UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/036
Judgment No.: UNDT/2014/031
Date: 19 March 2014
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SHRIVASTAVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Bart Willemsen, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund ("UNICEF"), filed an application contesting her reassignment to a new post and the "limitation of contract extension to seven months following reassignment of post, constituting constructive dismissal". The Applicant submitted that the limitation of her contract extension to seven months resulted in her separation from service as of 31 July 2011. She submitted that the contested decision

> unfairly prejudice[d] her legitimate expectation of continued employment, violate[d] the terms of her non-reimbursable loan and the corresponding lien on the post formerly occupied by her, and [was] improperly influenced by retaliatory motives for having complained about unfair treatment and improper actions by her immediate supervisor.

2. At the time of filing, the Applicant had been in the service of the Organization for some 24 years. She submitted that the refusal, without clear justification, to provide for any continuation of her services either on loan/secondment to her government or with the UNICEF India Office was a violation of the terms of her loan/secondment, and a means of forcing her termination from service just six months before completion of 25 years of service.

3. As a remedy, the Applicant sought a two-year fixed-term appointment and extension of her loan/secondment, as well as compensation for moral damages.

4. With respect to the merits of the Applicant's claims, the Respondent submitted, *inter alia*, that the issue in this case was not about non-renewal of a contract, but about the length of such contract, which determination can be made only by the Administration.

5. By consent, the Tribunal first dealt with the issue of receivability. In *Shrivastava* UNDT/2013/148, rendered on 27 November 2013, the Tribunal found

the present application receivable. The Tribunal further stated that, in its considered view, the present case was amenable to amicable resolution. The Tribunal invited both parties to consider whether informal dispute resolution was possible, stating:

> In the Tribunal's considered view, the present case is amenable to amicable resolution. The Tribunal is of the firm view that if both parties take a reasonable, pragmatic, and fair-minded approach, amicable resolution of all outstanding matters is within their reach. The parties are to consider seriously whether informal dispute resolution is possible, and promptly advise the Tribunal in the event they wish to attempt it.

Procedural matters

6. On 10 December 2013, the parties filed a joint statement, pursuant to *Shrivastava* UNDT/2013/148, saying that they were willing to attempt informal resolution of the matter. The parties requested the Tribunal to suspend the proceedings until 17 January 2014. The requested suspension was granted by Order No. 336 (NY/2013).

7. On 17 January 2014, the parties filed a joint requested for an extension of time to continue their discussions. They request a further suspension of the proceedings until 14 February 2014, "in which period all efforts will be made to find an amicable resolution or to conclude that no amicable resolution can be found". The extension was granted by Order No. 14 (NY/2014).

8. On 12 February 2014, the parties filed a joint request for a further extension of time of three weeks to continue their efforts to find an amicable resolution. The parties explained that they were awaiting feedback from one of the units of the United Nations and shared the view "that an amicable resolution is still within reach". The extension was granted by Order No. 16 (NY/2014).

9. On 6 March 2014, the parties filed a joint request for a further extension of time of one week to continue their efforts to find an amicable resolution. The requested extension was granted by Order No. 40 (NY/2014).

10. On 14 March 2014, the Applicant filed a notice of withdrawal of her application, stating:

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

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 the 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 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.*

13. In the instant case, the Applicant has confirmed that she is withdrawing the matter "fully, finally and entirely on the understanding that this will constitute a final determination on the merits, and is without appeal". The Applicant's unequivocal withdrawal of the merits signifies a final and binding resolution with regard to the rights and liabilities of the parties, requiring no pronouncement on the merits but concluding the matter *in toto*. Therefore, dismissal of her case with a view to finality of proceedings is the most appropriate course of action.

14. The Tribunal commends both parties, particularly their learned counsel, for their good faith efforts to resolve this case amicably. The case file in this matter consisted of over 250 pages, with the application itself having 37 annexes

appended thereto. No doubt a joint bundle, including further documents, would have been required for a hearing, and due to the alleged hostile environment and allegations and counter-allegations, witness testimony would have been required to reconcile the substantial dispute of facts evident from the pleadings. The amicable resolution of this complicated case no doubt saved significant resources of the Tribunal and both parties.

Order

15. 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.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 19th day of March 2014

Entered in the Register on this 19th day of March 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York