



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NY/2017/085
UNDT/NY/2018/024
Order No.: 216 (NY/2018)
Date: 31 October 2018
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

ZILBERG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:

Daniel Trup, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 18 August 2017, the Applicant, an Auditor at the P-4 level with the Office of Internal Oversight Services (“OIOS”) in New York, filed an application contesting the decision to not select him for the temporary job opening for the position of Chief of Section, Audit, at the P-5 level (Job Opening No. 17-AUD-OIOS-80688-J-NEWYORK(T)) of the Information and Communications Technology (“ICT”) Section within OIOS. This case was registered under Case No. UNDT/NY/2017/085.

2. The Applicant’s principle contention is that the manner of the temporary recruitment was clearly intended to favour a specified candidate and, in doing so, the Administration failed to give him full and fair consideration for the position.

3. On 18 September 2017, the Respondent filed a reply contending, *inter alia*, that the application is without merit as the Organization fully and fairly considered the Applicant in accordance with the legal framework for temporary appointments. The Respondent states that following a comparative analysis of the job applicants, another candidate, who was allegedly better suited for the position than the Applicant, was selected for the position.

4. On 18 May 2018, the Applicant filed a second application contesting the decision not to select him for the job opening for the position of Chief of Section, Audit, P-5 (Job Opening No. 17-AUD-OIOS-73526-R-NEW YORK(R)) of the ICT section within OIOS. The Applicant contends that recruiting a specified candidate (the preferred candidate) for the temporary appointment for this post before awarding the fixed-term position to this same candidate violated the Administration’s obligation to give him full and fair consideration. He also contends that the written test, specifically the final marking, was assessed in a manner as to ensure the Applicant would not be shortlisted for an interview. This case was registered under Case No. UNDT/NY/2018/024.

5. In this second application, the Applicant also moved for the second case, Case No. UNDT/NY/2018/024, to be consolidated with Case No. UNDT/NY/2017/085 pursuant to arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure. The Applicant contended that in both cases he seeks to contest the manner of recruitment with regard to the P-5 level post of Chief of Audit by recruiting the preferred candidate to a temporary position before selecting this candidate for the fixed term appointment. Furthermore, the Applicant anticipates that the same evidence would be presented in both applications as both cases have similar issues of fact and/or law. Therefore, joinder/consolidation would likely result in a more efficient or expeditious resolution of the proceedings without prejudicing the interests of the parties.

6. On 18 June 2018, the Respondent filed a reply to Case No. UNDT/NY/2018/024 contending, *inter alia*, that the application is without merit as the Applicant was fully and fairly considered for the position. Since the Applicant did not pass the written assessment for the position, he was therefore not recommended for selection for the position. In the reply, the Respondent did not address nor object to the Applicant's motion for consolidation of the two cases.

7. On 6 September 2018, by Order No. 168 (NY/2018), the Tribunal ordered that Case No. UNDT/NY/2018/024 and Case No. UNDT/NY/2017/085 be subject to combined proceedings with the option of separate judgments being issued if deemed necessary and directed the parties to file a joint submission consisting of, *inter alia*, a list of agreed facts, facts in dispute, agreed legal issues, and any further information or document(s), if any, each party requests produced, by 28 September 2018.

8. On 21 September 2018, the parties jointly requested a suspension of the proceedings, including the deadlines contained in Order No. 168 (NY/2018), for 30 days to allow the parties to explore informal resolution of the two cases.

9. On 24 September 2018, by Order No. 188 (NY/2018), the Tribunal waived the deadlines contained in Order No. 168 (NY/2018) until further notice and

suspended the proceedings until 24 October 2018, by which date the parties were directed to inform the Tribunal as to whether the cases have been resolved. If so, the Applicant was directed to confirm to the Tribunal, in writing, that his applications in both cases are withdrawn fully, finally, and entirely, including on the merits.

10. On 17 October 2018, the Applicant filed the motion to withdraw “[f]ollowing informal resolution between the parties”.

Consideration

11. 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.

12. 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.

13. 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*.

14. In the instant case, the Applicant filed a request stating that “[f]ollowing informal resolution between the parties, [he] hereby withdraws all of his allegations and claims in the present proceedings before the United Nations Dispute Tribunal in finality, including on the merits, and with no right of reinstatement”.

15. 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 two cases, requiring no pronouncement on the merits but concluding the matters *in toto*. Therefore, the dismissal of his cases with a view to finality of the proceedings is the most appropriate course of action.

16. The Tribunal commends the parties for resolving these matters and the Applicant for withdrawing the present cases, as this has saved time and other valuable resources of the Tribunal, the Organization and all concerned.

Conclusion

17. The Applicant has withdrawn his two cases, Case No. UNDT/NY/2017/085 and Case No. UNDT/NY/2018/024, the subject of combined proceedings, in finality,

including on the merits. There no longer being any determination for the Tribunal to make, the applications in the combined proceedings are dismissed without liberty to reinstate.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of October 2018