

**IN PROCEEDINGS BEFORE THE
COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL
BETWEEN:**

DR TAWANDA HONDORA

APPLICANT

-and-

THE COMMONWEALTH SECRETARIAT

RESPONDENT

**Before the Tribunal constituted by
President Aruna Narain, Judge Catherine Callaghan, Judge Carol Roberts**

JUDGMENT

4 September 2024

INTRODUCTION

1. The Applicant (Dr Tawanda Hondora) was employed by the Respondent (the Commonwealth Secretariat) as Adviser and Head, Rule of Law Section from 1 September 2020 to 1 September 2023.
2. The Applicant seeks an award of damages for what he alleges is the Respondent's failure to investigate a complaint which he made under the Respondent's Whistleblowing Policy.

FACTS GIVING RISE TO THE DISPUTE

3. The Applicant commenced employment with the Respondent on 1 September 2020, in the post of Adviser and Head, Rule of Law Section in the Governance and Peace Directorate ("GPD").
4. At all material times, the Senior Director of the GPD (and therefore the Applicant's direct line manager) was Professor Luis Franceschi. From 1 July 2022, Professor Franceschi also held the position of Assistant Secretary General ("ASG"). For convenience, he is referred to hereafter as the ASG.
5. On 12 January 2023, the Applicant communicated challenges he was having with the ASG to Dr Umakant Panwar, the Director of Human Resources and Facilities Management Division. Those included his belief that the ASG "had created and/or permitted to develop an extremely hostile working environment," "subjected [him] to bullying and harassment" and "breached [his] right to dignity and privacy."
6. The Respondent's Human Resources department attempted to mediate the issues between the Applicant and the ASG. Additionally, at the Applicant's request, an independent external mediator was appointed to facilitate an informal dispute resolution process. However, the external mediation process ultimately concluded in mid-2023 without a resolution of the underlying issues between the Applicant and the ASG.
7. On 13 March 2023, the Applicant sent a report to the Respondent's Legal Counsel and Data Protection Officer (hereafter, "Legal Counsel"), complaining that the ASG had committed breaches of the Respondent's data policy and breaches of confidentiality, and requested an

investigation. On 20 March 2023, the Applicant sent a second report to Legal Counsel complaining of separate breaches of confidence by the ASG at the time when the Applicant was a prospective employee.

8. On 5 April 2023, Legal Counsel asked the Applicant to refer his concerns to Human Resources under both the Disciplinary and the Grievance Procedures in the Staff Handbook.
9. Rather than acting on Legal Counsel's suggestion to action an investigation through the filing of a grievance, on 17 April 2023, the Applicant filed a 78-page report under Section 22, Rule 3 of the Respondent's Whistleblowing Policy alleging that the ASG had committed acts amounting to gross misconduct arising out of alleged "unlawful and wrongful disclosures to unauthorised third parties" and a breach of the UK's Data Protection Act. For convenience, we shall refer to this report as the "Whistleblowing Complaint".
10. On 24 May 2023, the Applicant was notified that his Whistleblowing Complaint was "under process", and that the Respondent was "engaging with an external officer in line with the provisions of the WB policy". On 20 July 2023, the Applicant was notified that his Whistleblowing Complaint would be investigated by an external organisation, TCM Group, and the Respondent provided him with the name of the investigator. On 25 July 2023, the Applicant replied by email, expressing concerns about the experience and skill set of the proposed investigator. He also complained that the Respondent was not protecting him from the ASG's "retaliation" against him for filing the Whistleblowing Complaint and the "ongoing bullying and harassment".
11. On 28 July 2023, the Respondent informed the Applicant that it was satisfied that the investigator and TCM were suitably qualified to undertake the whistleblowing investigation and asked the Applicant to provide details of any retaliation and specify what interventions he was seeking to protect him. The Applicant was also invited to lodge a grievance under the Respondent's Grievance Policy if he had experienced retaliation, bullying or harassment.

12. On 4 August 2023, the Applicant was advised that the investigator would investigate all the concerns raised by the Applicant in his Whistleblowing Complaint of 17 April 2023. The Applicant was interviewed for several hours by the investigator as part of the investigation.
13. On 13 October 2023, Dr Panwar informed the Applicant that the Respondent had received the investigator's report into the Whistleblowing Complaint ("Investigation Report") and that the report would be provided to him under separate cover. Dr Panwar noted that the investigator had concluded that the ASG did not make unlawful or wrongful disclosures of the Applicant's personal data to unauthorised third parties, and that there was no case to answer in relation to the Applicant's complaints of wrongful disclosure of data. Dr Panwar also informed the Applicant that the Investigation Report concluded that the issues raised by the Applicant should have been raised as a grievance as suggested by the Respondent's Legal Counsel on 5 April 2023, and did not qualify as a whistleblowing complaint or attract whistleblowing protection, because the complaints raised were not in the public interest but instead related to his employment contract. Additionally, Dr Panwar informed the Applicant that, since it was "not accepted" that any of his proposed actions would be in the public interest, any communication which the Applicant had proposed to make would be a breach of the Confidentiality Agreement he had signed on 28 August 2020.
14. The 153-page Investigation Report was provided to the Applicant by email on 18 October 2023.

THE PROCEEDINGS BEFORE THE TRIBUNAL

The Application

15. On 20 January 2024, the Applicant filed an Application with the Tribunal in which he alleged that the Respondent 1) failed to discharge its duty to investigate, properly or at all, his "17 April 2023 report" and that it 2) "staged" an investigation into his report.
16. The Applicant asserts that the Respondent formally investigated only whether the ASG had subjected him to conduct that may have breached the Respondent's Whistleblowing Policy, but that his 17 April 2023 report did not request such an investigation. Rather, he contends, he sought an investigation into whether the ASG's conduct, and handling of his personal data, breached the Respondent's policies on confidentiality, data protection, privacy and

harassment. He argues that the Respondent's failure to investigate this complaint constitutes a breach of its duty to "investigate or to investigate promptly, thoroughly and objectively allegations of harassment and other related policies on confidentiality, data protection and privacy" as well as its "duty of care ... to provide a safe working environment." Additionally, the Applicant contends that the Respondent failed in its duty to provide "reasons for administrative decisions" and engaged in an "abuse of authority".

17. The Applicant has alleged that the investigation was "a sham" for a number of reasons, including that he had no input into the selection of the investigator, that he was not provided with the Investigator's Terms of Reference, that he was misled about the scope of the Investigation Report, and that the Respondent did not make it clear to the Applicant that it had adopted the findings/conclusions of the Investigation Report.
18. The Applicant seeks "moral damages" in the amount of £40,000 (revised to £80,000 in his Rejoinder) for the ASG's conduct and "improper handling of his personal data in breach of the organization's policies on confidentiality, data protection, privacy and harassment."
19. The Applicant also seeks an Order anonymizing his name in any of the Tribunal's public judgements and/or orders to both safeguard his future employment prospects as well as to "protect [him] from intrusive media attention and requests for interviews that are likely to arise from the Tribunal's decision."
20. The Applicant has also requested payment of his legal costs (unspecified), and disclosure of certain documents held by the Respondent, including Guidelines on the Conduct of Investigations, documents identifying individuals who had roles in the proposal, drafting, revision and approval of the Investigator's Terms of Reference, ACAS Guidance on Conducting Workplace Investigations and a copy of the CIPD Rules on Whistleblowing used by the Investigator.

The Respondent's Answer

21. The Respondent filed its Answer on 28 March 2024, denying the Applicant's claims.
22. The Respondent asserts that the Applicant's application exceeded the parameters of the Tribunal's jurisdiction, which is limited to contractual matters. The Respondent claims that

it is not the Tribunal's role to review the merits of an investigation report or to retry disciplinary issues.

23. The Respondent claims that the application is without merit. The Respondent says that it properly considered and responded to all the Applicant's complaints.
24. The Respondent denies that the Applicant is entitled to any relief. It asserts that the Applicant is not entitled to any damages because his claims are unfounded. The Respondent opposed any application for costs. The Respondent opposed the request for disclosure and anonymity.

The Applicant's Reply

25. In his Reply of 12 June 2024, the Applicant repeated his assertions that the Respondent failed to investigate any of the categories of concerns he raised in his 17 April 2023 report regarding the ASG's "wrongful disclosures of personal data" in contravention of Staff Rule 8, "acts of misconduct" arising from his handling of his personal data, and "criminal conduct" in the disclosure of third-party personal data. The Applicant also repeated his allegations that the Respondent breached its duty both under internal law and rules of international administrative law in failing to investigate his 17 April 2023 report, that the Respondent's purported investigation of non-existing and non-alleged breaches of its Whistleblowing Policy was wrongful, and that the Respondent's failure to investigate his 17 April 2023 report caused him moral injury.
26. The Applicant asserts that he had a legitimate expectation that the Respondent would "investigate promptly, thoroughly, fairly and objectively" his 17 April 2023 report.
27. The Applicant contends that the Investigation Report of 13 October 2023 did not constitute the Secretary General's decision on his Whistleblowing Complaint, contained in his 17 April 2023 report.

The Respondent's Rejoinder

28. The Respondent filed its Rejoinder on 22 July 2024. The Respondent reiterated that the Tribunal's role was to undertake a limited review of the impugned decision rather than conduct its own investigation, as identified in the Tribunal's 8 May 2024 Order.

29. The Respondent says that it adopted a fair, rational and justified approach to the Applicant's Whistleblowing complaint, that it was taken in accordance with the Respondent's Whistleblowing Policy, that the external, independent investigator's terms of reference were adequate, and that the Applicant was not misled about the terms or content of the investigation.

PROCEDURAL ISSUES

Tribunal's Order of 8 May 2024

30. In an Order dated 8 May 2024, the Tribunal refused the Applicant's request for disclosure of documents except for the document *Commonwealth Secretariat's Guidelines on the Conduct of Investigations*. In considering the request, the Tribunal identified the following three issues to be determined:

1. What is the administrative decision impugned by the Applicant in this matter and does it fall within the Tribunal's jurisdiction?
2. Consequent to the Applicant alleging misconduct by their line-manager and "improper disclosure to third parties of [their] confidential personal data" what legal obligation was owed by the Respondent to the Applicant, in accordance with the Applicant's terms and conditions or appointment, the internal law of the Respondent and the principles of international administrative law?
3. To what extent, if any, was the Respondent in breach of its legal obligation owed to the Applicant, consequent to the Applicant alleging misconduct by their line-manager and "improper disclosure to third parties of [their] confidential personal data"?

No Oral Hearing

31. Rule 14 of the Tribunal's Rules provides that oral proceedings shall be held if the Tribunal members hearing a case so decide or if either party so requests and the Tribunal so agrees. Neither party requested an oral hearing, and the Tribunal determined that the dispute could be decided based on the written submissions of the parties.

Anonymity Request

32. The Applicant seeks an order for anonymity under Rule 5.3(f) of the Rules, claiming that he has a reasonable apprehension that media interest will "adversely affect his privacy" and "affect his future employment prospects."

33. Rule 23(4) of the Tribunal’s Rules provides that: “The Tribunal may grant a request for anonymity where good cause has been shown for protecting the privacy of an individual”. The Tribunal considers that no good cause has been shown. Personal embarrassment or notoriety are insufficient cause. The Applicant was appointed a Judge of the High Court of Belize on 17 January 2024, so the issue of his future employment prospects is moot.

34. Accordingly, the Applicant’s request for anonymity is refused.

THE JURISDICTION AND ROLE OF THE TRIBUNAL

35. Article II of the Statute that establishes the Tribunal provides that it has jurisdiction to hear and determine an application brought by a member of staff of the Secretariat which alleges the non-observance of a contract in writing with the Secretariat, including, in relation to a contract of service, the non-observance of the contract of employment.

36. Article II.3 provides that:

Subject to paragraph 4 of this Article, the Tribunal shall only consider an application if:

...

(b) the application is filed within a period of 90 days after the latest of the following:

- (i) the occurrence of the event giving rise to the application;
- (ii) receipt of notice, after the applicant has exhausted all other remedies available within the Commonwealth Secretariat ..., that the relief asked for or recommended will not be granted;

...

37. Paragraph 4 of Article II provides that:

- (i) The Tribunal may nevertheless consider an application which is out of time where it is satisfied that it was not reasonably practicable for the application to be filed before the end of the period of 90 days.

...

DETERMINATION OF THE LEGAL ISSUES

(1) What is the administrative decision impugned by the Applicant, and does it fall within the Tribunal's jurisdiction?

The Impugned Administrative Decision

38. Although the Applicant alleges that the Respondent failed to investigate his concerns set out in his 17 April 2023 report, properly or at all, the Applicant must accept, in the face of the evidence, that the Respondent did carry out an investigation. The real gravamen of his application is that the Respondent's investigation was inadequate or a 'sham' and as a result, the Respondent failed to uphold the Applicant's complaints.
39. Dr Panwar's letter of 13 October 2023 informed the Applicant of the outcome of the investigation, which was that the investigator had found that there was no case to answer in relation to any of his complaints. As the Investigation Report found the Applicant's complaints to be unsubstantiated, the Respondent determined that there was no need for any action to be taken by the Respondent. It is clear to the Tribunal from Dr Panwar's letter of 13 October 2023 that the Respondent accepted the findings of the Investigation Report and did not propose to take any further action in respect of the Applicant's complaints. The Tribunal rejects the Applicant's argument that he only became aware of how the Respondent would address the report in December 2023.
40. The Tribunal finds that the impugned administrative decision occurred when the Respondent informed the Applicant that, in reliance on the Investigation Report, it would take no further administrative action in response to the Applicant's complaints. In other words, on 13 October 2023, the Respondent informed the Applicant that that the "relief asked for... will not be granted" (CSAT Statute, Article II.3 (b)(ii)).
41. However, the Applicant did not receive a copy of the Investigation Report until 18 October 2023. The Applicant was not in a position to assess whether or not there had been an adequate or genuine investigation into his complaints until he received a copy of that report. Therefore, the Tribunal accepts that the elements of the impugned administrative decision were not complete until 18 October 2023.

Does the Application Fall Within the Tribunal's Jurisdiction?

42. Consequently, the Applicant was required to file his application within a period of 90 days after 18 October 2023. The 90-day time period ended on 16 January 2024. The Application was filed on 20 January 2024, four days out of time.

43. Although Article II.4(i) of the Statute provides that the Tribunal may nevertheless consider an Application which is out of time where it is satisfied that it was not “reasonably practicable” for the Application to be filed before the end of the period of 90 days, the Applicant has neither claimed nor demonstrated that it was not practicable for the Application to be filed within the 90-day time period.

44. The Tribunal concludes that it was reasonably practicable for the Application to be filed within the 90-day time period, and consequently that the issues raised by the Applicant are not within the jurisdiction of the Tribunal to consider. (See also *Philip Pooran and the Commonwealth Secretariat*, CSAT APL/6, March 2002)

SUMMARY OF FINDINGS

45. We find that the Application is not within the jurisdiction of the Tribunal to determine as it was made beyond the 90-day time period within which the Application was required to be filed.

Costs

46. The Applicant sought his costs, but there was no request for costs from the Respondent. Having considered its discretion in accordance with Article IX.3 of the Statute, the Tribunal determines that each party shall bear its own costs.

FORMAL ORDERS

47. The Tribunal makes the following orders:

- a. The Tribunal is without jurisdiction to consider the Applicant's Application.
- b. Each party shall bear its own costs.

Delivered on 4 September 2024

/S/ Aruna Narain

President Aruna Narain

/S/ Catherine Callaghan

Judge Catherine Callaghan

/S/ Carol Roberts

Judge Carol Roberts

And

/S/ Peter Quayle

Peter Quayle, Executive Secretary