



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

NEMETH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON WITHDRAWAL**

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**Counsel for Applicant:**  
Marisa Maclellan, OSLA

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 10 October 2017, the Applicant filed an application on the merits contesting a decision identified as “the procedure of the selection process for JO 76088 [“the Job Opening”] and the determination of her ineligibility to continue in the process due to her written test score”.

2. On the same date (10 October 2017), the Applicant also filed, as a separate case in the Tribunal’s eFiling portal, a document titled “Motion for interim measures pending proceedings”. The Applicant requested that the Tribunal order the suspension of the selection process for the post as “Security Lieutenant, S5 [the Job Opening]” in the Safety and Security Service (“SSS”), Department of Safety and Security (“DSS”) as per art. 14 of the Rules of Procedure pending the duration of the proceedings before the Dispute Tribunal.

3. By notification dated 11 October 2017, the New York Registry of the Dispute Tribunal (“the Registry”) acknowledged receipt of the application on the merits and transmitted it to the Respondent. The parties were informed that the application on the merits had been assigned to the undersigned Judge. The Respondent was instructed to submit his reply by 10 November 2017.

4. In a separate notification dated 11 October 2017, the Registry acknowledged receipt of the Applicant’s motion for interim measures in accordance with art. 14 of the Dispute Tribunal’s Rules of procedure, noting that:

... This serves as confirmation that, on 10 October 2017, at 12:17 p.m., the Tribunal received a motion for interim measure in accordance with art. 14 of the Dispute Tribunal’s Rules of Procedure from the Applicant.

[...]

... Further to Judge Greceanu’s instructions, the Respondent shall submit his reply by 5:00 p.m. on Thursday, 12 October 2017.

5. On 12 October 2017, the Respondent filed a response to the motion for interim measures.

6. By Order No. 232 (NY/2017) issued on 16 October 2017, the Applicant's motion for interim measures was rejected.

7. On 10 November 2017, the Respondent filed his reply in which he stated that the application was not receivable *ratione materiae* since it was premature and that, in any event, it was without merit as the Applicant was fully and fairly considered for the relevant post.

8. On 1 February 2018, in Order No. 25 (NY/2018), the Tribunal instructed the parties as follows (emphasis omitted):

... By 5:00 p.m. on Friday, 23 February 2018, the Applicant is to file (a) a response to the receivability issue raised by the Respondent in his reply and (b) a copy of the final notification of her non-selection;

... By 5:00 p.m. on Wednesday, 28 February 2018, the Respondent is to file the following additional information together with the relevant supporting documentation which appears to be relevant in the present case:

- a. A copy of the Job Opening;
- b. The composition of the panel, the date of grading the written tests and the date when the candidates were informed that the passing score at the written test was 65 percent;
- c. The score for each question and the total score for each applicant;
- d. If all the written tests were already graded or not at the moment when each of the candidates were requested to identify and effectively identified their written test;
- e. The date when the written tests were opened;
- f. The current stage of the selection process;

... By 5:00 p.m. on Wednesday, 28 February 2018, the parties are to file a joint submission informing the Tribunal whether they agree to enter into informal resolution of the case either through the Office of Ombudsman or through *inter partes* discussions and whether they seek the suspension of the proceedings in this regard;

... In the event the parties do not agree to pursue informal resolution, by 5:00 p.m. on Wednesday, 28 February 2018, the parties are to file separate statements informing the Tribunal if additional

written and/or oral evidence is requested and if so, stating its relevance;

... If the parties agree that no further evidence is requested and that the Tribunal may decide the case on the papers before it, by 5:00 p.m. on Friday, 9 March 2018, the parties are instructed to file their closing submissions both on the receivability and on the merits of the case, based only on the evidence already before the Tribunal.

9. On 12 February 2018, the Applicant filed her reply pursuant to Order No. 25 (NY/2018) in which she stated that her application as filed was “[...] receivable as it [was] ripe for review and not premature”.

10. On 27 February 2018, the parties filed a joint submission in response to para. 11 of Order No. 25 (NY/2018) in which they stated that they did not agree to engage in informal dispute resolution and did not seek the suspension of proceedings.

11. On 28 February 2018, the Applicant filed a submission pursuant to para. 12 of Order No. 25 (NY/2018) in which she requested additional oral evidence consisting in her testimony and the testimonies of the proposed eight witnesses, as identified in the Applicant’s submission.

12. On 28 February 2018, the Respondent filed a submission in response to para. 10 of Order No. 25 (NY/2018) in which he attached the relevant documents.

13. On 9 March 2018, the Respondent filed a submission pursuant to para. 13 of Order No. 25 (NY/2018) containing his closing statement both on receivability and on the merits.

14. On 27 March 2018, by Order No. 67 (NY/2018), the Tribunal ordered that a Case Management Discussion (“CMD”) be held on 10 April 2018 in the court room of the Dispute Tribunal in New York to discuss the further proceedings in the case.

15. On 10 April 2018, the CMD took place in the Tribunal’s courtroom. The Applicant was present in person, and assisted by her Counsel, Ms. Marisa Maclennan via telephone and the Respondent was represented by

his Counsel, Mr. Alan Gutman, who was accompanied by Ms. Mihaela Astinova, an intern. The Applicant and her Counsel indicated they had no objection to the presence of the intern at the CMD.

16. At the CMD, the Tribunal requested that the Applicant further explained the relevance of the proposed additional oral evidence set out in her submission of 28 February 2018. The Applicant's Counsel stated that the proposed additional oral evidence would assist the Tribunal in clarifying factual elements of the case. The Respondent's Counsel reiterated his position that the contested decision was not an administrative decision and that the application was not receivable. The Tribunal indicated that the receivability and the merits of the application would be decided based upon the entire evidence in the case.

17. In light of the parties' submissions and their statements during the CMD, the Tribunal considered necessary and therefore instructed the parties to file a joint submission containing a detailed list of agreed facts. The parties confirmed that prior efforts were made to resolve the case informally, however, they were not successful. The Tribunal further recommended the parties that, while preparing the agreed facts, to consider the possibility of entering into discussions for an informal resolution of the case and requested an update as to the parties' progress in this regard.

18. On 18 April 2018, by Order No. 85 (NY/2018), the Tribunal ordered the parties to file a jointly-signed submission providing: (a) a list of agreed facts; and (b) whether the parties agree to enter into discussion for informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions and seek suspension of proceedings.

19. On 26 April 2018, the parties filed a motion to suspend the proceedings, informing the Tribunal that the parties have reached an agreement in principle to informally resolve this case. The parties jointly requested "the suspension of the proceedings, including the deadlines contained in Order No. 85 (NY/2018), for 30

days to allow the parties to prepare, review, and approve a written settlement agreement.”

20. By Order No. 89 (NY/2018), the Tribunal granted the parties’ joint request for suspension of the proceedings, ordered the suspension of the proceedings before the Tribunal until 25 May 2018, and instructed the parties to inform the Tribunal by 25 May 2018 as to the progress of the informal discussions and/or whether this case has been resolved.

21. On 25 May 2018, the parties filed a joint submission in response to Order 89 (NY/2018) informing the Tribunal that they had reached an agreement in principle to resolve the case and that, since the matter was with the Under-Secretary-General for Management for review, they requested a further suspension of the proceedings until 8 June 2018.

22. By Order No. 107 (NY/2018), the Tribunal granted the parties’ joint request for suspension of the proceedings, ordered the suspension of the proceedings before the Tribunal until 8 June 2018, and instructed the parties to inform the Tribunal by 8 June 2018 as to the status of this case.

23. On 11 June 2018, Counsel for the Applicant filed a notice of withdrawal, stating that:

... The Parties have reached a settlement agreement in this case.

... [The Applicant] respectfully asks the Tribunal to allow her to withdraw her Application.

### **Consideration**

24. The Tribunal commends the Applicant for withdrawing the present case based on the informal discussions between the parties followed by a settlement agreement. This saves valuable resources and contributes to a harmonious working relationship between the parties.

25. 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.

26. 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*).

27. 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.

28. 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.

29. 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 Tribunal 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.

30. *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-026; *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.

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

32. 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 her application, the Tribunal no longer needs to make a determination on the merits and takes note of the withdrawal.

IT IS ORDERED THAT:

33. The Applicant has withdrawn the matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2017/097 is hereby closed without liberty to reinstate.

(Signed)

Judge Alessandra Greceanu

Dated this 12<sup>th</sup> day of June 2018