UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/033
Judgment No.: UNDT/2013/123
Date: 9 October 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

EL-KOMY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON WITHDRAWAL

Counsel for Applicant:
Lennox S. Hinds
Claire Gilchrist

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

Introduction

1. The Applicant, an Arabic Translator, Arabic Translation Service, Department for General Assembly and Conference Management at the United Nations Headquarters, has two cases pending before the Dispute Tribunal. In the first case—Case No. UNDT/NY/2012/003 (filed on 27 January 2012)—he contests the propriety of the extension of his probationary appointment instead of conversion to a permanent appointment status. In the second case—Case No. UNDT/NY/2013/033 (filed on 24 April 2013)—the Applicant contests the decision to separate him from service following the decision not to grant him a permanent appointment upon the completion of his probationary employment period.

Background

2. On 25 April 2013, the Applicant filed a motion for expedited hearing in the present case. On 29 April 2013, by Order No. 118 (NY/2013), the Tribunal denied the request for expedited hearing but, in order to accommodate both parties and due to the particular circumstances of the case, ordered, under art. 10.2 of its Statute, suspension of "the implementation of the decision to separate the Applicant … pending the final determination of the substantive merits of the application or until such further Order as may be deemed appropriate by the Tribunal". The Secretary-General appealed Order No. 118 and, on 31 July 2013, the United Nations Appeals Tribunal ordered rescission of Order No. 118 (*El-Komy* 2013-UNAT-324).

3. By Order No. 156 (NY/2013), the Dispute Tribunal directed the parties to file a joint submission stating, *inter alia*, whether they agree to attempt to resolve Cases No. UNDT/NY/2012/003 and UNDT/NY/2013/033 informally either through the Mediation Division of the United Nations Office of the Ombudsman

and Mediation Services or through *inter partes* discussions. Failing to agree to informal resolution of the cases, the parties were directed to file a jointly-signed

324, dated 31 July 2013, whereby the interim measures order was rescinded. The Applicant contended that the parties were still in the middle of mediation proceedings, yet the Respondent had chosen to separate the Applicant from service, thus demonstrating bad faith and a disinterest in resolving the matter informally.

7. On Friday, 2 August 2013, in view of the Applicant's submission and not having received any submissions from the parties or the Mediation Division contrary to Order No. 169 regarding the status of their mediation efforts, the Tribunal set the matters down for a case management discussion on 6 August 2013.

8. Thereafter on 2 August 2013, the Mediation Division submitted a letter stating that "the parties are still actively involved in mediating this case" and asking, "[i]n an effort to continue in good faith to settle this matter", an extension of time "for completion of mediation" to Friday, 30 August 2013.

9. By Order No. 190 (NY/2013), dated 7 August 2013, the Tribunal directed that, on or before Thursday, 15 August 2013, the parties or the Mediation Division shall inform the Tribunal as to whether the cases have been resolved.

10. On 15 August 2013, the Mediation Division informed the Tribunal that "the parties are still actively involved in mediating this case" and although "tremendous headway [has been] made towards settlement", they required more time to complete the mediation process. The Mediation Division reques22.n8e med

parties had consented to such request. The requested extension was granted by Order No. 220 (NY/2013), dated 3 September 2013.

12. By letter dated 11 September 2013, the Mediation Division sought a further suspension of proceedings for a period of two days to complete the mediation. The requested extension was granted by Order No. 227 (NY/2013), dated 11 September 2013.

13. On 13 September 2013, the Tribunal received a letter from the Mediation Division advising that both matters had been successfully resolved. On the same day, the Applicant filed a notice of withdrawal of the present case, confirming the resolution of the dispute and withdrawing both applications "fully, finally, and entirely, including on the merits".

Consideration

14. 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 [(whit02t5Nc.3156(8D0 6(6,)0-4.4(Y)-4.4(/)60c.1a47d Tw

14.

Statute states that the Tribunal "shall be competent to hear and pass judgment on an application filed by an individual", as provided for by 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. Of course, 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.

16. 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.*

17. The Applicant has two pending matters before the Tribunal which, although extrinsically linked

liabilities in all essential elements by consensus, therefore disposing of the merits. The Applicant confirmed that, following successful mediation, he was indeed withdrawing the matter *in toto*, that is, fully, finally, and entirely, including on the merits. Therefore, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

Conclusion

18. The Applicant has withdrawn this case 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 or the right to appeal.

(*Signed*)