



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

FAYEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:

Joseph Grinblat, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Chenayi Mutuma, ALS/OHRM, UN Secretariat

Introduction

1. On 28 November 2012, the Applicant, a staff member with the Department of Public Information in New York, filed an application contesting the decision not to select her for a temporary position at the P-4 level in her Department. The Respondent's reply, stating that the Applicant's claims were without merit, was filed on 27 December 2012.

2. On 7 February 2013, the Applicant filed a motion requesting "authorization to withdraw her application".

3. On 12 March 2013, the Tribunal issued Order No. 69 (NY/2013), directing the Applicant to confirm whether she was withdrawing her application in its entirety, that is fully and finally, including on the merits, with no right of reinstatement.

4. On 13 March 2013, the Applicant filed a submission confirming "that her application is withdrawn in its entirety, that is fully, and finally, including on the merits, with no right of reinstatement".

Withdrawal of application

5. As the Tribunal stated in *Giles* UNDT/2012/194, although its 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 in the Tribunal's Statute or Rules of Procedure regarding discontinuance, abandonment, want of prosecution, postponement, or withdrawal of a case. 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.

6. 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.

7. 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.

8. 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*.

9. 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 the applicant's 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".

10. In the instant case, the Applicant confirmed that she was indeed withdrawing the matter fully, finally and entirely, including on the merits, without right of reinstatement. Therefore, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

Conclusion

11. The Applicant has withdrawn the matter fully, finally and entirely, including on the merits, with the intention of resolving the dispute between the parties in 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 13th day of March 2013

Entered in the Register on this 13th day of March 2013

(Signed)

Hafida Lahiouel, Registrar, New York