



Judgment No. 2023-UNAT-1365



Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Martha Halfeld
Case No.:	2022-1729
Date of Decision:	30 June 2023
Date of Publication:	31 July 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Marcos Zunino, OSLA
Counsel for Respondent:	Rosemarie McClean

1. Polycarp Ambe-Niba, a former staff member of the United Nations Assistance to the Khmer Rouge Trials (UNAKRT), contested the decision of the Chief Executive of the Pension Administration (CE/PA) of the United Nations Joint Staff Pension Fund (UNJSPF or Fund) rejecting his request that the Fund issue a duplicate withdrawal settlement following his claim that he did not receive his withdrawal settlement of USD 414,587.28 disbursed by the Fund on 18 July 2019 due to fraud (the contested dd

7. On 9 May 2018, the Fund received the first page⁴ of Mr. Ambe-Niba's original payment instructions form, the Pens.E/7, dated 25 January 2018, but it did not contain his banking information.⁵ In the course of e-mail correspondence from May 2018 until May 2019 between him and the Fund (with Mr. Ambe-Niba using a Yahoo e-mail address), concerning the benefit options available to him, he asked when he could expect his benefit to be paid "into [his] UNFCU account provided upon separation". However, he had not provided any banking information to the Fund upon separation.

8. The Fund advised him of the need to submit a new Pens.E/7 payment instructions form in order to make a benefit election.⁶ On 10 June 2019, the Fund received by e-mail a new, original Pens.E/7 form dated 15 May 2019, which contained an election for a withdrawal settlement on the second page. The banking information fields were still blank. The contact in the address field on that same page specified a Gmail e-mail address and a mailing address in Cameroon.

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11. On 19 June 2019, the Assistant advised him that the Fund did not have any of his banking information.⁹ He responded on 19 June 2019, confirming that he would “fill out the form accordingly and send it to the Assistant by DHL”.¹⁰

12. On 25 June 2019, in the course of exchanges from 25 June 2019 until 15 July 2019, the Assistant received from Mr. Ambe-Niba’s Gmail address, an advanced scanned copy of a new Pens.E/7 form dated 21 June 2019 in his

Assistant responded by requesting a signed letter confirming the election to this effect be emailed, which it was.¹³

14. On 15 July 2019, the Fund e-mailed Mr. Ambe-Niba to advise him that his withdrawal settlement was at the audit stage and would be released shortly.¹⁴ The same day, the Fund received a response from him acknowledging the information.

15. On 15 July 2019 and 18 July 2019, the Assistant (at the correct e-mail address) received e-mails from Mr. Ambe-Niba, inquiring as to the status of the payment of his withdrawal

28. On or about 3 February 2020, the Fund again contacted its own bank, JP Morgan Chase.³¹ JP Morgan Chase attempted, unsuccessfully, to recover the funds from Bank of America, and on 19 February 2020 informed the Fund that Bank of America had advised it that there were no funds available for recovery.

29. On 19 March 2020, Mr. Ambe-Niba provided copies of the messages he stated he had sent to, or received from, the Fund.³² The Information Management Systems Service of the Fund (IMSS) reviewed the e-mails supplied and established the following:

(a) Most of the e-mails that he claimed had been sent to him by the Fund were sent to him through a third-party server, by an unknown sender, and were “spoofed” to make them falsely appear as though they had been sent by the Fund. Mr. Amba-Niba himself noted that, when viewing the messages in Gmail, he “found a question mark in red next to certain messages and when [he] clicked on the question mark the following hidden caption appeared: ‘Gmail couldn’t verify that un.org actually sent this message (and not a spammer)’”. Whoever sent these e-mails did so without needing to access or compromise any of the UNJSPF’s e-mail accounts.

(b) The e-mails which he attempted to send to the Fund in response to the spoofed

30. According to Mr. Ambe-Niba, on 2 April 2020 he spoke to Bank of America who advised him that only the Fund could request recall of the funds.³³

The Impugned Decision

31. On 8 June 2020, the Standing Committee rendered its Statement of Facts and applicable law.³⁴

32. In reviewing the case at its 203rd meeting held on 8 July 2020, the Standing Committee considered that a fraud may have been perpetrated but it was not competent to reach a conclusion on the perpetrator of the fraud, and therefore requested CE/PA to refer the matter to the Office of Internal Oversight Services (OIOS) for possible investigation.³⁵ On 19 October 2020, OIOS informed the Fund that there was no indication that any staff member was implicated in the reported matter and that evidence possibly identifying implicated persons is 3535,04 (w6.7 3 (i)6.70((atnTJ

39. First, he argues that the Fund, by paying the settlement into the incorrect account, did not discharge its obligation pursuant to Article 31(a) of the Regulations, Rules and Pension Adjustment System of the UNJSPF (Regulations). He never submitted in writing a form instructing the Fund to pay his withdrawal settlement to the Bank of America account as required by Rule J.2 of the Administrative Rules of the UNJSPF (Administrative Rules). The form submitted in his name did not contain his signature; an expert opinion confirms that the signature on that form was not written by the same p.3 (as)-7.1 93hs[T

43. Finally, Mr. Ambe-Niba asserts that the refusal to pay him the settlement derailed his family's plans for his retirement and caused severe financial hardship. He had to withdraw USD 24,83.75, incurring USD 8,841.79 in fees and interest. The travel to New York was necessary for the Fund to finally establish his identity. Regarding loss of chance, he requests compensation in the amount of USD 50,000 due to the fact that the contested decision disrupted his daughters' education as, without the settlement, one could not pursue university studies and the other had to undertake employment damaging her academic performance. As to non-pecuniary harm, he requests compensation in the amount of another USD 50,000 because his suffering was compounded by having been subjected to allegations that he was implicated in the fraud; as a result, he had to seek the help of a clinical psychologist and has been diagnosed with several ailments

safeguard the integrity of his communications, and his own actions and inactions allowed the fraud to be perpetrated. He repeatedly ignored warning messages in his personal e-mail account that flagged incoming fraudulent e-mails as untrustworthy; he repeatedly sent e-mails, ostensibly intended to the UNJSPF, to non-existent e-mail addresses, and then ignored the delivery failure reports; he informed the UNJSPF that he would send his payment instructions via DHL, but subsequently claimed that he had entrusted the form, containing his personal and bank account information, to “the wife of [his] boss who knew someone traveling to the US”; he falsely claimed that the payment instructions form had been delivered and provided a tracking number that instead showed that the document had never been shipped; and he failed to act promptly when he discovered that there had been a fraud, delaying months in contacting Bank of America, where payment was sent, or the competent authorities.

47. In addition, the Fund says that the Appellant has not been transparent regarding his dealings with Bank of America as he has provided a bank account statement and cheques that he claims to have recently received from Bank of America, relating to an account into which his withdrawal settlement was paid but not explained how he was able to obtain such confidential documents if he has no connection to the account.

48. The Fund contends that, in view of Mr. Ambe-Niba’s gross negligence and omissions, there were no measures that the UNJSPF could have taken to prevent the fraud. The person whose identity was compromised must bear the liability if s/he was at fault, grossly negligent, careless, dishonest and/or if there is evidence of wilful misconduct on their part. As such, liability for the loss should rest with him, whose actions and omissions allowed the fraud to occur, and not with the UNJSPF.

49. The Fund submits that, even if the liability of the UNJSPF is affirmed, any award should be reduced to account for Mr. Ambe-Niba’s substantial negligence. The Fund is not liable for interest on any unpaid benefits.

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States, as the bank statements. He also provides recordings of telephone conversations with Bank of America on 20 August 2022 wherein he inquired into his fraud complaint and is advised that he did not have a right of recovery to the funds deposited fraudulently, but the sender of the funds did have a right of recovery.

69. Therefore, on the face of the evidence it appears that the Fund has not met their onus and obligation of paying the withdrawal settlement to the participant, Mr. Ambe-Niba, but has paid the amount to someone else entirely.

70. However, there are some unanswered questions regarding the Bank of America bank account, including, if Mr. Ambe-Niba is not involved in the account, how was he able to obtain copies of bank statements and cancelled cheques and why did the Bank of America letter addressed to him, confirming he did not open the account, have the same mailing address (in Los Angeles) as the bank statements. These factual questions need further clarity and evidence.

71. Further evidence and clarity are also required as to why Mr. Ambe-Niba's withdrawal settlement was paid into an account not in his name and not opened by him but in the name of someone else. To support the payment retrospectively, the Fund seems to have relied on representations of Bank of America that the account was opened in the name of Mr. Ambe-Niba. For example, in an e-mail of 23 January 2020, the Fund's representative summarized a call with a representative of Bank of America who stated that the "account was opened in the name of Mr. Polycarp AMBE-NIBA". In addition, in an e-mail of 14 February 2020 from the Fund to the Fraud Department of JP Morgan Chase (the Fund's bank), the Fund advised that the "UNJSPF payment via JPMC [was] to an account in the same name as that of the individual with Bank of America". This seems to have been incorrect as the bank statements show that the account is in the name of a "Janet N**** D**** Sole Proprietor DBA Polycarp Ambe-Niba".

and made a finding which may also be incorrect, namely that the Fund “paid [the] withdrawal settlement into a bank account in [Mr. Ambe-Niba’s] name in the Bank of America”.

73. The Fund argues that they followed and observed the Regulations in payment of the withdrawal funds and this was sufficient and the only basis for review pursuant to Article 2(9) of the Statute.

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85. We remand the matter to the Standing Committee of the United Nations Joint Staff Pension Board, pursuant to Article 2(9) of the Appeals Tribunal Statute, for additional fact-finding as set out above.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 31st day of July 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar