UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/057
Order No.: 265 (NY/2016)
Date: 25 November 2016
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ELIMU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Cristiano Papile, ALS/OHRM, UN Secretariat
Miryoung An, ALS/OHRM, UN Secretariat

Introduction

1. On 14 October 2015, the Applicant, an Associate Human Resources Officer in the Field Personnel Division, Department of Field Support ("DFS") in New York, filed an application challenging the imposition of disciplinary measure of demotion for a period of two years, with no eligibility for promotion. Specifically, the Applicant contested

> the procedural approach to the investigations carried out against me for my alleged integrity breach during the processing of [Job Opening No.] 425074 (Political Affairs Officer-P-3), which was based on a fact-finding panel report [that] issued formal allegations of misconduct against me for allegedly administering the written assessment for the [P-3] position … which I myself applied, and was candidate, for.

2. The Applicant stated, *inter alia*, that he was singled out for "selective justice" in that other staff members were not investigated for the same or similar offences. The Applicant also submitted that there were instances in which other staff members engaged in similar conduct, with full knowledge of their superiors, and suffered no negative consequences.

3. The Respondent filed his reply on 13 November 2015. The Respondent submitted, *inter alia*, that the material facts were established by clear and convincing evidence and that the Applicant's claims were without merit. The Respondent stated that there was no evidence in support of the Applicant's claim that there was a practice whereby other staff members who administered tests also took them as candidates with the awareness and condonation of their supervisors. The Respondent submitted that the established facts legally amounted to misconduct, that the Applicant's procedural rights were fully respected, and that the imposed disciplinary measure was proportionate to the misconduct.

Procedural background

4. By Order No. 294 (NY/2015) dated 17 November 2015, the Tribunal directed that this case would join the queue of pending cases awaiting assignment to a Judge.

5. On 9 May 2016, the present case was assigned to the undersigned Judge.

6. By Order No. 110 (NY/2016) dated 11 May 2016, the Tribunal directed the parties to file a jointly-signed submission by 7 June 2016, with, *inter alia*, the factual and legal issues in contention, a list of witnesses to be called together with brief statements of their evidence, tentative dates for a hearing, and other matters, with a view to holding a case management discussion ("CMD") on 9 June 2016, in order to prepare for the hearing of this matter.

7. By email to the Registry dated 24 May 2016, the Applicant stated that he would be represented by private counsel in this case.

8. On 3 June 2016, the parties filed a joint submission requesting an extension of time until 14 June 2016 to file the jointly-signed submission and requesting that the CMD be rescheduled to another date in the circumstances.

9. Following the joint request, as there was no authorization form on file from the Applicant's designated legal representative, the Registry endeavored to contact said Counsel, who confirmed that indeed he was not representing the Applicant. The Applicant subsequently confirmed that he was unrepresented.

10. By Order No. 134 (NY/2016) dated 7 June 2016, the Tribunal ordered the parties to file the jointly-signed submission by 14 June 2016 and to attend a CMD in preparation for a hearing on the merits on 27 June 2016.

11. On 14 June 2016, the parties filed a jointly-signed submission pursuant to Order No. 134 (NY/2016).

12. Pursuant to para. 15 of Order No. 134 (NY/2016), the CMD took place on 27 June 2016. However, it was agreed at the CMD that it would be postponed until 18 July 2016, when the Applicant would be present in New York.

13. Accordingly, by Order No. 154 (NY/2016), the Tribunal directed both parties to attend a CMD on 18 July 2016. The CMD took place as scheduled at 11 a.m. on 18 July 2016.

14. By Order No. 171 (NY/2016) dated 18 July 2016, the Tribunal directed the parties to confer with a view to resolving the matter informally, failing which the parties were to file further submissions by 30 August 2016.

15. On 18 August 2016, the parties filed a joint submission requesting the proceedings to be suspended for two months to explore the possibility of informal resolution of the dispute.

16. By Order No. 202 (NY/2016) dated 19 August 2016, the Tribunal suspended the proceedings until 25 October 2016.

17. On 24 October 2016, the parties filed a joint submission requesting the proceedings to be suspended for one month to finalize their informal discussions.

18. By Order No. 250 (NY/2016) dated 25 October 2016, the Tribunal suspended the proceedings until 24 November 2016. The parties were directed to file a submission by 5:00 p.m. on 24 November 2016, informing the Tribunal of the outcome of their informal discussions. In the event of an amicable resolution, the Applicant was directed to file a motion withdrawing his application, stating that he withdraws the matter fully and finally, including on the merits, with no right of reinstatement of this case.

Submission dated 24 November 2016

19. On 24 November 2016, the Applicant sent an email attaching a notice of withdrawal, which stated: "Pursuant to the terms and conditions of a settlement agreement, the Applicant hereby withdraws his Application without ability to reinstate".

Consideration

20. 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.

21. With 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.*

22. In the instant case, the Applicant has confirmed in writing that he is withdrawing the matter without ability to reinstate. The Applicant's unequivocal withdrawal of the merits signifies a final and binding resolution with regard to the rights and liabilities of the parties in all respects in his case, requiring no pronouncement on the merits but concluding the matter *in toto*. Therefore, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

23. The Tribunal commends the parties for their good faith efforts at resolving the case amicably. Such efforts are encouraged as amicable resolution of disputes is an essential component of the new system of internal justice, not only saving valuable resources of the Organization but contributing also to a harmonious working environment and culture.

Conclusion

24. The Applicant has withdrawn the present 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 for the Tribunal to make, this application is therefore dismissed in its entirety without liberty to reinstate.

(Signed)

Judge Ebrahim-Carstens

Dated this 25th day of November 2016