



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2024/041

Order No.: 8 (GVA/2025)

Date: 17 February 2025

Original: English

Before: Judge Francesco Buffa

Registry: Geneva

Registrar: Liliana Lopez Bello

SAMARASINHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Manuel Calzada

Counsel for Respondent:

Elizabeth Gall, UNDP

Introduction

1. The Applicant, a staff member of the United Nations Development Programme (“UNDP”), filed an application contesting the decision of 20 August 2024 by UNDP to extend his placement on Administrative Leave Without Pay (“ALWOP”) from 25 August 2024 to 24 November 2024.

2. The challenged decision indicates that the Assistant Secretary-General, Assistant Administrator and Director, Bureau for Management Services, had received a draft report from the Office of Internal Oversight Services (“OIOS”) that the Applicant may have engaged in prohibited conduct in violation of the provisions of the Secretary-General’s Bulletin on “Addressing discrimination, harassment, including sexual harassment, and abuse of authority”, which may rise to serious misconduct if substantiated.

Procedural background

3. On 23 December 2024 the Applicant, who is represented by Counsel, Mr. Manuel Calzada, in these proceedings, personally sent to the Registry a document titled “motion to withdraw the application and suspend proceedings” indicating his wish to “withdraw the ... application on the merits” in the present case and noting that “the contested issue is being addressed through other mechanisms and does not require a remedy through the Tribunal at this time”.

4. The motion was sent directly by the Applicant to the Registry from his personal email and, on the same day, the Respondent was informed of the said filing by an automatic notification from the e-filing system.

5. The motion was not included in the case record nor processed at the time due to an oversight and it was not submitted to the judge, as no judge was in assignment of the case at that time

6. On 6 February 2025, this Tribunal issued Order No. 4 (GVA/2025), which was communicated to the parties, ordering, *inter alia*, a hearing in the present case.

7. Having received Order No. 4 (GVA/2025), the Respondent submitted an inquiry on 6 February 2025 stating:

I see from the procedural history outlined in the order that there was no reference to the Applicant's motion to withdraw his application in this case (UNDT/GVA/2024/041) filed on 23 December 2024. Would it be possible to update the parties on the status of the motion?

8. On the same day, following the Respondent's inquiry, the Applicant sent an email to the Registry and the Respondent indicating the following:

In light of this order, the absence of no active legal representation at the time the request was made due to sudden ill health of counsel and no progress "through other mechanisms" as referred to in the communication, kindly allow me to confer with counsel and revert to you by tomorrow as to whether we still wish to proceed in this matter.

9. On the same day, the Registry, on its own, wrote to the parties acknowledging receipt of the parties' communications and apologized for "any inconvenience caused by the oversight regarding the Applicant's motion for withdrawal filed on 23 December 2024".

10. On 6 February 2025, the Applicant personally submitted, via the e-filing portal, a motion withdrawing his 23 December 2024 motion to withdraw his application upon consulting his Counsel. He stated that the motion of 23 December 2024 was made without the advice of his Counsel, who was ill, and was made by the Applicant "under great duress," which could be certified by his psychiatrist. He requested the Tribunal to proceed with the case as per Order No. 4 (GVA/2025).

11. On 7 February 2025, the matter for the first time was brought to the attention of this Judge, who instructed the Registry to include the motion for withdrawal filed on 23 December 2024 into the case record, reserving any assessment of its value. This Judge further instructed the Registry to order the Respondent to comment on the new motion.

12. On 10 February 2025, the Tribunal requested the Respondent to submit comments on the Applicant's latest motion to withdraw the motion that he had submitted on 23 December 2024.

13. On 10 February 2025, Counsel for the Applicant filed a response to Order No. 4 (GVA/2025), stressing that the situation the Applicant complained of is ongoing and asking for an examination of the case on the merits in the interest of justice and fairness. Among others, Counsel for the Applicant requests that the case proceed and be heard on its merits, stating that:

As matter of the best interests of justice, it is respectfully submitted that the proceedings must be heard on the merits. The Applicant welcomes the opportunity for witnesses, and himself included to be examined truthfully and transparently.

14. On 11 February 2025, the Respondent submitted his comments and opposed the Applicant's motion to withdraw his 23 December 2024 motion to withdraw his application, stressing that:

An applicant cannot approbate and reprobate in proceedings before the Dispute Tribunal, that is, adopt different positions with respect to pursuing his or her application. Such conduct is an improper use of the legal process and wastes judicial resources.

15. The Respondent, among others, argued that various grounds advanced by the Applicant in the motion and the submissions filed on 7 and 10 February 2025 for changing his position concerning the pursuit of his application are not supported by evidence. He asserted that:

To allow the withdrawal puts at risk the proper conduct of appeals before the Tribunal as future applicants may adopt inconsistent positions depending on the case management or other order issued by the Tribunal during the course of the proceedings.

16. Accordingly, the Respondent requested the Tribunal to dismiss the motion and grant the motion to withdraw filed on 23 December 2024.

17. On 12 February 2025, while not requested by the Tribunal, the Applicant personally filed a rejoinder to the Respondent's comments. He recalled having already submitted that Applicant's legal counsel was unavailable due to illness in December 2024 and that he is prepared to provide a certification from the psychologist and medical doctor treating him during the period in question for depression and anxiety directly related to these proceedings. The Applicant continues to plead that the case proceeds to the hearing on the merits as contained in Order No. 4 (GVA/2025).

18. In an annex to the rejoinder, the Applicant indicated that he had been notified on the same day that his ALWOP would be extended for a further three months from 24 February 2025 until 23 May 2025. He added that due to the effect of this long-lasting measure, he had remained without any income for a long time and was unable to support his young family. He insisted on hearing his witnesses, stating that a late justice is a denied justice.

Consideration

19. The Tribunal is aware that there is a legal dispute between the parties about the effect of the 23 December 2024 motion for withdrawal filed by the Applicant personally, without intervention by his legal representative, and about the legal possibility of withdrawing that motion.

20. Having this in mind, some legal issues arise in the case:

a. First. In this case, does the withdrawal have a substantive impact or only a procedural effect? If the withdrawal has no substantive impact but only a procedural effect, who has the legal standing to submit the withdrawal, the Applicant or his/her legal counsel, or both? What is the legal means to convey the motion to the Tribunal? Is it lawful that an Applicant represented by counsel directly send a motion to the Registry?

b. Second. Assuming a motion has been lawfully transmitted, when does the extinction of the proceedings come into play? When the motion is filed or when the judicial order ruling on the motion is issued? Can the Judge consider

any event supervening the original motion that occurred before the ruling on the motion?

c. Third. Is it possible to withdraw a motion for withdrawal before the Judge rules on it? If so, under which conditions?

d. Fourth. Is the Applicant required to invoke vices of his will, saying, for instance, that there was an error or duress, or is it just his/her choice to continue or not continue the proceedings?

e. Fifth. Could the order ruling on the withdrawal be directly appealed before the United Nations Appeals Tribunal, or could its content be appealed only by appealing the final judgment if the proceedings continue?

f. Sixth. Given that it results from the records that the ALWOP was prolonged and considering that in this situation, it could be foreseen that another application, similar to the present, be filed in the next future on the same matter of contentions (the same facts being the ground for the measure which is repeatedly extended and repeatedly challenged by the Applicant), would the parties find it useful or not to have a hearing on the merits in the present case to assess the matter once and for all? In the affirmative, and if the Tribunal would allow the Applicant to withdraw his motion to withdraw dated 23 December 2024, would the parties agree not to appeal the respective Order to allow these proceedings to continue?

21. In light of the above and pending a decision on the Applicant's motions, the Tribunal suspends the deadlines mentioned in Order No. 4 (GVA/2025).

Conclusion

22. In view of the foregoing, it is ORDERED THAT:

a. Parties shall address the above-mentioned issues, answering in writing to said questions, recalling jurisprudence, if any, and expressing their views by **Friday, 28 February 2025 Geneva COB**; and

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- b. Deadlines mentioned in Order No. 4 (GVA/2025) are suspended.

(Signed)

Judge Francesco Buffa

Dated this 17th day of February 2025

Entered in the Register on this 17th day of February 2025

(Signed)

Liliana López Bello, Registrar, Geneva