

UNITED

8 On 30 June 2022, the Applicant separated from the Organization. His final entitlements, including the salary for the month of June 2022, were withheld by the Administration⁴

9 On 13 July 2022, Mr. Ebow Idun, the Chief, Human Resources, MONUSCO, wrote to DMSFC seeking advice on whether to release or withhold the final salary and entitlements to the staff members who separated from the Kalamie office, considering that there could be fraud cases against them⁵. This inquiry concerned the Applicant and other staff members who had separated from the Kalamie office on 30 June 2022. Ten cases are pending before this Tribunal on this issue.

10 The DMSFC responded on the same day stating “we will review and revert shortly”.⁶

11 On 18 July 2022, Mr. Idun sent a follow-up email to DMSFC. He stated

Please note that the SRSG [Special Representative of the Secretary

investigations. Alternatively, given the desperation of the affected staff members, consider a compromise of making partial payments as the investigation continues

13 On 21 July 2022, OIOS transmitted a report of possible fraud to the Special Representative of the Secretary General (“SRSG”) to MONUSCO. This report was copied to other senior management offices of the United Nations.⁸ In this report, the OIOS recommended that consideration be given to withholding the separation entitlements of the named staff members (including the Applicant), should the Organization wish to recover sums disbursed to these persons through fraudulent medical claims submissions.

17 On 5 October 2022, the Respondent appealed Order No 140 (NEI/2022), on the ground that the UNDT had exceeded its competence¹³

18 On 10 October 2022, OIOS informed the Office of Human Resources (“OHR”) of a revised estimate of the potential financial loss caused by the Applicant in the amount of USD 2,425,777 instead of USD 820,730 as initially estimated¹⁴. The following day on 11 October 2022, OHR instructed MONUSCO to release the Applicant’s P.35 and PF.4 forms¹⁵

19 On 17 October 2022, the Applicant filed a motion for execution of Order No 140 (NEI/2022). On 19 October 2022, the Respondent filed a reply challenging the motion for execution of Order No 140 (NEI/2022) on grounds that the matter was moot because instructions to process the Applicant’s P.35 and PF.4 forms had been given on 11 October 2022¹⁶

20 On 25 October 2022, the UNDT issued Order No 154 (NEI/2022) dismissing

notification (PF.4) and sending it to the secretariat of UNSPF within three days of completion of the action

27. The Applicant elaborates that he 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 the Applicant would be separated from service on 30 June 2022 due to the closure of the Kalamie 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, along with the rest of the separating national staff members of the Kalamie office and was interviewed as a subject on 18 June 2022. The OIOS investigation was not concluded at the time of his separation from the Organization and to his knowledge, the investigation is still ongoing. Therefore, no factual finding was ever made to establish that the Applicant had

benefits, i.e, from the date of his separation until the date UNSPF received his P:35 and PF:4 forms

Issue II: Whether damages should be awarded to the Applicant

31 Relying on the jurisprudence of this Tribunal²¹, the Applicant argues that he should be given financial compensation and moral damages. He contends that it is undisputed that he was never indebted to the Organization as claimed in the contested decision. Therefore, his pension benefits should never have been withheld from him. Since separating from MONUSCO, the Applicant and his family have faced immense financial distress and struggled to survive due to the unlawful retention of his pension benefits caused by the contested decision. The despair faced by the Applicant is witnessed and corroborated by MONUSCO's own senior management.²²

32 The Applicant's inability to provide the basic essential needs for his family harmed their physical and mental health, as well as his. The delay in paying his pension entitlements caused him severe financial hardship, stress, embarrassment and loss of self-esteem. Without any medical insurance and money to pay for treatments, the Applicant and his family were also deprived of receiving proper medical care to address their physical and psychological damage.

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

34 By way of remedies, the Applicant requests

a Interest on the core time pension with claval settlement at the US Prime Rate from the date of his separation until the date UNSPF received his P.35 and PF.4 forms; and

b USD5000 in compensation for moral damages for the pain and suffering caused by the contested decision

Respondent's submissions

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

35 The Respondent contends that the contested decision was reasonable. The Applicant had already been interviewed by OIOS before he separated from the Organization on 30 June 2022. He was well aware of the serious fraud allegations against him. Therefore, the contested decision was also reasonable pending the OIOS investigation. The Organization must be able to rely on the OIOS Memorandum and OIOS' assessment of the financial loss as it secures its financial interests from fraud. The OIOS is an independent investigating entity and it only initiates an investigation following a preliminary assessment indicating that such is warranted. In this regard, it should be noted that when OIOS issued its Memorandum and financial loss estimate, OIOS had already interviewed the Applicant. In addition, OIOS had a reasoned report on the Applicant's claims from the Fraud Investigation Unit ("FIU") of Cigna, the administrator of the medical insurance, concluding that the Applicant had been duly reimbursed.

36 The available information indicated that the Applicant submitted false claims to Cigna for a total staggering amount of USD94,674.77. These claims involved 81

hospital admissions of the Applicant and his insured dependents. On at least 10 occasions, Cigna received invoices for overlapping or connecting admissions (i.e., admissions where the patient is simultaneously admitted in two hospitals or is hospitalized immediately after or shortly upon being discharged from another hospital). During the nine purported hospitalizations, the Applicant was at work according to his own UMOA records, which are certified as true and accurate. These records established with a high probability the Applicant's misconduct.

37. Cigna prevented a major part of the financial loss to the Organization by not reimbursing the full amount of USD9,674.77. Nevertheless, as noted, OIOS estimated the financial loss to the Organization at USD8,207.30, which exceeded the Applicant's final entitlements of USD7,823.49. It would be inappropriate to second-guess OIOS' assessment now with the benefit of hindsight, knowing that OIOS later revised its initial estimate of the financial loss to USD2,425.77 following its further review of the matter as the investigation progressed. This fact was unknown at the time of the

to enable him/her to take an informed decision whether to offer a kind of surety in exchange of the release of the documents while the determination is being made

40 In view of the above cited jurisprudence, the Respondent maintains that these conditions were not in the present case before the contested decision was taken. The indebtedness of the Applicant had a high level of probability in light of the information available to the Organization. The value of the indebtedness was estimated by OIOS, the competent investigating entity. The Applicant was also on notice, considering that he was informed of the investigation and interviewed prior to his separation on 30 June 2022.

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Amount at Risk USD 9,674,777

Amount Containing Sick Leave Registrations USD 870,091

Total Amount to Be Recovered USD 7,666,954

56 Interestingly, the data also showed that

Number of admissions 81 (!!!) admissions for 5 insured with 35 admissions for M3, M4 and M5 feedback UN on sick leave request revealed that the sm (staff member) was on duty during 6 alleged admissions.”³⁴ These numbers contradict the Cigna FIU report that said “Ms Kabilava was on duty during 9 of her alleged admissions.”³⁵

57 Similarly, the amounts at issue are inconsistent, or at least evolving. As noted above, the Cigna chat showed that the amount at risk was USD 9,674,777, while the amount containing sick leave registration was USD 870,091 and the total amount to be recovered was USD 7,666,954 (8% of the total amount alleged to be “at risk”). Yet another amount appears in an email referencing “the response from OIOS” and describing the Applicant’s “possible maximum USD liability” as USD 8,207,300.³⁶

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

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

66 The first black box is the Cigna exercise. The Tribunal has not been told what parameters were used in identifying cases to be examined, nor what the exercise and systematic monitoring disclosed. Unlike in other of the related cases, the record in this case does not even indicate when the Applicant's file was flagged for monitoring.

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documents while the determination is being made. Obviously, moreover, the Administration must act swiftly.”

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

77 The Applicant claimed that she should be given financial compensation and moral damages as a result of the wrongful decision to delay issuance of her pension paperwork until 25 October 2022. Specifically, she requests that the Tribunal order the Respondent to pay:

a Interest on the one-time pension withdrawal settlement at the US Prime Rate from the date of her separation until the date UNSPF received her P.35 and PF.4 forms; and

b USD 5,000 in compensation for moral damages for the pain and suffering caused by the contested decision

78 ST/AI/15/Rev.2 sets out a precise and orderly process for personnel payroll clearance actions upon the separation of a staff member. It expressly provides that “Executive or administrative offices will be responsible for:.. (b) completing form P.35 normally one month in advance of the last regular working day...”⁵¹ The effective date is to be the date of separation⁵²

79 Then the Office of Programme Planning, Budget and Finance is responsible for preparing and “sending the Pension Fund separation notification (PF/4) to the Secretariat of the UNSPF within three days of the completion of the [P.35]”.⁵³

80 In this case, the Applicant’s date of separation was 30 June 2022. However, the pension paperwork was not received at UNSPF until four and a half months later, 18 November 2022.⁵⁴

⁵¹ See ST/AI/15/Rev.2 p 2, para 5(b).

⁵² Id

⁵³ Id at p 4 para 10(d).

⁵⁴ Application annex 13

81 To be sure, ST/AI/155Rev.2 does authorize the USG/DMSPC to delay issuance of the pension paperwork under certain circumstances. However, as explained above, those circumstances were not present in this case and the delay was improper.

82 Both this Tribunal and UNAT have consistently determined that appropriate remedy for delays in paying monetary entitlements is the award of damages.⁵⁵ That interest has been calculated at the US prime rate from the date on which the entitlement was due until the date of payment.⁵⁶

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

84 The Respondent accurately points out that the Organization's "rules do not specify an exact date at which a former staff member's pension entitlements have to be disbursed."⁵⁷ From that he argues that the date the pension paperwork would normally be received by UNSPF should include "the acceptable administrative processing time frame of around 35 months".⁵⁸

85 The only evidence cited for an acceptable processing time frame is the MEU's recommendation to grant two months of interest to other Kaleri staff members whose pension paperwork was improperly delayed. According to the MEU, two months "represents the approximate period of delay vis à vis other former staff members who separated from the same duty station on 30 June 2022, and whose PF-4 forms were

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- 96 In light of the Tribunal's findings, the application succeeds in part
- 97 The decision to delay issuance of pension paperwork is found to be unlawful
- 98 The Respondent shall pay to the Applicant four months of interest on the money that was due to her, calculated at the US prime rate
- 99 The Applicant's claim for other financial and moral damages is denied
- 100 All other Applicant's claims are denied

(Signed)

Judge Sean Wallace

Dated this 12th day of September 2023

Entered in the Register on this 12th day of September 2023

(Signed)

Eric Muli, Officer in Charge, Nairobi