UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/022
Judgment No.: UNDT/2014/009
Date: 28 January 2014
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ADUNDO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:
Lennox S. Hinds

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

Introduction

1. Between 3 April and 24 May 2013, the United Nations Dispute Tribunal received six separate applications from six Security Officers in the Department of Safety and Security in New York, appealing the decision made by the Chief, Safety and Security Services, with the approval of the Office of Human Resources Management, to require them as a condition of future employment to undergo a comparative review exercise. Specifically, the six applications were filed on the following dates and assigned the following case numbers:

a. UNDT/NY/2013/020 (*Yudin*) – filed on 3 April 2013;

b. UNDT/NY/2013/022 (*Adundo*) – filed on 3 April 2013;

c. UNDT/NY/2013/023 (*Lamuraglia*) – filed on 8 April 2013;

d. UNDT/NY/2013/024 (*Adu-Mensah*) – filed on 8 April 2013;

e. UNDT/NY/2013/032 (*Mabande*) – filed on 22 April 2013;

f. UNDT/NY/2013/089 (*Chaclag*) – filed on 23 May 2013.

2. The present Judgment concerns the application filed by Mr. Adundo (Case No. UNDT/NY/2013/022).

Background

Early case management

3. By five separate Orders issued on 30 May 2013 (Orders No. 135 (NY/2013), No. 136 (NY/2013), No. 138 (NY/2013), 141 (NY/2013), 142 (NY/2013)), the Tribunal ordered the parties in *Yudin*, *Adundo*, *Lamuraglia*, *Adu-Mensah*, and *Mabande* to file five separate jointly signed statements identifying agreed and disputed issues of law and

fact in each of their cases. No joint submission was ordered in the matter of *Chaclag*. The submissions were duly filed.

4. On 13 October 2013, the Applicant in the matter of *Yudin* filed a motion for an expedited hearing on the merits. He stated that his contract was set to expire on 31 December 2013 as a result of the contested retrenchment process, and, "if the Tribunal does not intervene, [he would face] a likely end to his United Nations career in less than three months". He requested "an expedited hearing in this case as soon [as] practicable and by mid-December 2013".

Order for combined proceedings

5. By Order No. 265 (NY/2013), dated 23 October 2013, the Tribunal directed that the six cases would be subject to an order for combined proceedings and set them down for a hearing on the merits on 3–5 December 2013. The parties were ordered to file, by 6 November 2013, their lists of witnesses and an agreed bundle of documents in preparation for the hearing.

6. The agreed bundle and lists of witnesses were duly filed. The Applicants proposed calling seven witnesses. The Respondent proposed calling four witnesses. Each party indicated the preferred order for the appearance of their respective witnesses.

7. On 21 November 2013, the Tribunal issued Order No. 320 (NY/2013), stating that, due to unforeseen scheduling conflict, it would not be able to carry on with the hearing on the agreed dates. The Tribunal directed the parties to agree on alternative dates. The parties were also directed to file an agreed order of appearance of their witnesses.

8. On 25 November 2013, the Tribunal issued Order No. 321 (NY/2013), directing the parties to attend a case management discussion on 26 November 2013.

Case management discussion of 26 November 2013

9. Counsel for the Applicants attended the case management discussion in person. Counsel for the Respondent appeared by telephone.

10. Counsel for the Applicants stated that five of the six applicants had been placed against regular budget posts. Counsel for the Applicants stated, however, that all of the Applicants, bar one, nevertheless intended to proceed with their claims as they wished to claim pecuniary and non-pecuniary damages.

11. Counsel for the applicants further stated that one of the Applicants wished to withdraw his case. The Tribunal advised Counsel for the Applicants that, in this event, a notice of final and full withdrawal, including on the merits, should be filed by the said Applicant. This would be an appropriate cost saving procedure and would, of course, be without prejudice to the claims of the remaining Applicants.

12. At the conclusion of the case management discussion, the parties were directed to discuss any outstanding matters and agree on dates for a hearing on the merits.

Joint submission of 26 November 2013

13. On 26 November 2013, following the case management discussion, the parties filed a joint submission requesting the hearing to be rescheduled to the latter half of January 2014, preferably any three days in the week of 27–31 January 2014 or, alternatively, 22–24 January 2014. The parties further filed an agreed order of appearance of witnesses.

Hearing on the merits set for 29–31 January 2014

14. By Order No. 324 (NY/2013), dated 29 November 2013, the Tribunal set these cases for a hearing on the merits on 29–31 January 2014. The parties were directed, in the event they decide to resolve these cases informally, to advise the Tribunal accordingly in good time prior to the scheduled hearing on the merits in order to avoid

unnecessary expenditure of the Tribunal's resources. Further, the Tribunal ordered that should any of the Applicants decide not to proceed further with the application, they shall promptly file a notice withdrawing the matter fully, finally and entirely, including on the merits.

Notice of withdrawal in a related case

15. On 10 December 2013, Mr. Mabande filed a notice of withdrawal of his application. On 11 December 2013, the Tribunal issued Judgment No. UNDT/2013/168, stating that, "[t]here no longer being any determination to make, this application is dismissed in its entirety without liberty to reinstate or the right to appeal".

Notice of withdrawal in the present case

16. On 27 January 2014, the Applicant in the present case filed a notice of withdrawal, stating: "The Applicant has decided not to proceed further with his application. He hereby files this notice withdrawing the matter fully, finally and entirely, including on the merits".

Consideration

17. 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.

18. 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.

19. 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.*

20. In the instant case, the Applicant has confirmed that he is withdrawing the matter *in toto*, that is, fully, finally, and entirely, including on the merits. The Applicant's unequivocal withdrawal of the merits signifies a final and binding

resolution with regard to the rights and liabilities of the parties. Therefore, dismissal of his case with a view to finality of proceedings is the most appropriate course of action.

Order

21. 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, this application is dismissed in its entirety without liberty to reinstate or the right to appeal.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 28th day of January 2014

Entered in the Register on this 28th day of January 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York