

CSAT/9

In the matter of

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

SIMMONS & OTHERS

Applicants

AND

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Justice R A Banda, President

Justice Sir Arnold Amet, Member

Justice K M Hasan, Member

JUDGMENT

APPLICATION AND PLEAS

1. The Applicants are challenging the decision of the Respondent which was communicated to the staff on 25 November 2003. The decision concerned the payment to staff of the Cost-of-Living Allowance (hereinafter called COLA). This issue was the subject of proceedings between the Applicants and the Respondent before this Tribunal. Those proceedings resulted in the Judgment of this Tribunal which was delivered on 10th October 2003. The Applicants are all members of the Executive Committee of the Commonwealth Secretariat Staff Association.

2. This Application is brought before the Tribunal in accordance with Article 11 of the Statute of the Arbitral Tribunal of the Commonwealth Secretariat and we are satisfied that before the Applicants brought their Application to the Tribunal they had exhausted local remedies which were available to them within the Secretariat. We are further satisfied that this Application was brought to the Tribunal within the prescribed time limit and we therefore have jurisdiction to determine the issues raised in this application.

3. The relevant facts in this case are that the Applicants filed an application on 20th December 2002 in which they challenged the decision of the Respondent taken in September 2002 not to pay staff COLA for the year 2002/2003. It was the Applicants' contention in the earlier proceedings that their contracts of employment required the Respondent to adjust their salaries each year to take account of increases in the cost of living. They also submitted that the failure by the Respondent to do so constituted a breach of their contracts of employment. Alternatively, the Applicants contended that in withholding the COLA payment, the Respondent had exercised its discretionary powers unlawfully and that its decision was also procedurally unfair and/or disproportionate.

4. After considering the materials that were placed before it together with the written submissions, the Tribunal in its earlier Judgment came to the following decision:

(i) That COLA was not a contractual entitlement. The Tribunal held that it could find nothing within the documentation or submission from the Applicants which could substantiate their contention that payment of COLA had become an expressed, implied or acquired right through custom or practice. The Tribunal further held that International Organisation Rules do not confer any acquired right on staff members except where such Rules have acquired the character of a fundamental element in the Applicants' contract of service in terms of the WBA T decision in the de Merode case.

(ii) That the decision to pay COLA was a matter for the Respondent's discretionary powers but that those powers had to be exercised in accordance with the principle of International Civil Service Law.

(iii) That in the circumstances of those proceedings the Respondent in withholding the COLA for July 2002/2003 had exercised its discretion unlawfully.

(iv) That the Respondent pay £100 to each member of staff as moral damages for the injury suffered.

5. As we understand it, there is no dispute on the findings of the Tribunal in its earlier Judgment; the problem, however, lies in the meaning or interpretation to be put on those findings.

Background of the Application

6. The genesis of the case before us started immediately after the Tribunal delivered its decision of 10th October 2003. After the Judgment was promulgated the Respondents Management Committee met to consider the implications of the Judgment and took the following decisions:

(i) Not to make a payment of COLA to members of staff for the financial year of 2002/2003.

(ii) To make a payment of COLA to members of staff for the financial year of 2003/2004 on the basis of anticipated inflation for 2003/2004 rather than on the basis of inflation between July 2002 and July 2003 and that the payment would be made in two lump sums rather than as a regular increase and that it would be a bonus and would not be consolidated into salaries.

7. The Applicants have contended that the Respondents decision was incompatible with the earlier Judgment of the Tribunal which was delivered on 10th October 2003. Alternatively, the Applicants have submitted that in retaking the decision on the COLA, the Respondent had exercised its discretion unlawfully. They have further contended that the methodology which the Respondent used in deciding whether or not it could afford to pay the COLA for 2002/2003 was flawed. They argued, and submitted, that while the need to save money was a proper factor that could be taken into account in deciding whether or not to pay COLA, such decision had to be taken in a manner which was "objective, stable and foreseeable" and that the Respondents decision failed to meet this standard in view of the inadequate manner in which the Respondent had prepared its budget. While the Applicants concede that the Respondent had a discretion when retaking its decision, they have argued that the Respondent had to act lawfully and in accordance with the terms of the earlier Judgment of the Tribunal. The Applicants have submitted that in the circumstances of this case the Respondent has no choice but to pay the COLA for 2002/2003. They reinforced this contention by suggesting that the flaw which was identified by the Tribunal in its earlier Judgment was incapable of correction.

8. *The Applicants have further submitted that the Respondent had acted unlawfully when they changed the basis on which COLA for 2003/2004 was to be paid. They have contended, in particular, that the Respondent acted unlawfully when it decided to pay COLA for 2003/2004 on the basis of anticipated inflation rather than on the basis of inflation between July 2002 and July 2003. The Applicants have further argued that the Respondent also acted unlawfully when they decided to pay COLA in two lump sums rather than as a regular increase and as a bonus, which would not be consolidated into salaries.*

9. *It is to be noted again that the Applicants have conceded that on the basis of the earlier Judgment of the Tribunal and from other authorities referred to in that Judgment, the Respondent had the right in principle to change the basis on which it would pay the COLA provided its decision reflected the proper financial planning and was foreseeable.*

The Applicants have contended that the Respondent acted unlawfully because it purported to make the change to the methodology retrospectively.

10. *The Respondent on its part has submitted that the Applicants are not entitled to any remedy from this Tribunal. It has referred to the earlier Judgment of the Tribunal and has submitted that the Judgment had called upon it to exercise its discretion in respect of the payment of COLA in a lawful manner. The Respondent has contended that neither of its decisions which it has made in the light of the earlier Judgment was unlawful. It has argued that its decision in respect of 2002/2003 COLA was compatible with the Judgment of the Tribunal and that its decision in respect of the 2003/2004 COLA was a proper exercise of its discretion.*

11. *It is noted that the earlier Judgment of the Tribunal did not find the decision of the Respondent not to pay COLA for 2002/2003 disproportionate nor did the Tribunal order the Respondent to compensate the Applicants for loss of salary resulting from the Respondents decision to withhold the COLA from July 2002. The earlier Judgment of the Tribunal recognised that the Respondent had a discretion which had to be exercised in a lawful manner. It is the Respondent's case that immediately upon the Tribunal delivering its earlier Judgment, the Respondent announced to all staff that it would pay to the staff concerned the sum of £100 which the Tribunal had ordered to be paid as moral damages for the injury suffered. The Respondent has contended that the correct meaning of the earlier Judgment of the Tribunal was that while its earlier decision had been rescinded, it was left open to the Respondent to go through the decision-making process again if it so wished and that it had not been ordered to pay COLA. It is further the Respondents case that it had informed the Applicants that payment of COLA for*

2003/2004 was subject to the approval of the Finance Committee and that a decision could not be made on that COLA before the results of TACOS review had been made and that a decision had to wait the delivery of the Judgment in the earlier proceedings. All staff were kept fully informed on the methodology which the Respondent would use if they had to pay the COLA for 2003/2004. It is quite clear to us that in as far as TACOS review was concerned some members of staff were involved in the review process. All staff were also informed by the Respondent that if the 2003/2004 COLA had to be paid it would be with effect from the previous financial year.

Common Grounds

12. We have carefully considered the materials that were placed before us. There are certain matters which are common ground to both parties. The Applicants, as we have already observed, have conceded that the Respondent had a discretion when retaking the decision on the COLA for 2002/2003. The Applicants have also conceded that the Respondent had the right to change the basis on which it could calculate the COLA to be paid. It is therefore incumbent upon the Applicants to show how the exercise of the discretion by the Respondent in deciding to pay or not pay COLA and its decision to change the basis on which COLA would be calculated was unlawful. It is significant to observe that at no point did the Applicants attack any of the factors which the Respondent considered in making their fresh decision. The Applicants must show how the discretion which resides in the Respondent was improperly or unlawfully exercised. The Respondent clearly set out the factors which it considered in making the decisions in question. These were set out in the letter from the Secretary-General dated 25th November 2003. It is also curious to note that the Applicants did not contend that the Respondent's decision was disproportionate or arbitrary. This indeed was the position the Applicants took in the earlier proceedings but not in the case before us.

The Tribunal's Findings

13. It is clear to us that one of the basis upon which the Applicants' challenge was premised was their contention that there was only one way in which the Respondent could comply with the earlier Judgment of the Tribunal. They contended that the defect which the Tribunal had identified in its earlier Judgment could only be rectified by paying the 2003/2004 COLA. We find this interpretation of the Tribunal's Judgment difficult to accept. The earlier Judgment made it quite clear when it expressly stated -

"... the rescission of the decision not to pay COLA does not bring with it the restoration of the COLA since the discretion whether or not to pay the said sum remained a discretionary one to be exercised in a lawful manner"

14. If the Tribunal had wanted the Respondent to come to a particular decision it would have said so but it did not. 15. It is also our view that the case of *Cocks v Thanet-DC*[1983]2AC286 which the Applicants cited to support the proposition that only one decision was possible from the earlier Judgment can be distinguished from the present case. We can find no passage in the earlier Judgment from which an inference could be drawn that the only decision the Respondent had to make was to pay the COLA. In judicial review cases a court may indeed quash a decision if it has been taken unlawfully, but it must be in the clearest of cases where the court will indicate the decision the public body should take, as the court must never substitute its own decision for that of the public body. If the earlier Judgment of the Tribunal had indicated the decision to be taken by the Respondent, then the discretion which resided in the Respondent would be an illusory one.

16. The Applicants have also contended that the Respondent's decision to pay COLA for 2003/2004 on the changed basis was wrong procedurally. As we have already observed the Applicants have conceded that as a matter of principle the Respondent had the right to change the basis on which it could pay the COLA.

17. The Respondent told the Applicants as early as 19 May 2003 through the Newsletter which was issued by the Secretary General why an early decision on 2003/2004 COLA could not be made until a later date. The relevant part of the Newsletter stated as follows:

"Staff may be aware that at the March 2003 meeting, the Executive Committee questioned the appropriateness of paying staff a cost of living increase for 2003/2004 while TACOS review was under way. However, you will be interested to know that in the budget proposals presented by the Secretariat,

a special "pay reserve" has been established in each budget to pay staff a cost of living increase for 2003/2004 if approved by the Executive Committee, once the outcomes of the TACOS and the pending case brought before the Arbitral Tribunal by members of the CSSA Executive are known"

18. We find that the decision of the Respondent to pay COLA for the 2003/2004 financial year on the basis of anticipated inflation for the year 2003/2004 and in two lump sums rather than as a regular increase and as a bonus that would not be consolidated into salaries was a proper exercise of the Respondent's discretion and was not unreasonable. We can find no evidence to show that the Respondent exercised its discretion wrongly or unlawfully. Nor can we find any evidence to show that the decision to pay the 2003/2004 COLA was "unprocedural" or that the methodology used was wrong.

19. We accordingly find that the bases of the Applicants' challenge have not been substantiated and must therefore dismiss the application.

Given on this 15th day of July, 2005 in London.

Signed

Justice R A Banda, SC

Justice Sir Arnold Amet Justice K M Hasan