

CSAT/7

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the matter of

MEMBERS OF THE COMMONWEALTH SECRETARIAT STAFF ASSOCIATION

Applicants

AND

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Professor Duncan Chappell, Justice Hassan Jallow, Miss Anesta Weekes QC

JUDGMENT

APPLICATION AND PLEAS

There are 12 Applicants in this matter. Mr Michael Gillibrand; Ms Kishwer Falkner; Dr Jocelyn Johnston; Dr Tichaonezvi Ruredzo; Mr Mohammed Jasimuddin; Mr Alan McLeod; Dr Peter Frost; Mr Andrew Simmons; Ms Nicole McIntyre; Mrs Lucie Shigikile; Ms Cheryl Rebeiro; and Mr Ranjith Tillekaratne (the Applicants). Each of the Applicants is a member of the Executive Committee of the Commonwealth Secretariat Staff Association (CSSA).

On 20 December 2002, each of the Applicants lodged an application with the Commonwealth Secretariat Arbitral Tribunal (the Tribunal) alleging a breach of their contract of employment with the Commonwealth Secretariat (the Respondent). At the time of the lodging of their Application, each Applicant indicated that it was their purpose not only to gain redress for themselves but also for all members of the CSSA. Accordingly, each member of the Executive Committee of the CSSA filed an identical application in a manner which they believed would be both correct and convenient for all members of the staff association. Formal leave to file the applications in this way was granted by the President of the Tribunal, acting in accordance with Rules 6 and 23 of the *Rules of the Arbitral Tribunal of the Commonwealth Secretariat* (the Rules). The use of the word Applicant throughout this judgment means all members of the CSSA.

Each Application is filed pursuant to the provisions of Schedule I of the *Commonwealth Secretariat Act 1966* and Article II of the *Statute of the Arbitral Tribunal of the Commonwealth Secretariat (the Statute)* and accordingly the Tribunal has jurisdiction to consider and pass judgement on this matter. Further, before bringing their applications to the Tribunal each Applicants has exhausted all remedies available within the Secretariat (Statute: Article II 2(i)» and has brought his or her application within the appropriate time (Statute: Article II 2(ii))

In summary, each Applicant claims that it is a term of their contract of employment that the Respondent will adjust his or her salary each year to take account of an increase in the cost of living. Since a review conducted in 1995 (see Application, section IV: Annex 3) of the Terms and Conditions of Service (TACOS) of the Respondent, each Applicant's salary has been adjusted with effect from 1 July of each year in line with the United Kingdom's Retail Price Index (RPI). The said contractual term is incorporated as part of their contract of employment through the custom and practice of the Respondent. This custom and practice has operated annually in respect of every applicant's contract.

In breach of this term of their contract of employment, the Respondent failed to increase their salary in July 2002 to take account of the increase in the cost of living with reference to the RPI, or at all. Instead, the Respondent deliberately withheld the Cost of Living Adjustment (COLA) without the consent of each of the Applicants, and in a retrospective manner. The due date for payment of the COLA was 1 July 2002. The decision to withhold COLA was communicated to each of the Applicants, and all other staff members of the Respondent, by email from the Secretary-General dated 23 September 2002, and confirmed by a notice from the Secretary-General dated 15 November 2002. By acting in this manner each Applicant claims that the Respondent has unilaterally and unlawfully withheld the COLA to which they were entitled. This action by the Respondents amounts in law to a breach of contract.

Further, or alternatively, that if each Applicant is not entitled through custom and practice to the annual COLA in line with the RPI, that payment of the said sum was subject to the Respondent's discretionary powers. The exercise of this discretionary power to withhold the COLA was unlawful in that it was procedurally unfair and, or disproportionate.

In advancing these various contentions, each of the Applicants has relied on certain facts set out in their respective applications. (See Application, Section IV: Annex 20). It is not proposed to list these facts here, but rather to refer during the course of the judgment only to those facts, which in the Tribunal's view are relevant and central to this decision.

As a result of the alleged breach of contract, each of the Applicants seeks the following:

- a rescission of the decision by the Respondent to withhold the COLA from members of staff for the financial year 2002/03;
- an order that the Respondent increase the salary of members of staff by one per cent to reflect the COLA that should have been applied in July 2002 for the financial year 2002/03; and
- if the order above for specific performance is not applied with retrospective effect as from 1 July 2002, an order that the Respondent compensates each Applicant for loss of salary resulting from the unlawful withholding of the COLA from July 2002 until the date the order sought above is implemented by the Respondent (see Application, Section II: Pleas).

In summary the Respondent denies that the Applicants are entitled to any of the orders, which they seek. The Respondent denies that the withholding of a COLA was unlawful, or that it is a term of the Applicants' respective contracts of employment, either expressed or implied. They contend that payment of any cost of living increase is always a discretionary matter. Finally, that the Respondent properly exercised its discretion in withholding payment of the COLA in September 2002.

As they are entitled to under the Rules, the Applicants have filed a written Reply on the Answer of the Respondent (the reply) and the Respondent, in turn, has filed a Rejoinder. On 17 July 2003 the parties were advised that in terms of Rule 9.5, with the receipt of the Respondent's Rejoinder, the written proceedings in this matter were closed. However, the parties were also informed that the President of the Tribunal would be prepared to accept any additional written statements or documents that they might wish to provide before the matter was formally set down for determination. The parties were also informed that, in terms of Article VIII of the Statute of the Tribunal, the Tribunal was minded to determine the case with a three-person panel, which included the President of the Tribunal.

The parties were also granted an extension of time in order for them to file with the Tribunal written submissions prepared by a legal representative.

THE ISSUES

The Tribunal will deal with the following issues:

- PAYMENT OF THE COLA.
- PROBLEMS WITH THE PREPARATION OF 2002/03 BUDGET.
- RESPONDENT'S RESPONSE TO BUDGET DEFICIT.
- EXERCISE OF DISCRETION BY SECRETARY-GENERAL.
- REDRESS.

PAYMENT OF COLA

It is clear that the Respondent, an international organisation, may, if it desires, make rules and regulations for the periodic adjustment of salary. The application of such rules must not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between this organisation and its staff (*In re Niesina (No.2) and others*. Judgment No. 1118 ILOA T). An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law (*In re Argos*. Judgment 1682 ILOAT).

On the basis of the documentary evidence submitted by the parties the Tribunal is satisfied that the Respondent has no written rules relating to salary adjustments for its staff other than those rules requiring approval of budget by Member Governments of the Commonwealth. These rules are contained in the 1965 Agreed Memorandum on the Commonwealth Secretariat and the Finance Regulations of the Commonwealth Secretariat (see Answer, Annex 10: paras 2 & 3). The practice of the Respondent in

applying these rules is evidenced by notices provided to staff since 1995. (See Application, Section IV: Annex 2). These notices indicate that the Finance Committee, which is now termed the Board of Governors, considers each year whether, and if so by how much, staff salaries can be increased following release of the United Kingdom's RPI. A detailed account of the way in which salaries have been set since the establishment of the Commonwealth Secretariat in 1965 is contained in the Application. (See Application, Section IV: Annex 3). Both parties are in agreement that this represents an accurate statement of the evolution of the current salary structure. In 1965 staff salary levels were set and adjusted annually in line with British Civil Service (BCS) salaries. This system was modified on a number of occasions over succeeding decades. In 1995 a TACOS review recommended that the annual salary adjustment should be made on the basis of the United Kingdom's RPI rather than on the basis of BCS annual adjustments. (See Application, Section IV: Annex 3, page 47). This recommendation was subsequently adopted by Member Governments of the Commonwealth and a Notice titled "Revised Diplomatic and Non-Diplomatic Salary Scales, July 1995" was issued to staff.

The evidence shows that the practice of making adjustment of salaries on an annual basis according to the United Kingdom's RPI continued from 1995 until the decision taken by the Respondent to withhold this adjustment for the 2002/03 financial year.

The Tribunal can find nothing within the documentation or submissions from the Applicants to substantiate their contention that payment of the COLA had become an expressed, implied, or acquired right through custom and practice. It is well established that an international organisation's rules do not confer any acquired right on staff members, except where it was the rules that induced them to join the international civil service, and the amendment of the rules will substantially alter the conditions of service which they are entitled to expect will continue (In re De Los Cobos and Weaner Judgment 391 ILOA T).

It is also clear, from the decision of the ILOA T in the matter of In re Bethet (No 2) and others that the law of international organisations provides that international civil servants do not have an acquired right to an automatic indexing of their salaries. As was stated in In re Bethet:

"The Complainants consider that their acquired rights had not been recognised in the new regulations: the Laboratory was obliged, in their view, to index their salary to the cost of living at the time when they entered its service and such indexing formed part of their basic and essential conditions of employment, and hence of their acquired right. However, international civil servants do not have an acquired right - any more than national civil servants - to an automatic indexing of their salaries. As recalled in Judgment 1118 (In re Niesina (No 2) and others), the establishing of regulations for the periodic adjustment of salary is within the discretion of the organisations provided that these regulations do not violate the principles of international civil service law and their application does not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between these organisations and their staff members." (In re Bethet (No 2) and others, Judgment No 1912 I LOAT: paragraph 19).

As already stated, the rules of the Respondent make no reference to indexation of salary and there is nothing in those rules which could have induced a member of the staff to join the Secretariat in the expectation that the salary payable would be indexed. There is also no reference in any contract of employment with any member of staff to structural adjustment of salaries, or to cost of living increases. The Applicants contend that notwithstanding the absence of any express or implied contractual provisions of this type, the custom and practice of the Respondent over a period of more than 35 years to adjust annually the salaries of staff in order to reflect movements in the cost of living has created an acquired obligation of this nature in their conditions of employment. The Applicants refer to the 1981 decision (No 1) of the World Bank Administrative Tribunal (WBA T) in De Merode and others v The World Bank (De Merode) as authority for the proposition that the written contract between an international organisation and its staff "remains no more than one of a number of elements which collectively establish the ensemble of conditions of employment (see Applicants Submission: 10). According to the Applicants, in order to generate a legal obligation two conditions must be fulfilled - there must be a repeated pattern of behaviour on the part of the organisation and there must be evidence of an

underlying belief that the practice reflects a legal obligation. The Applicants contend that both of these conditions have been met in the present case.

The Respondent also refers to the decision in *De Merode*. In their submissions (see *Rejoinder*, paras 73-78). The Respondent contends that in *De Merode*, the WBAT did conclude that the consistent practice of the World Bank of making periodic adjustments out of a conviction that it was legally obliged to do so had the consequence that the Bank was required to carry out periodic reviews of salaries, taking into account various factors. The WBAT also determined that:

"the Bank is under no duty to adjust salaries automatically to increases in the cost of living, and it retains a measure of discretion in this regard". (See *De Merode*, *Rejoinder*, Annex 17: para 112).

In the Tribunal's view the *De Merode* decision is not definitive of the situation prevailing in this case. In *De Merode* the WBAT determined, as is evident from the succeeding passage from the Judgment, that the salary adjustment practice which had arisen at the World Bank over a number of years was not only made out of a conviction that it represented a legal obligation, but the existence of this obligation was acknowledged in writing by World Bank management and communicated to certain employees of the Bank at the time of their appointment.

No evidence exists in this case of any written acknowledgement or communication sent to members of the CSSA of the type, which existed in *De Merode*.

The WBAT in *De Merode* stated, relevantly, the following:

"111 In holding that the conditions of employment of staff members did not in 1979 contain any rule of law relating to the method of adjustment of salaries or to the taking into consideration of certain factors in preference to others, the Tribunal is not asserting that the conditions of employment contain no rules whatsoever regarding salary adjustment. True, neither the letters of appointment and acceptance nor the Articles of Agreement, nor any written rule or regulation, include any provision requiring the Bank as a matter of law to make periodic adjustments of salaries. However the Tribunal considers that a consistent practice of periodic adjustment has been established, and that the Bank makes these adjustments out of the conviction that it is legally obliged to do so. In his Memorandum to the Executive Directors dated April 19, 1972, the President wrote:

"It is by now our established practice to review the staff compensation programme annually in early spring with a view to introducing whatever changes may be appropriate effective May 1".

Since then, this practice has been affirmed year by year, and the increases adopted in 1979 and 1980, as well as those decided upon since the filing of proceedings in the present case, have confirmed it. The circumstances within which certain Applicants have been recruited and, in particular, certain information provided to them, at the time of their appointment further confirm the existence of this obligation.

112 The Tribunal considers in consequence that the Bank is obliged to carry out periodic review of salaries, taking into account various relevant factors. The Bank is under no duty to adjust salaries automatically to increases in the cost of living and it retains a measure of discretion in this regard. This does not mean that the rises in the cost of living in a period of inflation constitute a factor that can be ignored or disregarded in the exercise of that discretion. On the contrary, the established practice, and statements confirming that practice, have created a legal obligation to make periodic adjustments reflecting changes in the cost of living and other factors. In the opinion of the Tribunal such an obligation is a fundamental element in the Applicants' conditions of employment which the Bank does not have the right to change unilaterally. In this respect, the Tribunal takes particular note of the statement made in the Respondent's Joint Memorandum to the effect that:

"It is still the intention of the Bank to adjust salaries periodically to reflect changes in various factors, including cost of living."

(*De Merode*: *Rejoinder*, Annex 17, paras 111-112).

In the Tribunal's view the establishment of the regulations for the periodic adjustment of salary in this case still remains a matter of discretion for the Respondent, provided that these regulations do not, in the words of *In fa Bethet* (No 2) and others, "violate the principles of international civil service law and their application does not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between those organisations and their staff members".

The question for this Tribunal is whether, in exercising its discretion to withhold COLA for the financial year 2002/03, the Respondent did violate any of the stated principles of international civil service law. PROBLEMS WITH THE PREPARATION OF THE 2002/03 BUDGET.

In a witness statement included as a component of the Respondent's Answer, the Secretary-General the Rt Hon D C McKinnon, has described in some detail the powers given to him in his capacity as the Secretary-General to appoint staff and also to prepare budgets. (See Answer, Annex 10). The Secretary-General notes that authority has been given to him by Commonwealth Governments, under the 1965 Agreed Memorandum on the Commonwealth Secretariat, (as amended) to make decisions to appoint staff, subject always to this right being exercised within approved budgetary limits. (Answer, Annex 10: paras 2-4).

The Secretary-General also notes that he is constrained in his decisions by the Financial Regulations of the Commonwealth Secretariat, which require that budgets are to be prepared by him and submitted to the Board of Governors for approval prior to the commencement of each financial year. This financial year runs from 1 July to 30 June. Once approved, the budgets then constitute an authority for the Secretary-General to incur liabilities, although any expenditure outside approved limits still requires further and specific authorisation.

With regard to the setting of levels of salaries and allowances, the Secretary-General refers in his statement to the process that has already been described above, and adopted, since the establishment of the Commonwealth Secretariat in 1965. (Answer, Annex 10: para 11). The Secretary-General indicates that since 1997 the Finance Committee (and in 2002 the Board of Governors) has approved allocations for salaries and allowances and staff have been advised of any increases in salary scales. Copies of the various notices issued between 1996 and 2001 confirm that the agreement of the Finance Committee and now the Board of Governors is required in order to pay these increases, and that they are at the discretion of Member Governments (Annex 10: para 22-23).

Turning to the position in the financial year 2002/03, the Secretary-General states that in the normal course of events budget preparations start in December and are finalised in late April for presentation to Governments to consider in Resource Week, which takes place in June. However, in this particular financial year, some delays in this process occurred as a result of a postponement of the meeting of Commonwealth Heads of Government (CHOGM) from October 2001 until March 2002. Since decisions made at CHOGM would have an influence on the allocation of financial resources, detailed budget preparations for the 2002/2003 financial year were also postponed. (Annex 10: paras 24-25).

As a direct result of this postponement of CHOGM the Secretary General and his management team were working within a timeframe of less than two months to deliver detailed budget proposals by mid-May so that Governments could consider them before the scheduled Resource Week meetings in June. The Secretary-General says that a salient aspect of this situation was that the allocation for salary and allowances to be made in the budget had to be set before any detailed human resource planning had been completed. (Annex 10: para 32).

The sequence of events that then occurred during Resource Week and shortly thereafter needs to be set out in detail. As the Secretary-General states:

"34. The Finance Sub-Committee met for Resource Week on 26 June and at that time I advised governments that the budget proposed for their consideration showed more resources going to programme work and less to support services. I also advised that this produced great pressure on the allocation for staff costs and it was increasingly questionable whether the Secretariat could continue to deliver its programmes under zero real growth. During this same meeting I also drew to the attention of members that the pressure on the allocation for staff salaries and allowances - which inevitably rose at a higher rate than the UK RPI - meant that the staff establishment would be reduced from a nominal 305 to less than 285 in 2002/2003.

35. The annotated agenda provided to governments for the Resource Week meetings states that, in relation to staff costs and resources, "some further fine tuning to the establishment may be undertaken after Resource Week and any changes put to the Executive Committee of the Board of Governors at its meetings in September". This is a reference to the expected outcome of the continuing human resources planning.

36. My statements to the meeting of the Finance Sub-Committee and the annotated agenda provided to governments made specific reference to establishment issues because I believed it was incumbent upon me to advise governments that, in accordance with the Finance Regulations, I might need to revert to them in respect of the budget proposed to cover staff costs. I believed that a close examination of these costs could well reveal that the decisions reached by the Management Committee in May about staff numbers might not prove affordable within the allocation for salaries and allowances once we had the full information about staff costs for the financial year which the detailed human resource planning would provide.

37. In the event I was proved right and I did need to revert to the governing bodies on the question of the budget allocation for salaries and allowances.

38. In early July the Human Resource Planning Committee met to consider how to deal with questions relating to the Secretariats establishment. To facilitate this discussion further work was done on the actual staff costs likely to be incurred and on 9 July I understand that the Committee was advised that an estimated £536,000 more than the salaries allocation approved in Resource Week would be required. This was at the mid-point of the estimates made by the Secretariats Finance and Management Information Section.

39. The Human Resources Planning Meeting was held under the Chairmanship of Deputy-Secretary-General Mugasha on 11 July. It considered a number of options to deal with the difference between the estimated staff costs for the year and the approved budget. Among the options it considered were not paying the 1 % inflation increase, reducing programme costs, particularly travel budgets, taking funds from the programme contingency and considering whether some Secretariat staff costs could be charged to the CFTC budget. That Committee recommended to me that all identified options for covering the shortfall be pursued.

40. I spoke to the Annual General Meeting of the Commonwealth Secretariat Staff Association on 17 July and alerted staff members to the problems we were encountering with the salaries budget in a zero real growth environment. I told staff that while staff costs increased by about 6% a year as a result of the combination of the inflation increase and annual increments, our budget would only increase by 1 % I emphasized that the way we had dealt with this in the past - cutting posts and freezing recruitment - could not continue, not least because of its adverse effects on the programme delivery expected by governments." (Answer, Annex 10: paras 34-40).

On the basis of the process outlined above, it is contended on behalf of the Respondent that it did all that was required in order to plan for and present a proper budget, which adequately outlined the actual financial requirements of running the Commonwealth Secretariat for the financial year 2002/2003. (See Answer, and in particular paras 19-28).

Following the process of discovery, which occurred between the parties, further documentation has been obtained from the Respondent, which indicates that problems were identified in the planning process for the 2002/2003 budget well before the finalisation of the document presented during Resource Week. In their Reply, the Applicants provide a review of this documentary material. (See Reply, Annex 1). As early as 8 April 2002 the Respondent's Director of Corporate Services wrote to the Director of Strategic Planning and Evaluation in terms indicating that it had been known for some time prior to this date that the provisional allocations made in budget planning for staff were insufficient to cover the staff already in post and that increased budgets would be needed for any planned expansion. (Reply, Annex 1: para 1.2-1.3).

By 9 May 2002, the Respondent's Management Committee had met and decided to hold a firm line on staff costs. An appreciation of the concerns that were then being expressed about the budget preparation process can be discerned from the following email correspondence sent by the Director of the Office of the Secretary-General to the Director of the Corporate Services Division:

As you will gather from Virginia when you return to the office, the Management Committee (minus Mr Cox who is away) was pressed into meeting today given the need to adhere to time schedules with Resource Week documents. The Management Committee was given the plethora of requests for reclassifications and additional posts and decided that for now it would firmly hold the line and have staff costs calculated on the basis of persons in post plus posts under active recruitment plus one new

CS4 post for PAD costed at CS51 level. SG was basically quite cross that many Divisions had completely disregarded the advice given in your memorandum and I suspect this will become the principal issue at the meeting with Directors on 20 May. The implications of the MC's aforementioned decision was that all other new priorities would have to be met by rejigging existing staff resources.

The autumn meeting of the new Board of Governors will offer an opportunity to present some fine-tuning if necessary.

It was further agreed that the savings from accommodation would go toward staff costs and that the balance of the overspend be managed through the variable of the implied vacancy rate (probably around 6-7%), which is lower than in recent times." (See Reply, Annex 1: para 1.6).

In a reply to this particular message the Director of Corporate Services noted, among other things:

"If we are to go to governments later in the year with papers arguing for a real increase in budgets, the case will only be credible if we can show, convincingly, that we have achieved significant economies and efficiency improvements: we would need real evidence on issues like the savings in travel expenditure; and we need to lay the groundwork now by setting out some of the evidence in the papers for Resource Week.

It follows from the above that I am not confident that we will be in a position to circulate the papers for Resource Week by the middle of next week as planned. Despite the efforts to improve planning on the printing and distribution of the papers, as of this morning the Printing Unit had received virtually no information on delivery dates or lengths. As far as I know, none of the papers is in final draft, or has been approved by senior management; I should emphasise that all these failures are evident in the papers for which I or my teams are responsible. The likelihood is that all the papers will arrive at the last moment, creating blockages both for senior management approval and for production. (Reply, Annex 1: para 1.8).

At a further meeting of the Management Committee held on 13 May 2002, there was again a discussion about budget issues. It was noted that:

"The Committee briefly discussed the human resource plans submitted by Divisions and noted with concern that many Divisions had submitted a number of requests for new posts or upward reclassification of existing posts: this had been done in spite of a clear indication by Mr Martin that there was no scope for any increase in staff costs in financial year 2002/2003. Those Divisions which, had been specifically requested to show savings on staff costs had not done so. The Secretary-General had, in the event, decided that the establishment table for 2002/2003 should only reflect those currently in post, plus posts presently under active recruitment, plus one additional post for PAD in support of good offices activities. The Secretary-General indicated his intention to raise this matter at his meeting with Directors on 20 May: (Reply, Annex 1: Document 5).

Following these various deliberations, the proposed budget for 2002/2003 which, did go forward to the Finance Committee for its consideration during Resource Week (see Reply, Annex 1: Document 6) recorded that:

"Staff costs had been set at £8.88 million, a reduction of 0.8 per cent on the £8.95 million approved for the 2001/02 budget. The reduction reflects the intention to focus more resources on projects. The proposed allocation includes provision for a 1 % increase in pay scales, and implies a continued downward pressure on staff numbers that is unlikely to be sustainable without adverse effects on programme delivery: (Reply, Annex 1: Document 6, para 34).

The budget paper contained a specific recommendation to members of the Finance Committee in the following terms:

"Recommendation: Members of the Finance Committee are requested to consider and approve the proposed budget for the year 2002/03 including a 1 % increase in net expenditure compared to 2001/02 and a 1% increase in pay scales." (Reply, Annex 1: Document 6, para 40).

While no documentary material was provided among the evidence presented to the Tribunal, which showed approval by the Finance Committee of this recommendation, it is clear from other documents that this approval was given prior to the commencement of the financial year 2002/03. Thus in a document prepared on 9 July 2002 by the Respondent's Corporate Services Division for subsequent presentation to the Human Resource Planning Committee on 11 July 2002, reference is made to the

approved allocation for staff pay and allowances in the Commonwealth Secretariat budget 2002/03. This same document also identifies that this budget is not sufficient to meet the expenditures planned for, and that a significant shortfall exists in the finance available. (See Reply, Annex 1: Document 8).

The Applicants dispute the Respondents contention that the Budget for 2002/03 was adequately prepared. They assert that the budget which had been prepared by the Respondent for presentation at the annual Resource Week meetings in June 2002, was one which they knew, or should have known, did not record accurate costs required by the Respondent for the period covered by the budget. The shortfall between the budget for financial year 2002/03 and the actual costs was approximately £534,000, and in particular this included an item of approximately £200,000 for the current pay and allowances of employed staff, without filling any vacancies.

The Applicants assert that, had this budget been prepared competently, it would have reflected the actual costs to the Respondent for the relevant financial year. The governing councils of the Respondent would have approved a budget during Resource Week in June 2002, which would have provided adequate funding. This would have avoided any shortfall in the funds required to meet salary costs of existing staff, including the cost of the annual COLA increase. The circumstances, which then gave rise to the Respondents decision to withhold the COLA arose as a result of the failure by the Respondent to exercise reasonable skill and care in the preparation of its budget. It is therefore unreasonable and inequitable for members of staff to be forced to bear the cost of the Respondents errors in connection with this budget preparation. (Application, Section III: paras 5.1-5.2).

The Tribunal finds that the preparation for the Budget in 2002/03 was inadequate. The Budget itself was not accurate and therefore failed to set out the true financial needs of the Commonwealth Secretariat. The Tribunal also finds that the Respondents were aware or should have been aware of the serious deficiencies in the process for submitting the budget. In addition the Respondents should have been aware that by adopting a process with serious shortcomings there was a real risk that the content of the Budget to be presented to Governments for approval would be inaccurate.

RESPONDENT'S RESPONSE TO BUDGET DEFICIT.

As is already apparent from the statements cited earlier of the Secretary-General, the identification of a shortfall in the budget estimated at £536,000 was made as early as 9 July 2002, only days after official approval had been given by the Finance Committee to the budget proposal advanced by the Respondent. This is a substantial sum of money amounting to more than 5 per cent of the net expenditure of £11.44 million approved for the financial year 2002/03. In the Tribunal's view it is a sum of money, which should not have been missed if an adequate method and procedure had been adopted when the detailed budget was proposed and approved as set out above.

Following the discovery of the deficit the Respondent initiated a number of measures intended to rectify the situation. On 11 July 2002, the Human Resources Planning Committee met to discuss the budget shortfall. At this meeting, which appears to have been the first time that withholding the annual cost of living adjustment to staff salaries was discussed as a possibility, the Committee was advised through the memo referred to earlier of the Corporate Services Division, that

"The approved allocation for ComSec pay and allowances in 2002/03 is not enough to pay for the number of staff in post in 2001/02 the staff numbers assumed will cost some £536K more than the approved POE (Plan of Expenditure). Not filling any of the post 1 July 'known vacancies' or the vacancies arising from assumed resignations would save a big chunk of the shortfall - £ 330K. Nevertheless, even if no new vacancies arising after 1 July were filled there would still be a shortfall in the order of £200K. "

(Reply, Annex: Document 8).

On 24 July 2002, the CSSA Executive Committee enquired about payment of the COLA and was informed that the Respondent had decided to eliminate it, thereby saving £80,000. (Application: Annex 6).

On 25 July 2002, a meeting took place of a number of the Respondents senior managers at which concern was expressed about the financial situation. More particularly, during the meeting the Directors expressed their concern about why the financial gap existed and why they were not informed about it before the budget was discussed during Resource Week. A request was made to the Secretary-General for him to address all Directors in order to explain the reasons for the financial crisis. (See Reply, Annex 1: Document 9).

On 26 July 2002, the CSSA Executive Committee met with the Secretary-General. The minutes of that meeting indicate that the Secretary-General agreed to delay informing staff about the elimination of the COLA. The CSSA Executive Committee indicated that it had identified a number of alternative means of saving at least £80,000. Further suggestions were made by other members of staff (See Application: Annex 7).

On 5 August 2002, the Secretary-General sent out a message to all staff assuring them that "every suggestion [for savings] will be carefully considered and acknowledged" 19 (Application: Annex 12). On 23 August 2002, a further letter from the Secretary-General to staff stated that:

"As to the issue of the inflation adjustment to salaries, this would save about £80,000. It is still too soon to decide on this but I hope to be able to make a final decision by the end of September." (See Application: Annex 12).

On 20 September 2002, the Secretary-General met the Executive Committee of the Board of Governors. The minutes of the meeting show that the Secretary-General explained the budget shortfall and provided his proposals for reducing costs, including the elimination of the COLA. (Application: Annex 8). In his statement the Secretary-General also provides a description of what took place at this meeting of the Executive Committee on 20 September 2002 as well as the outcome of various informal consultations that he had with members of this Committee. The Secretary-General reported that:

"The message that came back to me through these informal consultations was that many member countries had in the last decade frozen the salaries of their public servants, and in several cases had made significant cuts - some up to 25 per cent. In the course of my meetings and discussions I found no government that believed that the salaries of Secretariat staff could or should be increased in real terms year after year when the result of that was a steady and constant erosion of the number of staff and the ability to deliver programmes.

The feedback I received from governments led me to believe that one of the options for meeting the shortfall in the staff costs allocations that must be put to them was the option not to pay the 2002/03 discretionary cost of living adjustment.

It was on the basis of the decision of the Executive Committee of the Board of Governors to support the proposals I have made, which included endorsement of the 1 % inflation adjustment not be paid, that my Deputies and I advised the staff of the Divisions for which we had respective responsibility that we did not intend to pay the 1 % cost of living adjustment for the financial year 2002/03." (Answer, Annex 10: paras 47-48; 51).

The Tribunal rejects the Applicant's submission that there was lack of adequate consultation in respect of the crisis surrounding the Respondent's acknowledgement that the Budget showed a substantial short fall.

EXERCISE OF THE DISCRETION BY THE SECRETARY-GENERAL

The Tribunal must now consider whether or not the exercise of this discretion was conducted in a lawful manner against the relevant background facts set out. The Tribunal's approach to this issue is based upon the principles, which it has espoused in an earlier decision, drawn from *In re Ballo* Judgment No 191, I LOAT. As was stated in *In re Ballo*:

"Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has put before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier or, finally, whether there has been a misuse of authority."

A further helpful and relevant decision which sets out the principles governing the limits on the discretion of international organisations to set adjustments in staff pay is in *In re Allaert and Warnels* (No.3) Judgment 1821 I LOAT. In that decision those principles are spelt out in the following terms:
a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*In re Aroos and others*) in 6.

b) *The chosen methodology must ensure that the results are "stable, foreseeable and clearly understood". Judgments 1265 (In re Berlioz and others) in 27 and 1419 UJ. reMevlan and others) in 30.*

c) *Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.*

d) *While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (In re Ball and Borohinj) in 21), the mere desire to save money at the staffs expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (In re Cuvillier No.3) in 6.*

Although the factual situation in In re Allaert and Warnels (No 3) differs from that in the present matter, the principles enunciated in that decision are broad enough to apply to this case. In applying paragraph a) of the above principles, the Tribunal finds that on the facts of this case the decision whether or not to pay the COLA had to be based upon two primary considerations on the part of the Respondent - first, what system or standard of reference is to be adopted in order to decide the percentage appropriate for the COLA and, second, what method is appropriate to decide whether the Respondent can afford to pay the COLA. The latter of the two considerations of necessity required a detailed and adequate financial assessment of cost put into a budget proposal presented to Governments for their annual approval. *The first consideration provides no difficulty and cannot be criticised as the Respondent adopted the well-known and widely accepted Retail Price Index of the United Kingdom in order to fix the annual percentage for COLA.*

The second matter, the Respondent's approach to the budget, requires more detailed examination.

Applying the principles in In re Allaert and Warnels No 3 to the facts of this case, the Tribunal finds that:

1) *The methodology utilized to prepare and present a budget proposal for the 2002/03 financial year was inadequate; and*

2) *As a consequence of (1) above the decision not to pay the COLA did not meet the principles of International Civil Service Law.*

The Tribunal's finding is based upon the evidence, outlined above, which reveals a litany of concerns expressed by senior managers in the employ of the Respondent about the budgetary process during the period leading up to the presentation of the actual budget in Resource Week. Managers appear to have been acting under severe time constraints, and in circumstances, which precluded them from giving proper consideration to the details of the budget, even though clear warnings were given that the proposed budget was inadequate to cover staff costs. Despite the recognition of a looming financial crisis, those responsible for the planning of the budget failed to make cuts or adjustments which would have averted the shortfall in funding identified just a few days into the commencement of the new financial year.

The methodology adopted throughout the budgetary process, was not one, which ensured that the results were "stable, foreseeable and clearly understood". Thus having first determined that the COLA was to be included in the budget for 2002/03 and gaining approval of this salary adjustment from the Finance Committee, the Respondent shortly thereafter determined it should withhold this payment in circumstances which were neither foreseeable to the Applicants nor, it would seem, to many of the senior managers involved in the initial stages of setting the budget.

The principles espoused in In re Allaert and Warnels (No 3) acknowledge that the necessity of saving money may be one valid factor to be considered in adjusting salaries, provided the method adopted is "objective, stable and foreseeable". The facts of the present case reveal a clear desire on the part of the Respondent to save money as a result of a financial crisis, This was, however, a crisis, which could and should have been identified at a time prior to the submission of the budget proposal for the financial year 2002/03, rather than after the budget had been approved. In the aftermath of this crisis it is not surprising to find a perception on the part of the Applicants and other staff represented in this action, that the decision not to pay the COLA was based upon a mere desire to save money at the staffs expense following inadequate financial planning on the part of the Respondent.

To summarise the gravamen of this complaint, the methodology adopted by the Respondent in 2002/03 to determine the budgetary requirements for the Commonwealth Secretariat was inadequate. As a result, there is now financial instability, and a lack of foreseeability about financial matters touching upon staff cost. Further, the Applicants who are members of the Executive Committee of the CSSA, as well as all of the members of that Association, have not been able to understand until late in the day the true financial implications of this budgetary crisis.

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Given the Tribunal's finding that the Respondent failed to exercise its discretion in a lawful manner as regards non-payment of the COLA, what remedies are the Applicants entitled to?

The Tribunal's own powers to grant remedies are to be found in Article X of the Statute which states:

"1. If the Tribunal finds that the application is well-founded it shall order the rescission of the decision contested or the specific performance of the obligation invoked. Where an application is made by a staff member, the Tribunal shall, at the same time, fix the amount of compensation to be paid to the applicant for the injury sustained, provide that such compensation shall not exceed the equivalent of three years' net pay of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher amount of compensation. A Statement of the specific reason for such an order shall be made.

Article X, states that the Tribunal "shall", if it finds an application to be well founded, (as it has in the present matter), "order the rescission of the decision contested or the specific performance of the obligation invoked- (emphasis added). Further, where as in this case a staff member makes an application the Tribunal is obliged, at the same time to fix the amount of compensation, which is to be paid to the Applicant for any injury sustained.

Amerasinghe concludes from his review of the practice and jurisprudence of the granting of remedies by Tribunals that:

"These decisions warrant the conclusion that tribunals have not been reluctant to assume what may be called inherent powers to grant remedies. It seems to be accepted that, even in the absence of specific provisions in a Statute of a tribunal which expressly or by clear implication refers to certain remedies that the tribunal may grant and the circumstances in which they may be granted, and even where the Statute may appear exhaustively to describe those remedies and the circumstances in which they may be granted, a tribunal has an inherent power to grant remedies other than those specifically mentioned -and in circumstances other than those expressly referred to in the Statute. It is reasonable, however, that this inherent power should not be too broadly construed. Clearly, a tribunal must not exceed a power to grant remedies that is clearly and unequivocally circumscribed by the Statute." (Amerasinghe: 445).

In the present case the Tribunal concludes that it has no power to grant remedies other than those, which are clearly and unequivocally stated in Article X of its Statute. Thus in the circumstances which have been described, rescission rather than specific performance is an appropriate remedy. Rescission of the decision not to pay the COLA does not bring with it the restoration of the COLA since the decision whether or not to pay the said sum, remains a discretionary one to be exercised by the Respondent in a lawful manner. If the budget were prepared in a timely and accurate way, then the Respondent would have appreciated the shortfall and would have been in a position (if they so decided) to forewarn the Applicants that the COLA for 2002/03 would not be paid. Under the provisions of Article X of the Statute, the Tribunal cannot order the specific performance of payment of a sum of money, which is not an expressed, implied or acquired term of a contract of employment, but one which is, as stated above, subject to the exercise of discretionary power.

Given these constraints, and having regard to the practice and jurisprudence of other international tribunals as described by Amerasinghe, the Tribunal concludes that it is appropriate in this case to order compensation for the moral injury suffered by each of the Applicants, as a result of the failures which have been described in the budgetary process (see Amerasinghe: 502-503). The Tribunal therefore orders:

1) The rescission of the decision of the Respondent of 20 September 2002, to withhold payment of the COLA to members of the CSSA; and

2) That the Respondent pay to each of the Applicants who were employed by the Respondent at the time of the decision taken not to pay the COLA (20th September 2002), a sum of £100.

Given on this 10th day of OCTOBER 2003 in London

Signed

Professor Duncan Chappell President

Anesta -Weekes Justice Hassan Jallow