



The Commonwealth

CSAT APL/ 23

THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

MADONNA LYNCH

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before The Tribunal constituted by

Mr Christopher Jeans QC, President; Justice Seymour Panton O.J., C.D., member; and Justice Sandra Mason QC, member.

RULING

The Ruling of the Tribunal is that

(i) the Tribunal has no jurisdiction to entertain this Application because the Applicant has failed to exhaust internal remedies before bringing the Application

(ii) the Application is accordingly rejected.

REASONS

1. The Tribunal met to consider

(a) the Respondent's contentions

(i) that the Tribunal has no jurisdiction over a matter falling within the purview of the Respondent's disciplinary procedures

(ii) that the Application cannot be entertained because internal remedies had not been exhausted at the time of the application

("the preliminary issues")

(b) The Applicant's request for disclosure, opposed by the Respondent.

2. The issue of disclosure does not arise if either of the Respondent's contentions on either of the preliminary issues is upheld.

Brief history of events relevant to the Tribunal's determinations

3. Madonna Lynch (the Applicant) has been employed by the Commonwealth Secretariat (the Respondent) for the greater part of eleven years. There was a short break in her employment in 2006/7.

4. On 21st September 2012 the Acting Director of the Secretariat's Political Affairs wrote[1] to the Applicant setting out certain allegations about remarks the Applicant was alleged to have made at work. We do not think it is necessary or appropriate to give further currency to those allegations by setting out any detail.

5. On 23rd April 2013 the Director of Human Resources wrote[2] to inform the Applicant that these alleged remarks would be investigated by a Disciplinary Board ("the Board"). There were two charges: one relating to 18th September 2012, the other relating to April 2012

6. The Board reported[3] in July 2013. In the Board's "unanimous" opinion, "*the investigation had not uncovered evidence to substantiate either of the charges*". It stated the allegations should accordingly be dismissed.

7. The Report dismissed the charges against the Applicant without offering any summary of the evidence, and with little byway of detailed conclusions or reasoning.

8. Nonetheless, the Report did "highlight" various "*observations and recommendations*" arising from what is described as its "*findings*". Some of these were critical of the Applicant.

9. The Report stated that one of the incidents in question "reflected poorly" on the Applicant. On page 4 the Report states:

"...although there was no verifiable evidence for the charges, there appeared to be circumstantial evidence that her behaviour at work on occasion, did not reflect well on her. Despite her frequent correspondence evoking Commonwealth values and principles, her own behaviour seems at times to have failed to uphold the ComSec spirit of that mix of professionalism, benign tolerance and amicable collaboration needed to make cross-cultural diversity in the workplace effective. "

10. This paragraph of the Report goes on to state that the Applicant appeared on occasion to have behaved in a “confrontational manner” and that her attempt “to portray herself as entirely blameless” for certain background tensions and unease was “not convincing”. Some examples are then set out.

11. At the foot of this paragraph then appears the “unanimous recommendation of the Board” that “while the allegations should be dismissed...[Ms Lynch] should be officially reminded that inappropriate or inconsiderate behaviour will not be tolerated”

12. After making various findings and recommendations about other staff members and HR processes and about the way forward, a further specific recommendation is set out about the Applicant, near the foot of the Report, stating that she

“should be informed of the importance of bearing in mind the environment in which conversations are taking place...it is incumbent on [the Applicant] and all staff to be conscious of the content and manner of all their communications at all times and, in particular, in open plan office environments. When working in such environments, staff must acknowledge the possible sensitivities of staff they work with and treat all Secretariat Colleagues with the respect we ourselves expect.

13. The Applicant was dissatisfied that the Report, which acquitted her of the charges, should nonetheless have included observations and recommendations which were critical of her.

14. On 8th August 2013 the Applicant wrote a letter of appeal to the Secretary -General under paragraph 17 of Annex 1 of the Secretariat’s Disciplinary Procedure. The appeal was expressed to be against what she described as the “defamatory and unsubstantiated comments made about me in (the Board’s)report”.

15. The letter runs to some 21 pages. In addition to attacking the criticisms made of her in the Board’s report, the letter includes complaints about the procedure followed, the roles played by particular individuals and extensive discussion of the facts and evidence.

16. At paragraph 76 and by way of conclusion she sets out her requests of the Secretary-General: “(1)The Secretariat expunge the Disciplinary Board’s report and all its related documents from my personnel file and all the Secretariat’s records.

(2)The Secretariat compensates me for the damages I have suffered to my personal and professional life, because of the proceedings of the Disciplinary Board, and the manner in which its proceedings denigrated my integrity

(3)The Secretariat informs all individuals to whom it has relayed copies of the Disciplinary Report, or to whom it has orally informed of its contents, that the findings of the report have been annulled and retracted. All such individuals must also be informed that it is prejudicial, and personally and professionally inappropriate to relay any information contained in the report about me to anyone.

(4) The Secretariat to appropriately compensates me for the procedural irregularities of the Disciplinary Board.

(5)The Secretariat compensates me for its delay in addressing the matter.

(6)The Secretariat meets my legal costs, which was necessitated by the Secretariat’s insistence to improperly convene a Disciplinary Board.

(7) The Secretariat compensates me for exemplary damages for the compromised Disciplinary Board’s abuse of power, its blocking of exculpatory evidence, its conflict of interest, its misrepresentation of evidence, and the effects [sic] its defamatory report further had on my well-being.

(8) The Secretariat calls the Director of Human Resources, Ms Zarinah Davies, to account through appropriate disciplinary measures, for abdicating her important duty of care to me; and for her serious dereliction of duty by not faithfully upholding the rules and procedures of the Secretariat towards me in good faith.

(9) The Secretariat apologise to me by way of letter for its gross abuse of power, lack of due process and the adverse effects it has caused to my health and my good name.”

17. Receipt of the appeal was acknowledged by the Secretary General’s office on 20th August 2013. On behalf of the Secretary General, Mr Simon Gimson stated that the Secretary General was on leave that the appeal had been brought to the Secretary-General’s attention and was being considered.

Correspondence[4]attached to the Applicant’s Reply shows that when she chased for a response, the Secretariat wrote on 15th October 2013 stating that it had asked its investigator to pause whilst

discussions with the Applicant's solicitor were underway. The Applicant replied the same day stating that she looked forward to "understanding the reasons for this delay, and await the outcome of legal counsel consultation".

18. It appears that without corresponding further with the Secretariat she filed her application to the Tribunal. The Application is dated 2nd December 2013 and is stamped as received on 4th December 2013.

19. The application to the Tribunal is complex and diffuse. It is relevant to note that the "decision contested" is that of the Disciplinary Board (See Section 1(5)) and that the "grounds" listed in Section III relate to the convening of the Disciplinary Board, the procedure it followed, its investigation, its handling of evidence, its alleged failures of due process and its adverse comments of the Applicant in the Report. The Relief sought includes the expunging of the Board's report from all records and compensation. Wide ranging disclosure is sought in relation to statements and materials before the Disciplinary Board.

20. On 18th December 2013 the Secretary-General wrote to the Applicant to give his decision on her appeal under the Disciplinary Procedure. He upheld her appeal in part.

21. The Board's recommendation that the Applicant be "officially reminded that inappropriate or inconsiderate behaviour will not be tolerated" amounted, in the Secretary-General's view, to an official reprimand and thus to involve the imposition of a disciplinary penalty. This was inappropriate where *"a staff member has been exonerated on all charges of misconduct, as is the situation in your case"*

22. He went on to state that his appellate function was restricted primarily to correcting errors of law and that it was not for him to "descend into findings of fact made by the Board" and that, in the absence of new evidence warranting interference, he would not overturn factual findings or opinions based on factual findings. He added, however, that he found the Board's comment to the effect that the Applicant's behaviour *"had contributed significantly to the problem"* was *"justified on the evidence"*. He concluded

"In the light of the above, my decision, which under the Secretariat's internal law is final, is as follows:

a. The report of the Disciplinary Board dated 15th July 2013 shall be expurgated to remove the recommendation that you be officially reminded that inappropriate or i inconsiderate behaviour will not be tolerated, as this amounts to a reprimand and thus the unjustified imposition of a disciplinary penalty;

b. Your personnel record will be annotated to reflect that you were found not culpable of the allegations of misconduct raised against you and that, as such, you were not subjected by the Secretariat to any form of disciplinary penalty

c. As you were found not culpable of misconduct by the Disciplinary Board and as you have prevailed in this part of the disciplinary appeal to me, you will be reimbursed by the Secretariat for the legal fees that you incurred in defending yourself before the Board and in bringing this appeal, provided that those fees are (i) deemed to be reasonable; and (ii) supported by suitable invoices provided by your solicitor

d. In all other respects your appeal is dismissed"

23. So the Secretary-General's decision considerably changed the landscape.

24. On the one hand it expunged are commendation in the Report adverse to the Applicant (because it amounted to a reprimand of the Applicant which was inconsistent with her acquittal); it eured the annotation of the personnel file to make clear that the Applicant was found not culpable; and it awarded her costs.

25. On the other hand the Secretary-General's appellate decision specifically endorsed the Board's comment that the Applicant had contributed to the problem and it declined to grant her the wider remedies she had sought.

26. The Applicant did not submit a fresh Application impugning the Secretary-General's appellate decision. Nor did she submit an amended application focussing on the Secretary -General's decision and the new landscape it created.

27. It is in these circumstances that we now consider the preliminary and interlocutory matters which are raised for our determination.

28. It is relevant to address first the preliminary issues raised by the Respondent. If the Respondent is correct in saying that the Tribunal lacks jurisdiction or cannot consider the claim because internal

remedies were not exhausted, then the claim falls to be dismissed and the Applicant's disclosure application does not arise.

The Respondent's contentions on the preliminary issues and the Claimant's response to them
Jurisdiction

29. The Respondent contends that the Tribunal lacks jurisdiction over disciplinary decisions. It points out that under Article 1 of the Tribunal's statute relevant jurisdiction is confined to applications which allege "non-observance" of the contract of employment. It further points out that the disciplinary proceedings were governed by the procedure in Annex 1 to the Staff rules and that the Secretary-General's decision on appeal is stated by paragraph 17 of the Schedule to be "final".

30. In the alternative the Respondent contends that the Tribunal's jurisdiction over disciplinary cases is restricted to cases where the wrong procedure has been used or where there has been an abuse of power.

31. The Applicant contends that the matters of which she complains can be classified as breaches of the implied duty of trust[5] in the contract of employment and thus fall within the Tribunal's jurisdiction over "non-observance" of the contract. In any event, she contends the Tribunal does have jurisdiction over abuse of power and that the present case can be brought within that rubric.

Exhaustion of remedies

32. Under the heading "*The complaint is irreceivable*"[6]the Respondent invokes Article II paragraph 3 of the Tribunal's Statute which debars the Tribunal from considering an application where alternative remedies have not been exhausted. It points out that the appeal (an internal remedy) was still pending at the time of the application; that the Secretary-General's decision materially changed the situation; and that there has been no further or amended application directed to the Secretary-General's decision.

33. The Applicant contends [7] that she took all reasonable steps to exhaust internal remedies and points to the delay in receiving the Secretary-General's decision on appeal.

The relevant provisions of the Tribunal's Statute in Full

34. The Statute provides (so far as material, emphasis added) as follows:

Part II Jurisdiction

Article II

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

(a) a member of staff of the Commonwealth Secretariat...

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

2. *[Not relevant]...*

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 ...including the redress of Grievance procedures specified in the contract or in relevant Staff Rules

(b) [the application is filed within the time limit, detail not relevant]

(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. *[Extensions of time for late applications - not relevant]*

5. *For the purposes of this Statute*

(a) "contract of employment" and "terms of appointment" include all relevant Regulations and Rules in force at the time of the alleged non-observance.....

The Staff Rules and Disciplinary Procedures

35. The Staff Rules are incorporated in to the contracts of staff members and disputes about them are expressly stated to be within the jurisdiction of the Tribunal under Article II of the Statute.

36. The "General Rules" section of the Staff Rules specifically provides that the Disciplinary Rules and Procedures in Annex1 form part of the Rules. Annex 1 provides in detail for the procedures and powers of a Disciplinary Board. Paragraph 17 provides for the right of appeal
"to the Secretary General, whose decision shall be final"

37. No timescale or procedures are specified in relation to the Secretary-General's decision. Does the Tribunal lack jurisdiction because the matter relates to Jurisdiction and disciplinary procedures?

38. In the light of our conclusions on the "Exhaustion of internal remedies" issue (below) we do not think it necessary or appropriate to make any general ruling about the precise scope for review by this Tribunal of disciplinary decisions.

39. However, even assuming (but without deciding) in the Applicant's favour that there are circumstances in which disciplinary decisions could be reviewed by the Tribunal, the provision in the disciplinary procedure that the Secretary General's decision on appeal is "final" is, in our view, a highly significant one. It means that, ordinarily at least,

(i) It is the Secretary-General's decision which must be the focus of the Application to the Tribunal and

(ii) that argument about the scope for the Tribunal to review disciplinary decisions must address the meaning and intention of the rule that the Secretary-General's decision is final .

Exhaustion of internal remedies

40. At the time she brought her application to the Tribunal the Applicant had not exhausted her remedies by awaiting the Secretary- General's decision.

41. Article II paragraph 3 of the Statute bars the Tribunal from considering the application unless the Applicant "has exhausted" internal remedies. Does this mean that the remedies must be exhausted before the Application is brought or does it merely delay the Tribunal's power to consider the matter?

42. We think that ordinarily the rule must require the exhaustion of remedies before the application is brought. It is not sufficient that remedies have been exhausted at the later point when the Tribunal considers the matter.

43. We say this principally for two reasons.

44. First, the intention is clearly that there should be no resort to litigation, with its costs, special burdens and its confrontational dimension, without using available internal processes first. This would be frustrated if an individual could launch proceedings whilst internal processes are still in train.

45. Secondly, internal appeals or grievances may change the decision or the scope and basis for any legal attack. It therefore makes sense that the member of staff should obtain a final outcome through internal process before applying to the Tribunal.

46. Article II Paragraph 3(c) establishes an exception "*where the Tribunal determines that the [internal] remedies available cannot adequately address the issues raised in the application*".

47. This is not in play here. It was clearly within the power of the Secretary-General to deliver remedies which adequately addressed the issues raised by the Applicant. Indeed he did deliver some significant relief. If anything his powers were *wider than those of the Tribunal. For example he could cause disciplinary action to be instituted against a member of staff (though he did not in fact do this). In short this was not a case where internal remedies could not address the issues.*

48. Quite apart from the exception in paragraph 3(c) of Article II we can envisage that there might be cases where completion of the internal remedy process could be described as a mere formality. In such cases different considerations might arise, though we emphasise that we express no final view on the matter.

49. In the present case, the Secretary-General's decision was far from a formality. Indeed, he did allow the appeal in part.

50. Moreover, the provision (in paragraph 17 of Annex 1 to the Staff rules) that the Secretary-General's decision is "final" is significant here. It meant that it was especially important, as we have reasoned above, that any application should

(i) focus on the Secretary-General's decision

(ii) address the implications of the provision in the Disciplinary Procedure that his decision was final.

51. Expressed in broad practical terms, this is not a case where an attack on a first instance decision or action (here those of the Disciplinary Board) can simply be transposed as an attack on the appellate decision (here that of the Secretary-General). The Secretary-General's decision is different in nature and outcome and is made under a discrete provision whereby the decision is deemed "final". It follows that any legal attack on his decision would have to be different from that addressed in the application, which addresses only the decision of the Disciplinary Board.

Delay

52. We do not propose to offer any general analysis as to how delay on the part of the Secretariat in delivering internal remedies might affect the operation of the Statute so as to justify the presentation of an application which could otherwise be regarded as premature.

53. The facts do not bring the present case into the territory where such an analysis might be necessary. In particular we note the following:

(i) The appeal was exceptionally complex, involving a lengthy history; on any view it was one which required significant investigation.

(ii) It was (correctly) directed to the Secretary-General, the official at the very apex of the executive. Whilst he no doubt had considerable assistance available to him, it must be recognised that if he is to take his appellate responsibilities seriously, it will be necessary for him to assign significant time to the matter and that delays may sometimes occur.

(iii) The Applicant had been assured that the matter was receiving attention and an investigator had been identified

(iv) There was a notified "pause" in October whilst lawyers on both sides discussed the position

(v) The Applicant did not write to the Secretariat warning of any intention to start proceedings if a decision was not received within a given timescale.

54. In the circumstances the failure to exhaust internal remedies cannot be justified by delay on the part of the Secretariat, even assuming (without deciding) that unjustified delay might give rise to a further exception or qualification on the general rule.

Conclusion

55. The Tribunal is precluded from considering the case because alternative remedies had not been exhausted when the application was brought.

56. The application is dismissed. Accordingly, the issue of disclosure does not arise.

Costs

57. The Tribunal makes no award of costs in relation to the application. The Applicant has failed in her application but having regard to the history of the matter (including the Secretary-General's acceptance that the Disciplinary Board erred in certain respects) the Tribunal considers an award of costs against her to be inappropriate.

Given on this 18th day of July, 2014.

Christopher Jeans QC, President

Judge Seymour Panton Judge Sandra Mason