Introduction

1. The Applicant, an Arabic Translator, Arabic Translation Service, Department for General Assembly and Conference Management at the United Nations Headquarters, has two cases pending before the Dispute Tribunal. In the first case—Case No. UNDT/NY/2012/003 (filed on 27 January 2012)—he contests the propriety of the extension of his probationary appointment instead of conversion to a permanent appointment status. In the second case—Case No. UNDT/NY/2013/033 (filed on 24 April 2013)—the Applicant contests the decision to separate him from service following the decision not to grant him a permanent appointment upon the completion of his probationary employment period.

Background

2. On 25 April 2013, the Applicant filed a motion for expedited hearing in Case No. UNDT/NY/2013/033. On 29 April 2013, by Order No. 118 (NY/2013), the Tribunal denied the request for expedited hearing but, in order to accommodate both parties and due to the particular circumstances of the case, ordered, under art. 10.2 of its Statute, suspension of "the implementation of the decision to separate the Applicant ... pending the final determination of the substantive merits of the application or until such further Order as may be deemed appropriate by the Tribunal". The Secretary-General appealed Order No. 118 and, on 31 July 2013, the United Nations Appeals Tribunal ordered rescission of Order No. 118 (*El-Komy* 2013-UNAT-324).

3. By Order No. 156 (NY/2013), the Dispute Tribunal directed the parties to file a joint submission stating, *inter alia*, whether they agree to attempt to resolve Cases No. UNDT/NY/2012/003 and UNDT/NY/2013/033 informally either through the Mediation Division of the United Nations Office of the Ombudsman

and Mediation Services or through *inter partes* discussions. Failing to agree to informal resolution of the cases, the parties were directed to file a jointly-signed statement in preparation for a hearing on the merits. The parties were ordered to file their joint statement by 2 July 2013. The deadline was subsequently extended by Order No. 162 (NY/2013), at the Respondent's request, until 15 July 2013.

4. On 15 July 2013, the parties filed a joint submission stating their agreement to attempt informal resolution of the cases through the Mediation Division. The parties requested the Tribunal to "give appropriate direction to the Mediation Division for mediation proceedings to be initiated on an expedited basis". The parties agreed that mediation should proceed as soon as possible.

5. By Order No. 169 (NY/2013), dated 15 July 2013, the Tribunal referred the two pending cases to mediation under art. 15 of the Tribunal's Rules of Procedure. The Tribunal explained in its Order that it was giving a short period of time of two weeks for mediation "in view of the urgency with which the parties are seeking informal resolution". The Tribunal stated that, in its view, these cases were particularly ripe for informal resolution, and expressed its appreciation that the Mediation Division and the parties would "take all appropriate steps to ensure that these cases are resolved in the most expeditious manner possible". The Tribunal further ordered that, on or before Monday, 29 July 2013, "the parties or the Mediation Division shall inform the Tribunal as to whether the cases have been resolved".

6. On Thursday, 1 August 2013, the Applicant filed an urgent request for a status conference "to set dates for an expedited hearing to be completed prior to 31 August 2013". The Applicant stated that, despite the fact that the parties had submitted to mediation, he had been informed by a decision dated 1 August 2013 that he would be separated from service effective 31 August 2013 as a result of the judgment of the United Nations Appeals Tribunal in *El-Komy* 2013-UNAT-

324, dated 31 July 2013, whereby the interim measures order was rescinded. The Applicant contended that the parties were still in the middle of mediation proceedings, yet the Respondent had chosen to separate the Applicant from service, thus demonstrating bad faith and a disinterest in resolving the matter informally.

7. On Friday, 2 August 2013, in view of the Applicant's submission and not having received any submissions from the parties or the Mediation Division contrary to Order No. 169 regarding the status of their mediation efforts, the Tribunal set the matters down for a case management discussion on 6 August 2013.

8. Thereafter on 2 August 2013, the Mediation Division submitted a letter stating that "the parties are still actively involved in mediating this case" and asking, "[i]n an effort to continue in good faith to settle this matter", an extension of time "for completion of mediation" to Friday, 30 August 2013.

9. By Order No. 190 (NY/2013), dated 7 August 2013, the Tribunal directed that, on or before Thursday, 15 August 2013, the parties or the Mediation Division shall inform the Tribunal as to whether the cases have been resolved.

10. On 15 August 2013, the Mediation Division informed the Tribunal that "the parties are still actively involved in mediating this case" and although

parties had consented to such request. The requested extension was granted by Order No. 220 (NY/2013), dated 30 September 2013.

12. By letter dated 11 September 2013, the Mediation Division sought a further suspension of proceedings for a period of two days to complete the mediation. The requested extension was granted by Order No. 227 (NY/2013), dated 11 September 2013.

13. On 13 September 2013, the Tribunal received a letter from the Mediation Division advising that both matters had been successfully resolved. On the same day, the Applicant filed a notice of withdrawal of the present case, confirming the resolution of the dispute and withdrawing both applications "fully, finally, and entirely, including on the merits".

Consideration

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 as a valid defence *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. Once a matter has been determined, 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. Article 2.1 of the Tribunal's

Statute states that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual", as provided for by art. 3.1 of the Statute. Generally, a judgment involves a final determination of the proceedings or of a particular issue in those proceedings. 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 litigant should not have to answer the same cause twice. Of course, a determination on a technical or interlocutory matter is not a final disposal of a case, and an order for withdrawal is not always decisive of the issues raised in a case.

16. 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*.

17. The Applicant has two pending matters before the Tribunal which, although extrinsically linked and convenient to have been dealt with jointly, concern two discrete contested decisions supported by separate facts, issues and legal arguments. In the instant case, the parties have resolved their rights and

liabilities in all essential elements by consensus, therefore disposing of the merits. The Applicant confirmed that, following successful mediation, he was indeed withdrawing the matter *in toto*, that is, fully, finally, and entirely, including on the merits. Therefore, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

Conclusion