022

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AFAZALI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Julia Kyung Min Lee, OSLA

Ana Giulia Stella, OSLA

Counsel for the Respondent:

Jacob van de Velden, DAS/ALD/OHR, UN Secretariat

Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Background

1. On 29 September 2022, the Tribunal received an application for suspension of action (“SOA”) from the Applicant, a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). The Applicant is challenging a decision made on 22 August 2022 to delay the issuance of his payroll clearance action form until the conclusion of investigations by the Office of Internal Oversight Services (“OIOS”) against him for possible fraud.

2. The Respondent filed a reply on 3 October 2022.

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

Facts

4. The Applicant joined MONUSCO in the Kalemie duty station on 4 October 2004. On 11 April 2022, the Applicant received notice of non-renewal of his fixed-term appointment beyond 30 June 2022 due to the “dry cut” of his post caused by the closure of the Kalemie office that had been planned since 2020.¹

5. On 30 June 2022, the Applicant separated from MONUSCO due to the abolition of his post. The Applicant was at the time of his separation being investigated for false claims worth USD13,017.79 under the Medical Insurance Plan (“MIP”).²

6. On 23 August 2022, the Applicant received by email a letter from Ms. Martha Helena Lopez, Assistant Secretary-General for Human Resources at the Department of Management, Strategy and Policy and Compliance (“DMSPC”) dated 22 August

¹ Application, paras. VII(1) and (2).

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

2022, stating that his final entitlements of up to USD13,017.79 would be withheld until the conclusion of the investigation against him by the OIOS and that the Administration would delay the issuance of his personnel payroll clearance action form P.35 until the investigation has been concluded, and all indebtedness to the United Nations had been settled.³

7. The Applicant requested for management evaluation of the decision on 9 September 2022.⁴

Submissions

Applicant's submissions

8. The Applicant's case is summarized below.

a. Citing *Azar* UNDT/2021/125, the Applicant submits that the purpose behind the practice of withholding pension payment under ST/AI/155/Rev.2 (Personnel payroll clearance action) is not akin to a bail and the Administration cannot rely on it to withhold notification to the United Nations Joint Staff Pension Fund ("UNJSPF") in cases that concern a state of only a hypothetical indebtedness to the Organization which has not been determined and quantified at the time of separation of a staff member.

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

c. The Applicant was not notified of any indebtedness to the Organization or called upon to settle any debt pursuant to ST/AI/155/Rev.2 prior to his separation from service. The Administration was fully aware that

³ Application, annex 3.

⁴ *Ibid.*, annex 5.

the Applicant would be separated from service on 30 June 2022 due to the closure of the Kalemie office, which had been planned since it was first announced in 2020. The Applicant was only notified that he was under investigation by the OIOS on 1 June 2022 and was only interviewed as a subject three days before his separation date.

d. The OIOS's investigation was not concluded at the time of his separation from the Organization and to his knowledge, the investigation is still on-going. Therefore, no factual finding has been made to establish that the Applicant currently is or was ever indebted to the Organization. Moreover, the decision to withhold the Applicant's final entitlements and the delay in the issuance of the P.35 form did not have the required authorization of the Under-Secretary-General for Management until 22 August 2022, almost two months after the Applicant's separation from service. Therefore, the Administration arbitrarily withheld the Applicant's final entitlements and pension benefits for no valid reason since 30 June 2022.

e. The Applicant was not told how long it would take for the OIOS to complete its investigation in his case, therefore, his final entitlements and pension benefits are withheld indefinitely. Since the OIOS only appears to have begun its investigation around June 2022 against all of the national staff members in the Kalemie office, as evidenced in MONUSCO's internal emails, it would likely take several months or years before the OIOS concludes its investigation. Denying the Applicant his pension benefits for a prolonged period of time based on unfounded assumptions of indebtedness is in violation of ST/AI/155/Rev.2 and staff rule 3.5.

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

g. The contested decision causes irreparable harm because since separating from MONUSCO, the Applicant and his family have been facing immense financial distress and have been struggling to survive. The Applicant is unable to provide the basic essential needs such as food and housing for his family. The Applicant's inability to provide these basic essential needs for his family harms their physical and mental health, as well as his. The harm caused to the Applicant's health and the health of his family is an irreparable harm that cannot be considered as mere economic loss.

Respondent's submissions

9. The following is a summary of the Respondent's case.

a. Granting the application would irreversibly undermine the Organization's recovery of the financial loss caused by the Applicant's possible serious misconduct which is being investigated. Such final relief is not appropriate in a suspension of action application. It would not maintain a status quo, but effectively modify it. The UNAT has acknowledged the difficulties of recovery after the staff member's separation faced by the Organization in its interpretation of the purpose of ST/AI/155/Rev.2 as being also aimed at securing such financial recovery of losses of the Organization due to the staff members' misconduct. Unlike private creditors, the Organization has no option to pursue former staff members through national courts.

b. The Applicant effectively seeks a priority hearing of his request for management evaluation and his possible UNDT appeal and the decision on the merits thereof, and to obtain final relief in the form of a summary judgment in his favor. As such, the application is not receivable *ratione materiae*.

c. The Applicant wrongly asserts that the Administration arbitrarily withheld his final entitlements and pension benefits for no valid reason since

30 June 2022. The Organization had a very good reason to withhold the Applicant's final entitlements and delay the issuance of his P.35 form

d. The Applicant was at the time of his separation being investigated for false claims under the MIP, including for 10 purported hospitalizations while the Applicant represented that he was at work at the Mission. UMOJA records are certified as true and accurate by staff members, both on a monthly and yearly basis. These records are therefore incontrovertible proof of a misrepresentation by the Applicant to the Organization regarding his medical insurance claims. These records establish a high probability of indebtedness of the Applicant to the Organization.

e. In addition, the Fraud Investigation Unit ("FIU") of Cigna, the administrator of the MIP, made a reasoned report on these and other irregularities in the claims of the Applicant, and concluded that the Applicant had been unduly reimbursed.

f. Furthermore, OIOS has launched an investigation into the misconduct of the Applicant, which follows a preliminary assessment of the case indicating that an investigation is warranted. OIOS interviewed the Applicant as a subject on 23 June 2022. OIOS has estimated based on the information available to it, including the interview of the Applicant, that the financial loss to the Organization is USD13,017.79.

g. Against this background, the Organization appropriately used its only two legal means to secure recovery of its estimated financial loss by: withholding the estimated financial loss suffered by the Organization from the staff member's final separation entitlements, until the investigation has been concluded and the findings support the imposition of financial recovery pursuant to staff rule 10.1(b); and by delaying the issuance of the P.35 form.

h. The estimated indebtedness of the Applicant had a high level of probability in light of the information available to the Organization. The delay

of the issuance of the P.35 form was also necessary, as indicated. The Applicant's final entitlements of USD7,076.81 were insufficient and did not suffice to cover his estimated indebtedness to the Organization of USD13,017.79. Once the Organization releases the Applicant's P.35 form, the associated PF.4 notification will be sent to the UNJSPF, and the Applicant will receive a full payout of his withdrawal settlement in the amount of USD65,893.42. That money will be gone and the Organization will have no other form of surety to recover its full estimated financial loss.

i. The Organization is willing to issue the P.35 form of the Applicant immediately, subject to sufficient surety to ensure recovery of its estimated financial loss. There are various forms this surety could take. The Applicant could, for instance, agree to a payment of the estimated financial loss by the UNJSPF from his pension benefits. This would imply that he gets his pension settlement now, minus only the estimated financial loss of the Organization. This amount of the financial loss would be held by the Organization and would be returned to the Applicant if no misconduct and financial loss is established. However, the UNJSPF can only make such payment with the agreement of the Applicant. Without that agreement, and in the absence of any surety, the Respondent can only protect its legitimate financial interests by delaying the issuance of his P.35 form to ensure financial recovery.

j. As regards irreparable damage, the Applicant has the burden of proof. The proof must be of a loss that cannot be adequately remedied, not mere economic loss. However, the Applicant has not provided any evidence whatsoever. The Applicant makes a bare assertion, without any substantiation, that he is "unable to provide the basic essential needs such as food and housing to his family," which "harms their physical and mental health, as well as his." Without any evidence, it cannot be assumed that the Applicant lacks financial means to provide food and shelter to his family and that he faces "immense financial distress" that would cause him and his family to struggle

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

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

l. In his application, the Applicant refers to the “continuing legal effect” of the contested decision. This understanding of “particular urgency” in art. 2(2) of the Tribunal's Statute is erroneous. The UNDT has held that if an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The required urgency should involve an acute threat. Moreover, self-created urgency does not satisfy the requirements for suspension of action.

m. The Applicant has failed to demonstrate the required urgency. The Applicant has also failed to show the timeliness of his actions. The Applicant sought management evaluation only after more than four weeks after the contested decision was communicated to him and almost 12 weeks after his separation.

n. The Applicant erroneously asserts that the contested decision is being implemented indefinitely. As set out in the letter to the Applicant communicating the USG/DMSPC's decision, the delay of the Applicant's

P.35 form is a temporary (administrative) measure. This measure lasts only “until the investigation has been concluded, and all indebtedness to the United Nations, including the possible financial loss of the Organization resulting from the alleged unsatisfactory conduct [if any] has been satisfactorily settled.” If no misconduct is established, the withheld final entitlements will be paid to the Applicant and his P.35 form will be issued.

Applicant’s motion for leave to respond to the reply

10. In his motion dated 3 October 2022, the Applicant makes the following submissions.

a. A decision with continuous legal effects is only implemented when it has been entirely implemented. The Respondent has not provided any information on when the OIOS investigation would be concluded; therefore, the contested decision continues to have a continuing legal effect on the Applicant for an indefinite time. As such, his application for suspension of action is receivable.

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

c. The Respondent has not even provided one medical invoice to support his arguments. The Respondent has not provided any evidence that can reasonably lead to any factual finding that the Applicant submitted false claims under the MIP or that he was indebted to the Organization. The spreadsheet attached in annex R/3 is incomprehensible to the Applicant and does not support the Administration’s position that the Applicant submitted fraudulent medical claims to Cigna. It can also be speculated that the Applicant’s UMOJA records contained administrative errors.

d. Citing *Songa* UNDT/NY/2021/032, the Applicant submits that facts resulting from a deficient investigation could not be relied upon, where an applicant was not given an opportunity to rebut the allegations or point to exculpatory evidence. As such, the Respondent has failed to establish any credible facts to establish that the Applicant 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 and this Tribunal's ruling in *Azar*.

e. The Applicant takes exception to the Respondent's inappropriate assertion that, "without evidence, it cannot be assumed that the Applicant lacks financial means to provide food and shelter to his family and that he faces "immense financial distress" that would cause him and his family to "struggle to survive". Proof is required but has not been provided. This applies *a fortiori* considering the Applicant's 18 years of service with the Organization." The Applicant has not received any salary since May 2022 because the Organization wrongfully decided to withhold his final entitlements, which the Organization confirmed to be USD13,017.79. Moreover, he was expected to receive his duly earned pension benefits in the amount of USD65,893.42, shortly after separating from service.

f. It has been almost four months since the Applicant had any income to support his family. Such as any worker deprived of his usual economic support, he is facing financial distress and struggles to satisfy his and his family basic needs. The despair faced by the Applicant is witnessed and corroborated by MONUSCO's own senior management. The Applicant does not have to provide any other evidence of his precarious financial situation as it is self-evident if the Organization is withholding his final entitlements and pension entitlement. Further, the Organization is in no position to make patronizing comments on how the Applicant should have planned financially for the past 17 years of service to prepare for the unexpected and unlawful

withholding of his pension entitlements. The Applicant and his family have struggled to survive for far too long without any income and urgently need access to his duly earned pension entitlements.

Considerations

11. The Tribunal considers that granting the Applicant's motion to file the response attached with the motion will assist in the determination of the issues arising in these proceedings. Therefore, the motion is granted.

12. In deciding whether to grant the Applicant's application to suspend the challenged action while a decision on his MER is pending, the Tribunal must be satisfied that the application meets the conditions of art. 2.2 of the of the UNDT Statute and art. 13 of the UNDT Rules of Procedure. The conditions provided therein are that the SOA can only be granted where:

- a. the decision appears prima facie to be unlawful,
- b. in cases of particular urgency and
- c. where its implementation would cause irreparable damage.

Prima Facie Unlawfulness

13. Regarding prima facie unlawfulness, the Tribunal's jurisprudence has been consistent in holding that "the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision."⁵ In the instant case, as in the cases of *Asumani*⁶, *Mutombo*⁷ and *Kabila and others*⁸ where the Tribunal recently granted SOA applications sought by similarly circumstanced applicants, the Tribunal finds that Applicant has met this threshold.

⁵ *Minaeva*, Order No. 56 (GVA/2020).

⁶ Order No. 138 (NBI/2022).

⁷ Order No. 137 (NBI/2020).

⁸ Order No. 140 (NBI/2020).

14. As summarized in *Asumani* at paragraphs 19 and 20, the Tribunal in *Azar* UNDT/2021/125 deliberated on the alleged unlawfulness of the withholding of a staff member's pension payments and the Administration's decision to not forward the personnel payroll clearance action form to the pension fund pursuant to sections 11 to 13 of ST/AI/155/Rev.2.

15. The Tribunal underscored, at paragraph 20, that "situations contemplated in ST/AI/155/Rev.2, ..., concern a stated indebtedness and a staff member's refusal to settle the debt. The purpose of ST/AI/155/Rev.2, thus, is to enforce compliance with a financial obligation, the extent of which is defined, albeit may be disputed." Accordingly, the Administration could not rely on the said sections to withhold notification to the UNJSPF in cases that concern hypothetical indebtedness to the Organization, which was not determined and quantified at the time of separation. The determination in *Azar* was that it was unlawful for the Administration to delay the release of the P.35 form to the UNJSPF even if the applicant had resigned while an investigation against him was ongoing because he "was not notified of any indebtedness to the Organization or called upon to settle it, as required by ST/AI/155/Rev.2."

16. The Applicant in the instant case stands in similar stead to *Azar* as the Organization's investigation for recovery of alleged false medical claims remains inconclusive. The alleged indebtedness is hypothetical. There remains no determined basis for the quantum of indebtedness claimed having been arrived at, either at the time of separation several months ago or to the present date. The allegations remain inconclusive and unsubstantiated even following the filing of the Respondent's reply to the application, which referred only to confidential deliberations that were ongoing and not disclosed. In these circumstances the Applicant has proven that the decision appears to be prima facie unlawful.

Particular Urgency

17. The Applicant further succeeds in establishing particular urgency. In not

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

Irreparable Harm

18. The Tribunal underscored in *Asumani* at paragraph 17 that the obligation to pay salary for work performed is “the obvious primary duty of any employer towards its employee.” Furthermore, “pensionable remuneration is among the allowances that United Nations staff members are entitled to receive, and the entitlement to receive a pension benefit vests in a participant on the day succeeding the last day of contributory service”.

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

ORDER

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

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 5th day of October 2022

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi