



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

SHLAPACHENKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:
Mariam Munang, OSLA

Counsel for Respondent:
Alan Gutman, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 2 October 2018, the Applicant, a Senior Political Officer at the P-5 level with the Department of Political Affairs in New York, filed an application, contesting the Administration's decision not to include him in the Resident Coordinator ("RC") pool, following an assessment conducted by a private consulting firm in London appointed by the United Nations Development Group. The Applicant submits that the design of the assessment rendered it opaque and arbitrary, and that his candidacy was not given full and fair consideration, and seeks rescission of the decision, and for him to be considered for inclusion in the RC pool.

2. Together with his application, the Applicant made a request for suspension of proceedings pending informal resolution, stating as follows (reference to footnotes omitted):

Upon filing his [Management Evaluation Request ("MER")], Mr. Shlapachenko has been in discussion with the Administration regarding the amicable resolution of this matter, initially with the assistance of [the Management Evaluation Unit ("MEU")], and presently through the Office of the Ombudsman. Mr. Shlapachenko has requested that this matter be mediated through the Mediation Division of the Office of the Ombudsman.

If this matter is resolved informally, there would be no need for protracted litigation and further expenditure of resources. The suspension of proceedings pending informal resolution is therefore in the interest of all parties.

3. On the same day (2 October 2018), the New York Registry of the Dispute Tribunal transmitted the substantive application with the request for suspension of proceedings to the Respondent, instructing him to file the reply by 1 November 2018. Upon the instructions of the undersigned Judge, the Respondent was also directed to indicate if he consented to mediation through the Mediation Division of the Office of the Ombudsman and Mediation Services ("UNOMS") and if he had any objection to

the request for suspension of proceedings, by 3 October 2018, so that an appropriate Order may follow.

4. On 3 October 2018, Counsel for the Respondent informed the New York Registry of the Dispute Tribunal via email that “[t]he Respondent has not agreed to mediation through the Mediation Office, and does not agree to the Applicant’s motion for suspension”.

5. On 9 October 2018, by Order No. 196 (NY/2018), the Tribunal directed the Respondent to confirm whether he consents to the continuation of discussions before the UNOMS, or alternatively, whether the parties prefer to conduct *inter partes* discussions and for the parties to file a jointly signed submission indicating whether they agree to attempt any informal resolution, and if so, whether the parties request a suspension of the proceedings. The Tribunal further stated that the deadline for the filing of the Respondent’s reply (1 November 2018) is vacated until the Tribunal’s further order.

6. On 24 October 2018, the parties filed a joint submission stating that, in the absence of the Mediator of UNOMS, who was on Mission to Somalia and Nairobi until the week of 9 November 2018, the parties agreed to attempt informal dispute resolution discussions on an *inter partes* basis and requested the suspension of the proceedings, including the deadline for the Respondent’s reply, until 30 November 2018. The Respondent further submitted that should the parties agree to pursue informal dispute resolution under the auspices of UNOMS following the Mediator’s return, the parties would advise the Dispute Tribunal to request a formal referral.

7. On 25 October 2018, by Order No. 208 (NY/2018), the Tribunal suspended the proceedings until 30 November 2018, on which date the parties were to inform the Tribunal as to the progress of the Applicant’s claim and/or whether this case had been resolved.

8. Thereafter, the Tribunal issued several Orders suspending the proceedings upon the joint requests of the parties from time to time while the parties conducted *inter partes* discussions in an attempt to resolve the matter informally, the last of which is Order No. 38 (NY/2019) suspending the proceedings until 13 March 2019.

9. On 25 February 2019, the Applicant filed the Notice of Withdrawal, stating that “[p]ursuant to the terms and conditions of a confidential settlement agreement, the Applicant hereby withdraws his Application ... This withdrawal includes all the Applicant’s allegations and claims” and “[t]his is a full, final and entire withdrawal, including on the merits, with no right of reinstatement”.

Consideration

10. The desirability of finality of disputes within the workplace cannot be gainsaid (see *Hashimi* Order No. 93 (NY/2011) and *Goodwin* UNDT/2011/104). Equally, the desirability of finality of disputes in proceedings requires that a party should be able to raise a valid defence of *res judicata*, which provides that a matter between the same persons, involving the same cause of action, may not be adjudicated twice (see *Shanks* 2010-UNAT-026bis, *Costa* 2010-UNAT-063, *El-Khatib* 2010-UNAT-066, *Beaudry* 2011-UNAT-129). Matters that stem from the same cause of action, though they may be couched in other terms, are *res judicata*, which means that an applicant does not have the right to bring the same complaint again.

11. The object of the *res judicata* rule is that “there must be an end to litigation” in order “to ensure the stability of the judicial process” (*Meron* 2012-UNAT-198) and that a party should not have to answer the same cause twice. Once a matter has been resolved, a party should not be able to re-litigate the same issue. An unequivocal withdrawal means that the matter will be disposed of such that it cannot be reopened or litigated again.

12. In the instant case, the Applicant filed a submission stating that he “withdraws his Application ... This withdrawal includes all the Applicant’s allegations and claims” and “[t]his is a full, final and entire withdrawal, including on the merits, with no right of reinstatement”.

13. The Applicant’s clear and unequivocal withdrawal of all of his allegations and claims with no right of reinstatement signifies a final and binding resolution with regard to the rights and liabilities of the parties in all respects in his case, requiring no pronouncement on the merits but concluding the current matter before the Tribunal. As the Applicant has withdrawn the application and decided to end the pending litigation, there is no matter remaining for adjudication by the Dispute Tribunal.

14. The Tribunal commends both parties, and their respective counsel, for their good faith efforts in resolving this case amicably *inter partes*. Such efforts should be encouraged as the amicable resolution of cases saves the Organization valuable resources and contributes to a harmonious working environment within the Organization, particularly where there is an ongoing employment relationship.

Conclusion

15. The Applicant has withdrawn all his allegations and claims in finality, including on the merits with no right of reinstatement. There being no matter for adjudication by the Dispute Tribunal, the application is dismissed without liberty to reinstate.

(Signed)

Judge Ebrahim-Carstens

Dated this 28th day of February 2019

Entered in the Register on this 28th day of February 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York