UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/062
Judgment No.: UNDT/2013/074
Date: 30 April 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KANHEMA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:
Duke Danquah, OSLA

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

Introduction

1. On 3 July 2012, the Applicant, a staff member with the Department of Public Information of the United Nations Secretariat, filed an application contesting the selection process for two P-4 level positions.

2. On 5 July 2012, the Registry transmitted the application to the Respondent, stating that the Respondent's reply was due on 6 August 2012.

3. On 17 July 2012, after engaging in informal discussions with the Respondent, the Applicant sought leave from the Tribunal for the parties to pursue mediation through the Mediation Division of the United Nations Office of the Ombudsman and Mediation Services with a view to informal resolution of the matter.

Continued suspension of the proceedings

4. On 23 July 2012, the Tribunal suspended the proceedings until 31 August 2012 to allow the parties to resolve the dispute amicably.

5. On 27 August 2012, following the advice of the Mediation Division that "they require until the end of November to complete mediation", the parties filed a joint submission requesting that the proceedings remain suspended until 30 November 2012.

6. On 31 August 2012, the Tribunal issued Order No. 177 (NY/2012), extending the suspension of the proceedings until 30 November 2012.

7. On 30 November 2012, the Mediation Division requested that the proceedings be further suspended until 14 December 2012, to "complete mediation" and "draf[t] the terms of a settlement agreement".

8. On 30 November 2012, the Tribunal issued Order No. 248 (NY/2012), extending the suspension of the proceedings until 14 December 2012.

9. Despite being granted three orders previously for suspension of proceedings, and an extension of time until 14 December 2012, neither the parties nor the Mediation Division reported the status of their mediation efforts to the Tribunal by the stipulated deadline of 14 December 2012.

10. Having received no submissions from the parties or a status report from the Mediation Division for more than three months, the Tribunal issued Order No. 54 (NY/2013), on 26 February 2013, noting the lack of communication on the outcome of the informal resolution efforts by the stipulated deadline or at all, and directing the parties to report on the status of the mediation efforts.

11. On 27 February 2013, the Mediation Division sent a letter to the Tribunal, stating:

> [T]he parties have an agreement but still need to actively resolve a certain issue.
>
> In an effort to continue in good faith to settle this matter and given the nature of the outstanding issue, [the Mediation Division requests] on behalf of both parties that the time for completion of the mediation be extended to 27 March 2013.
>
> Both parties have consented to this request for an extension of time to complete the mediation.

12. On 1 March 2013, the Dispute Tribunal issued Order No. 59 (NY/2013), directing the parties to inform it by 27 March 2013 as to the status of their mediation efforts.

13. Despite being granted the further extension of time until 27 March 2013, neither the parties nor the Mediation Division reported the status of the mediation efforts to the Tribunal by the stipulated deadline.

14. Following a reminder from the Tribunal to the parties after the expiration of the deadline, the Mediation Division, on 4 April 2013, sent a communication to the Tribunal requesting a further two-month extension of time until 4 June 2013 to complete mediation, stating that "the details of the agreement are contingent on certain factors being achieved which is more time consuming than was first anticipated".

15. On 5 April 2013, the Tribunal issued Order No. 85 (NY/2013), noting that art. 15.6 of its Rules of Procedure, approved by the General Assembly in resolution 64/119 of 16 December 2009, states that "[i]t shall be the responsibility of the Mediation Division to apprise the Dispute Tribunal of the outcome of the mediation in a timely manner". The Tribunal observed that the last two deadlines set by it were not complied with by the parties, and reminded the Mediation Division of the need to report back to the Tribunal.

16. The Tribunal further observed in Order No. 85 (NY/2013) that the mediation in this case had commenced more than eight months ago, during which period proceedings remained suspended, and that, whilst respecting the confidentiality of the mediation process, the reasons for requesting further suspension were unclear to the Tribunal, particularly in view of the communication of 30 November 2012, which stated that only two more weeks were required to complete mediation and finalise the terms of the settlement agreement. The Tribunal noted that one of the advantages of alternate dispute resolution is to offer speedy and cost-effective relief.

17. Noting the apparent lack of progress and continued non-compliance with its Orders on timeous reporting of the status of the mediation, the Tribunal granted a final suspension of two weeks, until 22 April 2013, to finalise the mediation process. The Applicant was further ordered, in the event of successful mediation, to file a written notice of withdrawal.

18. On 22 April 2013, the Tribunal received a communication from the Mediation Division, stating that "due to good faith efforts of all parties, the matter was settled in mediation".

19. On 29 April 2013, the Applicant filed a notice of withdrawal, stating that "[i]n view of the fact that the mediation ended successfully and the Applicant is satisfied that the remedies that he sought in his application will eventually be met, and given that he has no further need to pursue the claims contained in his application with the Tribunal, he now seeks permission of the Tribunal under [art.] 19 of the [Tribunal's] Rules of Procedure to withdraw the application *in toto*".

Effect of successful mediation

20. Pursuant to art. 8.2 of the Tribunal's Statute, "[a]n application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation".

21. 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.

22. 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. Of course, 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.

23. In the instant case, the Applicant confirmed that, following successful mediation, he was indeed withdrawing the matter *in toto*, that is, 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.

24. Pursuant to arts. 2.1(c) and 8.2 of the Tribunal's Statute, should the Administration fail to implement the mediation agreement, the Applicant may file an application to enforce its implementation under art. 8.2 of the Statute of the Tribunal (see also art. 7.4 of the Tribunal's Rules of Procedure). Such application shall be filed within 90 calendar days after the last day for the implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, within 90 calendar days after 30 calendar days from the date of the signing of the agreement.

Conclusion

25. The Applicant has withdrawn the matter in finality, including on the merits, with the intention of resolving the dispute between the parties. There no longer being

any determination to make, this application is dismissed in its entirety without liberty to reinstate, and without prejudice to the Applicant's right, if necessary, to file an application under arts. 2.1(c) and 8.2 of the Tribunal's Statute seeking to "enforce the implementation of [the] agreement reached through mediation".

(*Signed*)

Judge Ebrahim-Carstens

Dated this 30th day of April 2013

Entered in the Register on this 30th day of April 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York