



**Before:** Judge Alessandra Greceanu  
**Registry:** New York  
**Registrar:** Pallavi Sekhri, Officer-in Charge

MIKSCH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON WITHDRAWAL**

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**Counsel for Applicant:**  
Natalie Dyjakon, OSLA

**Counsel for Respondent:**  
Elizabeth Gall, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 24 May 2018, the Applicant, a Security Officer at the S3-X level working with the United Nations Department of Safety and Security (“UNDSS”) in New York, filed an application contesting the decision:

[...] to breach an implicit term and condition of his appointment relating to the duty to protect him from exposure to any form of prohibited conduct, including acts of retaliation, through preven[...]tive measures. In this case, the Administration failed to implement sufficiently all of the measures recommended by the Ethics Office in its letter dated 15 November 2017.

2. On 24 May 2018, the case was assigned to the undersigned Judge.

3. On 25 June 2018, the Respondent duly filed his reply.

4. On 3 August 2018, Counsel for the Applicant filed a request for withdrawal of the proceedings, stating that:

After receiving clarification from the Respondent in his Reply dated 25 June 2018 and after further review, the Applicant hereby withdraws his Application in Court File Number UNDT/NY/2018/025.

## **Considerations**

5. The Tribunal commends the Applicant for withdrawing the present case based on the clarification the Respondent provided in his reply dated 25 June 2018. This saves valuable resources and contributes to a harmonious working relationship between the parties.

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. 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*).

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

9. 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.

10. If an identical application is filed by the same applicant against the same party after s/he waived her/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: (i) same parties; (ii) same object; and (iii) 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.

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*) (see *Shanks* 2010-UNAT-026bis; *Costa* 2010-UNAT-063; *Meron* 2012-UNAT-198). Further, the United Nations Appeals Tribunal in *Meron* has stated that "there must be an end to litigation" in order to ensure the stability of the judicial process.

12. The Applicant expressed in the motion filed on 3 August 2018 his will to withdraw his application and thereby to end the pending litigation.

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

IT IS ORDERED THAT:

14. The Applicant has withdrawn the matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2018/025 is hereby closed without liberty to reinstate.

*(Signed)*

Judge Alessandra Greceanu

Dated this 8<sup>th</sup> day of August 2018