



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/025

Judgment No.: UNDT/2018/124

Date: 14 December 2018

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

CAMERA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:

Daniel Trup, OSLA

Natalie Dyjakon, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member holding a permanent appointment and serving at the P-4 level, step 6 as an Architect in the Department of Safety and Security (“DSS”) in New York, filed an application entitled “Application and Request for Expedited Hearing”, contesting the “decision of the Administration to reduce [his] contracted salary and the manner of the implementation of the Unified Salary Scale”. The Applicant requests rescission and to receive outstanding pay backdated accordingly.

2. In his response, the Respondent contends that the application is not receivable and, in any event, without merit.

Relevant procedural history

3. On 5 April 2017, the Applicant filed the application.

4. On 5 April 2017, in accordance with art 8.4 of the Dispute Tribunal’s Rules of Procedure, the Registry transmitted the application to the Respondent, instructing him to file his reply by 8 May 2017.

5. On the same day, the case was assigned to the undersigned Judge.

6. On 8 May 2017, the Respondent filed his reply.

7. On 11 May 2017, by Order No. 91 (NY/2017), the Tribunal instructed the Applicant to file a submission addressing the issue of receivability as raised in the Respondent’s reply by 9 June 2017.

8. On 7 June 2017, the Applicant filed his response to the receivability issue raised in the Respondent’s reply.

9. On 15 June 2017, by Order No. 116 (NY/2017), the Tribunal instructed the parties to attend a Case Management Discussion (“CMD”) in the courtroom of the Tribunal in New York on 22 June 2017.

10. At the CMD held on 22 June 2017, Counsel for both parties attended in person (for the Applicant, Mr. Daniel Trup and Ms. Natalie Dyjakon and, for the Respondent, Mr. Alister Cumming). Upon the inquiry of the Tribunal, the Applicant’s Counsel indicated that there are currently three types of salary scale cases pending before the Tribunal, of which the present case is one, involving different legal issues. On the interlocutory matter of receivability, in light of the Appeals Tribunal’s judgment in a similar case, namely *Ovcharenko et al.* 2015-UNAT-530, the Tribunal found the application to be receivable *rationae materiae* as it concerned an administrative decision with direct impact on the actual salary of the Applicant, who had filed the present application after receiving his January 2017 pay slip.

11. By Order No. 127 (NY/2017) dated 29 June 2017, among other orders, the Tribunal instructed Counsel for the Applicant to state, in writing, what the three types of salary scale cases involving different legal issues are and identify them, and to inform the Tribunal, after consulting with the parties, if the options of: (a) consolidation of cases based on the criteria of the identical legal issue invoked in the application, or (b) the “pilot case” criteria for each type of case, were to be considered.

12. On 30 June 2017, the parties filed a joint submission pursuant to Order No. 127 (NY/2017) in which they indicated that the first category of cases are those involving “Non-dependent spouse and dependent children (including a child who is or will be 21 years old in the near future)”. The parties further identified the cases belonging to this category, namely the present case, Case No. UNDT/NY/2017/027 (Shermet) and Case No. UNDT/NY/2017/041 (Hanoch). The Applicant requested that these cases be consolidated.

13. By Order No. 173 (NY/2017), issued in Case No. UNDT/NY/2017/027 (Shermet) on 23 August 2017 and Order No. 174 (NY/2017), issued in Case No. UNDT/NY/2017/041 (Hanoch) on 23 August 2017, the Tribunal consolidated these cases along with the present case.

14. On 8 September 2017, the Respondent filed his response to Orders No. 127 (NY/2017), No. 173 (NY/2017) and No. 174 (NY/2017).

15. On 12 October 2017, Applicant's Counsel filed a submission requesting the establishment of a three-judge panel to review the cases listed before New York. Further, Counsel for the Applicant updated the list of pending salary scale cases before the undersigned Judge. On the same day (12 October 2017), the Respondent's Counsel filed additional submissions on receivability.

16. By Order No. 269 (NY/2017) issued on 11 December 2017, the Tribunal provided the following orders (emphasis omitted):

11. The Applicants' request for suspending the proceedings is rejected.

12. By 5:00 p.m. on Friday, 12 January 2018, the Applicants shall file an updated matrix reflecting the reductions of their contracted monthly salary between 31 January 2017 and 31 December 2017 and the method of calculation.

13. The Applicants' request for all salary scale cases filed before the Dispute Tribunal in New York to be consolidated and decided by a three-judge panel is to be decided in due course.

14. At 10:30 a.m. on Wednesday, 17 January 2018, the parties shall attend a CMD in the courtroom of the Tribunal to discuss the further proceedings in the present cases. By 5:00 p.m. on Monday, 15 January 2018, the parties shall inform the Tribunal whether they and their respective counsels are available to attend the CMD in person, or, if unavailable, by video-link or telephone, and provide contact detail information, i.e.: a video conference link and/or, a land line number and a cellular number.

17. On 12 January 2018, the Applicant filed a submission regarding “the reductions of [his] contracted monthly salary between 31 January 2017 and 31 December 2017 and the methodology to calculate the requested compensation”.

18. By Order No. 11 (NY/2018) issued on 19 January 2018, the Tribunal ordered the parties to file additional documentation and to agree on a date for a CMD in the period from 1 to 9 March 2018.

19. On 14 February 2018, the Applicant filed a submission pursuant to Order No. 11 (NY/2018) and provided a copy of his statement of earnings and deductions for December 2017 and January 2018.

20. On 14 February 2018, the parties filed a joint submission pursuant to Order No. 11 (NY/2018) containing additional submissions on various matters and provided the agreed date of 7 March 2018 for the next CMD.

21. At the CMD held on 7 March 2018, Counsel for both parties attended in person (for the Applicant, Mr. Daniel Trup and Ms. Natalie Dyjakon, and for the Respondent, Mr. Alister Cumming). The Applicants’ Counsel, Mr. Daniel Trup, informed the Tribunal that, on 2 March 2018, the judgments issued in Geneva’s salary scale cases were appealed by the Secretary-General and that the Applicants in these cases may consider filing a cross-appeal. He then requested the suspension of the proceedings in all the identical pending salary scale cases in New York assigned to the undersigned Judge on the grounds that (a) the Respondent has appealed cases with identical facts before the Appeals Tribunal, and that, (b) regardless of the outcome in the present cases, it is likely that an appeal will be filed by one of the parties and the Appeals Tribunal will be further faced with other appeals effectively dealing with the same subject matter both on receivability and merits. The Respondent’s Counsel opposed to the request for suspension of the proceedings and indicated that his position is for the proceedings to continue.

22. On 9 March 2018, the Applicant filed a submission following the CMD in which detailed the reasons for their request for suspension of the proceedings.

23. By Order No. 74 (NY/2018) issued on 3 April 2018, the Tribunal, noting that the Respondent opposed the Applicant's request for suspension of the proceedings and wanted the proceedings to continue, considered that the request for suspension could not be granted as no legal provisions allowed the Tribunal to suspend, in the absence of the parties' agreement, the proceedings of a pending application, either with a different or with a similar/identical object with the application(s) in other case(s) pending before the same Tribunal or before the United Nations Appeals Tribunal, which may have a direct legal effect on the case requested to be suspended, and rejected the request to suspend the proceedings in the present case. The Tribunal further ordered that the present case was to be decided by the Tribunal on the papers, that the parties could file any additional relevant documentation no later than 20 April 2018, and that the parties were to submit their closing statements by 18 May 2018 based only on the evidence already before the Tribunal.

24. On 18 May 2018, the parties filed their closing submissions.

25. On 21 June 2018, the Tribunal instructed the Respondent via email to file a copy of the Applicants' employment contract/Letter of Appointment by 22 June 2018.

26. On 22 June 2018, the Respondent duly filed the available documentation, as instructed by the Tribunal.

27. On the same day (22 June 2018), having reviewed the new documentation filed by the Respondent, the Tribunal requested Counsel for both to attend a CMD on 25 June 2018.

28. At the CMD held on 25 June 2018, Counsel for both parties attended in person (for the Applicant, Ms. Natalie Dyjakon and Mr. Daniel Trup, and for the

Respondent, Mr. Alister Cumming). The Tribunal informed the parties that, taking into consideration the documentation provided by the Respondent, it was necessary to re-open the proceedings in order to obtain further clarifications from both parties. The Tribunal observed regarding the Applicant's employment contract, that he had been offered a permanent appointment by a Letter of Appointment with an effective date of appointment and signed on behalf of the Secretary-General on 3 April 2007, and that the offer was signed by the Applicant on 9 April 2007. The permanent appointment was in the United Nations Secretariat "in accordance with the terms and conditions specified [...] and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and Staff Rules". In the Letter of Appointment was stated that the assessable salary could increase subject to satisfactory service and that the salary shown did not include any allowance to which he might be entitled.

29. By Order No. 133 (NY/2018) issued on 2 July 2018, the Tribunal ordered the Respondent to file additional relevant information and documentation by 16 July 2018 and the Applicant to file a response, if any, by 30 July 2018.

30. On 16 July 2018, the Respondent duly filed the available documentation, as instructed by the Tribunal in Order No. 133 (NY/2018).

31. On 26 July 2018, the Applicant filed his response pursuant to Order No. 133 (NY/2018).

32. By email of 28 August 2018, the Tribunal advised the parties that the case was to be decided on the papers before it and that closing submissions, if any, were to be filed by 14 September 2018.

33. On 14 September 2018, the Applicant filed a notice of withdrawal, stating that "[the Applicant] seek[s] to withdraw all of [his] allegations and claims before the Dispute Tribunal with respect to [the present case]".

34. On 14 September 2018, referring to *Lloret Alcaniz et al.* 2018-UNAT-840, the Respondent filed a submission in which he, *inter alia*, stated that:

... In the present case, the claims made by the Applicant are identical to the arguments already considered and rejected by the Appeals Tribunal in *Lloret Alcaniz*, as well as in *Quijano-Evans et al.* [2018-UNAT-841] and *Mirella et al.* [2018-UNAT-842]. There is no basis upon which the present case can be distinguished from those cases. The Dispute Tribunal is bound by the Appeals Tribunal's judgment [referring to *Igbinedion*, 2014-UNAT-410, para. 24]. Accordingly, the Dispute Tribunal ought to follow *Lloret Alcaniz et al* and dismiss the Application.

Consideration

35. The Tribunal commends the Applicant for withdrawing his application in the present case. This saves valuable resources and contributes to a harmonious working relationship between the parties.

36. The Tribunal considers that each person has the fundamental human right to free access to justice, which includes the right to file an application in front of an impartial tribunal, and therefore also the right to withdraw that application.

37. An application represents the materialization of an applicant's right to appeal the contested decision. This is the first procedural act by which an applicant invests the Tribunal of dealing with the appeal. The whole procedural activity will take place within its limits and the application must be filed by the person who has the right to appeal the contested decision (*ratione personae*), within the applicable time limit (*ratione temporis*) and in front of the competent Tribunal (*ratione loci*).

38. Consequently, to be legally valid, a request for the withdrawal of an application has to be formulated by the applicant and/or by his/her counsel and must consist of the unconditional expression of the applicant's free will to close his/her case before a judgment is issued.

39. An application can be withdrawn orally and/or in writing, partially or entirely. The withdrawal request can refer either to the pending application (as a procedural act) or to the right to appeal itself.

40. The Applicant expressed in his motion of 14 September 2018 his will to withdraw his application and thereby to end the pending litigation.

41. In conclusion, the withdrawal request represents the Applicant's free will to end the litigation. Since the Applicant has withdrawn his application, the Tribunal no longer needs to make a determination on the merits and takes note of the withdrawal.

Conclusion

42. In the light of the foregoing, the Tribunal DECIDES

43. The Applicant has withdrawn the application. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2017/25 is hereby closed.

(Signed)

Judge Alessandra Greceanu

Dated this 14th day of December 2018

Entered in the Register on this 14th day of December 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York