

CSAT/1

First Session

In the Matter of

GURMEET HANS

Applicant

and

(1) THE COMMONWEALTH SECRETARIAT

(2) Ms SEELAWATHI EBERT, REGIONAL DIRECTOR

COMMONWEALTH YOUTH PROGRAMME

Respondents

Applicant in Person

Mr Richard Nzerem, Director, Legal and Constitutional Affairs Division of the Commonwealth Secretariat

for the Respondents

Before the Tribunal Constituted by

Justice Ulric Cross - President

Justice Austin Amisah

Justice Hosbet Suresh

JUDGMENT

The Applicant, Gurmeet Hans was an employee of the First Respondent from 4 May 1994 to 23 August 1995. She was employed during that time as a Senior Programme Officer (SPO) in the Commonwealth Youth Programme (CYP) in Chandigarh. Her contract was for a period of two years. It contained a clause which required her to serve on probation for six months. At all material times the Second Respondent was, in her capacity as Regional Director (RD), the person in charge of the CYP. The Applicant's employment contract was terminated on 23 August 1995, that is, before the expiration of the two year period. The complaints of the Applicant which bring her before this Tribunal arise from this early termination of the contract as well as the propriety of the extension of her six month probation period by the First Respondent. The Applicant challenges both the extension of her probation and the termination of her contract as unlawful. These challenges together with the treatment the Applicant alleges the Respondents meted out to her during her period of service, which had adverse consequences on her, form the basis of her case.

The Applicant, accordingly, claims the following reliefs:

I. As compensation and damages for personal and professional damages suffered as a result of joining an organisation that gave a fraudulent job description to the post (See Annex 1. page 3), and was not serious in the incumbent's discharge of duties specified in the appointment letter, for breach of contract, unauthorised deduction from salary and discrimination as an Indian by the RD, the plaintiff seeks from the defendants an amount of Pounds Sterling 100,000/- (One hundred thousand Pounds Sterling) with interest @ 21 percent thereon.

II A compensation of the value of 8,000 pounds sterling (eight thousand) with interest @ 21 per cent thereon; as and by way of the emoluments that would have accrued to the Applicant had her services not been terminated in breach of contract.

III Her dependent child's education and air travel to Bombay during all vacations, along with escort (both ways), be met for the year 1995-96, which is as follows:-

School fees: Indian Rs.15, 180

Vacation Trips: Indian RS.39,372

Total Indian Rs.54,552

with interest @ 21 %

(Please see Annex 10)

IV All expenses towards correspondence with the organisation, on matters pertaining to climate at work and the affairs of the Centre be reimbursed to her, vide claim submitted to the Commonwealth Secretariat, London on Aug. 1, 1995 (See Annex 11) and to the RD on August 22, 1995 (See Annex 10):

Indian Rs. 13542

VI Difference due towards salary and gratuity on account of increment due on 6-5-95 but not given: 110 pounds sterling with interest @ 21 per cent thereon.

VII For excess deduction of taxes: Interest @ 21 per cent on excess tax deduction of Indian Rs.1,47,675 (See Annex 12 for proof of refund of this amount), and pounds 500 for costs incurred to recover this amount.

VIII All costs (with 21% interest) related to litigation prior to submitting this application, as information on tribunal was given to the Applicant in June 1996 only.

IX All costs towards application to the Arbitral Tribunal of the Commonwealth Secretariat.

X The Applicant pleads for expeditious processing of the case in view of her long and arduous quest for justice, and requests that case related materials be sent by courier to her, rather than by post to prevent delay. She further pleads for an oral hearing in view of the nature of the case and also expeditious handling of the case. To be able to appear personally, she requests the Tribunal to approve financial support from the Commonwealth Secretariat for herself and her solicitor, to enable her to present her case, without suffering from an economic disadvantage.

The Respondents deny these claims. Their position was summarised by Mr Nzerem in the final words of his opening statement where he concluded simply that the Applicant had no case.

The first claim of the Applicant in actual fact encompasses four separate grounds of complaint. In the first she complains of personal and professional damage suffered by her as a result of joining an organisation that gave a fraudulent job description for the post and that was not serious in her discharge of duties specified in the appointment letter. As to the fraudulent job description no evidence was adduced in support throughout the hearing. As to whether the Respondents were serious about the discharge of her duties specified in her appointment letter it seems as if the whole dispute in the case is partly based on it. The second ground which the first claim encompasses is breach of contract. This is a ground which seems to take into account the charge of the lack of seriousness on the part of the Respondents in the incumbent's discharge of duties and will be considered more fully presently. The third ground which the first claim involves is the unauthorised deduction from her salary which turns out to be a question of deduction of tax due to the Indian Government from her salary by the Second Respondent as RD. It is also a matter which will be examined on its own. The final ground which the first claim embraces is discrimination as an Indian by the Second Respondent.

We will presently give our reasons why we think that there is no basis for this allegation which should be summarily dismissed.

The other claims put forward are dependent upon the validity or otherwise of the claim to the continued existence of the Applicant's contract of service. If we were to hold that her contract was validly determined, these claims will automatically fall away. Of course, if we were to hold otherwise, then these claims will require individual examination.

The Tribunal acceded to the Applicant's request for an oral hearing. In the result, the Applicant gave oral evidence, but produced no other witness. The Respondents, on the other hand, called six witnesses, including the Second Respondent.

The Applicant who held a position in the NSS Tata Institute of Social Sciences applied for position of Senior Programme Officer (SPO) in the Commonwealth Asia Regional Centre based in Chandigarh, India. The Centre is a part of the Commonwealth Youth Programme (CYP). She was interviewed by a Board which included the Director of the Women and Youth Affairs Division of the Commonwealth Secretariat, Mrs Eleni Stamiris, and the Regional Director of the CYP at Chandigarh Mrs Seelawathi Ebert, who was Member/Secretary. One of the candidates at the interview was Mr Momen who was the Programme Officer (PO) at the CYP Centre at Chandigarh. The Applicant's performance at the interview was so brilliant that a unanimous view was taken by the Interviewing Board to appoint her. As stated earlier, the Applicant's appointment was made subject to the satisfactory completion of six months probationary service. According to the functions attached to the appointment letter.

"The Senior Programme Officer assists the Regional Director in:

- (a) implementing the operational plan of the Centre and developing mechanism for evaluation of the activities;
- (b) providing necessary guidance to Centre supported projects and monitoring their progress;

- (c) planning, organising, running and evaluating training and other development programmes, at national, sub-regional or regional level;
- (d) preparing appropriate training materials for use by training institutions in member countries;
- (e) gathering and disseminating information materials on young women and men;
- (f) helping member governments in the development of youth policy and promotion of youth programmes;
- (g) establishing and developing networks of organisations and agencies working in similar fields;
- (h) making professional inputs to various activities, organised by the Centre.

The Senior Programme Officer will also be required to deputise for the Regional Director, when required, carrying out essential administrative and financial tasks."

The purpose of probation is stated in Dr C F Amerasinghe's learned treatise on The Law of the International Civil Service (2nd ed.) Vol III at page 151 in which he says:

" In Salle the WBAT stated that it was of the essence of probation that the organisation be vested with the power to define its own needs, requirements, and interests and to decide whether, judging by the staff member's performance during the probationary period, he did or did not qualify for employment with the organisation; and that the administrative authority during the probationary period tested not only the probationer's professional ability but also whether he could adjust to the specific requirements of the organisation. In Molina the ILOAT stated that the most important object of probation was to enable the administration to ascertain whether the probationer fitted in with the organisation, and that this purpose was paramount"

"WBAT" in the text stands for the World Bank Administrative Tribunal, and "LOAr" stands for International Labour Organisation Administrative Tribunal.

According to Mrs Stamiris she was very impressed by the performance of the Applicant at the interview, and was excited by the prospect of the Applicant joining the programme, especially as the Applicant was a woman . And she, Mrs Stamiris was prepared to give the Applicant every encouragement and support. Unfortunately, it was not long after she commenced her service that difficulties started to appear in the appreciation of the Applicant. Evidence was given by the Second Respondent of complaints being made against the Applicant's approach to her personal relations with the personalities with whom, in the interest of the CYP, she had to co-operate. Both the Second Respondent and Mrs Stamiris gave evidence to the effect that not long after that complaints were received from others for example, participants in programmes which had been arranged and other work colleagues about the poor human relations of the Applicant. The unsettled situation at the Centre introduced by the presence of the Applicant was confirmed by witnesses who had worked with her there. These witnesses called by the Respondent all testified that the Centre was peaceful before she arrived but her arrival changed all that.

She was described as rude, overbearing and in other ways managed to introduce dissatisfaction into life at the Centre. No doubt these matters were reported to Mrs Stamiris. According to her evidence she became so disenchanted with the Applicant that she thought at quite an early stage that the Applicant's contract should be terminated before the end of the first six month's probationary period. Indeed, she seemed to have given instructions to this effect but these instructions were not carried out, because as she said, others thought otherwise. From the evidence, it would appear that included among these others were her assistant, Dr Agochiya and the Second Respondent. Dr Agochiya in his evidence stated that he wanted to see a written report on the Applicant before he took any measures against her. The Second Respondent thought that the Applicant should be given a second chance to improve.

The Applicant, on the other hand, confident of her abilities in the management of the Centre, and in the discharge of functions assigned to her, took the view that she had done nothing wrong for which she ought to be censured. Thus, she claimed for example, that during the first six months of her contract the Second Respondent was away from the Centre for no less than 111 days. That figure was disputed by the Second Respondent who said that she was away for no more than 95 days. Whichever figure is taken, the point was that the Second Respondent could be away for that length of time because she, the Second Respondent, knew that she had a competent deputy in charge. In addition, the Applicant wanted to show by the Second Respondent's absences, that the Respondent could not have had time to properly assess the Applicant's performance. The retort of the Second Respondent to this argument was that although the Applicant was in charge in the initial stages while she was away, whenever she came back there were so

many complaints against the Applicant that she had to spend unnecessary time on the Applicant's conduct during her absence, so that, in the later stages she, the Second Respondent, refused, with the approval of the Director in London, to allow the Applicant to act in her stead whenever she was away.

Until the 28th of October 1994, i.e. a week before the expiration of the first six month period of her probation service there were no reports in writing about the Applicant's conduct. The Second Respondent said that each time she had a complaint against the Applicant's relationship with others she spoke to the Applicant and called for an improvement in her conduct. It is however, significant that she did also say that she never investigated the complaints. She never for example confronted the Applicant with the complainants. In the case of participants in programmes at the Centre she said, because she was sure that the Applicant would punish the complaining parties, when she had the opportunity, if she got to know who they were. The Second Respondent, said that she enquired from the Applicant whether the allegation was true or not but the Applicant denied this. Nevertheless, she went ahead and spoke to the Applicant about the deficiencies in her conduct.

As stated earlier there were no written reports on any of the complaints against the Applicant until 28 October 1994. That report was written by the Second Respondent and addressed to Dr Agochiya, in response to a letter calling for her report on the performance of the Applicant during the first probation period. It is as follows:

"Report on Confirmation of Mrs Gurmeet Hans

This is with reference to your fax dated 14th October 1994, I shall put across the following observations of Mrs Gurmeet Hans, the Senior Programme Officer, who will be completing her probation period on 5th of November 1994.

Mrs Hans is a knowledgeable person and possesses considerable cognisance of organising training courses. Despite that, I personally feel that she needs some more time to adapt to the codes of conduct of an International Organisation like CYP, Asia Centre. In the interest of the Organisation, her probation period should be extended by another six months for the reasons mentioned thereunder:

1. At times, Mrs Hans fails to co-operate and work as a desirable team member which leads to discomfort and disgruntlement of subordinate staff.
2. She shows low receptivity towards her colleagues and senior officials, especially so, in front of others.
3. It seems that she wants complete autonomy, as she seldom consults other staff members before she acts, devaluing others reliability and receptivity and consequently her own.
4. On some occasions, she shows signs of immaturity. She possibly believes in a discursive philosophy and lacks much desired leadership qualities.
5. While with the trainees, she not only lacks expected enthusiasm, but is also found practising favouritism and unhealthy groupism, thereby rendering her personality questionable. If reflected, she is gruff and throaty. She bursts at the trainees showing little control over her temperament. Very often, she uses her conscience negatively, making her behaviour conspicuously unwelcoming.
6. Many a times, informally and in second week of September 1994, I personally requested her to mend her approach so that the work environment of the Centre becomes more conducive. Still, instead of any reform, the things worsened, especially in my absence from the Centre.

Therefore, I shall conclude with the remark that we would need some more time to mitigate Mrs Hans behaviour. Perhaps, if she becomes more accommodative, she could come out as a more reliable and resourceful person to the organisation.

With kind regards,

Mrs Seela Ebert"

The report was copied to Mrs Stamiris.

The Report is open to criticism on the ground that it appears imbalanced, as it did not say much about the good sides of the Applicant, especially with respect to her efficient organisation of programmes at the Centre. It would be noticed that the report contained one sentence recognising the knowledge and organising skills of the Applicant. It is otherwise mainly a criticism of her conduct. This may be explained on the ground that everyone in authority who gave evidence acknowledged the high performance of the Applicant in the discharge of the work allocated to her especially when she was working on her own. Where they found her wanting was in connection with her personal relations. That report was not shown

to the Applicant. It was followed by a letter dated 31 October 1994 from Mr Knowles, Senior Personnel Officer of the First Respondent in London. It reads as follows:

"Dear Mrs Hans

You will know from paragraph 4 of our letter of 25 March 1994 that your appointment as Senior Programme Officer is subject to the satisfactory completion of 6 months probationary service.

We have now received from the Regional Director, a report on your performance during this period at the Centre and that report is under consideration here.

I will of course, communicate with you again when our considerations are completed.

Yours sincerely

John W Knowles

Senior Personnel Officer

Overseas Personnel Section"

One of the problems which had plagued relationships at the CYP during the Applicant's probation service was a question of definition; namely, the definition of the expression 'performance of service'. In the course of her service with the First Respondent organisation it would appear that the Applicant took performance of service to mean her discharge of functions assigned to her. The Respondents on the other hand, took the expression 'performance' to mean not only the satisfactory discharge of work allocated to her but also the ability to fit into the CYP. As was often said, by the witnesses for the Respondents, the question was whether or not she was a team player. This difference in perception, seems to have created some misunderstanding between the parties because while the Applicant thought that with a proper performance of work allocated there can be no question of challenge to her position in the CYP, all who had to appraise required the performance of her service, such as the Second Respondent, the Assistant Director of the Division and the Director Mrs Stamiris took the word performance in the appraisal in the broader sense of whether she could fit in the organisation. The Respondent's view seems justified by the citation above from Dr Amerasinghe's work. And according to that view, the Applicant, in the view of the Respondents, was not a team player.

Thus by the date that the first probation period came to an end all that the Applicant had in writing was this last letter of 31 October 1994. Some may think that the letter should put her on notice that an adverse report had been made against her which was under consideration. This conclusion however is not inevitable. Having regard to the difference in the concept of performance of service held by the Applicant on the one hand, and the Respondents, on the other, the Applicant could not have been expected to take the letter as an indication of the reception of an adverse report. In any case the Applicant is entitled to expect that if an adverse report has been made against her she would be given an opportunity of commenting on it.

The next written material on her probation was received by the Applicant on the 3 March 1995. That was a letter written by the Head of Personnel and Staff Development Department, Mr John Barber on 25 January 1995 which first referred to the letter of Mr Knowles of 31 October 1994 and an understanding by the writer that the matter (presumably the matter of the Applicant's probation) was discussed at a meeting held in Chandigarh between the Applicant, Mrs Ebert and Dr Agochiya and said as follows:

"After careful consideration of your Director's report to the Secretariat on receipt of recommendations from colleagues in London, the Secretary-General has now decided that your period of probation be extended by a further six months. That period will be until 5 May 1995. Ms Ebert will, just prior to that date, submit a further report on your work and after consideration of that report we will communicate to you again."

By the time the Applicant received this letter, four months of the projected six further months of probation had already passed. Upon the Applicant protesting about that she was told apologetically that the delay in the delivery of the letter had been due to some problem in the postal system. The Applicant however cannot be expected to bear the responsibility for the deficiencies of a communication system chosen by the Respondents.

It is correct as the letter of the 25 January 1995 states, that a meeting was held by Dr Agochiya, Mrs Ebert and the Applicant in Chandigarh. Dr Agochiya wrote a report on this meeting which dealt solely with the personal traits of the Applicant and also the fact that the Applicant was informed that an extension of her

probation period by six month would be recommended and during that period her performance and conduct will be closely monitored. The meeting was held in the latter part of November and the report on it written by Dr Agochiya was made on the 9 December 1994. Although the report seems to deal entirely with the Applicant's probation, Dr Agochiya conceded in evidence that he also had to advise the RD to adopt certain practices which had hitherto not been followed at the Centre to improve this. That seems to suggest that the meeting was not all one way and that its object was to find a way of making the affairs of the Centre move forward. That, if correct, would require some concessions on both the side of the Applicant and the RD. Indeed, the Applicant insisted, and had at the material time been apparently under the genuine impression that the meeting was held at her request for Dr Agochiya to persuade the RD to change certain systems in the management of the Centre. Dr Agochiya's concession that he did not inform the Applicant specifically that the meeting had been called primarily to deal with her probation period would tend to give support to the Applicant in the impression, however erroneously, which she held.

The question which arises at this stage is this: Was the Applicant given a fair treatment in the manner in which consideration was given by the Respondents to the matter of her probation extension? In deciding this question of fairness, account must be taken of the Second Respondent's evidence that she did not inquire into the correctness of the allegations made by colleagues, participants in the programme arranged at Chandigarh and others because she knew the Applicant would deny them as she had denied earlier allegations. She did not confront the Applicant with those who had made the report against her, especially reports made by the participants in programmes, because she expected that if she did so the Applicant would will punish them afterwards. Account must also be taken of the fact that the letter of 28 October 1994, that is, the one written report that was made on her by the Second Respondent to the Secretariat in London was not shown to her to enable her to make representations in reply. When these matters are considered it becomes quite clear that in this matter of the extension of her first probationary period the Applicant was the subject of procedural injustice.

The other aspect of the claim based on the breach of contract must be the termination of the Applicant's contract on the 23 August 1995. According to the Applicant as the extension of her first probation period was unlawful and invalid everything which happened thereafter must be tainted by the same illegality and consequential invalidity. She took herself as having been impliedly confirmed after the first six months probationary period. She was then on a confirmed member of the Secretariat and she argued thereafter any termination of her agreement must be according to the Staff Rules and Regulations. We do not think that confirmation of a probationary appointment can be tacitly made. In Amerasinghe's treatise on administrative law and procedures in international organisations, he says this:

"Whether the period of probation should be extended lies within the discretion of the administrative authority. However, it appears that generally probationers must be informed of the decision to extend their probation. On the other hand, tribunals have regarded tacit extensions as regular inasmuch as such extensions do not prejudice the interests of probationers who could refuse them. The UNA T took this view in Lane and the ILOA T in Molina. However, it is established that a probationer cannot be tacitly confirmed nor can a probationary appointment be automatically converted into a permanent one as a result of the administration's failure to take positive action at the end of a probationary period."

(See C F Amerasinghe: The Law of the International Civil Service (2nd ed.) Vo"U 154)

A great deal of documentary material was amassed during this period and presented to us. Several of the documents were of the Applicant writing to the Secretariat in London to various officers and all the way upto the Secretary-General complaining of the unfair treatment which had been meted out to her and appealing for a fresh consideration of her case together with replies from the London office including a reply from the Deputy Secretary-General, Sir Anthony Siaguru assuring her that her case had been given every fair consideration possible and therefore there was no question of a change.

We do not think it necessary to refer to all this literature. In looking at this issue of alleged illegal termination of contract, the following facts have to be taken into account. If the Applicant claims that by the end of her first probation period there was either no complaint against her performance or that no record of it was brought to her notice, she must have got to know during the ensuing six months that

whatever the nature of her tenure there were serious complaints against her suitability for a permanent position at the Centre.

Whatever difference there might have been in her appreciation of the expression "performance of service" required by her employer the First Respondent, this difference must have been removed during the second six months period of her employment. This conclusion is supported by a number of incidents occurring during the period. There was first of all the meeting between herself, the Second Respondent and Dr Agochiya in Chandigarh in November 1994. Dr Agochiya in his report of 9 December and in his evidence stated that the personality deficiency in the Applicant complained of, especially the complaint that she was not a team player and her poor relations with third parties, was brought to her attention. The Applicant herself, on her own volition, in her cross examination of Mrs Stamiris suggested that she had telephoned the witness to convey New Year's Greetings at the end of 1994 and she invited Mrs Stamiris to state the nature of the conversation. Mrs Stamiris's answer was that although it was a pleasant conversation she kept telling the Applicant that she must change her ways. Mrs Stamiris was anxious, even at that stage, to see the Applicant succeed as a member of the Commonwealth team at the Centre. Her desire to promote the interests of the Applicant as prompted by the fact that the Applicant was a woman, and she, the witness, very much wanted women to succeed. This evidence was not controverted by the Applicant. According to Mrs Stamiris, after this conversation, the conduct of the Applicant improved during the following three weeks, then she reverted to type. It would be extraordinary if the Applicant did not appreciate that her conduct and ability to fit into the team was the subject matter of Mrs Stamiris's advice.

Two reports written on the Applicant by the Second Respondent were addressed to Dr Agochiya in April 1995. Both of them were critical of the Applicant's conduct. Although a copy of the first was not given to the Applicant, a copy of the second written only a couple of days later was. The Applicant has attached the earlier of the two letters as a fabrication on the ground that had the first dated 10 April 1995 existed at the time of writing the second on 12 April 1995 the latter would have referred to the former. That was not the only document attached on the ground of fabrication by the Applicant. The case of fabrication is based on a submission that the documents were made at a late date and inserted among the bundle of documents. But we do not think we need make any ruling as regards the others as it is unnecessary to our conclusion. We think, however, that in the case of the Second Respondent's April reports neither letter was fabricated. Dr Agochiya said in evidence that he received both reports at the relevant time. Even if the second report dated 12 April is alone considered, it is critical enough of the conduct of the Applicant for her to know of the thinking of the Respondents about her performance at the CYP.

By this time both the Applicant and the Respondents' side were devoting a great deal of time to the "Case of Mrs Hans". However looked at, this was unhealthy from the point of view of the Respondents' objectives and purposes. As early as 21 February 1995, Mrs Stamiris, the Director of the Division under which the Applicant worked had written a confidential note in the Secretariat which expressed her exasperation of the case. The note contained the following revealing statement:

"During the second six-month extension of probation of Mrs Hans, I gave Devendra Agochiya final warning and instructions that the Secretariat now had enough time to get its act together, revise what was obviously a faulty bureaucratic probation process, and terminate in May Mrs Hans' contract. In other words, I advised him that I expected that this second deadline was not to be missed for anything! No more inertia, hedging and excuses, but swift action was a must."

As the exchange of correspondence increased in intensity, Mrs Stamiris wrote on 5 May 1995 the following letter to the Applicant:

"Dear Ms Hans

As you are aware, the matter related to your confirmation in the post of Senior Programme Officer is under the consideration of the Secretary General. I also recall, with regret, that whenever Mrs Ebert is on duty travel, you are not able to carry out the work of the Centre in the desired way and often have problems relating with the staff, further vitiating the working environment of the Centre. Therefore, in the interest of the Centre, and indeed of the CYP, you are advised not to attend the office from 9 May till the end of the month. The staff of the Centre will be instructed accordingly by the Regional Director. However, you will receive your full salary and allowances for the period.

Yours sincerely

Eleni Stamiris (Ms) Director, Women's & Youth Affairs Division"

The most instructive document on how relations had deteriorated between the Applicant and the Respondents, however, is a summary Record of a Meeting held on 26th June 1995 which several officers of the First Respondents' organisation attended. These included Mrs Stamiris, Mr Barber, Dr Agochiya, Mr Knowles, all of whom have appeared before in this judgment, and one Mr Sankar, Head of Financial and Management Information Department of the First Respondent's organisation. The purpose of the meeting as stated in the Record was that "The meeting was held to consider whether any new information had emerged since WY AD (which must be Mrs Stamiris's Department) had recommended to the Secretary-General that Mrs Hans not be confirmed in her post of Senior Programme Officer at the CYP Asia Centre". During the course of the meeting a report was made by Mr Sankar of a meeting with the Applicant which had taken place since that recommendation. The record of Mr Sankar's report on this meeting deserves extensive quotation. It reads:

"Mr Sankar reported that he later spent some 4 to 5 hours with Hans. He had gone to Chandigarh with an open mind and had deliberately not read the Secretariat file. Hans also considered that the situation had gone too far to resolve. She would not feel confident working with Ms Ebert; no trust existed. She was adamant that they could not work together. She did however suggest that perhaps a way forward might be to clearly define some division of responsibility between herself and the Regional Director. Hans informed Mr Sankar that she had a job to return to and other avenues of employment existed. Her most recent fax dated 18th June to Mr Sankar was circulated to colleagues at the meeting and it was clear from the third paragraph on page 3 that there could be no prospect of an amicable solution to the problem. That section of the fax reads as follows:

"You (Mr Sankar) had initiated some discussion on how the matter could be resolved. My faith in the Commonwealth Secretariat and the CYP remains unshaken. However, I have lost faith in the leadership of Ms Ebert at the Asia Centre in view of all professional and personal harm she has caused to me, her unethical ways and domineering exploitative nature, besides her administrative and professional incompetence."

Mr Sankar took the opportunity to speak to other local staff at the Centre, especially those in the Accounts Department. They had encountered numerous problems with Hans who was aggressive and abusive to them. She had claimed a number of allowances to which she was not entitled.

In summary, Mr Sankar suggested that there could be no long term future for Hans at the Centre and that, for the good of the Centre it would be difficult to continue employing Gurmeet Hans."

The Applicant does not deny the meeting or the contents of the report as affecting her. Obviously, by then, relations between the Applicant and the Second Respondent, who was the Director of the Centre had irretrievably broken down. One had to go. The Applicant had always had a very low opinion of the professional competence of the Second Respondent. In her statement of claim in this application, the Applicant makes clear the basis of this low regard. She says:

- (i) the RD did not possess the academic qualifications of the Applicant;
- (ii) the professional experience of the RD was far less than that of the Applicant.

Before us, the Applicant stated, and sought to get the Second Respondent to admit, that she, the Respondent, contributed nothing to the professional work of the Centre. It is not clear whether behind the Applicant's mind lurked the thought that in a trial of strength between herself and the Second Respondent, she with her supposed superior qualifications should be preferred to the Respondent. She was, by the time she met Mr Sankar, prepared to accommodate the presence of the Second Respondent if there was a clear division of responsibility between them. But as we are obliged to recall, her contract was to assist the Second Respondent and not to share responsibility with her.

Bearing in mind the fact that it is the employing organisation which defines its own needs, requirements and interests, and has the right to judge by the Staff member's performance on whether he or she satisfies those needs etc. or not, we find that the First Respondent is entitled to say from the observance of the staff member that she has not satisfied those needs, requirements or interests.

After the meeting of 26 June 1995 a memorandum was put up to the Secretary-General on 6 July 1995 that the appointment of the Applicant be terminated in the interest of the First Respondent's organisation

by giving her one month's notice. After due consideration, the Secretary-General approved the recommendation. The only question to consider in this regard is whether the Secretary-General had the power to legally terminate the contract with the period of notice specified. There is no doubt that the Secretary-General had this power. Clause 12(b) of the Contract with the Applicant provides that:

"Appointment will be on contract for two years. This assignment may be terminated:

(b) by the Commonwealth Secretary-General giving written notice of one month in the event of your acting in breach of the terms and conditions of this assignment or of your not performing the assignment to the satisfaction of the Commonwealth Secretary-General. or of gross misconduct on your part."

There was, accordingly, no breach of contract in the termination of the Applicant's contract.

We also think that there was no fraudulent job description of the post that Applicant applied for. No basis was laid for such a claim, which, in the circumstances, sounds frivolous and vexatious. The claim that the Applicant was discriminated against by the Second Respondent on account of her being an Indian seems also to be unfounded. The Second Respondent worked throughout the material period with the Programme Officer (PO), Mr Momen, who is Indian. Indeed, it is part of the case of the Applicant that the Second Respondent and the PO conspired to undermine her and to make her life unbearable. It is on record also that at the interview at which the Applicant was selected, the Second Respondent kept coming out of the interviewing room and asking the whereabouts of one 'Dr Prakash' because his name was on the list of interviewees. To the Applicant, this could only mean that the Second Respondent wanted to give Dr Prakash the job rather than to the Applicant. The inconsistency in her case with respect to the designs of the Second Respondent is that Dr Prakash is also an Indian.

We conclude on the issue of breach of contract that there was no breach but there was a failure to observe the rules of natural justice in that the Applicant was given no official intimation of her specific shortcomings during the first probationary period, was denied a proper hearing prior to the extension of the period and was only informed of the extension four months after the first probationary period had expired. She has therefore suffered procedural injustice. On account of procedural injustice we award the Applicant three month's salary based on the initial net salary stated in her contract, with interest at 7% per annum from the date the first six month's probation period ended until the date this judgment is delivered.

In view of our decision that no breach of contract was occasioned by the termination of the Applicant's appointment, claims II and III have no basis and are hereby dismissed.

We do not see why the Secretariat should be saddled with the expenses of the Applicant in her communications with the First Respondent on the climate at work. No reimbursement is therefore due. Claim IV is accordingly dismissed.

In Claim VI, the Applicant asks for the difference due towards salary and gratuity on account of increment due on 6 May 1995. The suggested date of increment more or less coincides with the time that the First Respondent was considering terminating her appointment for failure to perform her service as required. Indeed Mrs Stamiris's letter advising the Applicant not to attend the office from 9 May 1995 till the end of the month, which month, which effectively month, which effectively made 9 May the last day on which she actually attended the office is dated 5 May 1995. It will be recalled that in that letter it is stated that "whenever Mrs Ebert is on duty travel, you are not able to carry out the work of the Centre in the desired way and often have problems with the staff, further vitiating the working environment of the Centre." We do not think that in the circumstances the award of an increment, with its attendant consequences, which has not been expressly given by the organisation is competent to this Tribunal. We dismiss that claim.

We spent a long time on Claim VII. That dealt with what the Applicant described as illegal deduction of Indian Income Tax. The issue was not whether the Applicant was liable to pay such tax. She was and she knew it. But she argued very forcefully, that according to her contract, paragraph 18, "The Commonwealth Secretariat will not be responsible for any taxes on your emoluments or other allowances which may be payable in India or elsewhere." The argument which the Applicant founded on this clause was that the First Respondent had nothing to do with her tax matters, which ought to be left severely alone for her to deal with. But she also knew that according to Indian law, the tax payable was deductible at source. The duty of the employer here cannot be altered or abridged by contract. The question which she fought and fought valiantly on this latter point until the end was whether the deduction should have

been made by the Second Respondent at the Chandigarh Centre or from London. Her battle on this issue was in itself a telling comment on her attitude towards the Second Respondent and the Centre. Her case was that the deduction should have been made in London because her employer was based in London. The Centre to her mind was definitely not her employer. She was not prepared to accept that the Centre was the representative office of the Secretariat in Chandigarh, or that the Second Respondent was the representative of the Secretariat there. We think she is wrong. The Secretariat was her employer, but in certain matters the Second Respondent had to be recognised as the representative of the Secretariat in Chandigarh. When Indian law requires that an employee should have her tax deducted at source, where there is a failure to do so, the Indian authorities would be not questioning the Secretariat for this default, it is the Chandigarh Centre

that they would turn to. Whether she likes it or not, the Second Respondent was the representative at the Centre at the material time and it is to her that they would turn. We are quite satisfied that all that Clause 18 of her contract meant was that the First Respondent disclaimed liability to pay the Applicants' tax from its own moneys. The clause was not meant to convey the understanding that where the law of the host country demanded that an employee's tax should be deducted at source, the First Respondent was going to plead that because it had entered into an agreement with the employer that it was not liable for her tax on her salary, so the First Respondent would refuse to obey the law in the host country.

We are, however, sympathetic to the Applicant in her claim that the First Respondent through its agents made a mistake in the deduction of the tax due to the Indian Government, and as a result an amount of RS,1,47,675 was erroneously deducted, which she recovered only after considerable time and effort. As she recovered the overpayment of tax, she suffered no loss by the over deduction. But she was deprived of the amount over a period of time and consequentially lost interest on that sum. We award her the interest on the amount of the overpayment at the rate of 11 % per annum from the time of the deduction until the time of the recovery of the sum. We also award her Indian Rs.10,000 for her costs incurred to recover the amount.

The claim in Claim VIII for all costs related to litigation prior to submitting this application must be dismissed. The Respondents cannot lawfully be made liable for legal proceedings pursued without authorisation or foundation which the Applicant chooses to follow. The Applicant is at liberty to pursue her interest in a court or tribunal which she thinks could redress her perceived wrongs. It is not the fault or liability of the Respondents if she chooses a court or tribunal which has no jurisdiction over the Respondents. Claim VIII must be dismissed and is accordingly dismissed.

Claim IX is for all costs towards the application to this Tribunal. We recognise this head of claim We think that just as a Plaintiff is entitled to his/her costs if he/she wins a substantial part of his/her claim, so the Applicant also is entitled to her valid expenses incurred in connection with this application. To that end, she is entitled to her return fare from and to India, economy class; a per diem allowance calculated from the day that she arrived in this country, on account of this case, that is 8 September 1998 at the rate of £150 per day until the last day of the hearing on 2 October 1998. The other incidental claims are dismissed.

We thank all parties, Mr Nzerem and witnesses for their assistance to this Tribunal.

London

Dated this day of October 1998

Per Suresh J.

My Learned Brothers have given a finding that the Applicant suffered procedural injustice in the matter of the extension of her first probationary period and accordingly she has been awarded Compensation of three month's salary together with interest at 7% p.a. from the date the first six months probation ended until the date this judgement is delivered. I agree with this. However, they do not agree that during the extended period of probation, she suffered the same denial of principles of natural justice and fair play which led ultimately to the termination of her services. It is here, I differ with respect, from my learned Brothers.

I do not intend to suggest that the termination of her services should be set aside. I consider that she is entitled to be compensated on the same principles as in the case of the extension of the first probationary period, which was apparently improper.

The Respondents purported to terminate her services under Clause 12 (b) of the Contract alleging "in that you have not performed the assignment to his satisfaction ... " (Letter dated 14-7-1995)

Clause 12(b) enables the Secretary-General to terminate the services of the Applicant by giving one month's notice, " in the event of your acting in breach of the terms and conditions of this assignment, or of your not performing the assignment to the satisfaction of the Commonwealth Secretary-General, or of gross misconduct on your part".

It is clear that the termination was not on account of any breach of the terms and conditions of her appointment. So also, it was not on account of any "gross misconduct" on her part. Apparently there was none. In fact as late as on 12th April 1995, Sir Anthony Siaguru Dy-Sec-General writes in his letter to the Applicant, " your file confirms that no warning letter was given, but I would not expect one to be given unless the circumstances were extremely serious."

Therefore, the question is what could be the ,meaning of the words" not performing the assignment to the satisfaction of the Commonwealth SecretaryGeneral!." The expression must be understood in the context it appears. The expression preceding relates to the terms and conditions of her service. The expression succeeding relates to " gross misconduct" which is akin to misbehaviour. The adjective" gross" would suggest serious misbehaviour. The Applicant's service has not been terminated on the ground of misbehaviour though that has been the allegation throughout. The expression" performing the assignment" must therefore be construed to mean performance of that which has been assigned to her, and not as related to behaviour.Any other interpretation would render this expression tautological.

Her letter of appointment shows what was assigned to her - the functions (See Annexe 1 to the letter of appointment - Job description). There is no allegation that she has not discharged her functions well. On the other hand even in the witness box the Director Mrs Starn, ris, the Assistant Director Dr Agochiya and even the Regional Director Mrs Ebert have all categorically said that she was excellent in her work. Even if it could be said that she was required "to assist" the Regional Director in carrying out the functions mentioned therein, it could not be faulted on the ground of any want of behaviour in as much as she has performed her job as well. There is no allegation that she did not assist the Regional Director at any time in implementing any of the programmes. Therefore, the ground chosen for terminating her services is without any material and it is in that sense arbitrary and unfair.

It is a well settled legal position of universal application that non-arbitrariness and fairness are the essential requirements of every administrative action. Yes, it is true - it is the subjective satisfaction of the Secretary-General but it must be based on objective materials.

Under Regulation No.21, which applies to all staff members serving a probationary period, "the Secretary-General may at any time terminate the appointment, if in the Secretary General's opinion such action would be in the interest of the Secretariat." The termination of her services is not on the basis of this Regulation. The termination letter does not say that the termination was in the interest of the Secretariat .In other words the exercise of power under clause 12(b)was a colourable one, the objective being to "sack" her from service there beeing no justifiable grounds, perhaps on an assumption that there would be no judicial scrutiny. It is in such situations, the Tribunal is entitled to take into account all the preceding and surrounding circumstances to consider whether the action taken could be sustained or not, on the basis of principles of due process of law.

We have already held that the extension of the probation period suffers from the vice of procedural injustice. The Secretariat never maintained any appraisal form or any confidential record. The only report is the report dt 28- 10-1994 which was never shown to the Applicant at any time. It is an admitted position that the report was one sided in as much as it never mentioned whatever was good about her and only reported whatever was not good about her. This is, to say the least, patently unfair to any employee in the matter of assessment of his performance in service. In any event her professional competence was never in question .The report is against her behaviour in that she was rude with "low receptivity towards her colleagues and senior officials" and failed "to cooperate and work as a desirable team member which leads to discomfort and disgruntlement of subordinate staff". Needless to say that all these allegations were kept as vague as it could be, with no particulars or any supporting documents based on proper investigation and inquiry.

Thereafter Dr Agochiya met the Applicant in November, 1994 much after the expiration of the first six month's period. He did not record any minutes of the meeting, but he prepared a performance report dated 9-12-1994 which again was never given to the Applicant. According to the Respondents, it was on the basis of this report her probation period was extended. The actual letter extending the probation period is dated 25-11-1995, but it was served on the Applicant as late as on 7-3-1995. There is no explanation why the minutes of the meeting were not recorded, why the performance report dated 9-12-1994 was not given to her and why the letter of extension was served so late excepting pleading administrative lapses.

The Applicant promptly protested against this by her letter dated 10-3-1995.

Before she could get any reply, the Regional Director Mrs Ebert by her letter dated 12-4-1995 addressed to Dr Agochiya, Assistant Director recommended that the Applicant's services to be terminated as "she has not changed her behaviour". This letter is again as vague as the earlier report containing no material particulars or documents in support of the recommendation. It appears that the Regional Director had made another adverse report dated 10-4-1995 which was never given to the Applicant at any time.

The question is what made the Regional Director recommend termination of her services within such a short time after serving the letter extending her probationary period. Did any event of significance in relation to her "behaviour" take place between 7-3-1995 and 12-4-1995 so as to recommend termination of her services? or for that matter did any event of such significance take place between January 1995 and April 1995? When I asked Mr Richard Nzerem to point out any such instances, he could point out only three instances on the basis of the report dated 23-3-1995 made by the Regional Director to the Secretariat (which report again was not given to the Applicant, the Respondents strangely asserting that it was not their policy to give such documents.)

The first instance relates to a personal letter written by the Applicant to the Director, and upon the Regional Director asking her to divulge the contents of the same, the applicant politely declined to do so. How does this become a matter relating to her objectionable behaviour? The letter is written to the Director, and if there was anything improper in the letter the Director could have disclosed to us, and the Applicant's attention could have been drawn to the same.

The second instance relates to a note dated 16-12-1994 prepared by the Accounts Officer, in connection with the Applicant's contention that the Chandigarh office had no right to collect Income-Tax from her. The note does not reflect any "rude" behaviour from the Applicant. The fact is that the Chandigarh office collected more than what is due from her by way of income tax and we have awarded her loss of interest on the amount so recovered and also costs incurred by her for getting the refund from the Income-Tax Department.

The third instance relates to a programme in which Miss Vidya Rao was to be invited for a programme to be held in April, 1995. It appears, Miss Rao had prepared a paper she wanted to present. The Regional Director felt that before contacting Miss Rao, she should have been consulted and the Applicant could not have taken the decision on her own. The Respondents have not led any evidence to show about anything adverse that happened as a result of inviting Miss Rao. So also this incident has nothing to do with her behaviour.

Thus we are left with no material whatsoever, excepting, perhaps preconceived, prejudice, to come to any conclusion that her behaviour was such that she could not be continued any further. On the other hand, during this period the Applicant had organised successfully three training programmes in respect of which there was no complaint at all. The letter extending her probationary period was served on her on 7-3-1995. The Respondents were required to give her a reasonably fair climate and opportunity to work. Instead, within less than five weeks time, they sought to recommend termination of her services on the basis that there was no change in her behaviour. This is patently unfair.

As far as Mrs. Stamiris, the Director, was concerned she had never brought any objectivity at any time in this case. Her note dated 21st Feb, 1997 clearly depicts that she was more biased against the Applicant, than anybody else in the administration. On the very next day of the selection of the Applicant for the job Mrs Stamiris; succumbs to a hearsay statement describing the Applicant being a "very difficult" person. Within three weeks, she says that she got the report of "first signs of trouble", while there is no evidence of the same before us. Within three months, i.e. by about 12th August, 1994, she instructs Dr. Agochiya "

to start the necessary procedures well in advance to terminate Mrs. Hans employment" She wanted the termination notice to be served on Mrs. Hans by 5th September, for which purpose she asked Dr. Agochiya " to move swiftly, chase the document from desk to desk, and not miss our deadlines." There can be no better evidence of pre-determined bias than this, particularly when in August-September, 1994, there were no reports against the Applicant. In fact, Mrs. Ebert was away from Chandigarh, from 28th June to 29th July and again from 24th August to 9th September. It was during this period the Applicant was entrusted with three Training Programmes which she had conducted successfully.

Dr. Agochiya's evidence shows that he did not initiate any action against the Applicant as there was no material against her. Even the report dated 28-10-1994 recommended her extension of the first probationary period, and not any termination. So also, Dr. Agochiya's Performance Report dated 9-12-1994 recommends extension and not termination. Mrs. Stamiris blames Dr. Agochiya for " a faulty bureaucratic probation process" without realising that she could as well be blamed for being capricious and arbitrary. The Applicant received a copy of the report dated 12-4-1995 on 8-5-1995. She was forced to give an interim response on the same day. On the very next day, Le. 9th May, 1995, Mrs. Stamiris instructs her not to attend the office any further. The Applicant's subsequent letters and appeals were all in vain because Mrs. Stami'ris had a closed mind from the very beginning, and the Applicant could not have had any objective appraisal of her performance of her service from Mrs. Stamiris.

The gravamen of the charges against the Applicant is that she was not a " team player". In an atmosphere of bias and prejudice where her superior officers had made up their minds to terminate her services within three months of her being in service, she could never have been accepted as a team member. The charge was as fanciful as their reason for terminating her services. I would have upheld the charge if the same could have been sustained on the basis of objective materials. There was no such material. On the other hand all the six training programmes conducted successfully by her were not "solo" performances. The Programmes, which included several participants, could not have been successfully concluded without mutual co-operation and team work.

The other allegation which is not there in any of the reports or letters, is that she has failed to "assist" the Regional Director. "Assist' in what? The letter of Appointment spells out that the Applicant has to assist the Regional Director in the functions mentioned therein. There is no evidence to hold that she has not assisted in the implementation of those functions. All the programmes organised during her tenure had been successfully carried out. Hence, even this charge is as unsustainable as all the others levelled against her.

Thus, I hold that the Respondents failed to accord the Applicant the due process of law when they purported to terminate her services. She suffered the same procedural injustice and denial of principles of natural justice and fair play in the extended period as in the matter of extension of the first probationary period. On the same principles, I would award her a compensation of £10,000/- for the procedural injustice suffered by her as mentioned in the foregoing paragraphs.

On all the other issues and findings, I agree with my Learned Brothers.

Dated this day of October 1998

Justice H. Suresh