Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

GILES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant filed an application contesting the Administration's decision to fill a P-5 level post in the Department of General Assembly and Conference Management ("DGACM") of the United Nations Secretariat without advertising the job vacancy for the said post. The Applicant stated that had the post been advertised, she would have applied and would have been found to fulfill the eligibility requirements.

2. The Respondent submitted in his reply that the present application was not receivable as, *inter alia*, the contested decision was a policy decision, not an administrative decision, and did not affect the Applicant's rights. Further, according to the Respondent, the Administration is not always required to issue a vacancy announcement to fill a post but may instead laterally move a candidate to a vacant post or, as was the case here, appoint a candidate from a roster of pre-approved candidates.

3. For reason of the present application being unequivocally withdrawn, as explained below, the Tribunal will not pronounce on the merits of the Applicant's claims or of the Respondent's reply.

Proceedings before the Tribunal

4. The Applicant filed her application on 24 January 2011 and the Respondent filed his reply on 28 February 2011, contending that the application was not receivable and without merit. By Order No. 219 (NY/2012), dated 6 November 2012, the Tribunal sought the views of the parties on whether the matter could be dealt with on the papers. The Tribunal also requested further particulars and the production of documents in an unredacted form from the respondent.

5. On 13 November 2012, the Tribunal was advised that, following the Applicant's meeting with her new Counsel, it "bec[ame] apparent that there is a significant amount of information relevant to the case that is not reflected on the papers and detailed instructions will be required before further submissions can be prepared and the requirement for an oral hearing can be properly considered". The Applicant requested an extension of time of one month in order to file additional submissions.

6. Following the Tribunal's Order No. 230 (NY/2012), dated 14 November 2012, granting the parties two weeks to file their final submissions, the Applicant informed the Tribunal on 28 November 2012 that "[h]aving recently been advised concerning the receivability issues in the case by new Counsel", the Applicant now wishes to withdraw her application.

Withdrawal of application

7. Although the Tribunal's Rules of Procedure contain a provision for summary judgment (see art. 9 of the Rules and also art. 7.2(h) of the Tribunal's Statute), there are no specific provisions regarding discontinuance, abandonment, want of prosecution, postponement, or withdrawal of a case in the Tribunal's Statute or Rules of Procedure. However, abandonment of proceedings and withdrawal of applications are not uncommon in courts and generally result in a dismissal of the case either by way of an order or a judgment. In this regard, reference can be made to art. 19 of the Tribunal's Rules of Procedure, which states that the Tribunal "may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties". Also, art. 36 of the Tribunal's Rules of Procedure provides that all matters that are not expressly provided for in

the Rules shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by art. 7 of its Statute.

8. 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). As Judge Boolell stated in *Bangoura* UNDT/2011/202, matters that stem from the same cause of action, though they may be couched in other terms, are *res judicata*, which means that the applicant does not have the right to bring the same complaints again.

9. Once a matter has been determined, parties should not be able to re-litigate the same issue. An issue, broadly speaking, is a matter of fact or question of law in a dispute between two or more parties which a court is called upon to decide and pronounce itself on in its judgment. Article 2.1 of the Tribunal's Statute states that the Tribunal "shall be competent to hear and pass judgment on an application filed by an individual", as provided for in art. 3.1 of the Statute. Generally, a judgment involves a final determination of the proceedings or of a particular issue in those proceedings. 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 litigant should not have to answer the same cause twice.

10. For example, a judgment on the exception that a claim discloses no cause of action can support a plea of *res judicata*, but not a judgment upholding an exception on a purely technical ground. Similarly an order of absolution from the instance is ordinarily not decisive of the issues raised, as it decides nothing for or against either

party and it is accordingly not a final judgment capable of sustaining a plea of *res judicata*.

11. Therefore, a determination on a technical or interlocutory matter is not a final disposal of a case, and an order for withdrawal is not always decisive of the issues raised in a case. In *Monagas* UNDT/2010/074, the Tribunal dealt with a withdrawal by the applicant on the grounds that he intended to commence proceedings against the Organization in the national courts of Venezuela. The Tribunal enquired of his counsel whether the applicant was aware as to the status of the United Nations before national courts, the fact that the United Nations retained discretion regarding its own immunity, and therefore the hurdles the applicant might face regarding seeking relief in such a manner. Further, notwithstanding that the matter had not been canvassed on the merits, it would be unlikely for it to be reinstated once dismissed. In that case, the Tribunal noted the judgment of Judge Cousin in *Saab-Mekkour* UNDT/2010/047, where he found the application of "a general principle of procedural law that the right to institute legal proceedings is predicated upon the condition that the person using this right has a legitimate interest in initiating and maintaining legal action. Access to the court has to be denied to those who are no longer interested in the proceedings instituted".

12. In the instant case, in light of what the Tribunal construed to be an equivocal withdrawal, a case status discussion was held on 4 December 2012 to ascertain the precise nature of the Applicant's withdrawal. The Applicant's new Counsel confirmed that the withdrawal was not only premised on issues of receivability but that she was indeed withdrawing the matter fully, finally and entirely, including on the merits. The Applicant's Counsel confirmed that the Applicant understood that this was not a withdrawal without prejudice or with a reservation of the Applicant's right to reinstate any issues or claims. Both Counsel agreed that a dismissal of the

case with a view to finality of proceedings would be the most appropriate course of action.

Conclusion

13. The Applicant has withdrawn the matter fully, finally and entirely, including on the merits, with the intention of resolving the dispute between the parties with finality. There no longer being any determination to make, this application is dismissed in its entirety without liberty to reinstate.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 7th day of December 2012

Entered in the Register on this 7th day of December 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York