UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2010/084
Order No.:	130 (NY/2014)
Date:	29 May 2014
Original:	English

Before: Judge Ebrahim-Carstens, Presiding
Judge Meeran
Judge Shaw

Registry: New York

Registrar: Hafida Lahiouel

KODRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL OF APPLICATION

Counsel for Applicant:
Brian Gorlick, OSLA
Daniel Trup, OSLA

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

Introduction

1. On 15 June 2010, the Applicant filed an application contesting the decision of the Secretary-General to implement the decision of the International Civil Service Commission to reclassify the Nairobi duty station from Hardship Class C to Hardship Class B, effective 1 January 2010.

Procedural history

2. The application was filed with the Nairobi Registry on 15 June 2010. Having considered a motion for the recusal of the judges in Nairobi, Judge Boolell issued an order on 20 July 2010, granting the motion.

3. On 27 July 2010 the case file was transferred to and registered in the New York Registry and assigned to Judge Ebrahim-Carstens.

4. On 13 January 2011, Judge Ebrahim-Carstens requested the President of the Dispute Tribunal to seek authorization from the President of the United Nations Appeals Tribunal to refer the case to a panel of three judges, in accordance with art. 10.9 of the Dispute Tribunal's Statute. On 14 January 2011, the President of the Dispute Tribunal transmitted the request to the President of the Appeals Tribunal.

5. On 18 January 2011, the President of the Appeals Tribunal issued President's Order No. 1 (UNAT/2011), authorizing the referral of the case to a three-judge panel, pursuant to art. 10.9 of the Dispute Tribunal's Statute and art. 2.3 of the Appeals Tribunal's Rules of Procedure (stating that the President of the Appeals Tribunal may "authorize the referral of a case to a panel of three judges of the Dispute Tribunal, when necessary, by reason of the particular complexity or importance of the case").

6. By *Kodre* Order No. 5 (GVA/2011), dated 21 January 2011, the President of the Dispute Tribunal (Judge Laker) established a three-judge panel to hear this matter, comprised of the New York full-time Judge Ebrahim-Carstens, Presiding, Judge Kaman (New York ad litem Judge), and Judge Meeran (half-time Judge).

7. On 9 February 2011, the present case was set down for a hearing on the merits in New York on 23–24 February 2011.

8. On 16 February 2011 the Respondent filed a motion for joinder of the instant matter together with Case No. UNDT/NBI/2010/057 (*Obino*), which was registered in Nairobi and concerned a similar issue of reclassification of the Addis Ababa and Nairobi duty stations from Hardship Class C to Hardship Class B. Simultaneously, the Respondent filed a motion in Nairobi for a change of venue of Case No. UNDT/NBI/2010/057 (*Obino*) for purposes of the joinder of the two cases.

9. On 18 February 2011, by Order No. 16 (NBI/2011), Judge Boolell rejected the Respondent's motion for change of venue in Case No. UNDT/NBI/2010/057 (*Obino*).

10. On 18 February 2011, the Applicant filed a response to the motion for joinder together with a request for postponement of the substantive hearing on the grounds, *inter alia*, that neither the Applicant nor one of the key witnesses were available to give evidence on said dates.

11. In light of the belated request for joinder and the request for the postponement of the substantive hearing, the Tribunal decided that, for a fair and just disposal of this case, the hearing on the merits scheduled for 23 and 24 February 2011 would be postponed, but that a case management hearing would be held on 23 February 2011.

12. At the case management hearing held on 23 February 2011, the Respondent withdrew the motion for joinder of the present case with that of *Obino*, having conceded that, in light of Judge Boolell's Order No. 16 (NBI/2011), the motion was moot.

13. Following the said case management hearing held on 23 February 2011, the Tribunal issued Order No. 71 (NY/2011), identifying tentatively the issues in the case and directing the parties to make further submissions.

14. On 23 March 2011, the Applicant requested an extension of time to comply with Order No. 71 (NY/2011). The extension was granted. The parties' submissions in response to Order No. 71 (NY/2011) were duly filed in May and June 2011.

15. On 24 June 2011, Judge Laker, then President of the Dispute Tribunal, issued Order No. 107 (GVA/2011), appointing Judge Shaw (half-time Judge), as a panel member to replace Judge Kaman, whose term expired on 30 June 2011, there being only one Judge (full-time), at the New York duty station from 30 June 2011 until June 2012.

16. On 23 January 2013, Judge Boolell rendered *Obino* UNDT/2013/008, finding that the application in that case was not receivable under art. 2.1(a) of the Tribunal's Statute.

17. On 25 March 2013, an appeal was lodged with the United Nations Appeals Tribunal in relation to *Obino* UNDT/2013/008 by the applicant in that case.

18. On 4 September 2013, the Tribunal issued Order No. 222 (NY/2013), directing the parties to file a jointly-signed submission stating, *inter alia*, whether they had objections to the present matter being stayed until the appeal under *Obino* UNDT/2013/008 was decided.

19. On 16 October 2013, the parties filed a joint submission, stating, *inter alia*, that they agree that the Tribunal's consideration of this case be stayed until the appeal under *Obino* UNDT/2013/008 was decided.

20. On 5 November 2013, the Tribunal issued Order No. 287 (NY/2013), ordering that this matter be stayed pending the judgment of the United Nations Appeals Tribunal in the matter of *Obino*. The parties were ordered to file, within two weeks of the date of publication of the written judgment of the United Nations Appeals Tribunal in the matter of *Obino*, a joint submission indicating their views as to further consideration of the instant matter in light of the judgment in *Obino*.

Appeals Tribunal's judgment in *Obino*

21. On 13 May 2014, the Appeals Tribunal issued its written judgment in relation to the case of *Obino* 2014-UNAT-405, dismissing the Applicant's appeal and affirming the finding in *Obino* UNDT/2013/008 that the application in that case was not receivable under art. 2.1(a) of the Tribunal's Statute.

Notice of withdrawal

22. On 23 May 2014, the Applicant filed a submission, stating that, "[a]fter reflection and in consideration of its contents the Applicant respectfully withdraws her complaint and all subsequent proceedings filed before the UNDT".

Consideration

23. 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.

24. 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.*

25. The Applicant in the instant case has agreed to abide by the decision in *Obino* 2014-UNAT-405, and confirmed that she is withdrawing "her complain and all subsequent proceedings filed before the [Dispute Tribunal". The Applicant's withdrawal of the application 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.

Conclusion

26. 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 29th day of May 2014