UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/059
Order No.: 98 (NY/2018)
Date: 17 May 2018
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

KINGLOW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON WITHDRAWAL

Counsel for Applicant:
Brandon Gardner, OSLA

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

Introduction

1. On 9 November 2016, the Applicant, a former Programme Assistant at the GS-6 level, step 8, with the Project Management Unit, Programme Planning and Operations Division ("PMU"), Economic Commission for Latin America and the Caribbean ("ECLAC"), in Santiago, Chile, filed an application in which she contests the decision not to renew her fixed-term contract "following an alleged abolition of her post following a supposed reorganisation" or restructuring exercise. The Applicant asserts in her application that her nonrenewal and the reasons proffered where simply an attempt to mask the strategy of moving her from her post because of her pregnancy and subsequent maternity and post-maternity leave.

2. On the same date, the Registry acknowledged receipt of the application and transmitted it to the Respondent in accordance with art. 8.4 of the Rules of Procedure of the Dispute Tribunal, instructing him to file a reply by 9 December 2016.

3. On 9 December 2016, the Respondent filed his reply in which he claims that the application is without merit.

4. It is a matter of record that on 27 June 2016, the Applicant had submitted an urgent application with the Tribunal requesting suspension of action of her impending separation from service by 30 June 2016, pending the outcome of management evaluation. In those proceedings the Applicant submitted, amongst others, that no process of reclassification or restructuring was in fact underway and that no other posts appeared to be affected by the alleged process. On 29 June 2016, ECLAC informed the Applicant that it would not implement the nonrenewal decision until the completion of the management evaluation process, whereupon the Tribunal closed the case (see Order No. 155 (NY/2016) dated 29 June 2016 under Case No UNDT/NY/2016/030). On 11 August 2016, the Management Evaluation Unit upheld

the administration's decision not to renew the Applicant's appointment and on the same date she was separated from service.

5. From the facts as presented on the initial record before it in the application for suspension of action, the Tribunal in its aforesaid Order No. 155, at para. 19, noted as follows:

> … […] that the circumstances of this case, as presented by the Applicant, appear unusual and require careful consideration by the Administration. The Applicant is a dedicated staff member with a good performance record, who has just returned from her maternity leave and subsequent post maternity annual leave. A range of international human rights and labour standards protect female workers and promote gender related non-discrimination measures in relation to their reproductive functions, including the right to work. Everyone has the right to just and favourable conditions of work and to protection against unemployment (art. 23, Universal Declaration of Human Rights). Article 5 of International Labour Organisation ("ILO") Convention No. 158 (on Termination of Employment) (1982) lists reasons that shall not constitute valid reasons for termination, including pregnancy and family responsibilities (art. 5(d)), and absence from work during maternity leave (art. 5(e)). The right to return to work is explicitly mentioned in art. 8 of ILO Convention No. 183 (on Maternity Protection) (2000). The ILO Recommendation No. 191 (on Maternity Protection) (2000) goes further by taking into account the inherent problems that can arise when returning from maternity leave in terms of determining rights, such as calculating seniority, promotions, pensions, and health or disability benefits.

6. Therefore, when the substantive application was filed, on noting the further developments in the matter, which on the Tribunal's preliminary observation, (without prejudice to the ultimate determination and final outcome), did not augur well for organizational culture, by Order No. 177 (NY/2017) dated 30 August 2017, the Tribunal invited the parties to attempt amicable resolution of the matter and provided the following orders:

> … By **5:00 p.m.** on **Friday, 29 September 2017**, the parties are to file a jointly signed statement providing, under separate headings, the following information:

a. A consolidated list of agreed and contested facts in chronological order, making clear reference to the relevant and specific dates, manner of notification or transmittal of information, and the documentary evidence, if any, relied upon to support the agreed or contested fact (clearly referencing the appropriate annex to the application or reply as, for example, A/1 or R/1);

b. A list of any further documents which each of the parties request to produce, or request the opposing party to produce, and the relevance thereof;

c. Whether they request an oral hearing to address the merits of the application and, if so:

i. A list of the witnesses that each party proposes to call; and

ii. A brief summary of the issue(s) to be addressed by each witness.

d. If the parties would be willing to enter into negotiations on resolving the case amicably either through the assistance of the Office of the Ombudsman and Mediation Services or *inter partes*;

e. Where there is a disagreement over a fact or statement, the joint statement shall identify the parties' respective positions thereon.

7. On 29 September 2017, the parties filed the jointly-signed submission in response to Order No. 177 (NY/2017) in which they set out agreed and contested facts. The Applicant further requested that she be allowed to submit some additional documentation, that the Respondent be ordered to produce certain written evidence, and that a hearing be held for the Applicant and her former supervisor to give testimony. The Respondent opposed all these requests, noting that if a hearing nevertheless was to be held, he would request to call the Applicant's former supervisor as a witness. In the joint submission, the parties further indicated that they "would be willing to enter into negotiations on resolving the case amicably either through the assistance of the Office of the Ombudsman or *inter partes*".

8. On 25 January 2018, the Tribunal issued Order No. 18 (NY/2018). The Tribunal in the aforesaid order highlighted its observations from the 29 September

2017 jointly-signed submission, in particular the contested facts, that there was a serious dispute of material facts that would necessitate a hearing in this case. Furthermore, that it was also apparent that the Respondent had not fully addressed some of the Applicant's contentions which appeared undisputed. In light of the Tribunal's preliminary observations, and in light of the particular circumstances of this case, the parties were encouraged to make all attempts to resolve this matter amicably. In light of the parties' readiness to engage in informal resolution of this matter as entreated by the Tribunal, the Tribunal suspended the proceedings until 20 February 2018 and ordered the parties to inform the Tribunal, on or before the same date, as to whether the case has been resolved.

9. On 20 February 2018, the parties filed a "Joint Motion for Further Suspension of proceedings", informing the Tribunal that the parties "remain engaged in *inter partes* discussions to informally resolve the matter" and requesting that the proceedings be suspended for a further 30-day period in order to enable their discussions to continue.

10. By Order No. 43 (NY/2018) issued on 20 February 2018, the Tribunal granted the joint motion and suspended the proceedings until 20 March 2018, instructing the parties to inform the Tribunal on or before the same date as to whether the case had been resolved.

11. On 19 March 2018, the parties filed another "Joint Motion for Further Suspension of proceedings", informing the Tribunal that the parties "remain engaged in *inter partes* discussions to informally resolve the matter" and requesting that the proceedings be suspended for a further 30-day period in order to enable their discussions to continue.

12. By Order No. 58 (NY/2018) issued on 19 March 2018, the Tribunal granted the joint motion and suspended the proceedings until 19 April 2018, instructing the

parties to inform the Tribunal on or before the same date as to whether the case had been resolved.

13. On 18 April 2018, the parties filed another "Joint Motion for Further Suspension of proceedings", informing the Tribunal that the parties "have reached an agreement in principle to resolve this case" and requesting that the proceedings be suspended for a further 30-day period in order to allow time for the Under-Secretary-General for Management to review the case.

14. By Order No. 87 (NY/2018) issued on 18 April 2018, the Tribunal granted the joint motion and suspended the proceedings until 18 May 2018, instructing the parties to inform the Tribunal on or before the same date as to whether the case had been resolved.

15. By request for of withdrawal of proceedings dated 15 May 2018, Counsel for the Applicant stated that,

> Following the signing of a Settlement Agreement between the parties, [the Applicant] withdraws all of her allegations and claims in the present proceedings before the United Nations Dispute Tribunal in finality, including on the merits, and therefore requests a discontinuance of the proceedings.

Consideration

16. The desirability of finality of disputes within the workplace cannot be gainsaid (see *Hashimi* Order No. 93 (NY/2011), dated 24 March 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 an applicant does not have the right to bring the same complaint again.

17. 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 unequivocal withdrawal means that the matter will be disposed of such that it cannot be reopened or litigated again.

18. 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:
>
> > *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.*

19. In the instant case, the Applicant filed a request stating that she "withdraws all of her allegations and claims in the present proceedings before the United Nations Dispute Tribunal in finality, including on the merits, and therefore requests a discontinuance of the proceedings".

20. 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 her case, requiring no pronouncement on the merits but concluding the matter *in toto*. Therefore, the dismissal of her case with a view to finality of the proceedings is the most appropriate course of action

21. The Tribunal notes that the substantive application in this case was filed in November 2016, which together with documentary annexes, consists of 144 pages. Thereafter followed the reply, subsequent submissions, including the joint submission by the parties, and several orders by the Tribunal. The suspension of action application which was filed on 27 June 2016 required urgent consideration of the matter, with the Tribunal setting aside all other matters and dealing with it on urgency basis by 29 June 2016, when the Tribunal was informed that the contested decision would no longer be implemented after all, thus rendering the matter moot. Some 18 months later the substantive matter is now amicably resolved.

22. The Tribunal commends the parties for resolving this matter and the Applicant for withdrawing the present case. This saves valuable resources all round and also contributes to inculcating a harmonious working environment and culture within the Organization. Even more so, as ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides that managers and supervisors have a duty to take all appropriate measures to provide a harmonious work environment, with sec. 6.1 providing that heads of departments and offices shall provide annual reports to the Assistant Secretary-General for Human Resources Management which shall include an overview of all preventive measures taken "with a view to ensuring a harmonious work environment" (see also *Nadeau* UNDT/2018/052). It is therefore commendable that management has seen fit to finally resolve this matter amicably so that the Tribunal could dispose of this matter without the need for a hearing, with all its attendant costs, and the issuance of a reasoned judgment thereafter.

Conclusion

23. The Applicant has withdrawn the present case in finality, including on the merits. There no longer being any determination for the Tribunal to make, this application is dismissed in its entirety without liberty to reinstate.

(Signed)

Judge Ebrahim-Carstens

Dated this 17th day of May 2018