UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/071
Order No.: 115 (NY/2018)
Date: 1 June 2018
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

CHOHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 6 December 2016, the Applicant, a Legal Officer at the P-4, step-11 level, within the General Legal Division of the Office of Legal Affairs ("GLD/OLA") in New York, filed an application contesting her "final 2015/16 [electronic performance appraisal] issued on 29 June 2016". The Applicant submits that the contested decision constitutes a breach of ST/AI/2010/5 (Performance Management and Development System). The Applicant seeks an "amendment of [her] 2015/16 performance evaluation to reflect fair ratings and acknowledgement of work completed" and to "move to another function within OLA given the risk of prejudice in the next performance cycle and the impact on [her] career in terms of providing this performance evaluation to prospective employers".

2. On 6 December 2016, the Tribunal's Registry transmitted the application to the Respondent instructing him to reply by 6 January 2017.

3. On 27 December 2016, the Applicant filed a motion requesting leave to amend her application. In her motion, the Applicant informed the Tribunal of the status of mediation efforts with the United Nations Ombudsman and Mediation Services ("UNOMS") as follows:

> While the Applicant had requested mediation since July 2016, this mediation only commenced in late October 2016. At the time of the filing, the Applicant was fully expecting the mediation to continue and resolve the dispute. Therefore, she did not prepare the full legal arguments for her case before [the Dispute Tribunal, "UNDT"]. The day after her filing to the UNDT on 7 December 2016, the Applicant requested the Ombudsman's Office's assistance in ensuring that the mediation continued. The Ombudsman's Office had advised that the proceedings before the UNDT could therefore be suspended.
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> However, on 16 December 2016, the Ombudsman's Office informed the Applicant that the mediation was suspended pending the Administration's response to the formal procedure initiated by the

> Applicant before the UNDT. The Applicant was further informed that the earliest that such mediation could resume would be January 2017.
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> As a result of these events and in order to fully present her case before the UNDT, the Applicant requests that the UNDT Judge grants her request for leave to supplement or amend her Application with the attached Brief.
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> The Applicant would like to emphasise she has been endeavouring since July 2016 to resolve this matter through mediation and remains committed to returning to mediation.

4. On 6 January 2017, the Respondent filed his reply arguing, *inter alia*, that the application should be dismissed on the grounds that it is not receivable *ratione materiae* since the Applicant has not identified an administrative decision impacting upon the terms of her appointment. The Respondent submits that comments and ratings for individual values and competencies in an otherwise satisfactory e-Pas are not administrative decisions, accordingly the application is not receivable. If found receivable, the application should be dismissed for lack of merit because the Applicant was assessed lawfully in compliance with the procedures set out in ST/AI/2010/5.

5. On 13 April 2017, by Order No. 75 (NY/2017), the Tribunal noted that the mediation efforts between the parties had been suspended pending the Administration's response to the Applicant's application. The Tribunal stated that since the Respondent had filed his reply, it would be appropriate to inquire whether mediation efforts have resumed, and if so, whether the parties request the Tribunal to suspend the proceedings in this case. The Tribunal ordered that the Applicant's motion of 27 December 2016 to amend the application be refused, noting that the Applicant however, in the interests of justice, would have the opportunity to file a response to the Respondent's reply wherein she may incorporate, the arguments set forth in her motion together with any other relevant comments. The Tribunal also directed that the parties file a jointly signed submission by 26 April 2017, indicating whether they agree to attempt informal resolution, and, if so, whether they request a

suspension of the proceedings. The Tribunal further ordered that if the parties do not agree to attempt or continue informal resolution, the Applicant shall file a response to the Respondent's reply by 5 May 2017.

6. On 26 April 2017, pursuant to Order No. 75 (NY/2017), the parties filed a joint submission informing the Tribunal that the parties had not agreed to attempt informal resolution and that "[w]hile the Administration's position is that it is not possible to informally resolve this case, the Applicant continues to reiterate her willingness to participate in such informal resolution as the UNDT deems fit".

7. On 5 May 2017, pursuant to Order No. 75 (NY/2017), the Applicant filed a response to the Respondent's reply.

8. By Order No. 254 (NY/2017) dated 15 November 2017, the Tribunal ordered the parties to file a jointly signed statement by 15 December 2017 providing the following information: a consolidated list of agreed facts in chronological order; a consolidated list of facts in dispute if any, in chronological order; a list of agreed legal issues; a list of any further document(s), if any, each party requests production of, and the relevance of such document(s).

9. On 5 December 2017, the parties filed a "Joint Motion for Suspension of Proceedings" informing the Tribunal that the parties were agreeable to entering into mediation discussions under the auspices of the UNOMS, and requested the Dispute Tribunal to suspend proceedings and to refer the matter to the UNOMS.

10. By Order No. 274 (NY/2017) dated 14 December 2017, the Tribunal referred the matter to the Mediation Division of the UNOMS for mediation pursuant to art. 15 of the Tribunal's Rules of Procedure and suspended the proceedings until 14 March 2018.

11. On 12 March 2018, the Ombudsman submitted a letter to the Registry by email confirming "that the parties continue to engage in good faith efforts to find a mutually agreeable solution" and, on behalf of the parties, requested a one-month extension until 16 April 2018.

12. Taking into consideration the parties' consent to mediation, and pursuant to art. 15 of the Tribunal's Rules of Procedure, on 12 March 2018, the Tribunal issued Order No. 54 (NY/2018) referring the matter to UNOMS for further consideration and also further suspended the proceedings until 16 April 2018.

13. On 13 April 2018, a Senior Mediator from the UNOMS submitted a letter to the Tribunal advising that "the parties concur that they have reached an agreement in principle and need more time to work out the details of the settlement. Therefore, on behalf of the parties, I would like to request an extension until 1st May 2018. Both parties have consented to this request."

14. By Order No. 82 (NY/2018) issued on 13 April 2018, the Tribunal granted the joint motion and suspended the proceedings until 1 May 2018, instructing the parties to inform the Tribunal on or before the same date as to the progress of the settlement agreement and/or whether this case has been resolved.

15. On 30 April 2018, a Senior Mediator from the UNOMS submitted a letter to the Tribunal advising that "[a]fter discussions with the parties, I have been requested to inform the Tribunal that the parties need more time to review and finalize the details of the settlement agreement in this case. Therefore, on behalf of the parties, I would like to request an extension until May 15th, 2018."

16. By Order No. 93 (NY/2018) issued on 1 May 2018, the Tribunal granted the parties' request for an extension and suspended the proceedings until 15 May 2018, instructing the parties to inform the Tribunal on or before the same date as to the progress of the settlement agreement and/or whether this case has been resolved.

17. On 15 May 2018, a Senior Mediator from the UNOMS submitted a letter to the Tribunal advising that "the parties have reached and signed an agreement this evening and the matter was settled in mediation. A notice of withdrawal of the Application will be forthcoming in due course."

18. On 31 May 2018, the Applicant filed a notice of withdrawal in which she stated, "Pursuant to both Section 19 of Order No. 93 and section 6 of the Settlement Agreement dated 15 May 2018, the Applicant hereby confirms to the UNDT that her application before the UNDT concerning the instant case is withdrawn fully, finally and entirely, including on the merits".

Consideration

19. The desirability of finality of disputes within the workplace cannot be gainsaid (see *Hashimi* Order No. 93 (NY/2011), dated 24 March 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 an applicant does not have the right to bring the same complaint again.

20. 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 party should not have to answer the same cause twice. Once a matter has been resolved, a party should not be able to re-litigate the same issue. An unequivocal withdrawal means that the matter will be disposed of such that it cannot be reopened or litigated 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:
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> > *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.
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> 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 filed a notice stating that she agrees to withdraw her case fully and finally and entirely including on the merits as set out above.

23. 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 her case, requiring no pronouncement on the merits but concluding the matter *in toto*. Therefore, the dismissal of her case with a view to finality of the proceedings is the most appropriate course of action.

24. The Tribunal commends the parties for resolving this matter and the Applicant for withdrawing the present case. This saves valuable resources all round and also contributes to inculcating a harmonious working environment and culture within the Organization. Even more so, as ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)

provides that managers and supervisors have a duty to take all appropriate measures to provide a harmonious work environment, with sec. 6.1 providing that heads of departments and offices shall provide annual reports to the Assistant Secretary-General for Human Resources Management which shall include an overview of all preventive measures taken "with a view to ensuring a harmonious work environment (see also *Nadeau* UNDT/2018/052). It is therefore commendable that management has seen fit to finally resolve this matter amicably so that the Tribunal could dispose of this matter without the need for a hearing, with all its attendant costs, and the issuance of a reasoned judgment thereafter. The Tribunal is also appreciative of the assistance rendered by the UNOMS in resolving this matter amicably.

Conclusion

25. The Applicant has withdrawn the present case in finality, including on the merits. There no longer being any determination for the Tribunal to make, this application is dismissed in its entirety without liberty to reinstate.

(Signed)

Judge Ebrahim-Carstens

Dated this 1st day of June 2018