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Introduction

1. On 1 October 2013, the Applicant filed an application contesting his non-selection to two Deputy Director positions in the Investigations Division, Office of Internal Oversight Service (“OIOS”), advertised through Job Opening No. 12-LEG-OIOS-23183-R-VNA (X) and Job Opening No. 12-LEG-OIOS-23591-R-NAIROBI (X) (“the job openings”).
2. On 2 October 2013, the Applicant filed a “Disclosure Request-Clarification” and, on 31 October 2014, an addendum with annexes to his application as well as a request for Case Management Discussion (“CMD”).
3. On 31 October 2013, the Respondent filed his reply, contending that the Applicant’s claims were without merit.

Procedural background

4. On 1 November 2013, the Tribunal (Duty Judge), by Order No. 283 (NY/2013), found the Applicant’s request for a CMD premature and declined the motion. The Tribunal also directed the Applicant to provide a succinct three-page response to the Respondent’s reply.
5. On 5 November 2013, the Applicant filed a response to Order No. 283 (NY/2013), followed by a further one page filing on 7 November 2013 reiterating his previous request for a CMD.
6. By Order No. 296 (NY/2013) dated 7 November 2013, the Tribunal (Duty Judge) rejected the Applicant’s request for CMD. The case was set to join the queue of pending cases to be assigned to a judge in due course. It was noted that all further filings and correspondences in this case were stayed

14. On 10 December 2014, the parties attended a CMD during which the Tribunal invited both parties to explore the possibility of informal resolution. The Applicant reaffirmed his agreement, as indicated in the jointly signed statement filed on 1 December 2014, to such a course of action, including possible referral to the Office of the Ombudsman and Mediation Services. The Respondent requested one day to file a response to this matter.

15. On 11 December 2014, Counsel for the Respondent confirmed that he was agreeable to having the matter referred to the Office of the Ombudsman and Mediation Services.

16. By Order No. 340 (NY/2014) dated 15 December 2014, with the consent of the parties, the Tribunal ordered that the present case be referred to the Office of the Ombudsman and Mediation Services and that the proceedings be suspended until 10 March 2015 by which time the parties were to inform the Tribunal whether this case had been resolved.

17. Subsequent a number of time extensions, by letter dated 10 April 2015, the Office of the Ombudsman and Mediation Services informed the Tribunal that “the parties did not reach a settlement in mediation”.

18. By motion dated 13 April 2015, the Applicant submitted an addendum to the jointly signed statement of the parties pursuant to Order No. 295 (NY/2014).

19. On 23 April 2015, the Applicant submitted a “Legal Representative Authorization Form”, indicating that Mr. Robert Appleton would act as his legal representative in the present case.

20. By email of 27 May 2015 to the Tribunal, the Applicant (on his own) requested an update on the status of the case.

21. By Order No. 109 (NY/2015) dated 5 June 2015, the parties were called to attend a CMD on 22 July 2015, which was rescheduled for administrative reasons to 27 July 2015. On 15 June 2015, the Applicant informed the Tribunal that his Counsel was not available in July. In response to Order No. 117 (NY/2015) dated 16 June 2015, parties indicated that they would be available for a CMD on 6 August 2015.

22. On 6 August 2015, as instructed by Order No. 164 (NY/2015) dated 24 July 2015, the parties attended a CMD. During the CMD, Counsel for the Applicant mentioned that the parties had been close to reach an amicable settlement and expressed his willingness to continue the informal discussions in the present case. Counsel for the Respondent replied that she had no instructions to this end, but that she would contact OIOS for a response as soon as possible.

23. On 6 August 2015, the Tribunal issued Order No. 180 (NY/2015) ordering the Respondent to file and serve a response as to whether the informal discussions were to be continued.

24. On 7 August 2015, the Respondent filed a submission to confirming that he was agreeable to having the matter referred to the Office of the Ombudsman and the Mediation Services.

25. By Order No. 182 (NY/2015) dated 10 August 2015, the Tribunal referred the case to the Office of the Ombudsman and Mediation Services and suspended the proceedings before the Tribunal until 10 November 2015.

26. On 12 August 2015 the Applicant filed a motion for expedited review and order for the immediate production of documents and records. On 13 August 2015, the Counsel for the Applicant was informed by email from the Registry that, under the instructions of the Tribunal, starting from 10 August

2015 and during the suspension of the proceedings before the Tribunal, all case-related matters and/or requests were addressed to and considered by the Office of the Ombudsman and Mediation Services.

27. On 10 November 2015, the Office of Ombudsman and Mediation Services informed the Tribunal that “as a result of the fact that the parties could not agree on the question of participation in the mediation, the matter did not proceed to mediation”.

28. By Order No. 291 (NY/2015) dated 12 November 2015, the Tribunal instructed the parties to attend a CMD on 9 December 2015 to discuss the further proceedings of the present case.

29. At the CMD on 9 December 2015, Counsel for the Applicant confirmed that informal settlement discussions were ongoing with the Department of Management but stated that there was no need for suspending the proceedings. Counsel for the Respondent indicated that he was of the view that the proceedings should not continue while the settlement negotiations were ongoing.

30. By Order No. 305 (NY/2015) dated 11 December 2015, the Tribunal ordered the parties to attend a CMD on 2 February 2016 to provide an update on the negotiations and to confirm their participation no later than 27 January 2016.

31. On 27 January 2016, Counsel for the Respondent confirmed his availability for the CMD scheduled for 2 February 2016.

32. On 29 January 2016, the Applicant informed the Tribunal that his Counsel was not available to attend the CMD scheduled for 2 February 2016, indicating that “discussions with management have progressed and are continuing toward a possible informal resolution”. The Applicant therefore

requested a two-week extension ~~and~~ “towards the continuance of the mediation process”.

33. By Order No. 24 (NY/2016) dated 29 January 2016, the Tribunal granted the Applicant’s request for ~~extension~~ of time and called the parties to attend a CMD to discuss the further ~~proceedings~~ of the present case on 17 February 2016.

34. In response to Order No. 24 (NY/2016) dated 12 February 2016, the Applicant requested “an additional two-week extension based on his assurances and those of Management ~~that~~ efforts continue to seek an informal resolution to the issues at hand”.

35. By Order No. 39 (NY/2016) dated 12 February 2016, the Tribunal granted the request for ~~extension~~ of time and a CMD was scheduled for the parties to discuss further ~~proceedings~~ of the present case on 7 March 2016.

36. On 29 February 2016, the Applicant submitted a response to Order No. 39 (NY/2016) requesting “[...] an ~~extension~~ until 6 April so that the Tribunal can be apprised of a final determination ~~as to~~ whether or not the matters at hand will be resolved through mediation ~~or~~ proceed to case management”.

37. By Order No. 60 (NY/2016) dated 29 February 2016, the Tribunal granted the requested extension of ~~time~~ and called the parties to attend a CMD to discuss the further proceedings of the present case on 12 April 2016.

38. By response to Order No. 60 (NY/2016) dated 6 April 2016, the Applicant advised the Tribunal that “~~the~~ parties were not able to come to an agreement in relation to a possible informal resolution to the matters [at] hand” and that the Applicant and his Counsel ~~would~~ be unavailable ~~to~~ participate in a case management discussion (“CMD”) during the periods from 10 to 20 April 2016 and from 13 May to 8 June 2016.

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Order No. 272 (NY/2016)

46. In the joint statement, the Applicant set out a list of 19 separate documents or categories of documents that he wished to produce. The documents were set out at sub-paras. 24(a)–(s) of the joint statement as follows:

24. As provided for paragraph 11.e the Applicant wishes to bring to the Judge's attention his intention to produce the following documents:
 - a. Copy of the [Under-Secretary-General, "USG"]/OIOS Compact for 2011, 2012 & 2013 (open source document);
 - b. Copy of the Applicants 2011-2012 ePAS performance appraisal;
 - c. Copy of the D1 Vacancy Announcements
 - d. UNDT Order 103 New York/2013
 - e. Applicants submission to the [Management Evaluation Unit, "MEU"] dated 30 April 2013; and addendums
 - f. Response from MEU to Applicants submission dated 22 October 2013
 - g. Copy of [GB] Transmittal Memo (Vienna) dated 27 June 2013
 - h. Copy of [GB] Transmittal Memo (Nairobi) dated 27 June 2013
 - i. Copy of United Nations Comparative Analysis Report Job Opening #23591
 - j. Copy of United Nations Comparative Analysis Report Job Opening #23183
 - k. Email from the USG/OIOS to the Applicant dated 29 July 2013 05:48 PM;
 - l. Email from the Applicant to the USG/OIOS dated 29 July 2013 08:32 PM;
 - m. Copy of Memorandum from USG/OIOS to Mr. [CR], Chief Administrative Law Section dated 11 October 2013
 - n. Copy of a Competency-based Interview Assessment Sheet;

- o. Copy of Applicant's application for the D2 Director Ethics Office dated 17 October 2014
- p. Copy of the Office of Human Resource Managements response dated 29 October 2014 informing the Applicant he did not meet the selection criteria due to the provisions of 6.1 of ST/SGB/2011/1
- q. ST/SGB/2011/1
- r. Various General Assembly and 5th Committee publications held by the Official Document System of the United Nations as they pertain to vacancy rates at the Office of Internal Oversight Services
- s. Interview record dated 30 June 2014 between the Applicant, Ms. [EB] and Mr. [JG] UNFPA.

47. The Tribunal considered the documents indicated at sub-paras. 24(a)–(c) and (e)–(m), already filed by the Applicant, relevant for the fair disposal of the case.

48. The Tribunal noted that the documents identified as sub-paras. 24(d) and (q) were, respectively, a previous order of the Tribunal published on its website, and a bulletin of the Secretary-General. The Tribunal considered Order No. 103 (NY/2013) relevant for the present case and the Applicant was instructed to file it. However, ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations) was to be considered evidence, but rather applicable law invoked by the Applicant.

49. The Applicant was granted leave to file the document identified at sub-para. 24(n).

50. The Tribunal ruled that the documents identified at sub-paras. 24(o) and (p) are not relevant to the proceedings in the present case, since they were related to another selection process.

51. The Tribunal stated that it would ~~rese~~ its ruling on the relevance and admissibility of the documents identified at sub-paras. 24(r) and (s) until after it has heard oral testimony ~~the~~ hearing on the merits.

52. In the joint statement, the Applicant also ~~re~~ requested production of 15 separate documents or ~~copies~~ copies of documents. The ~~documents~~ documents were set out at sub-paras. 25(a)–(o) of the joint statement as follows:

25. The Applicant also requests production of the following documents:

- a. Ms. [RB]'s prohibited conduct complaint against the Director ID/OIOS;
- b. Ms. [RB]'s MEU application (including any attachments thereto) in relation to the D1 selection process for the Investigations Division OIOS;
- c. The MEU response to Ms. [RB]'s application in relation to the DI selection process for the Investigations Division OIOS;
- d. Ms. [S]'s MEU application in relation to the ~~D1~~ selection process for the Investigations Division OIOS;
- e. The MEU response to Ms. [S]'s application in relation to the D1 selection process for the Investigations Division OIOS.
- f. The complaint submitted by Mr. [JF] in relation to the accusations made by Ms. [RB] in her above noted MEU submission as summarized by UNDT/NY/2013/025;
- g. Any preliminary investigation and/or inquiries undertaken by the USG/OIOS ~~in relation~~ to the release and/or utilization of confidential information associated to the OIOS DI recruitment process; including all emails and “everything” else (as commented by the ~~USG~~ OIOS) that was forwarded to the Deputy Director ID/OIOS by the Administration Officer ID/OIOS.
- h. All documents (including but not limited to covering memorandums, e-mail exchanges and attached documents) that were forwarded to the Management Evaluation Unit by anyone in OIOS for their consideration in the compilation of the MEU response to Ms. [RB] (item b.)

i. All documents (including but not limited to covering memorandums, e-mail exchanges and attached documents) that were forwarded to the Management Evaluation Unit by anyone in OIOS for their consideration in the compilation of the MEU response to Ms. [S] (item d.)

j. The Hiring Manager's recommendations;

k. The personal notes, as completed by each panel member stemming from the written examination(s) and telephone interview(s) in relation to the Applicant, myself, Mr. [JF] and Mr. [BS] (with the latter two being the selected candidates.)

1. The justification provided to OHRM for the selection of Mr. [BS] as an external candidate over that of the Applicant, an internal candidate, as required by paragraph 9.3 of ST/AI/2010/3.

m. All documents pertaining to the D1 selection process whether they were generated in document format, e-mail or electronic entry within the INSPIRA system

n. All e-mails or other documents from the Director ID/OIOS requesting the Organization commence an investigation pertaining to the issues raised by or implicating Ms. [RB]

o. The order or direction from Ms. [EB] to commence an investigation against Ms. [RB].

53. At the CMD, the Applicant indicated that he no longer requested the production of the documents set out in sub-paras. 25(d)–(f), (n), and (o).

54. The Tribunal stated that it would reserve its ruling on the admissibility of the documents identified at sub-para. 25(a) and (g)–(i) until after it has heard oral testimony at the hearing on the merits.

55. The Tribunal stated that it would reserve its ruling on the admissibility of the documents identified at sub-para. 25(b) and (c) until after it receives confirmation from the Respondent as to whether a copy of the relevant request for management evaluation filed by Ms. B, and the MEU response to the

59. In the joint statement, the parties each proposed witnesses that they intend to call at a hearing on the merits. The following common witnesses were identified by both parties:

- a. The members of the assessment panel: Mr. MS; Mr. DK; Ms. EB and Mr. KL; and
- b. Ms. CL, the former USG/OIOS.

60. In addition, in the joint statement, the Applicant identified another eight proposed witnesses in addition to the Applicant himself. However, at the CMD, the Applicant stated that, of the eight further witnesses, the only individual he still intended to call is Mr. GB. At the CMD, the Applicant also proposed an additional witness: Mr. CS.

61. The Tribunal was informed by the Applicant that he was aware that Mr. MS was in principle available to testify but he still had to contact the other proposed witnesses and confirm their availability to the Tribunal. The Respondent's Counsel also indicated that he also had to verify and confirm the availability of his proposed witnesses.

62. Consequently, the Tribunal stated that the Applicant's testimony was considered to be relevant and that

63. By Order No. 118 (NY/2016) dated 12 May 2016, the Tribunal provided the following orders:

27. By 5:00 p.m. on Friday, 3 June 2016 the parties are to file the information and documents set out below:

a. The Applicant is to file the documents identified at paras. 11 and 12 of this Order;

proposed to be heard and ~~they~~ agreed on a hearing ~~on~~ the merits in the first two weeks of October 2016.

68. By Order No. 173 (NY/2016) dated 19 July 2016, the Tribunal noted that it considered all written ~~and~~ oral evidence ~~submit~~ted by the parties relevant to the present case and ~~order~~ed the parties to attend a hearing on the merits on 11, 13 and 14 October 2016.

69. On 1 September 2016, the Applicant ~~filed~~ a “Renewed application for expedited review and order for ~~production~~ of documents and records”.

70. In his response dated 21 ~~September~~ 2016 to the Applicant’s 1 September 2016 submission, the Respondent ~~stated~~ that the motion should be denied.

71. By Order No. 222 (NY/2016) ~~date~~ 23 September 2016, the Tribunal granted the Applicant request in part:

18 The Applicant’s request for immediate production of documents and records as per his 1 September 2016 submission is granted in part

73. On 5 October 2016, the parties filed a joint submission in response to Order No. 173 (NY/2016).

74. A hearing on the merits took place on 11, 13 and 14 October 2016. The Applicant gave his witness testimony on 11 October 2016 and Counsel for the Applicant informed the Tribunal that his client wished to withdraw Mr. CS as a witness. On 13 October 2016, after having conferred with Counsel for the Respondent regarding the terms of the confidentiality agreement between Mr. MS and the Organization, Counsel for the Applicant informed the Tribunal that his client wished to withdraw Mr. MS as a witness. Mr. GB, Ms. EB, and Mr. DK then provided their witness testimonies. After Mr. DK's testimony, the Applicant's Counsel informed the Tribunal that his client wanted to make an additional statement as part of his testimony and requested the permission to do so the following day. The Respondent's Counsel had no objection and the Tribunal granted the request. On 14 October 2016, at the end of the hearing, the Tribunal recommended the parties to review the entire evidence on record and to complete, if possible, their prior efforts for informal resolution of the present case. The counsel for the Respondent informed the Tribunal that the job opening relevant to the present case was position specific and not a generic job opening.

75. During the hearing and by Order No. 248 (NY/2016) dated 21 October 2016, the Tribunal instructed the Respondent to file additional evidence, and both parties to file their closing submissions based only on the evidence before the Tribunal, including submissions on the relevance of paragraph 6 and 9 of ST/AI/401 as amended by ST/AI/2003/4 within three weeks from the date the hearing transcripts have been made available to the Tribunal.

77. The hearing transcripts were made available to the parties on 28 October 2016. The Registry of the Dispute Tribunal therefore, informed the parties via email that the deadline to file the respective closing submissions was 5:00 p.m. on 18 November 2016.

78. On 11 November 2016, the Applicant filed a response to the Respondent's submission of 21 October 2016, requesting that the Tribunal direct the Respondent to file additional evidence by 18 November 2016.

79. On 15 November 2016 the Applicant filed a motion for extension of time to file his closing submissions through 29 November 2016, due to "unanticipated travel commitments of the Applicant's counsel and the Applicant's own travel schedule". The Applicant also reiterated his request formulated in his submission filed on 11 November 2016, asking

intervention from the Tribunal on the production of certain documents which the Applicant, pursuant to the directions of the Tribunal at the hearing and Order 248, anticipated would be available for the closing submissions.

The Applicant respectfully submits that it would be beneficial for the p rm2

5. The Applicant has always remained open to informal resolution of the matters before the Tribunal and wishes to take advantage of this renewed opportunity to do so. The issues raised in the Applicant's first motion for extension still apply, as there remain unanticipated conflicts between the travel schedules of the Applicant and his counsel; further, in the event that the informal settlement is unsuccessful, the Applicant respectfully maintains that a ruling from the Tribunal on the Applicant's 11 November 2016 submission will be beneficial to the parties prior to the filing of closing statements.

6. In order to allow sufficient time to maintain that

88. 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 with 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*).

89. 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.

90. An application can be withdrawn orally and/or in writing, partially or entirely. The withdrawal request can refer to the pending application (as a procedural act) or to the right to appeal itself.

91. If an identical application is filed by the same applicant against the same party after she or he waived her/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 re-litigate differently in the same matter.

92. *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 (*in 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.

93. The Applicant clearly expressed his withdrawal request of 5 December 2016, his free will to finally withdraw his application and thereby end the pending litigation.

94. 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.

95. In light of the foregoing,

IT IS ORDERED THAT:

96. 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/2013/112 is hereby closed without liberty to reinstate.

(Signed)

Judge Alessandra Greceanu

Dated this 6th day of December 2016