

CSAT/3(No.1)

JUDGMENT OF THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

September 2001

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the Matter of

SELINA MOHSIN

Applicant

and

The Commonwealth Secretariat

Respondent

JUDGMENT

September 2001

1. By an application dated the 22nd December 1999, Ms Selina Mohsin ("the Applicant") applied to the Commonwealth Secretariat Arbitral Tribunal ("the Tribunal") for the determination by the Tribunal of a number of issues arising from her contract of employment. In brief those issues concern decisions of the Review Board and the Secretary General's decision to accept the Review Board's recommendation. The Applicant contends that those issues amount to breaches of her contract of employment. In addition the Applicant contends that she suffered unlawfully discrimination on the grounds of her sex and harassment at the hands of two supervisors. The Respondent failed to stop this discrimination and harassment.

2. It is important to briefly mention the legal personality of the Commonwealth Secretariat Arbitral Tribunal and its jurisdiction in general in relation to this case. It is common knowledge that the Commonwealth Secretariat was set up by heads of member states of the Commonwealth by agreed memorandum dated June 1965. The United Kingdom has enacted primary legislation to give effect to the Memorandum, namely the Commonwealth Secretariat Act 1966.

Section 1 (3) of this Act provides that,

"Every written contract entered into by or on behalf of the Commonwealth Secretariat, if it does not contain an express provision for the reference of any dispute in connection with the contract to arbitration, shall be deemed to contain a provision that any such dispute shall at the request of either party to the contract be referred to arbitration and (except where the contract falls to be construed by reference to the law of Scotland) shall accordingly be treated as an arbitration agreement for the purposes of the Arbitration Act 1950 .. "

The principal source of its jurisdiction is derived from the Statute of The Arbitral Tribunal of The Commonwealth Secretariat. (the Statute).

Article X1V of the Statute says:

"In dealing with all cases before it relating to contracts of service, the Tribunal shall be bound by the principles of international administrative law (which shall apply to the exclusion of the national laws of individual member countries)".

The Commonwealth Arbitral Tribunal is therefore an international Administrative Tribunal. Reference will be made where necessary in this judgment to relevant internal Statutes such as Staff Regulations and Staff Rules of the Commonwealth Secretariat, (Staff Rules) the Equal Opportunities Policy (EOP), the specific contract of employment and accepted practice within the Secretariat. Reference will be made to judgments of other international administrative Tribunals. The use of judgments from other jurisdictions was recognized and adopted in De Merode WBAT (1981) Decision 1 at page 13 para 23.

"while the various international administrative tribunals do not consider themselves bound by each other's decisions and have worked out sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different... The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other administrative Tribunals..."

If a general principle of law applies then the judgment will say so. It is not necessary to enter a discourse in this judgment as to the sources of international Administrative law, which is appropriate for an International Administrative Tribunal such as this one. Dr C.F. Amerasinghe in his learned treatise of The Law of the International Civil Service states

"It is also clear that, while international administrative tribunals may be tribunals,, their task is to decide internal disputes between international organizations and their employees within the organized legal systems of those organizations, and in the process of such dispute settlement, a tribunal applies internal law of the organization concerned as the law governing the conditions of employment". (The Law of The International Civil Service second edition Chp 5 paae 1 07).

This approach is echoed in the Judgment of De Merode WBAT (1981) Decision 1. p12 para 27:

"The tribunal. which is an international tribunal. considers that its task is to decide internal disputes between the Bank and its staff within the organized legal system of the World Bank and that it must apply the internal law of the Bank as the law governing the conditions of employment".

3. Prior to dealing with the facts, issues and relevant authorities, it is important to set out two aspects of the history of these proceedings. Firstly, that the parties to this dispute were originally the Applicant, the Commonwealth Secretariat as first Respondent, and the Head of Education Dr. Wright and Director of Human Resources Professor Matlin, as second and third Respondents. The Tribunal ordered that the second and third Respondents be struck out of the proceedings, leaving the Commonwealth Secretariat as the only Respondent. This was so ordered as the wording of Article II of the current Statute of the Arbitral Tribunal of the Commonwealth Secretariat ("the Statute") provides for actions between only employees, staff members of the Commonwealth Secretariat and the employer, the Commonwealth Secretariat. Article II of the Statute states as follows:

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

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

(b) The Commonwealth Secretariat;

(c) Any person who enters into a contract in writing with the Commonwealth Secretariat.

The Applicant no doubt cited the second and third Respondents in anticipation that she may invite the Tribunal to order remedies against each individually. There is no power under the Statute for the Tribunal to order remedies against individual employees. The duty of the Tribunal is to consider the complaint of the Applicant (which includes allegations against other employees) and to decide upon appropriate remedies as against the Commonwealth Secretariat.

4. Secondly, the Applicant requested an oral hearing by a three member Tribunal. The Tribunal granted an oral hearing. The decision to grant an oral hearing was communicated to the parties in writing by letter dated 11th January 2001. The Tribunal after ordering that the hearing of this matter should be in public (both parties agreeing that it should be so) proceeded to hear evidence from the Applicant and witnesses called on her behalf. On the third day of the proceedings the Tribunal received unfortunate news that the President of the Tribunal was suddenly taken ill and was in hospital. Over the next three days the Secretary to the Tribunal received further unfortunate news that one of the remaining two members of the Tribunal was also unwell and unable to attend the remaining hearings listed for the completion of this matter. Neither the President nor the second member of the Tribunal would be available to continue to hear evidence on this matter before June 2001. The second unwell member indicated that he would not be available to hear further oral evidence until September of 2001. It is important to note that various witnesses for both parties had already been granted leave of absence from work in order to attend the Tribunal and there would be extreme difficulties if the oral hearing were put off till June or after because of international duties and commitments of those witnesses. The remaining member of the Tribunal liaised with the President and the parties as to how to proceed with this matter, which was part heard. On the 14th March 2001, the parties reconvened to discuss the possible options for the future conduct of this case in the light of the unavailability of the President and one member. There is no obligation upon the Tribunal to consult with the parties in these unusual circumstances but it was thought proper and fair to do so. The Applicant through her solicitors sent written response dated 21 st March 2001, stating _ "We are very anxious indeed to hear of progress being made to continue (or re-commence if appropriate) the hearing as soon as possible." (See Appendix A1). Between 14th March and 21 st March the President consulted with both members of the Tribunal and the Secretary of the Arbitral Tribunal as to the options available to him. The unwell member of the Tribunal had left the jurisdiction of the United Kingdom but the President was able to communicate with him direct via the telephone to discuss the options available to the President in the light of the fact that the unwell member was

unavailable to be back in the United Kingdom until September. By written communication dated 22nd March 2001 (see Appendix A2) the President who was still unwell ordered that the remaining available member of the Tribunal be designated to act alone pursuant to Article 4 (1) of the Statute. In addition the President took into account the provisions of Rules of The Arbitral Tribunal of The Commonwealth Secretariat, ("The Rules") namely Rules 1 (2) and Rules 23. In deciding the best possible options for the parties and in particular bearing in mind the interest of the Applicant, the President stated as follows: "on reading Article 4 (1) and (2) it is apparent that the statute does not provide for the unusual circumstances in this case. ie. the unexpected events referred to above which leaves only one member of a three-member Tribunal able to adjudicate on this case.

The President therefore interprets the statute accordingly and finds that Article 4(1) must be applicable to the facts of this case."

The Tribunal in dealing with the unexpected events had to bear in mind the following:

"The Judgement of the Tribunal shall be final and binding on the parties and shall not be subject to appeal." Article IX.2

That being a Tribunal of final decision that it had to adopt principles of fairness in dealing with the Applicant's case. An example of the principles of fairness applicable to the Tribunal can be found in Article 6 of the European Convention on Human Rights.

The unwell member of the Tribunal who at the time of the President's written communication of 22nd March 2001, was outside the United Kingdom in the United States of America, Bethesda Maryland, sent a detailed fax dated 22 March 2001 stating that it was his decision to terminate the oral proceedings and to proceed to deliver judgment after it is prepared. In addition he sent by fax detailing his dissent to the order of the President dated 22nd March. (see Appendix A3 & A4 for both faxes). Both faxes were sent to the parties directly by the unwell member of the Tribunal. In respect of the covering note attached to Appendix A4, the Tribunal is unaware as to whether that document was also sent to the parties by the said member of the Tribunal.

The Tribunal is grateful to both parties for their cooperation and patience in dealing with the unexpected event which occurred. It would be quite wrong and against natural justice to abandon an oral hearing properly granted by a Tribunal when it was not the fault of either party in these proceedings that 2 members of the Tribunal became unavailable. The Tribunal's first priority in these difficult circumstances was to ensure that the oral hearing was completed as soon as possible, particularly as the Applicant was in the middle of presenting her case and witnesses for both sides had set aside time to attend the oral hearing. The order of the 22nd March ensured that this was done.

5. SUMMARY OF RELEVANT FACTS.

The summary of facts is largely taken from the agreed chronology (Appendix B) requested by the Tribunal and prepared by both parties. The Tribunal is grateful to both parties for their preparation of this helpful document.

22nd November 1994 a letter of appointment told the Applicant that she was successful in obtaining the post of Chief Programme Officer in the Education Department of the Human Resource Development Division (HRDD) grade MI. The letter stated, "Your appointment is on contract for a period of three years in the first instance from the date of assumption of duty". The Applicant from that date became an employee of the Respondent on a fixed term contract. One of the reasons no doubt for the Applicant's successful appointment was her impressive CV and work experience. The Applicant was required to act as Chief Programme Officer on the Human Resource Development Initiative (HRDI). She would be expected to focus on the day to day activities of the HRDI, to identify key issues and initiatives which would eventually progress towards workshops and international events. In addition to commission and manage consultants and to write reports.

On or about March/April 1995 Professor Matlin took up the post of Director of HRDD a few months after the Applicant took up her post and became her line manager. He held a meeting with the Applicant to discuss her role.

Between February and August 1995, the Applicant successfully completed her first six month probationary period. The first performance appraisal record (PAR) dated 20th July 1995 written by Professor Matlin was

very positive and gave the Applicant an overall grade of B. This PAR contained no negative comments from the Applicant's line manager.

In July 1995 the Applicant along with others from the HRDD organised and coordinated the Malaysia workshop. A meeting was held to discuss the Malaysia workshop between the Applicant and Mr. Alam (Additional Secretary Ministry of Education, Bangladesh). 25th January 1996, Mr. Alam sent a fax stating that the Bangladesh government had decided to abandon the proposed workshop.

In June 1996, a further workshop was held in Botswana which was attended by the Applicant whose role was to act as team leader and coordinator. The Deputy Secretary-General Sir Humphrey Maud attended this workshop. A number of complaints were made by support and administrative staff about the Applicant's professional behaviour during the workshop. There followed a meeting with the Deputy Secretary-General the Applicant and her line manager Professor Matlin on 10 July 1996. As a result of the July meeting there were a number of exchanges of correspondence between the Applicant and Professor Matlin.

On the 8th August 1996 Professor Matlin wrote to the Applicant expressing his support for the Applicant and her work despite the criticisms leveled against her. The Geneva meeting for the Association of Development of Education in Africa (ADEA) took place on 30th September to 1st October 1996. During and after the Geneva meeting Professor Matlin received a number of complaints from persons inside and outside of the Commonwealth Secretariat regarding the Applicant's performance. There then followed a number of exchanges of correspondence from Professor Matlin to the Applicant dealing with this issue.

The second PAR dated 1st November 1996 written by Professor Matlin was clearly not as good as the first. The overall grade of C was lower (the previous PAR contained combinations of A's and B's) and the record contained negative comments whereas the first did not. In particular the record states, "there have been adverse comments on her management style at workshops."

Applying the principles set out in *In re Ballo*, the Tribunal must review the decision to use the Review procedure instead a disciplinary procedure. The Statute Rules clearly allows the Respondent in its discretion to use either "a Review Board or a disciplinary process."

Rule 39 and Rule 40 allows the Respondents to use a Review Board where "at any time a staff member whose performance is reported to be less than satisfactory .. "

Rule 128, provides that "acts or omissions which may render a staff member subject to disciplinary procedures ... category (a) Included under this category are acts or omissions affecting: (111) performance of duties:

The oral evidence of Mr. Srinivasan is helpful on this issue. He told the Tribunal that the Secretariat never contemplated using disciplinary proceedings against the Applicant. During cross-examination by the Applicant's counsel he stated,

"you've pointed out that the disciplinary Review Board if it meets can undertake or can recommend a series of fairly draconian actions. I personally would not have gone along with using that procedure for Ms Mohsin's case".

Mr Srinivasan was at pains to convey to the Tribunal that it was his view that the use of disciplinary proceedings where the Applicant ran the risk of dismissal, suspension or downgrading was more draconian than the Review Board who could only recommend non-renewal, which was always a possibility from the commencement of the contract. Disciplinary proceedings carry an unwelcome and often lasting stigma for those subject to it and tend to suggest that the person concerned did some deliberate wrong act. The Tribunal accepts the evidence of Mr. Srinivasan that he thought disciplinary proceedings were not as fair as the Review Board and was therefore not appropriate for Ms Mohsin.

There is no basis therefore to conclude that the Respondent's exercise of its discretion to use the Review Board was unlawful.

22nd and 23rd July 1999, the Review Board considered the question of Renewal of the Applicant's contract. As stated above it is required to do so under Rule 39 and Rule 40. There is no procedural irregularity in using this procedure.

8.2 Where the decision for granting an increment is linked to performance of the contract which procedure should be used, Review Board or Disciplinary procedures?

For the same reasons set out above the Tribunal finds there to be no procedural errors or irregularities in dealing with the issue of withholding an increment by the Review Board procedure. Rule 40(f) specifically gives the Review Board the function of making recommendations in respect of increments.

8.3 Was the Applicant afforded due process in relation to the Review Board's consideration of performance, renewal of contract and withholding of increment?

20th February 1997, the Review Board considered the Applicant's performance. The Tribunal notes that the Review Board adopted the customary requirement that to base its recommendations on renewals primarily on Appraisal Reports. The Board were faced with supplemental information in the form of a written recommendation and accompanying note. Both these additional documents were inconsistent with the two Appraisal Reports before the Board. The said note contained very serious criticisms of the Applicant's performance. The Applicant accepts that she received a copy of the said note about her performance, on 14th February 1997. The Tribunal rejects the Applicant's submissions that the writing of the note one month before the convening of the Review Board amounts to procedural unfairness. A line manager who is requested by the Secretary-General to make a recommendation on a staff member is entitled to do so at the time of the request, even if he is aware that a Review Board is about to convene. The important fact is that the Applicant was shown the report before the Review Board actually met and was able to comment upon its contents.

There is evidence from the minutes of the Review Board, and statement of Dr. Mutahaba the chair of that Board that they carefully considered the inconsistency between the Applicant's two APR and the Supervisors subsequent written recommendation. The Board were rightly concerned about the inconsistencies and understandably wanted further explanation or clarification from the Supervisor. The Tribunal however is concerned about the procedure that was then adopted to deal with the Board's concern. The Supervisor was invited to speak to the Board in order to clarify the issues in his note on performance. The Applicant was not told about this. Neither was she invited to speak to the Board in order to deal with the oral representations made by her supervisor.

The Tribunal considers that the Review Board should have invited the Applicant to deal with the contents of the oral representation. The Applicant is entitled to feel that it was unfair that the Board had received additional explanation from her supervisor on the important topic of her performance, which she did not have an opportunity to comment upon. Especially in the light of the fact that the Applicant had received two previous satisfactory reports and in the light of the fact that her written submission showed that she did not agree with the views expressed by her supervisor in his final note to the Board.

The audi alteram partem 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.

The Tribunal finds that there was a procedural irregularity. The irregularity was a significant one because the oral representations were on the important topic of work performance and the Review Board took those representations into account when making its decision to make recommendation for a shorter term of two years instead of three. The penultimate paragraph of the Review Board's report is important in this regard. It states:

"After reviewing all the information which was available, ie the Head of Division's recommendation, his supplementary information contained in the note accompanying the recommendation, Ms Mohsin's submission, and the Head of Division's oral account, the Board concluded that there were some performance problems on the part of Ms Mohsin that could not be overlooked. Taking those factors into account, the Board recommended that Ms Mohsin be offered a shorter contract of two years".

The Board when exercising its discretion on renewal of the Applicant's contract took into account the oral representations of the supervisor. Therefore the decision is tainted by the procedural irregularity. It is important to note that there was ample evidence to substantiate the recommendation of a shorter two year term if the Board had not received oral representations from the Supervisor without informing the Applicant thereby denying the Applicant due process. In addition if the Board had received oral representations from both supervisor and Applicant they would have been entitled on the evidence available, to arrive at the same recommendation of a shorter term of two years.

The decision of the Secretary-General to accept the recommendation of the Board is also tainted, because he has adopted a recommendation based upon procedural irregularity. The Tribunal does not find that the Secretary-General acted lawfully in any other way. Accordingly the Tribunal rescinds the decision of the Board 20th

February 1997, and the decision of the Secretary-General to accept the recommendation.

The Tribunal notes the written statements of Mr. Barber, Head of Personnel and Staff Development, Dr. Mutahaba Director of Administration, who both confirm that procedures adopted by the Review Board on all other occasions in relation to the Applicant were fair, correct and afforded the Applicant due process. In reviewing those decisions namely, the Review Board of the 12th April & 16th May 1999, and 22nd and 23rd July 1999, the Tribunal finds no basis for a finding of procedural irregularity.

On each of the occasions that the Review Board considered the Applicant's case she was given the opportunity to present her case in respect of her wish to have her contract renewed. Each Board took into account relevant matters and were entitled to exercise their discretion as they did. The final decision by the Review Board on 22nd, 23rd July 1999 based their decision on the difficulty of the working environment and the unsatisfactory performance of the Applicant. Unsatisfactory performance coupled with difficult working relationship is an acceptable basis for non renewal of a fixed term contract. Support for this can be found in the following two judgments. In re Hrdina ILOAT no. 229 (1974), In re Rebeck ILOAT no. 77 (1964). Therefore, the above mentioned decisions of the Review Board cannot be said to be manifestly erroneous.

8.4 Did the making of the decision to closely supervise the Applicant contain any procedural flaws?

On the 28th August 1998, the Deputy Secretary-General (Political), Mr. Srinivasan wrote to the Applicant informing her that a decision had been taken by senior management that she would be very closely supervised over the next six months. In addition that at the end of the six month supervisory period that senior management will again review the matter and reach appropriate conclusion. It is important to set out the chronology leading up to the making of this decision. Mr. Srinivasan in his oral evidence before the Tribunal said that Dr. Wright submitted a report (dated 9th June 1998), which was received by Sir Humphrey Maud. This report dealt specifically with Dr. Wright's concerns about supervision of the Applicant. It was an important document because it contained a number of serious criticisms of the Applicant's work performance. Sir Humphrey Maud sent this report to the Secretary-General who called for a meeting to discuss the report. The written statement of Sir Humphrey Maud does not give any detail of the events leading up to a meeting which took place with the Secretary-General. The written statement of Mr. Srinivasan also lacks any detail on the vents leading up to this meeting. What is clear from both these statements and from the oral evidence of Mr. Srinivasan is that a meeting took place some time in June 1998 before the 28th June. Those present at this meeting were, the Secretary-General, Mr. Srinivasan, Sir Humphrey Maud and Dr. Wright. Mr Srinivasan states that Dr. Wright brought all the papers in the Applicant's case to the meeting and that the Secretary-General spent a considerable amount of time looking through the documents. None of the persons present at this meeting have presented any minutes of that meeting to the Tribunal. The Tribunal is concerned about the absence of evidence on two matters. Firstly, as to whether the Applicant was consulted (whether orally or in writing) before the decision was made, and secondly, as to whether any records were made and or kept of the matters discussed at the meeting. Counsel for the Applicant asked Dr. Wright during cross-examination whether the Applicant was consulted about the decision to closely supervise before the decision was made. Dr. Wright replied that he did not know if she was consulted by anyone. The Tribunal finds that the Applicant was not told of the meeting nor was she invited to comment upon the representation made by those who attended the said meeting. Secondly the Tribunal finds that no record was made or kept of this meeting. Finally the Tribunal notes that senior management did not use the statutory procedure for dealing with staff members who demonstrate unsatisfactory performance. Rule 40 allows a supervisor to raise unsatisfactory performance of a member of staff at any time. Dr. Wright's memorandum was about the performance of the Applicant as it related to her response for supervision. Where an established procedure is not used there is even more reason to ensure that the Applicant is kept informed and allowed fair opportunity to deal with matters. Mr. Okot-Uma, the CSSA chairman rightly raised this issue in a letter to Mr. Srinivasan dated 5th October 1998

under paragraph entitled "On the Mechanism of Senior Management Decision". The Tribunal finds the absence of consultation and record of the meeting to be a procedural irregularity which denied the Applicant due process on matter affecting her work performance. The Tribunal considers that the finding does not provide a proper basis for rescinding the administrative decision to closely supervise because it is of the view that the irregularities are not fundamental although they are important. The said procedural irregularity does not taint the decision of the Secretary-General to reject the options proposed by Mr. Srinivasan and supervisor not to renew the Applicant's contract and to order instead close supervision. The Tribunal also notes that this procedural irregularity does not taint any of the decisions made subsequently, which form part of the Applicant's claim.

The Tribunal finds that senior management having made the decision to closely supervise gave the Applicant an opportunity to deal with the details of the close supervision programme.

8.5 Did the Respondent fail to investigate fairly complaints raised by the Applicant about her supervisors?

The Applicant submits that there was a failure to investigate the complaints raised by the Applicant. If there was an investigation of any complaint that such investigation was inadequate or procedurally flawed. In support of this submission the Applicant cites as examples the following. That the Review Boards preferred the opinions expressed by the supervisors simply because they were more senior without taking genuine steps to verify the truth of those opinions. That the Gold report was not a genuine effort by management to establish the veracity of the account given by the supervisor Dr. Wright.

The Applicant complained directly to the Secretary-General 15th January 1997 about the behaviour of Professor Matlin. In that letter is clear that the Applicant had an audience with the Secretary-General as the letter states, "thank you for allowing me this opportunity to have an audience with you and present my case .." Dr. Mutahaba, received this letter and passed it onto the Head of Personnel, Mr. Barber in order to obtain guidance as to whether the letter constituted a grievance within the Staff Rules. The reply from Mr. Barber dated 30th January 1997 concluded that it did not. The reply in addition stated that "Discourtesy, rudeness and intimidation from one's supervisor/Head of Division could indeed form the basis of a grievance. However, the grievance procedure as set in Staff Rule 214 has not been followed". The matter was left there. The Tribunal finds that this was inadequate. Whilst it is clear that the Applicant was competent to properly initiate a formal grievance against her line manager in the proper form her failure to do so should not prevent the Respondent from investigating her allegations informally. The Tribunal notes that the Office Notice no. 59/97 states, "For some years the only official mechanism for dealing with grievances has been staff rule 214 which is simple, very brief and generally considered to be inadequate. It has rarely been used by staff who wish to seek redress of a perceived grievance". This Office Notice is dated 23rd December 1997, after the Applicant raised her complaint in January 1997, however the Tribunal considers that the Respondents could have conducted an informal investigation in the absence of this Office Notice. This was done in relation to a complaint by the Applicant in a letter dated 5th October 1998 (reference is made to this letter on page 27 of this judgment).

Dealing with the first example cited by the Applicant, the Tribunal rejects the submission that the submission that Review Boards preferred the views expressed by the Supervisors simply because they were senior staff. The documentary evidence shows this to be not the case. The First Review Board which met on the 20th February 1997, were clearly concerned about the views expressed by Professor Matlin. They were not prepared to accept his recommendation of non-renewal of the Applicant's contract in the light of the inconsistency between the recommendation and the two APRs. Having interviewed the Supervisor, the Board rejected his recommendation. Further it is important to note that the Board then went on to comment that in future the Supervisor should be more proactive and positive in his supervision of the Applicant.

The minutes of the Review Board 16th April and 12th May 1999 discloses a careful analysis and examination of both supervisor and Applicant's views. There is no evidence in this report of a preference for the views of the Supervisor.

The record of Appraisal Review Board 30th June, 8th July 1998, dealt with the very serious allegation that the Applicant's supervisor had deliberately changed certain comments (which had been discussed with the Applicant) on her PAR form without showing the changes to her. The Board without hearing from the

Supervisors expressed concerns in favour of the Applicant. The record of the Board states, "The Board was concerned that in one case brought to its attention ... if written comments are shared with the post-holder, they should not be amended thereafter".

The Review Board of 22nd and 23rd July 1899, dealt with the recommendation of non-renewal of the Applicant's contract from her supervisor and the Applicant's submissions to the contrary. This reports states, "Normally the Board would have accepted the technical assessments of her supervisors as the Secretariat's experts in the field, but in the light of the history in this case there was good reason not to rely fully on their judgments".

There is a proper basis for finding that the Board on this occasion also did not simply accept the views expressed by the supervisors because they were more senior than the Applicant.

The Applicant wrote a memo dated 5th October 1998, making complaint about her supervisor Dr. Wright. Professor Matlin wrote to the Applicant (28th October 1998) setting out the process and conclusion of a thoroughly conducted investigation of her complaint. The Tribunal notes that this document was copied and sent to other important persons such as Sir Humphrey Maud, Mr. Srinivasan and the Staff Association. This was a proper investigation, which was treated seriously and fairly by management.

The Applicant made a formal complaint of harassment against Dr Wright on 19th October 1998. Mr. Gold, Director of the Economic and Industrial Development Division of the Secretariat dealt with the investigation into the complaint, under the new procedure set up by Office Notice no. 59/97. Annex 2 paragraph 1 introduced an informal stage of the grievance procedure. The Tribunal is concerned about the lack of evidence to substantiate that this stage was carried out and if it was that it was adequately carried out. Dr. Wright in his written statement states that he was never approached by the Applicant about the complaint prior to the formal stage, neither was he approached by a staff mediator. Mr. W'O Okot-Uma, chair of CSSA, in his written statement does not mention speaking to Dr. Wright about the Applicant's complaint. In contrast to these two witnesses Mr Barber states, "I first attempted to establish whether there had been any use of the informal stage and there appeared to have been a brief use. It was therefore appropriate to proceed to the formal stage."

He gives no details of the informal procedure as to what was done and by whom. There is no record of this. The Tribunal does not find Mr. Barber's evidence on this point reliable. In addition the Applicant's letter of 19th October makes reference to the Staff Association's unsuccessful attempt to mediate. The evidence of Mr W'O Okot-Uma does not support this. The report of Mr. Gold makes reference to previous attempts at mediation naming Mr. W'O Okot-Uma and Mr. Matthews). There are no details of these attempts and the Tribunal did not receive any evidence from Mr. Matthews on this point. The report further notes that Mr Matthews abandoned the informal process due to the importance of the allegation of tampering with the PAR. The Tribunal notes that the tampering of the PAR allegation is one of many complaints. Other complaints were equally important. The Tribunal does not think that this was a good reason to abandon the process before speaking to the alleged aggressor. The Tribunal finds that informal action was not carried out in accordance with Annex 2(1) of the Staff Rules. This amounts to an important procedural irregularity. However, this irregularity does not taint the decision recorded in Mr Gold's report.

In dealing with the issue of tampering of the PAR (27th November 1997) Mr. Gold conducted a thorough investigation before arriving at his findings. The conclusions on tampering cannot be said to be manifestly erroneous. The Tribunal is concerned however that the evidence before Mr. Gold disclosed that the changes on the form were not initialed. The Tribunal accepts the submissions of the Applicant on this issue that changes made following signature on the form by supervisor and Applicant should be initialed. Although the failure to initial may have been an oversight by both supervisor and Applicant (therefore not deliberate) absence of signatures to the changes amounts to a procedural irregularity. It is not a significant irregularity as there is ample evidence to conclude as did Mr. Gold in his investigation that the Applicant saw the changes. Such an irregularity does not render the Gold report and process manifestly erroneous.

Mr. Gold's report concentrated on the allegation of tampering and the discussions between the Applicant and Dr. Wright on 29th September 1998. He however also dealt with all other aspects of the Applicant's complaint and did not discard them as suggested by the Applicant in her submissions to the Tribunal. It is

clear from the report that Mr. Gold reviewed the enormous quantity of documentation (over 300 pages) in the case before making his decision. He interviewed 14 staff members. The Tribunal finds that the process adopted fulfilled the standards required for due process. The conclusions within the report cannot be said to be manifestly erroneous.

9. WAS THE APPLICANT DISCRIMINATED AGAINST ON GROUNDS OF HER SEX? WAS SHE HARRASSED BY PROFESSOR MATLIN AND DR. WRIGHT? DID THE RESPONDENT FAIL TO TAKE ADEQUATE STEPS TO PREVENT DISCRIMINATION AND HARRASSMENTS

In dealing with this issue the Tribunal notes the definition of Harassment as defined in the footnote on page 4 of the EEOP in Office Notice no. 28/97.

"Harassment is defined as repeated, unreciprocated and unwelcome comments, actions, suggestions or physical contact that are found objectionable and offensive by the recipients on Grounds of sex, race or other issues mentioned in this policy. These may threaten an employee's sense of job security or create a stressful, intimidating or unsafe working environment. "

In addition the Tribunal notes the definition of Discrimination on the grounds of sex as defined by a number of international instruments and as an accepted principle of labour law is:

A person discriminated against a woman if he treats her less favourable than he would treat a man or he applies to that woman a requirement or condition which he applies or would equally apply to a man but this condition is to the detriment of the woman because she cannot comply with it. In reference to International instruments the Tribunal notes the Equal Treatment Directive 76/207/EEC (9th Feb 1976), which implements the principle of equal treatment for men and women as regards working conditions in employment. There is also a recent addition to this directive entitled The General Framework directive for Equal Treatment in Employment and Occupation (no. 2000/78/EC).

The Applicant's application sets out the particulars of discrimination and harassment. In summary the Applicant contends that the Respondent failed to implement the EEOP policy, failed to take into account complaints made by the Applicant about the adverse conduct of her supervisors, failed to implement disciplinary proceedings against the supervisors, failed to stop acts of discrimination and failed to independently review the decision of the Review Board to recommend non-renewal of the Applicant's contract. The Tribunal received almost no evidence from the Applicant to support her claim that the Respondent's actions were based upon discrimination on the basis of her sex. The Applicant must establish on the balance of probabilities that the Respondent's actions were based upon discrimination on the grounds of sex. Whilst attending a workshop in India the Applicant claims that Professor Matlin came to her suite and while there looked at her up and down and around her midriff area in an intimate strange way, causing the Applicant to feel uncomfortable and embarrassed. On 12th May 1999, the Applicant attended the Review Board. The Record of the Board states that "Ms Mohsin felt that she was being discriminated against, for reasons not clear". The Tribunal notes that the matter of the incident in India was never reported to senior management or to the staff association, the Secretary-General or to the Review Board. Indeed the Tribunal was left with the same conclusions as that reached by the Review Board on the 12th May that the Applicant felt she was discriminated for reasons not clear. Mr. W'O Okot-Uma who was a staunch supporter of the Applicant throughout her many complaints could not give the Tribunal an explanation as to the Applicant's case on discrimination. The Tribunal did not receive any evidence of whether the Respondents treated other staff more favourably than the Applicant on the ground that other staff were men. Neither did the Tribunal receive evidence of indirect discrimination. The Tribunal finds that the Applicant did feel that she was being discriminated against on the grounds of her sex. This was an erroneous perception on the part of the Applicant and had no basis in fact. The Tribunal finds that the administrative decisions taken by the Respondent in relation to renewal of the Applicant's contract and increment were based upon non-discriminatory grounds such as work performance, professional and technical expertise and personal relations with external and internal staff. Throughout the Applicant's supervision the supervisors were critical of her performance. The Applicant was clearly upset and often distressed by the criticisms. The Tribunal finds that those criticisms (written and oral) did not amount to harassment. Such criticism was in a genuine attempt to assist the Applicant in improving her work performance.

10. WAS THE POSSIBILITY OF LATERAL TRANSFER CONSIDERED BY THE RESPONDENT?

The Applicant submits that the Respondent did not investigate the matter of a lateral transfer. In support they rely upon the evidence of Mr. Srinivasan who told the Tribunal that he expressed the view that attempts to find lateral transfer should not be pursued.

The evidence before the Tribunal indicates that following the Review Board's recommendation of 22nd and 23rd July 1999 on lateral transfer that steps were taken to investigate the possibilities. This is clearly evidenced in a memorandum from John Barber dated 29th July 1999. He states, "while the Board does mention the possibility of transfer to another division, we know that this is not easy at programme level (because staff tend to be recruited for their specialist skills) and we in Administration Division know from dealing with current redundancies in the same grade that there are no opportunities at present in the CS5 grade".

Mr. Barber in his statement explained that he looked into the matter of the transfer himself and could find no availability. The oral evidence of Mr Srinivasan supported this. This is clear evidence that the Respondent carefully considered the recommendation of transfer, looked into the possibility and was able to give written reasons as to why it would not be feasible. An important document on this issue is entitled Headquarters Recruitment Report as at 25th May 1999. This document lists 21 posts under recruitment in May. All jobs listed are in various stages of being allocated to a prospective staff member. On page 7 of that document there is one CS5 post listed but this post is "on hold" until further notice. Mr. Srinivasan explained to the Tribunal in his oral evidence that those words mean that a decision has been taken not to fill the post. The Headquarters Recruitment Report is of assistance in deciding what information was available to the Respondent at the time they considered the transfer issue. Mr. Srinivasan told the Tribunal that the Secretary-General would not consider post vacant at a specific point in time but within a six-month horizon thereafter. Mr. Srinivasan clearly wrote on the memo from Mr. Barber that he would not advocate exploring the possibility of a lateral move. This note was dated 4th August 1999, after Mr. Barber has already considered and investigated the matter of lateral transfer. The Tribunal finds that Mr. Srinivasan's view did not negate what had been done before. It certainly contributed to no further action on the matter. The Applicant's submission that the Respondent failed to investigate the possibility of transfer is rejected.

11. WAS THE RESPONDENT'S DECISION NOT TO RENEW THE APPLICANT'S CONTRACT IN FEBRUARY 2000 BASED UPON AN ERRONEOUS CONCLUSION OF UNSATISFACTORY PERFORMANCE?

This is one of the most contentious issues in this case. There are numerous documents concerning the issue of the Applicant's performance. A large number of persons spent a good deal of time within the Secretariat dealing with the matter of the Applicant's performance. The Applicant submitted to the Tribunal that although the Applicant accepts that she was not perfect Applicant further contends that there was a deliberate attempt by management to "do her work down" in order to unfairly justify removing her from her post by way of non-renewal. These submissions are rejected for the following reasons.

The Applicant's submissions might have more weight if the only persons who complained of her performance were management. Those who did not work within the Secretariat made complaints. Two examples will suffice. Mohan Kaul wrote on 22nd February 1996, although the letter does not specifically mention the Applicant by name it refers to her work. When this letter is read along with a memo dated 23rd February from Professor Matlin to the Applicant it is clear that Mr. Kaul's letter was about the Applicant's performance. Mr. Alam wrote to Professor Matlin on 4th March 1996, referring to the Applicant by name. This letter was very critical of the Applicant. Mr. Alam wrote again informing Professor Matlin that the government in Bangladesh had abandoned the idea of holding a workshop. This decision was a direct result of Mr. Alam's views of the Applicant's performance.

Diane Fischer wrote to Professor Matlin on 8th October 1996, making complaint that she thought that the Applicant's presentation in Geneva was a "disaster". In all three examples mentioned Professor Matlin discussed the complaints with the Applicant giving her an opportunity to defend herself.

Dr Goel (a staff member) in a statement gives supporting evidence about the Applicant's unsatisfactory performance during the Indian and Bangladesh workshops. Therefore as early as 1996, there were concerns raised about the performance of the Applicant from both her supervisor and from others. These concerns continued throughout 1998 to 1999. The Applicant's letter of 27th August 1998 makes it clear

that she objects to Mr. Wright's method of supervision. Both Review Board's of 1998 and 1999, refer to performance problems and the breakdown in relations between the Applicant and supervisor. Despite examples of positive feedback about the Applicant's performance she continued to receive criticism after her first six month probationary period which was considered very good. Positive feedback came from a number of persons including, Mr. S Chatterjee on the India workshop and Mr. Peter Fowler when he worked as UK High Commissioner to Bangladesh.

In summary, the Applicant began well at the Secretariat but soon her work standard began to fall. Supervision was difficult because as found by the Review Board there was a lack of mutual trust and respect between the Applicant and her supervisors. No doubt this lack of mutual trust and respect fuelled the Applicant's allegation that her PAR had been tampered with. The Tribunal having heard from Dr. Wright and the Applicant prefers the evidence of Dr. Wright on this issue. Ms Mohsin found it difficult to accept that she must have seen the changes if she was able to comment as she clearly did in part 5 of the said form. It is more likely than not that the changes on the form were pointed out to Ms Mohsin. In assessing the Applicant's reliability as a witness the Tribunal notes that she was unable to give an adequate explanation for her failure to mention the behaviour of Professor Matlin in India to anyone in a position of authority before she instituted proceedings.

The Tribunal finds that one of the important underlying causes of the breakdown in communications between supervisors and the Applicant was the observation by the Review Board (16th & 12th May 1999) that "a sense emerged that she did not have much esteem for her supervisors' professional competence (or indeed their persons).

Both Professor Matlin and Dr. Wright found it difficult sometimes impossible to supervise the Applicant in an effective way. The Tribunal accepts the evidence presented by the Respondent that it would not be possible to change supervisors twice in a small department for an officer of the Applicant's level.

The Tribunal finds that there was ample evidence for the Review Boards to find as they did that there were problems relating to performance of the Applicant. The Review Board took into account relevant facts and issues.

1. WERE THE DECISIONS OF THE SECRETARY-GENERAL TO ACCEPT RECOMMENDATIONS OF THE REVIEW BOARD IN 1998 AND 1999 MANIFESTLY ERRONEOUS?

The Secretary-General, is vested with the power to make appointments within the Secretariat. He acts upon the recommendation of the Review Boards and takes into account views of the relevant Deputy Secretary-General and divisional directors. Mr. Srinivasan in his oral evidence described the then Secretary-General as " he was not a rubber stamp in any sense of the word but an extremely meticulous and thoughtful and just man". There is evidence that the Secretary-General did not just adopt the views presented to him when he rejected the options put to him by Mr. Srinivasan in August 1998 prior to the letter of 28th August dealing with decision to closely supervise the Applicant. His decisions to act upon the recommendations of the Review Board in relation to the Applicant and his decision not to alter his decision on appeal raised by the Applicant dated 7th September 1999 cannot be said to be manifestly unreasonable.

DECISION:

This Tribunal having considered the evidence in this case and for the reasons set out above hereby:

1 . Rescinds the decision of the Review Board of 20th February 1997 recommending the Applicant be awarded shorter term of two years and the Secretary-General's decision to accept the recommendation. Article X of the Statute gives power to the Tribunal to award compensation in this regard. The Tribunal has agreed with the parties that no order will be made as to compensation before it receives submissions from the parties.

The Tribunal find the following procedural irregularities:

2. Lack of consultation before the taking of the decision to closely supervise. No record of the meeting of decision was taken.

3. No informal action was carried out prior to a formal grievance process (initiated by the Applicant's letter dated 19th October 1998) pursuant to provisions of Office.

4. Failure to signature changes on the PAR of 27th November 1997.

The Tribunal notes that remedy for procedural irregularity is limited by the provisions of Article X paragraph 2.

“If the Tribunal finds that the procedure prescribed in the rules of the Secretariat has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits, order the case to be remanded for institution or correction of the required procedure, provided that the aggrieved staff member is still in the employment of the Commonwealth Secretariat.”

In the light of the wording of paragraph 2 above, the Tribunal invites submissions from both parties as to the appropriate remedy, if any, for the procedural irregularities.

Dated this 6th day of September 2001

ANESTA WEEKES QC

[APPENDICES TO JUDGMENT AVAILABLE IN HARD COPY ONLY]