UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/046
Judgment No.: UNDT/2013/108
Date: 23 August 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

GUEVARA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:
Monika Ona Bileris

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

Introduction

1. On 1 June 2011, the Applicant, a former staff member of the United Nations Integrated Mission in Timor-Leste, filed an application contesting various decisions related to her retirement from service with the Organization, including overpayment recoveries and delays in finalizing her separation personnel action form, which allegedly prevented her from receiving her pension entitlements timeously.

2. A case management discussion was held on 30 January 2013, at which the Tribunal invited the parties to consider resolving this case informally, either through *inter partes* discussions or through the Mediation Division of the United Nations Ombudsman and Mediation Services. By Order No. 37 (NY/2013), dated 1 February 2013, the parties were directed to file a submission stating, *inter alia*, whether they agree to attempt to resolve the matter informally.

3. On 28 March 2013, the parties filed a joint submission requesting the Tribunal to refer the matter to mediation and to suspend the proceedings pending the outcome of the mediation.

4. On 1 April 2013, the Tribunal issued Order No. 81 (NY/2013), referring the matter to mediation and suspending the proceedings until 1 May 2013.

5. On 30 April 2013, the Tribunal received a letter from the Mediation Division, sent on behalf of both parties, seeking an extension of time "for completion of the mediation" to 1 July 2013, both parties having consented to this request.

6. On 1 May 2013, the Tribunal issued Order No. 120 (NY/2013), suspending the proceedings until 1 July 2013 and ordering that

> [b]y Monday, 1 July 2013, the parties or the Mediation Division shall inform the Tribunal as to whether the matter has been resolved". If so,

> the Applicant shall confirm to the Tribunal, in writing, that her application is withdrawn fully, finally, and entirely, including on the merits.

7. On 8 July 2013, the Tribunal, not having received any communication from the parties or the Mediation Division, issued Order No. 166 (NY/2013), directing the parties to inform the Tribunal of the outcome of their informal resolution efforts by 11 July 2013.

8. On the same day, 8 July 2013, the Tribunal received a communication on behalf of the parties from the Mediation Division dated 1 July 2013, seeking an extension of time to 1 August 2013. This notification of 1 July 2013 apparently did not reach the Tribunal previously due to a technical problem.

9. On 9 July 2013, the Tribunal issued Order No. 167 (NY/2013), directing the parties to inform the Tribunal of the outcome of their mediation efforts by 1 August 2013.

10. On 1 August 2013, Counsel for the Applicant sent an email to the New York Registry, informing that "the parties have agreed to a settlement" and stating that:

> [T]he settlement agreement is still in process and has yet to be received, reviewed or signed by the Applicant.
>
> Applicant will, after reviewing and signing the agreement, confirm with the Tribunal in writing that her Application is officially withdrawn. Until such time, the Applicant reserves her right to maintain her appeal before the [Dispute Tribunal] and respectfully requests the Tribunal to keep her case open.

11. On 16 August 2013, the Tribunal issued Order No. 199 (NY/2013), directing the Mediation Division or the parties to inform the Tribunal by 26 August 2013 as to whether the matter has been resolved.

12. On 23 August 2013, the Tribunal received a letter from the Mediation Division, confirming that "the matter was settled in mediation". On the same day, the Applicant filed a notice of withdrawal, stating that, "having successfully settled the matter, she hereby withdraws her case fully, finally, and entirely, including on the merits".

Consideration

13. 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.

14. Once a matter has been determined, a party 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 by 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.

15. In regard to the doctrine of *res judicata*, the International Labour Organization Administrative Tribunal ("ILOAT") in Judgment No. 3106 (2012) stated at para. 4:

> The argument that the internal appeal was irreceivable is made by reference to the principle of *res judicata.* In this regard, it is argued that the issues raised in the internal appeal were determined by [ILOAT] Judgment 2538. As explained in [ILOAT] Judgment 2316, under 11:
>
> > *Res judicata* operates to bar a subsequent proceeding if the issue submitted for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard.
>
> A decision as to the "rights and liabilities of the parties" necessarily involves a judgment on the merits of the case. Where, as here, a complaint is dismissed as irreceivable, there is no judgment on the merits and, thus, no "final and binding decision as to the rights and liabilities of the parties". Accordingly, the present complaint is not barred by *res judicata.*

16. In the instant case, the parties have resolved their rights and liabilities in all essential elements by consensus, therefore disposing of the merits. The Applicant confirmed that, following successful mediation, she was indeed withdrawing the matter *in toto*, that is, fully, finally and entirely, including on the merits, without right of reinstatement or appeal. Therefore, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

Conclusion

17. 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, or the right to appeal.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 23rd day of August 2013

Entered in the Register on this 23rd day of August 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York