



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON WITHDRAWAL

Counsel for Applicant:

Brian Gorlick, OSLA

Counsel for Respondent:

Sophie Parent, ALS/OHRM, UN Secretariat

Introduction

1. On 4 February 2011, the Applicant filed an application contesting the decision to impose on him the disciplinary sanction of a written censure following conduct that was determined to not be in accordance with provisions of ST/SGB/2004/15 (Use of information and communication technology resources and data) as well as a motion for confidentiality in which he sought that “for the purposes of the proceedings initiated with his application, his identity be kept confidential”.

2. On 10 February 2011, the Tribunal (Judge Ebrahim-Carstens) issued Order No. 41 (NY/2011) providing the Respondent with an opportunity to respond to the Applicant’s motion. On 17 February 2011, the Respondent replied to the motion, stating that there were no exceptional circumstances to justify that the present proceedings be deemed confidential. On 25 February 2011, the Tribunal (Judge Ebrahim-Carstens) issued Order No. 59 (NY/2011) rejecting the Applicant’s request for confidentiality.

3. On 29 March 2011, the Respondent filed his reply requesting that the Tribunal reject the application.

4. On 22 May 2013, the undersigned Judge was assigned to this matter.

5. On 20 August 2013, the Tribunal issued Order No. 205 (NY/2013) directing the parties to submit a joint statement identifying the agreed facts and legal issues, as well as whether a judgment could be rendered on the papers before it. The parties filed their joint submission on 20 September 2013 and also informed the Tribunal that they did not require a hearing in the present case.

6. On 16 September 2013, the Applicant filed a motion for withdrawal in the present case and in another case presently before the Tribunal, Case No. UNDT/NY/2012/070. The Applicant’s motion contains three distinct requests: a request to join the present case with Case No. UNDT/NY/2012/070, a withdrawal of

the two cases, and a request for all the documents contained in each of their case files to be placed under seal upon the withdrawal of the applications. The Applicant stated that on 10 September 2013, the Respondent communicated, in writing, with the Applicant concerning these cases and stated that he did not object to the Applicant's request to place all the documents in the case files under seal upon the withdrawal of the Applicant's applications. The Applicant considers that any reference to these cases on the United Nations website, which is publicly accessible, would impose an unjustified additional punishment on him and his family.

Consideration

Request for joinder

7. On 7 September 2012, the Applicant filed an application, registered under number Case No. UNDT/NY/2012/070, contesting the decision of the Assistant Secretary-General of the Office of Human Resources Management not to grant him a permanent appointment.

8. Prior to 16 September 2013, the Applicant never requested that the present case and Case No. UNDT/NY/2012/070 be considered jointly. The Tribunal considers that the Applicant's motivation to withdraw both cases does not present sufficient legal grounds to grant such a request.

9. The request to join these two cases, Case No. UNDT/NY/2011/012 and Case No. UNDT/NY/2012/070, is rejected and the Tribunal will further refer only to the withdrawal of the present case—Case No. UNDT/NY/2011/012. The request to withdraw Case No. UNDT/NY/2012/070 will be considered separately by the assigned judge.

Withdrawal

10. 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.

11. The 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 (*rationae personae*), within the applicable time limit (*rationae temporis*) and in front of the competent Tribunal (*rationae loci*).

12. Consequently, to be legally valid, a request for the withdrawal of an application has to be formulated by the applicant personally or by his counsel and must consist of the unconditional expression of the applicant's free will to close his case before a judgment is issued.

13. 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.

14. When an applicant withdraws an application based solely on procedural reasons, the Tribunal is not making a final determination on the merits of the case. As the Tribunal held in *Guevara* UNDT/2013/108 "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".

15. By giving up his or her right to appeal, an applicant irrevocably renounces his or her claim on the merits and she/he will be unable to re-litigate that claim in front of the Tribunal. In such a case, an applicant's withdrawal represents an explicit renouncement of the right to appeal and an implicit acquiescence of the contested decision (including the facts and applicable law as established by the respondent).

Since there is no longer a dispute on the legality of the decision, the Tribunal's decision represents the final disposal of the case.

16. If an identical application is filed by the same applicant against the same party after s/he waived his/her 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: (1) same parties; (2) same object; and (3) same legal cause, and has both negative and positive effects: it is impeding 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 to be further questioned (*non bis in idem*).

18. The Appeals Tribunal stated in *Meron* 2012–UNAT-198 that “there must be an end to litigation” in order to ensure the stability of the judicial process.

19. The Applicant mentioned in his motion for withdrawal of Case No. UNDT/NY/2011/012 that he has “already been sanctioned and thereby the disciplinary matter is closed”.

20. The Applicant clearly expressed his free will to fully and finally withdraw his application and thereby end the pending litigation. His subsequent request for the application, orders, responses to orders and submissions that constitute the case file be placed under seal upon the withdrawal also reflect that the withdrawal refers to the right to appeal itself.

21. 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. Although the Tribunal

no longer needs to make a determination on the merits (since the decision is no longer contested by the Applicant), the present decision represents for the parties a final disposal of the matter and the application is to be dismissed.

Under seal

22. The Tribunal notes that the withdrawal request was filed more than two years after the initial application during which time both parties filed submissions and evidence in response to the Tribunal's orders. As the Tribunal has already highlighted in Order No. 59 (NY/2011): "the parties' written pleadings before the Dispute Tribunal are generally not available to the public and that the Tribunal's case records are kept confidential and secure in its Registry". The parties have the obligation to maintain confidentiality and are therefore expected to ensure that all the written pleadings and documentation relating to their case are not disclosed to third parties.

23. There is no settlement in the present case which can be affected by the content of the file. Article 18(4) of the Tribunal's Rules of Procedure provides: "[t]he Dispute Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances".

24. In the present case there are no security interests or other exceptional circumstances which can justify a measure to preserve the confidentiality of evidence such as placing under seal all the documents included in the case file upon the withdrawal of the application. The request for the documents contained within the case file be placed under seal is to be rejected.

25. According to art. 26 of the Tribunal's Rules Procedure, the present judgment shall protect personal data and is to be published on the website of the Dispute Tribunal after its delivery. The Applicant stated in his motion that "a publicly available judicial order indicating his involvement would impose an unjustified

additional punishment or blemish on [his] professional reputation” and would also affect his family.

26. The right to the protection of private and family life is a fundamental human right protected by art. 12 of the Universal Declaration of Human Rights, art.17 of the International Covenant on Civil and political Rights, art. 8 of the European Convention on Human Rights and art.17 of the American Convention on Human Rights.

27. Taking into consideration the particular circumstances of this case, and in order to respect the Applicant’s good faith during the proceedings as well as to prevent any prejudice to his private and family life that might arise from the publication of the present decision, the Tribunal considers it appropriate for the Applicant’s name to be redacted from the judgment.

Conclusion

In the light of the above considerations, the Tribunal DECIDES:

28. The requests for the joinder of the present case with Case No. UNDT/NY/2012/070 and to place under seal all the documents filed in it upon its withdrawal are rejected.

29. The Applicant has withdrawn the matter in finality, including on the merits and this application is dismissed in its entirety without liberty to reinstate.

30. The Applicant's name is to be redacted from the present judgment.

(Signed)

Judge Alessandra Greceanu

Dated this 4th day of October 2013

Entered in the Register on this 4th day of October 2013

(Signed)

Hafida Lahiouel, Registrar, New York