UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/002
Order No.: 141 (NY/2018)
Date: 6 July 2018
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

NDIAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:
Maurizio Giuliano

Counsel for Respondent:
Bettina Gerber, HRLU

Introduction

1. On 29 January 2018, the Applicant filed an application in which she, in the name of her deceased spouse, contested the "[d]ecision by [New York] Insurance Unit not to allow the family of the [staff member] to enrol[l] in after-service health insurance (ASHI) after the [staff member's] death".

2. On 31January 2018, the Registry acknowledged receipt of the application and transmitted it to the Respondent, instructing him to file a reply by 5 March 2018.

3. On 5 March 2018, the Respondent filed a motion for extension of time to file the reply, submitting that, "In light of the fact that many different offices are involved and the need for further consultations to ensure that the record is complete, the Respondent respectfully requests the Tribunal to extend the deadline to submit the Respondent's reply to 20 March 2018".

4. By Order No. 50 (NY/2018) issued on the same day, 5 March 2018, the Tribunal granted the Respondent's motion and extended the deadline to file a reply until 20 March 2018.

5. On 20 March 2018, the parties filed a joint motion for a suspension of proceedings informing the Tribunal that in the interim "[…] the parties were in contact and decided to seek mediation to find an amicable settlement to this case within one month" and "[…] respectfully request that the Tribunal suspends proceedings, without prejudice to either party until 20 April 2018 in order to find an amicable settlement to the case".

6. By Order No. 60 (NY/2018) issued on the same day, 20 April 2018, the Tribunal granted the Respondent's motion and extended the deadline to file a reply until 20 March 2018.

7. On 18 April 2018, the parties filed a joint motion for a suspension of proceedings informing the Tribunal that "they are still in the process of finding an amicable settlement to this case" and "respectfully request that the Tribunal suspends proceedings, without prejudice to either party until 21 May 2018, in order to settle the matter".

8. By Order No. 87 (NY/2018) issued on 19 April 2018, the Tribunal granted the request and suspended proceedings until 21 May 2018.

9. On 18 May 2018 the parties filed a joint submission requesting a further suspension of proceedings stating that they were "making good progress in settling the matter and an agreement was in the process of being drafted, but that in order to finalize the agreement, the parties would need additional time". The parties requested until 22 June 2018 in order "to conclude the negotiations".

10. By Order No. 100 (NY/2018) dated 18 May 2018, the request for a further suspension of proceedings was granted and the proceedings were suspended until 22 June 2018.

11. On 22 June 2018, the parties filed a joint submission requesting a continued suspension of proceedings until 20 July 2018, stating, *inter alia*, that:

> [T]hey agreed on the terms of the settlement agreement and that the agreement was approved by the [Under-Secretary-General] for Management on 21 June 2018. In view of this, the parties wish to inform the Tribunal that the Applicant intends to withdraw her application in due course, assuming all goes well".

12. By Order No. 129 (NY/2018) issued on 22 June 2018, the Tribunal granted the joint motion and suspended the proceedings until 20 July 2018, instructing the parties to inform the Tribunal on or before the same date as to whether the case had been resolved.

13. On 6 July 2018, the Counsel for the Applicant filed a submission titled, "Withdrawal of Application", in which was stated that the parties "agreed on the terms of a mutually suitable settlement agreement [and in] view of this, the Applicant withdraws the Application […]".

Consideration

14. 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.

15. 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.

16. 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.*

17. In the instant case, the Applicant filed a request stating that she withdraws her application because the parties "agreed on the terms of a mutually suitable settlement agreement".

18. 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

19. The Tribunal commends the parties for resolving this matter and the Applicant for withdrawing the present case, as this has saved time and other valuable resources of the Tribunal, the Organization and all concerned.

Conclusion

20. 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 6th day of July 2018