



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

1. On 10 September 2013, the Applicant, a former Political Affairs Officer in the United Nations Stabilization Mission in Haiti (“MINUSTAH”), filed a motion for extension of time to file an application regarding the abolishment of her post and the related non-extension of her fixed-term contract in light of “ongoing settlement endeavours with the Management Evaluation Unit (“MEU”). On 13 September 2013, the Respondent consented to the request for extension of time.

2. On 16 September 2013, the Applicant filed a request for confidentiality by which she asked that an unidentified Order from 2012 as well as the Tribunal’s forthcoming Order on her pending request for extension of time not be published. The Respondent filed and served his response on 17 September 2013, disagreeing with the confidentiality request in relation to the already published Order No. 51 (NY/2012) dated 19 March 2012 issued in another case of the Applicant before the Dispute Tribunal (Case No. UNDT/NY/2012/018) as well as the anticipated Order in the present case. The Respondent did not object to maintaining the nature and details of the Applicant’s scheduled medical procedure confidential.

3. By Order No. 233 (NY/2013) dated 18 September 2013, the Duty Judge granted the Applicant’s request for extension of time and to maintain her medical documents confidential. The Applicant was further instructed by the Tribunal to file the application on or before 5:00 p.m. (New York time), Friday, 18 October 2013.

4. On 18 October 2013, at 1:52 p.m. (New York time), the Applicant filed her application as an *ex parte* filing in which she was contesting the following administrative decisions: (a) the abolishment of her post, (b) her non-selection to “three posts identical to her position of Political Affairs Officer P-4”, and (c) her electronic performance appraisal system (“ePAS”). In support of her application, she appended 15 annexures.

5. On the same date, at 3:48 p.m., by Order No. 260 (NY/2013), the Duty Judge ordered the Applicant to file her application within the time limit indicated in Order No. 233 (NY/2013) in a form that could be served on the Respondent or her case would be dismissed in its entirety.

6. By email of the same date, at 5:03 p.m., the Applicant stated, *inter alia*, that:

... I authorize that my 18 October 2013 UNDT submission and annexes be shared with MINUSTAH ...

7. By Order No. 264 (NY/2013) dated 22 October 2013, as the case in his view was suitable for an expedited hearing on the merits, the Duty Judge instructed the Respondent to “give consideration to providing an expedited reply or, alternatively to inform the Tribunal within 7 days if this is not practicable” and, if a reply were to be received within the next 14 days, he instructed that a case management discussion be held on 7 November 2013.

8. At the request of both the Respondent and the Applicant referring to ongoing settlement negotiations, by Order No. 274 (NY/2013) dated 29 October 2013, the Duty Judge extended the time limit for the Respondent to file his reply to Friday, 3 January 2014. On 23 December 2013, the parties filed a joint request for further extension of time, stating that settlement discussions were still ongoing. By Order No. 351 (NY/2013) dated 23 December 2013, the Duty Judge granted the time extension and instructed the Respondent to file his reply no later than 31 January 2014. On 29 January 2014, the parties filed a further request for extension of time, which the Duty Judge granted and instructed the Respondent to file his reply no later than 14 February 2014.

9. On 14 February 2014, the Respondent informed the Tribunal that the settlement efforts had failed and, on the same date, filed his reply together with seven annexures. Without leave from the Tribunal but diligently, the Applicant filed a response to the Respondent’s reply on 17 February 2014.

10. On 2 July 2014, the present case was assigned to the undersigned Judge.
11. By Order No. 275 (NY/2014) dated 10 October 2014, the Tribunal instructed the parties as follows:
 16. By **5:00 p.m., 7 November 2014**, the Respondent is to file and serve, if any, additional comments to the Applicant's response filed on 17 February 2014 and submissions and documentation regarding:
 - a. All vacant Political Affairs Officer posts, both those advertised and those to be filled by transferring staff, at the P-4 level as well as other identified, if any, suitable posts in MINUSTAH or in other missions from the beginning of the downsizing process and until 31 December 2014, including job descriptions;
 - b. The type of procedure followed—either through a competitive selection process or transfer—to recruit the candidates chosen, if any, for each of these posts.
 17. By **5:00 p.m., 19 November 2014**, the Applicant is to file and serve her comments, if any, to the Respondent's filings of 7 November 2014.
 18. By **5:00 p.m., 24 November 2014**, the parties are to inform if the case can be decided by the Tribunal on the papers before it, or additional evidence and/or a hearing is needed.
12. On 12 October 2014, the Applicant requested a hearing and indicated that she and at least one witness were prepared to testify in the present case. She also underlined that due to personal reasons she would be available for a hearing at the end of January, beginning of February.
13. On 7 November 2014, the Respondent filed its comments on the Applicant's 17 February 2014 submission and relevant documentation as requested by the Tribunal by Order No. 275. On 24 November 2014, the Respondent filed his response to para. 18 of Order No. 275 (NY/2014).
14. On 25 November 2014, the Applicant filed a response to the Respondent's reply from 7 November 2014.

15. By Order No. 328 (NY/2014) dated 2 December 2014, the parties were requested to attend a case management discussion (“CMD”) on 29 January 2015.

16. On 29 January 2015, the CMD was held at which the Applicant participated via telephone and Counsel for the Respondent was present in person.

17. By Order No. 22 (NY/2015) dated 4 February 2015, the Tribunal ordered the parties as follows (emphasis in the original):

6. The Applicant is to file and serve, on or before **5:00 p.m. on Friday, 13 February 2015**, a concise submission stating:

- a. Whether any oral evidence will be adduced in the case, including the Applicant’s testimony;
- b. The name of any witness who will be called to testify, as well as the relevance of their testimony.

7. The Respondent is to file and serve a response, if any, on or before **5:00 p.m. on Wednesday, 25 February 2015**, stating:

- a. Whether they would intend to cross-examine any of the witnesses listed by the Applicant;
- b. The name of any witness who will be called to testify, as well as the relevance of their testimony.

8. **On or before 2:00 p.m., on Friday, 13 March 2015**, the parties are to present a joint motion indicating whether a [Case Management Discussion (“CMD”)] would be required as well as the agreed date for a hearing, if required. Otherwise, the parties are to indicate whether they consider that the case can be determined on the papers.

18. By regular email dated 12 February 2015, the Applicant filed a motion for an extension of time to file her submission pursuant to Order No. 22 (NY/2015).

19. At the instructions of the Tribunal, on 13 February 2015, the Respondent filed and served his comments to the Applicant’s motion for time extension, stating, *inter alia*, that the Respondent should have adequate time to review the Applicant’s list of witnesses and select witnesses in response prior to the scheduling of the hearing in this matter.

20. By Order No. 30 (NY/2015), dated 13 February 2015, the Tribunal rejected the Applicant's request for another CMD at this stage of the proceedings and ordered the Applicant to file and serve, on or before 17 February 2015, a concise submission stating whether any oral evidence will be adduced in the case, as well as the name of any witness who will be called to testify and the relevance of their testimony. The Respondent was ordered to file and serve a response, if any, by 27 February 2015, stating whether they would intend to cross-examine any of the witnesses listed by the Applicant and the name of any witness they intend to call.

21. On 17 February 2015, the Applicant stated that she will be testifying at the hearing and proposed the name of two witnesses, referred to as witnesses "X" and "Y". In an *ex parte* filing made on the same day, the Applicant listed two witnesses and reiterated her intention to file a motion for *in camera* hearing.

22. On 19 February 2015, the Applicant filed a letter from one of the proposed witnesses. The Respondent received this filing via the electronic notification system.

23. On 27 February 2015, the Respondent contended that the Applicant failed to comply with Order No. 30 (NY/2015). The Respondent submitted that it is essential that he is informed of the identity, and the relevance of the testimony, of the witnesses called by the Applicant. The Respondent opposed the request for *in camera* hearing and stated that he intended to cross-examine the Applicant. However, the Respondent submitted that he is unable to determine whether or not he may cross-examine the other witnesses whose identity has not been disclosed by the Applicant. The Respondent listed six witnesses to be called in relation to the Applicant's claims that the mission management was biased against her. Two of these six witnesses were referred to by the Applicant's proposed witness in his letter of 19 February 2015. The Respondent stated that he intended to call another four witnesses concerning the downsizing of the United Nations Stabilization Mission in Haiti.

24. By regular email dated 2 March 2015 to the New York Registry, copying the Counsel for the Respondent, the Applicant informed that “there [are] renewed settlement endeavors currently under way, whose outcome I await ...”.

25. By Order No. 42 (NY/2015 dated 12 March 2015, the Tribunal instructed the parties to inform “whether they agree that the proceedings be suspended and whether their informal discussions are being held *inter partes* or through the Office of the Ombudsman and Mediation Services” on or before 5:00 p.m. on Friday, 20 March 2015.

26. By joint response of 20 March 2015, the parties submitted that:

... To date, the parties have conducted *inter partes* discussions without the involvement of the Office of the Ombudsman and Mediation Services.

... The parties agree that the proceeding be suspended and that the matter be referred to the Mediation Division of the Office of the Ombudsman and Mediation Services in order that further efforts toward informal resolution may be made.

27. By Order No. 48 (NY/2015) dated 23 March 2015, taking into consideration the parties’ consent to their case being referred to mediation, and pursuant to art. 10 from the Tribunal’s Statute and art. 15 of the Tribunal’s Rules of Procedure, the case was referred to the Mediation Services in the Office of the Ombudsman and Mediation Services for consideration, and the proceedings before the Tribunal were suspended until 23 June 2015.

28. On 22 June 2015, the Tribunal received a letter from the Office of the Ombudsman and Mediation Services on behalf of both parties requesting an extension of the time to 23 July 2015 to complete the mediation efforts. On 22 July 2015, the Tribunal received a letter from the Office of the Ombudsman and Mediation Services on behalf of both parties for a further extension of time until 27

August 2015 to complete the mediation efforts. By Order No. 162 (NY/2015) dated 24 July 2015, the Tribunal granted the extension of time.

29. On 25 August 2015, the Tribunal received a letter from the Office of the Ombudsman and Mediation Services on behalf of both parties requesting a further extension of time until 30 October 2015, stating that, “[...] the parties have reached a settlement in principle. The details of an agreement are currently under review for approval and signature. [...] The parties have consented to this request for an extension of time and continue to work in good faith in finalizing the outcome of this mediation”. By Order No. 195 (NY/2015) dated 26 August 2015, the Tribunal granted leave to the request for time extension.

30. On 29 October 2015, the Tribunal received a letter from the Office of the Ombudsman and Mediation Services in which it stated that “[t]he parties have consented to this request for an extension of time and continue to work in good faith in having the matter concluded”. By Order No. 282 (NY/2015) dated 30 October 2015, the Tribunal granted the requested time extension until 21 December 2015.

31. On 21 December 2015, the Tribunal received a letter from the Office of the Ombudsman and Mediation Services in which it stated that, “[the Office of the Ombudsman and Mediation Services] should like to apply, on behalf of both parties, for the time for completion of the mediation to be extended until Friday, 29 January 2016 ... The parties have reached an agreement in principle and have consented to this request for an extension of time and continue to work in good faith to finalize the agreement”. By Order No. 308 (NY/2015) dated 21 December 2015, the Tribunal granted leave to the request for time extension.

32. On 27 January 2016, the Tribunal received a letter from the Office of the Ombudsman and Mediation Services in which it stated that, “[the Office of the Ombudsman and Mediation Services] should like to apply, on behalf of both parties, for the time for completion of the mediation to be extended until Friday, 26 February 2016.

The parties have reached an agreement in principle and have consented to this request for an extension of time to continue to finalize remaining details”. By Order No. 23 (NY/2016) dated 29 January 2016, the Tribunal granted leave to the request for time extension.

33. On 26 February 2016, the Tribunal received a letter from the Office of the Ombudsman and Mediation Services in which it stated that, “[the Office of the Ombudsman and Mediation Services] should like to apply, on behalf of both parties, for the time for completion of the mediation to be extended until Friday, 15 April 2016. The parties have reached an agreement in principle and have consented to this request for an extension of time to continue to finalize remaining details”.

34. By Order No. 62 (NY/2016) dated 2 March 2016, the Tribunal provided the following orders to the parties (emphasis in the original):

11. An extension of time for completion of the mediation efforts is granted until **5:00 p.m. on Friday, 15 April 2016**;

12. In case the settlement negotiations are not finalised by **5:00 p.m. on Friday, 15 April 2016**, the parties are to attend a [Case Management Discussion] at **11:00 a.m. on Wednesday, 20 April 2016** to discuss the further proceedings of the present case. The parties are to confirm their participation no later than **5:00 p.m. on Friday, 15 April 2016**. Should the parties finalize the settlement negotiations before this date, they are to inform the Tribunal immediately.

35. By email of 15 April 2016, the Office of the Ombudsman and Mediation Services notified the Tribunal that, “Please note that the parties have finalised their negotiations in the above captioned matter and the settlement agreement is circulating for final signatures”.

36. By email of 19 April 2016, copied Counsel for the Respondent, the Office of the Ombudsman and Mediation Services and an external private counsel, the Applicant informed the Tribunal, *inter alia*, that: “[her] case with the [Dispute Tribunal] has been successfully mediated by the Ombudsperson’s Office [...], leading to a mutual agreement

on 15 April, and precluding any hearing scheduled for today”. She requested that: “[a]s a result, I would also be most grateful if any reference to the case visible on google might be withdrawn, if so possible”.

37. By Order No. 94 (NY/2016) dated 19 April 2016, the Tribunal instructed (a) the parties that the CMD scheduled 20 April 2016 was cancelled, and (b) the Applicant to file, by 21 April 2016, a formal “Notice of Withdrawal” signed by her, confirming that her application is withdrawn fully, finally and entirely, including on the merits. In the Notice, in order to allow the Tribunal to make the appropriate order, the Tribunal also directed the Applicant to clarify exactly what she requested when she stated in her 19 April 2016 email that “[a]s a result, I would also be most grateful if any reference to the case visible on google might be withdrawn, if so possible” and provide justification(s) for the request. The Tribunal further provided the Applicant instructions on how to file such Notice through its eFiling portal.

38. On 20 April 2016, by regular email, the Applicant filed a Notice of Withdrawal stating as follows:

Pursuant to the terms and conditions of a recently concluded settlement agreement, the Applicant hereby withdraws all of her allegations and claims in the present proceedings before the Dispute Tribunal in finality, including on the merits. and with no right of reinstatement and therefore requests a discontinuance of the proceedings in Case No. UNDT/NY/2013/107.

39. The Registry uploaded the Notice of Withdrawal into the eFiling portal on 21 April 2016.

Consideration

40. The Tribunal commends both parties for their successful efforts in resolving this case amicably. Such efforts should be encouraged as the amicable resolution of cases saves valuable resources and contributes to a harmonious working relationship between the parties.

41. 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.

42. 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*).

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

44. 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.

45. If an identical application is filed by the same applicant against the same party after she or he waived her or his right to appeal the matter, the exception of *res judicata* can be raised by the other party or *ex officio* by the court itself. *Res judicata* requires three cumulative elements: (i) same parties; (ii) same object; and (iii) same legal cause, and has both negative and positive effects: it is blocking the formulation of a new identical application and guarantees that it is not possible to rule differently in the same matter.

46. *Res judicata* is a reflection of the principle of legal certainty and does not prejudice the fundamental right to a fair trial since the access to justice is not absolute and can be subjected to limitations resulting from the application of the other

principles. The principle of rule of law and the principle of legal certainty, expressed also by *res judicata*, require, *inter alia*, that an irrevocable decision given by the Tribunal not to be further questioned (*non bis in idem*) (see *Shanks* 2010-UNAT-026bis; *Costa* 2010-UNAT-063; *Meron* 2012-UNAT-198). As stated by the United Nations Appeals Tribunal in *Meron* that “there must be an end to litigation” in order to ensure the stability of the judicial process.

47. The Applicant clearly expressed, in her Notice of Withdrawal of 20 April 2016, her free will to fully and finally withdraw her application and thereby end the pending litigation.

48. In conclusion, the object of the withdrawal request is the right to appeal itself and represents the Applicant’s free will to end the litigation. Since the parties reached a settlement agreement, the Tribunal no longer needs to make a determination on the merits and takes note of the withdrawal.

IT IS ORDERED THAT:

49. The Applicant has withdrawn the matter in finality, including on the merits. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2013/107 is hereby closed without liberty to reinstate.

(Signed)

Judge Alessandra Greceanu

Dated this 22nd day of April 2016