



Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

PERRY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON WITHDRAWAL

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 9 November 2017, the Applicant, a Security Officer at the S-2 level in the Department of Safety and Security (“DSS”), filed an application contesting the Administration’s refusal to grant him Special Post Allowance, in light of him performing higher level duties and functions within the Special Investigation Unit.

2. By notification dated 10 November 2017, the Respondent was instructed by the Tribunal, pursuant to art. 8 of the Dispute Tribunal’s Rules of Procedure, to submit his reply no later than 11 December 2017.

3. On the same day, the case was assigned to the undersigned Judge.

4. On 1 December 2017, the parties filed a “Joint Motion for Suspension of Proceedings” informing the Tribunal that they are in the process of concluding an agreement to resolve the dispute informally. The parties further noted that the agreement is awaiting implementation, which is due to take place within the next 30 days, and requested the Dispute Tribunal to suspend proceedings until Monday, 8 January 2018.

5. By Order No. 264 (NY/2017) dated 5 December 2017, the Tribunal suspended the proceedings until 8 January 2018 and requested them to inform the Tribunal, by the same date, as to the progress of the mediation discussions and/or whether this case has been resolved.

6. On 8 January 2018, the parties filed a “Joint Motion in response to Order No. 264 (NY/2017)” informing the Tribunal “that the parties have concluded an agreement to resolve the dispute informally. The agreement is awaiting implementation. Further efforts are being made to secure full implementation with the office concerned”. The parties requested a further suspension of proceedings until 5 February 2018.

7. By Order No. 4 (NY/2018) dated 9 January 2018, the Tribunal suspended the proceedings until 5 February 2018 and requested the parties to inform the Tribunal,

by the same date, as to the progress of the mediation discussions and/or whether this case has been resolved.

8. On 5 February 2018, the parties filed a “Joint Submission in response to Order No. 4 (NY/2018)” informing the Tribunal that “the parties have concluded an agreement to resolve the dispute informally. The agreement has been implemented in part. Further efforts continue to be made to secure full implementation with the office concerned”. The parties requested a further suspension of proceedings until 5 March 2018.

9. By Order No. 29 (NY/2018) dated 6 February 2018, the Tribunal suspended the proceedings until 5 March 2018 and requested the parties to inform the Tribunal, by the same date, as to the progress of the mediation discussions and/or whether this case has been resolved.

10. On 5 March 2018, the parties filed a “Joint Submission in response to Order No. 29 (NY/2018)” informing the Tribunal that “the parties have concluded an agreement to resolve the dispute informally. The agreement has been implemented in part. Further efforts continue to be made to secure full implementation with the office concerned”. The parties requested a further suspension of proceedings until 9 April 2018.

11. By Order No. 52 (NY/2018) dated 9 March 2018, the Tribunal suspended the proceedings until 9 April 2018 and requested the parties to inform the Tribunal, by the same date, as to the progress of the mediation discussions and/or whether this case has been resolved.

12. On 26 March 2018, the Applicant filed a notice of withdrawal, stating that “Following implementation of an agreement between the Parties, [the Applicant] seeks to withdraw his claim before the Dispute Tribunal with respect to this same matter”.

Consideration

13. The Tribunal commends the Applicant for withdrawing the present case based on the informal communications between the parties. This saves valuable resources and contributes to a harmonious working relationship between the parties.

14. 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.

15. 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*).

16. Consequently, to be legally valid, a request for the withdrawal of an application has to 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.

17. 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.

18. 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.

19. 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 that “there must be an end to litigation” in order to ensure the stability of the judicial process.

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

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. 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.

IT IS ORDERED THAT:

22. The Applicant has withdrawn the matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2017/108 is hereby closed without liberty to reinstate.

(Signed)

Judge Alessandra Greceanu

Dated this 28th day of March 2018