



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

SHEHADEH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON WITHDRAWAL

Counsel for Applicant:

Daniel Trup, OSLA
Natalie Dyjakon, OSLA

Counsel for Respondent:

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 18 April 2017, the Applicant, a staff member holding a permanent appointment and serving at the P-5 level, step 4, as a Senior Political Affairs Officer in the Department of Political Affairs (“DPA”) in New York, filed an application entitled “Application and Request for Expedited Hearing”, contesting the decisions of the Administration to reduce his contracted salary and the manner of the implementation of the Unified Salary Scale, and to downgrade his step from P-5/05 to P-5/04. The Applicant requests that the contested decisions be rescinded and to receive outstanding backdated pay accordingly.

2. On 18 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 18 May 2017.

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

4. On 18 May 2017, the Respondent filed his reply arguing, *inter alia*, that the application was not receivable, as the decision had been taken by the General Assembly and the Secretary-General was obligated to implement the General Assembly resolutions 70/244 and 71/263.

5. By Order No. 108 (NY/2017) issued on 6 June 2017, the Tribunal instructed the Applicant to file a submission addressing the issue of receivability as raised in the Respondent’s reply.

6. On 7 July 2017, the Applicant filed a response to the Respondent’s reply on receivability.

7. On 12 October 2017, the Applicant filed an updated list of the salary scale cases filed in NY and the Respondent filed additional submissions regarding the receivability of the first contested decision.

8. By Order No. 272 (NY/2017) dated 11 December 2017, the Tribunal provided the following orders:

... The present application is receivable *ratione materiae* in relation with both contested administrative decisions.

... **By 5:00 p.m. on Friday, 12 January 2018**, the Applicant shall file an updated matrix reflecting the reductions of his contracted monthly salary between 31 January and 31 December 2017, and the methodology to calculate the requested compensation..

... **By 5:00 p.m. on Friday, 12 January 2018**, the Respondent shall file a submission providing the following documents and information:

- a. Detailed presentation of the elements of the Applicant's net salary as of 31 December 2016 and of 31 January 2017-31 December 2017, together with detailed explanation of each element and the methods of calculation;
- b. The ICSC's proposal leading to the General Assembly resolution 70/244 (United Nations common system: report of the International Civil Service Commission), adopted on 23 December 2015;
- c. All documents presented to the General Assembly in relation to the recommendation of the ICSC that the proposed unified scale be updated to reflect adjustments in base/floor salaries that may be approved before its implementation as decided in para. 7 of General Assembly resolution 70/244;
- d. Whether such an update on adjustments was prepared in December 2016 before the implementation of the current unified salary scale;
- e. Whether revised estimates to address the financial implication on a provisional basis were presented to the General Assembly (referring to para. 3 of General Assembly's

resolution of 30 October 2015);

f. Whether the staff members' representatives were consulted and expressed their consent before the implementation of the unified salary scale and the related transitional measures;

g. Documents setting forth the calculation of salary rights and allowances for a new staff member in a similar position as the Applicant, which was employed on or after 1 January 2017;

h. Documents setting forth the findings of the Office of Legal Affairs that were given to the ICSC.

... The Respondent's submission shall also provide supporting documentation and address the following questions:

a. If, as recommended by the ICSC in para. 222 of its 2015 report to the General Assembly, the Applicant, as part of the group receiving prior to January 2017 a salary calculated on the dependency rate, benefitted from legal guidance to learn what the consequences of the implementation would be;

b. In light of ST/AI/2016/8 ("Dependency status and dependency benefits"), adopted on 28 December 2016 and reflecting the new definition of "dependency", which states expressly that such definition "shall enter into force January 2017", how sec. 3.4, due to the Applicant's professional level, was implemented in relation to his rights;

c. How the transitional measures were applied to the Applicant, and how the calculation was made;

d. How the dependency allowances for single staff members were calculated prior to the implementation of the unified salary scale and how they are calculated now in accordance with the mandatory applicable rates;

e. All the supporting documentation related to the decision to downgrade the Applicant from P-5/05 to P-5/04.

... The request for the suspension of the proceedings is rejected.

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

... The parties are to attend a CMD on **Wednesday, 17 January 2018 at 10:30 a.m.** and they are to confirm their availability no later than **Monday, 15 January 2018 at 5:00 p.m.**

9. On 12 January 2018, the Applicant filed a notice of withdrawal, stating that he “seeks to withdraw all his allegations and claims before the Dispute Tribunal in respect to [Case No. UNDT/NY/2017/031]”.

10. On the same date, 12 January 2018, the Respondent filed his response to Order No. 272 (NY/2017).

Consideration

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

12. 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.

13. 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*).

14. 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.

15. 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.

16. 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.

17. *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 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*, "there must be an end to litigation" in order to ensure the stability of the judicial process.

18. The Applicant expressed in his motion his will to withdraw his application and thereby to end the pending litigation.

19. 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.

IT IS ORDERED THAT:

20. The Applicant has withdrawn the matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2017/031 is hereby closed without liberty to reinstate.

(Signed)
Judge Alessandra Greceanu

Dated this 17th day of January 2018