

CSAT/2

JUDGMENT OF THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT ON  
PRELIMINARY POINT RELATING TO THE JURISDICTION OF THE TRIBUNAL

July 2000

JUDGMENT OF THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the Matter between

DR A S SAROHA

Applicant

and

THE REGIONAL DIRECTOR, COMMONWEALTH YOUTH PROGRAMME (ASIA)

Respondent

Before the Tribunal Constituted by

Justice P L Ulric Cross - President

Justice A N E Amisah

Miss Elizabeth Gloster QC

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1. By application dated 23 August 1999, Or. Ajit Singh Saroha ("the Applicant") applied to the Commonwealth Secretariat Arbitral Tribunal ("the Tribunal") for the determination by the Tribunal of disputes arising out of the circumstances in which his contract with the Commonwealth Youth Programme: Asia Centre ("CYP: Asia Centre") was not renewed after 31 May 1999. The Applicant contends that his contract was illegally and unjustifiably terminated by Ms Seela Ebert, the Regional Director of CYP: Asia Centre ("the Regional Director").

2. The Tribunal itself raised as a preliminary point whether it has jurisdiction in this matter and directed that the issue, as to whether the Tribunal has competence, should be settled by the Tribunal in accordance with Article III of the Statute of the Arbitral Tribunal of the Commonwealth Secretariat ("the Statute"), as a preliminary issue.

3. The Respondent contends that the application should be dismissed without any consideration of the merits, because (so the Respondent argues) the Tribunal does not have jurisdiction to consider this matter. The Applicant contends that the Tribunal does have jurisdiction.

In relation to this jurisdictional issue, the relevant article of the Statute is Article II. Insofar as is material for present purposes, Article II provides as follows:-

"Article II

The Tribunal shall hear and pass judgment upon any application brought by:

- (a) a member of staff of the Commonwealth Secretariat;
- (b) the Commonwealth Secretariat;
- (c) any person who enters into a contract in writing with the Commonwealth Secretariat

"which alleges the non-observance of the contract and includes, in relation to contracts of service the non-observance of the contract of employment or terms of appointment of such member of staff, and in relation to contracts for services the non-observance of the terms of the contract.

4. For the purpose of this Statute:

- (a) "member of staff" means:
  - (i) any current or former member of the headquarters staff of the Secretariat;
  - (ii) any person who is entitled to claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death;
  - (iii) staff recruited through Secretariat headquarters in London to serve in regional offices of the Commonwealth Youth Programme; and office staff of the Commonwealth small States facility in New York recruited through Secretariat headquarters in London; and
  - (iv) temporary appointees;
- but does not include:
  - (v) experts employed to work outside the United Kingdom under the Commonwealth Fund for Technical Co-operation;
  - (vi) consultants employed by the Secretariat who do not fall within the meaning of the word "employee";
  - (vii) persons employed in the domestic households of staff employed at headquarters.

(b) "contract of employment" and "terms of appointment" include all relevant Regulations and Rules in force at the time of the alleged nonobservance and include the provisions relating to staff retirement and end of contract benefits;

(c) "contract of service" includes "contract of employment

(d) "contract for services" includes any contract for the supply of services other than a contract of service.

"

5. The Respondent contends that the Applicant is neither "a member of staff of the Commonwealth Secretariat" within Article II. I (a), nor a "person who enters into a contract in writing with the Commonwealth Secretariat", within Article II. I (c). If the Respondent were right in that contention, then it is clear that this Tribunal would have no jurisdiction to determine the Applicant's application. This is because the Tribunal's jurisdiction to determine disputes is clearly and expressly limited to applications brought by the persons or bodies identified in Article II.1.

6. The following summary of the facts is largely taken from the explanatory statements filed in support of the Respondent's submissions on the jurisdiction plea.

7. The Commonwealth Youth Programme was established following a meeting In August 1973 of Commonwealth Heads of Government. That meeting endorsed the decision taken in January of the same year by Ministers concerned with Youth Matters to establish a Commonwealth Youth Programme ("CYP").

8. Pursuant to this mandate, CYP set up four regional centres to cover the various regions of the Commonwealth. They are the CYP: Asia Centre, located in Chandigarh, India (the relevant centre for the purposes of this application); the CYP: South Pacific Centre, located in Guadalcanal, Solomon Islands; the CYP:

Africa Centre, located in Lusaka, Zambia; and the CYP: Caribbean Centre, located in Georgetown, Guyana. These regional centres and the Commonwealth Secretariat ("the Secretariat") have been accorded diplomatic status with its incumbent immunities and privileges by the host governments.

9. The requisite legislation to grant the CYP: Asia Centre the privileges and immunities afforded by the Government of India to international organisations was promulgated by the Central Government of India on 3 January 1978 pursuant to powers conferred by Section 3 of the United Nations (Privileges and Immunities) Act 1947. It was provided that Section 18 of Article V of the Schedule to the said Act should apply to the CYP: Asia Centre with certain modifications. These included a provision that the CYP: Asia Centre:

"will have a legal personality and the legal capacity necessary for the exercise of its .functions. It shall have immunity from suit and legal process except to the extent provided hereunder ...".

10. The Secretariat, as a matter of policy, makes a distinction between "Programme Staff" recruited through the Secretariat headquarters in London and "Local Staff" recruited by the Regional Directors of regional centres. This was confirmed in a statement by Ms. Jane Foster, Special Adviser, Head of Youth Affairs, Commonwealth Youth Programme, Commonwealth Secretariat. The Programme Staff, who are made up of the Regional Directors and Senior Programme Officers, have diplomatic status in the countries where the centres are located, and the Local Staff does not.

11 . Programme Staff are recruited internationally and the posts are advertised by direct circulars to member governments and through international press advertisements effected by the Secretariat in London. Applicants for the position of Regional Director are interviewed in London by an interview panel chaired by a Deputy Secretary-General of the Secretariat. The recommendation of the interview panel has to be approved by the Secretary-General. Applicants for the post of Senior Programme Officer are interviewed in the regions and a member of the Secretariat representing the Secretary-General chairs their interview panel. The Secretary-General again approves the recommendation of the interview panel. The terms and conditions of service of Programme Officers are the Rules and Regulations applicable to the Secretariat staff members in London.

12. Local Staff members are support and administrative staff recruited directly by the regional centres. The respective Regional Directors are responsible for recruiting them by placing advertisements in the local press, arranging their interviews and signing their letters of appointment. Their terms and conditions of employment are the rules and regulations of the specific centre and are expressly referred to in their letters of appointment.

13. So far as the Applicant's recruitment was concerned, newspaper advertisements were placed locally, interviews were conducted locally and the Applicant was appointed by the CYP: Asia Centre as a Research and Documentation Officer with effect from 1 June 1995 for a two-year period pursuant to the terms of a letter dated 20 June 1995. This was extended for a further two years with effect from 1 June 1997. He was appointed as a member of the local staff of the CYP: Asia Centre by the Regional Director, who signed his letter of appointment.

14. The Applicant's letter of appointment was written on headed writing paper of the CYP: Asia Centre. It stated inter alia "(v) Your appointment will be governed by the existing rules and regulations of the Centre or which may be framed from time to time".

15. At all material times, the relevant rules and regulations of the Centre were set out in a document entitled "Commonwealth Youth Programme Regulations Covering the Terms and Conditions of Service for Locally Recruited Staff: Commonwealth Youth Programme: Asia Centre Chandigarh: Conditions of Service" ("the CYP: Asia Centre Conditions of Service").

16. Paragraph 75 of these Conditions of Service provided as follows:-

"If a staff member is dissatisfied ..with a penalty administered by the Regional Director on [sic] the manner in which the matter was conducted, such an officer may make an appeal in writing to the Director of the Commonwealth Youth Programme in London. "

(That paragraph refers to the Director of the CYP in London. However, the Gender and Youth Divisions were merged some time ago and the Director of the Commonwealth Youth Programme in London is now called "the Director of the Gender and Youth Affairs Division". However this change in the director's title is irrelevant for present purposes.)

17. In our judgment it is clear that the Applicant does not fall within Article 11.1 (a) of the Statute. He does not fall within any of the categories described in Article 11.4(a)(i) to (iv). He is not a current or former member of the headquarters staff of the Secretariat; he is not a person who is entitled to claim as a personal representative or by reason of a staff member's death; he is not a member of staff recruited through Secretariat headquarters in London to serve in regional offices of the CYP. On the contrary the Applicant was recruited locally in India. Nor was he a member of staff appointed for a temporary period. Therefore, in our judgment, it is clear that he does not come within the category of "a member of staff of the Commonwealth Secretariat" as that expression is defined in Article 11.1 (a).

18. The next issue which arises is whether it could be said that the Applicant falls within the category of persons described in Article 11.1(c) of the Statute, namely "any person who enters into a contract in writing with the Commonwealth Secretariat".

19. In our judgment the Applicant does not fall within the description of such a person. In order to fall within this description, the Applicant would need to establish first that, although his contract of employment had been with CYP: Asia Centre, nonetheless, as a matter of law, the CYP: Asia Centre was part of, or a division of, or an agent of, the Commonwealth Secretariat and accordingly that, by contracting with the CYP: Asia Centre, he had in effect contracted with the Commonwealth Secretariat. Secondly, he would need to establish that the category of persons described in sub-paragraph (c) was apt, as a matter of construction, to include employees of the Commonwealth Secretariat who did not satisfy any of the criteria identified in paragraph 4(a).

20. In our judgment such an argument must fail. First, it is clear from the restricted definition of "member of staff" that staff recruited through Secretariat offices outside London, or recruited otherwise to serve in regional offices of the CYP, are not intended to fall within the definition of "a member of staff of the Commonwealth Secretariat". It would indeed be a surprising construction if such persons were nonetheless able to come within the description in Article 11.1 (c) on the basis that every contract in writing with a regional office of the CYP was automatically treated as a written contract with the Commonwealth Secretariat itself. In this respect we agree with the submission made by the Respondent that Article 11.1 (c) cannot be read to include the same category of persons who have been excluded by Article 11.1 (a) read with Article 11.4(a)(iii).

21. Moreover, a document entitled "Memorandum of Understanding and Financial Regulations of the Commonwealth Youth Programme (as revised at the First Meeting of the Commonwealth Youth Ministers incorporating the Eleventh Meeting of the Commonwealth Youth Affairs Council, Republic of Maldives, May

1992)" confirms our view that it was always intended that a distinction should be drawn between staff appointed by the Commonwealth Secretary General for the purposes of the administration and operation of the CYP, and those otherwise appointed.

22. In this context it is relevant to note the following provisions of the Memorandum of Understanding:-  
"ARTICLE I

**ESTABLISHMENT OF THE PROGRAMME**

1. Commonwealth Heads of Government at their meeting in August 1973 endorsed the decision taken in Lusaka in January 1973 by Ministers concerned with Youth Matters to establish a Commonwealth Youth Programme. The Programme will in its operation, form part of the activities of the Commonwealth Secretariat, and it will be administered by the Commonwealth Secretary General.

VIII. Administrative arrangements

50. The Commonwealth Secretary-General will be responsible for conducting the operations of the Programme in accordance with the decisions of the Commonwealth Youth Affairs Council and the Committee of Management and for the programme of work and staffing subject to an approved budget. The Secretary-General may delegate to senior officers responsible for any of these functions or the day to day operations of the Programme.

51. Staff appointed by the Commonwealth Secretary General for the purpose of the administration and operation of the Programme will for all purposes be members of the staff of the Commonwealth Secretariat and the provision of the agreed memorandum on the Commonwealth Secretariat will apply to them ."

23. In our judgment, paragraph 51 underlines the distinction that staff appointed by the Commonwealth Secretary-General - in practice, those recruited through Secretariat headquarters 111 London, whose appointment is approved by the Secretary-General - are to be members of the staff of the Commonwealth Secretariat, whereas those appointed by persons other than the Secretary-General are not intended to be members of the staff of the Commonwealth Secretariat. Again, this reinforces our View that it would be surprising if Article II of the Statute were to be construed in such a way as to render the limited definition of "member of 'staff of the Commonwealth Secretariat" in paragraphs 1 (a) and 4(a) as effectively nugatory, because paragraph I(c), in practice, would catch any employee of the Commonwealth Youth Programme, provided that he or she had a written contract with the local regional centre.

24. Finally, and perhaps determinatively, it is clear from the modified provision of Section 18 of Article V of the Schedule to the Indian United Nations (Privileges and Immunities) Act 1947 that the CYP:Asia Centre has a separate legal personality from the Commonwealth Secretariat, at least under Indian law. It is clear from the letters of appointment dated 20 June 1995 and 16 July 1997 respectively that the Applicant indeed contracted with CYP:Asia Centre and not with the Commonwealth Secretariat. In our judgment, in order to identify for the purposes of Article II of the Statute the party with whom the relevant person has contracted, one needs to look at the status of the other contracting party, as determined, or defined, by the law of the state where the contract is concluded. Under Indian law there could be no doubt that the CYP:Asia Centre was recognised as a body with a separate legal personality and identity from that of the Commonwealth Secretariat.

25. It is also clear that the CYP:Asia Centre Conditions of Service for locally recruited staff (referred to above) expressly envisage that disputes would be referred to a local disciplinary committee constituted by the Regional Director and that appeals therefrom would lie to the Director of the CYP in London. Such provisions are inconsistent with the notion that in reality the Applicant was contracting with the Commonwealth Secretariat.

26. In all the circumstances, we conclude that it is impossible to categorise the Applicant as a person who has entered into a contract in writing with the Commonwealth Secretariat so as to fall within Article II.1(c). Accordingly we conclude that the Tribunal is not competent to deal with the Applicant's application because it does not have jurisdiction to do so.

27. We should say that, in relation of Ms. Gurmeet Hans, the former Senior Programme Officer of the CYP Asia Centre, upon whose case the Applicant relied in support of his arguments for jurisdiction, the circumstances were very different. Ms. Hans was a person who was recruited through Secretariat headquarters in London to serve in CYP Asia Centre and was paid directly by the Commonwealth

Secretariat. In those circumstances, the acceptance by the Tribunal of jurisdiction in relation to her case cannot assist the Applicant, since she fairly and squarely fell within the definition of "member of staff" contained in Article II.4(a)(iii).

28. Accordingly the Application is dismissed.

President

Mr Justice P L U Cross

Miss Elizabeth Gloster QC

14 July 2000