



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 23 April 2018, the Applicant, a former Engineering Technician/Chief Electrical and Mechanical Unit (“EMU”) at the United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-5 level, filed an application contesting the decision of the Administration to not select him for the position of Engineering Technician at the FS-5 level (“the Position”) with the United Nations Support Office in Somalia (“UNSOS”) in Mogadishu. The Applicant alleges that the decision not to select him prior to the completion of the selection process was unlawful and that he was not given fair consideration. Further, pursuant to Rule 19 and Rule 36 of the Dispute Tribunal’s Rules of Procedure, the Applicant submitted in his application a motion for joinder/consolidation with Case No. UNDT/NY/2018/012.

2. On 24 April 2018, the New York Registry sent an acknowledgment email to the parties informing them that the Tribunal had received the Applicant’s application on 23 April 2018, that it had been assigned to Judge Alessandra Greceanu under Case No. UNDT/NY/2018/018, and that the application had been transmitted to the Respondent in accordance with art. 8.4 of the Dispute Tribunal’s Rules of Procedure. The email also informed the parties that pursuant to art. 10 of the Dispute Tribunal’s Rules of Procedure, the respondent had 30 days from the date of receipt of the application to submit his reply, including on the Applicant’s request for consolidation of the present case with case number UNDT/NY/2018/012, and that the reply should therefore be filed by Thursday, 24 May 2018, by 5:00 p.m.

3. On 24 April 2018, the New York Registry sent another email to the parties confirming that Mr. Steven Dietrich had been listed as Counsel for the Respondent in Case No. UNDT/NY/2018/018.

4. On 21 May 2018, the Applicant filed a motion for interim measures requesting, as interim relief pursuant to art. 10.2 of the Dispute Tribunal’s Statute,

the suspension of the implementation of the contested decision until a final judgment is rendered in the present case.

5. By Order No. 105 (NY/2018), the motion for interim measures was rejected.

6. On 24 May 2018, the Respondent filed his reply to the application stating *inter alia* that the application was not receivable.

7. By Order No. 106 (NY/2018), the Tribunal instructed the parties to attend a Case Management Discussion (“CMD”) on Thursday, 31 May 2018 at 10:30 a.m. in the courtroom of the Dispute Tribunal in New York to discuss the further proceedings in the present case.

8. At the 31 May 2018 CMD, the Applicant was represented by his Counsel, Ms. Natalie Dyjakon, and the Respondent was represented by his Counsel, Mr. Steven Dietrich. Counsel for the Respondent informed the Tribunal that the Applicant had just been offered a temporary position in the new United Nations Mission for Justice Support in Haiti (“MINUJUSTH”). Counsel for the Applicant confirmed the information and mentioned that the Applicant had applied to this post.

9. The Tribunal commended the parties for their efforts and recommended them to enter into discussions for an informal resolution in both Applicant’s cases pending before the Tribunal. The Tribunal further recommended the parties to review, during their discussions, whether the method used to evaluate and score the written test (automatic evaluation by the computer) for the position the Applicant had applied for in United Nations Support office in Somalia, Mogadishu, as submitted by the Respondent’s Counsel, was in line with the specific legal requirements of the selection process, including the ones establishing the role of the assessment panel, who is to evaluate and score of the written test and to conduct the interviews. The parties could also consider, since the selection process is still ongoing, an appropriate correction.

10. The Tribunal also requested the parties to verify and inform the Tribunal about the stage of the selection process in another post of Engineering Technician at the FS-5 level that the Applicant has applied for, namely the one in the Democratic Republic of Congo, Goma, as it appeared from the parties' submissions that this process was still on-going. Further, the Tribunal asked the parties to explore the best option for the Applicant, especially since he was a former permanent staff member on an abolished post and to give appropriate consideration to his retroactive continuity in service, if agreed for him to be reinstated.

11. By Order No. 131 (NY/2018) issued on 26 June 2018, the Tribunal, commending the parties for their good faith efforts aimed at resolving this case amicably, ordered the parties to inform the Tribunal by 2 July 2018 as to whether they had finalized a provisional agreement of the present case, or if they consented for the proceedings to be suspended during their informal resolution.

12. On 2 July 2018, the parties filed a joint submission informing the Tribunal that they had not yet finalized a provisional agreement and they requested two additional weeks for this purpose. The parties also informed the tribunal that the proceedings were not to be suspended pending their efforts to seek to resolve the case informally.

13. By Order No. 138 (NY/2018) issued on 3 July 2018, the Tribunal, commending the parties for their good faith and efforts aimed at resolving this case amicably, ordered the parties to inform the Tribunal by 20 July 2018 as to whether they had finalized a provisional agreement of the present case.

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

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

16. 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.”

17. 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.

18. 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.

19. 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.”

Considerations

20. 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.

21. 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.

22. 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*).

23. 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.

24. 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.

25. 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.

26. *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; *Merón* 2012-UNAT-198). As stated by the United Nations Appeals Tribunal in *Merón* that "there must be an end to litigation" in order to ensure the stability of the judicial process.

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

28. In conclusion, the object of the withdrawal request filed by the Applicant 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:

29. The Applicant has withdrawn the matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2018/018 is hereby closed without liberty to reinstate.

(Signed)

Judge Alessandra Greceanu

Dated this 20th day of September 2018