UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/060
Order No.: 133 (NY/2016)
Date: 7 June 2016
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

LAWRENCE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:
Duke Danquah, OSLA

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

Introduction

1. On 11 December 2015, the Applicant, a GS-6 level staff member in the United Nations Development Programme ("UNDP") and a former GS-5 level staff member at the United Nations Secretariat, filed an application against the decision of the Office of Human Resources Management ("OHRM") of the Secretariat

> not to consider [her] request for a transfer from the Secretariat to UNDP because 'the United Nations Secretariat has not accepted to apply the Inter-Organization Agreement [Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances] to movements of GS staff members.

2. The Applicant submitted, *inter alia*, that the practice of the United Nations Secretariat appeared to be not to allow inter-agency transfers under the Inter-Organization Agreement for General Service staff. The Applicant submitted, in effect, that this practice was unlawful as it conflicted with the terms of the Agreement and the Tribunal's case law on the hierarchy of legal norms. The Applicant submitted that the blanket prohibition on the transfer of General Service staff is discriminatory and an invalid exercise of the discretionary authority of the Secretary-General. The Applicant sought rescission of the contested decision and retroactive implementation of her transfer from the United Nations Secretariat to UNDP, including the grant and/or restitution of all related benefits and entitlements. In the alternative, she sought monetary compensation.

3. The Respondent submitted in his reply, *inter alia*, that the application was not receivable as the Applicant did not challenge an administrative decision falling under art. 2.1(a) of the Tribunal's Statute because she did not

identify a decision that has direct legal consequences upon the terms of her appointment with the United Nations Secretariat. The Respondent contended that the Inter-Organization Agreement was an arrangement between the respective organizations and not one entered into with staff members of the Organization, who are not intended to be privy to or beneficiaries of the agreement. The Respondent submitted in the alternative that the Applicant's submission is without merit as the Organization did not accept to apply the Agreement to the movement of General Service staff members for a number of reasons, and the decision not to agree to the Applicant's transfer was lawful. The Respondent further stated that the Applicant has suffered no harm. She resigned from the Secretariat, was paid out all of her separation entitlements, and took up the GS-6 post with the UNDP.

Case management

4. Prior to the filing of her application, the Applicant requested an extension of time to file it. The request was granted by Order No. 283 (NY/2015), dated 30 October 2015.

5. The Respondent's reply was filed on 11 January 2016.

6. The case was assigned to the undersigned Judge on 29 February 2016.

7. On 1 March 2016, the Tribunal issued Order No. 61 (NY/2016), directing the parties to confer, by 10 March 2016, with a view to resolving the matter informally. In the event the case could not be resolved amicably, the parties were directed to file further submissions, with the Respondent's submission due 24 March 2016, and the Applicant's submission due 31 March 2016. Specifically, Order No. 61 stated:

> … This case presents a very particular set of circumstances and many basic issues remain unaddressed in both the application and the reply. In addition to the issues of receivability raised by the Respondent, the Tribunal will need to seek further submissions from both parties on the legal status of the Inter-Agency Agreement, delegation of authority within the Secretariat with regard to decisions relating to the Agreement, and the compensation sought. With regard to the last point, the application is vague and does not contain any specifics as to the nature or sum of damages sought by the Applicant. It is unclear what she alleges she should have received had her transfer been processed under the Inter-Agency Agreement. Nor do the parties' submissions discuss mitigation of losses and the effect of any award (in the event the Applicant prevails on both receivability and merits) on the separation entitlements that may have been already paid out to the Applicant upon her departure from the Secretariat. It may well be that, if any inter-agency transfer were to be affected, the amounts paid would need to be recovered in part or in full.
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> … Accordingly, the Tribunal will direct the parties to file further submissions on the issues identified above.
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> … The parties are reminded that, at this stage of the proceedings, they are free to attempt informal resolution of the dispute, be it through the United Nations Ombudsman and Mediation Services or via *inter partes* discussions. Should the parties decide to resume their informal discussions, they shall promptly inform the Tribunal thereof and seek suspension of the proceedings.
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> 8. The Tribunal encourages both parties to exercise their best judgment and use their best endeavours to try to resolve this case amicably in order to save valuable resources.

9. The parties were unable to resolve the case amicably.

10. On 24 March 2016, the Respondent filed his submission pursuant to Order No. 61 (NY/2016).

11. On 12 April 2016, the Applicant filed her submission in response to Order No. 61 (NY/2016). The Applicant explained that the submission (which

was due 31 March 2016) was filed belatedly because of technical issues with the eFiling portal that resulted in the Applicant not receiving the Respondent's submission of 24 March 2016 until 5 April 2016.

12. On 6 May 2016, the Tribunal issued Order No. 107 (NY/2016), directing the parties to file further submissions by 24 May 2016, and reminding the parties that they were free to continue their attempts at informal resolution of the dispute through the United Nations Ombudsman and Mediation Services or via *inter partes* discussions. Specifically, Order No. 107 stated:

> … In her response to Order No. 61, the Applicant contends that, in order to enforce the Inter-Organization Agreement, the United Nations promulgated staff rule 4.9(a) which states *inter alia* that "Interorganization movements are defined in and shall be governed by an interorganization agreement among the organizations applying the United Nations common system of salaries and allowances." The Applicant states that staff members seeking a transfer or secondment or loan must determine from the relevant organizations how they "have accepted to apply [the Agreement] in the individual case".
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> … Regrettably, the Applicant's filing of 12 April 2016 did not provide a significant degree of clarity on the issues of relief claimed by the Applicant. She did not specify the exact heads of damages or the sums of compensation for each head of damages, nor did she explain the precise legal basis for her claims, other than to contend that her "contract of employment with the UN and years of service in the Organization have endowed [her] with certain acquired rights that should survive her movement from the UN Secretariat to UNDP".
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> … It appears that, following her separation from the UN Secretariat, the Applicant was placed on a higher grade post at UNDP (GS-6/step VI at UNDP v. GS-5/step VII at the Secretariat) and, accordingly, has been receiving a higher salary. Therefore, it is unclear what loss she would have suffered from the alleged "loss of benefits for 6 years of seniority", noting in particular that her appointment at the higher GS-6 level presumably indicates that her experience and seniority were taken into account. The Applicant's

reference to "a corrective measure to avoid the eventual diminishment of her pension benefits" is also unclear, as both the UN Secretariat and UNDP are part of the United Nations Joint Staff Pension Fund and, as para. 17 of the Agreement states, "The Agreement does not affect any rights which the staff member may have under the Regulations of the UN Joint Staff Pension Fund". Further, the Applicant has not explained what type of compensation she seeks in relation to the "loss of opportunity for early retirement at age 55", considering that she is currently 36 years old and is approximately 20 years away from retirement, which may render her claims speculative in view of various contingencies of life that may intervene in the course of the next 20 years.

… The Applicant also listed among her claims for relief "a preference for 46.5 days of leave/vacation instead of the paid commuted amount". It is common cause, however, that the Applicant was paid that commuted amount upon her separation from the Secretariat. Thus, if her requests were granted and her annual leave days were reinstated, she would be expected to return the commuted amounts previously paid to her in lieu of those days.

… The issues identified above concern matters of relief, whereas issues of receivability and merits remain outstanding. However, it is important at this stage of the proceedings to ensure clarity as to the scope of the issues and claims before the Tribunal.

… In order to clarify the issues and claims in this case, the Tribunal will also order the Respondent—as reflected below—to file a further submission in relation to matters raised in the Respondent's reply and in his submission of 24 March 2016.

Informal resolution

… The parties are reminded that they are free to continue their attempts at informal resolution of the dispute through the United Nations Ombudsman and Mediation Services or via *inter partes* discussions. Should the parties decide to resume their informal discussions, they shall promptly inform the Tribunal thereof and seek suspension of the proceedings. The Tribunal would encourage both parties to consider resolving this case amicably in order to save valuable resources.

IT IS ORDERED THAT:

… The Applicant is granted leave to file her submission after the deadline set out in Order No. 61 (NY/2016). The filing made on 12 April 2016 is hereby accepted and made part of the record.

… By **5 p.m., Tuesday, 24 May 2016**, the Applicant shall file and serve a submission responding to each of the following:

i. Specifying each head of damages sought by her and the legal basis therefor;

ii. Specifying the sums of compensation claimed by the Applicant under each head of damages, or the method/formula by which they are quantifiable;

iii. Providing explanations for her claims for relief in view of the observations made in paras. 14–17 of the present order.

… By **5 p.m., Tuesday, 24 May 2016**, the Respondent shall file and serve a submission responding to each of the following:

i. Whether the Respondent denies that, previously or at any time, General Service staff were allowed to transfer under the Inter-Organization Agreement;

ii. When was the decision made to no longer allow the transfer of General Service staff under the Inter-Organization Agreement;

iii. Producing a copy of the decision made to no longer allow transfers of General Service staff under the Inter-Organization Agreement;

iv. Whether the decision to not allow transfers of General Service staff under the Inter-Organization Agreement is a blanket policy applying to all General Service staff or is it made an on individual, case-by-case basis;

... The Tribunal will thereafter issue further orders as it deems appropriate.

13. On 17 May 2016, the parties filed a joint submission requesting a three-week suspension of proceedings from 24 May 2016. The parties stated that they had initiated discussions with a view to resolving the matter amicably and needed additional time to come to an agreement on outstanding issues.

14. By Order No. 119 (NY/2016) dated 19 May 2016, the Tribunal granted the requested suspension of proceedings.

Withdrawal motion

15. On 3 June 2016, the Applicant filed a motion to withdraw her application. She stated:

> … After the parties further discussed the remaining issues, the Applicant informed her counsel that she was satisfied with the outcome reached and requested her counsel to duly withdraw her application to the UNDT.
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> … The Applicant hereby withdraws her application "fully, finally and entirely, including on the merits" in keeping with the imprecation in the said Order.
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> … The matter is therefore concluded from the Applicant's standpoint.

16. 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.

17. With 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:
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> > *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.
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> 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*.

18. In the instant case, the Applicant has confirmed in writing that she is withdrawing the matter fully and finally, including on the merits. The Applicant's unequivocal withdrawal of the merits signifies a final and binding resolution with regard to the rights and liabilities of the parties in all respects in his case, requiring no pronouncement on the merits but concluding the matter *in toto*. Therefore, dismissal of the case with a view to finality of proceedings is the most appropriate course of action.

19. The Tribunal commends both parties for resolving this matter without the need for a final judicial determination. Amicable resolution of disputes

saves valuable resources and contributes to a harmonious working environment.

Conclusion

20. The Applicant has withdrawn the present 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 for the Tribunal to make, this application is therefore dismissed in its entirety without liberty to reinstate.

(Signed)

Judge Ebrahim-Carstens

Dated this 7th day of June 2016