



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON WITHDRAWAL

Counsel for Applicant:

Brian Gorlick, OSLA

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 9 August 2012, the Applicant filed the present application, contesting the decision of the Assistant Secretary-General for Human Resources Management not to grant him a permanent appointment because of a prior disciplinary sanction of written censure imposed on him as a result of a finding of misconduct.

Motion to withdraw

2. On 16 September 2013, the Applicant filed a motion requesting withdrawal of his case and that the case file be placed under seal upon such withdrawal.

3. The Applicant stated in his motion that the Respondent had no objection to his request to place all the documents in the case file under seal upon the withdrawal of the application. The Applicant considers that any reference to this case on the United Nations website, which is publicly accessible, would impose an unjustified additional punishment on him and his family due to the particular circumstances of his case.

Consideration

Withdrawal

4. The Applicant has requested that this case, concerning the failure to grant him a permanent appointment because of the disciplinary sanction of a written censure, be withdrawn.

5. 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 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 complaint again.

6. 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.

7. 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*.

8. The Applicant’s challenge to the contested decision is supported by specific facts, issues and legal arguments, and it follows that the withdrawal of the matter would resolve the rights and liabilities of the parties in all essential elements by consensus, therefore disposing of the merits. Therefore, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

Request to place the case file under seal

9. The Applicant states that placing the entire case file under seal would not compromise the transparency of the system of justice because the allegations in the underlying disciplinary case were of a relatively minor nature, with no aggravating factors. This of course, is not a determination

the Tribunal can or should make if the matter is being withdrawn. The Applicant further states that he has worked for the Organization for thirteen years and throughout his career has demonstrated the highest standards of integrity. The Applicant states that, by granting his request to place the entire case file under seal, the Tribunal would be acting consistently with Order No. 123 (GVA/2013), issued in an unrelated case, in which the Tribunal closed the case on withdrawal and directed the Registry to place the case file under seal.

10. The Applicant further submits that the Respondent has no objections to his request, but does not stipulate whether this is part of a settlement agreement. In any event, the simple agreement of the parties without acceptable justification does not necessarily result in an order to place records under seal, since such procedures are in most jurisdictions reserved for exceptional cases. For example Rule 2.551(a) of the 2013 California Rules of Court stipulates that “[a] record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties”. The mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to place them under seal.¹

11. Article 18.4 of the Tribunal’s Rules of Procedure provides that “[t]he Dispute Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances”.

¹ See, e.g., *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

12. The purpose of placing specific documents or entire record under seal and the rationale behind this procedural step are explained in the Guidelines on the Filing of Submissions through the eFiling Portal (available on the Tribunal's website):²

Under seal filings

19. In the context of the Dispute Tribunal, filing a document under seal means that only the filing party, the non-filing party to the proceedings, and the Tribunal will have access to it. No third party will have access to the protected document unless it is unsealed by an order of the Tribunal.

20. The option of filing under seal is reserved for filings that require additional protection against disclosure to third parties. Specifically, should at any point in time the Tribunal issue an order granting access to a case file to a third party, any filings under seal in that case file would remain confidential unless a separate order is issued by the Tribunal specifically granting access to them.

13. The additional protective measures of placing specific sensitive documents under seal is generally used in cases involving security interests or other exceptional circumstances justifying imposition of measures preserving the confidentiality of evidence. The above Guidelines pertain to under seal documents at the time of filing, whereas in this instance the application is made on withdrawal of the matter some months later, for the placement under seal of the entire record, and not of specific documents. The Tribunal finds that in view of the already confidential status of the Tribunal's case files (as explained below), and the reasons offered by the Applicant, which do not warrant placing the entire case file under sea, the Applicant's request to place the case record under seal need not be granted.

² See http://www.un.org/en/oaj/files/undt/basic/guidelines_on_efiling.pdf.

Confidentiality

14. Practice Direction No. 6 (“On Records of the Dispute Tribunal”, adopted on 27 April 2012 and available on the Tribunal’s website)³ explains in para. 13 that the Tribunal’s case files are not available to the public and that access to them can only be granted by a Judge. Specifically, Practice Direction No. 6 states:

13. Access to materials other than judicial issuances pertaining to cases other than the ones to which one is a party can only be granted by a Judge. Written requests to this effect should be submitted through the Registrar using the generic form available on the Tribunal’s website, or some other means acceptable to the Registrar.

15. As the Tribunal stated in Order No. 59 (NY/2011) in Case No. UNDT/NY/2011/012, “the parties’ written pleadings before the Dispute Tribunal are generally not available to the public and ... the Tribunal’s case records are kept confidential and secure in its Registry”. The parties shall also maintain confidentiality and are expected to ensure that the written pleadings and documentation relating to their case are not disclosed to third parties.

Request for anonymity

16. Taking into consideration the particular circumstances of this case, the Tribunal considers it appropriate for the Applicant’s name to be redacted from the judgment.

³ See http://www.un.org/en/oaj/dispute/pdf/practice_direction_no6.pdf.

Conclusion

17. The Applicant has withdrawn this case in finality, including on the merits, with the intention of resolving all aspects of the dispute between the parties. There no longer being any determination to make, the application under Case No. UNDT/NY/2012/070 is dismissed in its entirety without liberty to reinstate.

18. The parties shall keep all documents and submissions contained in the present case confidential, in particular, they shall not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate any of those documents or submissions to anyone, for any purpose whatsoever, without further order of this Tribunal .

19. The Applicant's name is to be redacted from the present judgment.

(Signed)

Judge Ebrahim-Carstens

Dated this 11th day of October 2013

Entered in the Register on this 11th day of October 2013

(Signed)

Hafida Lahiouel, Registrar, New York