UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/056
Judgment No.: UNDT/2013/064
Date: 8 April 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

AGHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 25 June 2012, the Applicant, a Security Officer based in New York, filed an application contesting the decision of 7 February 2012 "to require [him] to undertake to pay for half the cost to convene a medical board in accordance with Staff Rule 6.2 if his appeal for the review of his request for sick leave is granted". The underlying facts arose when in January 2010, when the Applicant was diagnosed with a medical condition while visiting his home country. The United Nations Medical Services Division subsequently certified 36 sick leave days on the basis of the information provided by the Applicant, which certification the Applicant disputed and requested the convening of a medical board. The Applicant submitted in his application that he had been informed that, if the board made a decision to his disfavour, he would bear the fees for the member's of the medical board, estimated at USD80,000. In his application before the Tribunal, the Applicant sought (i) rescission of the Respondent's decision to require him to cover part of the costs of the medical board, and (ii) an order that the Organization convene a medical board at its expense to review the Applicant's request for sick leave.

2. On 26 July 2012, the Respondent filed his reply, submitting that the application is not receivable as no final decision has been made with respect to the Applicant's responsibility for the partial costs of the medical board. The Respondent submitted that such a decision would only be made following the conclusion of the medical board's work. According to the Respondent, if, following the medical board, the Organization were to alter its original decision in favour of the Applicant, the Organization would pay the medical fees and incidental expenses related to the board. The Respondent submitted, however, that there is no legal obligation for the Organization to cover the expenses of the medical review process if the Applicant's request is found to be without merit. The Respondent stated that the Applicant was never advised that the cost of the board would be USD80,000.

3. By Order No. 55 (NY/2013), dated 26 February 2013, the Tribunal directed the parties to attend a case management discussion on 7 March 2013. The Tribunal noted that, if successful, the Applicant's claim concerned a disputed period of a mere 25 days of sick leave.

4. On 6 March 2013, one day before the case management discussion, the parties filed a joined submission requesting to suspend the proceedings to allow them to resolve the matter informally.

5. By Order No. 67 (NY/2013), dated 6 March 2013, the Tribunal suspended the proceedings for two weeks. In view of the nature and amount of the claim in dispute and the costs already incurred, as well as potential costs of the medical board and subsequent litigation, the Tribunal commended both parties for their efforts to resolve the case amicably. The Tribunal noted that such efforts should be encouraged as amicable resolution of cases saves the valuable resources of staff and the Organization and contributes to the harmonious working relationship between the parties.

6. On 20 March 2013, the parties filed a joint submission stating that, although they had made progress in their discussions with a view to resolving this matter informally, they needed an extension of two weeks to reach a final resolution.

7. By Order No. 75 (NY/2013), dated 21 March 2013, the Tribunal granted an extension of two weeks, directing that at the expiration of the extension, the parties shall inform the Tribunal whether the matter has been resolved fully, finally, and entirely, including on the merits.

8. On 5 April 2013, the Applicant filed a submission stating: "Pursuant to the terms of conditions of a confidential settlement agreement, the Applicant respectfully requests to withdraw his application". He stated that he was withdrawing "in their entirety all of his allegations and claims in the proceedings". The Applicant

further "acknowledge[d] that this represented a full and final withdrawal, including on the merits with no right of reinstatement".

Withdrawal of application

9. 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.

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). 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.

11. 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.

12. 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*.

13. 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 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".

14. In the instant case, the Applicant confirmed that he 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

15. 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 8th day of April 2013

Entered in the Register on this 8th day of April 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York