

CSAT APL/16

THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

MONICA OYAS

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

**Mr Christopher Jeans QC, President; Justice Usha Mehra, member and Justice R N
Ukeje OFR, member**

JUDGMENT

Introduction: the kernel of the case

1. The human resources function at the Commonwealth Secretariat was to be upgraded. It would no longer be a “section”. It would become instead a Division”. As a Division it would have a “Director”.
2. Directors at the Commonwealth Secretariat are paid at pay point C. So whoever was appointed Director of Human Resources would be paid at point C.
3. The Applicant, MO, was Head of the Human Resources Section at the time the re-organisation was proposed.
4. As Head of Section her pay grade was D, which is lower than ‘C’.
5. The Secretary-General decided that the post of Director would be subject to open competition. It is this decision which lies at the heart of the dispute.
6. The Applicant says that she was in effect already doing the job of Director. So, she says, it was not a vacant post - it was her existing job, in all but name.
7. She points to a job evaluation study carried out by consultants which shows, she contends, that her work as Head of Section merited a grade C. This goes to show, she says, that she is already working at the level expected of a Director.
8. She says she has the ability to perform as Director and that there was no need to advertise externally. Here too she points to the advice of consultants who said as much.

9. She attacks the Secretary General's decision from many angles. She says it was a breach of her contract, an infringement of her legitimate expectations, an abuse of power, an act of unfairness, bad faith, discrimination and victimisation towards her. She claims mandatory and declaratory orders. She claims damages. They are to include financial losses. They are also to include compensation for the personal injury she says she has suffered in consequence of the alleged wrongdoing.
10. Her case was considered sufficiently arguable to justify the grant of an interim injunction. The injunction restrained the Respondent from progressing the recruitment process or implementing any decision relating to the Applicant's contract until the Tribunal makes its final decision on the merits of the claim.
11. The Respondent, the Commonwealth Secretariat, says that the Director position was a new post in substance as well as in name. The Respondent says that subjecting a new post to competitive recruitment was in line with its rules and policies. Far from discriminating or victimising, the Secretary-General was operating a principle of equal opportunity in opening the job to competition.
12. As appears below, there are many by-ways to the debate which has ensued. But this central issue remains at the heart of it. Was the Director post a "new" post which the Respondent was entitled to advertise? Or was it the Applicant's post, or a post to which she had a prior claim?

The facts and background in detail

13. We now set out in chronological sequence the key facts and exchanges which have given rise to the dispute. Later in the judgment we will make further factual findings and draw inferential conclusions when resolving the issues.
14. The Applicant was appointed "Head of Human Resources, Human Resources Section" in 2007. Her appointment letter was dated 10th August 2007. On 14th August 2007 she countersigned it by way of acceptance of its terms. The appointment was to start on 1st October 2007.

15. The letter provided, amongst other things,
- (i) that her contract as Head of Human Resource, Human Resources Section was “for a period of three years in the first instance which may be renewed subject to mutual agreement according to the exigencies of the service”;
 - (ii) that the contract incorporated the Staff Regulations and Staff Rules as laid down and amended from time to time by member states and/or by the Secretary General
 - (iii) that the pay point for the position was D and
 - (iv) that she was classified as an overseas staff member.
16. The “Staff Regulations” are made by the Commonwealth Governments and can be amended only with their agreement. As the Human Resource Handbook of the Secretariat (“the Yellow Book”) explains, the Regulations
- “embody the general conditions of service and the rights, duties and obligations of Secretariat Staff. They envisage that the Secretary General should supplement them by making, and amending from time to time, such staff Rules consistent with the Regulations as are considered necessary. The Rules and Regulationsbecome part of staff members contracts of employment...”
17. Some relevant Regulations are as follows:
- (i) Regulation 3: Staff members are subject to the authority of the Secretary General.
 - (ii) Regulation 9: The Secretary General “may make appropriate provisions for the classification of posts and staff in conformity with the principles laid down by the Commonwealth Heads of Commonwealth Governments and in accordance with the nature of the duties and responsibilities required.” The Secretary General “may designate staff by grades as appropriate”.
 - (iii) Regulation 10: The Secretary General in accordance with [the 1965 Memorandum establishing the Secretariat] has Authority to make appointment of staff members.
 - (iv) Regulation 11 **“In the appointment, transfer and promotion of staff the utmost consideration shall be given to the necessity for securing the highest standards of efficiency, competence and integrity ...”**.

(v) Regulation 12 Acceptance of the letter of appointment constitutes an acknowledgement that the staff member is bound by the Staff Pension and Rules.

(vi) Regulation 13 Appointments to diplomatic and professional grades (CS1-7) “shall not be for more than 3 years and shall be subject to the Secretariat Rotation Policy”.

(vii) Regulation 16: The Secretary General may terminate employment, giving reasons, if inter alia, the needs of the service require abolition of the post or staff reduction.

[Emphasis added].

18. Staff Rules are made by the Secretary General to supplement the Regulations. They also form part of the contract of employment. Rules relevant to the present case include the following:

“(i) Rule 10 and Annexe 4 which establish a mechanism for complaining about non-renewal of the contract.

(ii) Rule 11 which provides that all higher grades are to be on fixed terms.

(iii) Rule 16: “Staff members employed on contracts for any period of one year or more shall be informed in writing whether they will be offered a new contract. **Such information will, so far as practicable, be given to staff members not later than 6 calendar months before the date of expiration of their contracts. Where information has not been so given the contract will be treated as having been extended for a period of 6 calendar months after the date on which such notice was in fact given.**”

(This is subject to exceptions including “non-voluntary redundancy” – Regulation 18).

(iv) Rule 55 which provides for salary on promotion.

(v) Annex 2 which sets out grievance procedure (Yellow book p. 157)

19. Also within the Yellow book is to be found the Guide to HR Management. This is material which has been drawn up in consultation with the staff association (CSSA) and approved by the Secretary-General and vetted by consultants to ensure “conformity with current best practice in HR management”. As such it does “not form part of staff members contracts of employment” (Yellow book Foreword pvi). This is in contrast to the Staff Regulations and Staff Rules which do form part of the contracts of staff.

20. The Guidance includes the following:

- (i) Introduction para. 6: refers to rigorous equal opportunity policies.
- (ii) Introduction para. 9: **“The importance of a rigorous and transparent system of recruitment is emphasised, reflecting the requirement that posts in the Secretariat are normally subject to competition and open to both external and internal candidates”**.
- (iii) Chapter 2 sets out “principles” which include commitment to equal opportunities (para. 5) (Yellow book p. 10).
- (iv) Chapter 3 sets out responsibilities for HR management. Paragraph 2 provides that final decisions on all staffing issues are at the Secretary- General’s discretion (Yellow book p. 13).
- (v) Chapter 4 sets out inter alia the committee structure and explains the role of the Management Committee , a Committee consisting of the Secretary- General, his Deputies (“the DSGs) and the Director (OSG) as secretary. (Yellow book p. 17).
- (vi) Chapter 5 para. 3 provides that **“vacancies in Grades CS6 and above are normally the subject of open external competition, except where the Secretary-General exercises his/her discretion to effect a lateral transfer (Chapter 7)”** (Yellow book p. 21).
- (vii) Chapter 7 and Annex 10 deal with rotation. Staff in Grade CS6 **“normally serve three three-year contracts in the secretariat”** (para. 4.3 and Annex 10) Para. 4.4 provides that staff **“can expect to be fully notified of their departure between six months and one year before the end of their contract.”** (Yellow book p. 32 and see p. 83). Paragraph 14 of Annex 10 states that “while 2 three-year contracts should continue to be the norm for Diplomatic staff, the norm for professional staff in Grades Cs5 and CS6 could extend to 3 three year contracts., subject to satisfactory performance and “the continued need for the skills of the particular officer”
- (viii) Chapter 7 para. 6 notes that the Secretary General retains the right to make a **“lateral transfer”** outside normal procedures to meet urgent need etc. (Yellow book p. 32).

[Emphasis added]

- 21. We have flagged these provisions at the outset because they form the background to the disagreement which was to ensue.
- 22. As Head of the Human Resources Section, the Applicant initially reported to the Director of Corporate Services. There appear to have been difficulties in that relationship. In March 2008 the reporting line was changed. The Applicant was to report instead to Deputy Secretary-General FM. This was set out in a memo from the Secretary General dated 25th March 2008 recording that the change was being made “with immediate effect and for the time being”. The change appears to have

been satisfactory to all and was not in fact revoked. But it was never stated to be permanent and was not intended to represent a promotion.

23. Meanwhile, some consultants (“IPAC”) had been engaged by the Secretariat to report on the HR function. They reported on 31st March 2008. Their report is lengthy. In the course of it they identified perceived weaknesses in the HR function; but they praised the qualities of the Applicant. On page 10 the following observations appear

“. In fact our consultations have revealed that there is a strong perception of inadequate HRS competency by many of its clients. This is in spite of the fact that the current Head of Human Resources is a highly-qualified and experienced person with the capability to transform the human resources section into a professional competent organization and the fact that several HR Officers and Assistants have professional, graduate and post-graduate degrees and designations in the human resources field as well as experience in human resources management from outside the Secretariat.”

They recommended restructuring of the section:

“It is recommended that the jobs in HRS be re-evaluated to better reflect their strategic and operational responsibilities, and the competencies the job will require for it to be performed in a satisfactory manner. Previous job evaluations have clearly under-rated these jobs, as described later in this Report. **It is also recommended that HRS be restructured, by clustering his experts due to teams based on the main functions in its organization.** This will enable HRS to operate more efficiently and effectively and will help develop further expertise, through knowledge-sharing and cross-functional team work.”

[Consultants’ emphasis]

Importantly, they also recommend that the section should become a separate division.

“Repositioning of the HR Structure

In order for HRS to properly fulfil its strategic role, i.e. to become the strategic partner, change agent, policy advisor and employee advocate, it has to undergo significant changes. **It is recommended that these changes start with a decision of the Management Committee to change the reporting relationship of HRS within the Secretariat, making it a separate Division.**”

24. On 1st April, 2008, the day after the IPAC report was submitted, a new Secretary-General (K. S) assumed office.

25. On 9th May 2008 the Management Committee considered the recommendation to upgrade the Human Resources Section to a Division. The relevant minute states as follows:

“Upgrading the Human Resources Section (HRS) to a Division, headed by a Director. The Committee felt that this needed careful consideration, given that the current Director of Corporate Services, whose contract would not be completed until June 2009, had been recruited with a job description that placed her in charge of HRS. It also noted, in this context, that if HRS were to be elevated to a full-fledged Division there may be similar pressure to upgrade the Finance & Management Information Section (FMIS). The Committee also agreed, in discussing this issue, that if HRS or FMIS were to be upgraded to Divisions, **the incumbent Heads of Section would need to subject themselves to an open competition to win the Director post in each case, as automatic promotion would not be appropriate and would be questioned by the CSSA.**”

[Emphasis added]

The minute was copied to the Applicant.

26. Thus, no immediate decision was made on whether to upgrade the Section. But if it was to be upgraded, the Management Committee’s position from the outset was that there should be open competition to “win” the Director role.

27. On 14th July 2008 the Management Committee decided to keep in abeyance the recommendation to convert the Human Resources Section into a Division. It also noted that a group was to be established to advise the Secretary General on Human Resources in the Secretariat. The Applicant attended this meeting.

28. On 16th December 2008 the Management Committee noted that the HR Section could become a Division without applying the same “uplift” to any other section.

29. On 12th January 2009 the Management Committee made the decision: the Human Resources Section would indeed become a Division.

30. At a further meeting on 26th January 2009 of the Management Committee, it was noted, as the minutes record:

“ that the Secretary-General had the authority to proceed to create the position of Director of HR and to authorise the implementation of the restructuring of the section into a Division, mindful of the need to do so from within existing resources. The Committee agreed to proceed with recruitment of a **Director of Human Resources (new position)** and a Director of Corporate Services (replacing incumbent on completion of tenure.”

[Emphasis added]

31. As the minute records, the Committee saw the Director of Human Resources as a “new position”.
32. The Applicant was absent from work on account of illness at the time of the 26th January 2009 meeting. On her return on 3rd February 2009, Mr G, Director, sent her the minutes.
33. The Applicant’s return from work will have coincided with the arrival of a letter from the Secretariat’s Occupational Physician, Dr. S dated 2 February 2009. The letter relays allegations from the Applicant of “a prolonged historic problem with the Human Resources function since 2006, which preceded [the Applicant’s] employment in the Secretariat”. The letter relays allegations of “bullying, harassment and intimidation” by the Director of Corporate Services “under whose purview the function of HR used to be located”. The letter relays the Applicant’s view that the “continuing activities” of the Director of Corporate Service are “the major source” of an on-going problem. The doctor states:

“Monica’s description of the situation is one of abuse, harassment, intimidation, and racism, which has resulted in her experiencing severe anxiety. Monica has physical manifestations in the form of significant musculoskeletal problems, which I am advising her to have treatment for; she is also suffering from severe anxiety which has resulted in a significant disturbance of her sleep pattern. She tells me that she has also had problems with her blood pressure, as recorded by the Secretariat’s Occupational Health Advisor Mrs B and on two occasions last year, she suffered from medical problems arising from stress at work. She says her General Practitioner is aware of these situations.

As the Secretariat’s Occupational Health Physician, I wish to draw the Secretariat’s attention the bullying, intimidation and harassment that MO and her staff appear to have been subjected to in the work environment. In my experience of handling incidents of work related stress, this one seems to me to be one of the worst that I have come across.”

The Applicant's complaints against the Director of Corporate Services are not part of the claim brought before us but she has included the doctor's reports in the annexes to her narrative. We make the following brief observations:

(i) It should be recorded that the doctor is relaying (in very general terms) the Applicant's assertions about the alleged bullying. Though the doctor appears to be supportive of the Applicant and was plainly concerned for her welfare, it is not apparent that he had any first hand knowledge of the conduct of which he complains. We would respectfully doubt whether it was appropriate for him to express views, especially in such strong terms, about matters which were not within his knowledge.

(ii) The Applicant's anxiety and musculoskeletal problems pre-date the dispute which was about to arise on the Applicant's return to work about whether the Director role should be open to competition.

(iii) We are not able to say whether the pre-existing anxiety problem affected her perceptions about the decision to open the Director post to competition, which she discovered on her return to work.

34. On 24th March 2009 the Applicant sent a memo to the Management Committee. She pointed out that due to her absence she had not had the opportunity to provide "technical input" at the time of the meeting of 26th January. The memo continues:

"In this context, I wish to provide the following technical input on the matter of the elevation/repositioning of the Secretariat's Human Resources Management function to a Division for Management Committee's consideration.

1. The IPAC Report recommended the repositioning of the HR structure by elevating HR to a Division in keeping with good practice and to enable HR to properly fulfil its strategic role. Essentially, this means that technically, the principal purpose, role/job content, substantial function and core responsibilities/accountabilities of the role do not change technically or substantially. It is only that due to professional dictates on good practice coupled with the Secretariat's business needs, the function is being enabled to respond to its accountability with the requisite authority level.

The foregoing is demonstrated by the job description of the role under the current title of Head of HR (copy attached) which inter alia specifies but is not limited to the following provisions/responsibilities/accountabilities.

[These are then set out.]

The foregoing therefore trigger a number of pertinent technical issues which need to be addressed for the HR restructuring to be dealt with professionally and in due recognition of legally based good HR practice. The issues are as follows:

a) In my understanding, as a general principle of both Law and Human Resources, as long as a role/job function is not substantially different upon any reorganisation/restructuring that job would not be advertised as long as the incumbent is performing all or a substantial part of the job/role.

b) In the case of Director HR role, the role/job has not changed. This being the case, the proposal to advertise the role would raise a number of technical complexities. Firstly, as long as the role/job or any of its substantial parts remain the same/unchanged (as it would evidently), given the current job description, and contract of employment, there would be no valid basis for advertising the role. **If the role is advertised, given that it is substantially (arguably totally) the same as the current role of Head of HR, the Secretariat would effectively be making that role redundant.** Management would therefore need to address the potential risk to the Secretariat that arises from this.

c) Additionally, by seeking to advertise the Director HR role, Management may wish to consider that the inference could easily be read to imply a vote of no confidence in the incumbent which it would be reasonable to expect not to be the case, as Management would have been appraised of the findings of the functional review of its Human Resource function and in particular, Management Committee's attention is drawn to the IPAC report on page 10. [She then quotes from page 10 of the Report as we have done above]. This is reinforced by the excellent performance appraisal report and on-going delivery of the transformation of the Secretariat's HR function to a best practice benchmark.

d) The above consideration would equally guide any suggested way forward in regard to other positions in the restructuring of HR for which the job descriptions may remain substantially the same.

e) There would therefore not be a legal or HR basis to advertise the role of Director HR nor other roles in the proposed new structure of HR for which the above circumstances are applicable.

f) Management may wish to consider that technically regardless of the role/job title, the inference and implications of the Management Committee decision of 23 February to advertise a role that substantially remains the same would by any reasonable judgement/interpretation, be that Management already decided that they have already evaluated the HR role in its new title as well as the incumbent and pre-judged that the incumbent is incapable of undertaking the current role. This would be viewed as constituting constructive dismissal of the incumbent. If this be the case, it would be reasonable to conclude that Management would have set up a constructive dismissal issue.

g) As already indicated, by advertising the role of Director HR, Management would have effectively declared the current role under the title of Head of HR redundant because the role performs the same function as any role that would be titled Director HR. This raises a legal risk as the Secretariat would technically not be able to fill a role that has been rendered redundant. Consequently, any reasonable interpretation would view this as likely to

cause professional damage and embarrassment both to the incumbent and the Secretariat, which would not have been intended by the decision.

h) It would appear therefore that the Management Committee decision may have inadvertently overlooked the technicalities as set out above.

i) Additionally, the suggested oversight in the Management Committee decision is enhanced by the fact that there has been good practice precedence in the Secretariat as evidenced by Management's decision in 2004. At the time, the Secretariat's records would show that the Youth Affairs Division was upgraded from a Section to a Division and the then incumbent who was the Head of the Section was upgraded with the role to a Director. Please refer to the attached letter signed by the then DSG Mrs F Mugasha. It would be noted that the incumbent of that role was unable to be issued with the usual COMSEC contract in terms of the duration of contract due to the then prevailing political circumstances in regard to the termination of the membership of his country to the Commonwealth.

j) Under similar circumstances in law, an employee would therefore have reasonable and legitimate expectations not to be treated differently.

k) The Secretariat's own practices on the restructuring/reorganisation exercises that have been and continue to be implemented would show that due regard has normally been given to the above technical matters. It would be important therefore that this matter is reviewed in order that the restructuring of HR is dealt with in the same manner as other restructuring exercises in the Secretariat because HR staff including the Head of HR would have a legitimate expectation that they would not be treated differently. This is particularly important to ensure that the Secretariat is seen to be consistent in its approach and treatment of staff and for the actions not to be seen as different in the case of HR.

l) Given the critical and highly sensitive role of HR in any organisation and the prevailing organisational circumstances surrounding the HR Function in the Secretariat and taking into consideration various findings in the IPAC Report, it would be in the mutual interest of the staff of HR and the Secretariat that any decisions and actions that are taken are seen to be the right decisions, equitable and professional with due care for decisions not to be seen to be unduly influenced by certain prevailing circumstances or pressures.

On the above basis, I would professionally advise against advertising of the role of Director, HR and/or other roles that have not changed substantially and further that the established practice be applied to the restructuring of HR. I recommend in this regard that Management Committee looks at the suggested way forward document that was submitted to the DSG by HR in January 2009, (copy attached) as a recommended guide for the restructuring process. This would be taken forward and developed further once an appropriate selection and assimilation criteria is agreed.

I trust that Management Committee would wish to consider reviewing its decision to advertise the Director HR role/job in the light of this technical input.

Thank you."

[Emphasis added]

35. We have quoted this memo at length because it details very clearly the position to which the Applicant was to adhere in subsequent debates and in these proceedings.
36. Although, quite understandably, she tendered this memo, as “technical input” and as “advice” by way of “recommendation” to management in her professional capacity, the Applicant did of course have a personal interest in the issue: it was a submission about her own situation.
37. It was clear that the position taken by the Applicant could lead to a legal challenge from her. The Management Committee minute of 21st April 2009 record as follows:

“4. Update of IPAC process

The Committee was provided with copies of job descriptions prepared for a new Finance and Administration Director, a new Human Resources Director and the third Deputy Secretary-General. The Committee noted that the job description for DSG was open for further reflection by the Management Committee.

The Committee also discussed the implications and options regarding the up-gradation from Human Resources Head of Section to the position of Human Resources Director. Comments from IPAC were considered and an overview of potential challenge was provided. It was decided that legal opinions on the issue would be considered. The Committee agreed to reflect further on this matter.

The Committee also noted that other staff currently in place in the Human Resources Section, would not necessarily face similar challenges as most senior positions are either new or vacant since recruitment had been purposefully slowed down over recent time.”

38. The following day, Dr S became involved again. His letter of 22nd April 2009: to the DSG M-M states:

“I had been receiving regular reports from Ms B, who advised that MO was still suffering from considerable stress at work, with anxiety and insomnia. I saw Monica again on 22 April 2009. When I saw MO, she explained that the management board had taken the decision on 26 February to upgrade her post to Director of Human Resources, reporting to the Board and was no longer to be under aegis of the Director of Corporate Services. Monica said it was decided by the Board that the post would need to be advertised, both internally and externally. MO says that this has caused her considerable distress as by advertising the post, she concludes that it amounts to a vote of no confidence in her.

Monica says that the natural outcome of the changes that have taken place at the Commonwealth Secretariat is that she should have been appointed to the upgraded post of Director of Human Resources which post she says she has essentially been

undertaking since March of last year, as recommended by IPAC. She says that she has drawn her views in a detailed memorandum on the situation, to the attention of the management committee; she understands that her views are being given careful consideration.

The conclusion is that MO will continue to suffer from considerable anxiety and stress until the situation is clarified. It is therefore my recommendation that every practicable effort should be made to resolve this situation, in order to bring the uncertainty that Monica finds herself in at the moment to a conclusion.”

39. On 21st April 2009 a paper was produced in the form of “a Draft Management Committee decision” embodying a list of distinctions between the Head of Section job description and draft Director job description. The Director role was shown as having responsibilities which exceeded those of the Head of Section, including advisory responsibilities to the senior management group “strategic partner” status, leadership and delegated decision-making authority and financial accountability. Longer experience was indicated as required than for the Head of Section role. We return later in the judgment to assess whether the role was indeed different and more senior than the Head of Section role.

40. On 28th April 2008 Management Committee considered legal advice (which is privileged and has not been disclosed). The Secretary-General’s further comments are minuted as follows:

“The Secretary-General observed that the Secretariat was in the process of a significant restructuring of its Corporate Services area, including the appointment of a third Deputy Secretary-General and the upgradation of the position of Director of Human Resources. It was further noted that it was not possible to draw a clear conclusion about the risks entailed until the job description for the Director of Human Resources was settled. The Secretary-General proposed to consider this further and submit further thoughts for Management Committee’s consideration, after which further legal advice might become required.

The Committee discussed the role that it has in settling on the job descriptions of posts in the Secretariat, mindful of the need to ensure that due process is observed and that expertise is provided in the preparation of such documents.

The Committee **agreed** that it would reflect further on the role of Director of Human Resources.”

41. At a further Management Committee meeting on 1st May 2009 the Secretary-General:

“emphasised that the objective of the change from a Human Resources Section to a Human Resources Division **was not simply to effect a name change but to**

achieve a substantive upgradation in the HR function within the Secretariat along with other measures to strengthen corporate affairs more generally; that he attached considerable importance to an open and competitive process for recruitment of senior staff; and that he had established in a recent conversation with his predecessor that no grounds existed from that quarter for any expectation that MO might have of being appointed Director.”

42. We take the last sentence to be a reference to the Applicant’s contentions arising from her 24th March 2009 memorandum that she had a legitimate expectation or claim to be appointed Director. The Secretary-General was not expressing a view as to whether she would obtain the job in the open and recruitment process he clearly favoured.

43. At a further Management Committee meeting on 19th May 2009 the Secretary General reiterated his view and expectation that the Director role would be qualitatively different from the Head of HR role:

“...The Committee also reaffirmed that it envisaged a Human Resources Division being created, **led by a Director, which would be upgraded and operating at a higher level of strategic engagement in the Secretariat than at present through the HR Section led by a Head.**

The Committee considered whether or not the differences in the job description of the current post of Head of Human Resources Section and the job description of the proposed post of Director of Human Resources Division were substantially different. **The Secretary-General expressed his expectation that the Head of Human Resources and Director of Human Resources would be qualitatively different posts.**”

The IPAC consultants were then summoned to the meeting and advised:

“The IPAC consultants ... advised that there were differences in pay grade, essential professional qualifications and experience in the job description for the current Head and draft job description for the proposed Director, but no difference in management reporting lines.

The IPAC consultants concluded that the currently proposed Director post was not significantly different to that of the current Head post, and that the incumbent Head seemed capable of performing in the Director role. The IPAC consultants further advised that, on the basis of her CV and their observations, **the incumbent Head of Human Resources Section had the requisite skills and experience to fill the Director post, although her performance would need to be assessed and validated by her line manager.**

The Committee considered the process for filling the post of Director of Human Resources, acknowledging that posts for Directors and Deputy Secretaries-General are usually advertised and filled competitively. The Committee recalled that there were other current and prospective reorganisations occurring in the Secretariat, which would be affected by decisions taken regarding the filling of posts as the Human Resources Section was reorganised into a Division. The Secretary-General expressed his expectation that there should be clarity about the process for filling senior posts and consistency in applying that process.

The IPAC consultants highlighted the benefits of retaining institutional memory and stability by retaining staff in the Secretariat. The consultants commented on the disruptions in the Human Resources Section in the past and the importance of avoiding further disruption to the Secretariat.

The IPAC consultants further advised that a newly created post should be advertised externally and filled competitively but that internal appointment of existing staff should be considered first where a new post arises from restructuring, being mindful of the stability for the institution, the development opportunities that such a practice offers for staff, and the desirability of avoiding redundancies.

The Committee had been informed of a situation in the past where a former staff member had successfully taken a case to the Commonwealth Secretariat Arbitral Tribunal on the grounds that the Handbook's provisions for dealing with a reorganisation of posts had not been properly observed. The Committee asked about the extent to which the sort of internal process of appointment being proposed by the IPAC consultants would accord with the Handbook. The IPAC consultants responded that the Handbook's provisions should be viewed as guidelines, and that an external competitive recruitment process could be pursued if there were not suitable internal candidates for posts."

44. The IPAC advice, though qualified, thus tended to support the appointment of the Claimant. IPAC thought the Head of Section and Director posts were not "significantly" different (though they did not go so far as to suggest they were the same job). They thought the Director should be subject to external application only if it could not be filled internally; and they thought it could be filled internally by the Applicant, who had "the requisite skills and experience", though her performance would need to be "assessed and validated" by her line manager. They did not suggest (as the Applicant had done) that the Applicant must be automatically awarded the role to avoid constructive dismissal. They did, however, appear to favour her appointment and to disfavour external competition for the post.
45. Whether the Secretary General was bound to accept IPAC's advice is an issue we will later address.

46. On 2nd June 2009 the Management Committee had a more general discussion about restructuring. The Committee agreed:

“... that internal candidates should be given close consideration in a restructuring, mindful of the Secretariat’s existing contractual obligations to them and responsibility as a good employer.

The Committee noted that an individual’s expectations of employment were linked to the existence of the specific post and job description for which that individual was originally recruited, rather than being linked to a specific duration of employment in the Secretariat. **In the circumstances, the Committee agreed that an individual affected by restructuring could not have a legitimate expectation that s/he would continue to be employed in a new post arising from restructuring beyond her/his current contractual term.**

The Committee therefore also agreed that an individual affected by restructuring of her/his post should be offered the option of filling a new post for which s/he was competent, but should also be aware that this offer would only pertain to employment to the end of her/his current contractual term, after which the post would stand vacant and be filled through the usual open and competitive process.

The Committee agreed that the same approach should be taken to all staff affected by a restructuring irrespective of their seniority.”

[Emphasis added].

47. We note that the Committee agreed that an individual affected by the restructuring of *his/her post* should in principle have the opportunity of filling a new post for which he or she was competent. The Committee was not saying however that such an individual must be slotted in at a higher level than that at which he or she was currently employed.

48. In June 2009 IPAC submitted a further report to the Respondent on “Instituting Best Practice”. We need not set out its recommendations.

49. On 8th July 2009 the Secretary-General met with the Applicant. We have a note of that meeting. The Applicant said that she felt victimised and undervalued. The Secretary General said he appreciated and valued her. Later the conversation turned to the Director of HR. The Applicant said that she had the experience and could do the job. She asked how the Secretary General proposed to proceed with the appointment. The Secretary General said that the situation was uncertain and was under consideration. This was true in that no final decision had been taken. The

Secretary-General did not , however, take the opportunity to repeat his frequently expressed view that the Director role should be open to external competition.

50. In a subsequent memo dated 17th July 2009 the Applicant requested that a decision on the Director position be taken before her home leave (scheduled for 24th July 2009) was to begin .
51. The Secretary General apparently received the Applicant's memo after her departure on home leave. He replied on 26th August 2009, explaining that the Management Committee continued to deliberate.
52. In October 2009 the Secretary General set up the Strategic Human Resources Committee to advise him on discretionary matters and to advise the Management Committee on strategic human resource issues. The Applicant was one of those appointed to the Committee (The Secretary General's note of 6th October 2009 refers).
53. Meanwhile a further group of consultants, PriceWaterhouseCoopers ("PwC") were advising on job evaluation. They reported job evaluation scores for a number of jobs including the role of Head of HR Section. They evaluated that job at a points score which fell within the band for grade C. The job was of course currently at grade D. Grade C was level at which Directors were paid.
54. The Applicant then learnt that it was proposed to review the job description on which the evaluation had been based and she registered her concern about this in an e-mail dated 14th October 2009 to DSG Masire Mwamba.
55. On that day, 14th October 2009, the Secretary General announced his decision that the Director Human Resources position should be filled by open competition. He told the Applicant he recognised that this would be a disappointment but not a complete surprise (Note for file 14th October refers).

56. The Secretary General sent a memo to the Applicant the same day (14th October 2009). Since it sets out the substance of the Secretary General's considered position in answer to the Applicant's memo of 24th March 2009, we set it out in full:

"Please refer to your memorandum of 24 March 2009, which was prompted by the Management Committee's decision of 26 January 2009 to recruit a Director of Human Resources. The delay in response is regretted, owing to the need to properly ensure that a final decision taken on this matter is reasonable, lawful, and in the interests of the proper functioning of the organisation.

2 There are three considerations to which attention should be drawn. The first is the importance that I attach to the integrity of the system of appointment by open competition, particularly at senior levels in the Secretariat. **There is an express rule in the Handbook (Sutherland Human Resource Handbook Ch 5 clause 3.1 at page 21) that a vacancy at the grade of this post under consideration is normally the subject of open external competition.** It is most important that the Secretariat honours the provisions of the Handbook, and **I do not see any legitimate reason to depart exceptionally from the Handbook and the enshrined principle of open competition.**

3 The second consideration is that the post of Director of Human Resources Division is not a lateral transfer from the post of Head of Human Resources Section. **While there are many functional similarities with the post of Section head, it is nonetheless expected that the Director should perform at a qualitatively higher level than that expected of the Section Head.** This upgradation was envisaged by the IPAC consultants and is expected by me. This expectation is reflected in the higher grading and remuneration for the post of Director (that will be at Grade C rather than at Grade D as is the case with the post of Head of Human Resources Section), and in the qualitative differences envisaged between the job descriptions for the Section Head position and the Director position.

4 Thirdly, you have drawn attention to your qualifications for the post. These are indeed worthy of consideration, but do not of themselves justify an automatic promotion into this position or derogation from the Handbook's rules and principles. **The advertising and recruitment of the Director through open competition should not be construed as indicating that you are incapable of performing your current role or that of Director; indeed you would be free to apply for the new post.**

5 Having consulted my predecessor carefully, I am satisfied that there are differences and extenuating circumstances in the case of the former Director of Youth Affairs Division which cannot be deemed to have created a precedent. I am also satisfied that assurances were not provided by the former Secretary-General that you would be promoted to the post of Director.

6 **Finally, it should be noted that the advertisement of the role of Director of Human Resources does not amount to a declaration that the post of Head of Human Resources falls simultaneously vacant. Upon appointment of the Director of Human Resources, I will then consider carefully whether the position of Head of Human Resources should continue to exist and will make a decision accordingly.**

7 I trust you will see that my intention is to act in a manner that is fair and in accordance with natural justice, in conformity with the Handbook, and mindful of all essential facts.

8 In the circumstances outlined above, I conclude and confirm that **the original decision of the Management Committee of 26 January 2009 is upheld and that the Secretariat should therefore proceed to open recruitment for the post of Director, Human Resources Division.**"

[Emphasis added]

57. An e-mail of the same day from DSG M-M confirmed to the Applicant that the decision was final.
58. The lines of dispute were thus drawn up. We set out the principal exchanges which followed down to the commencement of proceedings.
59. On 13th November 2009 the Applicant responded to the Secretary-General's memo of 14th October. Having expressed her dismay, the Applicant states as follows:

"... no mention whatsoever of the processes, various decisions or interim decisions that the Management Committee made between the date of my advice and your letter of 14 October or the lack thereof, which contributed to the delay that you acknowledged in your letter. It is therefore unclear to me if your letter was made with the full agreement of other members of the Management Committee.

I must, from the start, state clearly that I have never suggested, and do not now suggest that, as Secretary General of the Commonwealth, you do not have any discretionary powers when taking decisions that you perceive to be in the interest of the Commonwealth Secretariat. Far from it.

Allow me, however, to say, with the greatest respect, that discretion, whether at the national level or international level, the level at which the Secretariat operates, is not absolute. **My understanding is that discretion must always be exercised subject to the established and universally recognised principles of justice, transparency and accountability, which exclude any element of arbitrariness.**

I believe that during the whole period of my tenure so far, certainly since March 2008 and I would argue to some extent even before then, the justice of my case has been demonstrated beyond any reasonable doubt. **Certainly since March 2008, notwithstanding my long and agonising wait for your decision on this matter, I have been performing the functions envisaged for the Director post in all but name, both qualitatively and quantitatively despite all the difficulties.**

I am fully aware that expert advices you have been given regarding this matter confirm that the correct approach, both legally and morally, would be to focus on the job roles rather than the incumbents in the role.

No objective reading of the situation will fail to draw the conclusion that, on the basis of available evidence, it is not the intention to retain the role of Head of Human Resources post the designation of the Director role and yet, in your memo of 14 October 2009, you expect me to believe otherwise by seeking to assure me that “upon appointment of the Director of Human Resources [you] will then consider carefully whether the position of Head of Human Resources should continue to exist ...”

I regret to have to say that in all the circumstances, the fact that it took you close to eight months to respond to my advice of 24 March 2009 and the omission does not inspire much confidence in me that the decision on the Headship of Human Resources or any other decision regarding my position will be made timeously or indeed that it will be made in a fair manner, in accordance with the principles of natural justice.

I do not deny that it is your prerogative to take decisions and action that you consider to be in the interest of the organisation. Equally, I expect you will respect my right to question any such decision or action, which I consider to be manifestly unfair to me.

I request therefore that you review all the available evidence and expert advice submitted to you and reconsider your decision with a view to resolving this matter in line with the principles of fairness, natural justice, and the appropriate and lawful manner; appropriately designating me as Director of HR.”

[Emphasis added]

60. The Secretary General responded on 15th December 2009 expressing regret at the tone of the Applicant’s letter and inviting her to particularise her allegations of unlawfulness and arbitrariness.
61. In her response dated 23rd December 2009 the Applicant re-iterated her position set out in the 24th March 2009 memorandum. She suggested that the IPAC consultants had “*set out very clearly that the position of Director HR is encumbered under the title of Head of HR and therefore not vacant*”. She further referred to the PWC job evaluation, which showed that “the role of Head of HR as presently established, was confirmed and classified as Pay Point C, which is the Director level pay point in the Secretariat. The memo continues:

“° A precedent exists in the Secretariat in the case of the appointment of the Head of Youth Affairs Section to the role of Director upon the upgrade of the post from Head of Section to Director in 2004.

° Since joining the Secretariat in October 2007, I have performed the role of Head of HR (not Section Head), with the responsibilities envisaged for the role under a Director title and certainly, since March 2008, when my reporting line was changed by the Secretary-General, I continue to occupy a Director role.

° The Secretary-General in his conversations with me in the course of the restructuring process of the HR function informed me that the procedures for finalising the HR restructuring process had been concluded and that he was just awaiting the return of one of the DSG's to the office at the time, to finalise the process. Having participated in the development of the processes and having led in all aspects of the restructuring process of the HR function I have been aware that I was to be appointed Director HR initially, up to the end of my first employment contract. This position now appears to be abandoned or reversed."

After referring to her work stress and Dr. S's report, she concludes

"In the light of the above matters, it is my respectful contention that on the particular facts surrounding my position, it would not be lawful, fair, or reasonable to advertise the post of Director HR. In making this contention, I do not in any way purport to refuse to carry out your instructions but simply to respond to your request for the specifics of my complaints, which I have endeavoured to summarise for you.

I would appreciate if these matters could be addressed and I am prepared to discuss."

62. On 12th January 2010 the Management Committee considered a job description for the position of Director.

63. On 27th January 2010 the Secretary General responded to the Applicant's memo of 15th December 2009 as follows:

"2. The finalised job description for the Director of the Human Resources Division is being conveyed to you shortly for ensuing action as envisaged.

3. It should ... perhaps be reiterated again for the sake of clarity that the functions of the Head of Human Resources (responsible for a Human Resources Section) and the Director of Human Resources (responsible for a Human Resources Division) are not envisaged to be the same. **The Director will be expected to perform and lead at a qualitatively higher level in a Division, this being an upgrade of both position and institutional unit within the Secretariat structure than is the case at present.**

4. It should also perhaps be restated that I am satisfied that no assurance was provided to you by my predecessor that you would be appointed to the position of Director, whilst **my position has been clear and consistent throughout that the post should be filled through open competition.**

5. Your concerns about the impact on you personally of managing the Human Resources Section at this time of transition have been the subject of consideration by Management Committee and discussion between us, where I have expressed my continued concern for your welfare and that of all staff in the Section. Management is acutely conscious of its duty of care to all staff. ...”

64. On 12th February 2010 the staff association (the CSSA) wrote to the Secretary General expressing concern about open recruitment for the Director position and expressing a

“considered opinion that the SG should have appointed the current holder [the Applicant] to the position until the holder completes her contract with the organisation.”

The association alleged that open recruitment would “grossly violate” the Applicant’s employment rights. It urged the Secretary General to reconsider.

65. On 12th February 2010 DSG M-M briefed HR staff on the proposed HR function. On 24th February 2010 an organisational structure chart was distributed. The chart showed the Director of Human Resources at the apex with four positions immediately below the Director: Head Resourcing, Head Employee Relations or Policy Development, Head Compensation and Talent Management, Manager HR Organization Performance and Reporting. There was no position of Head of Section. The chart reflected a proposal only and no target date for implementation was specified.

66. On 26th February 2010 the Secretary General responded to the CSSA (with a copy to the Applicant). In denying any illegality the Secretary General set out what he considered the relevant facts as follows:

“Thank you for your memorandum of 12 February 2010, which I assume was discussed beforehand with M O.

The factual and legal assertions raised in the memorandum and its tone are puzzling and I feel it is necessary for me to provide a corrective.

It is incorrect to state that the decision to recruit openly for a Director of Human Resources Division was taken without considering that there is already a Head of Human Resources Section. On the contrary, this was borne fully in mind. The relevant facts of the matter are as follows:

- All Director posts have been filled by open competition since I assumed office.

- The Head of Human Resources Section is graded at pay-point D. The position of Director of Human Resources Division is to be a new position in an upgraded unit and thus is graded at pay-point C.

- The Secretary-General would therefore be acting against both the spirit of the Sutherland Handbook (which encourages competition) and the letter of the Sutherland Handbook (which, in Chapter 5 paragraph 3 and Chapter 7 paragraph 5 expressly provides that the "normal" rule is for open external competition for this grade of post. In particular, Chapter 7, paragraph 5 rules out the possibility of internal promotion at this level of post):

- **The post of Head of Human Resources will continue after the appointment of the Director of Human Resources Division until considered further by the Assistant Secretary-General and Director of that Division in light of operational requirements."**

[Emphasis added]

The last paragraph is clearly important. In spite of the organisation chart, the Secretary General was making it clear that the Head of Human Resources position would continue after the appointment of the Director, pending further consideration by the appointed Director and ASG. This clearly was not a comfortable position for the Applicant; but her role as Head of Section was being preserved for the time being. The letter is copied to the Applicant but it is a little surprising (and a matter about which she was to complain subsequently) that the last paragraph was not the subject of a specific memo to her personally. The fact that her post as Head of Resources will continue *after* the Director is appointed (even though it may thereafter be further considered) is clearly an important message. It may be that the Secretary General thought he had already conveyed this message to the Applicant in paragraph 6 of his memo of 14th October 2009 (above). But the memo to the CSSA sets out the position more positively. The message needed to be re-iterated, in any event, in the light of developments. We are surprised that the point was not addressed in a personal memo to the Claimant in early 2010.

67. The retention of the Head of HR post was noted in a briefing paper to the Management Committee which met on 9th March 2010. The Committee agreed to take legal advice on the implications of accepting the job evaluation findings.

68. The post of Director HR was advertised on 8th May 2010.
69. On 19th May 2010, the Applicant wrote to ASG SC about whether her contract was to be renewed. Her contract was due to expire in October 2010.
70. A schedule of the contracts due to expire was prepared for the Management Committee on 26th May. The entry for the Applicant records: "*contract expires 30/9/2010. One contract served. One further contract to serve*". This was simply a statement the secondment's "rotation" policy. It did not imply that any decision had been made.
71. A memo received from SC for consideration at the Management Committee's meeting of 26th May noted that the Applicant's position was for discussion "based on recommendation to be circulated separately by ASG". The Respondent has stated through its legal counsel that no such recommendation was in fact circulated and that there was accordingly "no such document that could be provided" (letter of 29th July 2011) .When invited by letter from the Tribunal to explain whether this meant that no such document existed, the response did not definitively state that it did not. Mr K on behalf of the legal and constitutional Affairs division responded on 2nd August:

"As set out in that correspondence there was no such recommendation circulated. Specifically, at the Management Committee Meeting the Assistant Secretary-General verbally outlined the factual position concerning the Applicant noting that any decision would be taken when the new position had been filled and that accordingly rule 16 of the Commonwealth Secretariat Staff Rules, governing staff that are not informed about a decision regarding the renewal of their contract, would apply. In accordance with the standard practice of the Committee this statement was not recorded verbatim; rather the decision adopted by the Management Committee, constituted as a Review Board was, namely to inform the Applicant that Rule 16 applied."

72. We infer from the absence of a definitive response that a document probably did exist even though it was not circulated. It would, however, have been the ASG's document and the Tribunal took the view, that since the relevant discretions in this case were exercised by the Secretary-General, not the ASG, it would not be proportionate to delay final consideration of the case by launching yet further enquiries about the document

73. In the event the decision was that the Applicant's contract be extended for six months under rule 16 of the Staff Rules (above). It will be recalled that this rule provides for information about renewal to be given "so far as practicable" six months before expiration. The same Rule triggers a six month extension where information has not been given six months before expiry.
74. On 8th June 2010 SC wrote to the Applicant conveying this decision as follows:

Renewal of contract

I am writing in response to your request to be advised about the Secretariat's intention regarding the renewal of your current contract which, I am informed, expires on 30 September 2010.

As you know, under the Handbook provisions, staff members shall be informed in writing whether they will be offered a new contract. Such information will, as far as practicable, be given not later than 6 calendar months before the date of expiration of their contracts. In your particular case, it is not possible to be definitive at this stage since the HR Section is being upgraded to a Division and an open recruitment of a Director is to take place. Accordingly, I note that the Secretary-General has already informed you that a decision on the post currently filled by you will be made after the matter has been considered further by me and the new HR Director in light of operational requirements in an upgraded Human Resources Division.

In the circumstances, I can confirm that we will treat your contract in accordance with Rule 16 in the Staff Handbook, which states that where information has not been given about a decision on a renewal of a contract at least 6 months before the date of expiration, "the contract will be treated as having been extended for a period of 6 calendar months after the date on which such notice was in fact given".

I hope this clarifies the position."

75. It is not completely clear to us what was the date to which the contract was being extended. It may have been 8th December 2010 (six months after the memo of 8th June); but nothing turns on this for present purposes in view of later events (and in particular the injunction which was to be granted by the Tribunal).
76. On 16th June 2010 the Applicant responded, raising the query as to when the six months was to run and raising a series of complaints and questions about the handling of this issue. She noted that the Secretary General was aware of her contention that her job had simply been relabelled.

77. The Applicant submitted further complaints to Mr C about the communication process.
78. The closing date for applications for the Director HR post was 9th July 2010. The Applicant did not apply. The Secretary General had made it clear that she could apply. Indeed it seems to the Tribunal that she could have applied without abandoning her contention that she should not have to apply.
79. Instead the Applicant made her application the Tribunal on 4th August 2010. On 31st August 2010 Mr Justice Hasan, the then President, in consultation with Mr Dabee , member and Justice Ukeje, member, made orders requiring the Respondent to suspend the recruitment process and the implementation of any decisions relating to the Applicant's contract of employment until the Tribunal makes its final decision on the merits of the Applicant's claim.
80. By a further Order dated 8th April 2011 it was directed that the Applicant's contract is deemed to be extended until 31st July 2011 or until the Tribunal's judgment, whichever is the sooner. On the retirement of Justice Hasan , a fresh panel was constituted. The current President made a further Order on 1st July 2011 extending the continuation of the Applicant's contract until delivery of judgment, which was expected to be on or about 31st August 2011.
81. By her application the Applicant seeks the following substantive orders.

"SUBSTANTIVE ORDERS

3. The rescission of the decisions made by the Respondent on 26 January 2009, 14 October 2009, 15 December 2009, 27 January 2010 and 29 January 2010 to advertise and fill by open competition the role of Director HR which is a role that is substantively held by the Applicant under the title of Head of HR.

4. The rescission of the decision by the Respondent on 15 December 2009 and confirmed on 8 June 2009 that no decision will be made on the Applicant's contract until a new Director HR has been appointed.

5. An order for specific performance to compel the Respondent to:-

5.1 to make a decision on the renewal of the Applicant's contract

5.2 designate the Applicant to the grade that corresponds to her duties and powers which is pay point C, as evaluated by PriceWaterhouseCoopers on 5 – 9 October 2009.

5.3 accord the Applicant the normal terms and conditions of service prevailing in the Commonwealth Secretariat at pay point C.

5.4 pay to the Applicant the salary at pay point C from the 26 March 2008 when she no longer reported to the Director of Corporate Services.

6. An order that the Respondent pay to the Applicant compensation in the sum of £750,000 for injury suffered by the Claimant [Applicant] due to the negligence of the Respondent and its breach of contract and due to the discrimination and/or unequal treatment of the Applicant.
7. Costs.
8. Any other relief as the Tribunal deems appropriate.

IN ADDITION TO OR IN THE ALTERNATIVE to the orders sought in the foregoing paragraphs 3 to 8, the Applicant requests the Tribunal for the following orders:

9. A declaration that the Respondent acted unlawfully by its decision firstly made on 26 January 2009 and reaffirmed with reasons by the Secretary General's decisions on 14 October 2009, 15 December 2009, and 27 January 2010 to advertise and fill the post of Director Human Resources by open competition which was advertised on 29 May 2010 in the Economist.
10. A declaration that the Respondent acted unlawfully in failing to decide the question of renewal or non-renewal of the Applicant's contract in accordance with the Staff Regulations and Rules until the appointment of a new Director of HR at the Meeting of its Management Committee on 26 May 2010.
11. That the Respondent pays the Applicant compensation for the loss of salary and earnings and all other benefits commensurate with pay point C over a period of three years had the Applicant been appointed as Director HR. Alternatively, that the Respondent pays the Applicant compensation for the loss of salary and earnings and all other benefits commensurate with her current pay point D over a period of three years.
12. That the Respondent pays compensation for the loss of salary and earnings and benefits resulting from the failure of the Respondent to appropriately classify the role performed by the Applicant at Pay Point C from March 2008 to the present and continuing.
13. An order that the Respondent pay to the Applicant compensation in the sum of £750,000 for injury suffered by the Claimant due to the negligence of the Respondent and its breach of contract, and due to discrimination and/or unequal treatment of the Applicant.

14. Costs.

15. Any other relief as the Tribunal deems appropriate.”

82. The Applicant’s contentions are fully set out in her application and her very extensive reply and we will not repeat them in detail. The length and diffusivity of her submissions, particularly those made in the Reply did not always lend clarity. However, her essential allegations, already rehearsed fully in the correspondence we have set out, are clear enough. She claims that the Director post should not have been subject to open recruitment because she was already doing the role; that the Director post should have been assigned to her; that her legitimate expectations were breached in this respect; that she had been subject to victimisation, discrimination and unfair treatment in the way she had been treated and had suffered personal injury as a result of it.
83. The Respondent’s case is succinctly expressed in the Respondent’s Answer and Rejoinder. The Respondent’s essential case is that the decisions made were within the scope of the discretion the Secretary-General enjoys and in accordance with the Staff Regulations and declared equal opportunities policy and were not unlawful.

Two principles of law

84. This Tribunal is governed by the principles of international administrative law.
85. Two principles need to be stated at the outset.
86. First, it is well established that in examining decisions made in the exercise of discretionary power, the tribunal may not substitute its judgment for that of the organisation: see Re. Ballo (ILOT Judgment No. 191); In Re. Gracia de Muniz Administrative Tribunal Judgment 269. It may impugn such decisions on a variety of grounds but not on the simple basis that it disagrees with the judgment which was made. The principle was expounded in Judgment 2510 of the United Nations Administration Tribunal, which the Court stated at paragraph 10.

“... an international organisation necessarily has power to restructure some or all of its departments or units, including by the abolition of posts, the creation of new posts and the redeployment of staff (see Judgments 269 and 1614). As was pointed out in Judgment 1131, the Tribunal may not supplant an organisation’s view with respect to these matters, and decisions on them are discretionary and subject to limited review.”

87. Secondly, an organisation is not in principle, obliged to accept advice or recommendations from advisers: BA v International Bank for Reconstruction and Development World Bank Tribunal Decision No. 423. In that case the Bank was not bound by recommendation of its own grievance panel . Moreover since it had not committed in advance to implement its recommendations in full, it was not an abuse of discretion to refuse to do so (see para. 27 of the Judgment).

The central issues in the case

88. The Tribunal identified the following issues as being central to the case. Depending on the resolution of these issues it might or might not be necessary to address further issues.

89. The issues are as follows:

(1) Whether the Applicant was entitled to the position of Director, HR

(2) Whether the Secretary General was bound by the recommendations of the consultants

(a) IPAC, in relation to whether the Director HR should be subject to open competition

(b) PwC, in relation to evaluation of the Applicant’s job

(3) Whether the decision to fill the Director position by open competition was in accordance with or contrary to the Staff Regulations Staff Rules and applicable policy guidance,

(4) Whether the Respondent committed any breach of contract or duty

in not implementing the job evaluation study outcome in relation to the Claimant

(5) Whether the non-renewal of the Applicant's existing contract, and the delay in deciding about it, amounts to a breach of contract or duty

(6) Whether there was any obligation on the Respondent to renew the Applicant's contract.

(7) Whether the Applicant had a legitimate expectation that it would be renewed

(8) Whether the Respondent acted in bad faith.

(9) Whether the Respondent victimised or discriminated against the Claimant or treated her unfairly

(10) Whether the Applicant suffered personal injuries in consequence of any breach of duty.

(11) What remedy, if any should follow and in that connection, whether internal remedies have been exhausted and whether there was undue delay.

90. Some of these questions may be answered quite shortly in the light of the answers to other questions. We deal with them in turn. At certain points it will be necessary to deal with certain additional factual matters which did not fit into the chronological summary set out above.

(1) Was the Applicant entitled to the position of Director HR?

91. Under her contract of employment, the Applicant was employed as Head of HR Section, not as Director. Her contract has never been varied so as confer on her the status of Director.

92. The Applicant says, however, that she has been doing the job of Director in all but name. She says the Director post is nothing more than a “re-labelling” of her existing job. To use her expression (e.g. Reply para. 6.29.12), she contends that the Director post is already “encumbered” by her.
93. We disagree. We do not consider that the Director role can fairly be described as the same job the Applicant is doing. It is a more senior role as “strategic partner” of the Secretary-General, ASGs and other Directors.
94. We recognise that job descriptions can never convey a complete picture of the job; that the accuracy and appropriateness of various job descriptions and proposed job descriptions in this case is a matter of debate; and that (whilst we cast no aspersions whatever) it is not difficult for anyone writing a job description to do so with a particular conclusion in view. Moreover, where the jobs being compared are at the apex of the same function (in this case HR) a good deal of similarity is to be expected in the description of the work.
95. In this case, however, the Applicant’s job involved reporting to a Director. That line of reporting was withdrawn by agreement for the time being because of relationship difficulties, so that the Applicant then reported to a DSG. But the fact that the job was fashioned as a job reporting to a Director is a very powerful indication that a lower level of authority and responsibility is involved. Moreover we think it plain that, as the Respondent has submitted, a higher level of strategic engagement (and with it a different level of performance) can be expected from a Director than from a Head of Section. The Director post could also be regarded also as requiring longer experience.
96. It is true that IPAC recommended that (subject to assessment of her performance) the Applicant could be appointed to the Director role. But this does not mean that she is doing it already.
97. The PwC job evaluation study suggests that her responsibility as Head of Section merited a “C” grading, the same as a Director. But this does not mean she is doing the Director’s job. Leaving aside the question (see below) whether the evaluation

outcome had to be accepted and implemented, a finding by a job evaluator that a “score” for job Y falls within the same grade bracket as a “score” for job Z does not mean that jobs Y and Z are the same job. Moreover, an employer who found that job Y was evaluated at a score yielding the same grade level as job Z when job Y was designed to report to job Z (which is comparable to the situation here) would immediately question the appropriateness of either the job evaluation or the grade structure.

98. The job of Director was conceived as a more senior job than the job of Head of Section and justifiably so.
99. We reject the Applicant’s claim that she is already doing the Director’s job, or that the Director role is a mere re-labelling of her existing job.
100. In conclusion, the Director HR job is not “encumbered”. The Applicant is not “entitled” to the post of Director.

(2) Was the Secretary-General bound by the recommendations of the consultants

101. No.
102. As discussed above, an international organisation is free, in principle, to take advice and to reject it or accept it as it sees fit.
103. The Secretary-General was not obliged to accept the recommendation of IPAC that the Applicant be appointed, either in the qualified form in which that recommendation was given or at all.
104. He was also entitled not to implement the job evaluation study of PwC. The very fact that the grade indicated was the same as the grade to which the job was designed to report would raise questions about the appropriateness of the grading structure and/or of the evaluation which would cause any employer to pause. The fact that a restructuring was about to take place, (with possible reconfiguration of roles) also provided reason not to act on the evaluation.

105. There was no abuse of power in not accepting and implementing the recommendations of either group of consultants.

(3) Was the decision to fill the Director role by open competition in accordance with or contrary to the Staff Regulations Rules and Policy Guidance?

106. It is an identifiable principle in the governing rules of the Commonwealth Secretariat that new positions should be open to competition.

In particular

(1) The constitutional document establishing the Commonwealth Secretariat is the Agreed Memorandum of 1965 . It provides (in what was originally para. 35 and is now in paragraph 30).

“The paramount consideration in the selection of staff and in the determination of conditions of service will be the necessity of securing the highest standards of efficiency, competence and integrity, due regard being paid to the importance of recruiting the staff on as wide a geographical basis as possible within the Commonwealth. The Secretary-General will have discretion, in the light of the above considerations, to appoint senior staff to the Service of the Secretariat from among panels of names submitted by Commonwealth Governments...”

[Emphasis added]

The importance of appointing the best available candidates is thus a founding principle of the Secretariat. Opening new positions to external competition is much more consistent with this principle than restricting posts to internal candidates.

(ii) Regulation 11 of the Staff Regulations reflects this principle by requiring as follows:

“In the appointment, transfer and promotion of staff the utmost consideration shall be given to the necessity for securing the highest standards of efficiency, competence and integrity ...”

(iii) The principle runs through the Guidance to HR management also. For example:

- (a) Chapter 5 para. 3 provides that **“vacancies in Grades CS6 and above [the Applicant is grade 6] are normally the subject of open external competition, except where the Secretary-General exercises his/her discretion to effect a lateral transfer (Chapter 7)”** (Yellow book p. 21).”
- (b) Chapter 7 para. 6 notes that **“Lateral transfers”** can be made outside normal procedures, for example, to meet urgent need. Appointing the Applicant as Director would have been a promotion, not a lateral transfer.
- (c) Annex 10, dealing with rotation proposes **“that staff subject to rotation should be encouraged to apply for posts at a higher grade through a process of external open competition”**.
- (d) Moreover the principle of equal opportunity, which is itself incorporated into the Guidance, points to the desirability of open recruitment as a principle where a new job is created. It is good equal opportunities practice to advertise new jobs and not to restrict them to internal candidates

107. The Secretary General made clear from the start the importance he attached to subjecting new positions to open recruitment. In doing so, we find that he was embracing the principle equal opportunity and not infringing it. He was entitled, in the exercise of his discretion and in line with the Staff Regulations and HR Guidance to subject the Director role, as a new post, to outside competition.

108. Our conclusion here is not affected by the decision of a previous Secretary General in promoting the head of youth affairs or other particular instances of the treatment of others on which the Applicant relied. We deal with these below in connection with the discrimination allegation.

(4) Was there a breach of contract in not implementing the job evaluation?

109. It follows from an analysis above that we consider that the Secretary General had a discretion whether to implement the evaluation made by PwC and that he did not abuse his power or act outside the limits of his discretion in not implementing it.
110. Unsurprisingly there had been re-gradings when certain other certain posts were re-evaluated in the past (for example when Human Resources Officers were re-designated as Human Resources Advisers). This does not mean that the Secretary-General was obliged to implement every re-evaluation or to act immediately upon every re-evaluation.

(5) Was the non-renewal of the contract or the delay in renewing it itself a breach?

(a) Non-renewal

111. The starting point is the contract of employment, which is expressed to be renewable “by mutual agreement”. The Applicant had no contractual right to insist on renewal
112. The general policy is for a first contract at this level to be renewed. This is part of the Respondent’s the rotation policy. However, there were special circumstances in the present case. The future of the Head of HR Section post was in doubt. Indeed it did not exist in the organisation chart which had been distributed. Although the Applicant was told that the post would continue for the time being on the appointment of the Director, its future would then have to be considered. In the circumstances there was no abuse of discretion in not renewing her contract.

(b) Delay

113. The Applicant was definitively informed, when being copied into the memo to the CSSA on 26th February 2010, that her job would continue to exist, for the time being, after the Director post was filled.
114. She was also eventually given notice (on 6th June 2010) that her contract would be extended for six months under the Staff Rules. This was not done until less than four months before her contract was due to expire. Staff Rule 16 says that where

practicable, the individual should be informed at least six months before expiry whether or not the contract would be renewed. Here it was not practicable to tell her six months before expiry whether it would or would not be renewed because no decision had been made and the long term future of her post continued to be in doubt.

115. We bear in mind that the stance adopted by the Applicant in relation to the Director role was posing challenges for the organisation, which may well have affected the usual flow of communication to the Applicant. Nonetheless the communication from the Secretariat to the Applicant about her future was not as clear or as direct as it might have been. We would have expected the notification that the Head of Section job was to continue for the time being would be the subject of a personal communication to the Applicant. Instead she was informed as a “copied in” recipient of the memo to the CSSA. The memo extending her term was somewhat ambiguous as to date. Further no initiative was taken to discuss with her the likely or possible timetable of events affecting her position.
116. We do not consider that these imperfections amounted to a breach of the express or implied terms of her contract. Whilst the communication could have been simpler, clearer and more personal, the underlying decisions were communicated to her. The uncertainty of her situation reflected the continuing uncertainty about the shape of the HR function.
117. The Applicant’s legal challenge and the injunction granted have necessarily prolonged that uncertainty.

(7) Did the Claimant have a legitimate expectation as to renewal?

118. Yes
119. We accept that by virtue of the rotation policy, a person at the Applicant’s grade holding a particular post under a first three year contract has a legitimate expectation that it will be renewed.

120. Where a restructuring is taking place and the post of the staff member is to disappear and the staff member is notified of non-renewal in good time, the expectation may not apply. To this extent we agree with the Management Committee's stance at the meeting of 2nd June 2009 quoted above. Here, however, the Respondent did not give notice of non-renewal to the Applicant. It did not tell her that her post would definitely disappear. Instead, it confirmed that her position as Head of Section would continue for the time being subject to further consideration once the Director was in place. In these circumstances she retained and retains the legitimate expectation that she would be granted a further contract running to the end of September 2013. This legitimate expectation is unaffected by the grant of the injunction in her favour or by the lifting of that injunction by this judgment. We so declare.

(8) Bad faith

121. We reject the allegation of bad faith against the Secretary -General.

122. He was committed from the outset to honour the principle that there should be open competition for new jobs. Partly as a result of challenges raised by the Applicant and advice received from consultants, he and the management team paused for consideration. Whilst (as we have observed above) communications about the Applicant's existing position and the non-renewal of her contract could have been clearer and more personal, we do not find any basis for an allegation of bad faith.

(9) Victimisation/Discrimination/breach of equal opportunity/unfairness

123. We do not consider that the Secretary General victimised the Applicant acted in breach of equal opportunities or unfairly towards her.

124. As we have indicated above, in subjecting a job (which we find to be a new post) to open competition, he was acting in accordance with equal opportunity principles and in accordance with Staff Regulations and HR guidance.

125. We find nothing in the treatment of other staff, which raises an inference of unfair discrimination or breach of equal opportunity and/or unfairness. We will not repeat out analysis on previous questions which bear on these issues.
126. The Applicant relies on the treatment of IT. He had been head of the Youth Affairs Unit. He was appointed Director (under a previous Secretary-General) when the unit became a Division without open competition. The Respondent explains this as a special case. Mr T was a Zimbabwean. Zimbabwe was in political upheaval. Zimbabwe's withdrawal from the Commonwealth meant that he would not be eligible for a fresh contract after the twelve months remaining in his existing contract. The Respondent says that appointing him as Director for a short time provided operational stability for a short period and served a humanitarian purpose towards him. The post was subject to open recruitment at the end of his contract.
127. The circumstances of the present case did not involve these special circumstances or anything analogous. But even if we had judged the circumstances of Mr T's case to be similar, we do not consider that the exercise of discretion in Mr T's case to appoint him Director would abrogate or limit the general principle in the Staff Regulations and Guidance that open competition should be the rule, rather than the exception. We do not draw any inference of discrimination or unfairness from the favourable treatment of Mr T.
128. The Applicant has alluded at various points to the treatment of other individuals in respect of specific contractual issues they have had with the Secretariat. In contrast to Mr T's treatment, which did raise a case for explanation, we do not find that there is any sufficient basis for comparison to justify close examination of these other cases.
129. For example, the circumstances in which a Ms. O was granted a Higher Responsibility Allowance appear remote from the circumstances of the Applicant's case and do not assist.
130. We do not consider there is any basis for an allegation of discrimination, breach of equal opportunities, victimisation or unfairness towards the Applicant.

(10) Personal injury

131. We have not found any relevant breach of duty to the Applicant, so the question of what injuries she has suffered and how they were caused does not arise for decision.
132. We do note however that serious health problems had already set in by the time the Applicant was notified of the proposal to put the Director job out to competition. Further the Applicant (through Dr. S) was attributing these problems to alleged bullying (by a particular individual) which is not the subject of a claim before us.
133. We do not understand that we are being asked to make any rulings on whether the Respondent had a safe system of work or whether the Respondent overworked her in such a way as to breach that duty. Even assuming (without deciding) that such a claim would be within our jurisdiction as entailing “non-observation of a contract” (within Article II para 1 of the Tribunal’s Statute) we do not think such a claim could possibly be established without an extensive oral hearing and oral evidence. No oral hearing has been sought in the present case.

Conclusion on substance of claims

134. It follows from the determinations above that we have rejected the Applicant’s claims, except that we declare that she retains a legitimate expectation of being granted a fixed term contract running to the end of September 2013.

(11) Remedy

135. In view of the conclusion set out in the previous paragraph, it is strictly unnecessary to consider further questions relating to remedy (including exhaustion of internal remedy and delay) but we do so briefly.

Exhaustion of internal remedy

136. The Respondent does not plead or rely on any failure to exhaust internal remedies.

137. We think it was right not to do so. We find that there was no failure by the Applicant in this regard.

Delay

138. Paragraphs 3-4 of Annex II of the Statute of CSAT provide

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

(a) in relation to a contract of service, the applicant has exhausted all other remedies available within the Commonwealth Secretariat or other body or organisation eligible under Annex A including the redress of grievance procedures specified in the contract or in relevant Staff Rules; and

(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 or other eligible body or organisation, 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) Notwithstanding the provisions of paragraph 3(a) the Tribunal may consider an application where all other remedies have not been exhausted where the Tribunal determines that the remedies available cannot adequately address the issues raised in the application.

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.”

139. It could clearly be argued that the event giving rise to the application was in reality the decision to subject the Director job to external competition, which was taken and announced well over 90 days before proceedings in the Tribunal were started. However, the advertisement of the position did not occur until 29th May 2010 (less than 90 days before 4th August) and there were further relevant exchanges about the

Applicant's existing contract after that time. We are prepared to treat these recent events as the events giving rise to the application and thus to treat the claim as being in time.

140. The Respondent nevertheless submits that delay may be relevant to remedies the Tribunal might otherwise grant; but since we dismiss the claims in substance, it is not necessary to address this question.

Costs

141. As regards the costs of this Application, our order is that each party bears its own costs.

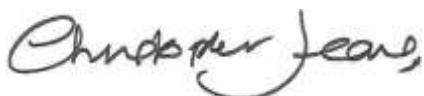
Outcome

142. The claims are dismissed, except that we declare that the Applicant retained and retains a legitimate expectation of being granted a further fixed term contract running to the end of September 2013.

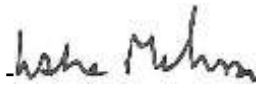
143. For the avoidance of doubt, the existing injunction is at an end from the date of the judgment.

Given on this 26th day of August 2011

Signed

A handwritten signature in cursive script that reads "Christopher Jeans".

Christopher Jeans QC, President



Justice Usha Mehra, Member



R.N. Ukeje.

Justice R N Ukeje, OFR, Member