Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

MALININ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:
Mariam Munang, OSLA

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

Introduction

1. On 21 September 2018, the Applicant filed a motion for extension of time to file an application before the Dispute Tribunal in respect of a decision to find him ineligible for the After-Service Health Insurance ("ASHI"). He sought an extension of time pending settlement discussions and stated that the parties had been engaged in settlement discussions to resolve the dispute with the assistance of the Management Evaluation Unit ("MEU").

2. On the same day (21 September 2018), the New York Registry of the Dispute Tribunal transmitted the Applicant's motion to the Respondent and, upon instructions of the undersigned Judge, directed the Respondent to file a response by 24 September 2018.

3. On 24 September 2018, the Respondent filed his reply to the Applicant's request stating that the Respondent has no objection to the Dispute Tribunal granting the Applicant additional time to file an application, more particularly that the Applicant is engaged in discussions with the MEU to informally resolve the dispute and that the "MEU anticipates that a settlement proposal for the review and consideration of the Under-Secretary-General for Management will be finalized the week of 24 September 2018".

4. On 25 September 2018, by Order No. 189 (NY/2018), the Tribunal denied the Applicant's motion for extension of time to file an application on the grounds, *inter alia*, that it did not satisfy prevailing legal requirements, more especially the conditions specified in art. 8.1(d)(iv) of the Dispute Tribunal's Statute, and directed the Applicant to file his application, if any, on or before 26 September 2018, as required by art. 8.1(d)(i) of the Dispute Tribunal's Statute and art. 7.1(b) of the Rules of Procedure.

5. On 26 September 2018, the Applicant filed his application and motion for suspension of proceedings pending informal resolution, stating as follows (reference to footnotes omitted):

> Upon filing his [Management Evaluation Request], Mr. Malinin has been in discussion with the Administration regarding the amicable resolution of this matter, with the assistance of the MEU. On 20 September 2018, the MEU informed the Applicant that "there is a very high degree of probability that the matter will be resolved within the next month (or two, taking into account technical aspects)" and that they need more time to "finalize the settlement proposal".
>
> If this matter is resolved informally, there would be no need for protracted litigation and further expenditure of resources. The suspension of proceedings pending informal resolution is therefore in the interests of all parties.

6. On the same day (26 September 2018), the New York Registry of the Dispute Tribunal transmitted the substantive application with the request for suspension of proceedings to the Respondent, instructing him to reply by 26 October 2018, and, upon instructions of the undersigned Judge, directed the Respondent to indicate by 27 September 2018 if he had any objection to the request for suspension of proceedings.

7. On 27 September 2018, the Respondent informed the New York Registry of the Dispute Tribunal via email that he does not object to the Applicant's motion for suspension of proceedings.

8. On the same day (27 September 2018), by Order No. 191 (NY/2018), the Tribunal suspended the proceedings until 8 November 2018, by which date the parties were directed to inform the Tribunal as to the progress of the Applicant's claim and/or whether this case has been resolved. In the latter event, the Applicant was directed to confirm to the Tribunal, in writing, that his application is withdrawn fully, finally and entirely, including on the merits. The deadline for the filing of the Respondent's reply (26 October 2018) was also vacated until the Tribunal's further order.

9. On 16 October 2018, the Applicant filed the motion to withdraw and discontinue proceedings stating that the parties reached a settlement agreement on this matter on 8 October 2018 and therefore the Applicant was seeking to withdraw his application fully.

Consideration

10. 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 an applicant does not have the right to bring the same complaint again.

11. 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.

12. 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*.

13. In the instant case, the Applicant filed a request stating that he withdraws his application because "the parties reached a Settlement Agreement on this matter".

14. 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, the dismissal of his case with a view to finality of the proceedings is the most appropriate course of action.

15. 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

16. 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 31st day of October 2018