



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2024/041

Order No.: 19 (GVA/2025)

Date: 6 March 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.

Procedural background

2. A detailed description of the procedural background of this case is contained in Order No. 8 (GVA/2025) issued on 17 February 2025, notably in paras. 2 to 18, as it has to be considered here recalled and known by the parties.

3. The Tribunal, aware that there was a legal dispute between the parties about the effects of the motion for withdrawal filed personally by the Applicant on 23 December 2024 and about the legal possibility of withdrawing the motion (as made on 7 and 10 February 2025 by the Applicant personally and by his Counsel respectively), by said Order No. 8 (GVA/2025) invited the parties to answer six specific questions on the matter.

4. On 28 February 2025, the parties expressed their views on the matter.

5. In particular, the Applicant stressed that the Tribunal generally requires that, when an Applicant is represented by Counsel, motions be submitted through the designated legal counsel and that the leniency and flexibility in terms of format and procedure, at times extended by the Tribunals to self-represented litigants, is usually not extended to applicants represented by Counsel. It further highlighted that the United Nations Appeals Tribunal (“UNAT”) and the International Labour Organization Administrative Tribunal (“ILOAT”) have similarly emphasized that procedural integrity requires adherence to formal representation unless explicitly waived. The correct procedural means to deliver to the Tribunal in cases of applicants represented by counsel is precisely through counsel, and in the proper format outlined in the Rules of Procedures. To allow represented applicants to submit *pro se* without dismissing counsel would lead to procedural anarchy and confusion and possibly interfere with counsel’s strategy. According to the

Applicant, in this instance, had the Registry timely identified the purported motion, it would be reasonable to assume that it would have reached out to his Counsel to ensure compliance with form and substance, which is clearly absent from the Applicant's own submission.

6. The Respondent filed his submission after the deadline assigned (so unduly benefiting from additional time to read and contrast the counterparty's submissions on the disputed issue), recalling the principles established in *Sheykhiyani* UNDT/2009/023 as a guidance to the Tribunal in considering motions to withdraw. Under those principles, the Tribunal considers whether the motion itself clearly and unequivocally demonstrates the Applicant's intention to withdraw the application and thereby it ends the proceedings. In any case, procedural law does not tolerate to turn back the clock, as reasons of security and reliability tie the parties to their statements unless there are exceptional circumstances to warrant the withdrawal of a motion for withdrawal (and the burden of proving these circumstances is on the Applicant). Accordingly, apart from these exceptional situations, a party cannot approbate and reprobate and the Tribunal has an obligation to protect the processes of the Tribunal from abuse and to do justice to both parties. The unequivocal principle established under *Sheykhiyani* is that mere error or a change of mind would not be a proper basis for the Tribunal to grant the Applicant's request to withdraw the motion to withdraw.

7. On 1 March 2025, the Applicant filed a motion to dismiss the Respondent's late submission *ratione temporis* as it was filed at 11.35 p.m., beyond the prescribed deadline (COB Geneva on 28 February 2025) pursuant to Order No. 8 (GVA) 2025, in violation of article 19 of the United Nations Dispute Tribunal ("UNDT") Rules of Procedure.

8. On 3 March 2025, the Respondent filed a response on the issue of timeliness raised by the Applicant in his motion of 1 March 2025. The Respondent maintains that his submission filed on 28 February 2025 was timely filed.

9. On 4 March 2025, the Applicant filed further submissions insisting that the Respondent's submission filed electronically at 11:35 p.m. on 28 February 2025

was filed after COB UN Geneva and after the closure of the UNDT Geneva usual working hours, and as such should be deemed to have been filed at the start of the next working day, Monday 3 March 2025, and beyond the deadline clearly established by Order No. 8 (GVA/2025).

Consideration

10. Article 12 of the UNDT Rules of Procedure states as follows:

1. A party may present his or her case to the Dispute Tribunal in person, or may designate counsel from the Office of Staff Legal Assistance or counsel authorized to practice law in a national jurisdiction.

2. A party may also be represented by a staff member or a former staff member of the United Nations or one of the specialized agencies.

11. The Tribunal's Practice Direction No. 2 on Legal Representation states as follows:

3. A party may present his or her case to the Tribunal in person, or may designate counsel as per art. 12 of Rules of Procedure of the Tribunal.

...

5. A party may change counsel at any time during the proceedings. The Tribunal shall be notified immediately [...]

12. Although the Tribunal's Rules of Procedure contain a provision for summary judgment, there are no specific provisions regarding discontinuance, abandonment, want of prosecution, postponement, or withdrawal of a case in the Tribunal's Statute or Rules of Procedure. However, abandonment of proceedings and withdrawal of applications are not uncommon in courts and generally result in a dismissal of the case, generally by way of an order.

13. Article 36 of the Tribunal's Rules of Procedure provides that:

All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its Statute.

14. In this regard, reference can be made also to art. 19 of the Tribunal's Rules of Procedure, which states that the Tribunal:

May at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

15. In this legal framework, the Tribunal preliminarily notes in general terms that, by a motion to the judge for withdrawal, an applicant can express his/her will to withdraw the application. This is not an act with necessary substantive effects, as the applicant can renounce to the proceedings, but not to the substantive right (which can have a different legal protection by other means).

16. It has to be added that, in a proceeding concerning employee's rights where the staff member challenges an administrative decision (and is required to do it within a strict timeframe), the interest in the dispute is only on the Applicant, and the Respondent has no specific interest in the judgment (because the interest of a final solution of the dispute is satisfied also by any decision which closes the dispute even only for procedural reasons, as the staff member is foreclosed in any case to present his/her case again before the judge once the deadline for the application has elapsed; in addition, the Respondent is represented by his own counsel and has no legal expenses to claim). These are reasons why no acceptance by the Respondent of the Applicant's withdrawal is required in the system (different from what is provided in some national systems, especially in civil law countries).

17. Having so said, when the Applicant is represented by Counsel, the legal standing in the proceedings is only of the Counsel, and the Applicant can only express his/her views and will only do so through the appointed representative (unless for specific activities requiring a personal intervention, such as a testimony).

In other terms, in the said situation there is no concurrent legal standing, as judicial activities can be performed only by the appointed Counsel.

18. In theory, a practical approach could suggest a different interpretation allowing a concurrent legal standing of the Applicant in person and of his/her Counsel, particularly in relation to the statement that only the party in person can take and that the Counsel can only convey to the Tribunal.

19. However, contrary to this interpretation is the consideration of the prohibition, set generally in the lawyers' code of conduct, for the legal representative of each party to contact the counterparty, being necessary that any exchange occur through the mediation of the appointed counsel. In other terms, it is within the obligation of loyalty of the counsel to avoid any contact, even indirect (that is performed by third persons, other than the Applicant's representative), with the party who is represented by counsel.

20. The same is for the Registry, moreover when the Applicant and the Registry are part of the same Organization: their relation must be only formal, always through the appointed counsel, being incompatible with the impartiality of the Registry to have any contact with the parties directly, without the necessary intermediation of their counsel.

21. The Tribunal is of the view that any different practice is not consistent with the formal rules of the judicial proceedings and with the impartial role of the Registry.

22. The same principle applies to the exchanges between the parties, which have no legal procedural value till the moment they are conveyed in the records of the proceedings.

23. In accordance with article 12 of the Tribunal's Rules of Procedure and paragraphs 3 and 5 of Practice Direction No. 2, the Applicant may decide to represent himself at any time in the proceedings, but his/her determination on his/her representation must be formally expressed and conveyed to the Tribunal in

a formal way, by a withdrawal of the power of attorney already conferred to the Applicant's Counsel.

24. This leads to the conclusion that -when the applicant is represented by counsel- any document directly filed (notably, through informal channels, like a private email) by an applicant in person—to the Registry or to the counterparty- is not lawfully filed in the proceedings, and therefore does not produce any effect. As such, the Registry shall not (and can even refuse to) put it in the records.

25. It follows that the same occurs for documents filed by the Administration (or its organs) without the intervention of the Respondent's Counsel.

26. The said principle applies also to the power of attorney conferred to the counsel, as an applicant is represented by his/her counsel till the moment he/she withdraws the legal power of attorney in a statement filed with the Tribunal, being instead irrelevant (for the representation in the legal proceedings) any statement expressed elsewhere by the applicant (for instance, by an email directly sent to the counterparty's counsel and not transmitted at the same time to the Tribunal).

27. A legal dispute is a formally regulated activity where the general practice emphasizes the importance of clear and consistent communication through appointed counsel. This approach ensures that the Tribunal can efficiently manage the proceedings and that the applicant's case is presented coherently, while accepting personal submissions by an applicant represented by counsel would create procedural confusion or disrupt the orderly administration of the case.

28. While applicants retain the right to self-representation, once counsel is appointed, all submissions are to be made through that counsel, unless the applicant formally changes his/her representation status.

29. In the Tribunal's case law, the person who generally conveys the Applicant's decision on withdrawal to the Tribunal is the Applicant's Counsel.

30. In *Adundo* UNDT/2014/009, it was Counsel for the applicants who stated that one of the Applicants wished to withdraw his case; the Tribunal advised Counsel

for the Applicants that, in this event, a notice of final and full withdrawal, including on the merits, should be filed by the said Applicant.

31. Hence, all exchanges were between the Tribunal and the Counsel, even if the substantive decision on withdrawal was to be made by the Applicant personally.

32. In *Giles* UNDT/2012/194, the Applicant informed the Tribunal that “having recently been advised concerning the receivability issues in the case by new Counsel”, she wished to withdraw her application. The Tribunal, in light of what it construed to be an equivocal withdrawal, held a case status discussion to ascertain the precise nature of the Applicant’s withdrawal; there, the Applicant’s new Counsel intervened and confirmed the withdrawal and its content and extension; the Applicant’s Counsel confirmed that the Applicant understood that this was not a withdrawal without prejudice or with a reservation of the Applicant’s right to reinstate any issues or claims.

33. In *De Graaf*, Order No. 186 (NY/2015), where the Applicant was legally represented, “Counsel for the Applicant acted sensibly, following guidance given at the case management discussion, by requesting time to have discussions with the Applicant”.

34. In addition, the Tribunal notes that, in presence of a motion filed by the legitimate person, a judicial order accepting the motion is essential for the extinction of the proceedings to come into play, that is for the effects of the withdrawal to be produced; indeed, the effects on the proceedings, although caused by the motion, are produced only at the moment of the order, when the judge accepts the motion and acknowledges the will of the Applicant, the legal standing of the withdrawer, the lack of any apparent vices, and the exhaustiveness of the withdrawal.

35. This process ensures that the withdrawal is formally recognized and that the case is appropriately closed; the Tribunal retains the discretion to deny a withdrawal request if it deems that proceedings with the case are necessary to address significant issues or to prevent potential abuses of the judicial process. In practice, while the UNDT generally respects an applicant’s wish to withdraw, it maintains

the capacity to decline such requests in circumstances where the interests of justice require continued adjudication.

36. Between the moment the applicant files the motion and the judge rules on it, the Respondent is not without protection, as he can solicit the judge to rule on the motion and close the case.

37. In the Tribunal's view, a motion for withdrawal-lawfully filed- can be revoked. This interpretation is suggested by the need to keep offering protection to the person claiming a right, in accordance with the consideration that the closure of the proceedings depends exclusively on the expression of will of the Applicant (through his/her legal representative) and has no other reason, so that no competing interests require protection, as above recalled.

38. The power to invoke judicial protection of a staff member's right is his/her only business and the decision to proceed or not with the judicial proceedings rests upon his/her will only.

39. Moreover, allowing the Applicant's case to proceed does not place the Respondent at a disadvantage, as the case remains at the same procedural stage it would have been in, before the filing of the motion for withdrawal.

40. Therefore, the Tribunal disagrees with the statement in *Sheykhiyani*, which found that:

once sent to the court a withdrawal of action cannot be made undone. In general procedural law does not tolerate to turn back the clock, as reasons of security and reliability tie the parties to their statements unless they were in error about their meaning.

41. It is important to stress, also, that -in contrast with the recalled precedent- no specific reason for withdrawing the motion for withdrawal must be offered, as no reason is required for withdrawal as well, being the effect based on the simple expression of will by the applicant. In other terms, even with a will to withdraw freely and lawfully expressed, the Applicant can revoke the motion (before the judge has ruled on it, of course) without giving a specific reason; he/she has not the burden to show any cogent and consistent arguments to establish that there are

exceptional circumstances that would warrant the Tribunal to allow him to withdraw the motion to withdraw.

42. Moreover, like withdrawal does not require acceptance by the counterparty, also its revocation does not require any acceptance.

43. In its practice, the Tribunal issues an order to close a case following the applicant's motion to withdraw his/her application. The "extinction of the proceedings" is achieved by the issuance of an order to close the case.

44. Of course, there is a limit to the faculty of withdrawal, as established by the Appeals Tribunal in *Charles* 2014-UNAT-437, paras. 23 - 27, once the Tribunal has issued an order closing the case upon the applicant's motion for withdrawal, the Tribunal does not have competence to reinstate the application under its Statute.

45. This Tribunal follows this conclusion, which it finds applicable whatever could have been the reasoning by the Tribunal, and even if it did not assess properly the regularity of the withdrawal. Once closed, the case cannot be reopened anymore and an order on withdrawal has the substantive final effects of a judgment on the proceedings and it cannot be revoked; the only remedy to any error is an appeal. This is true to the point that the Respondent also noted that some Judges of the Tribunal have issued judgments, and not orders, upon such motions (such as in *Kamali* UNDT/2019/075).

46. Therefore, also the Respondent's objection -that there is no basis on which to distinguish the Tribunal's consideration of the Applicant's motion to withdraw his application in Case No. UNDT/GVA/2024/015 and his motion to withdraw in this case- fails, being the events different in the recalled cases (whatever was the cause of that difference) and being only Case No. UNDT/GVA/2024/015 already closed.

47. Applying the said principles to the case at hand, the Tribunal notes preliminarily that the Applicant in a statement personally filed on 23 December 2024 explicitly wrote that that "the contested issue is being addressed through other mechanisms and does not require a remedy through the Tribunal at

this time”; his withdrawal was therefore intended to produce only procedural effects.

48. In the case, the motion for withdrawal was not properly filed through the Applicant’s Counsel, who was the only person having legal standing for conveying the motion to the Tribunal, as mentioned above. Therefore, the Tribunal has to disregard it absent proper form and procedure. After that motion, the case remained active, at the same procedural stage; withdrawal was then revoked before it produced any effect.

49. The Tribunal considers that granting the Applicant’s request does not reset the case but merely ensures that the substantive claims are heard as initially intended.

50. This Tribunal is well aware that, being the Applicant represented by Counsel, the same requirements of legal standing are required for the revocation of the motion for withdrawal. The Tribunal notes, however, that in the present case the revocation made by the Applicant personally was followed by a motion by his Counsel asking to proceed in the dispute.

51. The Applicant is still represented in these judicial proceedings by his legal Counsel Manuel Calzada, as confirmed in the preliminary statement in the Applicant’s response to Order No. 8 (GVA/2025), that stressed that “Legal Counsel ...(was) duly appointed” and that “the Applicant at no stage having withdrawn the appointment”.

52. In the Tribunal’s view, Annex 2 of the Respondent’s latest submission, which was filed late and whose content could be related to any ALWOP prolongation, does not contain any specific reference to these proceedings and is not relevant to the present case for the reason already expressed above.

53. Therefore, the proceedings are not over. Accordingly, the matter can proceed to be examined on the merits in the interest of justice and fairness and can continue with the judicial activities planned as contained in Order No. 4 (GVA/2025).

Conclusion

54. The Applicant's motion dated 23 December 2024 to withdraw his application in Case No. UNDT/GVA/2024/41 is without any effect.

55. Order No. 4 (GVA/2025) stays, with the only modifications specified below; all the remaining parts are confirmed.

56. By **Tuesday, 11 March 2025** (Geneva COB time):

a. The Respondent shall file the investigation report in its final version, including all its annexes;

b. The parties shall provide the Tribunal with the information required under paras. 25 and 32 of the said Order No. 4 (GVA/2025), and with their requests and observations on evidence, if any, as specified above;

c. The parties may submit all the documents they find relevant for the case, with the warning that other production of documents after 11 March 2025 is barred, except if a late production could be exceptionally justified.

57. By **Friday, 14 March 2025** (Geneva COB time), the parties will file their comments on the counter parties' requests, if any, and observations on evidence.

(Signed)

Judge Francesco Buffa

Dated this 6th of March 2025

Entered in the Register on this 6th day of March 2025

(Signed)

Liliana López Bello, Registrar, Geneva