



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

UTKINA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON WITHDRAWAL AND MOTION  
FOR REDACTION**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 27 January 2014, the Applicant filed a motion for the withdrawal of the present matter (Case No. UNDT/NY/2012/011), which concerns the non-renewal of her contract beyond 31 December 2009. The Applicant also seeks the redaction of her “identity from all the documents which are publicly available on the [Dispute Tribunal’s] website, including [Judgment] on Suspension of Action [in Case No.] UNDT/NY/2009/143”.

2. The Applicant previously appeared before the Tribunal in connection with the same administrative decision in late December 2009, when she filed an application for suspension of action, pending management evaluation, of the decision not to renew her contract beyond 31 December 2009. Her application for suspension of action was registered under Case No. UNDT/NY/2009/143 and, following a public hearing, was rejected in Judgment No. UNDT/2009/096, rendered on 31 December 2009, following which that case was closed.

## **Background**

### *Application on the merits*

3. On 14 February 2012, more than two years after the publication of Judgment No. UNDT/2009/096, the Applicant filed a request for an extension of time to file her substantive application contesting the non-renewal of her contract beyond 31 December 2009.

4. Following several motions, counter-motions, and case management orders (see Orders No. 41 (NY/2012) and No. 67 (NY/2012)), the Tribunal granted the Applicant leave to file her application on the merits, without prejudice to the issue of receivability (Order No. 92 (NY/2012)). The Tribunal also rejected

the Respondent's motion to consider the issue of receivability as a preliminary issue, finding, *inter alia*, that the determination of whether the Applicant's case is receivable would likely require further submissions and oral evidence (see Orders No. 92 (NY/2012) and No. 95 (NY/2012)).

5. On 21 May 2012, the Applicant filed the present case on the merits, registered as Case No. UNDT/NY/2012/011, following which both parties filed various motions and counter-motions regarding case management. Following the filing of the Applicant's application on the merits, the Tribunal issued seven case management orders (Orders No. 142 (NY/2012); No. 187 (NY/2012); No. 242 (NY/2012); No. 257 (NY/2012); No. 265 (NY/2012); No. 24 (NY/2013); No. 60 (NY/2013)) and held a case management discussion on 5 December 2012. Since the filing of her original application for suspension of action, the Applicant was represented consecutively by three outside counsel. She is currently self-represented.

*Applicant's motion of 27 January 2014*

6. On 27 January 2014, the Applicant filed a motion for the withdrawal of the present case and for the redaction of "her identity from all the documents which are publicly available on the [Tribunal's] website", including Judgment No. UNDT/2009/096. The Applicant refers to art. 11.6 of the Tribunal's Statute, which states that "[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal". She further states that the citation of her name in Judgment No. UNDT/2009/096 is, *inter alia*, harmful to her professional reputation and her family safety and security because of her professional work and that it discloses her health status. The Applicant further states that she "would like to mention that the right to the protection of private and family life is a fundamental human right

protected by Article 12 of the Universal Declaration of Human Rights”. Further, she states that other United Nations officials are not named in Judgment No. UNDT/2009/096.

*Respondent’s response of 31 January 2014*

7. The Applicant’s motion for withdrawal and redaction was served on the Respondent on 27 January 2014, and the Respondent duly filed his response on 31 January 2014, expressing no objections to the withdrawal of these proceedings but opposing the request for redaction.

8. The Respondent submits that the request for redaction of Judgment No. UNDT/2009/096 has been brought in the wrong proceedings as that judgment was rendered in Case No. UNDT/NY/2009/143, which has since been closed. The Respondent states that the Tribunal has no authority to make an order on redaction in response to a motion filed in a separate case, which has not been subjected to an order for combined proceedings. The Respondent further states that, in any event, there are no good reasons for redacting Judgment No. UNDT/2009/096 as the Applicant has failed to establish any unusual or exceptional circumstances justifying the redaction of her name from a judgment which has been publicly available for more than four years. The Respondent requests that the Applicant’s request for redaction be dismissed.

*Applicant’s submissions of 1 February 2014*

9. On 1 February 2014, the Applicant, without leave of the Tribunal, filed a submission with comments to the Respondent’s response of 31 January 2014. She states, *inter alia*, that Cases No. UNDT/NY/2009/143 and No. UNDT/NY/2012/011 concern the same matters and that her request for redaction

of 27 January 2014 applies to both matters and indeed all documents publicly available on the Tribunal's website.

10. On 1 February 2014, the Applicant also filed, without leave of the Tribunal, a correction to her motion of 27 January 2014. She stated in this document that she was "confused at the moment [as to] how many cases" she had with the Tribunal, as she believed that Cases No. UNDT/NY/2009/143 and No. UNDT/NY/2012/011 were "one case renumbered due to chronological reasons". The Applicant states that, if she has two cases pending, she wishes to withdraw both of them "fully and finally and requests the Tribunal to redact her identity from all the documents which are publicly available on the [Tribunal's] website or which will become publicly available".

*Applicant's submission of 15 February 2014*

11. On 15 February 2014, the Applicant filed, without leave of the Tribunal, a submission seeking clarification from the Tribunal as to how many cases she has before it. She states that "should the Tribunal confirm that the Applicant has two cases, the Applicant seeks further directions from the Tribunal on whether the Applicant should file a separate Request for Case Withdrawal for Case No. UNDT/NY/2009/096 or the Tribunal accepts the Applicant's submission of 1 February 2014 as a request for UNDT/NY/2009/096 Case Withdrawal". The Applicant also requests expeditious consideration of her requests for case withdrawal by the Tribunal.

**Consideration**

12. The Applicant has had two registered cases before the Tribunal. The first case (Case No. UNDT/NY/2009/143) was closed as a result of the issuance of Judgment No. UNDT/2009/096, when the application for suspension of the decision not to

renew her appointment was denied. The second case (Case No. UNDT/NY/2012/011) is the pending substantive application contesting the decision not to renew her appointment.

### *Withdrawal*

13. The Applicant seeks a “full and final” withdrawal of the present case. The Respondent does not object to what is termed an “unequivocal withdrawal” in his reply, and, indeed, the Applicant in her unsolicited response to the reply does not challenge that the withdrawal is unequivocal and independent of the issue of redaction of her name. The Tribunal accepts that the Applicant has decided not to proceed further with her application and has filed a motion withdrawing the matter fully, finally, and entirely, including on the merits.

14. The desirability of finality of disputes within the workplace cannot be gainsaid (see *Hashimi* Order No. 93 (NY/2011) and *Goodwin* UNDT/2011/104). Equally, the desirability of finality of disputes in proceedings requires that a party should be able to raise a valid defence of *res judicata*, which provides that a matter between the same persons, involving the same cause of action, may not be adjudicated twice (see *Shanks* 2010-UNAT-026bis, *Costa* 2010-UNAT-063, *El-Khatib* 2010-UNAT-066, *Beaudry* 2011-UNAT-129). As stated in *Bangoura* UNDT/2011/202, matters that stem from the same cause of action, though they may be couched in other terms, are *res judicata*, which means that the applicant does not have the right to bring the same complaint again.

15. The object of the *res judicata* rule is that “there must be an end to litigation” in order “to ensure the stability of the judicial process” (*Meron* 2012-UNAT-198) and that a party should not have to answer the same cause twice. Once a matter has been resolved, a party should not be able to re-litigate the same issue. An issue, broadly speaking, is a matter of fact or question of law in a dispute between two or

more parties which a court is called upon to decide and pronounce itself on in its judgment. Of course, a determination on a technical or interlocutory matter does not result in the final disposal of a case, and an order for withdrawal is not always decisive of the issues raised in a case. An unequivocal withdrawal means that the matter will be disposed of such that it cannot be reopened or litigated again. In regard to the doctrine of *res judicata*, the International Labour Organization Administrative Tribunal (“ILOAT”) in Judgment No. 3106 (2012) stated at para. 4:

The argument that the internal appeal was irreceivable is made by reference to the principle of *res judicata*. In this regard, it is argued that the issues raised in the internal appeal were determined by [ILOAT] Judgment 2538. As explained in [ILOAT] Judgment 2316, under 11:

*Res judicata* operates to bar a subsequent proceeding if the issue submitted for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard.

A decision as to the “rights and liabilities of the parties” necessarily involves a judgment on the merits of the case. Where, as here, a complaint is dismissed as irreceivable, there is no judgment on the merits and, thus, no “final and binding decision as to the rights and liabilities of the parties”. Accordingly, the present complaint is not barred by *res judicata*.

16. In the instant case, the Applicant has confirmed that she is withdrawing the matter fully, finally, and entirely, including on the merits. The Applicant’s unequivocal withdrawal of the merits signifies a final and binding resolution with regard to the rights and liabilities of the parties, requiring no pronouncement on the merits but concluding the matter *in toto*. Therefore, dismissal of her case with a view to finality of proceedings is the most appropriate course of action.

*Request for redaction*

Scope of the Applicant's request for redaction

17. Based on the wording of her filings of 27 January, 1 February, and 15 February 2014, the Tribunal accepts that the Applicant's request for redaction refers to all documents that are publicly available in the present case and Case No. UNDT/NY/2009/143, including Judgment No. UNDT/2009/096, rendered on 31 December 2009. The Tribunal notes that the Applicant's filings of 1 and 15 February 2014, albeit filed under Case No. UNDT/NY/2012/011, specifically refer to Case No. UNDT/NY/2009/143, and that the two matters are indeed related to each other. Therefore, the Tribunal finds it appropriate to dispose of the motion of 27 January 2014 and subsequent filings in one judgment under the present case number.

Applicable rules

18. The relevant provisions in the Dispute Tribunal's Statute and Rules of Procedure are the aforementioned art. 11.6 of the Tribunal's Statute (see also art. 26.2 of the Rules of Procedure), regarding the protection of personal data, and art. 9.3 of the Statute (see also art. 16.6 of the Rules of Procedure), regarding the Tribunal's oral proceedings.

19. Specifically, art. 11 of the Tribunal's Statute states:

**Article 11**

...

6. The judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal



20. Article 9 of the Tribunal’s Statute states:

**Article 9**

...

3. The oral proceedings of the Dispute Tribunal shall be held in public unless the Dispute Tribunal decides, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed.

21. The Dispute Tribunal’s Practice Direction No. 6 on Records of the Dispute Tribunal (27 April 2012), available on the Tribunal’s website, states:

**General principles**

4. Public nature of the Tribunal’s work. The work of the Tribunal should be open and transparent, except insofar as the nature of any information that is deemed sensitive.

5. The Tribunal has the power to grant, refuse or restrict access to its records.

6. Access to the records of the Tribunal shall be subject to the need to protect personal data.

...

**Access to the records by parties**

...

13. Access to materials other than judicial issuances pertaining to cases other than the ones to which one is a party can only be granted by a Judge. Written requests to this effect should be submitted through the Registrar using the generic form available on the Tribunal’s website, or some other means acceptable to the Registrar.

...

**Access to the records by the public**

16. Access to non-confidential issuances of the Tribunal such as judgments and orders is publicly available through the website of the Tribunal and at the Registry of the Tribunal.

22. The term “personal data” is not defined in the Tribunal’s Statute, Rules of Procedure, or Practice Direction No. 6.

### Practice of the Tribunal

23. The granting of anonymity by international tribunals dealing with international civil servants has been the subject of some debate and divergent practices among various tribunals. Some of the concerns expressed regarding the redaction of applicants' names were that

[i]ncreased granting of anonymity will inevitably encourage those with grudges to bring meritless claims and specious accusations under cover of anonymity, wasting Tribunal resources and risking injustice at no reputational cost to the concealed applicant. Increased anonymity will also counter productively foster the impression that resort to the tribunal is a dangerous or shameful act. This is an easily avoidable trap. The commendable healthiness and greater sense of dignity is found in the traditional, openly adversarial system where named applicants know the stakes and conduct themselves in the case accordingly.<sup>1</sup>

24. In the United Nations context, both the United Nations Dispute Tribunal and the United Nations Appeals Tribunal in their published rulings generally identify the applicants bringing cases before them. The Dispute Tribunal has previously stated that, even though motions for confidentiality must be decided on a case-by-case basis, the granting of same without sufficient reason has the potential to not only invite requests of this kind in every matter, but to negate a key element of the new system of administration of justice—its transparency (*Abubakar* UNDT/2011/219, *Raffii* UNDT/2012/205). Transparency is a key element of the new system of justice, but it is an element that must be balanced against the necessity to do justice in individual cases, including by granting certain measures of confidentiality in respect of a party's identity where it is found to be justified for privacy, security or other compelling reasons. It is essentially a question of weighing the public interest against the private interest. The Tribunal's default position is that

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<sup>1</sup> Peter C. Hansen, *The World Bank Administrative Tribunal's External Sources of Law: The Next Chapter (2006–2010) (Part II)*, 11 *The Law and Practice of International Courts and Tribunals*, 449, 479 (2012).

of transparency, unless the Tribunal determines that a competing interest outweighs it.

25. As the Dispute Tribunal stated in *Abubakr*, unless there are unusual or exceptional circumstances, particularly arising from the evidence presented at a hearing before the Tribunal, motions for confidentiality and redaction should be discouraged. For instance, in *Oummih* UNDT/2013/045, the Tribunal found that an applicant's name should be redacted only in exceptional circumstances showing valid reasons to grant special treatment to the applicant as compared to other staff members filing applications. The Tribunal further found in *Oummih* that "a case of conflict between a staff member and her supervisor ... can in no way be considered exceptional" as to justify a redaction of the applicant's name.

#### Restricted confidential and personal data

26. In many domestic jurisdictions court records and pleadings in civil actions are generally available to the public. The sealing and redacting of records is normally done under specific statutory provisions and pursuant to established grounds justified by compelling privacy or safety interests that outweigh the public interest in access to the court record.

27. For instance, in the United States, the Federal Rules of Civil Procedure, as well as the rules of civil procedure of many states, contain provisions on the protection of sensitive personal information from unnecessary disclosure in court filings. The types of data considered restricted personal information include, *inter alia*, social security numbers, dates of birth, financial account numbers, and driver's license or identification card numbers.<sup>2</sup> It is important to note that the names of

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<sup>2</sup> See, .e.g., FED. R. CIV. P. 5.2(a); S.R.C.R. 1 (Nevada Supreme Court Rules Governing Sealing and Redacting Court Records).

parties to a civil case, including the name of *dominus litis*, are generally not considered to be confidential personal data requiring redaction.

28. Further, unlike in many domestic courts, generally the case record and filings made before the Dispute Tribunal are not available to the public. The only public documents are judgments and orders that are published on the Tribunal's website. The parties and their counsel are also expected to maintain the confidentiality of all written pleadings and documentation relating to the case by ensuring that they are not disclosed to third parties.

#### Timeliness of the motion for redaction

29. For finality, certainty and stability of the legal process, there must not only be an end to litigation but finality in all respects, including, *inter alia*, the right to appeal, to apply for revision, variation, interpretation, or redaction. In this regard, the time for appeal of a Dispute Tribunal's judgment is generally 60 calendar days of its receipt (see art. 7 of the Appeals Tribunal's Statute). The time limit for an application for revision of a Dispute Tribunal's judgment is 30 calendar days from the discovery of a decisive and previously unknown fact (but generally not due to negligence), and within one year of the date of the judgment (see art. 12 of the Dispute Tribunal's Statute). All other requests, such as requests for interpretation, generally should be filed within a reasonable time, failing which it may well be argued that the presiding judge is *functus officio* or that the request has been unreasonably delayed and thus should be rejected.

30. The timing of a motion or application for a closed hearing, for confidentiality and anonymity, and for the sealing or redaction of records is therefore of utmost importance. Tribunals and courts have evolved specific definitions, processes, and limitations that apply to such matters, including time-bar provisions. Ordinarily, such applications are made during the discovery and disclosure stage, on the tendering of

evidence, at the outset of the proceedings, and sometimes during, or, at the very least, at the conclusion of the proceedings. In this instance, Judgment No. UNDT/2009/096 on suspension of action was issued on 31 December 2009, following a hearing that was open to the public, whilst the motion for redaction was filed on 27 January 2014, some four years later. Since it was rendered on 31 December 2009, the first judgment (*Utkina* UNDT/2009/096) has been cited and referred to in approximately 30 unrelated publicly available rulings of the Tribunal, which are available on its website.

31. Furthermore, once a judgment has been in the public domain for some four years, the Tribunal may not provide an effective remedy with respect to its redaction as digital copies of the original judgment may continue to exist elsewhere. For instance, a publicly available judgment may have been accessed and downloaded by the public, and posted on other websites, including online law libraries.

Alleged breach of fundamental rights

32. The Applicant submits that the inclusion of her name in any published rulings of the Tribunal is and would be in breach of her fundamental human rights to privacy, safety and security. This submission is not supported by the facts as neither the present Judgment nor Judgment No. UNDT/2009/096 contains any sensitive personal information likely to have such an impact. The Applicant is the *dominus litis* in these proceedings. She filed the present application before the Tribunal, appeared before it, and made oral and written submissions. By initiating these proceedings she exercised her lawful rights. The Tribunal is enjoined to protect personal data only, and any suggestion that the naming of an applicant automatically leads to a breach of her or his fundamental human rights lacks persuasive legal support, and, in this case, factual support, and contradicts the well-established principle of transparency in judicial matters.

Conclusion regarding the Applicant's motion for redaction

33. The Tribunal finds that the present Judgment and Judgment No. UNDT/2009/096 do not deal with the Applicant's medical history, disclose any sensitive personal information, or refer to matters of a confidential nature. Whereas the present Judgment concerns the issue of withdrawal and redaction, Judgment No. UNDT/2009/096 concerned a request for suspension of action of the non-renewal of the Applicant's contract, the reason given being lack of funds. The proceedings in that case were conducted in an open session and there was no application by the Applicant for a closed hearing or for anonymity. Even if the presiding Judge were not deemed *functus officio*, the fact that Judgment No. UNDT/2009/096 has been publicly available for four years and has been cited in approximately 30 unrelated publicly available rulings of the Tribunal, with no requests for redaction of that judgment until January 2014, is reflective of its rather ordinary nature.

34. There is no suggestion that the Applicant's claims were frivolous or specious. Access to justice and recourse to the Tribunal is not a "dangerous or shameful act". Like so many applicants appearing before the Tribunal, it was the Applicant's lawful right to institute action, and subsequently to withdraw it at her instance. Her withdrawal is no indication as to the weakness or strength of her case. She has simply chosen to withdraw her application.

35. The Applicant has therefore failed to persuade the Tribunal that the matter of non-renewal of her contract and the information disclosed in the published Judgments is of such a nature as to outweigh the guiding principle of transparency in judicial proceedings and published rulings.

36. Having considered the grounds furnished by the Applicant and the Respondent's objections, and in view of the considerations above, the Tribunal

finds that the Applicant has not established sound and valid reasons for redacting her name from the published rulings of the Tribunal.

**Order**

37. The Applicant's motion for redaction is rejected.

38. The Applicant has withdrawn this case in finality, including on the merits, with the intention of resolving all aspects of the dispute between the parties. There no longer being any determination to make, this application is dismissed in its entirety without liberty to reinstate.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 28<sup>th</sup> day of February 2014

Entered in the Register on this 28<sup>th</sup> day of February 2014

*(Signed)*

Hafida Lahiouel, Registrar, New York