



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

CUMMINGS-JOHN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON WITHDRAWAL

Counsel for Applicant:

Daniel Trup, OSLA

Natalie Dyjakon, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Workplace Relations Specialist in UN Women in New York holding a fixed-term appointment and serving at the P-3 level, step 11 and who receives a temporary Special Post Allowance at the P-4 level, step 5, filed an application in which she contests the “decision of the Administration to reduce [her] contracted salary and the manner of the implementation of the Unified Salary Scale”. The Applicant requests rescission of the contested decision and to receive outstanding pay backdated accordingly.

2. In his response, the Respondent contends that the application is not receivable and, in any event, without merit.

Relevant procedural history

3. On 30 June 2017, the parties in Case No. UNDT/NY/2017/025 (Camera) filed their joint submission in response to Order No. 127 (NY/2017), providing a list of cases under Category 2 (“Non-dependent spouse and dependent children”) as follows: UNDT/NY/2017/033 (Porret), UNDT/NY/2017/035 (Coello Martin), UNDT/NY/2017/047 (Rodriguez-Garcia), UNDT/NY/2017/049 (Wiener), UNDT/NY/2017/051 (Kim), UNDT/NY/2017/055 (Lee), UNDT/NY/2017/057 (Moreau), UNDT/NY/2017/061 (Pala-Krishnan), UNDT/NY/2017/065 (Alford), UNDT/NY/2017/067 (Elbaz), UNDT/NY/2017/070 (Grenfell), UNDT//NY/2017/072 (Cummings-John) and UNDT/NY/2017/074 (Lopez Posse). The legal issues raised in all the cases in Category 2 were identified as follows:

1. Whether the Administration breached the terms and conditions of the staff member’s employment in not seeking his/her consent prior reducing his/her salary, thereby violating an acquired right.

2. Whether the Administration’s implementation of the Transitional Allowance was discriminatory in nature on the grounds that this benefit would depreciate annually as compared with staff

members who receive the single Parent Allowance or Spouse Allowance.

4. On 14 July 2017, the Applicant filed the application in the present case.
5. On 17 July 2017, in accordance with art 8.4 of the Dispute Tribunal's Rules of Procedure, the Registry transmitted the application to the Respondent, instructing him to file his reply by 22 May 2017.
6. On the same day, the case was assigned to the undersigned Judge.
7. On 16 August 2017, the Respondent filed his reply.
8. By Order No. 171 (NY/2017) issued on 23 August 2017, the Tribunal instructed the Applicant to file a submission addressing the issue of receivability as raised in the Respondent's reply by 22 September 2017.
9. On 7 September 2017, the Applicant filed a motion for extension of time, requesting that, in light of the Applicant's Counsel's previous engagements, the deadline to file such a submission be extended until Friday, 13 October 2017.
10. By Order No. 198 (NY/2017) dated 21 September 2017, the Tribunal granted the extension of time requested by the Applicant and ordered her to file a submission addressing the issue of receivability as raised in the Respondent's reply by 13 October 2017.
11. On 26 September 2017, the Applicant filed a motion for extension of time, requesting (a) a two-week extension of time to file the submission on receivability; (b) that a Case Management Discussion ("CMD") be scheduled on or after 5 October 2017.
12. By Order No. 211 (NY/2017) dated 28 September 2017, the Tribunal granted the Applicant's request for a CMD at which the request for extension was to be

discussed.

13. At the CMD held on 5 October 2017, Counsel for both parties attended in person (for the Applicant, Mr. Daniel Trup and Ms. Natalie Dyjakon, and for the Respondent, Mr. Alister Cumming).

14. On 12 October 2017, Applicant's Counsel filed a submission, *inter alia*, updating the list of pending salary scale cases in New York.

15. On the same day, 12 October 2017, the Respondent filed an additional submission on the second claim regarding the application not being receivable, indicating that he maintained his position that the issue of economic loss is relevant to the question of receivability, because if there is no economic loss, the Applicant's arguments on the merits of the case are purely academic and the Dispute Tribunal has no jurisdiction.

16. By Order No. 268 (NY/2017) issued on 11 December 2017, the Tribunal, *inter alia*, consolidated the present case with a range of other cases pending before it, found all these cases to be receivable *ratione materiae*, rejected a request for suspending the proceedings, requested the Applicant and the Respondent to provide certain additional documentation and information, and called the parties to attend a CMD on 17 January 2018.

17. On 10 January 2018, the Applicants filed a motion for extension of time to comply with Order No. 268 (NY/2017).

18. On 12 January 2018, the Respondent filed a submission regarding the Applicant's motion for extension of time and the submission ordered by the Tribunal by Order No. 268 (NY/2017).

19. At the CMD held on 17 January 2018, Counsel for both parties attended in person (for the Applicant, Mr. Daniel Trup and Ms. Natalie Dyjakon, and for the Respondent, Mr. Alister Cumming).

20. On 19 January 2018, the Applicant submitted a submission regarding her financial loss.

21. By Order No. 13 (NY/2018) issued on 19 January 2018, the Tribunal provided the following orders:

... By **5:00 p.m. on Wednesday, 14 February 2018**, the Applicants are to file, if not done already, a copy of their statement of earnings and deductions for December 2017 and January 2018.

... By **5:00 p.m. on Wednesday, 14 February 2018**, the parties are to file additional submissions and supporting documentation based on the review of the following documents:

- a. The ICSC's recommendations included in its 2015 and 2016 reports regarding the implementation methodology of the compensation package;
- b. The General Assembly resolutions 70/244 and 71/264 (United Nations common system) and the related provisions of Staff Regulation and Rules (ST/SGB/2017/1);

informing the Tribunal of their views regarding:

- i. The full approval by the General Assembly of the ICSC recommendations, including the methodology/methodologies;
 - ii. The accurate and complete implementation by the Organization of the recommended methodology for each element of the compensation package (salary, incentives, allowances and benefits) from 1 January 2017, including but not limited to the base/floor salary scale, post adjustment, margin estimate, staff assessment, dependency allowances, and pensionable remuneration;
 - iii. The relevant methodology that was adopted by the Organization, if any, for each element of the compensation package from 1 January 2017; if available, a copy of any such methodology is to be provided;
 - iv. The 2017 evaluations regarding the margin estimate and post adjustment.
- c. An agreed date for a CMD in the period from 1 to 9 March 2018.

22. On 14 February 2018, the Applicant filed a submission pursuant to Order No. 13 (NY/2018).

23. On 14 February 2018, the parties filed a joint submission pursuant to Order No. 13 (NY/2018) and provided the agreed date of 7 March 2018 for the CMD.

24. At the CMD held on 7 March 2018, Counsel for both parties attended in person (for the Applicant, Mr. Daniel Trup and Ms. Natalie Dyjakon, and for the Respondent, Mr. Alister Cumming). The Applicants' Counsel, Mr. Daniel Trup, informed the Tribunal that, on 2 March 2018, the judgments issued in Geneva's salary scale cases were appealed by the Secretary-General and that the Applicants in these cases may consider filing a cross-appeal. He then requested the suspension of the proceedings in all the identical pending salary scale cases in New York assigned to the undersigned Judge on the grounds that (a) the Respondent has appealed cases with identical facts to the Appeals Tribunal; and that, (b) regardless of the outcome in the present cases, it is likely that an appeal will be filed by one of the parties and the Appeals Tribunal will be further faced with other appeals effectively dealing with the same subject matter both on receivability and merits. The Respondent's Counsel opposed to the request for suspension of the proceedings and indicated that his position is for the proceedings to continue.

25. On 9 March 2018, the Applicant filed a submission following the CMD in which she detailed the reasons for their request for suspension of the proceedings.

26. By Order No. 73 (NY/2018) issued on 3 April 2018, the Tribunal, noting that the Respondent opposed the Applicant's request for suspension of the proceedings and wanted the proceedings to continue, considered that the request for suspension could not be granted as no legal provisions allowed the Tribunal to suspend, in the absence of the parties' agreement, the proceedings of a pending application, either with a different or with a similar/identical object with the application(s) in other case(s) pending before the same Tribunal or before the United Nations Appeals Tribunal, which may have a direct legal effect on the case requested to be suspended,

and rejected the request to suspend the proceedings in the present case. The Tribunal further ordered that the present case was to be decided by the Tribunal on the papers, that the parties could file any additional relevant documentation no later than 20 April 2018, and that the parties were to submit their closing statements by 18 May 2018 based only on the evidence already before the Tribunal.

27. On 18 May 2018, the parties filed their closing submissions.

28. On 21 June 2018, the Tribunal instructed the Respondent via email to file a copy of the Applicants' employment contract/Letter of Appointment by 22 June 2018.

29. On 22 June 2018, the Respondent duly filed the available documentation, as instructed by the Tribunal.

30. On the same day (22 June 2018), having reviewed the new documentation filed by the Respondent, the Tribunal requested Counsel for both to attend a CMD on 25 June 2018.

31. At the CMD held on 25 June 2018, Counsel for both parties attended in person. (for the Applicant, Ms. Natalie Dyjakon and Mr. Daniel Trup, and for the Respondent, Mr. Alister Cumming). The Tribunal informed the parties that, taking into consideration the documentation provided by the Respondent, it was necessary to re-open the proceedings in order to obtain further clarifications from both parties. The Tribunal observed, regarding the Applicant's employment contract, that she was initially offered a fixed-term appointment with United Nations Secretariat which was not found in the Applicant's Official Status File and therefore not provided to the Tribunal. At the date of the CMD, the Applicant was on secondment to UN Women, where she was offered an initial fixed-term appointment with an effective date of appointment of 1 February 2017 until 31 January 2018; the letter of appointment was signed by the Applicant on 8 February 2017. The initial fixed-term appointment in UN Women was "in accordance with the terms and conditions specified [...] and subject to the provisions of the relevant Staff Regulations and Staff Rules, and to

changes which may be duly made in such Staff Regulations and Staff Rules as from time to time”. In the Letter of Appointment was also stated that the assessable salary could increase subject to satisfactory service and that the salary shown did not include any allowance to which she might be entitled.

32. The Applicant’s secondment with UN Women was extended from 1 February 2018 until 31 January 2019. The Respondent indicated it is UN Women’s practice to only issue a letter of appointment on initial appointment and to issue personnel action form for the renewal(s) of appointment, and filed a copy of the Applicant’s letter of appointment issued on 3 February 2017 and the Personnel Action Report for the period 1 February 2018-31 January 2019.

33. By Order No. 134 (NY/2018) issued on 2 July 2018, the Tribunal ordered the Respondent to file additional relevant information and documentation by 16 July 2018 and the Applicant to file her response, if any, by 30 July 2018.

34. On 16 July 2018, the Respondent duly filed the available documentation, as instructed by the Tribunal in Order No. 134 (NY/2018).

35. On 26 July 2018, the Applicant filed her response pursuant to Order No. 133 (NY/2018).

36. On 14 September 2018, referring to *Lloret Alcaniz et al.* 2018-UNAT-840, the Respondent filed a submission in which he, inter alia, stated that:

... In the present case, the claims made by the Applicant are identical to the arguments already considered and rejected by the Appeals Tribunal in *Lloret Alcaniz*, as well as in *Quijano-Evans et al.* [2018-UNAT-841] and *Mirella et al.* [2018-UNAT-842]. There is no basis upon which the present case can be distinguished from those cases. The Dispute Tribunal is bound by the Appeals Tribunal’s judgment [referring to *Igbinedion*, 2014-UNAT-410, para. 24]. Accordingly, the Dispute Tribunal ought to follow *Lloret Alcaniz et al* and dismiss the Application.

37. On 14 September 2018, the Applicant filed a notice of withdrawal, stating that “[the Applicant] seek[s] to withdraw all of [her] allegations and claims before the Dispute Tribunal with respect to [the present case]”.

Consideration

38. The Tribunal commends the Applicant for withdrawing her application in the present case. This saves valuable resources and contributes to a harmonious working relationship between the parties.

39. The Tribunal considers that each person has the fundamental human right to free access to justice, which includes the right to file an application in front of an impartial tribunal, and therefore also the right to withdraw that application.

40. An application represents the materialization of an applicant’s right to appeal the contested decision. This is the first procedural act by which an applicant invests the Tribunal of dealing with the appeal. The whole procedural activity will take place within its limits and the application must be filed by the person who has the right to appeal the contested decision (*ratione personae*), within the applicable time limit (*ratione temporis*) and in front of the competent Tribunal (*ratione loci*).

41. Consequently, to be legally valid, a request for the withdrawal of an application has to be formulated by the applicant and/or by his/her counsel and must consist of the unconditional expression of the applicant’s free will to close his/her case before a judgment is issued.

42. An application can be withdrawn orally and/or in writing, partially or entirely. The withdrawal request can refer either to the pending application (as a procedural act) or to the right to appeal itself.

43. The Applicant expressed in her motion of 14 September 2018 her will to withdraw her application and thereby to end the pending litigation.

44. In conclusion, the withdrawal request represents the Applicant's free will to end the litigation. Since the Applicant has withdrawn her application, the Tribunal no longer needs to make a determination on the merits and takes note of the withdrawal.

45. In the light of the foregoing, the Tribunal DECIDES:

46. The Applicant has withdrawn the application. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2017/72 is hereby closed.

Observation

47. The Tribunal expresses its trust that the Administration will take all the necessary measures, if not yet taken, to locate the Applicant's Letter of Appointment with the UN Secretariat and to include it in her Official Status File. If the document cannot be found, the UN Secretariat is to re-issue this document, and transmit a copy to the Applicant within 30 days.

48. The Tribunal underlines the mandatory legal provisions of staff regulation 4.1:

As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

49. Concerning the issuance of a Letter of Appointment, staff rule 4.1 provides:

The letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.

50. Annex II to the Staff Regulations and Rules states:

- (a) The letter of appointment shall state:
- (i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;
 - (ii) The nature of the appointment;
 - (iii) The date at which the staff member is required to enter upon his or her duties;
 - (iv) The period of appointment, the notice required to terminate it and the period of probation, if any;
 - (v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;
 - (vi) Any special conditions which may be applicable;
 - (vii) That a temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment;
 - (viii) That a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;
- (b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules;
- (c) The letter of appointment of a staff member on secondment from government service signed by the staff member and by or on behalf of the Secretary-General, and relevant supporting documentation of the terms and conditions of secondment agreed to by the Member State and the staff member, shall be evidence of the existence and validity of secondment from government service to the Organization for the period stated in the letter of appointment

51. The Tribunal observes that the Personnel Action Report issued by UN Women is a document which cannot substitute the Letter of Appointment, and that such document is to be issued subsequently to the Letter of Appointment; the Tribunal recommends that UN Women issue the Applicant's Letter of Appointment for the

period 1 February 2018 to 31 January 2019 according with the mandatory requirements of staff regulation 4.1 and staff rule 4.1 mentioned above and discontinue the incorrect current practice.

(Signed)

Judge Alessandra Greceanu

Dated this 14th of December 2018

Entered in the Register on this 14th of December 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York