

CSAT/14(No.1)

JUDGMENT OF THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT JUNE 2009

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the matter of

ANN KEELING

Applicant

AND

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Justice K M Hasan, President, Justice Lionel Jones, Member, and

Justice Usha Mehra, Member

JUDGEMENT

This is an application in which the Applicant, Ann Keeling is contesting the decisions, or rather the lack of them, that the respondent made in connection with the way in which the Respondent dealt with the complaints submitted by Roli Degazon-Johnson, one of her colleagues, hereafter RDJ, and the way that they ignored the Applicant's objections and criticisms concerning how they dealt with the whole procedure.

1. The application is brought under Article 11 of the Statute of the Commonwealth Secretariat. At the outset of the judgment we would like to say that we have carefully considered the application by Ann Keeling dated 4 June 2008, the answer by CSAT dated 17 October 2008, the reply by the applicant dated 14 December 2008, the rejoinder by CSAT dated 4 February 2009 and all other materials placed before us.

2. Initially the Applicant in her application requested that she be given permission to adduce appropriate documentary and witness evidence but subsequently she no longer insisted on oral hearing as both parties agreed that the Tribunal had to decide a preliminary issue of whether the Tribunal had jurisdiction to entertain the Applicant's complaint.

3. The preliminary issue has arisen by reason of the requirement that, in order to have a right of access to the Tribunal an applicant must qualify as one of the category of persons listed in Article II of the Tribunal Statute. Article II provides among other things, as follows:

"1. The Tribunal shall hear and determine any application brought by:

(a) member of staff of the Commonwealth Secretariat;

(b)-----

(c) any other person who enters into a contract with the Commonwealth Secretariat;

which alleges the non-observance of a contract in writing with the Commonwealth Secretariat and includes in relation to a contract of service the non-observance of the contract of employment or terms of appointment of such member of staff-----"

Article II of the Statute goes on to provide in sub-Article 5 as follows:

"5. For the purposes of this Statute:

(a) "contract of employment" and "terms of appointment" include all relevant Regulations and Rules in force at the time of the alleged non-observance and include the provisions relating to staff gratuity, retirement and end of contract benefits;

(b) "contract of service" means an agreement between the Commonwealth Secretariat and a member of its staff for work by the staff member over a specified period of time and in relation to which the relevant Regulations referred to in paragraph (a) concerning a contract of employment will apply"

(c)

(d) "member of staff" means:

(i) any current or former member of the headquarters staff of the Commonwealth Secretariat

(ii) -----"

Therefore, the Tribunal will now proceed to deal with this preliminary issue on the basis of the papers before it and will confine itself to only those aspects of the papers that relate to jurisdiction. However in doing so, it would be necessary to provide a little background to the matter, without going into the substance of the Applicant's case.

6. In this regard, we are satisfied and find that before the applicant filed her application with the Tribunal she had exhausted the local remedy available within the Secretariat. We are further satisfied

that the application was filed within the prescribed time and we, therefore have the jurisdiction to determine the preliminary issue whether the Tribunal has jurisdiction in this matter.

7. The decisions which the Applicant is contesting and whose eventual rescission she will be requesting under Article X, paragraph 1 of the Statute is the decisions, or rather the lack of them, that the Respondent made regarding certain complaints filed against the Applicant by RDJ and the way that the Respondent ignored the Applicant's objections and criticisms concerning how they dealt with the whole complaint procedure.

8. The obligations which the Applicant is invoking and the specific performance of which she is asking for under Article X, paragraph 1 of the Statute are:

- i. the obligations that the Respondent owed to the Applicant as the Applicant's Employer being the implied terms of mutual trust and confidence and the Respondent's duty to take reasonable care for the safety of their Employees by providing a safe system of work and place of work.
- ii. a duty to the Applicant to take reasonable steps to prevent discrimination occurring.

The grounds on which she claims relief under Article X paragraph 1 of the Statute are :-a) personal injury sustained by her for which she claims compensation,

b) discrimination on the ground of colour for which she seeks a declaration that she was unlawfully discriminated by the Respondent and compensation on that ground and,

c) breach of contract for which she seeks damages.

10. It would seem appropriate to us to observe here that it does not surprise us that the obligations the Applicant is invoking and that the grounds upon which the reliefs she is claiming are based bear characteristics that are normally associated with employer/employee relationships.

11. The central issue that the Tribunal has to determine dissolves into whether the Applicant can be said to have been in a contractual relationship of employer and employee with the Commonwealth Secretariat. The determination of that issue, it seems, would necessarily produce the same result as a determination by the tribunal of whether the Applicant could be described either as "a member of staff of the Commonwealth Secretariat" or any other person who has entered into a contract with the Commonwealth Secretariat as set out and defined in Articles II.1(a) & (c) & II.5(a), (b) & (c) of the Tribunal Statute.

12. The application is accompanied by a number of documents from which the Applicant, in essence, invites the Tribunal to draw the conclusion that she had entered into a contract of employment or a contract of service with the Commonwealth Secretariat and therefore that she was an "employee" and a member of staff of the commonwealth Secretariat within the meaning of Article II of the Tribunal Statute.

13. For her part, counsel for the Respondent correctly argues that the Applicant must first establish the existence of a contract of service or employment with the Respondent and denies that such a contract ever existed. To support the Respondent's case, Counsel has helpfully drawn the attention of the Tribunal to relevant jurisprudence and case law in the practice of international administrative tribunals regarding secondments.

THE APPLICATION

14. The Applicant, Dr. Ann Veronica Keeling joined the Commonwealth Secretariat as the Director, Social Transformation Programmes Division on 14 February 2005. She continued in that position until 14 February 2008 but her last day in office was 1 February 2008 which took into account accrued leave. She is married, British and white. Her "employment contract" was for a three year period commencing from 14th February 2005 to 13th February 2008. In July 2007 she was offered and she had signed a new three year "contract of employment".

15. Before joining the Commonwealth Secretariat she used to work for Department of International Development, hereinafter referred to as DFID. She participated in an open competition for the post with other candidates and was offered the post for a period of three years in the first instance but which could "be renewed subject to mutual agreement according to the exigencies of the service and subject to fully satisfactory performance". On the evidence before us therefore the post was initially offered to her as an individual and she accepted the post and signed the contract in that capacity.

16. However, subsequent to commencing work, her employment with the Secretariat was subsumed in and governed by a Secondment Agreement between DFID and the Secretariat.

17. She asserts that the Commonwealth Secretariat was her employer and there was a contract of service between her and the Respondent and therefore that she is entitled to access Commonwealth Secretariat Arbitral Tribunal.

18. On the 7th December 2007 she gave the Commonwealth Secretariat a written notice terminating her contract of employment with them with effect from the 25 January 2008. She alleges that it is only because of the Respondent's actions that she left the employment.

19. The background to her case is that her colleague RDJ, who was a member of staff in her Division, had lodged with the Commonwealth Secretariat a complaint against her related to three specific incidents. Two of the incidents concerned complaints that the Respondent received about the complainant from the Governments of Sierra Leone and South Africa and the third related to the selection of the Division's Team for a November 2005 meeting with the Regional Education Ministers in Sierra Leone. The complaints made by the various parties were allegations of serious misconduct on the part of RDJ which had the potential to cause severe disruption and embarrassment to the Respondents relations with those countries.

20. The Respondent instead of following the mandatory informal procedure involving inter alia mediation, dismissed the Applicant's objection to a formal investigation and permitted a formal investigation to proceed. She contends that failure by the Respondent to follow the proper procedure prejudiced her in various ways. The initial complaint against her was lodged on either the 17th or 23rd January 2007 and yet she was not informed about it until 9 March 2007. The second complaint was submitted on the 18th June 2007 yet the Respondent failed to inform her until the 9th August 2007. Thereafter, a series of allegations were brought by the same person (RDJ) against the Applicant encouraged by others with the intention to get rid of her from her work place. The complainant was assisted and encouraged to pursue her complaint by the Commonwealth Secretariat Staff Association (CSSA) of which the complainant was an office holder. The Applicant's case is that the Secretariat should not have entertained the subsequent allegations brought against her as an investigation was already going on. She was subjected to a series of complaints by way of harassment. The only reason for the treatment she had received was, she contends, based on her colour, contrary to Commonwealth Secretariat's own policies. She contends further that the Secretariat should not have delayed the investigation for as long as it did without separating RDJ from her Division, thereby causing difficulties in carrying out her official duties. Meanwhile during the drawn out investigation her father had died and the harassment had also continued. She was mentally so distressed that she availed the first opportunity of getting another job and gave notice of leaving the Secretariat.

21. An investigator was appointed to investigate the allegations of RDJ and the Investigator's Report was delivered on the 18 December 2007. The Applicant claims that the Report exonerated her from the complaints and at the same time castigated the Respondents handling of the matter.

22. She contends that the Respondent's conduct was unjustified and unreasonable and that it constituted a breach of contract being a breach of implied term of mutual trust and confidence and of the duty to take reasonable care for the safety of the Respondent's employees by providing a safe system of work.

23. She further contends that the question of Secondment was only raised as an afterthought, after she had lodged the grievance petition against the Respondent and resigned her post. Two months after lodging her grievance against the Respondent on 1 February 2008 and after acknowledgment of its receipt by DSG Mugasha, she was informed of the withdrawal of an offer of mediation by a letter dated 8 April 2008 written by the Head of the Secretariat's Human Resource Section and stating:

"As you are aware, your "employment" with The Commonwealth Secretariat was governed by a Secondment Agreement between DFID and the Secretariat. This Agreement did not come to the knowledge of the Secretariat's Management until after the Secretariat's letter which was written to you on 8 February 2008 about setting up an informal process to deal with your grievance."

24. The Applicant's position is that at all material times she considered herself to be an employee of the Respondent and that in any event the secondment by DFID did not influence her behaviour as an employee of the Secretariat or the decision that she took in resigning her post. She had joined the Secretariat by participating in an open competition and had accepted the post when it was offered to her without reference to DFID. Again, subsequently, the Secretariat had also offered her a second contract

without reference to DFID which offer she accepted. In offering her a second contract the Secretariat surely must have known what it was doing and, in her view, had treated her as one of its employees.

THE RESPONDENT'S POSITION

25. For its part, the Respondent asserts that the Applicant, at all times, was an employee of The Department for International Development, a department of the UK Government and was on secondment to the Respondent. There was no contract of service between the Applicant and the Respondent in respect of which the Applicant may bring an application before the Tribunal alleging non observance of the contract of employment.

26. The Respondent observes that though the Applicant based her case under both paragraphs 3(b) and 3(c) of her Pleas yet it is evident from the application that her case is not about challenging a specific decision of the Respondent and seeking the rescission of that decision under 3(b) but it is more of a case under 3(c). As such, it was obvious that her case had to be advanced on the basis of alleged breach of obligations on the part of the Respondent towards her as an employee in the manner that she has described.

27. The Applicant's case therefore, as she implicitly recognises, depends upon the existence of employer and employee relationship between her and the Respondent. Therefore, the Respondent argues that it is essential that the Applicant establishes the existence of a contract of service between her and the Secretariat. If she fails to establish the existence of any such contract then her case must fail.

28. The Respondent has stated that the offer of a second contract which was made by the Secretariat to the Respondent by the letter dated 2 July 2007 was an administrative error, that it had no knowledge of the the letter of 24 January 2005 setting out the terms of the secondment even though the letter had been signed and returned, in acknowledgment, on behalf of the Respondent by one of its 'senior' employees. The letter specifically records that it is written to 'confirm' the arrangements for the Applicant's secondment from the DFID to the Respondent for a period of three years. In this connection the Respondent seems to be saying that the grievance that the Applicant lodged by her e mail dated 31 January 2008 (Annex 6) does not make any reference to her position as a secondee from DFID, implying that even the Applicant herself had no knowledge of the secondment arrangement although the documents before us suggest otherwise. In fact, far from not making any reference to The Applicant's status as a secondee, the letter specifically says so in paragraph 14 of Annex 6. Be that as it may, the Respondent claims that the offer letter of 2 July 2007 was written in complete ignorance of the true relationship with the Respondent, presumably because the offer letter predates the Applicant's email.

29. Immediately, however, the Respondent faces the difficulty of having to reconcile these contentions with some of the documents it has placed before the Tribunal. For instance, the Respondent draws the attention of the Tribunal to the witness statement of DSG Mr. Ransford Smith which states that the Applicant was required to report regularly to DFID as part of her secondment and that she had prepared the Final Report to DFID dated 1 February 2008 (page 17 of the Annex Documents to the Respondent's Answer). That report by the Applicant specifically refers to her being seconded from DFID. Then again at the Applicant's request the Respondent paid to DFID part of her remuneration which the DFID paid to the UK Civil Service as the employer's contribution, this arrangement is specifically noted by the Applicant in hand writing on the letter of 2 July 2007 (Annex 15). Therefore, any suggestion that the Applicant was unaware of her status as a secondee from DFID would be untrue. The Respondent nevertheless contends that it is clear from the preceding facts that nothing in the arrangement with the DFID gives rise to a contract of service between the Applicant and the Respondent.

30. The Respondent also claims that it sought to resolve the complaint lodged by DRJ against the Applicant informally but that the Applicant declined to follow an informal process. Therefore, the Respondent was constrained to formally investigate the complaint by appointing an independent investigator, Alwin Rea. The Applicant was given an opportunity to give a written response to the complaint and was interviewed by Alwyn Rea as part of the investigation and finally the investigator in her report found nothing to substantiate the allegations made in the complaint.

31. The Respondent denies that it had discriminated against the Applicant on the ground of the colour of her skin or that it had treated her less favourably or against the rules and procedures of the Secretariat.

32. The Respondent further denies that it had intentionally delayed the investigation or failed in any of its alleged duty towards the Applicant in dealing with complaint as its employer.

33. Finally, the Respondent believes that the Applicant at the conclusion of her secondment on 14 February either returned to performing her duties within DFID or sought and obtained a transfer of her employment to another branch of the U,K, civil service.

THE TRIBUNAL'S FINDINGS

34. The complainant has never denied that she was a secondee and consistently claimed that she was employed by the Respondent as a member of staff of the Commonwealth Secretariat but seconded to the Commonwealth Secretariat by the DFID. The evidence suggests that she made reference to her status as a secondee as already pointed out above in paragraph 28 in her regular reports to DFID. We have considered and reviewed fully and in considerable detail the respective arguments, as disclosed on papers filed before the Tribunal. The weight of evidence before the Tribunal shows that there should not be any dispute as to the knowledge of the claimant regarding her secondment to the Secretariat. The witness statement of DSG Mr. Ramsford Smith which states that the Applicant regularly reported to DFID as part of her secondment and that she prepared the Final Report dated 1 February 2008 (pages 17 and 18 of the Annex to the Respondent's Answer) to be sent to DFID. Those documents written by the Applicant specifically refer to her being seconded from DFID.

35. Therefore, there can be no dispute whatsoever that the Applicant was on "secondment" from the Department for International Development (DFID) of the United Kingdom government to the Commonwealth Secretariat. The terms of the secondment are set out in a memorandum titled DFID Secondment to the Commonwealth Secretariat. The memorandum is dated 24 January 2005 and was addressed to Elaine Lowe, Deputy head Human resources, Commonwealth Secretariat who signed it on 11 February 2005 to signify acceptance of the terms of the secondment on behalf of the Commonwealth Secretariat.

36. The memorandum provided among other things, that the secondment would be for a period of 3 years commencing 14 February 2005, that during the loan period, Ann Keeling will move on to Commonwealth Secretariat Terms and Conditions and will be subject to on Commonwealth Secretariat pay and performance Management System, and that further details on Commonwealth Secretariat terms and Conditions should be provided to Ann Keeling as soon as possible.

37. Prior to the receipt by the Secretariat of the secondment memorandum the Applicant had been a successful candidate in a selection process to fill the post to which she was eventually seconded. On 17 December 2004 the Secretariat sent her a letter informing her of her "appointment in the Commonwealth Secretariat as director, in the Social Transformation Programmers Division" The letter stated in paragraph 2 that "this contract incorporates the Commonwealth Secretariat staff Regulations and Staff Rules as laid down and amended from time to time by member governments and or by the Commonwealth Secretary General." (emphasis added). The letter was accompanied by a number of enclosures including a "Summary of Terms and Conditions for Pay Point C" which among other things said that "the full terms and conditions are set out in the Commonwealth Secretariat Staff Rules and Regulations which form part of the contract of all staff members"

38. What the Tribunal has to decide now are the implications of this arrangement for Applicant in her relationship with the Respondent as a secondee.

39. This Tribunal is bound by the provisions of its Statute and is required to apply the principles of international administrative law to the exclusion of the national laws of individual member countries of the Commonwealth. The applicable law for the Tribunal is defined in Article XII of the Arbitral Tribunal's Statute which gives guidance as to the law to be applied by the Tribunal. That Article states as follows: "1. In dealing with a case relating to a contract of service, and subject to paragraph 2 of Article V1, the Tribunal shall be bound by the principles of International law which shall apply to the exclusion of the national laws of individual member countries.

2. In all other cases, the Tribunal shall apply the law most closely connected with the contract in question.

3."

40. In his renowned treatise on the Law of the International Civil Service (As Applied by International Administrative Tribunals) Vol. II at page 258, Dr C.F. Amerasinghe draws attention to the need, for the purposes of implementing the Staff Regulations or Staff Rules and written law of an organization and for the purposes of applying the general law relating to the treatment of staff, to define or distinguish between the various forms that the assignment of staff members may take.

41. He refers to the case of Pagani, Council of Europe Appeals Board, Appeal No. 76[1982], Case Law Digest (1985), where the Appeals Board held that a secondment was to be distinguished from a transfer, the latter being dealt with in detail in the Staff Regulations while the former was not. Thus where the applicant had been 'seconded' to the directorate of Legal Affairs from his original service to fill a specific temporary post which was later made permanent the termination of his secondment could only be dealt with under the general provisions of the Staff Regulations and under the general principles of law and could not be treated as a transfer under the Staff Regulations. In some circumstances only the general provisions of the Staff Regulations and Rules would apply together with the general principles of law, while in the case of a 'transfer', the full force of the Staff Regulations would apply. In other words, 'secondment' gives rise to a special status and should be dealt with on a case by case basis depending on the circumstances as it is not easily susceptible to precise definition.

42. However, Dr. Amerasinghe suggests that one characteristic of secondment is that it is generally, though not always, accompanied by a fixed term contract. Also the case law of international administrative tribunals points to the existence of other indicative characteristics. In Higgins UNAT Judgment No. 92,[1964], UNAT Nos. 87-113p. 41 at 49, the UNAT said:

"IV. There is no legal definition of the term 'secondment' in the Staff Regulations and Rules of either IMCO or the United Nations. Nevertheless, the term 'secondment' is well known in administrative law. It implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits.-

V.

V1

"V11----there are three parties to the contract of secondment namely the releasing organization, the receiving organization and the staff member concerned.." (emphasis added)

43. And in Levčik, UNAT Judgment No. 192,[1974], JUNAT Nos. 167-203 p.204 at P 212 UNAT elaborated on the concept of secondment as follows:-

"V. The principles stated in Judgment 92 (Higgins) imply that in a case of secondment the situation of the official in question must be defined in writing by the competent authorities in documents specifying the conditions and particularly the duration of the secondment. These documents must be brought to the knowledge of the official concerned and his consent must be obtained. Any subsequent change in the terms of the secondment initially agreed on, its extension, obviously requires the agreement of the three parties involved. When a Government which has seconded an official to the Secretariat of the United Nations refuses to extend the secondment, the Secretary General of the United Nations as the administrative head of the organization, is obliged to take into account the decision of the government"

44. It would thus seem to be clear that a secondment could come to an end, for instance upon the withdrawal of consent by the seconding authority. Two important consequences flow from this:

1) the staff member remains in the service of the seconding authority and will revert to that service upon the termination of secondment, however terminated and

2) while the secondment lasts the relationship between the staff member and the organization to which he is seconded will be governed by the relevant provisions of the internal law of that organization.

45. The internal law of the receiving authority may require that certain procedures be followed in order to terminate the secondment. The secondment could terminate automatically according to its terms, if the terms are not changed by agreement of the parties. The situation was considered in Gross, ILOAT Judgment NO. 703 [1985] (FAO), pp 6-7 where the Tribunal considered the legal status of a secondee. It observed as follows:

"----- the 'secondment' agreement does not of itself give the staff member rights which are enforceable against an organisation, it can be enforced only to the extent that either the organisations have included

appropriate provisions in their administrative rules or the parties have accepted to apply it in the individual case.

.....while retaining his rights in the 'releasing' organisation the staff member shall be subject to the staff regulations and rules of the receiving organization.

.....the staff members contractual status is that of an official with a fixed-term appointment.

.....it (the secondment Agreement) is therefore to be treated as part of the administrative rules and is enforceable between the (three) parties.

.....the complainant was therefore a "staff member with a fixed term appointment while on secondment....."

46. A secondee is thus in the unique position of being able to enjoy rights and being subject to obligations in both the sending and receiving organizations(Gross).

Application of the principles and the law to the facts.

47. The clear implications of the above leave the Tribunal in no doubt that the Respondent contracted the Applicant as an employee from the time she accepted the offer of appointment as Director in the Social Transformation Programmes Division in the Commonwealth Secretariat . She accepted that offer on 22 December 2004 by signing, as she was requested to do, the letter of appointment dated 17 December 2004. The appointment was for a period of three years.

48. Significantly, the letter of appointment states among other things that "this contract incorporates the Commonwealth Secretariat Staff regulations and Staff Rules..."

49. The letter of appointment also states as follows:

"Your attention is drawn specifically to the procedure for settling disputes that may arise in connection with your employment..... the staff Rules contain a procedure for settling any grievance. In addition, there exists an independent Arbitral Tribunal for settling disputes to which the Secretariat is a party, in a manner consonant with its status as an international organization. Any staff member who feels aggrieved by reason of an alleged non- observance by the Secretariat of the terms of his/her contract of employment, and remains dissatisfied after exhausting all available remedies under the grievance procedure, may refer his complaint to this Tribunal."

50. Subsequent to accepting the appointment and before the applicant assumed duty at the Commonwealth Secretariat on 14 February 2005, the Department for International Development wrote to Ms. Elaine Lowe, the Deputy Head, Human Resources at the Commonwealth Secretariat in terms that suggested there had been prior consultations between the DFID and the Commonwealth Secretariat regarding the secondment of the Applicant to the Secretariat. The letter, dated 24 January 2005, was written by Ms Antonia Lawless, Secondments manager in the Human Resources Customer Services and Support Section of DFID. It was assigned and accepted "on behalf of the Commonwealth Secretariat" by Ms Elaine Lowe on 11 February 2005. The letter begins as follows:

"I am writing to confirm arrangements for Ann Keeling secondment to the Commonwealth Secretariat as Director Social Transformation Programmes Division."

51. The terms of the secondment are clearly set out in the letter of 24 January 2005 and contain, among other things, the following:

"As agreed, the secondment shall be for a period of 3 years commencing 14 February 2005.

During the loan period, Ann Keeling will move on to Commonwealth Secretariat Terms and Conditions, and will (be) subject to Commonwealth Secretariat's pay and Performance Management System.....

Further details on Commonwealth Secretariat Terms and Conditions should be provided to Ann Keeling as soon as possible .

If Commonwealth Secretariat alleges that the secondee is guilty of gross or serious misconduct, Commonwealth Secretariat may send the secondee home subject to Commonwealth Secretariat notifying DFID forthwith of the alleged gross or serious misconduct.

.....this arrangement shall automatically terminate if:

"..the secondee reasonably considers that Commonwealth Secretariat has contravened statutory or their organizational standards of conduct as detailed in their grievance procedure; and requests the Commonwealth Secretariat in writing to terminate the secondment.

It is the seconded's responsibility to follow the Commonwealth Secretariat Gross or Serious Misconduct guidelines as provided by Commonwealth Secretariat.

For the avoidance of doubt, it will be the responsibility of the Commonwealth Secretariat to investigate any allegation of Gross or Serious Misconduct, it will then be the responsibility of DFID to instigate any disciplinary proceedings in respect of the seconded.

For the avoidance of doubt nothing in this arrangement shall constitute Commonwealth Secretariat as the primary employer of the seconded

Unless otherwise notified, the secondment will be terminated 13 February 2008 and Ann Keeling will return to DFID.

Any extension to the secondment will be agreed at least 3 months prior to the aforementioned termination date"

52. It is apparent that this case has the classic hallmarks of a secondment as described in Higgins, UNAT judgment No.92 (1964) Levcik, UNAT Judgment No. 192 (1974) and Gross ILOAT judgment No. 703 (1985). In terms of this secondment arrangement, it is clear that the Applicant is a party to the secondment 'agreement' which sets out the rights and obligations of all three parties, the Secretariat, DFID and the Applicant(Higgins) . The applicant was fully aware of the secondment arrangements and while it may be that as a general rule a (secondment) Agreement does not of itself give the seconded rights which are enforceable against an organization (Levcik), it can, to some extent at least, be enforced. The agreement can be enforced to the extent that the organizations concerned have included appropriate provisions in their administrative rules or they have accepted to apply them in the individual case as appears to be the position in this case (Gross).

53. The Applicants initial letter of appointment dated 17 December 2004, perhaps understandably so, makes no reference to the secondment arrangement. A possible explanation for this may be because the appointment letter predated the letter formalizing the secondment 'agreement' entered into between the DFID and Commonwealth Secretariat in February 2005 and signed on behalf of the Commonwealth Secretariat by the Deputy head of the Human Resources Section. However, there is no explanation as to why the letter dated 2 July 2007 offering the Applicant a new contract makes no reference whatsoever to the secondment arrangement other than that the 'agreement' did not come to the knowledge of the Secretariat's Management until a much later date, three full years after the secondment agreement was signed, an explanation that the Tribunal does not consider sufficiently plausible. The offer or a new contract was in apparent disregard of the clear terms of the secondment agreement.

54. The letter dated 8 April 2008 addressed to the Applicant by Deputy Secretary General Mugasha stating that the '(Secondment) Agreement did not come to the knowledge of the Secretariat's Management until after the Secretariat's letter' of 8 February 2008, would seem to fly in the face of other documentary evidence before the Tribunal . There is before the Tribunal not only the Secondment Agreement itself signed on behalf of the Commonwealth Secretariat by the Deputy head of Human Resources in February 2005 but also a draft End of Secondment Report dated 1 February 2008 prepared by the Applicant and sent through Deputy Secretary General Smith, the Applicant's line manager, for the Secretary General,s signature and then for onward transmission to the DFID. Although there is nothing in the pleadings to show whether or not the Report was sent, not much would turn on this. The Deputy Secretary General's letter of 8 April 2008 effectively withdrawing an offer that had been made earlier to the Applicant by the head of the Secretariat Human resource Section sought to correct what is described as a mistake.

55. However, even if the Tribunal were to believe that the Secondment Agreement did not come to the knowledge of the Secretariat,s Management until after the letter of 8 February 2008 had been sent, and the Tribunal has no reason to doubt this, a reasonable inference could still be drawn from the circumstances that the knowledge of the Head of the Human Resources Section who one would assume to have the authority to sign the Secondment Agreement on behalf of the Secretariat and also to set up an informal mediation process to address the Applicant grievances would fix the Secretariat Management with vicarious knowledge of what had been done on its behalf and in its name. The withdrawal of the offer is, perhaps understandable as otherwise it would have been seen as a clear admission by the Respondent that the Applicant was, indeed, an employee and a member of staff of the Commonwealth Secretariat. The least that could be said, in these circumstances, is that there clearly was an

administrative lapse on the part of the Commonwealth Secretariat for which the Applicant can hardly be held responsible.

56. It is not clear from the documents before the Tribunal whether at the time the Applicant was hired, following the competitive interview, the question of secondment was raised at all. If the question was never raised, the minimum that one could presume is that the intention was for the Respondent to hire the Applicant as an employee. It would be difficult to speculate in what other capacity the Applicant was being hired. In which case that situation would not have changed and the relationship of employer and employee between the Respondent and the Applicant would have continued or at least would have come into existence in the manner described in the secondment agreement as soon as the agreement came to the knowledge of the Secretariat's Management.

57. It is not sufficient, in our Judgment, for the Respondents to simply state that a contract of service does not exist between the Commonwealth Secretariat and the Applicant and that it does not owe any duty to the Applicant as her employer. The inescapable conclusion that the Tribunal draws from the evidence before it is that although the Commonwealth Secretariat may not have been the Applicant's primary employer, nevertheless it was always intended that the Secretariat should be and was at all material times at least her secondary employer. They hired the Applicant and, in accordance with the terms of the secondment agreement, were in a position to fire her, albeit in consultation with the DFID as her primary employer. There is no doubt in our mind about the import of the Applicant's letter of appointment together with the summary of terms and conditions of appointment that were sent to her.

58. In light of the above we find that the Applicant was an employee of the Commonwealth within the meaning of the provisions of the Tribunal Statute. It means therefore that the applicant is entitled to bring her complaint before the Tribunal as a member of Staff of the Commonwealth Secretariat provided she complies with any other relevant provisions of Article II of the Tribunal Statute.

59. Accordingly, the Tribunal orders that the Respondent now file a substantive Answer to the Application filed by the Applicant on 6 June 2008. In accordance with Rule 6 of the Tribunal Rules it has 90 days from the date of this judgment within which to file its Answer, that is by close of business on Thursday 8 October 2009.

Given on this day of June 2009 in London

Signed

Justice K M Hasan (President)

Justice Lionel Jones, SC Justice Usha Mehra