Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

L. (No. 2)

v.

WTO

124th Session **Judgment No. 3867**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr V. L. against the World Trade Organization (WTO) on 4 April 2013 and corrected on 24 April;

Considering the letter of 3 June 2013 in which the WTO requested a stay of proceedings, the letter of 10 June in which the complainant commented on that request and the former Registrar's e-mails of 6 August 2013 notifying the parties of a stay of proceedings until the Tribunal had ruled on the first dispute between the complainant and the WTO;

Considering Judgment 3486, delivered in public on 30 June 2015, on the complainant's first complaint;

Considering the WTO's reply of 31 August 2015, the complainant's rejoinder of 10 November 2015, the WTO's surrejoinder of 19 February 2016, the complainant's further submissions of 30 January 2017 and the WTO's final comments thereon of 22 February 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the WTO's decision not to conduct an inquiry into his allegations of harassment.

On 15 April 2010 the complainant, who was a counsellor in the Appellate Body Secretariat of the WTO, asked the Director of the Human Resources Division (HRD) for a lateral transfer. On 7 June he told her that one of the reasons behind the request was that he had experienced some "differences of opinion" with the Director of the Appellate Body Secretariat in the first half of 2009 and that since June 2009 he had been subjected to "several humiliations", which he listed.

He met with the Director of HRD on 29 June 2010 and on three further occasions during the summer of 2010. On 14 September 2010 he sent her a letter in which he alleged that he had been put under "considerable pressure" to resign during those meetings. On the same date he sent the Director-General a memorandum in which, referring to the relevant provisions of Annex A to the Staff Regulations concerning standards of conduct, he requested an inquiry to determine whether he had been subjected to harassment or abuse of power.

On 5 October 2010 the Director-General informed the complainant that all transfer possibilities had been explored without success. He told the complainant that, if by 12 October he had not accepted an offer made to him at a meeting on the previous day, the relevant procedures for separation from service under Staff Regulation 10.3 would be initiated. On 8 October 2010 the complainant signed a mutual agreement which provided inter alia for special leave with full pay from 1 November 2010 and payment, on 30 April 2011 at the latest, of accumulated annual leave and a termination indemnity. The agreement also specified that, by signing it, the complainant undertook not to disclose its terms and acknowledged that the agreement "solved to his complete satisfaction all claims and grievances he may have [had] against the WTO and/or individual WTO officials". He likewise "agree[d] to withdraw forthwith all pending complaints or appeals in relation to such claims and grievances" and "agree[d] not to initiate in the future any appeal or complaint in relation to such claims and grievances or in relation to this mutual agreement". The complainant separated from service on 30 April 2011.

On 17 September 2012 the complainant submitted an internal complaint of harassment and/or abuse of power in respect of the period June 2009 to October 2010 and requested the Director-General to order an inquiry. He was informed on 5 October 2012 that the Director-General saw no reason to grant his request, since by signing the agreement of 8 October 2010, he had "agreed not to bring any claims relating to the circumstances of [his] dismissal". The complainant's request for review of that decision submitted on 26 October was dismissed on 7 November and he filed an appeal with the Joint Appeals Board on 27 November 2012. The Joint Appeals Board did not make any recommendations in its report of 31 January 2013, considering that the complainant's appeal did not come within its competence because he was no longer in the WTO's service when the contested decision was taken.

Having received no final decision from the Director-General, the complainant filed his second complaint with the Tribunal on 4 April 2013. In that complaint, he seeks the setting aside of the decisions of 5 October and 7 November 2012. He asks that the WTO be ordered to entertain his internal complaint of 17 September 2012 and conduct an inquiry. He also requests, should the Tribunal see fit, an award of moral damages for the injury that he considers he has suffered and, lastly, he claims 5,000 Swiss francs in costs.

The WTO submits that the complaint is irreceivable on the basis of the clause in the agreement of 8 October 2010 whereby the complainant waived all claims against it. Subsidiarily, it asks the Tribunal to dismiss the complaint as without merit.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 5 October 2012 and the decision of 7 November 2012 (confirming the previous decision), by which the Director-General of the WTO refused to act on a complaint of harassment and/or abuse of power submitted by the complainant on 17 September 2012. Both decisions were taken on the basis of the complainant's undertaking, made in an agreement of 8 October 2010 on the conditions of termination of his contract, not to

bring any claim against the WTO in connection with the circumstances of his separation from service.

2. In the course of the proceedings, the complainant requested hearings, particularly with a view to obtaining the testimony of various witnesses.

Contrary to what the complainant states in his rejoinder, the Tribunal is not bound to allow such a request. Article V of the Tribunal's Statute clearly authorises it to agree or decline to hold oral proceedings. It is therefore open to the Tribunal, if it considers it appropriate, to dismiss a request for such proceedings (see, in particular, Judgments 3779, under 3, and 3780, under 3).

The complainant's contention that the Tribunal's freedom to choose not to hold oral proceedings violates the European Convention on Human Rights is irrelevant. Indeed, apart from the fact that this contention appears unfounded, the Convention is not in any event applicable as such to international organisations within the legal system to which the Tribunal belongs (see, for example, Judgments 2236, under 11, 2611, under 8, or 2662, under 12).

In the present case, in view of the extensive and detailed submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the issues raised by the case and does not therefore deem it necessary to hold oral proceedings.

3. As stated above, in the agreement of 8 October 2010 the complainant acknowledged that "[the agreement] solve[d] to his complete satisfaction all claims and grievances he may have [had] against the WTO and/or individual WTO officials", "agree[d] to withdraw forthwith all pending complaints or appeals in relation to such claims and grievances", and "agree[d] not to initiate in the future any appeal or complaint in relation to such claims and grievances or in relation to [the agreement]".

Having regard to the wording of these clauses, which gives them a very broad sphere of application, there can be no doubt that they prevent the complainant from filing an internal appeal or a complaint to the Tribunal in connection with the facts alleged in his internal complaint

of 17 September 2012. In fact, they also prohibited the filing of that internal complaint at the outset, given that the word "complaint", as used in the agreement, also refers to any internal complaint.

The Tribunal also observes that the complainant's argument in his rejoinder that his internal complaint of 17 September 2012 should be seen merely as a "letter [...] updating" a previous complaint that had been filed on 7 June 2010 and reiterated on 14 September 2010 has no bearing on the actual effect of the clauses cited above insofar as they imply that any complaint filed prior to the signing of the agreement of 8 October 2010 must be considered moot.

4. The complainant nevertheless argues that the Tribunal should disregard the clauses in question on the ground that they ought to be regarded as "null, void and without legal effect". Apart from his submission that the conclusion of the agreement was flawed by a lack of consent, which will be discussed below, the complainant's argument in this respect rests on three pleas.

5. Firstly, the complainant submits that the clauses contravene the general principles of law because they have the effect of depriving him of the right to bring a complaint of harassment or abuse of power. However, in the context of a settlement, as is the case here, the infringement of an official's right to appeal or file a complaint is not unlawful. On the contrary, it is entirely acceptable for an official to waive such rights in return for the benefits gained from the settlement. This is, furthermore, common practice in the context of separation agreements, as here.

In this respect, the complainant's reliance on Judgment 2715, in which the Tribunal emphasised that an international organisation had acted unlawfully in making payment of a sum due to an official contingent on his relinquishing all means of appeal, is misplaced. In that case, pressure was improperly brought to bear on the official in return for nothing but the organisation's honouring of its own duties. That situation bears no comparison with the case of a clause in a settlement agreement providing for an official to receive benefits negotiated with him.

6. Secondly, the complainant argues that the clauses are unlawful because they are incompatible with the Director-General's obligation to act on complaints of harassment or abuse of power that are submitted to him. However, the exception that is made to that obligation is simply a consequence of the complainant's undertaking not to file such a complaint and, contrary to the complainant's submission, that does not constitute a breach of a mandatory requirement.

7. Lastly, emphasising that the agreement of 8 October 2010 set out the conditions of a termination under Staff Regulation 10.3(c) which, according to that provision, must be "on terms mutually agreed with the staff member", the complainant submits that a clause whereby a staff member waives the right to bring a complaint of harassment or abuse of power could not be validly included in such an agreement as it would bear no relation to with the purpose of the agreement. However, the fact that the agreement was concluded for the purpose of determining the conditions of the complainant's separation from service did not legally prevent it from containing, as part of the settlement between the parties, stipulations concerning other aspects of the relations between them.

In this connection, the Tribunal further observes that in this case it is by no means inappropriate that the separation agreement should have the effect of preventing an inquiry into the facts alleged in the complaints or letters of 7 June 2010, 14 September 2010 and 17 September 2012, since those facts were clearly related to the circumstances in which the complainant's contract was terminated.

8. Since this line of argument is hence unfounded, there only remains the question of whether, as the complainant maintains, the agreement of 8 October 2010 is flawed by a lack of consent because it was signed under duress.

9. When it examined that same question in Judgment 3486, dealing with the complainant's first complaint, the Tribunal found that this was plainly not the case.

However, as the complainant correctly points out, the present complaint is not barred by *res judicata* on that account. Under the Tribunal's case law, the parties, the purpose of the suit and the cause of action must be the same as in the earlier case for the principle of *res judicata* to apply (see, for example, Judgments 1216, under 3, 2993, under 6, or 3248, under 3). The present case, which challenges the Director-General's refusal to act on a complaint of harassment and/or abuse of power, has neither the same purpose nor the same cause of action as the case dealt with in Judgment 3486, which concerned the lawfulness of the termination of the complainant's contract.

10. Nevertheless, the Tribunal sees nothing in the evidence submitted in the present proceedings that would lead it to a different conclusion from that which it reached in the first case regarding the validity of the agreement of 8 October 2010.

11. The complainant submits that he had no intention of leaving the WTO of his own accord, and that he agreed to conclude the agreement only because the WTO's administration had clearly signalled its intention to terminate his contract at short notice and on less favourable conditions should he refuse to sign. Those assertions are certainly accurate but, as the Tribunal has already found in similar cases, such circumstances are not in themselves sufficient to show that unlawful pressure was exerted on the official concerned (see, for example, Judgments 1075, under 11, 13, 14 and 17, and 3680, under 7 to 10).

12. It is clear from the file that the Director-General wished to terminate the complainant's appointment as a counsellor in the Appellate Body Secretariat of the WTO because the complainant had completely lost the trust of Appellate Body members owing to serious difficulties presented by his professional conduct. In the particular context resulting from that situation, and given that such a reason would have justified a unilateral termination under Staff Regulation 10.3, despite what the complainant contends, it was by no means unlawful for the WTO to have steered the complainant towards an agreed separation under paragraph (c) of that Regulation.

13. The evidence also shows that the agreement of 8 October 2010 was the outcome of negotiations that commenced at the end of June 2010, lasted for several weeks and ended with the complainant receiving substantial compensation that was significantly greater than that originally offered. In view of those preliminary negotiations and the extent of the concessions that were made by the WTO, the Tribunal considers that requiring the complainant, in a memorandum dated 5 October 2010, to take a decision by 12 October on a proposed agreement the content of which was already familiar to him cannot be regarded as undue pressure.

14. Lastly, notwithstanding the complainant's submissions to the contrary, the existence of such pressure is not demonstrated by the refusal of the Director of HRD on confidentiality grounds to allow Staff Council members to attend the meeting of 8 October 2010 during which the agreement in question was signed.

15. In the light of the foregoing, the Tribunal must again find that the complainant has failed to show that he signed the agreement under duress.

16. As the agreement was not tainted with misrepresentation or any other flaw in consent, it was hence validly concluded by the parties, who are therefore bound by it.

Consequently, because of the very terms of the clauses cited under 3, above, the present complaint is irreceivable, as were the internal complaint and the appeal filed by the complainant, for the same reason (see Judgments 1934, under 7, and 2368, under 7).

17. The complaint must therefore be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ