



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON WITHDRAWAL**

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**Counsel for Applicant:**  
Brian Gorlick, OSLA

**Counsel for Respondent:**  
Josianne Muc, UNDP

## **Introduction**

1. On 6 September 2011, the Applicant, then Officer-in-Charge in the United Nations Development Program (“UNDP”) Office, Turkmenistan, filed an application contesting the decision to impose on him a sanction of a written censure and a loss of three steps in grade.

2. On 10 October 2011, the Respondent filed a reply whereby he submitted that the contested decision was taken following the proper application of the Staff Regulations and Rules.

3. On 22 November 2013, the Applicant filed a submission informing the Tribunal that he “withdraws this matter and requests that the Tribunal redacts his identity from all Orders, responses to Orders, and submissions, which he and the Respondent filed in the aforementioned case file, or which otherwise may be made publicly available...”.

## **Consideration**

### *Withdrawal request*

4. 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.

5. 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*).

6. 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.

7. An application can be withdrawn orally and/or in writing, partially or entirely.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.

8. 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".

9. 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.

10. 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.

11. *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*).

12. 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.

13. The Applicant mentioned in his motion for withdrawal of Case No. UNDT/NY/2011/070 that he has “already been sanctioned and thereby the disciplinary matter is closed”.

14. The Applicant clearly expressed his free will to fully and finally withdraw his application and thereby end the pending litigation.

15. 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.

#### *Redaction request*

16. 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. Consequently the only document in the present case to be made publicly is the judgment.

17. The Applicant stated in his motion that “a publicly available judicial order indicating [the sanctioned actions...] would impose an unjustified additional punishment or blemish on [his] professional reputation, especially because [he]

apologized for his actions and [...] is currently working with the United Nations”. Counsel for the Applicant also informed the Tribunal that the Respondent did “would not object to this request to redact the Applicant’s name upon withdrawal of the application”.

18. 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.

19. The Tribunal will also apply, as expressed by the International Monetary Fund Tribunal in Judgment No. 2013-4, “the principle, supported by the international administrative jurisprudence, that anonymity generally is to be granted only in such cases as those involving alleged misconduct or matters of personal privacy such as health or family relations”.

20. 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 professional reputation and 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.

21. With regard to the Applicant’s request to have his name redacted from the submissions “which otherwise may be made publicly available...”, the Tribunal notes that Practice Direction No. 6 “On Records of the Dispute Tribunal” states that submissions filed with the Tribunal can only be accessed by the public upon the granting of an order to that effect by a Judge. The Tribunal therefore considers that it is not necessary for it to order the redaction from “all Orders, responses to Orders, and submissions” which are maintained in the Tribunal’s case files.

**Conclusion**

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

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

23. The Applicant's request for redaction is granted in part and his name is to be redacted from the judgment.

*(Signed)*

Judge Alessandra Greceanu

Dated this 5<sup>th</sup> day of December 2013

Entered in the Register on this 5<sup>th</sup> day of December 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York