



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

McINTOSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON WITHDRAWAL

Counsel for Applicant:
Natalie Dyjakon, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. On 27 February 2018, the Applicant filed an application contesting the Administration's decision of 17 October 2017 not to make good faith efforts to assist in finding him an alternative position after it decided to abolish his current post.

2. On the same date, the case was assigned to the undersigned Judge and the Registry transmitted the application to the Respondent in accordance with art. 8.4 of the Dispute Tribunal's Rules of Procedure, instructing him to file a reply by 5:00 p.m. on Thursday 29 March 2018.

3. The Respondent filed his reply on 29 March 2018. In his response, the Respondent argued *inter alia* that the application is not receivable *ratione materiae*.

4. On 3 April 2018, by Order No. 77 (NY/2018), the Tribunal ordered the Applicant to file a response on the receivability issue raised by the Respondent by Tuesday, 10 April. The Tribunal also called for a Case Management Discussion ("CMD") to be held on Wednesday, 11 April 2018 in the court room of the Dispute Tribunal in New York to discuss the further proceedings in the case.

5. On 10 April 2018, the Applicant filed the requested response on the receivability issue raised by the Respondent.

6. On 11 April 2018, the CMD took place in the Tribunal's courtroom. The Applicant was represented by his Counsel, Ms. Natalie Dyjakon and the Respondent was represented by Ms. Christine Graham, who was accompanied by an intern. The Applicant's Counsel indicated that she had no objection to the presence of the intern, Ms. Kavin Uhr, at the CMD.

7. At the beginning of the CMD, as requested by the Tribunal, the parties confirmed that the Applicant was separated from the Organization on 18 January 2018 and that the only decision issued by the Organization is the termination decision issued on 9 October 2017, effectively implemented on 18 January. The Respondent's Counsel also indicated that the Applicant was retained as a member of the MINUSTAH liquidation team until 31 December 2017 and that he had requested suspension of the implementation of the contested decision to the Management Evaluation Unit ("MEU"), which was granted for three months.

8. Further, the parties informed the Tribunal that the MEU had not yet provided a response to the request for management evaluation regarding the decision not to select the Applicant for the position of Engineering Technician at the FS-5 level with the United Nations Support Office in Somalia ("UNSOS"), and that the deadline for the response was 45 days since the Applicant was based in Haiti before his separation.

9. The Tribunal, during the CMD, instructed the Respondent to file additional documentation which appeared to be relevant to the present case, consisting in a list of all available vacant suitable posts at the Applicant's level (FS-5) and lower levels with identical or similar competencies to the ones the Applicant performed, starting from 9 October 2017 and until present. The Respondent's Counsel reiterated his position, as expressed in the reply, that the contested decision is not an administrative decision and requested clarification regarding the lowest level of posts that the Applicant would consider acceptable, and indicated that Counsel would need approximately one month after the issuance of an order by the Tribunal to obtain the required information.

10. The Tribunal instructed the Applicant's Counsel to consult with her client on this question and to subsequently inform the Tribunal, including

whether there would be any additional evidence to be requested in relation to the relief as indicated in the application. The Applicant's Counsel stated that in the submission filed on 10 April 2018, she included a request for moral damages. The Respondent's Counsel objected to this and the Applicant's Counsel stated that she would contact her client in order to verify if he would maintain this request as part of the relief.

11. The Tribunal recommended the parties to inform the Tribunal if they might consider entering into discussions for an informal resolution of the case in light of its particular circumstances, the recent jurisprudence of the Dispute Tribunal and Appeals Tribunal, and the additional information to be obtained from the Office of Human Resources Management ("OHRM") regarding available suitable posts with identical or similar competencies to the ones the Applicant performed.

12. On 12 April 2018, the Applicant filed a submission informing the Tribunal that:

[7] [The Applicant] submits that, at the time he was notified of his termination and currently, he would consider Engineering Technician positions and any other suitable and similar positions available at the level of FS-4 and above.

[8] With respect to the direction made by the Tribunal at the [CMD] on 11 April 2018, that the Respondent provide details of all currently available similar posts as well as all similar posts that are at the same and lower level that [the Applicant] had since October 2017 until when he was separated on 18 January 2018, [the Applicant] submits that the Tribunal should consider expanding such a direction.

[9] Specifically, [the Applicant] maintains that it would also be relevant to have details of such posts since the date when the Administration decided that [the Applicant's] function would be "reduced", presumably around the date that he received advance notice of termination on 31 July 2017 (Annex 5 of the [Dispute Tribunal] Application). [The Applicant] submits that the obligation on the Administration

to make good faith efforts in finding him a suitable alternative position may have begun around this time.

[10] [The Applicant] confirms that he seeks moral damages in this case.

[11] While such a claim was not expressly specified in the [Dispute Tribunal's] [a]pplication filed on 27 February 2018, [the Applicant] submits that he is nevertheless entitled to claim moral damages pursuant to Article 10(5) of the [Dispute Tribunal's] Statute. As the issue relating to the remedies sought was clarified in the Response to Respondent's Reply on Receivability Pursuant to Order No. 77 (NY/2018), [the Applicant] does not deem it necessary to amend the original [Dispute Tribunal] Application.

13. By Order No. 83 (NY/2018) issued on 16 April 2018, the Tribunal instructed the parties as follows (emphasis omitted):

... By 5:00 p.m. on Thursday, 31 May 2018, the Respondent [is] to file (a) all the available vacant suitable posts at the Applicant's level (FS-5) and lower levels with identical or similar competencies to the ones the Applicant performed (FS-5), starting from 31 July 2017-the date when the Applicant received advanced notice of termination-until 18 January 2017 and to present and at a lower level (FS-4) and (b) [a] list of all available suitable posts at the Applicant's level (FS-5) and at a lower level (FS-4) occupied by staff members with fixed-term contracts and temporary contracts starting from 31 July 2017 to present which appear to be relevant to the present case.

... By 5:00 p.m. on Monday, 11 June 2018, the Applicant is to file a response, if any, to the documentation the respondent provided.

14. On 31 May 2018, the Respondent filed a submission pursuant to Order No. 83 (NY/2018) in which he attached the relevant documents.

15. On 11 June 2018, the Applicant filed a submission pursuant to Order No. 83 (NY/2018).

16. On 20 July 2018, the parties filed a joint submission informing the Tribunal that they were currently in the process of finalizing an agreement.

17. On 17 August 2018 the Registry, as instructed by Judge Greceanu, contacted the parties via email and directed that the Counsels “[...] inform the Tribunal if an agreement was reached and implemented in the above-referenced case.”

18. On the same day, Friday, 17 August 2018 the parties filed a joint submission and informed the Tribunal that they “[were] in the process of finalizing an agreement.”

19. By email dated 20 August 2018, the Tribunal commended the parties for their efforts to finalize the agreement, and directed the parties to inform the Tribunal as to whether the parties would benefit from a suspension of the proceedings before the Tribunal.

20. On 31 August 2018, the parties filed a joint submission informing the Tribunal that they were very close to finalizing an agreement and therefore they did not wish for the proceedings to be suspended.

21. On 14 September 2018, the Applicant filed a notice of withdrawal, stating: “Pursuant to the terms and conditions of a confidential settlement agreement, the Applicant hereby withdraws his Applications in Case Nos. UNDT/NY/2018/012 and UNDT/NY/2018/018” and “[t]his withdrawal includes all the Applicant’s allegations and claims in Case Nos. UNDT/NY/2018/012 and UNDT/NY/2018/018.”

Consideration

22. 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.

23. 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.

24. 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*).

25. 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.

26. 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.

27. 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.

28. *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.

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

30. In conclusion, the object of the withdrawal request filed on 14 September 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.

IT IS ORDERED THAT:

31. The Applicant has withdrawn the matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2018/012 is hereby closed without liberty to reinstate.

(Signed)

Judge Alessandra Greceanu

Dated this 20th day of September 2018