



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:
George Irving

Counsel for Respondent:
Tamara Shockley, UNICEF

Introduction

1. On 17 May 2010, the Applicant, a former Learning Specialist at the P-4 level in the Organizational Learning and Development Section (“OLDS”), United Nations Children’s Fund (“UNICEF”), filed an application with the Dispute Tribunal contesting the 22 December 2009 decision of the Director, Division of Human Resources (“the Director”), UNICEF, to dismiss her complaint against the Chief of OLDS (“the Chief”) for harassment and abuse of authority. The Applicant also appeared to encompass other administrative decisions in the application, particularly one concerning the abolishment of her former post with UNICEF.

2. The Respondent filed a reply on 17 June 2010, contending that the application was without merit, and also contending that the only issue properly before the Tribunal was the Director’s decision “to accept the findings of the [Office of Internal Audit (“OIA”)] Closing Report and not to take any action on her complaint of harassment and abuse of authority against the alleged offender”.

3. Following receipt of the Applicant’s submissions in response to the Respondent’s arguments on receivability, the Tribunal rendered a judgment on receivability on 10 October 2012, Judgment No. UNDT/2012/149, finding that the only decision properly before it was the Director’s dismissal of the Applicant’s complaint against the Chief for harassment and abuse of authority. The Tribunal further found that the facts surrounding the decision concerning the abolishment of the Applicant’s post, as well as any other relevant administrative decision, could still form part of the underlying factual background insofar as the Tribunal would find these pertinent to determining the substantive case.

4. On 1 May 2013, the Applicant’s Counsel filed a submission stating:

... In the interests of reaching an amicable settlement of the issues in this case, the parties through their respective Counsel have been engaged in discussions aimed at settling their dispute.

... In view of the fact that agreement has now been reached and finalised through the execution of a settlement agreement of all outstanding claims related to the application, the Applicant wishes to request the withdrawal of her application on the understanding that this will constitute a final determination on the merits, and is without appeal.

Withdrawal of application

5. As the Tribunal stated in *Giles* UNDT/2012/194, although its Rules of Procedure contain a provision for summary judgment (see art. 9 of the Rules and also art. 7.2(h) of the Tribunal's Statute), there are no specific provisions in the Tribunal's Statute or Rules of Procedure regarding discontinuance, abandonment, want of prosecution, postponement, or withdrawal of a case. However, abandonment of proceedings and withdrawal of applications are not uncommon in courts and generally result in a dismissal of the case either by way of an order or a judgment. In this regard, reference can be made to art. 19 of the Tribunal's Rules of Procedure, which states that the Tribunal "may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties". Also, art. 36 of the Tribunal's Rules of Procedure provides that all matters that are not expressly provided for in the Rules shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by art. 7 of its Statute.

6. 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 Judge Boolell 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.

7. Once a matter has been determined with finality, parties 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. Article 2.1 of the Tribunal's Statute states that the Tribunal "shall be competent to hear and pass judgment on an application filed by an individual", as provided for in art. 3.1 of the Statute. Generally, a judgment involves a final determination of the proceedings or of a particular issue in those proceedings. 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 litigant should not have to answer the same cause twice.

8. Therefore, a determination on a technical or interlocutory matter is not a final disposal of a case, and an order for withdrawal is not always decisive of the issues raised in a case. In *Monagas* UNDT/2010/074, the Tribunal dealt with a withdrawal by the applicant on the grounds that he intended to commence proceedings against the Organization in the national courts of Venezuela. The Tribunal enquired of the applicant's counsel whether the applicant was aware as to the status of the United Nations before national courts, the fact that the United Nations retained discretion regarding its own immunity, and therefore the hurdles the applicant might face seeking relief in such a manner. Further, notwithstanding that the matter had not been canvassed on the merits, it would be unlikely for it to be reinstated once dismissed. In that case, the Tribunal noted the judgment of Judge Cousin in *Saab-Mekhour* UNDT/2010/047 where, with reference to *Bimo & Bimo* UNDT/2009/061, *Hastopalli & Stiplasek* UNDT/2009/062 and *Moussa* UNDT/2010/029, he found the application of:

a general principle of procedural law that the right to institute legal proceedings is predicated upon the condition that the person using this right has a legitimate interest in initiating and maintaining legal action. Access to the court has to be denied to those who are no longer interested in the proceedings instituted.

9. In the instant case, the Tribunal finds that the aforesaid request by the Applicant is an unequivocal withdrawal of the application with informed consent, and premised on a full and final settlement of any claims whatsoever and howsoever arising from this cause of action, without liberty to reinstate or appeal.

10. The Applicant having confirmed that she is indeed withdrawing the matter fully, finally and entirely, including on the merits, without right of reinstatement or appeal, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

11. In view of the nature of the claim in dispute and the costs already incurred, as well as potential costs of subsequent litigation, the Tribunal commends both parties and their Counsel for their efforts in resolving the case amicably. The Tribunal notes that such efforts should be encouraged as amicable resolution of cases saves the valuable resources of staff and the Organization and contributes to the harmonious working relationship between the parties.

12. The Tribunal further observes that the Applicant has requested that her name be withheld from any judgment or order published in her case. This request was motivated on the fact that “she is currently employed by another [United Nations] entity under a contract subject to renewal and due to the sensitive nature of the issues being discussed, the publication could negatively affect her future employment prospects”. Considering the particular circumstances of the Applicant’s case, including that the Respondent has not objected to her request, the Tribunal redacts her name from this Judgment and Judgment No. UNDT/2012/149.

Conclusion

13. The Applicant has withdrawn the matter fully, finally and entirely, including on the merits, with the intention of resolving the dispute between the parties in finality. There no longer being any determination to make, this application is dismissed in its entirety without liberty to reinstate or appeal.

(Signed)

Judge Ebrahim-Carstens

Dated this 3rd day of May 2013

Entered in the Register on this 3rd day of May 2013

(Signed)

Hafida Lahiouel, Registrar, New York