CSAT/14(No.2)

JUDGMENT
OF THE
ARBITRAL TRIBUNAL OF THE
COMMONWEALTH SECRETARIAT

JUNE 2010

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the matter of

A K

Applicant

AND

COMSEC

Respondent

Before the Tribunal constituted by

Justice K M Hasan, President, Justice Usha Mehra, member and Justice Seymour Panton, member

---

JUDGMENT

JUDGMENT

Introduction

1. The Applicant, AK, a British subject, joined the service of the Commonwealth Secretariat in February 2005 on secondment from the Department for International Development (DFID) of the United Kingdom Government. In the Pleas, as set out in her originating Application filed in June 2008, the Applicant invoked certain obligations and sought, among others, the following order to be made in her favour by the Tribunal as follows:

> (a) any preliminary or provisional measures, such as the production of additional documents or the hearing of witnesses…before proceeding to consider the merits and in the event that the Respondent disputes that the Applicant was their employee that this matter should be determined as a preliminary issue.
> (b)
> (c)
> (d)

2. In the event, the Respondent did dispute that the relationship of employer and employee existed between the Applicant and the Respondent and it therefore became necessary for the Tribunal to determine this as a preliminary issue of jurisdiction.

3. In its judgment dated 4 June 2009 on the preliminary issue of jurisdiction, the Tribunal had held that the Applicant was an employee of the Respondent within the meaning of Article ll of the Tribunal Statute as claimed by the Applicant and in light of that judgment, the Tribunal ruled that it has jurisdiction to entertain the Application. Accordingly, it ordered the Respondent to file a substantive Answer to the Applicant's claims.

Intervention by a third Party

4. Before dealing with the merits of the substantive Application, the Tribunal must first of all dispose of another preliminary issue relating to the possibility of intervention by a third party.

5. After the publication of the Tribunal judgment on the issue of jurisdiction, the Tribunal Secretary received a communication from RDJ (also sometimes referred to as the Complainant) mentioned in the Applicant's Pleas. She said in her communication that she had become aware that her name featured prominently in the judgment in a way that did not reflect the true picture. She was concerned to clear her name and wished to seek the Tribunal's permission to intervene in the proceedings to set the record straight.

6. In response to her request to be allowed to intervene, the Tribunal Secretary wrote to her with a copy of the Tribunal Statute and the Rules drawing her attention to the relevant Article and Rules that she must follow in order to be permitted to intervene in an Application before the Tribunal. Nothing further was heard from RDJ until after the Tribunal Secretary's letter dated 3

March, 2010 addressed to the Applicant and the Respondent and copied to her advising them that the Application had been set down for hearing.

7. On 8 March, 2010, RDJ wrote to the Tribunal Secretary seeking his advice on a draft letter which she said she wished to be placed before the Tribunal and seeking leave to be permitted to intervene but which was not in accordance with the Tribunal Rules as explained to her by the Secretary. She eventually sent the letter, dated 17 March, 2010 in final form to the Secretary. Against his better judgment given that, in his view, the letter was not in accordance with the Tribunal Rules for the purposes of intervention, the Secretary included the letter in the bundle of documents for consideration and is now before the Tribunal.

8. The Tribunal has considered this sequence of events and the contents of RDJ's letter and has come to the conclusion that, even if the Tribunal were minded to allow her to intervene, considerable injustice would be done to the Applicant and the Respondent if she were to be allowed to do so at this late stage. It would result in the matter being adjourned 'sine die' to enable her to file the necessary documents to support her case. She had been given more than ample time to make a proper application to intervene but she failed to do so.

9. Furthermore, assuming that RDJ is still in the employment of the Respondent, or that she can bring herself within the jurisdictional requirements of the Tribunal Statute, she would still be within her right to pursue any complaints that she may have that she feels have remained unresolved.

10. It would be appropriate to observe here that while it might have been right and proper for the Tribunal to permit the Applicant to intervene had she made a proper and timely application, the Tribunal does not consider it to be its proper role or function to intervene in adjudicating differences between staff as such, as distinct from disputes between employer and employee. That, in the Tribunal's view, falls squarely within the province of the internal procedures of the organisation and outside the jurisdiction of the Tribunal, unless the differences have become an intrinsic part of an Application before the Tribunal and are such that unless they are addressed will adversely impact the organic health of the organisation.

11. Accordingly, the Tribunal does not propose to allow RDJ to intervene in this Application nor to invite her, as she expected the Tribunal would do, to provide any information that might assist the Tribunal in dealing with this Application.

The Application

12. Having disposed of the preliminary issue of jurisdiction as set out in paragraph 1(a) above, the Tribunal now has to deal with the merits of the substantive Application as set out in the remaining paragraphs 1(b)-(d) of the Applicant's claims in her Pleas which are as follows:

> "(b) the rescission of decisions, or rather a lack of them, that the Respondent made in connection with the way in which the Respondent dealt with the complaints submitted by RDJ and the way that they ignored the Applicant' objections and criticisms concerning how they dealt with the whole procedure

(c) that the Respondent owed her, as her employer the implied terms of mutual trust and confidence and the duty to take reasonable care for the safety of their employee by providing a safe system of work. Additionally, that the Respondent owed her a duty to take reasonable steps to prevent discrimination occurring

(d) damages for constructive and unfair dismissal, discrimination and breach of contract for up to a maximum of 3 times her net annual remuneration being the maximum that can be awarded under the jurisdiction of the Tribunal".

13. In regard to these, the Tribunal has before it the Pleadings comprising the originating Application, the Respondent's Answer to the Application, the Applicant's Reply and the Respondent's Rejoinder. In accordance with the Tribunal Rules, the receipt by the Tribunal of the last of these documents signalled the end of the written proceedings. However, the President in exercise of his discretion under the Rules invited the parties to submit any additional written statements or additional document they may wish. In response to this invitation, the Applicant submitted an additional written statement which is also before the Tribunal.

PARTICULARS OF CLAIM

14. In the Explanatory Statement of her Application, the Applicant sets out the facts and the legal grounds on which her Pleas are based and which are listed below. These replicate some of the facts and legal grounds for an application that she had lodged simultaneously in the UK Employment Appeals Tribunal but which the Tribunal understands she has suspended pending the determination of these proceedings:

As regards the claim for constructive and unfair dismissal she states that-

(i) On the 7th December 2007 I gave my employers a written notice terminating my contract of employment with them with effect from the 25th January 2008. I varied my last day at work to 1st February and with accrued leave my last day of employment was 9th March 2008. By virtue of their conduct towards me, I was entitled to terminate the contract which I did on notice.

(ii) I was employed as a Director in the Social Transformation Programmes Division (hereinafter referred to as the "Division").

(iii) In January 2007 I was the subject of a complaint (hereinafter referred to as the Initial Complaint) comprising 3 incidents of bullying, harassment and intimidation against a fellow employee, RDJ, who worked in the Division and in respect of whom I had responsibility. The background to the Initial Complaint was my action in having to address complaints made by external parties about the conduct of the Complainant. I was duty bound to address these issues. On the 18th June 2007 before the Initial Complaint had been determined the Complainant

submitted a second complaint comprising 4 further allegations. It is the Respondent's actions in the handling of these Complaints that form the basis of my claim.

15. In elaboration of her claim for constructive and unfair dismissal she states that:

(a) The Complainant was well known to the Respondent as a trouble maker having a history of inappropriate behavior and it should have treated her complaints with a degree of circumspection and have ensured that the Complainant followed Procedures laid down by the Respondent. This is particularly so given that it ought to have been reasonably apparent from a cursory investigation by the Respondent that the Initial Complaint was a consequence of my investigating the Complainant as a result of the complaints made against her and that it was maliciously motivated and without any merit or justification whatsoever.

(b) The Initial Complaint related to three specific incidents. Two of the incidents concerned complaints that the Respondent received about the conduct of 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 allegations made by the various parties were of serious misconduct which had the potential to cause severe disruption and embarrassment to the Respondent's relations with those countries.

(c) The Respondent failed to follow its own procedures for dealing with employee grievances. These provide that a complaint must initially follow a mandatory informal procedure involving inter alia mediation which I had agreed to engage in. Instead the Respondent permitted the Complainant to ignore this requirement and enabled her to proceed with the complaint by way of a formal investigation. The Respondent dismissed my objections. The formalization of the complaint had significant potential disciplinary consequences.

(d) The Respondent failed timeously to inform me that complaints had been made. The Initial Complaint was submitted on either the 17th or 23rd January 2007 yet the Respondent did not inform me about this until the 9th March 2007. The second complaint was submitted on the 18th June 2007 yet the Respondent failed to inform me of this until the 9th August 2007.

(e) During the period when the Initial Complaint was pending I was assured by the Respondent that they would not permit any further complaints to be submitted by the Complainant and as a consequence I agreed in good faith to participate in mediation and acted to my detriment by not insisting upon the Complainant being separated from the Division in order to protect me from

further malicious allegations. The second complaint was submitted immediately after the Complainant rejected mediation.

(f) The Respondent should have refused to allow the Complainant to submit the second complaint as the Initial Complaint was still pending given that by that stage the Initial Complaint was 5 months old. This caused further delays to the already delayed resolution of the Initial Complaint.

(g) The Respondent acted in a manifestly unfair way by insisting that I answer all the allegations in the time agreed with the appointed Investigator to submit my rebuttal in respect of the Initial Complaint by the 21st September. As the Respondent had failed to notify me about the further 4 allegations promptly this meant that I had 19 days to submit a rebuttal. This meant that I had to deal with 7 allegations dating back to May 2005.

(h) The Respondent allowed the Complainant to ignore the Procedures for the resolution of complaints and to dictate the timing of and the way in which the complaints were handled. This was to my detriment. The Respondent should have taken steps to protect my interests.

(i) the Complainant's actions amounted to harassment and avers that the Respondent was under a particular duty to avoid subjecting her to such harassment in view of her personal circumstances at the time which related to her seriously ill father and her ill mother. She said that her father died on 24 August 2007 following which she was granted compassionate leave. She said the Complainant was aware of this but still requested the Respondent to expedite the investigation in breach of the agreed timetable. She says that the Respondent granted the request and contacted her, while she was on compassionate leave, on the day of her father's funeral, to inform her that the submission of her rebuttal and Investigation hearings would be brought forward.

(j) The Complainant was assisted and encouraged to pursue her complaint by her staff association (CSSA) of which the Complainant was an office holder. The Complaint was part of a wider campaign by a number of individuals who were part of the CSSA who brought a number of baseless complaints against Directors. The Respondents were aware of this as they had informed me that they had been notified by the CSSA executive that it intended to exhaust me out of the Respondent's employment by bringing a series of grievance cases against me. I contend that this is all the more reason why the Respondent had a particular duty in this case to treat the Complainant's complaints with circumspection and to ensure that the matter was processed in an appropriate way.

(k) The delay in investigation of the complaints was substantial and unacceptable. I eventually had my interview with the Investigator in mid October 2007. The

delay was compounded by the length of time it took for the Investigator to produce his Report. I made enquiries in November and December 2007 of the Respondent to ascertain when the Report would be delivered. The Respondent was unable or unwilling to provide me with a date.

(l) I had had enough of the delay, we were now in December 2007 and yet the Initial Complaint which was made in January 2007 had still not been resolved and the way in which the Respondent had conducted the whole procedure without any care or concern for my welfare. The stress of dealing with the matter began to have a detrimental effect upon my health. I considered that my position as Manager was untenable. The Respondent had by its actions allowed the Complainant to undermine my authority.

(m) The Respondent had allowed the Complainant to ride rough shod over its own procedures and to dictate the terms upon which the Complaints were dealt with. They had allowed the Complainant by herself and in conjunction with the CSSA to pursue a campaign of victimization which amounted to harassment for which I hold the Respondent liable. I aver that the way the Respondent handled this affair was a breach of the implied term of mutual trust and confidence and the employer's duty to take reasonable care for the safety of an employee by providing a safe system of work.

(n) The Investigator's Report which was delivered on the 18th December 2007 exonerated me of the Complaints and castigated the Respondent's handling of the matter.

16. She further states that she had rebutted the Complainant's complaint dated 28th September 2007 and submits in support of this the documentation she had used for the Rebuttal.

17. She also states that the External Investigator contracted to investigate the complaints against her had made a Report which she said exonerated her.

18. She puts in evidence copies of the two contracts of employment signed by her and dated respectively 22 December 2004 and 10 July2007.

19. She contends that, in light of the above, the Respondent's conduct was unjustified and unreasonable and that it destroyed the relationship of trust and confidence and that she was constructively and unfairly dismissed.

As regards her claim for discrimination:

20. The Applicant refers again to the explanations she has given in respect of her claim for constructive and unfair dismissal, in particular paragraphs 14(j) and 14(m) above.

21. She further elaborates:

> "I am of white origin and I contend that the Respondent allowed a fellow employee (RDJ) to pursue a malicious campaign of victimization which amounted to harassment and which was racially motivated. The Complainant pursued this campaign both by herself and in conjunction with the workers representative body called the CSSA. The Complainant and/or that body CSSA submitted a number of racially motivated complaints against both myself and another white director employed by the Respondent. The leadership of the CSSA is comprised of a number of members who are of Caribbean/African origin. The Respondent had been informed of the CSSA's intentions so far as I was concerned and in spite of that failed to take any steps to protect me from the Complainant and/or CSSA acting in this way.
>
> I contend that I was treated less favourably on the grounds of my colour by the deliberate refusal of the Respondent to take steps to prevent the Complainant and/or the CSSA from acting in this way"

22. She contends, in light of the above, that the Respondent unlawfully discriminated against her on the grounds of her colour and claims compensation.

23. For its part, the Respondent rejects in entirety the Applicant's claims and puts her to strict proof of all her allegations.

24. Both parties agree that the Applicant was offered, and that she accepted, two consecutive contracts of three years duration each to serve as Director of the Social Transformation Programmes Division of the Commonwealth Secretariat. She commenced the first of these contracts in February 2005 which she completed. The letter of appointment indicated that the Commonwealth Secretariat Staff Regulations and Staff Rules, copies of which were made available to her, formed part of her contract. Immediately prior to this, the Applicant was employed by the Department for International Development of the United Kingdom Government (DFID).

25. It would appear that subsequent to her appointment, but before she assumed office at the Commonwealth Secretariat, an arrangement was struck between DFID and the Commonwealth Secretariat to second the Applicant to the Commonwealth Secretariat to serve as Director of the Social Transformation Programmes Division. This might explain why no reference was made, in her letter of appointment, to the secondment arrangement. However, the secondment Agreement provided, among other things, that the details of the Commonwealth Secretariat Terms and Conditions should be provided to the Applicant.

26. The Applicant has alleged that before commencing the second contract in February 2008 she had to resign for reasons that lie at the root of her claim of constructive dismissal. However, it would be appropriate to also note that no reference was made in the second contract to the secondment Agreement.

27. In its Answer, however, the Respondent confirms that it had received, from another of its staff members (RDJ) a complaint against the Applicant. The complaint alleged incidents of harassment which, as the Applicant acknowledged in her Reply, the Respondent was obliged to

deal with in accordance with its Human Resource Handbook and set out the various stages involved.

28. The Respondent asserts that following a number of meetings between the Respondent, the Applicant and RDJ about the possibility of mediation, the Complainant (RDJ) ultimately rejected the idea as unacceptable and therefore mediation could not proceed because mediation could only have been viable if both parties had been prepared to participate and that "the Respondent had no power to compel either party to do so." To support its assertion that the Applicant had refused to engage in the informal process after initially agreeing to do so points to the Applicant's statement in her Memorandum dated 19 March 2007 to the Acting Head of the Human Resources Section that she "would not be willing to engage in an informal process to resolve the alleged offensive behavior since I cannot resolve offensive behavior I have not committed." For that reason the Respondent concluded that the Applicant was, at least, partly responsible for the failure to follow internal procedures,

29. For her part, the Applicant states in the additional written statement that she submitted, pursuant to the Tribunal President's invitation and in accordance with the Tribunal Rules, sought to clarify, among other things but in particular, the reason for her resignation and why she believes responsibility for the failure to follow the prescribed informal procedure lies not with her but with the Respondent.

30. The Tribunal must now decide, in light of the documentary evidence before it, which version of the possible interpretations of the evidence shall prevail.

The facts

31. As has already been established, in the Tribunal judgment on the jurisdictional issue, the Applicant was for the purposes of this Application an employee of the Respondent, albeit on secondment. Furthermore, a conjunctive, instead of a disjunctive, reading of all the relevant documents would reveal a number of undisputed facts. Among these are the following:

(i) that the Respondent gave the Applicant two contracts the first of which she completed but the second of which she did not, having resigned before the commencement date;

(ii) that the Applicant was subject to a secondment Agreement between DFID and the Respondent;

(iii) that the Applicant was also subject to the Respondent's Terms and Conditions of Employment including the Staff Regulations and Rules;

(iv) that certain complaints alleging harassment were made against the Applicant by another staff member;

(v) that mediation was offered but, for reasons that are disputed or are not clear, not pursued

(vi) that an external investigator was contracted by the Respondent to investigate the complaint of harassment against the Applicant.

(vii) That the external investigator found no substance in the allegations of the complainant pertaining to harassment, bullying and humiliation by the Applicant

Assessment of the parties' claims

32. Considering the above facts, in no particular order, it is apparent that there were discrepancies in the recorded accounts of what actually happened.

33. For instance, with regard to mediation, it is clear that mediation was offered. There are conflicting views as to why mediation did not take place. What is clear, however, is that an offer for mediation was made by the Head of Human Resources Section in her letter dated 8 February 2008. The Applicant accepted the offer by her letter dated 11 February 2008 but it was effectively withdrawn by DSG M's letter of 8 April 2008. It would therefore be incorrect to say, as is asserted by Respondent that "the Applicant frustrated its efforts to implement the informal process" in accordance with the procedure outlined in the Respondent's Human Resource Handbook by rejecting the same, vide the memorandum dated 19 March 2007.

34. We have considered the Applicant's formal memorandum dated 19 March 2007 which is cited as evidence of her having rejected mediation. The refusal of mediation by the Applicant, vide the memorandum dated 19 March, lost its significance when the Applicant participated in the meeting of 3 April 2007 to get the matter amicably settled. The discussions on the matter continued until 26 June 2007 when RDJ rejected it.

35. Furthermore, the letter of 8 April 2008 by DSG M repudiating the mediation offer seemed to suggest that the Respondent's Staff Regulations and Staff Rules did not form part of the Applicant's contract, contrary to the clear terms of her appointment letter and the secondment Agreement.

36. To establish that the Applicant was subject to the Respondent's Staff Regulations and Staff Rules, one needs not look beyond paragraph 2 of her first letter of appointment dated 17 December 2004 which states as follows-

> "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."

37. The relevant provision of the Staff Rules is found in Annex 2 to the Rules (Mechanism to Deal with Contract and Administrative Grievances) and is as follows:

> "1. …..

Informal Action

2. Staff with an administrative or contract related problem will, in the first instance, bring such a problem to the informal grievance handling mechanism.

……..

……..

5. The informal mediation process, *which will be off the record* (emphasis supplied), will entail the following procedure:

- …….
- …….
- …….

38. The first complaint by RDJ was in January 2007. The Applicant at that time requested a transfer from the Division of either herself or the complaint. No action was taken. In the meantime, the complainant filed four more allegations. The Applicant repeated her request for a transfer of either herself or the complainant. Still no action was taken. It was clearly necessary for some action to be taken in order that there may be a smooth working environment in the Division. This is a finding made by the investigator appointed to investigate the complainant's allegations, with which we agree.

39. The whole process of determining whether mediation should or should not have taken place lasted for about six months. This was more than contemplated by the Rules. As a result, the Applicant had the complaint hanging over her for too long, with the accompanying mental stress. Therefore, it would seem that the Respondent's interpretation of the Applicant's memorandum of 19 March 2007 as amounting to a rejection of the informal process does not represent the correct facts.

40. We will return to the secondment Agreement when dealing with other aspects of the Applicant's claims, in particular, the obligation of duty of care which the Applicant claims is owed to her by the Respondent.

41. The Staff Regulations and Staff Rules that are incorporated in the terms of appointment are intrinsic parts of the Human Resource Handbook to which reference is made in many of the documents put before us in support.

42. As regards harassment, there is before us the Report of the outside consultant investigator contracted to investigate the complaints of harassment, bullying and intimidation lodged by RDJ against the Applicant. Different interpretations have been put by the Applicant and the Respondent on the findings in the Report.

43. In his Report (paragraph 9.2), the consultant said that both RDJ and the Applicant "were critical of Comsec management procedures and actions." He observed that harassment is very much about perception. He cited the Respondent's Human Resource Handbook which, (at Chapter 2, paragraph 6.2, page 11) defines *discriminatory* harassment as "repeated, unreciprocated and unwelcome comments, looks, actions, suggestions or physical contact that are found objectionable by the recipient on grounds of sex, race, sexual orientation, culture or

any other minority issue such as disability." (emphasis supplied). He also refers to the practice elsewhere all of which taken together he commented tended to imply that for harassment to occur, an individual has to do no more than assert that he or she finds the behavior unwelcome or unacceptable. He then goes on to comment that "if that were the case … many employees criticized by their managers, and feeling aggrieved as a result, could bring claims of harassment. This would place in question a great deal of what might be regarded as normal management action."

44. The consultant concluded that he had no doubt RDJ found the actions of the Applicant unwelcome but was unable to agree, on the basis of the detail provided to him, that the behaviour of the Applicant was inconsistent with reasonable normal management standards. He therefore concluded that "the complaints against the Applicant have not been sustained" but went on to emphasise that he did "not imply that the complaints are frivolous." He explained that delays in dealing with issues have understandably created frustrations and concerns and have assisted neither party – frustrations that he believed served the interests of neither of the parties.

45. It was not clear to the consultant, and the Tribunal would tend to the same view, why mediation, although discussed, was not attempted. It appears to have remained on the table but was in the end unilaterally withdrawn. The consultant himself had suggested that if both the Applicant and RDJ could not work together, this could become a key factor when it came to contract renewals. He also suggested that in such cases, many managers would favour internal transfer if the employer wished to keep both employees as otherwise valuable employees the employer did not wish to lose.

46. In light of his findings the consultant concluded, and the Tribunal can find no grounds for disagreeing with him, that the processing of the complaint had been unsatisfactory.

The law applicable to the issues

47. The Tribunal is content to proceed generally on the basis of a synthesis of the parties' formulations of the areas of dispute between them and which the Tribunal is satisfied captures and sufficiently reflects the Pleas as presented by the Applicant in her Application.

(i) As regards whether the Applicant has been discriminated against

48. The Tribunal has made an assessment of the relevant issues raised above and has come to the conclusion that, on the facts, the Respondent had not followed its own procedures fully. However, that conclusion must be viewed in the much wider context of the principles of law that are involved.

49. In paragraph 20 of her Reply to the Respondent's Answer, the Applicant acknowledged that RDJ was entitled to be represented in the informal procedures by the CSSA. However, she also said that although as a CSSA member herself she was at the initial stage given a representative by the CSSA, when that representative left the Secretariat in October 2007 she was not offered another representative. If, indeed, that is the case and as a CSSA member she had requested but was denied further assistance, that would have been patently wrong and

discriminatory. However, there is nothing before the Tribunal pointing to her having asked the CSSA for further assistance and being refused it and, in any event, the Respondent could hardly be blamed for that. The Tribunal has no reason not to believe that the CSSA is independent and not under the control of the Respondent. Indeed, it would seem from paragraph 26 of the Applicant's Reply that she did not seek such assistance but, given the circumstances especially the apparent potential conflict of interest, the only comment the Tribunal would make is that the CSSA should have been more circumspect in the way it seems to have acted in the matter.

50. As an international civil servant, like in any other international organisation, the Applicant is entitled to a regular and fair procedure in the handling of grievances and disputes. This is such a fundamental principle of law that it need not be backed by any case law. See ILOAT Judgment in Jose Bustani v OPCW, Case No. 2232 (2003), where it was held that there must be "full compliance with the principle of due process and "full compliance with the applicable statutory provisions" in the sense of the internal laws and procedures of the organisation concerned.

51. ILOAT has, however, warned in a succession of cases that care must always be taken when considering allegations of discrimination and personal prejudice having regard to the difficulty of proving such allegations. It would not be sufficient to simply adduce evidence that does not go beyond the level of unsupported allegations (see for instance ILOAT Judgments Nos. 2602, 2609, 2615, 2636 and 2655). For this reason, it would be necessary to distinguish elements of the discrimination that the Applicant is alleging in order to be able to address them properly. In this regard, it would be fair to refer to the Applicant's elaboration of her claims in paragraphs15(c); 15(g)-(i); 15(m) above which, taken together, would seem to suggest that the Applicant was the victim of unequal treatment by the Respondent as well as harassment which the Respondent appeared to ignore. This would not be an unreasonable conclusion to draw from the sequence of events, given that the complaints against her by RDJ were investigated whereas her own concerns and objections about RDJ were either not investigated properly or were simply ignored, even after she was exonerated by the investigator.

52. The Tribunal is not moved by the interpretation being given to the outside investigator's statement in his Report that he was not suggesting RDJ's complainants were frivolous. That could equally have meant that the investigator was saying he could not be heard to suggest that the Complainant should never have brought the complaints at all or that she should have been prevented from making them.

53. The Applicant's allegation of discrimination on the ground of her colour is more difficult to substantiate by relating it to any incident or incidents similar to that used to illustrate unfair or unequal treatment immediately above.

54. In light of the above, the Tribunal finds that the Applicant has been discriminated against by being treated unequally and unfairly but that she has not adduced sufficient evidence to support the claim of discrimination on the ground of her colour.

(ii) As regards whether the Respondent was in breach of its general duty of care to the Applicant (other than the duty of care to prevent discrimination occurring)

being the implied terms of mutual trust and confidence and to take reasonable care for the safety of their employee by providing a safe system of work:

55. Some International Administrative Tribunals, including the ILOAT have considered, in conjunction with other obligations such as harassment, the issue of the obligation of an employer organisation to provide a safe and secure workplace for its employees and have held that

> "harassment, which goes unchecked, is a breach of those fundamental principles requiring an organization to treat its staff members with dignity, to observe the principle of equality and to provide as safe and secure workplace." (see for instance ILOAT Judgment No. 2602, S.C. v WHO (2007).

56. The Respondent has its own Health and Safety policy which is described in Annex 13 of the Human Resource Handbook. A statement of that policy commits the Respondent, so far as is reasonably practical to, among other obligations, the following obligations:

> "…..
> Regular assessment of risks to health and safety in all activities undertaken by staff
> Secure personal safety at work
> Prevention of hazards to the health of all employees
> …."

This would suggest that the policy may not necessarily be limited to only physical safety and to ensuring the absence of physical hazards that might endanger staff.

57. As it indicated above that it would do, the Tribunal now returns to the secondment Agreement between DFID and the Respondent relating to the Applicant's employment with the Applicant. Independently of the general principles of law relating to an organisation's obligations as an employer, and in addition to the Respondent's own health and safety policy, the secondment Agreement provided as follows:

> **"Health and Safety**
>
> During the period of secondment Commonwealth Secretariat will be responsible to the secondee for compliance with all duties related to health, safety and welfare at work imposed upon an employer by any relevant statutory provision within the meaning of Section 53(1) of the Health and Safety at Work Act 1974 *as if Commonwealth Secretariat was the employer of the secondee."* (emphasis added).

58. While there is no suggestion here that the Respondent is necessarily subject to or bound by UK legislation, it is not in dispute that the Applicant was seconded to work for the Respondent pursuant to an agreement entered into freely by the Respondent. That agreement was binding upon it, in much the same way as that the contract with the Applicant was binding on it. It was therefore part of the regime that governed its relationship with the Applicant.

59. Having regard to the Tribunal's finding in paragraph 44 that the allegation of discrimination on the ground of colour had not been substantiated, for the same reason, the

Tribunal is not able to find that the Respondent has breached its obligation to take reasonable care for the safety of the Applicant. No evidence has been adduced before the Tribunal to show that the Respondent has done so. There was nothing to show that the Respondent had failed in this obligation simply by not following its own procedures in this regard so as to endanger the safety of the Applicant beyond the reference in paragraph 15(l) above to the "stress of dealing with the matter began to have a detrimental effect upon my health."

(iii) As regards whether the Applicant was unfairly or constructively dismissed:

60. The jurisprudence of other international administrative tribunals has recognised the principle of constructive dismissal. A definition of constructive dismissal which seems to be generally acceptable is that constructive dismissal is a

> "a convenient phrase used to signify that an organisation has breached the terms of a staff member's contract of employment in such a way as to indicate that it will no longer be bound by that contract. A staff member may, if he or she so wishes, treat that as constructive dismissal with all the legal consequences that flow from an unlawful termination of contract, even if he/she has resigned."

61. International administrative tribunals have also taken the view that constructive dismissal combined with harassment which goes unchecked, would constitute a breach of those fundamental principles requiring an organization to treat its staff members with dignity, to observe the principle of equality and to provide a safe and secure workplace. The principle of equality of treatment is infringed when staff members…receive different treatment from the employer organization.

62. The ILOAT has, in a long line of cases, dealt with claims based on a mixture of harassment, constructive dismissal as well as allegation of a breach of the obligation of duty of care and/or violation of the fundamental right to be treated equally and with dignity. See for instance ILOAT Judgments Nos. 2261 (2002) (FAO); 2200 (2003) (ITU); 2435 (2005) (ITU); 2745 (2008) (IAEA) and 2587 (2007) (IFRC). Most of the cases were dismissed by the Tribunal on the ground that the allegations had not been substantiated. In allowing or dismissing the cases, the Tribunal said that it would only overturn a decision where it is clear that

> **"**the authority taking (or not taking) the decision (being impugned) did not turn its mind to the question of whether or not the charge (leading to the dismissal) justified the penalty of dismissal, the most serious punishment available"

63. Discernible from these judgments is the principle that the Tribunal would not itself impose a penalty (as it has no power to do so) but it would not allow a penalty to stand if it has manifestly been imposed on an erroneous assumption. Nor would it condone an organisation's failure to bring the internal appeal process to a timely and proper conclusion, effectively depriving a complainant of both his/her remedy and employment. In appropriate cases the Tribunal would refer the matter back to the organisation for a new decision on the matter after giving the complainant full opportunity to make representations. (ILOAT Judgment No. 2261).

64. In a case similar to this, where the Applicant has since moved on, the opportunity to refer a matter back to the organisation for a new decision becomes an academic exercise, except in so far as it may affect the quantum of damages. It would be appropriate, in this case, to have regard to the Applicant's admission in paragraph 35 of her Reply to having actively sought the renewal of her contract in early 2007. She presents this as evidence of her love for the job and commitment to staying at the Secretariat. She sought to explain why events subsequent to her accepting the renewal of the second contract made her change her mind, prompting her to send an email to DSG S saying "life at the Secretariat had become intolerable…."

65. It was the accumulation of her frustrations and, in particular, these subsequent events that she said made her decide to go rather than because "she had received an offer of a new job she could not refuse", as asserted by the Respondent. She related the circumstances of the offer of the new job and the reason she had to respond swiftly accepting the offer explaining that her decision to accept it was "not planned but made in haste." She said that at that point the very thought of returning to the Commonwealth Secretariat was making me feel ill and I just wanted to get out" and she "applied for another job for the sole reason that she "considered her position in the Secretariat extremely hopeless and unlikely to improve."

66. Alongside these revelations, which the Tribunal can only describe as subjective but not entirely without merit, it would appear that as compared to the Complainant, the Applicant had been treated unequally by the Respondent, which does not necessarily translate into her having suffered any financial loss, or loss to the extent that she is claiming and for which she should be compensated.

Conclusions

67. It now remains for the Tribunal to determine what remedies, if any, the Applicant is entitled to receive.

68. The Applicant has alleged that she was constructively dismissed. However, this has not been proven. It should be recalled that notwithstanding the existence of unresolved complaints against her and the delay in dealing with these complaints, as well as the failure of the Respondent to separate the Applicant and the complainant, the Applicant did not hesitate to sign a new contract in July 2007. Furthermore, in her letter of resignation as well as the memorandum addressed to her colleagues, the Applicant did not mention any unhappiness as triggering her resignation. Indeed, she was looking forward to taking up her new position because of the fact that it was a promotion and it presented the sort of challenges that she had long been yearning for. In the circumstances, her claim of constructive dismissal is not sustained.

69. As regards the finding of discrimination on grounds of the unequal treatment meted out to the Applicant, and delaying at every step in dealing with the Applicant's concerns, the Tribunal is of the view that she is entitled to moral damages.

70. And as regards the finding that the Respondent had not fully complied with its own procedures to the detriment of the Applicant she is also entitled to moral damages.

71. However, in quantifying the damages that should be awarded to the Applicant, the Tribunal notes that moral damages is a head of damage that has tended to be assessed in a rather arbitrary manner by International Administrative Tribunals. Accordingly, the Tribunal considers that a global amount of £20,000 for discrimination on grounds of unequal treatment, for the protracted delay in following or not following fully its procedures and the mental stress and anguish that this would have occasioned to the Applicant, would adequately compensate the Applicant and would not be unreasonable in the circumstances.

72. The Tribunal makes dismisses the Applicant's claims in respect of those aspects of her case that it found she did not substantiate.

73. Finally, the Tribunal makes no order as to costs but would remain open to receive written submissions from the parties as to what order it should make in that regard.

74. Should the parties wish to address the Tribunal regarding costs, they have thirty days from the date of this judgment within which to file their written submissions with the Tribunal Secretary.

Given on this day of June 2010 in London

Signed

Justice K M Hasan (President

Justice Usha Mehra

Justice Seymour Panton O.J., C.D.