

CSAT APL/40

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

**RAM VENUPRASAD
APPLICANT**

and

**THE COMMONWEALTH SECRETARIAT
RESPONDENT**

Before the Tribunal constituted by

**Mr David Goddard QC (Presiding Member);
Mr Chelva Rajah SC; Professor Epiphany Azinge**

INTERIM JUDGMENT

Introduction

- 1 The Applicant, Mr Venuprasad, was employed by the Commonwealth Secretariat from 1 November 2001 to 31 December 2016. His final post was as Deputy Head of Office in the Secretary-General's Office. He was employed in that position from 16 November 2014 to 31 December 2016. His employment came to an end when his contract expired on 31 December 2016.
- 2 Mr Venuprasad was a senior and respected member of the Secretariat's staff. His performance appraisals were consistently positive. In his appraisal for the year to June 2015, completed in October 2015, his line manager (the Head of the Secretary-General's Office) assessed his performance as "Outstanding – exceeds all standards and objectives for the role". That assessment was endorsed by the then Secretary-General, Mr Sharma.
- 3 However in 2016, following the appointment of Baroness Scotland QC as Secretary-General, tensions arose. The deterioration in the working relationship between Mr Venuprasad and the Secretary-General culminated in the events of June to December 2016 which have given rise to Mr Venuprasad's application to the Tribunal.
- 4 In May 2016 confidential Secretariat documents were leaked to a British newspaper, the Daily Mail. Mr Venuprasad came under suspicion within the Secretariat as the source of those leaks. On 22 June 2016 he was suspended from his position. The Secretariat initiated disciplinary proceedings, and on 31 October 2016 a Disciplinary Board met to consider allegations that:
 - 4.1 Mr Venuprasad had acted in breach of the Secretariat's confidentiality policy, particularly its IT policy in Part 5, Section 12 of the Staff Handbook;
 - 4.2 Mr Venuprasad inappropriately handled confidential and highly sensitive information that he had access to in his position as Deputy Head of the Office of the Secretary-General.
- 5 The Disciplinary Board met in Mr Venuprasad's absence. Mr Venuprasad had become seriously unwell, and was on sick leave from 8 July 2016. The Board had agreed to a previous request from Mr Venuprasad to reschedule a hearing planned for 14 September, as he was unable to attend for health reasons. But the Board refused his request to adjourn the hearing it had scheduled for 3 November until he was well enough to attend (and advanced the hearing date to 31 October).
- 6 The Disciplinary Board found that the two allegations had been substantiated. However the Board concluded that there was no direct evidence that Mr Venuprasad leaked the emails and the information contained in them to a third party. The panel recommended that Mr Venuprasad be issued with a final written warning.

- 7 The Secretariat proceeded to issue a final written warning to Mr Venuprasad on 2 December 2016, just a few weeks before his employment was due to come to an end, and at a time when he was still on sick leave. He did not return to work before 31 December 2016, when his employment came to an end.
- 8 Mr Venuprasad pursued his internal right of appeal. That appeal was considered and dismissed by Sir Simon Gass in his capacity as Chief Operating Officer.
- 9 Mr Venuprasad challenges the following decisions:
 - 9.1 the decision of 22 June 2016 to suspend him;
 - 9.2 the decision of 12 August 2016 to subject him to a disciplinary procedure;
 - 9.3 the Disciplinary Board's decision in November 2016 to issue him with a final written warning;
 - 9.4 the decision of Sir Simon Gass dated 1 March 2017 to dismiss his appeal against the final written warning.
- 10 Mr Venuprasad says that these decisions breached a number of obligations which were owed to him by the Secretariat:
 - 10.1 his right to fair treatment (including due process, and the right to be heard);
 - 10.2 his right to see all of the information on the basis of which the disciplinary decisions were reached;
 - 10.3 the obligation to exercise disciplinary powers for a proper purpose, and prohibitions on:
 - (a) improper motive or prejudice;
 - (b) acting on the basis of errors of fact or omissions of fact;
 - (c) disproportionate sanctions;
 - 10.4 the obligation of trust and confidence.
- 11 Mr Venuprasad seeks compensation for loss of earnings and for various costs incurred by him in connection with the events described above. He also seeks rescission of the decision to suspend him and of the final written warning issued to him. The relief sought by Mr Venuprasad is discussed in more detail below.

The facts in more detail

Mr Venuprasad's employment with the Secretariat

- 12 Mr Venuprasad was first employed by the Secretariat as a Temporary Program Officer on 1 November 2001. His employment became permanent with effect from 1 July 2004. He was employed under a series of three year contracts. In June 2013, following the end of his third three-year contract, his contract was extended by one year. There were further one year extensions on two occasions. In November 2014, the Secretary-General offered Mr Venuprasad appointment as his Deputy Chief of Staff. He was employed in that position under a contract that ran from 16 November 2014 to 30 April 2016 (an end date that coincided with the end of the then Secretary-General's tenure). In March 2016 he was offered, and accepted, an extension of that appointment from 1 May until 31 October 2016. In May 2016 he was offered, and accepted, a further extension to 31 December 2016. The first of these extensions was approved by Baroness Scotland QC in her capacity as Secretary-General designate. The second was approved by Baroness Scotland QC following her appointment as Secretary-General (which took effect from 1 May 2016).
- 13 Throughout this period Mr Venuprasad received positive, indeed glowing, performance appraisals. It is clear from the material before the Tribunal that Mr Venuprasad had an excellent working relationship with Secretary-General Sharma, and enjoyed his full confidence.

Difficulties in Mr Venuprasad's working relationship with the Secretary-General

- 14 It is also apparent from the material before the Tribunal that the working relationship between Mr Venuprasad and the newly appointed Secretary-General, Baroness Scotland QC, encountered difficulties from an early stage. In a statement prepared by Mr Venuprasad dated 20 July 2016, Mr Venuprasad records a number of occasions on which he says he gave advice to the new Secretary-General that action that she proposed to take, or that she had taken, was not appropriate. He says that he advised Baroness Scotland against making certain appointments of consultants, including Lord Kamlesh Patel; expressed concern about the budget for a proposed garden party and the fact that it was scheduled to be held during Ramadan; expressed concern about what he perceived as discourteous treatment of the Prime Minister of a Commonwealth country during a visit to the Secretariat premises at Marlborough House; expressed concern about the arrangements made for High Commissioners during a visit by Her Majesty the Queen to Marlborough House on 9 June 2016; and expressed concern about statements made by the Secretary-General in relation to her predecessor at a "Town Hall" meeting held on 19 May 2016. He says that he was told by another senior staff member that his feedback to the Secretary-General about the last of these events had angered her.

The leaks to the Daily Mail

- 15 In early June 2016, the Secretariat received a number of email inquiries from a journalist working for the Daily Mail newspaper seeking answers to questions about a number of issues concerning the Secretariat. The journalist told the Secretariat that he had been passed a fairly

large quantity of internal Commonwealth emails, memoranda and other internal documents. He told the Secretariat that “they have come from an impeccable source and I am confident they are genuine.”

- 16 Mr Gary Dunn, the Deputy Secretary-General (Corporate), appears to have taken the lead in dealing with the leaks to the Daily Mail. In a “Fact-Finding Report” that he prepared, which is discussed in more detail below, he says that it became apparent to him that the Daily Mail had access to confidential information that had been provided to a small number of Secretariat staff members. On 9 June he asked the Head of IT to identify if any correspondence had been emailed from staff within the Secretary-General’s Office to the Daily Mail. A keyword search was undertaken in relation to the emails of all staff in the Secretary-General’s Office. On 10 June the Head of IT reported that there was no record of any email traffic between anyone in that office and the Daily Mail. However the keywords (taken from documents known to be in the possession of the Daily Mail) did match three documents that were in the possession of a small group of staff in that office. Mr Venuprasad had undertaken recent activity on those three documents.

Mr Venuprasad comes under suspicion

- 17 That led to a more in-depth assessment of Mr Venuprasad’s emails by the IT department. The review identified 11 instances where Mr Venuprasad had sent documents from his Secretariat email address to his personal Gmail address. Some of these documents were identified as sensitive confidential material. Mr Dunn was advised that in some instances Mr Venuprasad appeared to be deliberately attempting to conceal his actions by hard deleting the relevant emails. “Hard deleting” and “double deleting” are terms used to refer to deletion of a sent email from the sent items folder, followed by deletion of that email from the deleted items folder. Mr Dunn was advised that to the user this would appear to remove all trace of sending an email, but that such emails can be recovered by system administrators if required.
- 18 Mr Dunn decided that it was necessary to speak with Mr Venuprasad and “clarify his email management practices.”
- 19 The initial focus of the inquiry was on a document referred to as the “Corporate Group Weekly Report for 13 May”. The Daily Mail had confirmed that it had a copy of that document. The document was circulated by email to a small number of staff members. Mr Venuprasad was one of them. Mr Dunn was advised that the document was sent to Mr Venuprasad by email on 13 May 2016 at 18:07. Mr Venuprasad sent the email to his own Gmail account from his iPad at 23:17. He then hard deleted the email trail.
- 20 On Friday 10 June a decision was made to speak with all staff who had contact with this document in the course of the following week.
- 21 On the morning of Saturday 11 June Mr Dunn was informed that Mr Venuprasad had been granted urgent leave to travel overseas. Mr Dunn was concerned that he might have already

left the country, and he gave instructions for Mr Venuprasad's email and phone accounts to be "frozen".

- 22 Mr Dunn made telephone contact with Mr Venuprasad on Saturday 11 June, and advised Mr Venuprasad that he wanted to see him on Monday 13 June to discuss a serious matter relating to unusual activity in Mr Venuprasad's email account. Mr Dunn asked Mr Venuprasad to postpone his departure to India. Mr Venuprasad explained that that was not possible because of pressing family commitments in India. Mr Dunn asked him to provide copies of his ticket, and confirmation of the reason for his travel. Mr Venuprasad provided that information. Mr Venuprasad had applied for leave the previous week in order to travel to India. His line manager had approved that leave. Mr Venuprasad had then booked tickets for his travel.
- 23 It was agreed that Mr Venuprasad would come in to the Secretariat's premises on the evening of Sunday 12 June to meet with Mr Dunn, before he was due to leave for India.
- 24 The meeting took place at 7:30 p.m. on Sunday 12 June. It was attended by Mr Venuprasad, Mr Dunn, and Lord Kamlesh Patel. An incomplete transcript of the conversation at that meeting has been provided to us. It records Mr Dunn as saying that "Lord Patel is in attendance at the request of the Secretary-General because he is currently the only OSG [Office of the Secretary-General] management team member not to have received a copy of some of the documents concerned."
- 25 Mr Dunn put a series of questions to Mr Venuprasad in relation to the email activity on his account. Mr Venuprasad was asked why he had forwarded sensitive Commonwealth Secretariat Official information from his work account to his personal Gmail account. Mr Venuprasad said that he regularly forwarded emails to his Gmail account to review, read or work on at home. He was asked if this was the regular way that he did things, and he said that it was.
- 26 Mr Venuprasad was asked about the hard deleting of certain emails. Mr Venuprasad said that he regularly deleted his sent box as well as his inbox. Mr Venuprasad told Mr Dunn and Lord Patel that "there is no bad intention forwarding emails. It was simply as a matter of reference or whatever I needed and... I can also assure that I have not talked or been in touch or shared any... emails with a member of any media."
- 27 Mr Venuprasad was asked if he was willing to provide access to his Gmail account. He said that he was, but that first he wanted to speak to a lawyer friend. He made a call but was unable to contact the lawyer. He indicated that he would speak to the lawyer later, and email or SMS with his password so that Mr Dunn could access the email account. Mr Dunn pressed Mr Venuprasad to cooperate, and to provide access to the Gmail account as soon as possible.
- 28 Mr Venuprasad did not provide the Secretariat with access to his Gmail account. Mr Venuprasad says that he did not do so because his Gmail account included a large number of

confidential emails relating to family matters, and that it would breach his obligations of confidence in relation to that material to provide it to third parties. At one stage he indicated that he would go through his Gmail inbox and remove all such material before providing access. But ultimately he did not provide the Secretariat with access to his Gmail account: he says that this was the result of concerns he developed about improper access to, or use of, his account.

- 29 Mr Dunn questioned other staff in the Secretary-General's office about their handling of the "Corporate Group Weekly Report" document. None of them had sent the document electronically to a person outside the organisation.
- 30 It appears that over the next few days further investigations were undertaken in relation to Mr Venuprasad's email activity, to check the answers he had given at the 12 June meeting. A "Fact-Finding Report" dated 15 July 2016 prepared by Mr Dunn records that Mr Dunn was told that Mr Venuprasad "rarely deleted his email boxes as he had thousands stored in his sent box.¹ There was no pattern of deletions. The hard deletions of documents on 13 May were selective, as there were other documents on 13 May not deleted."

Mr Venuprasad is suspended

- 31 On 22 June 2016, while Mr Venuprasad was still on leave, a decision was made and notified to Mr Venuprasad that he would be suspended with pay with effect from Monday 27 June 2016 (the date on which he was due to return from leave). In a letter dated 22 June 2016 communicating the suspension to Mr Venuprasad, he was advised that a decision had been taken under Part 5, Section 8 of the Staff Handbook to conduct further fact-finding with a view to ascertaining if there was a need for a formal investigation, or if the matter could be addressed and resolved without a formal investigation. The letter set out the allegations against Mr Venuprasad as follows:

The allegations against you are that you forwarded confidential and sensitive information from your official email to your personal email from the Secretariat's IT systems. You then made a deliberate attempt to conceal the fact that you had forwarded specific confidential emails to your personal email by deleting the electronic record of the email or any trace that it had been forwarded from your official email account.

In taking these actions, it is alleged that:

1. You have acted in breach of the Secretariat's confidentiality policy particularly its IT policy in Section 12 of the Staff Handbook ...
 2. You inappropriately handled confidential and highly sensitive information you had access to in your position as Deputy Director of the Office of the Secretary-General.
- 32 Mr Venuprasad was advised that the suspension would remain in force until the Secretariat concluded its fact-finding and any subsequent related procedures. The letter noted that the

¹ The report is discussed in more detail below.

suspension did not constitute disciplinary proceedings, and the Secretariat had not reached a decision as to the veracity or otherwise of the allegations made against him.

33 The decision to suspend Mr Venuprasad was made by his line manager, Ms Applewhaite. There is no written record of Ms Applewhaite's decision, or of the material before her when she made that decision, or of her reasons for making that decision. Mr Venuprasad asked the Secretariat to disclose the report on which her decision was based. The Secretariat's response was that the decision was based on the Fact-Finding Report dated 15 July 2016 referred to in more detail below. That cannot be correct, as the Fact-Finding Report is dated some three weeks after the suspension decision was made on 22 June 2016. The Secretariat was not able to shed any further light on this question at the hearing held by the Tribunal.

34 On 1 July 2016 Mr Venuprasad received an email asking him to attend a further meeting on Friday, 8 July 2016. The meeting was described as forming part of the continuing fact-finding process. On 4 July 2016 Mr Venuprasad responded to confirm that he would attend the further fact-finding meeting on 8 July. That was followed by a letter from Mr Venuprasad's solicitors dated 7 July 2016 requesting information and documents relating to the allegations he faced, and recording that they had advised Mr Venuprasad to postpone the 8 July meeting until he had had the opportunity to consider that material. Mr Venuprasad was then asked to attend a meeting on Monday 11 July to conduct further fact-finding. Mr Venuprasad was reminded that under the terms of his suspension, he was required to attend any meetings initiated by the Secretariat.

Mr Venuprasad becomes unwell and goes on sick leave

35 Mr Venuprasad did not attend the meeting scheduled for Monday 11 July. He sent the Secretariat a "sick note" from his general practitioner indicating that he was unwell. He was placed on sick leave from 8 July 2016 to 1 August 2016. By letter dated 13 July 2016 the Secretariat advised Mr Venuprasad that it had arranged a referral for him to see the Secretariat's occupational health consultant, Dr Chris Schilling, on Wednesday, 27 July 2016.

36 Mr Venuprasad prepared a statement dated 20 July 2016, described by him as a "Protected Disclosure", in which he set out instances where he says he identified concerns in relation to procurement, transparency and the use of public funds in the Commonwealth Secretariat, among other matters. A summary of the statement was provided to the Secretariat in a letter from Mr Venuprasad's solicitors dated 26 July 2016. The complete statement was subsequently sent by Mr Venuprasad to the Secretariat and to a number of High Commissioners in their capacity as members of the Secretariat's Governing Council.

37 Mr Venuprasad saw Dr Schilling on 27 July 2016. A letter from Dr Schilling to the Human Resources Department of the Secretariat dated 29 July 2016 records that Mr Venuprasad was seriously unwell and was at present not fit for work, and was likely to remain unfit for work for some time.

Disciplinary procedure commenced

38 By letter dated 12 August 2016 Mr Venuprasad was advised that the allegations against him would be referred to a Disciplinary Board under section 5.12 of the Staff Handbook. The letter noted that it was anticipated that the date of the Disciplinary Board would be confirmed to Mr Venuprasad during the week commencing Monday 29 August 2016, and that he was required to make himself available to meet with the Board. The letter went on to note that he would continue to be suspended with pay until the Secretariat concluded the Disciplinary Board and any subsequent related procedures. The letter recorded that “at this stage, the Secretariat has not reached a decision as to the veracity or otherwise of the allegations.”

39 The letter enclosed a copy of a “Fact-Finding Report” dated 15 July 2016 prepared by Mr Dunn. That report set out in some detail the events that had led to the investigation of Mr Venuprasad’s email activity, and to his suspension. It is clear from the report that Mr Dunn had reached a firm view about Mr Venuprasad’s actions. Indeed Mr Venuprasad says that Mr Dunn had reached a firm view about his conduct at the outset of the investigation, and that as a result the investigation and the report lacked neutrality and balance. After setting out the information he had been given about Mr Venuprasad’s email activity, Mr Dunn said (at [61]) “there is little doubt that these three documents are in the hands of the Daily Mail as a product of Ram Venuprasad’s actions. His behaviour indicates deliberate attempts to conceal his sending and possession of these documents outside the secure Secretariat email environment. Information within these documents have led to media reports that have damaged the Commonwealth, have damaged the reputation of the Commonwealth Secretariat, and has created an environment of distrust internally.” Mr Dunn rejected explanations provided by Mr Venuprasad as false. His report concluded with the following recommendation:

72. After considering the evidence from this fact-finding exercise, it is clear that Ram Venuprasad has breached the organisations policies and general standards of professional conduct amounting to gross misconduct.

73. In accordance with the provisions of the Secretariat disciplinary procedure, I recommend that this case is immediately progressed to the formal stage and that a Disciplinary Board is convened as soon as practicable.

40 By letter dated 24 August 2016, Mr Venuprasad requested a number of documents referred to in the Fact-Finding Report.

Disciplinary Board convened

41 By letter dated 5 September 2016, the Secretariat advised Mr Venuprasad that a Disciplinary Board would be convened to investigate the following allegations against him:

1. That you acted in breach of the Secretariat confidentiality policy, particularly its IT policy and Part 5, Section 12 of the Staff Handbook.
2. That you inappropriately handled confidential and highly sensitive information you had access to in your position as Deputy Director of the Office of the Secretary-General.

42 The letter notified Mr Venuprasad that he was required to attend the Board's proceedings on Monday 12 September 2016.

43 The members of the Disciplinary Board were Mr Reginald Darius, Director, Economic Policy Division (Presiding Member); Ms Paula Harris, Director, Corporate Services Division; Ms Katherine Ellis, Director, Youth Division; and as Committee Secretary (and non-voting member) Mr Chris Norman of the Human Resources Division. The disciplinary procedure in the Staff Handbook provides for a fifth, non-voting, member of a Disciplinary Board to be an observer nominated by the Commonwealth Secretariat Staff Association ("CSSA"). It appears that the CSSA were invited to nominate a representative, but declined to do so. The Board therefore proceeded with three voting members, and one non-voting member/secretary.

Disciplinary Board meeting adjourned

44 The first meeting of the Board was rescheduled for 14 September 2016. By letter dated 8 September 2016, Mr Venuprasad's solicitors wrote to the Secretariat asking that the disciplinary hearing be adjourned until 6 October 2016. The letter expressed concern that requested documentation had not been provided. The letter advised that Mr Venuprasad was too unwell to attend the hearing, and expressed concern that the hearing had been scheduled while Mr Venuprasad was "signed off sick" until the end of September. In those circumstances, the letter said, Mr Venuprasad would provide the Secretariat with an "interim statement", including in relation to the allegations made by Mr Dunn in his Fact-Finding Report. That statement would be provided by 16 September 2016.

45 By letter dated 12 September 2016 Mr Venuprasad sent his "interim statement" to the Secretariat, to be provided to the Disciplinary Board. The interim statement ran to some 19 pages, with numerous annexures. In it Mr Venuprasad took issue with a number of the statements made in Mr Dunn's Fact-Finding Report, and set out his own account of the events that had occurred and his response to the allegations made against him. Mr Venuprasad expressed concern about statements which he understood the Secretary-General to have made about him at a number of work-related events, including commenting on the email activities that were the subject of the disciplinary proceedings, and saying that she could "ensure that I am unemployable". Mr Venuprasad said that he would adduce further evidence on these matters at the Disciplinary Board meeting.

46 Mr Venuprasad's interim statement listed a number of documents that he sought from the Secretariat in connection with the disciplinary proceedings. He expressed concern that the Secretariat had not followed due process in investigating the allegations against him. He considered that he had been selectively targeted by the Secretary-General and others because the advice that he had provided was unpopular and inconvenient. He noted that the Daily Mail had continued to publish leaked information from the Secretariat that came into existence after his suspension, which it would not have been possible for him to provide, showing that there was a different source of leaks to that newspaper. He identified a number of witnesses that he

would seek to call at the Disciplinary Board meeting, including the Secretary-General, Mr Dunn and Lord Patel.

- 47 By letter dated 14 September 2016 the Secretariat advised Mr Venuprasad’s solicitors that the Disciplinary Board had agreed to postpone meeting with Mr Venuprasad. It was anticipated that the meeting would be held on 3 November 2016, subject to the availability of the Disciplinary Board members. The letter noted that the Secretariat would be guided by the provisions of Part 5, Section 6 of the Staff Handbook in relation to the procedure in the event of a staff member going off sick during a disciplinary process.

Inquiries made by Mr Dunn about Disciplinary Board process

- 48 The documents disclosed by the Secretariat reveal that on 4 October 2016 Mr Dunn requested from Mr Darius, as chair of the Disciplinary Board, a report on the disciplinary process. The email recording the request says that the report “should also contain next steps.” Mr Darius asked Mr Norman to prepare a draft report “on proceedings to date on this issue”.
- 49 A draft report was prepared and circulated to Board members. Ms Harris responded saying she had some concerns about the request and the draft, which “does not feel right in view of some of the evidence presented by Ram and some of the questions raised”. She asked if it was appropriate for the Deputy Secretary-General to be demanding a report from the Board; whether any such report should go into details on the evidence and Board discussions; and whether providing such a report would “give credence to the fears raised by Ram and his legal team about the influence/control of the DSG over this process?” It appears that this issue was then discussed by Board members by telephone. That led to provision to Mr Dunn of a very brief report on the process followed and the “next steps”, which included scheduling a hearing at the earliest possible date.

Mr Venuprasad gives notice seeking to resign – resignation not accepted

- 50 In early July 2016 Mr Venuprasad had explored the possibility of a termination of his contract of employment on an agreed basis. That correspondence appears to have been conducted on a “without prejudice” basis. His proposal was not accepted. On 1 October 2016, Mr Venuprasad wrote an open letter to the Secretary-General tendering his resignation. His letter read as follows:

Dear Secretary-General Scotland,

I am a long-serving and loyal employee of the Commonwealth Secretariat. Inter-alia, I have worked as Deputy Head of Office to the Secretary-General and for a period of time acting as Head of Office. I have also been Head of Office to two Deputy Secretaries-General.

The last few months working with you has been an excruciating period for me. Providing you with objective and carefully considered advice has been a futile exercise. I had sought to protect you from the consequences of your proposed actions in procurement, transparency and the use of public funds. The consequence for me in providing that advice to you has been a process aimed at terminating my employment. The attached document is testament to these issues.

Since 12 June 2016, long established organisational processes and procedures have been discarded and attempts made to inculcate me. Lord Kamlesh Patel of Bradford, your close associate, was prominent in this process. A direct consequence has been a deterioration in my health. These are all matters of record, which have been documented and made available.

Given these circumstances, the Secretariat's continued unwillingness to provide a proper disclosure of documentation leading to my suspension, or to accept my offers of an agreed exit, means that I have no option left other than to tender my resignation in advance of the conclusion of my contract of employment. Please accept this letter as notice of my resignation.

I am keeping the Chair of Board of Governors and the troika comprising past, current and future Chairs-in-Office apprised of this matter because of the failure of organisational procedures.

Yours
Ram Venuprasad

sincerely,

51 By letter dated 7 October 2016 the Secretariat advised that it did not accept Mr Venuprasad's resignation, and denied that he had a legal right to resign with immediate effect. That letter read as follows:

Dear Ram,

We acknowledge receipt of your letter to the Secretary-General Rt Hon Ms Patricia Scotland QC dated 1st October 2016.

We note that you are tendering your resignation. Your employment is on a fixed term ending 31st December, 2016 (the "Fixed Term End Date").

Your employment therefore will continue, as per your contract, until the Fixed Term End Date. Thereafter your employment will cease with this organisation and we assume that you will leave the UK and return to your home country in accordance to the existing Home Office Regulations. Please therefore, note that we do not accept your resignation with immediate effect and we deny that you have a legal right to resign with immediate effect.

You are currently off sick and you are also subject to a disciplinary process which is currently underway and which predates your submission of sick notes. This Disciplinary process will continue until the Fixed Term End Date unless resolved earlier. As you know you are the subject of serious disciplinary allegations which need to be addressed as soon as possible.

For completeness, we strongly refute your allegations of breach of contract. You make a number of other groundless allegations which are also strongly denied. Please be aware that such allegations, if made in public, would be defamatory and accordingly we formally reserve the right to seek appropriate legal redress should this occur. We urge you to refrain from making such statements which we regard as unsubstantiated at best and malicious at worst. We also believe that they derive from the fact that you are in a disciplinary process facing serious misconduct issues.

As previously indicated the disciplinary panel will meet at Quadrant House, Floor 4 on 3rd & 4th November, 2016. You are required to attend and are entitled to be accompanied by a colleague should you so wish. Please confirm your attendance to Christopher Norman, HRD Officer in writing by post or email by 26th October, 2016 and whether you will be accompanied or not, and if so by whom.

Kind

regards

52 By letter dated 13 October 2016 Mr Venuprasad's solicitors responded to the Secretariat letter of 7 October 2016. In relation to Mr Venuprasad's resignation, the letter said:

Our client did not resign with immediate effect as you have stated. Our client's resignation letter was intentionally silent on the termination date.

Your denial of our client's right to terminate his contract with immediate effect is interesting. We assume you are denying there has been a fundamental breach of his contract of employment by the Commonwealth Secretariat entitling him to resign without notice? You will be unsurprised to learn that our client holds a different view.

Disciplinary Board process continues

53 The 13 October letter expressed a number of concerns about the fairness of the disciplinary process. However it went on to advise that Mr Venuprasad was willing to attend the Disciplinary Board hearing "on the strict condition that a) he is well enough and b) that he is provided with all the documentation referred to in Mr Dunn's 'Fact-Finding' Report."

54 The letter also took the somewhat unusual step of seeking to initiate an appeal against the yet to be delivered decision of the Disciplinary Board:

Our client's belief that the Secretary-General will make good her word to various Governors to dismiss him is such that he wishes to set the appeal against dismissal in train now. We ask therefore that an appeal date be set down and in the absence of any role to be played by the Deputy Secretary-General (Corporate), the name of the adjudicator of this process conveyed to us.

55 On 14 October 2016 Mr Venuprasad was notified that he was required to attend the Disciplinary Board proceedings on Thursday 3 November 2016 at 11:15 a.m. He was asked to confirm his attendance, and notify the name of any companion who would accompany him (as contemplated by the Staff Handbook). The letter went on to say:

If you are unable to attend the Disciplinary Board on 3rd November, consideration will be given to holding the hearing in your absence, in accordance with Part 5, Section 6.4 of the Staff Handbook.

56 By email sent on 20 October 2016, Mr Venuprasad was advised that the Secretariat would like him to attend a further occupational health appointment with Dr Schilling on 27 October.

Disciplinary Board declines adjournment and meets in Mr Venuprasad's absence

57 On 24 October 2016 Mr Venuprasad's solicitors wrote to the Secretariat to advise that Mr Venuprasad would not be able to attend an appointment with Dr Schilling on 27 October. His health was such that he was to be admitted to hospital for several weeks. In those circumstances, Mr Venuprasad also would not be able to attend the disciplinary hearing currently scheduled for 3 November 2016.

58 Mr Venuprasad then received an email dated 27 October 2016 advising him that the Disciplinary Board would convene in his absence. The email read as follows:

Dear Mr Venuprasad

We acknowledge receipt of a letter from Leigh Day dated 24 October 2016, communicating that you will be unable to attend the Disciplinary Board meeting on 3 and 4 November due to your ill health.

We also note in Leigh Day's letter that you have refused to see our occupational health doctor, for the pre-arranged appointment date of 27 October.

Please note that the Board will convene in your absence, and since you have confirmed that you will not be in attendance on 3 and 4 November, the date for the Board meeting has been brought forward to Monday 31 October 2016.

This will be the final meeting of the Disciplinary board.

Kind regards

59 Mr Venuprasad's solicitors responded to that email on 28 October 2016 as follows:

We are writing further to your email to our client copied below.

The content of your email is very concerning and deeply troubling for a number of reasons:

1. The Commonwealth Secretariat has been fully apprised of our client's deteriorating [health and admission to hospital]. Despite this, in what can only be described as an act of spite and intentional harm, it has chosen, via you, to contact him whilst [unwell] and falsely accuse him of refusing to visit an occupational health doctor and advise him that the disciplinary hearing will be brought forward and held in his absence.

2. Our client has not refused to visit occupational health. ... your comment is disingenuous and unkind.

3. Section 6 of the Staff Handbook refers to the procedures to be followed in the event of a staff member going off sick during a disciplinary process. Section e) 'Special Measures' states that *'the Secretariat will take particular care to ensure that a staff member receives all documentation relating to the disciplinary process sufficiently in advance to allow him/her to prepare fully'*. This has not happened in this case. As you are aware we have made repeated requests for full disclosure of all of the documents throughout this matter. Furthermore section d) states *that consideration will be given to allow the member to rely on written representations*. Ram has submitted an interim statement, but until he is provided with all documentation he cannot finalise his statement. To go ahead with a Disciplinary Hearing, in our client's absence and without affording him the benefit of your own procedural protections is not only grossly unfair, it is illustrative of the settled intention to dismiss him which we have expressed from the outset of this matter. Ram has resigned his position, after 15 years' service. His employment is due to terminate on 31 December 2016. He is currently [in hospital] and will be until mid November 2016. The Commonwealth Secretariat's decision to bring the Disciplinary Hearing forward and hold it in breach of your own procedures is extremely telling.

We note we still await a reply to our letter dated 13 October 2016 We look forward to receiving a detailed reply as a matter of urgency.

We further note that we still await a reply to our letter dated 24 October 2016. We look forward to your response as a matter of urgency and to your explanation as to why the Commonwealth Secretariat is not prepared to allow our client a period of grace to recover or indeed allow him the benefit of its own procedural safeguards as set out above.

In the circumstances shall be also be escalating this matter to the Chair of the Board of Governors.

Yours sincerely

- 60 Also on 28 October 2016, Dr Schilling emailed the Secretariat to confirm that he had advised Mr Venuprasad that Mr Venuprasad should give his treatment priority over coming to see him on 27 October, and should arrange to see him following his discharge from hospital. Dr Schilling recommended that the disciplinary process be postponed until Mr Venuprasad's treatment was complete.
- 61 Despite Mr Venuprasad's request for an adjournment, and the email from Dr Schilling, the Disciplinary Board proceeded to meet in the absence of Mr Venuprasad on 31 October 2016. By letter dated 8 November 2016 Mr Venuprasad was advised that the Disciplinary Board had concluded its proceedings, and the outcome would be communicated to him as soon as possible. The explanation given in the 8 November letter for the Disciplinary Board proceeding in the absence of Mr Venuprasad was that:
- the Secretariat did not consider it to be in the interest of Mr Venuprasad for the proceedings to be unduly prolonged for a further period of time. The board was of the view that it had sufficient information to proceed, including the detailed interim statement from Mr Ram Venuprasad.
- 62 Mr Venuprasad's solicitors responded on 9 November 2016, expressing dismay at the approach taken by the Secretariat.
- 63 On 14 November 2016 Mr Venuprasad's solicitors sent a further letter advising the Secretariat that Mr Venuprasad would (with the support of his doctor) be returning to his parents' house in India to continue with his recuperation and recovery there.
- 64 On 17 November 2016 Mr Venuprasad was sent what appears to be a standard form letter from the Secretariat's human resources division confirming that his last day of service would be 31 December 2016. The letter set out various practical and financial matters relevant to the end of his employment. It made no reference to the outcome of the Disciplinary Board meeting.
- 65 On 24 November 2016 Mr Venuprasad's solicitors wrote to the Secretariat in relation to the letters of 8 November and 17 November, seeking clarification of a number of issues. They asked the Secretariat to confirm Mr Venuprasad's status, saying "we trust he is no longer suspended".
- 66 On 25 November 2016 the Secretariat sent an email to Mr Venuprasad and to his solicitors outlining the outcome of the Disciplinary Board meeting, and attaching the Disciplinary Board recommendation. A covering letter from the presiding member of the Disciplinary Board recorded the allegations considered by the board, and advised Mr Venuprasad that the board had found that both allegations were substantiated, particularly relating to misuse of the Secretariat's IT systems and equipment and failure to comply with the Secretariat's rules, regulations or procedures. The Disciplinary Board recommended that he be issued with a final written warning. The letter did not address the question of Mr Venuprasad's suspension, and whether it was still operative.

67 It appears that the Disciplinary Board met on 12, 21 and 27 September and 27 and 31 October. The Board's deliberations are recorded in a memorandum dated 10 November 2016. That memorandum records that the Board considered that it was important for Mr Venuprasad to have an opportunity to answer questions from the Board, and for him to attend the Disciplinary Board meeting. The Board also recorded that it had requested additional information regarding the investigations carried out by the Secretariat. The Board agreed that Mr Tran, the Head of IT, and Mr Dunn would be required to respond to questions from the Board.

68 The memorandum touches only briefly on the decision to proceed in the absence of Mr Venuprasad. The relevant passage reads as follows:

The hearing for Mr Venuprasad was scheduled at the earliest possible date. The Board noted Mr Venuprasad's reported health issues however agreed that he should be requested to make himself available for a formal Board hearing. The Board agreed that the process would require a discussion with key witnesses.

The Board received confirmation that Mr Venuprasad would not be able to attend the Disciplinary Board meeting scheduled for 3 and 4 November on medical grounds. It was agreed to hold the Board meeting in his absence, and bring the date of this meeting forward to Monday 31 October, and hold the disciplinary hearing in the staff member's absence in accordance with Part 5, Section 6 of the Staff Handbook.

69 The memorandum does not record the reasons for the Board's decision to proceed in Mr Venuprasad's absence. The Staff Handbook provides for a hearing to proceed in the absence of the relevant staff member only in "exceptional circumstances".² It also provides that "full consideration will be given as to whether or not this is necessary".³ The memorandum does not record what the Board saw as the relevant "exceptional circumstances", or why it saw proceeding in Mr Venuprasad's absence as "necessary". There is no record of any consideration being given to alternative procedural measures that might be taken in these circumstances, such as permitting Mr Venuprasad to attend by telephone, or to have a representative attend on his behalf, or inviting him to provide further written submissions.

70 Mr Tran, the head of IT, was unable to attend the 31 October meeting in person. He was questioned by the Disciplinary Board over the telephone. Mr Tran confirmed certain points in relation to the email investigations that he had undertaken. Mr Tran was asked if a search had been completed on the output of the organisation's printers. He advised the Board that this option had been explored, but the system did not keep a record of printing for enough days. Mr Tran is recorded as remarking that it was unusual for hard deletion to take place, especially soon after forwarding a message. He told the Board that it was not Mr Venuprasad's usual practice to hard delete emails.

71 Mr Dunn was questioned by the Disciplinary Board in person. It appears from the memorandum that the Board had a lengthy discussion with Mr Dunn in relation to the

² Part 5, Section 6 at [6.4.1].

³ At [6.4.2].

investigations that were carried out, and in relation to his subsequent discussions and correspondence with Mr Venuprasad. Mr Dunn confirmed to the Board that after Mr Venuprasad was suspended, he would not have had direct access to some of the information that had subsequently appeared in the media. Mr Dunn was asked whether he had had an input into the responses to the letters from Mr Venuprasad's lawyers. He told the Board that because he had been involved in the fact-finding investigation, he "stayed removed from the decision-making process around this".

- 72 The memorandum also records a question being raised regarding the resignation letter that Mr Venuprasad submitted dated 1 October 2016, and the tone of the Commonwealth Secretariat's response. Mr Dunn advised the Board that he was not involved and that the action taken on this "would have been the line manager's call."

Disciplinary Board decision – final written warning issued

- 73 The Disciplinary Board's conclusions and recommendations were as follows:

After extensive deliberations, and a careful review of all written documentation, including the further correspondence between Mr Venuprasad, his lawyers, and the Commonwealth Secretariat, and the evidence provided by Mr Tran and Mr Dunn, the panel were satisfied that some key queries of the Board had been satisfied. Specifically, these related to extra searches on email relating to information presented in the media that Mr Venuprasad would not have been able to leak, owing to the fact that he was on suspension and had no Commonwealth Secretariat IT access; the sensitive and confidential nature of the information; and the process of identifying Mr Venuprasad as a likely perpetrator of the leaks to the media.

In respect to the first allegation against Mr Venuprasad: *It is alleged that Mr Venuprasad acted in breach of the Secretariat's confidentiality policy particularly its IT policy in Part 5, section 12 at the Staff Handbook.* Following the investigations, it was agreed by the Board that the IT Policy had been violated, due to the fact that the emails were sent to his external Gmail account. This first allegation is therefore substantiated.

Regarding the second allegation: *It is alleged that Mr Venuprasad inappropriately handled confidential and highly sensitive information that he had access to in his position as Deputy Director of the Office of the secretary General.* Following the investigations, it was agreed that owing to Mr Venuprasad's position within the organisation, he would have a greater burden of responsibility around highly sensitive information. The fact that the emails were exceptionally hard-deleted from his sent items folder in his Commonwealth Secretariat email account is likely to signify that he recognised the inappropriateness of his conduct; the intent to hide the fact that the emails had been sent was not normal practice. The Board found this allegation to be substantiated.

However, on the basis of the evidence, the panel reached a conclusion that there only exists proof that the emails were sent out from Mr Venuprasad's email account, and that there is no direct evidence that Mr Venuprasad leaked the emails and information contained within to a third party.

It is for this reason that the panel recommends that Mr Ram Venuprasad be issued with a Final Written Warning relating to this matter.

- 74 By letter dated 2 December 2016, the Secretariat issued a final written warning to Mr Venuprasad. The letter read as follows:

Dear Mr Venuprasad

I am writing to follow up on the letter dated 25 November 2016 from the Presiding Manager of the Disciplinary Board, where you were advised of the outcome of the Board's deliberations.

Under the terms of the Staff Handbook, Part 5, Section 5, Paragraph 13.3 this letter serves as a Final Written Warning to you.

This Final Written Warning is being issued following the Disciplinary Board review of the allegations made against you. Those allegations were:

1. It is alleged that you acted in breach of the Secretariat's confidentiality policy, particularly its IT Policy in Part 5, Section 12 of the Staff Handbook.
2. It is alleged that you inappropriately handled confidential and highly sensitive information you had access to in your position as Deputy Director of the Office of the Secretary-General.

The Board found both allegations to be substantiated, particularly in relation to misuse of the Secretariat's IT systems and equipment and failure to comply with the Secretariat's Rules, Regulations or procedures.

It is expected that in future you will adhere to the requirements of the Secretariat's confidentiality policy, in particular the IT Policy, a copy of which is attached to this letter for ease of reference. You are also expected to exercise sound judgement in the handling of confidential information that you may be privy to in the course of undertaking your duties with the Secretariat.

Should there be a further breach of the Secretariat's confidentiality policy, then you may be subject to further disciplinary action, up to and including dismissal.

Under Part 5, Section 5, Paragraph 14, you have the right to appeal the decision of the Disciplinary Board. Should you wish to lodge an appeal this must be addressed to the Deputy Secretary-General, Economic and Social Development (Deodat Maharaj) within 10 days of the date of this letter.

Yours

sincerely

Internal appeal from Disciplinary Board decision

- 75 Mr Venuprasad's solicitors responded by letter dated 8 December 2016. They advised that Mr Venuprasad did not accept the outcome and recommendations of the Disciplinary Board. They also contested the appointment of Mr Maharaj as Chair of the Appeal Board, on the basis that there was a potential conflict of interest. They set out a number of concerns about the fairness of the Disciplinary Board hearing. Mr Venuprasad expanded on those concerns in a lengthy email dated 12 December 2016, accompanied by a number of annexures.
- 76 A further letter from Mr Venuprasad's solicitors dated 21 December 2016 sought responses to their letters of 13 October, 24 November and 8 December, none of which had received a substantive response. The letter sought urgent confirmation of various matters, including that Mr Venuprasad's suspension had been lifted, and whether he was required to return to work, subject to medical advice.

77 By letter dated 9 February 2017 the Secretariat advised that it had appointed Sir Simon Gass, Acting Chief Operating Officer, to consider the appeal. The letter noted that the appeal would examine the issues Mr Venuprasad had raised in his various letters including the alleged non-compliance with the Secretariat's disciplinary procedures and the issues of unfairness. It summarised the points for consideration as follows:

Your letter of 8 December 2016 listed six points for consideration. These are summarised below with appropriate responses:

- a) That your client was not provided with the documentation referred to in the Fact-Finding Report prepared by Mr Gary Dunn, former Deputy Secretary General, Corporate Affairs;

The Secretariat's position is that Mr Venuprasad was provided with the Fact-Finding Report and other relevant documentation.

- b) That your client was not afforded the right to defend himself either in person or through a full written statement;

The Disciplinary Board considered the detailed and comprehensive Interim Statement from Mr Venuprasad during its proceedings.

- c) That the proceedings continued during your client's admission in hospital;

Although Mr Venuprasad was unable to attend the Disciplinary Board in person, the Board took into consideration the documentation provided by Mr Venuprasad. This is consistent with the provisions of the Staff Handbook.

- d) That the Disciplinary Board proceeded despite a recommendation from the Secretariat's Occupational Health Consultant to postpone it until your client had completed his in-patient treatment;

The Secretariat received the information from the Occupational Health Consultant and took this into consideration in line with the Secretariat's policies before proceeding with the Disciplinary Process.

- e) That the Disciplinary Board appears not to have considered the issues of unfairness and breach of policy raised by your client;

The Disciplinary Board takes its role very seriously and did consider all issues raised by your client including the issues of alleged unfairness and breach of policy before arriving at its decisions.

- f) That your client would have explained to the Disciplinary Board the routine practices he and his colleagues adopted regarding email.

The Disciplinary Board considered this matter before arriving at its decision.

It is anticipated that the review of your client's Appeal will be concluded by Friday 3 March 2017 so if there is any additional written representations on behalf of your client please provide these via e-mail to Mr. Christopher Norman, Human Resources Division, by Friday 17 February, 2017. Sir Simon Gass will convey the outcome of the Appeal.

78 The 9 February letter went on to say that the issue of Mr Venuprasad's suspension "is moot following the expiration of his contract."

79 By letter dated 1 March 2017 Mr Venuprasad was advised that Sir Simon Gass had decided to uphold the recommendation of the Disciplinary Board. The letter attached a report setting out the matters that Sir Simon had considered, and the conclusions he had reached. The report rejects the arguments of Mr Venuprasad and his lawyers that correct procedures had not been followed, saying that “correct procedures have been followed closely enough that the decision of the disciplinary board is valid.” The report also concludes that Mr Venuprasad was given an adequate opportunity to make his case, and in particular that although Mr Venuprasad maintains that the statement he made on 12 September 2016 was only “interim”, it was “full”. The passages of the report in relation to whether the appeal should have proceeded in Mr Venuprasad’s absence, and whether the decision of the board was reasonable and consistent with their terms of reference, are set out in full below:

The suspension decision

Mr Venuprasad's solicitors have argued (Paula Lee's email of 28 October) that Mr Venuprasad was not given access to all documentation relating to the disciplinary process as required by the Staff Handbook and was therefore unable to finalise his statement. Consequently, the Disciplinary Board had access only to his interim statement. However, Mr Venuprasad received the full pack of papers presented to the Disciplinary Board. Mr Darius's Memorandum refers to additional correspondence made available to the Board, but this lists primarily exchanges with Mr Venuprasad and his solicitors which would have been available to him. So I am satisfied that he had access to all documentation relating to the disciplinary process.

I have also asked myself whether there was further documentation that should have been available to the Disciplinary Board and therefore to Mr Venuprasad. Leigh Day's Letter of 8 September sets out a list of documents referred to in Gary Dunn's Fact Finding Report. However, the attachment to the Human Resources Officer, Chris Norman's email of 09 September, 2016 to Paula Lee makes clear that most of this documentation was available to Mr Venuprasad through the disciplinary pack. It is reasonable that the Secretariat withheld some correspondence and notes of meetings involving members of staff. Critically, I do not believe that these would have had any bearing on the two allegations faced by Mr Venuprasad ie that he acted in breach of the Secretariat's confidentiality policy and that he inappropriately handled confidential and highly sensitive information. They were not cited as evidence to support those allegations.

In any event, although Mr Venuprasad maintains that the statement he made on 12 September, 2016 was only ‘interim’, it is full. It is hard to see how it would have been added to by access to the additional documents he sought access to.

The decision to initiate a disciplinary procedure

The Staff Handbook sets out in Section 6 the procedure if a member of staff goes sick during a disciplinary process. In summary, where the sick period is expected to be short, the Secretariat will usually wait before proceeding; where the staff member is not fit to take part in a standard disciplinary procedure, the Handbook sets out Special Arrangements which may be implemented at its discretion. These Special Arrangements include, as an option, written representations. The Handbook also notes that in exceptional circumstances the disciplinary process may proceed in the absence of the staff member concerned.

In this case, Mr Venuprasad first signed off sick from 8 July. In a letter dated 6 September, Mr Venuprasad was notified that the Disciplinary Board would meet on 14 September, and he was asked to attend. Leigh Day subsequently asked for a delay until at least 6 October on the grounds that Mr Venuprasad had not received all relevant documentation (see above) and that he was too unwell to attend.

On 14 September Chris Norman wrote to Leigh Day accepting that there should be a delay until 3 November, in line with their request, but rejecting the claim that Mr Venuprasad had not received all relevant documentation. He also noted that in the light of Mr Venuprasad's concern about the neutrality of the proposed Chair of the Board, she had been replaced by Reginald Darius. Leigh Day's letter of 13 October confirmed Mr Venuprasad's willingness to attend the Board – but, again, only if he received further documentation and if he was well enough. Chris Norman's letter of 14 October to Mr Venuprasad noted that if he was unable to attend the Disciplinary hearing on 3-4 November, then consideration would be given to holding it in his absence. Leigh Day's letter of 24 October notified the Secretariat that Mr Venuprasad would be embarking on three weeks of [medical treatment] from 26 October and would therefore be unable to attend the hearing.

Against this background, I conclude that the Secretariat showed flexibility over the timing and format of the Disciplinary Board. There was no evidence to suggest that Mr Venuprasad's health difficulties were likely to be short-term. Leigh Day's repeated insistence on having access to additional documentation as a condition of Mr Venuprasad's attendance may reasonably have led to concerns that the conditions would never be met. And although this does not appear in the papers I have seen, I can understand that with the end of Mr Venuprasad's contract at the end of December 2016 and the long lapse of time since the initial Fact Finding report may have caused an understandable wish to get on with the process.

The Disciplinary Board decision

I am satisfied that the decision was reasonable. Although over several weeks Mr Venuprasad tried to assert that he was the victim of a personal attack, the facts that needed to be established in relation to the allegations made against him were fairly straightforward. Notwithstanding the more serious conclusions of Gary Dunn's original Fact Finding Report, Mr Venuprasad faced only two allegations:

- That he breached the Secretariat's confidentiality policy particularly its IT policy in Part 5, section 12 of the Staff Handbook; and
- That he inappropriately handled confidential and highly sensitive information that he had access to in his position as Deputy Director of the Office of the Secretary General.

On the first point, the Board concluded that the emails had been sent to Mr Venuprasad's private email address contrary to the IT Policy. On the second, the fact that the relevant emails were exceptionally hard-deleted from his account was taken as evidence that he knew his action was inappropriate and that the intent to hide his tracks was not normal practice. Having read Reginald Darius's Memorandum on the Disciplinary Board process, I agree that these were reasonable conclusions.

The dismissal of Mr Venuprasad's internal appeal

I also conclude that the decision of the Board that Mr Venuprasad should receive a final written warning as the sanction in this matter, was reasonable.

Secretariat statements to the media about Mr Venuprasad

80 It appears that the media had continued to take an interest in the matters that had been the subject of the May 2016 leaks. In response to approaches from a reporter from The Times, the Secretariat sent emails dated 11 November and 15 November answering questions asked about Mr Venuprasad, and setting out "statements" about him. The 11 November statement included the following paragraph:

A spokesman said "We have always maintained that the claims made by Mr Venuprasad were [sic] based on a whole series of false, misleading and distorted allegations and outright lies made

by a profoundly disaffected individual. Mr Venuprasad was never suspended for giving advice which he claimed Secretary-General Scotland did not take, as is being purported by the media. He was suspended after internal investigators found that he had breached our policy on confidentiality by sending confidential documents outside the Secretariat. His actions brought the Secretariat and his colleagues into disrepute. Mr Venuprasad is currently suspended from work pending the outcome of a disciplinary board. ...”

81 The 15 November “statement”, in addition to addressing certain other allegations against Mr Venuprasad, said:

The internal investigation into Mr Venuprasad, on which we have already commented, is being carried out by our human resources department and will involve a number of senior staff who will consider whether he had breached our policy on confidentiality by sending confidential documents outside the Secretariat.

82 These were not the only media statements made by the Secretariat about Mr Venuprasad. A Daily Mail article dated 10 October 2016 records a Secretariat spokesman as saying, in relation to the matters canvassed in Mr Venuprasad’s “Protected Disclosure” statement dated 20 July 2016: “These are a whole series of allegations made by a profoundly disaffected individual who is facing serious disciplinary charges.”

Mr Venuprasad’s application to the Tribunal

The Application

83 Mr Venuprasad then proceeded to file an application to the Tribunal seeking rescission of the decision to suspend him, rescission of the final written warning issued to him, compensation and costs.

84 The overarching theme of Mr Venuprasad’s Application is that because he gave unwelcome advice to the Secretary-General, and raised concerns about some of her decisions with other members of the Secretariat staff, he was “marked out and identified by the Secretary-General as being the source of a leak when adverse reports about her were published in the UK press.” He says that as a result of the assumption that he was the source of the leak, he was subjected to a campaign of intimidation and hostility which was designed to punish him, and to damage him reputationally and psychologically. He says in his Application that the campaign, and the various steps taken by the Secretariat to suspend him and to subject him to a disciplinary procedure, were in breach of the following obligations:⁴

- a. The general right to be treated fairly in law, including obligations of trust and confidence, as facets of the prohibition on abuse of power;
- b. The right not to have the CS Disciplinary Policy used against me:
 - i. for an oblique purpose, namely to punish me because of a suspicion, which could not be proved and was not well-founded, that I had leaked information about the Secretary General;

⁴ Application at [16].

- ii. to suspend me from work, and discipline me, when others who also acted in the same way (that is, had sent emails from their CS email accounts to private email accounts) remained in post, were not suspended, and were not disciplined; and
 - iii. to attack and discredit me;
 - iv. in other words, I contend that the Disciplinary procedure should not have been invoked at all;
- c. The right to have the Disciplinary Procedure operated fairly and in accordance with its own terms and the rules of natural justice; including the rights to:
 - i. see all relevant documentation;
 - ii. properly defend myself;
 - iii. have properly-authorized individuals make decisions about me – in particular, I challenge the institutional standing of Lord Patel of Bradford and Sir Simon Gass as decision-makers in my case, because:
 - 1. Lord Patel was insufficiently independent on [sic] Baroness Scotland; and
 - 2. Sir Simon was a temporary secondee, acting in an unpaid advisory role whose *de facto* corporate grade was unclear and who lacked an official corporate grade.
 - d. The right to be protected from dismissal or detriment under the CS Whistleblowing Policy. I am of the opinion that my resignation was akin to a direct dismissal by my employer (i.e. it amounts to a constructive dismissal), because I had no real choice but to resign, given the environment that was created in relation to me, and the course of conduct which I endured, which damaged my health. It was this conduct which caused me to resign. In any event, that conduct was detrimental to me;
 - e. The right that I had as an international civil servant not to have my employer, in abuse of its power, actively engage in a smear campaign against me in the national press and/or sanction offensive press statements about me;
 - f. The right – as another aspect of the prohibition on abuse of power – to have my health and safety protected at work, and not to be subjected to a campaign so aggressive and deleterious to my health ...
 - g. The right not to be threatened with unsubstantiated police action – another facet of the prohibition on abuse of power;
 - h. The right I have to know about the contents of a ‘thick file’ containing sensitive and personal information about me, which I am told is being passed around between High Commissioners and which originated, I have been told, from the senior management of the CS. This conduct breaches my fundamental rights to respect for my privacy and dignity as a person, and my right to respect for my reputation.

85 The arguments advanced by Mr Venuprasad are set out in more detail below in the course of discussing each of his specific challenges to decisions made by the Secretariat.

The Secretariat's Answer

86 In its Answer to the application, the Secretariat denied any breach of any of the obligations pleaded. It opposed the application for compensation, and the applications to rescind the decision to suspend Mr Venuprasad, and the decision to issue a final written warning. The Secretariat said that in the event of an order for compensation, it puts the applicant to proof of damage by reference to the Tribunal Statute and the Rules.

- 87 The Secretariat says that at all times it conducted the investigation into Mr Venuprasad's conduct and the disciplinary process in good faith. It denies that there was any ulterior motive in bringing disciplinary proceedings against Mr Venuprasad. In particular, the Secretariat denies that the investigation and disciplinary process were instigated against Mr Venuprasad on account of any animus against him by the Secretary-General. It says that in all the circumstances the allegations against Mr Venuprasad were well-founded, and that the process of their investigation and determination was fair.
- 88 The specific arguments advanced by the Secretariat in relation to each of the challenged decisions are set out in more detail below, in the course of discussing each of those challenges.

Further pleadings

- 89 As contemplated by the Tribunal's rules, Mr Venuprasad filed a Reply to the Secretariat's Answer. The Secretariat filed a Rejoinder which responded to certain points raised in that Reply.

Request for disclosure of documents

- 90 In his original Application, Mr Venuprasad sought disclosure by the Secretariat of a number of documents. Some of those were provided with the Secretariat's Answer. In his Reply, Mr Venuprasad reiterated his request for provision of certain documents that he considered had been requested but not provided. Further documents were provided with the Secretariat's Rejoinder. The Rejoinder also explained that some of the requested documents did not exist, or could not be located.
- 91 It was not clear to the Tribunal whether, following these exchanges, there were outstanding applications for disclosure that had not been resolved. Directions were issued seeking memoranda from the parties to clarify the position in relation to Mr Venuprasad's various requests for disclosure. This process resulted in disclosure of a small number of additional documents. The Secretariat confirmed to the Tribunal that it had disclosed all documentation which shows the investigation of other people in the context of this matter, and that the Tribunal could proceed on the basis that the documentation provided describes all the relevant investigations that took place.⁵ The Tribunal was not ultimately required to resolve any contested application for disclosure.

Request for oral hearing

- 92 In his Application, Mr Venuprasad sought an oral hearing on the basis that the application was relatively complex and fact-sensitive, and raised substantial questions of disputed fact between the parties. That request was reiterated in his Reply. The Secretariat opposed that application. Directions were issued seeking more detailed memoranda from the parties on the evidence that might be given at any oral hearing, and on the issues that Mr Venuprasad wished to address in oral argument. The parties filed memoranda in accordance with those directions.

⁵ Memorandum of counsel for the Respondent dated 23 March 2018 at [3].

Mr Venuprasad provided further particulars of the evidence he wished to call, and of the issues on which he sought to make oral submissions. In light of those memoranda, the Tribunal directed that there would be an oral hearing at which:

92.1 Mr Venuprasad would have the opportunity to call evidence from a former senior Secretariat staff member, Mr Simon Gimson, and one other witness. Mr Venuprasad called evidence from Mr Gimson. He did not in the event call the other witness;

92.2 the Tribunal would hear oral submissions from both parties on the following issues:

- (a) did the decisions to proceed with the Disciplinary Board hearing on 31 October 2016 in the absence of the Applicant, and to do so without providing an opportunity to the Applicant to make further written submissions and/or participate by telephone or other audio-visual means and/or be represented at the hearing, breach the Applicant's right to fair treatment?
- (b) was the disciplinary action against the Applicant initiated and/or pursued for improper motives? What inferences (if any) can be drawn in relation to this issue from the material before the Tribunal?

93 Mr Venuprasad also sought to give oral evidence himself, and to tender himself for questioning by the Secretariat. He advised the Tribunal that his original written statement would stand as his evidence in chief. The Secretariat opposed Mr Venuprasad's application to give oral evidence, and said it did not wish to put any questions to him. In those circumstances, the Tribunal did not consider that it would be assisted by oral evidence from Mr Venuprasad.

94 The Tribunal held an oral hearing on 3 and 4 April 2018, at which it heard Mr Gimson's evidence and heard submissions on the issues set out at [92.2] above.

The role of the Tribunal

95 The Statute that establishes the Tribunal provides that it has jurisdiction to hear and determine applications brought by a staff member of the Secretariat which allege the non-observance of a contract in writing with the Secretariat, including, in relation to a contract of service, the non-observance of the contract of employment or terms of appointment of the staff member.

96 It is not the role of the Tribunal to review the merits of a decision made by the Secretariat on employment matters, if the decision has been made in accordance with the terms (express and implied) of the relevant staff member's contract of employment.

Mr Venuprasad's contract of employment

97 In the period to which this application relates, Mr Venuprasad was employed under a written contract of employment entered into in November 2014, which had been extended on a number of occasions on the same terms and conditions. The contract expressly provided that it

incorporated the Commonwealth Secretariat Staff Regulations and Staff Rules as amended from time to time.

98 The Tribunal encountered surprising difficulties in identifying an authoritative version of the Rules and Disciplinary Procedure provisions that were in force at the relevant times. It is essential that the Secretariat maintain, for its own use and for the assistance of staff, an accurate and readily accessible record of the relevant provisions in force from time to time. It should be possible to identify not only the current version of these provisions, but also previous versions and the date from which any amendments were operative. The Tribunal is grateful to the Secretariat staff who were able to shed light on the operative date of certain amendments, and on the Handbook review process which appears to have resulted in versions of the Staff Handbook being prepared that incorporate “editorial changes” that were not the subject of any formal change process.

99 Rule 4 of the Staff Rules provides as follows:

4.1 All employees will be subject to disciplinary measures for misconduct and/or acts or omissions in violation of the Regulations or Rules. The Disciplinary Procedure is set out in Part 5 and forms part of these Rules.

100 Thus the Disciplinary Procedure in Part 5 of the Staff Handbook is incorporated into, and forms part of, Mr Venuprasad’s contract of employment.

101 A subsequent version of the Staff Handbook sets out a version of Rule 4 that refers only to Section 5 of Part 5. But the parties were ultimately in agreement that all provisions of Part 5 that relate to disciplinary matters, including Section 6 in relation to staff members who are unwell during a disciplinary process, were incorporated in Mr Venuprasad’s contract of employment.

102 Mr Venuprasad invokes a number of implied obligations in his contract of employment:

102.1 the right to fair treatment (including due process), in particular in the context of a disciplinary process. This requirement is recognised in the Secretariat’s Disciplinary Procedure (which as noted above is incorporated in staff members’ terms of employment), which provides “[i]t is imperative that the Disciplinary Board proceeds in a timely way and complies with due process”;⁶

⁶ Staff Handbook Part 5, Section 5 at [12.3.2]. See also *A K v Commonwealth Secretariat* CSAT/14 (No 2) (2010) at [50], describing the entitlement to a fair procedure in the handling of grievances and disputes as “such a fundamental principle of law that it need not be backed by any case law.”

102.2 the Secretariat's obligation to exercise powers, and in particular disciplinary powers, for the purpose for which those powers are conferred and not for an improper purpose;⁷ and

102.3 the obligation of trust and confidence. We understand this to be used as a convenient label for the duty to treat staff members with dignity. That duty can also be expressed as a duty on the part of the employer not to conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence between employer and employee without proper and reasonable cause.⁸

103 These implied obligations are all well established. They are not disputed by the Secretariat in its pleadings. However the questions of what is required by those implied obligations in each of the relevant contexts, and whether those obligations were breached, are in dispute.

104 The Tribunal emphasises that it is not its role to conduct its own inquiry into the allegations that were made against Mr Venuprasad in the disciplinary process. Nor is it the Tribunal's role to make any determination in relation to the question of responsibility for leaking information to the media. Rather, in the following sections of this decision the Tribunal identifies the relevant obligations that were owed by the Secretariat to Mr Venuprasad when making each of the challenged decisions, and considers whether those obligations were breached.

The evidence given by Mr Gimson

105 Mr Gimson provided a written statement of his evidence. He attended the Tribunal's hearing by telephone and answered questions in relation to his evidence from counsel and from the Tribunal.

106 Mr Gimson was employed by the Secretariat from 2004 until his resignation in February 2017. He served in a number of roles, including as Director and Head of the Secretary-General's Office from 2009 to 2015, and as Director of the Political Division from 2015 until 2017.

107 Mr Gimson gave evidence about what he described as "widespread and common" use by Commonwealth Secretariat personnel of personal phones and email accounts, in the interests of operational effectiveness. Until late in his employment he did not receive any requests from staff for permission to use personal IT equipment or personal email accounts for official purposes, because this was perceived as "an unwritten but widespread and accepted practice". It was only from May 2016 onwards that there was growing unease among staff about possible sanctions for such practices, influenced by the inquiries conducted into the leaks to the Daily Mail. This led Mr Gimson to purchase a second mobile phone for his personal use. In late 2016/early 2017 Mr Gimson received a request from staff involved in an overseas mission for

⁷ Amerasinghe, *The Law of the International Civil Service* (2nd ed, 1994) vol 1 ch 21, esp at 280-282, 289-295, 298-306; vol 2 ch 6 esp at 201 – 203.

⁸ See *Bandara v Commonwealth Secretariat* CSAT APL/22 (No 2) (2015) esp at [74]; *Singh v Commonwealth Secretariat* CSAT APL/27 (2015) esp at [85]; *Addo v Commonwealth Secretariat* CSAT APL/21 (2014) esp at [80] – [82].

permission to use personal computers and personal email accounts during the mission, in view of the ongoing practical inadequacies of the arrangements for accessing the Secretariat's IT systems. His evidence was that these kinds of practices had been common before May 2016 without staff seeking specific authorisation.

108 Mr Gimson said that:

The use of personal IT equipment and personal email accounts for work purposes was widespread and well-know [sic] in the Secretary-General's Office and Political Division at least, and likewise it was well understood that the IT policy, because of its impracticality, would not be enforced in this regard. I do not know of and cannot recall of anyone, aside from Ram Venuprasad, ever to be disciplined for breaching the IT policy at any time and certainly never this aspect of the IT policy.

109 Mr Gimson confirmed in the course of his oral evidence that it was common practice for staff members to send emails and documents from their work email accounts to their personal email accounts in order to work on those documents at home, outside normal office hours. He confirmed that this common practice extended to sensitive documents. He explained the difficulties with the Secretariat's IT system, and in particular external access to that system, which had given rise to this common practice in the interests of effective and efficient performance by staff members of their duties.

The suspension decision

110 The first decision that Mr Venuprasad challenges is the decision to suspend him made on 22 June 2016 by Ms Applewhaite, the Chief of Staff in the Secretary-General's Office. Ms Applewhaite was his line manager.

111 Regulation 19 of the Staff Regulations (which form part of staff members' terms of employment) provides that if a charge of misconduct is made against a staff member and the Secretary-General is satisfied that a prima facie case has been established, the employee may be suspended from duty, with or without pay, during the investigation.

112 Part 5 of the Staff Handbook (which also forms part of the contract of employment, in so far as it relates to disciplinary matters) provides that possible grounds for suspension include (but are not limited to):

112.1 where the staff member may or could interfere with key documents/tamper with key evidence;

112.2 where the staff member may or could interfere with witnesses;

112.3 where the staff member may or could obstruct any investigation(s);

112.4 where a member of the senior management committee considers this to be in the interest of the organisation.⁹

- 113 Mr Venuprasad says that the suspension decision formed part of the “campaign” against him, and was motivated by hostility towards him. He says that there is no record of the material that was before Ms Applewhaite at the time of the suspension, and no record of the reasons for the suspension. To the extent it was based on the information gathered by Mr Dunn in the course of preparing the Fact-Finding Report – and there is no direct evidence of this – he says that the investigation process was unfair and unbalanced.
- 114 In its Answer, the Secretariat says that Mr Venuprasad was suspended “because there were reasonable grounds for believing that the applicant might interfere with evidence and/or obstruct the investigation.” The Secretariat acknowledged, in the course of the hearing before the Tribunal, that there was no record of the reasons for the decision except to the extent that those reasons could be inferred from the Secretariat’s letter of 22 June. The Secretariat submitted that the nature of the allegations against Mr Venuprasad, and their context, permitted an inference to be drawn that Ms Applewhaite made the decision on the basis of concerns about potential interference with evidence, and concerns about potential further leaks.
- 115 At the hearing the Secretariat also acknowledged that there was no evidence before the Tribunal about the information that was before Ms Applewhaite at the time the suspension decision was made. There is no record of what she was told or shown, or by whom. It seems likely that Mr Dunn provided some information to her – presumably orally, given the absence of any disclosed communications between them – but even that is a matter of inference.
- 116 The Tribunal understands that Ms Applewhaite continues to be employed by the Secretariat, and could have been asked to provide evidence on these important issues. But no evidence was tendered from her.
- 117 The Tribunal is not prepared to draw the inferences about the reasons for the suspension contended for by the Secretariat, in the absence of any contemporaneous record of those reasons, and in the absence of evidence from Ms Applewhaite. There may have been good reasons to suspend Mr Venuprasad in June 2016. But in this case the adequacy of those reasons was challenged, the Applicant claims that the suspension was motivated at least in part by an improper purpose, and there is no contemporaneous record of the information relied on in reaching the decision or of the decision-maker’s reasons for her decision. In those circumstances it was incumbent on the Secretariat to provide evidence from Ms Applewhaite addressing those matters. Absent such evidence, the Tribunal is not in a position to speculate about the reasons for the decision, and whether suspension for those reasons was open to the Secretariat on the basis of the information available at that time.

⁹ Staff Handbook Part 5, Section 5 at [11.2].

118 The Tribunal's reluctance to draw an inference that the suspension decision was made for the reasons put forward by the Secretariat is contributed to by the continuation of the suspension, apparently without review, until the end of Mr Venuprasad's employment on 31 December 2016. The Staff Handbook contemplates regular review of any suspension.¹⁰ But there is no evidence that any such review took place between 22 June and 31 December. By 15 July 2016 (the date of the Fact-Finding report), or at the latest 31 October 2016 (the date on which the Disciplinary Board held its final meeting and reached its decision on the allegations against Mr Venuprasad), there was no risk of interference with evidence. The investigation process had been concluded. And by 31 October the Board had formed the view that it had not been shown that Mr Venuprasad was the source of any leaks (leaks that, as the Board noted, had continued after his suspension). The rationale for the suspension put forward by the Secretariat in its Answer was spent, but the suspension continued. The doubt that this casts on the original rationale for the suspension confirms the need for the Secretariat to call evidence to establish the reasons that motivated the original suspension decision.

119 We add that in the absence of any contemporaneous record of the reasons for a decision affecting an employee, it will often be necessary for the Secretariat to provide evidence from the decision-maker to enable the Tribunal to determine an application on a properly informed basis. The Tribunal expects a high degree of openness and candour from the Secretariat, which extends not only to disclosure of relevant written material but also to provision of evidence on significant matters that are within its sole knowledge. The Tribunal is unlikely to be receptive to submissions that an Applicant has failed to make out his or her case due to lack of evidence about the process followed in making a decision, or the reasons for a decision, in circumstances where there is no contemporaneous record, a genuine concern has been raised by the Applicant, and the Secretariat has not tendered evidence to dispel that concern.

120 The Tribunal has concluded that the decision to suspend Mr Venuprasad on 22 June was not made in a manner consistent with Mr Venuprasad's contract of employment. We add that if we had found that the suspension was justified on 22 June, we would have found that there was an obligation to review the suspension periodically, and that there was no justification for its continuation beyond 31 October. The failure to carry out a review promptly after that date, and the continuing suspension after that date, were further breaches of the Secretariat's obligations to the Applicant.

The Disciplinary Board decision

121 Mr Venuprasad's challenge to the decision of the Disciplinary Board has two main limbs:

121.1 he challenges the process followed, and in particular the decision to refuse his request for an adjournment, and to proceed with the hearing in his absence. He says that the Board

¹⁰ Staff Handbook Part 5, Section 5 at [11.5(d)].

reached its decision after hearing oral evidence from Mr Dunn and Mr Tran that he was not aware of, and had no opportunity to respond to;

121.2 he challenges the decision to uphold the allegations against him, and to recommend a final written warning. He says that the decision was arrived at for an improper purpose, and that the sanction imposed was disproportionate.

Process challenge

122 The Disciplinary Procedure provides that a staff member “will be given the opportunity to attend and make submissions to the board.”¹¹

123 The Staff Handbook contains detailed provisions in relation to the procedure that the Secretariat will follow where the ill-health of a staff member impairs the ability of that staff member to participate in the disciplinary procedure in the normal way. Because of the importance of this issue, we set out Section 6 of Part 5 of the Handbook in full in an appendix to this judgment.

124 As the Staff Handbook recognises, it is only in exceptional circumstances that a Disciplinary Board should determine a matter before it without providing the staff member with an opportunity to participate in the disciplinary hearing, and address the Board. In the absence of exceptional circumstances, the opportunity to participate in the hearing and to be heard by the Board is an essential element of a fair procedure. The opportunity to participate in the hearing is of particular importance where the Board receives information in the course of the hearing that has not been previously disclosed to the staff member, for example by hearing oral evidence and questioning witnesses.

125 Mr Venuprasad says the Disciplinary Board hearing should have been adjourned until he was well enough to attend. There were no exceptional circumstances that justified proceeding in his absence. He says the Board should have considered other options, such as permitting him to participate by telephone (as Mr Tran did); permitting him to be represented; and/or providing him with a further opportunity to file written submissions once he had all relevant information. As a result of the decision to proceed in his absence, he was denied the ability to respond to the evidence given at the hearing by Mr Dunn and Mr Tran, denied the opportunity to put further questions to them, and denied the opportunity to make representations to the Board.

126 The Secretariat said in its Answer that there were reasonable grounds for proceeding in the absence of Mr Venuprasad:

[76] The respondent submits that there were reasonable grounds for proceeding in the absence of the Applicant:

¹¹ Staff Handbook Part 5, Section 5 at [12.3.5].

- (a) In various correspondence the Applicant had indicated that he had provided a full explanation of his practice of forwarding email from his official account to his private account;
- (b) The Applicant had submitted a full “Interim statement” setting out his response to the allegations;
- (c) The issues for determination were narrow. The issue for determination was whether the Applicant had forwarded confidential information to his private email account. It was relevant that the Applicant had admitted forwarding the emails;
- (d) That in light of the Applicant’s letter of 24 October there were reasonable ground [sic] to believe that if the board adjourned the hearing set for 3 November the Applicant would be unable to attend any hearing on any other date in the future;
- (e) That the Applicant’s employment was due to end on 31 December 2016 and that it was in the interest of all parties that the disciplinary process be concluded by then.

127 In late October when Mr Venuprasad sought a further adjournment of the Disciplinary Board meeting scheduled for 3 November, he had been on sick leave for some time and his condition was serious. It was possible that he would recover sufficiently to return to work before the end of his contract on 31 December 2016. If he did recover enough to resume work, he would be in a position to attend a meeting with the Disciplinary Board at that time. But given the seriousness of his condition, there was a real prospect – the Secretariat says, a likelihood – that he would not recover sufficiently to return to work before his contract came to an end.

128 The Tribunal considers that the decision by the Board to proceed without hearing from Mr Venuprasad was a breach of his right to a fair procedure in a number of respects.

129 The record of the Disciplinary Board’s deliberations does not, as noted above, set out the reasons for the Board’s decision to proceed in the absence of Mr Venuprasad. This was a very significant procedural decision that the Board needed to consider carefully, and which should only have been made for good reason. The absence of any recorded reasons casts doubt on whether the Board understood the significance of this decision and the high threshold that needed to be reached before such a decision was made. The only contemporaneous record of the Board’s reasons for proceeding in the absence of Mr Venuprasad is the Secretariat’s letter of 8 November 2016, in which it was said that:

the Secretariat did not consider it to be in the interest of Mr Venuprasad for the proceedings to be unduly prolonged for a further period of time. The Board was of the view that it had sufficient information to proceed, including the detailed interim statement from Mr Ram Venuprasad.

130 Neither of these reasons is convincing. They fall far short of the “exceptional circumstances” threshold.

131 In circumstances where Mr Venuprasad and his lawyers considered that it was in his interest for the meeting to be postponed to enable Mr Venuprasad to attend, and the Secretariat’s own medical consultant had given advice supportive of a postponement, it was not reasonably open

to the Secretariat to assert a different view about Mr Venuprasad's interests and proceed on that basis.

- 132 The view expressed in the letter that the Board had sufficient information to proceed reveals a fundamental misunderstanding of the purpose of participation in a disciplinary hearing by the relevant staff member. Without hearing from Mr Venuprasad, the Board could not know what other information he might be able to provide, or what submissions he might wish to make on matters of procedure, substance and (if relevant) sanction in light of the discussion at the hearing. In particular, if he was not present he would not be able to hear and respond to the evidence given by the "key witnesses" that the Board intended to question to address some outstanding matters: Mr Tran and Mr Dunn.
- 133 As noted above, in its Answer the Secretariat submitted that there were reasonable grounds for the Board to proceed in Mr Venuprasad's absence, and sought to identify those grounds. But the Secretariat was not able to say whether those were in fact the grounds on which the Board reached its decision, in the absence of any record of its reasons and of any evidence on that point. If the reasons put forward in the Secretariat's Answer had been the Board's reasons, they also would fall far short of the "exceptional circumstances" threshold that would justify the exceptional step of proceeding in Mr Venuprasad's absence, and in particular proceeding to hear oral evidence and (in light of that evidence) reach a decision.
- 134 That leads into the second respect in which the procedure adopted was unfair. The Board identified the importance to its inquiries of speaking with key witnesses. It spoke with Mr Tran by telephone, asking him a number of questions about the investigations that had been undertaken, and about other investigations that had not been undertaken. The Board also conducted what appears to have been a substantial interview with Mr Dunn in person. Mr Venuprasad was entitled to know what Mr Tran and Mr Dunn had to say, and to respond to it. He should also have had the opportunity to put questions to them.¹² But because he was not present on 31 October, he did not have the opportunity to do so.
- 135 It is elementary that a fair disciplinary procedure requires that the affected party be aware of, and have an opportunity to respond to, all the material before the Disciplinary Board. As this Tribunal said in *Mohsin*, a case concerning a Review Board decision where the applicant had been given an opportunity to comment on written material before the Board but did not know of, or have an opportunity to comment on, further oral representations made to that Board by her supervisor at the Board's invitation:¹³

¹² See eg *Amerasinghe* vol 2 ch 6 at 211, referring to a number of decisions including *Lindblad* UNAT Judgment No 183 (1974); *Lebaga* UNAT Judgment No 340 (1984).

¹³ *Mohsin* CSAT 3 (No 1) (2001) at [8.3].

The audi alteram partem [hear the other party] rule is an essential characteristic of natural justice. Natural justice requires that the Applicant should have known of the additional oral representations against her interest and that she was given fair opportunity to deal with them.

- 136 In that case the Tribunal set aside the Review Board recommendation to offer the applicant a two year contract rather than a three year contract, and set aside (as “tainted”) the decision of the Secretary-General based on that recommendation.
- 137 In the present case, the Board received oral evidence from Mr Tran and Mr Dunn. The Board recorded in its decision that they were “key witnesses”, whose evidence meant that “some key queries of the Board had been satisfied.” The Board’s decision expressly records its reliance on their evidence. Because the Board met in Mr Venuprasad’s absence, he was not aware of that evidence and had no opportunity to address it. As the Secretariat acknowledged at the hearing, this of itself meant that the procedure followed by the Board was not fair. That acknowledgement was appropriate: the Tribunal considers that the procedure adopted was clearly unfair. As *Mohsin* illustrates, it is irrelevant that the Board might have been able to reach the same conclusion on the basis of other material before it. If Mr Venuprasad had been present he might have been able to elicit further evidence, or make further submissions, that shed a different complexion on the relevant events and on their wider context, leading to a different result. It can hardly ever be said with confidence that a particular result is inevitable whether or not a party is heard, and this is not one of those rare cases.
- 138 There is a third and closely related respect in which the procedure that was adopted was unfair. In circumstances where a Disciplinary Board considers proceeding in the absence of a staff member, despite the staff member expressing a desire to participate in the hearing, the Board is required to consider other procedural options for ensuring a fair hearing. This is recognised by the discussion of “special measures” in paragraph [6.3.1] of the Staff Handbook, set out in the Appendix to this judgment. That list of special measures should not be treated as exhaustive: in each case, consideration needs to be given to appropriate special measures that will ensure effective participation of the staff member in the disciplinary process. In this case, there is no record of the Board considering what special measures could have been adopted to enable effective participation by Mr Venuprasad despite his illness. The Board needed to consider whether he should be given the opportunity to participate by telephone or some other audio-visual means.
- 139 The Board should also have considered whether Mr Venuprasad would be permitted to attend the hearing through a representative.¹⁴ One of the “special measures” contemplated by the Staff Handbook where a staff member is unable to attend a Disciplinary Board hearing is

¹⁴ The Staff Handbook contemplates that where a Disciplinary Board hearing proceeds in the staff member’s absence, a “companion” of that staff member may attend even if the staff member is not present. The “Companion Policy” in the Staff Handbook provides that the companion must be a work colleague or Commonwealth Secretariat Staff Association representative. The usual role of the companion is to provide moral support. See Part 5, Section 3.

permitting the staff member to be represented in the process by a colleague or Staff Association representative, who takes an expanded role in the process to assist the staff member in ensuring that their case is fully presented. The Disciplinary Board should have offered Mr Venuprasad the opportunity to be represented at the hearing. We also consider that the Board should have given careful consideration to permitting representation by Mr Venuprasad's solicitors, in the circumstances of this case. Legal representation of a staff member will not normally be necessary at a Disciplinary Board hearing. But Mr Venuprasad's inability to attend, coupled with the background to the allegations and the impact on Mr Venuprasad of an adverse outcome, and the absence of a CSSA nominee as a member of the Board, were factors that pointed strongly towards a different approach in the present case.

140 As a bare minimum the Board should have provided Mr Venuprasad with an opportunity to make further written representations after being advised of the inquiries that the Board had directed to Mr Tran and Mr Dunn, and their responses to those inquiries. We doubt this alone would have been sufficient to provide a fair procedure overall. But the failure to provide even this limited protection underscores the serious procedural failings in the Disciplinary Board process.

141 The defects in the Board procedure mean that, as in *Mohsin*, the Board's recommendation that a final written warning be issued must be set aside. It follows that the Secretariat's decision to accept that recommendation and issue the warning, which were founded on the Board's recommendation, must also be set aside.

142 We have not found it necessary to consider Mr Venuprasad's other criticisms of the Board process, in these circumstances. His overarching submission that he was subjected to a campaign of hostility and intimidation by the Secretariat, and that the disciplinary process as a whole was pursued for an ulterior purpose, is addressed later in this judgment.

The challenge to the sanctions imposed by the Disciplinary Board

143 Mr Venuprasad's second complaint about the Disciplinary Board hearing is that the sanction imposed on him was not imposed for a proper purpose, and was disproportionate.

144 Paragraph 13 of Section 5 of Part 5 of the Staff Handbook sets out a non-exhaustive list of the formal disciplinary sanctions that may be imposed as a result of the Disciplinary Board process. The provisions in relation to formal warnings and final written warnings read as follows:

13.2 Formal Warning

13.2.1 A Formal Warning is usually issued where measures put in place at the informal stage have failed to result in a sustained improvement and/or where there has been a recurrence of a minor breach or where a first offence is of sufficient gravity to warrant a Formal Warning, following a Disciplinary Board Hearing. Any warning will be confirmed in writing by the Presiding Manager and will state:

- (a) the reason for the warning;
- (b) the standard required in the future;

- (c) the consequences of failure to sustain an improvement or of a further breach of conduct, including the possibility of further disciplinary action being taken up to and including dismissal
- (d) the right of appeal, together with details and timescales for raising an appeal.

13.2.2 The warning will be in force for 12 months. On expiry, the warning will remain on file but will be disregarded for disciplinary purposes.

13.3 Final Written Warning

13.3.1 A Final Written Warning may be issued following a formal Disciplinary Board hearing if the alleged misconduct is sufficiently serious to warrant one. It may also be issued following a Disciplinary Board Hearing resulting from a failure of the staff member to meet measures put in place following the informal stage and a formal warning has failed to improve or change behaviour or as a result of a staff member committing another act of misconduct during the timescale of an existing warning.

13.3.2 Any final written warning will be confirmed in writing and will state:

- (a) the reason for the warning and duration;
- (b) the standard required for the future;
- (c) the consequences of failure to sustain an improvement or of a further breach of conduct, including the possibility of further disciplinary action being taken up to and including dismissal;
- (d) the right of appeal, together with details and timescales for raising an appeal.

13.3.3 The Final Written Warning will be put on the staff member's personal file and may be taken into consideration for any future disciplinary [sic].

145 As is apparent from these provisions, the purpose of issuing a written warning to a staff member is to ensure that failure by a staff member to comply with their obligations does not continue in the future. The issue of the written warning encourages the staff member to change their behaviour, and identifies the consequences of a failure to do so.

146 Because the procedural defects in the Board decision mean it must be set aside, we can address this challenge relatively briefly. In the circumstances of this case it is difficult to see how the issue of a final written warning could serve any purpose connected with the Secretariat's employment of Mr Venuprasad. His employment was due to terminate two months after the date on which the Disciplinary Board met, and just over a month after the date on which the outcome was communicated to him on 25 November 2016. The written warning itself was only issued on 2 December 2016, less than a month before Mr Venuprasad's employment was due to terminate. There was a real prospect that his health would prevent him from returning to work during this period, and if he did return it would only be very briefly. The Secretariat suggested at the hearing before the Tribunal that a warning could serve a useful purpose if he returned to work briefly, or if at some future time he worked for the Secretariat in a different role. The Tribunal considers that these speculative possibilities are not sufficient to show that a final written warning was reasonably related to Mr Venuprasad's employment by the Secretariat.

147 The Board does not appear to have considered whether a final written warning was appropriate in these circumstances, or turned its mind to the question of whether the issue of such a warning

would serve any purpose relating to Mr Venuprasad's employment with the Secretariat. The Tribunal considers that if the Board had squarely addressed this question, the only possible answer was that no relevant purpose could be served by the issue of such a warning in the circumstances of this case.¹⁵

- 148 The exercise of a power is invalid if it did not serve any proper purpose, even where no positive irregular purpose is established.¹⁶ The Board's decision to recommend a final written warning is liable to be set aside because the issue of that warning did not serve any proper purpose in the circumstances of this case, as well as for the procedural reasons set out above.
- 149 This defect in the Board's decision can also be viewed through the lens of proportionality. A number of decisions of International Administrative Tribunals proceed on the basis that it is an abuse of power to impose a sanction that is disproportionate, or that is not reasonably related to the objective which it is intended to achieve.¹⁷ The Tribunal considers that giving a final written warning in the two months of Mr Venuprasad's employment served little or no purpose in connection with his employment by the Secretariat. However it would inevitably cause him significant disadvantage in obtaining future employment. In these circumstances, the sanction imposed was disproportionately severe and was not reasonably related to the purpose which the issue of a final written warning is designed to serve.

The dismissal of Mr Venuprasad's internal appeal

- 150 Mr Venuprasad challenges the dismissal of his internal appeal by Sir Simon Gass. Mr Venuprasad says that Sir Simon did not have authority to conduct the appeal in his capacity as Acting Chief Operating Officer: the appeal should have been conducted by a Deputy Secretary-General. He also says that Sir Simon did not consider all of his appeal grounds, and that the internal appeal decision suffered from the same defects as the Disciplinary Board decision.
- 151 The Tribunal does not understand the Secretariat to be suggesting that the internal appeal process was capable of curing the defects in the Disciplinary Board process identified above. Procedural defects may in some circumstances be cured by a subsequent procedure. But the nature of the internal appeal process was such that it could not cure the serious procedural defects identified above.
- 152 The internal appeal decision was also plainly wrong to conclude that the procedure followed by the Disciplinary Board was adequate. And the sanctions upheld on appeal remain open to

¹⁵ The commencement and continuation of disciplinary procedures and the imposition of certain sanctions may be appropriate where termination of the staff member's contract of employment is imminent, or even after it has come to an end: *Kaberere v Commonwealth Secretariat* CSAT APL/20 at [80] – [87], and see also CSAT APL/20 (No 2) (2014) at [41]. But those steps must be taken for a proper purpose, having regard to all the circumstances of the case.

¹⁶ Amerasinghe vol 1 p 293, citing *Gale* ILOAT Judgment No 474 [1982] (EMBL).

¹⁷ Amerasinghe vol 1 pp 298-299.

the same criticisms that were accepted by the Tribunal in the context of the Disciplinary Board decision.

- 153 It follows that the decision by Sir Simon Gass to uphold the Disciplinary Board decision must also be set aside. In those circumstances, it is not necessary for the Tribunal to consider whether Sir Simon had been properly authorised to conduct the internal appeal.

Media statements about Mr Venuprasad

- 154 Mr Venuprasad claims that the adverse statements made about him by the Secretariat to the media in October and November 2016 breached the Secretariat's obligation to treat him with dignity, and not to seriously damage mutual trust and confidence without proper cause. He says those statements were calculated to discredit him and harm his reputation, and have caused him significant prejudice and loss.
- 155 The conduct of the Secretariat in making these public attacks on Mr Venuprasad was wholly inappropriate. He remained an employee of the Secretariat at the time of the public statements, and was entitled to be treated with dignity and in accordance with the procedures set out in the Staff Handbook for dealing with any concerns about his conduct. If the Secretariat considered that he had engaged in misconduct, it could and should have pursued those concerns through the disciplinary procedure. Those concerns would have been dealt with following an appropriate process, in which he would have a fair opportunity to answer the allegations made against him. That disciplinary process would be conducted in private: even if a censure was ultimately imposed through such a process, it would remain confidential to the Secretariat and the staff member concerned. The Secretariat cannot circumvent the substantive and procedural safeguards of the disciplinary procedure in this manner.
- 156 The Secretariat conceded at the hearing that making these public statements in relation to an employee with whom there was a continuing employment relationship was inappropriate. That concession was inevitable. The Secretariat breached its obligations to Mr Venuprasad by making these adverse statements about him to the media.

Mr Venuprasad's "ulterior purpose" challenge

- 157 We have concluded that the suspension decision breached Mr Venuprasad's contract of employment. We have also concluded that the Disciplinary Board process was seriously flawed in a number of respects, with the result that the final written warning must be set aside. And we have found that the statements made about Mr Venuprasad to the media breached the Secretariat's obligations to him. In these circumstances, we consider that it is not necessary for us to determine Mr Venuprasad's argument that all of the steps taken against him were motivated by an improper ulterior purpose.
- 158 Mr Venuprasad claims that the disciplinary action taken against him alleged conduct (forwarding emails from his official email account to his personal email account) that was commonplace within the Secretariat, and that he was singled out for disciplinary action in order

to punish him for the leaks to the UK media for which the Secretariat suspected he was responsible. The essence of Mr Venuprasad's complaint in relation to this decision is that the Secretariat's power to initiate disciplinary action against an employee was exercised for an improper purpose: to punish him for conduct (leaking confidential information to the media) which was not the subject of the disciplinary allegations, which the Secretariat suspected he had engaged in but was not able to establish. He also says he was being punished for "whistleblowing". The statements which he says amounted to whistleblowing were the various statements and advice he provided to the Secretary-General referred to in his "Protected Disclosure" document dated 20 July 2016.

- 159 As noted above, the Secretariat strongly denies this allegation. It says that it conducted the disciplinary process in good faith, and that there was no ulterior motive in bringing the disciplinary proceedings against Mr Venuprasad.
- 160 It is elementary that the Secretariat's powers must be exercised for a proper purpose. The purpose of disciplinary proceedings is to protect the legitimate interests of the Secretariat in connection with the employment of the staff member in question, in circumstances where the Secretariat considers that the actions of the staff member may have amounted to misconduct or gross misconduct.
- 161 Mr Venuprasad's "ulterior purpose" claim advanced a serious allegation – effectively, of bad faith on the part of the most senior members of the Secretariat's staff. It was not so fanciful or obviously misconceived that it could simply be disregarded. We have already commented on the importance of the Secretariat providing evidence to enable the Tribunal to reach a properly informed decision, where the documentary record is inadequate.
- 162 One issue on which it would have been particularly helpful to have direct evidence was the allegation that the Secretary-General had made statements to a number of people outside the Secretariat at events she attended on 17 July, 7 October and 4 November 2016 which suggested she had concluded that Mr Venuprasad was the leaker; she was determined that he should be punished for that conduct; and she would ensure he was unemployable. There was no direct evidence that the Secretary-General had made such statements. But Mr Venuprasad had made some very specific allegations about what was said, and when. He faced obvious difficulties in obtaining direct evidence of such statements from the persons to whom they were made. The Tribunal has no power to require evidence to be given by anyone outside the Secretariat.
- 163 It would have been a simple matter for the Secretary-General to provide a direct response to these allegations. But the Secretariat elected not to provide any evidence from her. The Tribunal was advised by the Secretariat that the decision not to provide evidence about the alleged statements was made in light of the absence of any direct evidence that such statements were made. We understand the thinking behind that decision, but consider that it overlooks the Secretariat's responsibility to assist the Tribunal to reach an informed decision, and the real risk of adverse inferences being drawn in the absence of such evidence.

164 In this case we would have been reluctant to decide the “ulterior purpose” allegation on the basis of inferences, or on the basis of arguments about the burden of proof. If we had needed to decide the point, we would have exercised the Tribunal’s power under the Statute to require the Secretary-General, as an officer of the Secretariat, to appear before the Tribunal as a witness.¹⁸ We do not consider that we could fairly determine this allegation without hearing evidence from her. But in light of the conclusions already reached, a further oral hearing at which the Secretary-General would give evidence is neither necessary nor appropriate.

Conclusions and remedies

165 The Tribunal has concluded that the decision of the Disciplinary Board was flawed in a number of significant respects, and should be set aside. The Tribunal has also concluded that the internal appeal decision should be set aside. It follows that the issue of the final written warning to Mr Venuprasad on 2 December 2016 must also be set aside.

166 The Tribunal has also concluded that the decision to suspend Mr Venuprasad breached his contract of employment. The Tribunal considers that the appropriate remedial response is a declaration of breach, and an award of compensation. It would not serve any practical purpose to make an order setting the suspension decision aside, in addition to the other remedies awarded.

167 The Tribunal has found that the Secretariat breached its obligations to Mr Venuprasad by making adverse statements about him to the media, which were calculated to discredit him and harm his reputation.

168 The Tribunal considers that Mr Venuprasad is entitled to compensation for loss caused by the Secretariat’s breaches of its obligations to him. His suspension, the issue of a final written warning, and the attacks on Mr Venuprasad in the media are inherently likely to have damaged Mr Venuprasad’s reputation and prejudiced his search for new employment. An award of compensation in respect of those losses is in principle appropriate.

169 However the Tribunal is mindful of the Secretariat’s submission that it puts Mr Venuprasad to the proof of loss claimed, and wishes to be heard further on any award of compensation. Nor does the Tribunal consider that it currently has sufficient information before it to quantify compensation in respect of these losses. This is therefore an interim judgment that determines questions of liability, and certain remedies, with the quantum of compensation to be determined in a subsequent judgment.

170 The formal orders set out below include directions to enable the quantum of compensation to be determined by the Tribunal, should that prove necessary. However the Tribunal encourages

¹⁸ Article VIII(2).

the parties to seek to resolve the question of quantum by agreement, to avoid the time and expense involved in a further determination by the Tribunal.

171 The Tribunal has power to award interest in order to put an applicant in the position they would have been in but for a breach by the Secretariat.¹⁹ If Mr Venuprasad claims interest on any component of the compensation, the period for which interest is claimed and the rate of interest claimed should be addressed in his submissions on quantum of compensation. If the Secretariat wishes to limit its exposure to an award of interest, it is of course open to it to make a payment to Mr Venuprasad on account of the compensation payable to him in advance of determination of the amount of that compensation.

172 The Tribunal also considers that this is an appropriate case in which to award costs in favour of the applicant. If costs were not awarded, the amount of compensation awarded to Mr Venuprasad would be unfairly eroded by the cost of obtaining that compensation. In principle, he should receive the reasonable costs that he has incurred in connection with his application to the Tribunal. (Any claim for costs in respect of events before the commencement of the application to the Tribunal may be included in Mr Venuprasad's claim for compensation, if those costs were incurred as a result of breaches by the Secretariat of its obligations.) The Tribunal considers that costs to date should be determined and paid promptly, pending determination of the quantum of compensation. The formal orders set out below provide for submissions to be made on the question of costs, if those costs cannot be agreed by the parties.

173 The Tribunal makes the following orders:

173.1 the decision of the Secretariat to suspend Mr Venuprasad made on 22 June 2016 was a breach of the Secretariat's obligations under his contract of employment;

173.2 the decision of the Disciplinary Board dated 10 November 2016 is set aside;

173.3 the decision dated 28 February 2017 dismissing Mr Venuprasad's internal appeal is set aside;

173.4 the final written warning issued to Mr Venuprasad on 2 December 2016 is set aside;

173.5 the Tribunal reserves leave to the parties to make submissions on the amount of compensation to be awarded to Mr Venuprasad in respect of the breaches by the Secretariat of its obligations in connection with the disciplinary procedure. Mr Venuprasad must file submissions (and supporting evidence) on quantum by Friday 18 May 2018. The Secretariat must file submissions (and any supporting evidence) in response by Friday 15 June. Mr Venuprasad may file brief submissions strictly in reply

¹⁹ *H K v Commonwealth Secretariat* CSAT APL/19 (2012) at [95] – [96].

by Friday 29 June. If either party seeks an oral hearing, that request and the reasons for it should be set out in their submissions;

173.6 Mr Venuprasad is entitled to costs in respect of his successful application to the Tribunal. If costs cannot be agreed by the parties they will be fixed by the Tribunal on the basis of the parties' written submissions. Mr Venuprasad's claim for costs to date, and any supporting material, should be filed within 10 working days of this decision. The Secretariat's response should be filed within ten working days of receipt of Mr Venuprasad's costs submissions. Mr Venuprasad may file submissions strictly in reply within 5 working days.

174 Finally, the Tribunal wishes to record its gratitude for the assistance it received from counsel for both parties. Their submissions were of the highest calibre. Our ability to deliver our judgment shortly after the hearing is a reflection of the efficiency, clarity and focus of their submissions at that hearing.

Delivered on 16 April 2018

Signed

David Goddard QC, Presiding Member

Chelva Rajah SC, Member

Professor Epiphany Azinge, Member

And

Richard Nzerem, Secretary

Appendix – Extract from Part 5 of the Staff Handbook

SECTION 6 – PROCEDURE IN THE EVENT OF A STAFF MEMBER GOING OFF SICK DURING A DISCIPLINARY PROCESS

- 6.1 The Secretariat aims to ensure that all matters relating to discipline are dealt with fairly and promptly and will follow the principles set out in the disciplinary procedure.
- 6.2 The Secretariat will act consistently with the following principles in circumstances where the ill health of a staff member prevents the disciplinary procedure from being strictly followed because the staff member is too ill to fully participate in the investigation, adequately prepare for a hearing or attend the hearing itself.
 - 6.2.1 Where the absence is likely to be short, the Secretariat will usually wait until the staff member recovers and is able to take part fully in the process.
 - 6.2.2 When the absence is ongoing and it appears to the Secretariat that the staff member is likely to remain absent due to ill-health for an extended period, the Secretariat may require the staff member to cooperate with occupational health and their General Practitioner in determining whether or not he/she is sufficiently fit to take part in the disciplinary process.
 - 6.2.3 If, following consultation with occupational health, it appears to the Secretariat that the staff member is fit to take part in the disciplinary process, the process will continue, although the Secretariat may at its discretion also take any of the steps listed in “special measures” below.
 - 6.2.4 Where it appears that the staff member is not fit to take part fully in the standard disciplinary procedure, the Secretariat will consider taking any of the special measures set out below to enable the staff member to participate effectively.

6.3 Special measures

- 6.3.1 The Secretariat may, at its discretion, consider adjusting the disciplinary procedure by taking any or all of the measures set out below with a view to ensuring the effective participation of the staff member in the disciplinary process:
 - (a) **Venue:** The Secretariat will consider holding the disciplinary hearing at a venue other than its premises, either to reduce the stress caused to the staff member by attending the hearing or to accommodate any physical needs that the staff member may have.
 - (b) **Representation:** Where it appears to the Secretariat that the staff member’s illness may affect his/her ability to explain his/her case, the Secretariat will consider any request by the staff member to be represented in the process by a colleague or CSSA representative. The representative may be allowed an expanded role in the process where this would assist the staff member in ensuring that his/her case is fully presented.
 - (c) **Written representations:** Where the staff member may have difficulty in explaining his/her case, consideration will be given to allowing the staff member to rely on written representations, which may be prepared by a representative.
 - (d) **Documentation:** The Secretariat will take particular care to ensure that the staff member receives all documentation relating to the disciplinary process sufficiently in advance to allow him/her to prepare fully, taking into account any effect that the staff member’s health may have on his/her ability to analyse the information and prepare a response.

- (e) **Timing:** While being committed to the principle that matters should be dealt with promptly, the Secretariat may allow extra time for any stage of the disciplinary process to ensure that the staff member can participate effectively. Particular attention will be given to the duration of any disciplinary hearing and its impact on the staff member and the need to take appropriate breaks.

6.4 Holding the hearing in the staff member's absence

- 6.4.1 The Secretariat believes that, in the vast majority of cases, it should be possible using any or all of the measures outlined above to conduct a fair disciplinary process in which the staff member fully participates. However, there may be exceptional circumstances when the staff member will not be able to attend a disciplinary hearing, regardless of the measures that are taken.
- 6.4.2 In such circumstances, the Secretariat reserves the right to proceed with a Disciplinary Board hearing in the staff member's absence, although full consideration will be given as to whether or not this is necessary in the circumstances.
- 6.4.3 Where a Disciplinary Board hearing is convened, the staff member and his/her Companion will be informed of the time and location of the hearing and will retain the opportunity to attend. The Companion may attend, even if the staff member is not present.
- 6.4.4 The outcome of the hearing will be communicated in writing to the staff member, paying particular attention to the need to explain the details of any factual findings made and the basis of the decision reached.
- 6.4.5 The staff member will be given a full opportunity to appeal against any decision in accordance with the disciplinary procedure under the provisions of No. 14, Disciplinary Appeals Procedure. The special measures outlined above will also be considered by the Secretariat in relation to any appeal.