

**JUDGMENT
OF THE
ARBITRAL TRIBUNAL OF THE
COMMONWEALTH SECRETARIAT**

JUNE 2010

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the matter of

M H

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

1. This is an Application in which the applicant, M H contends, principally, that in enforcing its mandatory retirement age policy, the Respondent has acted in breach of her right under international law not to be discriminated against on grounds of age. She claims that her enforced retirement in September 2008 based purely on the mandatory retirement age of 60 is discriminatory against her on grounds of her age. She argues that the Respondent must demonstrate that its mandatory retirement age policy is not discriminatory against her and that it is based on objective and reasonable considerations.

2. She also claims, among other things, that

- (i) under International law any distinction related to age that is not based on reasonable and objective criteria amounts to discrimination.
- (ii) she was denied of her right of access to have her request to be allowed to work beyond the mandatory retirement age to be considered under the Respondent's grievance procedure. She asserts that there is nothing in the Sutherland Handbook (the Respondent's Human Resource Handbook) or elsewhere to support the Respondent's claim that her request did not fall within the Respondent's grievance mechanism,
- (iii) she was denied effective representation and the opportunity to present her case at the start of proceedings or at any stage by a person of her choice.
- (iv) her application was made in the appropriate manner and that it was submitted within the statutory time limit of 90 days.

The Application

3. The substance of the Applicant's claims which are set out in her Pleas may be summarized as follows:

- (i) In enforcing its mandatory retirement age policy, the Respondent has acted in breach of her right under international law not to be discriminated against. This amounted to unfair dismissal on the ground of her age, in breach of UN guidelines and was compounded by her being denied the right of access to the contractual grievance procedure.
- (ii) The breach of her right not to be discriminated against and the denial to her of the right of access to the Respondent's grievance procedure amounted to discrimination, which merits compensation beyond the statutory limit.
- (iii) The International Covenant on Civil and political Rights, First optional Protocol, which gives her a right not to be discriminated against on the ground of age has been violated by the Respondent.

- (iv) A finding of the UNHRC in the case of **Love v Australia, Case No. 983/2001** supports her claim in light of the Committee's finding that establishes the principle that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the grounds of "other status", or that it may amount to a denial of the equal protection of the law within the meaning of article 2 of the Convention.
- (v) The Respondent has not advanced any reasonable or objective criteria for its policy on retirement on the ground of age and, that being so, her compulsory retirement amounts to discrimination contrary respectively to Article 26, on the grounds of "other status" by its failure to protect her from discrimination on a proscribed ground, and a denial of equal protection under Article 2 of the Convention through the Respondent's failure to introduce a policy of comprehensive ban on age discrimination.
- (vi) The failure of the Respondent to advance any objective or reasonable basis for its discriminatory policies founded specifically on (a) internationally accepted standards; (b) medical evidence or (c) long standing practice is clear indication of the illegitimacy of those policies.
- (vii) The Respondent's policy of mandatory retirement at age 60 is contrary to an internationally recognised principle underlying the interpretation of discrimination. This principle, which she claims is endorsed by the International Labour Organisation's Committee of Experts, is to the effect that "an inherent requirement of an age distinction for a particular job must be proportionate to the aim being pursued and ... necessary because of the very nature of the job in question."
- (viii) The Applicant has suffered and continues to suffer the consequences of her unfair dismissal by the Respondent, in violation of her rights under Article 26 of the Convention.
- (ix) The Respondent's application of its retirement age policy to her was neither proportionate nor necessary
- (x) Having regard to the job she was performing as an elderly person and her working ability as well as the demographic, economic and social factors, the Respondent owed the Applicant an obligation to establish a retirement age policy that is flexible enough to permit her to continue working beyond the retirement age prescribed by the Respondent.

Factual background

4. The Applicant, who has given her date of birth as 9 September 1948, entered the employment of the Commonwealth Secretariat (the Respondent) in February 1987. She remained continuously in the employment of the Respondent until she reached the age of 60 when she was compulsorily retired in accordance with the Respondent's retirement age policy.

5. The Applicant was initially employed as a temporary employee on fixed short term contracts. However, from February 1989 she was converted to permanent staff on fixed term contracts. From then on each of the contracts was for three years duration. Her letter of appointment for each of these contracts included a provision that the Staff Regulations and Staff Rules as they stood at the time and as they may be amended from time to time form part of the Applicant's contract of employment.

6. Her employment record with the Respondent was as follows:

- a) Between 16 February 1987 and 1 February 1989 the applicant worked as a temporary appointee under various fixed short term contracts.
- b) Between 1 February 1989 and 31 December 2000 the applicant was employed as a permanent member of staff under various fixed term contracts of employment of three years each save for the period 2 July 1993 to 31 December 1994.
- c) Between 1 January 2001 and 9 September 2008 the applicant was employed under a contract for an indefinite period subject to the respondent's retirement age of sixty years and a three yearly review of performance.

7. On 17 April 2008 and 2 May 2008 the Applicant wrote to the Head of the Human Resources Section requesting that she be allowed to continue working for the respondent beyond the age of sixty but she was denied on the ground that the provisions of Regulation 21 of the Staff Regulations and Rules do not permit such extension unless the Secretary General in the interest of the Secretariat extends the age limit.

8. By an email dated 2 July 2008 to the Head of HR she requested that her employment as a locally-recruited member of staff ordinarily resident in United Kingdom be extended up to 65 in line with the national default retirement age in the United Kingdom.

9. By an email sent on 17 August 2008 but dated 15 September 2008 to the respondent's Deputy Secretary General the Applicant in accordance with Annex 2 of the Staff Rules sought to invoke the applicant's mechanism for dealing with Contract and Administrative Grievances which was denied.

10. By a memorandum dated 21 August 2008 the Applicant renewed her request to the Secretary General to be allowed to work beyond the age of sixty but the latter, vide letter of 15 October 2008, replied that it would not be possible to justify any waiver of the position impugned. By a letter dated 31 October 2008 the respondent reconfirmed that there had been no change in its position.

11. From January 2001 until 9 September 2008, when she was compulsorily retired, the Applicant was employed on an indefinite term contract. Her letter of appointment on conversion to an indefinite term employee contained the same provision regarding the application to her of the staff Regulations and Staff Rules as they may be amended from time to time.

12. At all material times, the Respondent's employment policy as elaborated in the Staff Regulations and Staff rules included a provision that imposes a mandatory retirement age of 60.

13. However, the Respondent's Staff Regulations and Rules also provided that the Secretary General may, in individual cases, extend the retirement age of sixty years in the interests of the Secretariat.

14. Based on the above facts, which are not in dispute, and without more, the Applicant would normally be liable to retire as a matter of course from the service of the Respondent on the anniversary of her 60th birthday in September 2008.

15. On 17 April 2008, the Applicant wrote to the Respondent's Head of Human Resources requesting to be allowed to work beyond the age of 60. Exchanges of correspondence concerning the issue of the Applicant's retirement followed and continued between the Applicant and the Respondent right up to and after the date of the Applicant's departure. That exchange included the Applicant's memorandum dated 21 August 2008 addressed to the Secretary General, a letter dated 15 September 2008 by the Director and Head of Office of the Secretary General in response to the Applicant's memorandum and a letter dated 31 October 2008 by the Head of Human Resources.

16. It is apparent from the exchange of correspondence between the Applicant and the Respondent that the Applicant believed right up to 31 October 2008 that there was still a possibility that the initial decision not to allow her to work beyond the compulsory retirement age of 60 would be reviewed in her favour.

17. In order to be receivable, an application to the Tribunal must be lodged in accordance with the Tribunal Statute which, among other things, stipulates that the application must be lodged "within a period of 90 days after the occurrence of the event that gave rise to the application."

The factual and legal basis of submissions by the parties

The Applicant

18. In her explanatory statement, the Applicant asserts that she had made her request in early 2008 to be allowed, as a UK resident, to continue to work until age 65 in line with prevailing national law and practice. However, she asserts that the only response she received which showed that the Respondent did not treat her plight with any sense of urgency or concern, was a mere repetition of the Respondent's policy without providing any objective or reasonable justification for the policy. She says that she was not only denied a timely response but that she was also denied the interim extension that she had requested pending final decision on her request.

19. In support of her assertions she drew the attention of the Tribunal to the exchange of correspondence between her and the Respondent and relies on the UN Human Rights Committee precedence which suggests that the enforcement of a mandatory retirement policy would be discriminatory unless the policy was based on objective and reasonable considerations. She said her request for an immediate

interim extension while the request was being considered in accordance with the Respondent's formal grievance procedure was given a short shrift. The only response she received was the DSG's reaffirmation of the decision to retire her at 60 without any reasons being given for denying her the opportunity to raise a grievance.

20. She further asserts that she was not only coerced into agreeing to a meeting with the DSG which never took place, but that she was also denied the opportunity to present her grievance effectively from the beginning. She was confident that if she took her claim to a UK court for being denied access to the Respondent's grievance procedure, she would get a judgment in her favour for unfair dismissal. She submits that there was unconscionable and culpable delay on the part of the Respondent in responding to her reasonable request and that this pointed to evidence of the Respondent's discriminatory practices.

21. In summary she argues that a combination of the procedural errors committed by the Respondent, in breach of its own rules, by denying her access to a fair grievance procedure and the complete disregard by the Respondent of the obligations placed on it by the UN Human Rights principles and precedents must lead to the conclusion that the Respondent is in breach of its obligations to her.

22. She asserts that in bringing her grievance before the Tribunal she has complied with the relevant rules and procedures. In support, she points to specific Articles of the Tribunal Statute and Rules, in particular the requirement that an Application must be lodged within a specified time limit as well as to the law the Tribunal must apply in dealing with applications before it including, in particular, that the Tribunal must deal with applications in a manner that is consistent with Commonwealth Principles relating to fundamental human rights as well as with the principles of international administrative law. She refers to the case law of the UNHRC and the European Court of Justice [**Love v Australia (Qantas)** and **Heyday**] which she suggests establish the principle that:

“a mandatory age retirement age/age discrimination is only acceptable if it is a proportionate means of achieving a legitimate social policy which relates to employment policy, the labour market or vocational training. Those aims are to be distinguished from purely individual reasons particular to the employer's situation such as cost reduction or improving competitiveness”

She suggests that this principle should inform the Tribunal's judgment when considering her case.

23. She claims compensation and submits that, as the only practical remedy and given the circumstances, the compensation due to her should be based on 5 years net loss of remuneration from age 60 to 65 plus pension loss.

24. Finally, the Applicant requested an oral hearing, in the words of her Application:

“because in this case it is claimed that the Secretariat has contravened a fundamental human right and denied MH (the Applicant) the right to a formal grievance, it would be a breach of MH's fundamental human rights if this

application was to be disposed of without allowing MH and her representative the opportunity to present her case.”

The Respondent

25. For its part, the Respondent asserts that at all material times, including when the Applicant was employed on temporary terms, the Applicant’s contract of employment was subject to a retirement age of sixty years as provided in the Staff Regulations and Staff Rules. The Respondent concedes that the Secretary-General has the discretion, in individual cases, to extend the retirement age of sixty years in the interests of the Secretariat and says that at no point had the Applicant given any reason or set out the basis why it would be in the interests of the Secretariat to allow her to work until the age of 65 years.

26. By way of explanation, the Respondent states that in December 2004 when the Applicant elected to be employed under new terms and conditions, she was made aware that her employment would continue to be subject to the Staff Regulations and Staff Rules. She had made her election in response to an offer that was made to staff generally following a review of the terms and conditions of service. On 3 October 2006 she was informed by letter, following the review of her performance, that her contract was being renewed until her retirement on 9 September 2008. The Applicant accepted the renewal of her contract on the terms of that letter.

27. The Respondent emphasises that none of the appointment letters that were issued to the Applicant made any provision for her remaining in service beyond the age of 60 years. On the contrary the Respondent asserts that Staff Regulation 21 and Staff Rule 24, which it says form an integral part of each of the Applicant’s contracts of employment, preclude the invocation of any such provision. The Respondent prays in aid the provisions of Staff Regulation 21 and Staff Rule 24 which are as follows:

Staff Regulation 21

“Staff members shall not normally be retained in service beyond their 60th birthday. The Secretary-General may in the interests of the Secretariat extend this age limit in individual cases.”

Staff Rule 24

“Employment will end automatically, whether or not notice has been given, upon a staff member reaching his/her 60th birthday, unless the Secretary-General has granted an extension or at the time of recruitment the terms of the letter of appointment go beyond age 60.”

28. The Respondent admits that on 17 April 2008 and again on 2 May 2008 the Applicant had written to the Head of the Respondent’s Human Resources Section requesting to be allowed to continue working beyond the age of 60 years. On 22 May 2008 the Head of the Human Resources Section replied to the Applicant’s request drawing her attention to the provisions of Staff Regulation 21 and to which, the Respondent says, the Applicant responded in a manner that constituted a challenge to the Respondent’s retirement policy. Nor, the Respondent argues, did the Applicant at any time advance any grounds particular to her case why the Secretary-General should exercise his discretion in her favour to allow her to work until the age of 65.

29. The Respondent contends that, the decision to terminate automatically the Applicant's contract is not discriminatory and that the comparison of treatment must be made with other staff employed by the Respondent and not with UK nationals employed elsewhere and who are governed by UK law on which the Applicant is partly relying and which, in any event, does not bind the Respondent.

30. The Respondent states that on 16 July 2008 the Head of the Human Resources wrote to the Applicant informing her that her request had been considered taking into account all pertinent matters and clarified that any application for an extension of contract beyond the age of 60 years must be made by a Divisional Director and based on exigencies.

31. The Respondent further states that at no time was the Applicant's request to be allowed to work beyond the age of 60 supported by a request from her Divisional Director that she be allowed to do so on the grounds of identified exigencies of work and asserts that at no time during her employment did the Respondent raise the Applicant's expectation that her contract of employment would be extended so as to allow her to work beyond the Respondent's normal retirement age of 60 years.

32. To support its assertions, the Respondent cites the case law of other international administrative tribunals relevant to the question of mandatory retirement policy. In particular the Respondent relies on the judgment of the International Labour Organisation Administrative Tribunal (**ILOAT**) (**Judgment No. 1897**), *In Re Cervantes (No.4) Kagermeier (No.5) and Munnix (No.2)* as well as in **Judgment No. 2669** The Respondent also relies on the judgment of the United Nations Administrative Tribunal (UNAT) in *Talwar* (**Judgment No.343**).

33. The Respondent contends that the Application is ill-founded and inadmissible on a number of grounds principally because:

- (i) it has not been filed within the prescribed time limit of 90 days from the date of the cause of action and that she has not adduced any evidence to show that it was not reasonably practicable for her to comply with that time limit
- (ii) beyond alleging a breach of the right to non-discrimination on the grounds of age under Article 26 of the International Covenant on Civil and Political Rights which the Respondent denies is binding on it, it merely seeks to challenge a rule of the employment policy of the Respondent and does not allege a breach of any term of the Applicant's contract of employment in terms of Article II.1 of the Tribunal Statute
- (iii) it does not constitute a matter that is amenable to resolution in accordance with the Respondent's mechanism for resolving contractual grievances to which she could legitimately claim she had been denied access.

The Respondent contends that in light of the above reasons the Application should be summarily dismissed.

34. The Respondent asserts that, in any event, a decision whether or not to allow the Applicant to work beyond the normal retirement age of 60 is entirely a matter within the discretion of the Secretary-General, that the Secretary-General had considered all the circumstances of the Applicant's case and that he had properly

exercised his discretion not to make any exception to the relevant Staff Regulation (Regulation 21) and Staff Rule (Rule24) respectively which provide that employment will end automatically upon a staff member reaching his/her 60th birthday.

35. The Respondent further asserts that at no time did it raise the Applicant's expectation that her contract of employment would be extended, which would have allowed her to work beyond the mandatory age of retirement for all staff and denies discriminating against her in comparison with other staff and denies that the Applicant has suffered any loss or damage as a result of the implementation of the Respondent's policy or actions under its own internal laws.

36. Finally, the Respondent submitted that an oral hearing is not warranted in that the matter is capable of being determined by the Tribunal entirely on the basis of the documents that the parties have placed before the Tribunal.

The issues to be decided

37. From the above it appears that the main areas of dispute which the Tribunal is invited to resolve are:

- i) whether the application is admissible under paragraph 1 of Part 11 Article 11 of the CSAT Statute as alleging the non-observance by the respondent of the applicant's contract of employment.
- ii) Whether the application was filed within the 90 day time limit prescribed by Article II paragraph 3 of the Tribunal Statute
- iii) whether, in enforcing its policy of mandatory retirement, the Respondent had breached the Applicant's right under international law not to be discriminated against on account of her age.
- iv) whether the Commonwealth Secretary General considered all the circumstances of the applicant's case and properly exercised his discretion not to make any exception to Regulation 21 of the Commonwealth Secretariat Staff Regulations and Rule 24 of the Commonwealth Secretariat Staff Rules regarding the application to the Applicant of the Respondent's mandatory retirement policy.
- v) whether the applicant's complaint constituted a matter which entitled her to access the Respondent's mechanism for resolving contractual grievances, in accordance with paragraph 8 of Annex 2 to the Rules.
- vi) whether an oral hearing in this case is warranted.
- vii) if the application is held admissible and the Tribunal orders an oral hearing whether the applicant is entitled under the provisions of Rule 12.1 of the Tribunal Rules to be represented in these proceedings by her current lay representative.

- vii) whether the applicant has suffered any loss or damage at the hands of the Respondent which would entitle her to compensation.

Assessment of the parties' claims and application of the law

38. First, the Respondent has submitted that the Application is not receivable by the Tribunal on the ground that it was filed out of time in that it was not filed within the 90 day limit as provided for in the relevant provisions of the Tribunal Statute.

39. The relevant provisions of Article II (paragraphs 3 and 4) of the Tribunal Statute are as follows:

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

- (a)
- (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, or
 - (iii) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within one month after receipt of such notice
- (c)

4. 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”

40. It would appear that the Applicant believed right up to 31 October 2008, even though this belief may have been misplaced and cannot be justified by the evidence before the Tribunal that there was still a possibility that the initial decision not to allow her to work beyond the compulsory retirement age of 60 would be reviewed in her favour. The Tribunal nevertheless has decided, in accordance with Rule 23.1 of its Rules, and in the interest of fairness, not to apply the 90 day limit strictly and to receive the Applicant's complaint.

41. As regards the Applicant's request for an oral hearing, which she says is

“becausethe Secretariat has contravened a fundamental human right and denied (her) the right to a formal grievance, (and that) it would be a breach of (her) fundamental human rights if this application was to be disposed of

without allowing her and her representative the opportunity to present her case”,

the Tribunal is not persuaded by the reasons she has advanced to support her request for an oral hearing about which more will be said shortly.

42. In regard to the Applicant’s complaint that she was denied a fair hearing by the Respondent and that she was discriminated against in that respect, she seemed to have been labouring under a misapprehension in believing that she was entitled under a provision in the Respondent’s Human Resource Handbook to be represented by any person of her choice in order to redress her grievance both within the Respondent’s internal grievance procedures and also before the Tribunal. The Tribunal can find nothing in the Human Resource Handbook to support such a claim.

43. The provisions of the Human Resource Book that could be said to be relevant in this regard can be found in PART ONE, paragraph 2 of CHAPTER 8 (Grievances and Arbitration) and in PART THREE, Annex 1 (Commonwealth Secretariat Staff Rules) at pages 37 and 154 respectively and which provide as follows:

“PART ONE: CHAPTER 8
Grievances and Arbitration

2 Grievances

2.1 A number of other issues may give rise to a grievance. Discipline, although potentially grounds for dismissal, is one, administrative and contract grievances (on topics other than the granting of contracts) are others. Likewise harassment (as defined in Chapter 2) may also lead to a grievance. Mechanisms for handling these eventualities are set out in Annexes 1, 2 and 3 to the Staff Rules.

.....

PART THREE: ANNEX 1
Disciplinary Rules and Procedures

Procedure

.....

13. The individual will attend and make submission to the Board; s/he may be accompanied by a CSSA representative or fellow staff member provided always that such CSSA member is not the same person as has been nominated by the CSSA as a member of the Board .

.....”

44. First, it is clear from the above that the right of a staff member to be represented by someone else is mentioned only in the context of a decision to take disciplinary measures against the staff member concerned. No disciplinary measure was being contemplated against the Applicant in this case. In any event, the evidence

before the Tribunal is that although the Applicant may not have been allowed to be accompanied by a “friend”, who was neither a current nor a former staff member, to a meeting with representatives of the Respondent, she was nevertheless able to use briefing material prepared for her by her “friend” in her meeting with the DSG, albeit not as effectively as might have been the case had she been allowed to be accompanied by her “friend”. There is no evidence before the Tribunal to support a claim by the Applicant that she was discriminated against, as compared to any other staff member, in the way she was treated by the Respondent in this respect.

45. As regards representation before the Tribunal, undeniably, it is a universally recognised principle of law that a complainant has the right to present his or her case and for the case to be heard by an independent tribunal of competent jurisdiction. The relevant Articles of the Tribunal Rules regarding representation at oral proceedings provide as follows:

“Rule 12.1 A staff member may present his or her case before the tribunal in person, including where oral proceedings are allowed pursuant to Rule 13 paragraph 1. The applicant may, alternatively, ...designate staff member or retired staff member of the Secretariat to represent him or her, or may be represented by a lawyer authorised to practice in any country which is a member of the Commonwealth;

.....

Rule 13.1 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. The oral proceedings may include the presentation and examination of witnesses or experts, and each party shall have the right of oral argument and of comment on the evidence given.”

46. The Tribunal considered her application for an oral hearing and came to the conclusion that it has sufficient documentary evidence to enable it to deal with the merits of her case and therefore that an oral hearing was not warranted in the circumstances and she was informed accordingly. That being the case, the question of whether or not she could be represented at an oral hearing by someone other than as specified in Rule 12.1 of the Tribunal Rules did not arise and became academic.

47. Against this background, and in the exercise of its powers to modify the Tribunal Rules in the interest of fairness and justice, the Tribunal did not insist that the documents lodged by the Applicant as part of her Pleadings and in support of her case should have been prepared strictly in accordance with Rule 12.1. Quite clearly, had there been an oral hearing, it is doubtful that her “friend” would have been permitted to appear before the Tribunal save perhaps as a “witness”, expert or otherwise. However, this should not be taken as establishing a precedent.

48. The real substance of the Applicant’s complaint is that the Respondent’s policy of mandatory retirement at age 60 is contrary to what she claims is an internationally recognised principle underlying the interpretation of discrimination and that the Respondent owes her a duty to adjust its employment policy accordingly. The Tribunal is not persuaded that the Respondent owes her any such duty. Nor is the

Tribunal persuaded by her assertion that both under current national United Kingdom law and international law, a policy of mandatory retirement at a particular age is necessarily unlawful or that in this respect the principle of non discrimination implies that “age distinction for a particular job must be proportionate to the aim being pursued and ... necessary because of the very nature of the job in question.” Furthermore, the Tribunal is not moved by the Applicant’s claim that the Respondent had failed to advance any objective or reasonable basis for its discriminatory policies, which the Applicant submits must be founded specifically on internationally accepted standards and medical evidence.

49. In truth, the Tribunal must deal with applications before it in a manner that is consistent with Commonwealth principles relating to fundamental human rights. It shall also take into account the practice of other international administrative tribunals while ensuring that the Rules under which it operates permit cases to be heard in accordance with the law that governs international organizations. In this regard, the Tribunal is mindful of Article XII.1 of the Tribunal Statute which provides that:

“the Tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries.”

50. The Applicant’s claim that the Respondent’s policy of mandatory retirement at age 60 is contrary to an internationally recognised principle underlying the interpretation of discrimination does not find support in any case law. The principle endorsed by the International Labour Organisation’s Committee of Experts, and which is to the effect that “an inherent requirement of an age distinction for a particular job must be proportionate to the aim being pursued and ... necessary because of the very nature of the job in question” must be viewed in its proper context and not in a vacuum.

51. The Applicant relies principally on certain observations by the UN Human Rights Committee in the case of **Love v Australia** (case No.983/2001) which concerned Qantas airline pilots who were required to retire having reached the airline’s mandatory retirement age of 60. The Committee had to decide, on the merits, whether the complainants had been the victim of discrimination contrary to Article 2, paragraphs 2 and 3, and Article 26 of the International Covenant on Civil and Political Rights. In its finding, the Committee made many observations including, as noted by the Applicant, that “distinctions (*as to age*) must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate...” and also that “a distinction related to age which is not based on reasonable and objective criteria *may* amount to discrimination on the ground of “*other status*” within the meaning of article 26.” (emphases supplied)

52. However, the findings of the Committee must be read conjunctively in their entirety and not disjunctively. In order to get the full import of the Committee’s findings it is necessary to set out in full its observations which are as follows:

“The issue to be decided by the Committee on the merits is whether the author(s) have been subject to discrimination, contrary to article 26 of the Covenant. The Committee recalls its constant jurisprudence that not every

distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant. While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of “other status” under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26. *However, it is by no means clear that mandatory retirement age would generally constitute age discrimination.* The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers’ protection by limiting the life-long working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age. *The Committee notes that while the International Labour Organisation has built up an elaborate regime of protection against discrimination in employment, mandatory retirement age does not appear to be prohibited in any of the ILO Conventions.* These considerations will of course not absolve the Committee (of its) task of assessing under article 26 of the Covenant whether any particular arrangement for mandatory retirement age is discriminatory.” (emphases supplied).

53. It is evident that the facts of Love’s case are different from the facts of this case in so far as in Love’s case “the contracts under which the complainants were employed did not include specific terms to provide for compulsory retirement at that or any other age.”

54. The first observation to make with regard to the above is that the Respondent is an international organization. As such, it is not a party to and is not bound by the International Covenant on Civil and Political Rights. It is, of course, bound by its own internal instruments and institutional rules which, in any event, substantially embrace rules and principles that are not dissimilar to universally applicable human rights principles. In this regard, the Tribunal is content to be guided by the views of an eminent jurist in the field of the institutional law of international organisations which is to the effect that

“ international organizations have a characteristic that with respect to their internal organization and functioning (they) are outside the jurisdiction of national law. Their life is governed by a set of rules and principles which constitute their internal law. Within this framework they are not subject to interference by states in regard to the legal system or the laws that apply”¹

55. The Applicant also relies on Heyday’s case, a judgment of the European Court of Justice (ECJ Case No. C-388/07) on a reference from the United Kingdom High

¹ C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, CUP (2005) 2nd Ed., p.272

Court to determine whether employers can lawfully force people to retire at the age of 65. In the judgment the ECJ clarified the policy in the EU Directive upon which age regulations are based and said that social policy objectives “such as those related to employment policy and the labour market” may be considered ‘legitimate’. It held that “it is for the national court to ascertain whether the UK legislation reflects such a legitimate aim and, second, whether the means chosen were appropriate and necessary to achieve it”, in other words that there is an option to derogate from the principle prohibiting discrimination on grounds of age. The ECJ judgment in *Heyday* does not say that a mandatory retirement age policy is unlawful *per se* and therefore does not necessarily advance the Applicant’s case.

56. Furthermore, the Tribunal cannot ignore its own Statute which provides in Article XII.1 that in dealing with cases before it “the Tribunal shall be bound by the principles of international administrative law which shall apply *to the exclusion of the national laws of individual member countries.*” (emphasis supplied). This negates the Applicant’s reference to and reliance on United Kingdom law.

57. It is also appropriate to note that there is no universal agreement among international organizations regarding the age at which they retire their staff as each organisation fixes the age that best suits its own requirements and circumstances. It is therefore no surprise that the mandatory retirement age varies from one international organisation to another. For instance, while the mandatory retirement age at the UN and the Commonwealth Secretariat is 60, at the FAO it is 62 whereas it is 65 at the European Patent Organisation.

58. Nor is the Tribunal bound by the findings of the UN Human Rights Committee and, in any event, the Committee reached the conclusion in the **Love** case that the facts before it did not disclose a violation of article 26 of the Covenant.

59. In line with the principles stated above, the Tribunal is satisfied that the Applicant’s request to be allowed to work beyond the mandatory retirement age of 60 had been considered by the Respondent taking into account all pertinent matters. The Respondent clarified its policy on mandatory retirement in a memorandum dated 16 July 2008 by the Head of the Human Resources Section in the following terms:

“the Secretariat policy states that the Secretary-General may in the interest of the Secretariat extend this age limit in individual cases. Essentially, this means that the exigencies of Secretariat’s work that would necessitate such consideration must be proven to be in existence and also stated in the request for extension ... by your Director. ...your request was not for a limited extension due to exigencies of service.”

60. That memorandum of 16 July 2008 also clarified that any application for an extension of contract beyond the age of 60 years must be made by a Divisional Director and based on exigencies.

61. The Respondent had stated that at no time was the Applicant’s request to be allowed to work beyond the age of 60 supported by a request from her Divisional Director that she be allowed to do so on the grounds of identified exigencies of work and that at no time during her employment did the Respondent raise the Applicant’s

expectation that her contract of employment would be extended so as to allow her to work beyond the Respondent's normal retirement age of 60 years.

62. The Tribunal can find no evidence, beyond the consistently good performance reports that the Applicant received over the years, of there having been any request from the Applicant's Director asking for the extension of her contract on the grounds of exigencies of service. Nor is there any evidence before the Tribunal to suggest that the Respondent had raised the Applicant's expectation that her period of employment would be extended beyond the mandatory retirement age .

63. All of the above would suggest that whether or not a request for the extension of employment beyond the mandatory retirement age is granted is a matter that lies within the discretion of the executive authority of the organisation concerned.

64. The Tribunal has had the benefit of drawing from the case law of other international administrative tribunals relevant to the question of mandatory retirement policy and the exercise of discretionary powers in relation to the enforcement of that policy. In particular it has considered **ILOAT Judgment No. 1897, *In Re Cervantes (No.4) Kagermeier (No.5) and Munnix (No.2)*** as well as **Judgment No. 2669 (*MC v FAO*)** where ILOAT held, in effect, that one of the complainant's reasons for seeking an extension beyond the mandatory retirement age which was "to obtain a decent pension" did not constitute a valid reason for exercising the discretion to extend in favour of the complainant. This was notwithstanding that the complainant may have acted on the basis of mistake as a result of misleading information, resulting in the complainant suffering considerable financial loss. *In Re Cervantes* also established the principle that "the right of equal treatment is breached when, in like or comparable situations, one person enjoys a benefit which is not granted to another."

65. In *In Re Cervantes*, the impugned decision had allowed two staff members reaching the age of sixty-five years, the age of automatic retirement, to obtain an extension of their service beyond that age so that they could complete a total period of service of ten years, thereby allowing them to obtain a retirement pension and to maintain their coverage by the health insurance scheme under favourable conditions, while none of the complainants claimed to be in the situation of reaching sixty-five years without being able to complete a period of ten years of service with the organization. They could not therefore complain of inequality of treatment on that score although they could argue inequality of treatment on a different score, namely the financial impact of the measure and its basis in law.

66. The Tribunal has also considered the judgment of the United Nations Administrative Tribunal (**UNAT Judgment No.343 (*Talwar*)**), which is only one in a long line of the case law of international administrative Tribunals that has established the principle that "an international administrative tribunal will not interfere in the exercise of discretion except in extremely limited circumstances. On the basis that "discretionary power is not absolute", it will only intervene in cases where it can be shown that the head of an organization acted without authority, breached a rule of form or procedure, or that the decision was based on a mistake of fact or law, or overlooked an essential fact, or that clearly mistaken conclusions were drawn from the facts." See for instance ILOAT Judgments No. 2377 in which the IAEA was Respondent and where the mandatory retirement age was 60 or 62 depending on the

date the staff member commenced was recruited and the World Bank Administrative Tribunal's seminal judgment in *de Merode* (**WBAT Judgment No.1**).

67. The Tribunal does not accept the Applicant's claim that there had been undue delay in responding to her request for an extension of her employment or that she had been denied access to the Respondent's grievance resolution mechanism. In the view of the Tribunal, her grievance cannot properly be classified as a grievance arising from a breach of the terms of her contract of employment as such.

68. Although it is not suggested that it would have made any difference, it is worth observing that the Applicant had worked for the Respondent continuously for at least twenty years and yet did not consider "challenging" the mandatory retirement age policy until the final year of her employment. It would thus appear that the Applicant is aggrieved not so much by a breach of the terms of her contract of employment as by the Respondent's employment policy which, from all accounts existed in the organisation even before she entered the Respondent's employment, and which she now seeks to challenge.

69. The Tribunal takes the view that the Applicant's assertion that the Respondent's decision was not based on objective and reasonable considerations in turning down her request for extension is unfounded. It was evident from the letter of 16 July 2008 from the Head of Human Resources that she was fully aware of the considerations and criteria that would form the basis for making a decision on whether or not to grant her request.

70. It would be appropriate to have regard in this respect to the principles that have informed the Respondent's employment policy taken from the Foreword to the Human Resource Handbook and which are as follows:

"The approach is to view all aspects of HR management as an integrated whole, and to recognize that the success of the Secretariat in providing cost-effective services with limited resources depends on the talents, energy and commitment of its entire staff. Thus the Secretariat, which is of modest size in comparison with other international organizations, lays particular emphasis on adaptability and responsiveness to changing needs, and on efficiency, effectiveness and economy in executing tasks.

To reflect the unique character of the Commonwealth and its member .. states, staff are recruited from as wide a geographical basis as possible within the Commonwealth, although the Secretariat does not operate a formal quota system. Particular attention is also paid at all levels of the Secretariat to gender balance, although again without a quota system."

Conclusions

71. In light of the above considerations, the Tribunal finds that in enforcing its mandatory retirement age policy, the Respondent had not acted in breach of the Applicant's right under international law principles not to be discriminated against. Accordingly the Applicant's severance from the employment of the Respondent upon attaining the age of 60 did not amount to unfair dismissal on the ground of her age.

72. The Tribunal therefore finds that the Applicant's claims have not been sustained. In particular, her claim that the Respondent's application of its retirement age policy to her was neither proportionate nor necessary has not been sustained.

73. In the Tribunal's view, these are the only conclusions that it can reach even having regard to the job she was performing and her working ability as well as the demographic, economic and social factors prevailing at the time.

74. The result is that the Applicant's claim that the Respondent owed her an obligation to establish a retirement age policy that is flexible enough so as to permit her to continue working beyond the Respondent's prescribed mandatory retirement age is unfounded and cannot be sustained in fact or in law.

75. It follows that the Tribunal finds all of the Applicant's claims unsupportable in law and are therefore dismissed. Accordingly her claim for damages on the ground that she has suffered and continues to suffer the consequences of her unfair dismissal by the Respondent is also dismissed.

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.