



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2017/009  
Order No.: 247 (NY/2017)  
Date: 3 November 2017  
Original: English

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**Before:** Judge Alessandra Greceanu  
**Registry:** New York  
**Registrar:** Morten Albert Michelsen, Officer-in-Charge

MALANA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON WITHDRAWAL**

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**Counsel for Applicant:**  
Natalie Dyjakon, OSLA

**Counsel for Respondent:**  
Esther Uwazie, UNICEF  
Miles Hastie, UNICEF

## **Introduction**

1. On 18 January 2017, the Applicant, a former staff member with a permanent appointment, who served as a Programmer Analyst at the P-3 level in the United Nations International Children’s Emergency Fund (“UNICEF”) in New York, filed an application with the Dispute Tribunal contesting the decision of the Administration not to “meet its obligations towards [him] as a permanent appointment holder” in connection with his separation from the Organization. The Applicant requested compensation of three years and five months net-base salary, less twelve months indemnity already received, as well as two months of salary compensation awarded him following a management evaluation by the Deputy Executive Director, Management in UNICEF, but not yet received.

2. On 18 January 2017, the Registry transmitted the application to the Respondent, instructing him to file his reply by 17 February 2017. On the same day, the case was assigned to the undersigned Judge.

3. On 17 February 2017, the Respondent filed his reply in which he, *inter alia*, argued that the application is not receivable.

4. On 21 March 2017, by Order No. 49 (NY/2017), the Tribunal instructed the parties as follows:

... **By 5:00 p.m. on Friday, 7 April 2017**, the Applicant is to file a response to the receivability issues raised in the Respondent’s reply.

... **By 5:00 p.m. on Friday, 7 April 2017**, the Respondent shall file a submission providing the following information and supporting documentation in a redacted form where necessary:

- a. documents relating to the original UNICEF post of the Applicant, (post 10125) from 1 December 2012 to the present, together with the job description and title;
- b. copies of the initial letter placing the Applicant on loan together with any subsequent letters of extension;

- c. documents relating to the placement of the Applicant on UNICEF post 82029, including the job description and vacancy announcement, if any;
- d. documents relating to the Applicant's secondment post(s) within the Secretariat, including post 14787, the job description(s), and the current status of post 14787;
- e. a list of all available posts in the Secretariat and in the field within UNICEF that are at the same level or lower as that of the Applicant, together with all job descriptions and vacancy announcements;
- f. whether the Applicant was placed on a roster for any other position during her tenure with the Secretariat;
- g. whether the Applicant was considered by UNICEF for rotational appointment, for a lower post, or for direct selection;
- h. the job descriptions of all posts identified in the Respondent's reply of 20 February 2017, together with the vacancy announcement of each post and the date of when a selection to each post was made, for each selected candidate providing the candidate's level prior to the appointment and the type of appointment each candidate had at the time of selection;
- i. a copy of the Applicant's resignation letter;
- j. whether the selection process for the fifth post for which the Applicant is under consideration is yet finalized, and if so, to file supporting documentation on the selection process, including the job description, level and type of appointment which the selected staff member had prior to being appointed to this post; and
- k. copies of the following documents referenced in the Respondent's reply:
  - i. CF/AE/2010/011. Amend.1
  - ii. CF/AE/2009/005, 22 July 2009
  - iii. CF/EXD/2013/004, 5 February 2013

... By **5:00 p.m. on Friday, 21 April 2017**, the Applicant shall file, if any, his comments to the Respondent's submission, including if he was informed and if he had the opportunity to express his acceptance for any of the available posts mentioned by the Respondent, before his resignation.

- 5. On 6 April 2017, the Respondent filed his submissions pursuant to Order No. 49 (NY/2017).

6. On 7 April 2017, the Applicant filed his response to the receivability issue raised in the Respondent's reply.

7. On 28 April 2017, the parties filed a joint submission pursuant to Order No. 49 (NY/2017), informing the Tribunal that:

... [...] the following factual disputes would warrant an oral hearing and additional evidence:

- a) The applicant's potential suitability for or likelihood that he would have been selected for post numbers 96109, 14106, 52317 and 15608;
- b) The availability of these posts at the time of the management evaluation request;
- c) UNICEF's practice and mechanism associated with reabsorption of seconded staff members;
- d) UNICEF's practice and mechanism associated with staff rotation, and alternative sourcing methods; and
- e) Issues of mitigation of losses.

8. On 15 August 2017, by Order No. 161 (NY/2017), the Tribunal instructed the parties to attend a Case Management Discussion ("CMD") on 23 August 2017 at the courtroom of the Tribunal in New York in order to discuss further proceedings in the case.

9. At the CMD on 23 August 2017, the Applicant was represented by her Counsel, Ms. Natalie Dyjakon, and the Respondent was represented by his Counsel, Ms. Esther Uwazie and Mr. Miles Hastie.

10. The parties informed the Tribunal that additional evidence was to be requested. The Applicant's Counsel indicated that she would request leave to adduce oral evidence from the Applicant in relation to the impact of the contested decision on the Applicant. The Respondent's Counsel indicated that they would also request to call a number of witnesses in order to adduce additional evidence in relation to issues that required further clarification in the case, including the availability of posts in question, the Applicant's potential suitability for the available posts, UNICEF's practice and mechanism associated with reabsorption of seconded staff members and UNICEF's practice and mechanism associated with staff rotation, and alternative sourcing

methods and mitigation of losses. Both parties indicated that they had no objection to the requests made by each other.

11. Having considered the parties' statements, the Tribunal determined the Applicant's testimony to be relevant, and granted his request for additional evidence. The Respondent's request for additional evidence was granted in part regarding any available written documentation related to the UNICEF's practices and mechanisms associated with staff rotation, if applied in the Applicant's case. The Tribunal indicated that some of the factual aspects in dispute may be clarified during the Applicant's testimony and that the relevance of additional evidence requested by Respondent regarding the Applicant's suitability for some available posts and UNICEF's practice and mechanism associated with reabsorption of seconded staff member was therefore only to be determined after the Applicant's testimony.

12. The Tribunal expressed its view that both parties would benefit from the case being resolved amicably and encouraged them to continue efforts for informal resolution of the case, either through the Ombudsman or *inter partes* discussions.

13. The parties agreed to provide the Tribunal with agreed dates for a hearing, and to revert to the Tribunal with jointly proposed dates.

14. On 24 August 2017, the parties filed a joint submission indicating that "they are available for [a] hearing on between Monday, 30 October 2017 and Friday, 3 November 2017. The parties propose Tuesday, 31 October 2017 as the hearing date".

15. On 28 August 2017, by Order No. 175 (NY/2017), the Tribunal instructed the parties as follows:

... The Applicant's request to adduce oral evidence from the Applicant is granted;

... The Respondent's request to adduce additional evidence is granted in part. The Tribunal grants the Respondent leave to file any available written evidence which may be related to UNICEF's practice and mechanism associated with staff rotation if applied to the Applicant's case;

... The parties are to attend a hearing at 10:30 a.m. (New York time) on Tuesday, 31 October 2017 in the court room in New York; and

... No later than 5:00 p.m. (New York time) on Thursday, 26 October 2017, the parties are to confirm their participation at the CMD. The Tribunal notes that, if a party is unable to appear in person, it would prefer that s/he participates via skype or video link rather than by telephone. If any party wishes to participate via skype, video link or telephone, s/he is to provide her/his contact information, meaning:

- a. If possible, a skype name and/or a video link location, *and*
- b. Two telephone numbers, preferably to a cellular phone or a land line. Even if a party provides skype or video link information, s/he is also to provide two telephone numbers as a back-up in case technical problems should occur with the skype or video link connection.”

16. On 17 October 2017, the Applicant filed a request for withdrawal of proceedings, indicating that the parties had reached an agreement to fully and finally settle the case and that he withdraws the present application.

### **Consideration**

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

18. 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.

19. 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*).

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

21. 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.

22. 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: (a) same parties; (b) same object; and (c) 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.

23. *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-026; *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.

24. The Applicant clearly expressed, in the withdrawal request of 17 October 2017, his free will to fully withdraw his application and thereby end the pending litigation.

25. 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 Applicant has

withdrawn his application, the Tribunal no longer needs to make a determination on the merits and takes note of the withdrawal.

26. In light of the foregoing,

IT IS ORDERED THAT:

27. 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/2017/009 is hereby closed without liberty to reinstate.

*(Signed)*

Judge Alessandra Greceanu

Dated this 3<sup>rd</sup> day of November 2017