



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/012
UNDT/NY/2013/015
UNDT/NY/2013/096
Order No.: 261 (NY/2014)
Date: 9 September 2014
Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

WISHART

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:
Janelle Melissa Lewis

Counsel for Respondent:
Robert Nadelson, UNDP

Introduction

1. The Applicant, a former staff member of the United Nations Development Programme (“UNDP”), has three cases before the Tribunal:

a. Case No. UNDT/NY/2012/012, in which the Applicant contests UNDP’s alleged failure to protect her from harassment and abuse of authority by her supervisors;

b. Case No. UNDT/NY/2013/015, in which the Applicant contests the decision of 20 December 2012 to issue her a written reprimand; and

c. Case No. UNDT/NY/2013/096, in which the Applicant contests, *inter alia*, the decision to place her on a “search period” (i.e., a period of time to look for a new position) and subsequent notice of separation.

2. On 31 July 2013, the Tribunal issued Order No. 181 (NY/2013) in Case No. UNDT/NY/2013/096, suspending “the implementation of the decision to end the Applicant’s search period and to separate her from service”. By Orders No. 223, (NY/2013), No. 224 (NY/2013), and No. 225 (NY/2013), all dated 6 September 2013, the Tribunal referred the three matters to mediation, and by letter dated 4 November 2013, the Office of the Ombudsman for the United Nations Funds and Programmes informed the Tribunal that the mediation efforts were not successful. The interim measures were subsequently extended by Orders No. 223 (NY/2013) and 292 (NY/2013) dated 7 November 2013. A full procedural history of this matter is more fully set out in order No. 94 (NY/2014) when the Tribunal discharged the interim measures on 24 April 2014, on which date the Applicant was also separated from service.

3. During the pendency of the interim measures, the Tribunal directed that the three cases be heard jointly and on an expedited basis. However, initially, the Tribunal's extraordinary efforts to expedite the hearing of these three cases as well as to facilitate their amicable resolution proved unsuccessful. On 28 July 2014, after the discharge of the interim measures and the Applicant's separation, the Tribunal called a Case Management Discussion ("CMD") to advance the proceedings. At the CMD, through the intervention of the Tribunal, it appeared that there was a possibility of further discussions regarding an informal resolution to the cases and, by Order No. 213 (NY/2014) of the same date, the Tribunal instructed the parties to further consider such resolution. By consecutive joint motions dated 11 August, 25 August and 3 September 2014, the parties informed the Tribunal that informal discussions were progressing.

Notice of withdrawal

4. On 3 September 2014, the Applicant filed a submission, stating:

... By joint response issued on 3 September 2014, the parties informed the Dispute Tribunal that, "... the Parties have now come to an informal resolution of the matters that are the basis for the cases presently before the Tribunal."

... The Applicant respectfully submits that she hereby withdraws fully, finally, and entirely, including on the merits UNDT case no. UNDT/NY/2012/012.

... The Applicant respectfully submits that she hereby withdraws fully, finally, and entirely, including on the merits UNDT case no. UNDT/NY/2013/015.

... The Applicant respectfully submits that she hereby withdraws fully, finally, and entirely, including on the merits UNDT case no. UNDT/NY/2013/096.

Consideration

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

6. 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 issue, broadly speaking, is a matter of fact or question of law in a dispute between two or more parties which a court is called upon to decide and pronounce itself on in its judgment. Of course, a determination on a technical or interlocutory matter does not result in the final disposal of a case, and an order for withdrawal is not always decisive of the issues raised in a case. An unequivocal withdrawal means that the matter will be disposed of such that it cannot be reopened or litigated again. In 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*.

7. In the instant three cases, the Applicant has confirmed that she is withdrawing all matters “fully, finally and entirely, including on the merits”. 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 all three cases, requiring no pronouncement on the merits but concluding the matter *in toto*. Therefore, dismissal of her cases with a view to finality of proceedings is the most appropriate course of action.

8. This matter has had a chequered history, as more clearly set out in order No. 94 (NY/2014), and has been the subject of several CMDs and *inter partes* discussions, with a view to resolution. Although it has taken time and strenuous effort to achieve resolution, the benefits of judicial intervention and active and vigorous case management cannot be gainsaid, and in this case have finally borne fruition. From the proposed list of 29 witnesses, and many diverse issues, the parties have admirably resolved all three matters in full and final settlement, thus saving valuable time and costs. The Tribunal commends both Counsel for the Applicant and Respondent, and the parties for their good faith efforts at resolving the three case amicably. Such efforts should be encouraged as the 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

9. The Applicant has withdrawn the three present cases 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 to make, this application is dismissed in its entirety without liberty to reinstate.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 9th day of September 2014