



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/040

Judgment No.: UNDT/2018/119

Date: 29 November 2018

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

FORTEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 25 September 2018, the Applicant, a staff member on continuing appointment with the Department of Field Support, New York, filed an application in which he contests the decision to deny his claim for compensation under Appendix D to the Staff Rules on the ground that it was time-barred and refusal to refer medical issues to the Medical Service Division or Medical Board to determine receivability. The Applicant requests the rescission of the contested decision and remand of the Applicant's claim to the Advisory Board on Compensation Claims ("ABCC") and damages for denial of due process and moral damages for infliction of stress.

2. On 26 September 2018, the case was assigned to the undersigned Judge.

3. The same day, the Registry acknowledged receipt of the application and, pursuant to art. 10 the Dispute Tribunal's Rules of Procedure, instructed the Respondent to file a reply by 26 October 2018.

4. On 26 October 2018, the Respondent filed a reply in which he states that on 25 October 2018, the Secretary of ABCC informed the Applicant that he had rescinded the decision to deny the claim under Appendix D and that a new decision on the claim would be taken. The Respondent claims that the application has been rendered moot since the claim is to be considered *de novo* and that the Applicant's claim of breach of duty of care is not receivable *ratione materiae* in the light of the jurisprudence of the United Nations Appeals Tribunal.

5. By Order No. 226 (NY/2018) issued on 7 November 2018, the Tribunal ordered the Applicant to file a submission informing the Tribunal if the case is to be maintained and if so, he is to file a response to the receivability issue invoked by the Respondent by 30 November 2018. In case the Applicant maintains the proceedings in the present case, the Tribunal would decide the case on the papers before it, and

instructed the parties to file their closing submissions, based only on the evidence before the Tribunal, by 14 December 2018.

6. On 16 November 2018, the Applicant filed a notice of withdrawal, stating: “In light of developments conveyed in the Respondent’s reply, the Applicant hereby withdraws all of his claims in the present proceedings before the Dispute Tribunal in finality, including on the merits, and with no right of reinstatement and therefore requests a discontinuance of the proceedings in Case No. UNDT/NY/2018/040”.

Considerations

7. The Tribunal commends the Applicant for withdrawing the present case based on the developments conveyed in the Respondent’s reply. This saves valuable resources and contributes to a harmonious working relationship between the parties.

8. 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.

9. 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 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 (*ratione personae*), within the applicable time limit (*ratione temporis*) and in front of the competent Tribunal (*ratione loci*).

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

11. 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.

12. If an identical application is filed by the same applicant against the same party after she or he waived her or 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: (a) same parties; (b) same object; and (c) 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 rule differently in the same matter.

13. *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*) (see *Shanks* 2010-UNAT-026bis; *Costa* 2010-UNAT-063; *Meron* 2012-UNAT-198). As stated by the United Nations Appeals Tribunal in *Meron*, “there must be an end to litigation” in order to ensure the stability of the judicial process.

14. The Applicant expressed in his motion his will to withdraw his application and thereby to end the pending litigation.

15. In conclusion, the object of the withdrawal request filed by the Applicant on 16 November 2018 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.

Conclusion

16. In light of the foregoing, the Tribunal DECIDES:

The Applicant has withdrawn the present matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2018/040 is hereby closed without liberty to reinstate. The present judgment on withdrawal is without prejudice to any future proceedings, if any, before the Tribunal related to the new decision to be issued by the ABCC.

(Signed)

Judge Alessandra Greceanu

Dated this 29th day of November 2018

Entered in the Register on this 29th day of November 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York