



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

HASHIMI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON WITHDRAWAL

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. On 13 May 2011, the Applicant, a Senior Administrative Assistant, in the United Nations Assistance Mission in Afghanistan (“UNAMA”), filed an application contesting the decision made by the Chief, Human Resources Policy Services, Office of Human Resources Management (“OHRM”) and the Assistant-Secretary General, OHRM, to: “withdraw the charges that have been levied under the qualification that no evaluation on the merits had taken place and the (implied) decision upon the withdrawal not to offer him compensation for moral damages as a result of the admitted wrongful act to charge”. The Respondent’s reply was filed on 15 June 2011.

2. By Order No. 267 (NY/2013) dated 23 October 2013, the Tribunal requested the Applicant to inform the Tribunal, on or before 29 October 2013, whether he wished to maintain his application. If the Applicant wished to maintain his application, the parties were ordered to file their respective closing submission by 19 October 2013.

3. On 29 October 2013, the Applicant informed the Tribunal that he wished to maintain his application. Subsequently, on 6 November 2013, the parties filed a joint submission informing the Tribunal that they entered into informal negotiations and sought a suspension of the proceedings for one month.

4. By Orders Nos. 300 (NY/2013), 335 (NY/2013) and 5 (NY/2014), the Tribunal granted the parties’ consecutive requests to suspend the proceedings from 8 November 2013 until 10 February 2014.

5. On 5 February 2014, the Applicant filed a submission stating that “[p]ursuant to the terms and conditions of a confidential settlement agreement, [he] respectfully requests to withdraw his application [and] ... all of his allegations and claims in the proceedings”.

Consideration

Withdrawal request

6. 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.

7. The 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 (*rationae personae*), within the applicable time limit (*rationae temporis*) and in front of the competent Tribunal (*rationae loci*).

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

9. An application can be withdrawn orally 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.

10. If an identical application is filed by the same applicant against the same party after he or she waived his/her 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: (1) same parties; (2) same object; and (3) same legal cause, and has both negative and positive effects: it is impeding the formulation of a new identical application and guarantees that it is not possible to rule differently in the same matter.

11. *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*).

12. The Appeals Tribunal stated in *Meron* 2012–UNAT-198 that “there must be an end to litigation” in order to ensure the stability of the judicial process.

13. The Applicant clearly expressed in his submission his free will to fully and finally withdraw his application and thereby end the pending litigation.

14. 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 parties reached a settlement agreement, the Tribunal no longer needs to make a determination on the merits and the application is to be dismissed.

Conclusion

In the light of the above considerations, the Tribunal DECIDES:

15. The Applicant has withdrawn the matter in finality, including on the merits and this application is dismissed in its entirety without liberty to reinstate.

(Signed)

Judge Alessandra Greceanu

Dated this 6th day of February 2014

Entered in the Register on this 6th day of February 2014

(Signed)

Hafida Lahiouel, Registrar, New York